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2

# GOVERNANCE AND LAW IN TRANSITION STATES

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# TABLE OF CONTENTS

# LIST OF ORIGINAL PUBLICATIONS

The dissertation is based on the following original publications:

**I** **Annus, Taavi**. Forthcoming. "Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments." *Duke Journal of Comparative and International Law*.

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**III** **Annus, Taavi** and Margit Tavits. Forthcoming. "Judicial Behavior in Transition: The Effects of Judge and Defendant Characteristics" *Law & Society Review*.

**IV** **Annus, Taavi** and Ants Nõmper. 2002. "The Right to Health Protection in the Estonian Constitution." *Juridica International: University of Tartu Law Review* 7: 117–126.

**V** **Annus, Taavi.** 1999/2000. "German Authors on Estonian Minority Rights." *Trames* 3 (53/48): 227–232 (review essay).

# INTRODUCTION

The challenges faced by Central and Eastern European states in the democratization process have been considerable. Planned economies needed to be replaced by market economies, and the extreme political centralization prevalent in all states was to be ended. However, closely following those initial steps, the transformation of the executive and the judicial branches of the government sector needed to be accomplished, being probably as important as the restructuring of the economy for sustained development. After the initial economic reforms, aimed at creating a viable private sector, the long-term economic development depends largely on the policies adopted and implemented by public officials in the public sector (so even World Bank 1997: 165). Sustainable economic and social development in developing countries mostly fails "because governments have failed to fashion appropriate roles for the state in development; they have been unable to organize and manage systems that identify problems, formulate policies to respond to them, implement activities in pursuit of policy goals, and sustain these activities over time" (Hilderbrand and Grindle 1997: 31). In the scholarly literature starting in the late 1980s, the crucial role of the state in economic development has been accepted more and more (for early accounts see Killick 1989 and Wade 1990; for later works, e.g., Chang and Rowthorn 1995). The crucial role of the public administration in policy implementation was rapidly recognized also by the institutions of the European Union. Whereas in the original "Copenhagen criteria" for potential new members of the union, much stress was put on the economic restructuring and political criteria, the focus quickly shifted to the capacity of the public administrations to implement the European Union policies (see, e.g., Dimitrova 2002).

Despite this dire need, the transformation of the governance structures has not been easy; and considerable failures have been witnessed. This dissertation deals with several aspects of the "governmental" side of the transition process — the creation of viable governance systems appropriate for the newly democratized states. The focus of the thesis is on the transition in the Central and Eastern European countries, whereas the Estonian case has been used as the main example. Estonia fits the purpose of describing governance reforms for two main reasons — it is a former republic of the Soviet Union, facing major change. At the same time, it was an aspiring member of the European organizations, first the Council of Europe and then later the European Union. This makes Estonia an interesting object of comparison for the Central European countries that were somewhat more advanced in the beginning of the transition process. However, even though the role of European Union for transition in Estonia is acknowledged, the Europeanization is not the focus of this thesis, but rather the transition as such.

This introduction presents the main dilemmas that the dissertation deals with, and provides some of the sources that could be used for further references. No complete account of the discourse and literature on governance and law in transition states is sought. The starting point, the concept of governance, needs a more thorough introduction, though.

## Governance, state and law

The leading theme in this dissertation is the transition of governance. This concept is a widely popular term in public administration during the last decade. Although the notion of governance is used by scholars studying various other fields (most notably, corporate governance and global governance), it is the literature on the developments in the public sector where this usage has flourished.

Governance may thus mean different things. Hirst (2000: 14–19) distinguishes between 'five versions of governance.' Rhodes (2000: 55–64) gives 'seven definitions of governance.' Governance is the term even used by the New Public Management scholars (e.g. Osborne and Gaebler 1992). Yet, almost all of those definitions (even including corporate governance and global governance) have something in common. Namely, governance denotes a more decentralized, a non-hierarchical, rather a network-based approach to making and implementing policies, be it inside or in between organizations. In the public sector concept, governance most often refers to the "inter-organizational networks of state and non-state actors" jointly engaging in "co-governance or 'co-steering' activities in the various policy sectors" (Sibeon 2000: 291). Governance is characterized by "interdependence, resource exchange, rules of the game and significant autonomy from the state" (Rhodes 1997: 15). For many public administration scholars, governance is a concept that helps to avoid the supposedly out-dated word 'government,' as the government is characterized by the hierarchical decision-making process and unilateral authority upon the civil society — something modern governance is supposedly better off without.

This sharp contrast between government and governance is wrong, or at least misleading (Drechsler 2003a). Those terms are actually not contradictory. Although a western scholar discussing governance in his or her advanced democracy may often not speak of the government, the central role of it in the networks of various kinds is simply assumed. Further, the role of government-enacted laws in governance cannot be underestimated. Although governance denotes more flexibility and less authoritative rules, the basic constitutional structures are not deemed obsolete. In fact, some definitions of public governance put the legal aspect in the forefront — governance can be viewed as "regimes of laws, rules, judicial decisions, and administrative practices that constrain, prescribe, and enable the provision of publicly supported goods and

services through associations with agents in the public and private sectors" (Hill and Lynn 2004: 4). The concern with legality and legitimacy and the importance of values such as rule of law distinguish governance from public management, which is more related to the business-like technocratic values (Kickert 2002: 1472).

## Governance and transition

In the transition context, the important role of the government when speaking of governance is even more visible than in advanced democracies. In fact, when various international institutions such as the World Bank promote "good governance," they usually and foremost focus on the good government (World Bank 1992), although the reduction of hierarchical state power is also desired. It is the combination of strengthening legitimacy and authority of the state, creating efficient administrations, and the appropriate distribution of authority between private and public sectors that is a necessary precondition of getting good governance in a developing society (Leftwich 1993). The balanced approach to development has often been neglected by practical reform politicians in developing countries, who call for the dismantling state structures and extremely liberal policies (e.g. Grindle 1997: 4).

Why is the strong state so crucial for achieving good governance in development? Various reasons, most of them applicable not only to developing but also to advanced democracies, are put forward.

First, the existence of the "rules of the game" such as basic constitutional framework or rules for private property rights are needed if markets were to function at all. Unless contractual rights are enforced by a central authority, the participants on the market cannot conclude those contracts with any certainty that the contracts will be fulfilled. It has been pointed out that the existence of the basic institutional framework has been the central reason why western capitalist economies have been able to develop so successfully (North and Thomas 1973; Williamson 1985). Creating, through constitution and laws, the basic institutional framework under which exchanges between different actors may take place is among the first tasks for a nation in transition (see, e.g., König 1992). This framework includes the basic rules of the game relating to the treatment of people, especially the protection of human rights including the protection of minimum social guarantees and minority rights. Only a strong state, not governance networks can adopt the framework and more importantly, guarantee the realization of this framework in practice.

Second, governance networks capable of formulating policies do not appear immediately. Thus, crucial policies necessary for the newly democratic state do not emerge through governance networks, as such networks do not exist right after the transition.

Third, governance networks are not the place to solve problems such as ethnic conflicts, as the unhappy experience of several countries in Eastern Europe demonstrates — it is the government who has failed in those situations. It is inevitably the role of the government to devise appropriate policies in certain fields, leading to difficulties discussed in the essays of this dissertation.

Fourth, governance through mostly non-state actors and networks seriously undermines the legitimacy of the state and may diminish trust in public agencies. This distrust may easily carry over to the policy areas where the government is the sole legitimate policymaker and policy implementer such as law and order. Moreover, the tight networks involving both public and private actors may lead to a closed and secretive policymaking within the 'iron triangles.'

Obviously, the state in transition is not as strong as needed (Drechsler 2000). The pre-transition governments were certainly big, in the sense of carrying out functions affecting the society in many more ways than the governments of the advanced democracies do. This, however, does not mean that the government was strong in the sense of having the capacity to formulate and implement policy, or to efficiently perform routine administrative functions (e.g. Grindle 1997: 3). The governments have only little experience with democratic policymaking, as the experience most officials have is usually not appropriate for a democratic state. Moreover, due to its overly intrusive nature the pre-transition government is strongly but justly associated with the negative view towards regulation and steering through central state bodies at all.

The previous discussion demonstrates that the transition states face severe difficulties in ensuring sustainable development. First, development presupposes strong and efficient governments that do not exist. Second, the creation of strong and effective government is not 'popular', due to the previous experience, but also due to the misconceptions about modern notions of governance. Probably only conscious and enduring reform efforts by the elites are able to overcome those difficulties and strengthen the government (or, 'enhance state capacity,' another widely used term in this context). This means that one needs to put effort into many different areas. At least three dimensions are often pointed out: human resource development, organizational strengthening, and institutional reform (Grindle 1997: 9). This dissertation mostly deals with two of those three fields — human resource development and institutional reform. The focus of this dissertation is especially on the reform of institutions and macrostructures, including the formulation process and contents of major policies addressed at the specific concerns of a transition country, such as Estonia.

## Replacement of public officials

Many of the difficulties for the transition countries arise from sheer inexperience. The Soviet civil servants hardly knew how to create successful policies, or even how these would look like on paper. This created the need for replacing them with new ones (**III**), and looking at the foreign experience (**I, II**). This section deals with the former, and the next section with the latter question.

If the negative image of the pre-transition public administration was true, the image of a civil servant is even more so. The Soviet emotionless bureaucrat has been the object of much ridicule and contempt. The powerful *nomenklatura* is often viewed upon as something utterly undemocratic and undesirable for the post-transition period. The civil servants were not a professional and impartial administrators of government policies, but rather integral parts of the suppression machinery of the Communist Party; whereas the highest levels of the administration were usually occupied by high party officials (Verheijen 1999a: 2–4). The policymakers and policy advisors from the Soviet times were obviously not equipped with the necessary skills to overcome the important problems and solve the imminent tasks facing the nation. Moreover, the legitimacy of those decision-makers was usually seriously hampered. For example, in Estonia, the first elections produced the winner under the slogan "Clean the Place!" ("*Plats puhtaks*!"), denoting the desire to get rid of the old functionaries. Lustration practices, i.e. "procedures for screening persons seeking public positions for their involvement with the communist regime" (Letki 2002: 530), have been widespread.

Among the more famous civil servant replacement policies was enacted in the Eastern Germany after the unification. Undoubtedly facilitated by the unique situation where new officials could be shipped in from the West, most of the leadership positions were filled with new personnel (Drechsler 2003b: 45–55; Derlien 1993). The changes were not limited to this country, however. The 'de-communistation' of the Bulgarian administration brought sweeping changes in the top tiers of the administration, even though an official law to prevent former communists to hold top posts was not enacted (Verheijen 1999c: 96–100). In Estonia, even though the slogan of cleaning the place was not implemented in public administration in full (Randma 2001: 121), the replacement of public officials was still rapid. By 1994, 73% of the higher level officials had been in office for less than three years, and altogether 37% of the public officials having been replaced (Sootla and Roots 235: 240). In Romania, some of the ministries saw almost a complete turnover among senior bureaucrats (Nunberg 1999a: 86). Of course, the change in personnel was not widespread in the Eastern Europe, rather to the contrary. In many instances, the composition of the public service did not change considerably, and so the old elites continued to dominate civil service even after transition (Vanagunas 1999: 228; Nunberg 1999b: 257).

This aspect of developing human resources — replacement of former public officials — has caught surprisingly little attention from the public administration reform literature. Mostly, one writes about the initiatives aimed at institutional reforms such as creating a professional and neutral civil service, usually through a Civil Service Act (e.g. Meyer-Sahling 2001; Wiatr 1995; Verheijen 2003), but also about training, performance management, and ensuring adequate compensation (SIGMA 1995; Verheijen 1999b; Nunberg and Barbone 1999: 35-47; Randma-Liiv forthcoming). Even when one talks about the need to instill new values in the civil service, one rarely mentions large-scale personnel replacements (for example, this question has not been brought out by Jenei and Zupkó 2001: 89-90; an exception is Nunberg 1999b).

There are three main and usually uncontested benefits of administering large-scale dismissal and replacement programs among civil servants in a transition process. Namely, the new civil servants probably enhance the legitimacy and prestige of the administration in the eyes of the public, in the eyes of the politicians, and they probably also bring new ethos into the state apparatus.

As already mentioned, the legitimacy of the transition states suffers greatly due to the intrusive nature of the pre-transition regime. If the old civil servants, once an integral part of the suppressing regime, continue to hold power over people, the trust in the new government may fall quickly. In fact, some evidence suggests that the trust in civil servants is indeed influenced by the attitudes towards the previous regime. Due to the fact that former *nomenklatura* cadres make up a considerable proportion of Russian civil servants, the "commonly held view is that little, if anything, has changed in the practices of the state bureaucracy since the demise of the communist system" (Kotchegura 1999: 38). Surveys conducted in Central and Eastern Europe show considerable support for the removal of former communist party members from positions of influence, with roughly 50% of the people supporting this goal (Letki 2002: 536). The low prestige and legitimacy of the administration is dangerous for several reasons. The people may alienate from the state. They may be unwilling to participate in the political process. They may feel less compelled to perform their duties, such as paying taxes. And last, but not least, it is extremely hard to recruit motivated, qualified and ethical people to such a civil service (Vanagunas 1999: 229).

The legitimacy of the administration in the eyes of the politicians is important because otherwise the policy advice would not be taken seriously, and the mistrust in the capacity and willingness to implement newly enacted reforms may seriously hamper democratic development. This argument is essentially similar as the arguments for the spoils systems in advanced democracies (Maranto 1998), but obtain stronger force in transition context where leftover officials are not only a legacy of the previous party, but a wholly different regime. It has been argued that the entrance of a large number of new professionals into the Polish civil service was an important factor in the success of economic reforms, as the cooperation between politicians and old officials

was not smooth (Torres-Bartyzel and Kacprowicz 1999: 168). As a negative example, the mid-level Bulgarian officials considerably slowed down economic reforms. The inability of the government to influence civil servants to work for them was among the reasons for the collapse of Dimitrov government (Verheijen 1999c: 107–08).

The old bureaucrats may also inhibit the internal development of civil service by continuing the previous traditions and shaping the administrative ethos. The old officials may easily be the "bearers of an administrative subculture which bears no resemblance to administrations of democracies" (Vanagunas 1999: 224). They are the holders of the norms of the previous *nomenklatura*, who feel comfortable to continue previous routines, represent the autocratic management style, who are partial and partisan, have the propensity to use public office for private gain, operate in secrecy, and care little about the need to efficiently and effectively serve the public (Vanagunas 1995). For example, the resistance of the "all-powerful bureaucratic apparatus" is among the main reasons why civil service reforms have not taken place in Russia (Kotchegura 1999: 22). As many of the Latvian civil servants were holdovers from the Soviet period, the administration was still dominated by strong centralization and subordination in the mid-1990s (Vanags and Balanoff 1999: 272). Similarly, the continuing centralism and party loyalty in Lithuanian civil service is arguably the legacy of the past (Jasaitis 1999: 301). Certainly, new officials are not guaranteed to bring in new values, but experience seems to demonstrate that the old officials certainly do not promote those new values, either.

The main argument against replacing civil servants of the previous regime is connected to their competence (Wilson 1991; Titma 1996: 67). Even though they do not possess necessary experience for creating and implementing new policies, they still know how to run a bureaucratic apparatus. They are very well "the only class of individuals with significant administrative experience" (Vanagunas 1999: 228). For example, the Bulgarian government was in serious difficulties in finding qualified staff after 'de-communistation' processes excluded officials who were tightly connected with the previous regime (Verheijen 1999c: 107).

Wide-scale civil service replacement, as any instance of a considerable amount of people leaving public service, has an additional risk, viz., it is the most qualified people that may actually leave. If the officials know about the planned large-scale dismissal, screening, or replacement efforts, the most qualified may not want to remain to face the uncertain situation, but seek more lucrative positions outside civil service.

This dissertation (essay **III**) takes a closer look at one of the arguments contributing to the discussion of the necessity of personnel replacements. The analysis is based on the judiciary, which provides a good opportunity to compare "old" and "new" officials. The screening procedures among the Estonian judiciary were significantly different from the screening procedures in

the general civil service — all the judges had to go through a reappointment process or they were unable to continue. In practice, several institutions along the way had a discretionary veto power over the reappointment, among them the rather national-minded President of the Republic. Significant turnover did take place, yet many of the old officials remained in office. After the judicial reform, "old" and "new" judges worked side by side.

The dissertation examines whether the actual behavior of the "old" judges differs from the "new" ones. Many of the arguments for or against exclusion of former officials from civil service actually make the assumption that the behavior differs. Those who support the replacement, argue that the old officials are unresponsive and inefficient as they always used to be. Those who support the continuation argue that the old officials are experienced and can thus make qualified decisions.

As to the judicial decision-making, the arguments why the behavior of the "old" judges would differ from the "new" ones are similar. For example, this dissertation considers the sentencing decision — whether to convict or to acquit the defendant. During the Soviet regime, the acquittal of a person was rare, as it was considered to be a failure of the criminal justice system. This exerted considerable pressure on the judiciary to avoid acquittals. High conviction rates are considered to be typical among the post-communist judiciaries and, thus, the Soviet and post-Soviet judges are usually expected to find defendants guilty. Further, the judges from the previous regime may want to appear more loyal to the state than the newly appointed ones. The pressure to appear loyal to the state during the transition may be exacerbated, as the representatives of the previous regime may fear reprisals. This apparent loyalty, however, may prevent the judges to perform their jobs correctly — to independently and responsibly weigh the evidence presented to them. Newly appointed judges are expected to pay more attention to the rights of the individual (the suspect) and be better prepared in their mentality to overturn the prosecutor's case in favor of the suspect. They also feel less pressure to prove their suitability to serve the new regime.

The dissertation looks both at the conviction rates as well as sentencing harshness. It turns out that the difference between the "old" and "new" decision-makers actually seems to be miniscule, if existent at all (**III**). The finding that the Soviet era criminal justice system experience in itself is not a significant determinant of judicial behavior in transitional period gives some support to the claim that replacement in itself is no solution to the problems among public officials.

The study does not provide arguments about the whole class of civil servants, as it is concentrated on judging. It is also obvious that even if the behavior of the old and new officials does not differ from each other significantly, there are several other reasons why at least some old official should not continue in civil service. For example, the legitimacy problems of the old *nomenklatura* are serious. However, proper training and screening

processes could actually produce an appropriate mix of experience and fresh ideas into the civil service, whereas problems associated with the replacement *in toto* are thus avoided.

## Policy transfer in transition

As shown above, the elite transfer to civil service positions was possible in Eastern Germany only. Another kind of transfer from West to the post-communist countries has been much more common, though, and that was the transfer of policies to replace previous ones and to address new problems. Policy transfer (or lesson-drawing, which denotes the more practical approach to the similar phenomenon, see James and Lodge 2003) has been perceived as a valuable tool in helping to "catch up" with the western neighbors (e.g. Rose 1993: 111–114). In transition societies, the newly created market environment was usually remarkably free, with little or no regulation in some of the most crucial aspects of the market, such as corporate governance, financial markets, or competition law. Not only the behavior of the participants in the market needed to be regulated, but some of the crucial institutions needed to be set up, such as private property, legal foundations of enterprise system or contract law. The need for regulation has usually been discovered quickly. It is obvious that those imminent tasks combined with the inexperience of the decision-makers with the new environment force them to look abroad for guidance and examples.

Such examples include the transfer of policies in very different fields. Even though welfare systems are often considered as nontransferable from advanced to developing countries due to the huge budget constraints in the latter (Rose 1993: 46–47), transfers have still taken place (e.g. Cox 1993). An interesting case is pension reform, where countries learning lessons from abroad, mostly Chile, range from Kazakhstan to Poland to Macedonia (Wagener 2002: 165–167). Latvia recently almost copied its new pension system from the yet to be implemented Swedish one (Müller 2002). Lesson-drawing is not limited to those issues where regulation was needed fast, but also to the more fundamental political institutions, such as constitutional institutional framework and electoral systems (Malova and Haughton 2002).

Estonia has been no different in this respect. Many basic institutions were based on examples from abroad. At least in the initial transition period, a strong influence of the German legal system was strongly visible. The property law regime was heavily based on the German civil code, the BGB. The constitutional interpretation followed largely German examples (**II**). The civil service reforms were also influenced by foreign ideas (Sootla and Roots 1999: 253), even though many of the attempted borrowings, often based on the German civil service, have not taken place in practice.

The transfer of policies increased considerably after the accession negotiations with the EU started to lift off. Probably the most important criterion for fulfilling the requirements of becoming the member state was the harmonization of domestic legislation with the *acquis communautaire*. Something often perceived as a technical and legal process in reality involves the adoption of numerous foreign policies in important fields (see, e.g., Jacoby 1999).

The essays in this dissertation show that almost all actors in a transition country have the tendency to borrow from foreign experience, not just the bureaucrats or politicians. It seems that even the courts in transition rely and cite foreign authorities, whereas the courts in advanced democracies rely more on domestic sources (**I**). The courts consider the opinions of their foreign counterparts persuasive in themselves and use them as an argument for similar domestic conclusions. This dissertation argues that the increased persuasiveness of the decision when relying on the foreign authority is actually the main reason why courts publicly engage in comparative reasoning. During the transition, examples from developed democracies serve not only as guidance for the decision-makers, but also as a persuasive argument meant for those whom the regulation (or court decision) is addressed. Some ideas in constitutional law may thus become simply fads, just like some policies do (Bennett 1991).

There are several reasons why the transfer of policies and ideas makes good sense for the less-developed countries. There is a severe need of introducing new policies and creating them from scratch is costly and time-consuming. Comprehensive analyses about the impacts of future policies are not easy to perform, and it may seem safer to adopt an already proven program. There is international pressure to adopt western style policies, and copying from there leaves an impression that this has been achieved. The effect is further strengthened by the various international advisors often promoting their home systems and policies. The domestic actors may feel that the people want things to be 'like in the west' and thus would support policies modeled after the western countries.

Yet there are various reasons why policy transfers often fail, and in transition context, the failures are easy to come. Dolowitz and Marsh (2000: 17–20) connect failures with uninformed, incomplete, or inappropriate transfers. Uninformed transfer occurs when there is insufficient evidence about the program and its effects in the donor country. Just as it is difficult to assess the impact of foreign judicial decisions (**I**), it is difficult to assess the effects of foreign programs (e.g. Mossberger and Wolman 2003: 433-434). In the transition context, this is often the case as there is considerable pressure to adopt fashionable policies (e.g., NPM reforms or strict and closed career systems) and no time is left to consider the programs in depth.

When an incomplete transfer occurs, crucial elements of the successful policy are left behind. For example, Estonia has adopted the anti-discrimination and equal pay provisions into its labor laws long ago, partly in order to harmonize its law with the EU. However, the crucial institutions that ensure the

adequate implementation of this provision — effective monitoring; adequate penalties for noncompliance; and mediation are not yet fully in place. It is no wonder that the law is largely not enforced.

Finally, an inappropriate transfer refers to the inadequate attention to the different conditions in the different countries. The transfer of a policy from the advanced democracy is by no means a guarantee for the success of the policy, even if the policy was successful in the donor country. As Richard Rose summarizes the argument, "lesson-drawing is deemed impossible in theories assuming that every country, or even every state or city is a unique configuration of culture, institutions, and history" (1993: 38). This uniqueness inhibits transfer because the problems that the new policies are supposed to address require unique solutions that take into account all the interrelated cultural, institutional and historical factors.

In the context of a transition state copying programs from advanced countries, the problem deteriorates. The copier needs policies that would bring the country to the par with the advanced nation. The policies existing in those countries presuppose budgetary resources, qualified personnel to implement the policies, and at least some degree of public acceptance. Even if those conditions exist, the question remains whether the policy will actually solve the problems of the transition country. It is clear that the solution adopted in one country does not necessarily tell what is going to happen in another country when the same solution is sought (**I**). The probability for this to happen when policy transfer takes place between an advanced and a developing country is even smaller, as there are only few problems that are similar in the both countries.

This, of course, does not mean that one should never look abroad and that learning is totally impossible. For example, this dissertation assumes that creating a strong institutional framework (property rights, human rights, a judicial system) benefits all transition countries. Statistical analyses demonstrate that creating a clear institutional framework in public administration — indeed, a Weberian one — correlates with economic growth (Evans and Rauch 1999). The rapid economic development in advanced countries is made possible by the strong institutional framework — another piece of evidence supporting the assumption. However, the message is rather that one should be careful to copy institutions or policies without comparably impressive evidence. The focus on a single country is insufficient. Rather, 'mixed scanning,' a broad survey of examples before selecting a few models for more careful analysis, is more appropriate (Mossberger and Wolman 2003: 436).

This dissertation argues that over time, foreign examples should become less persuasive. With growing experience in the reform process, the eagerness, but also pressure to copy from abroad should diminish. Decision-makers learn to analyze local needs, and the public is not persuaded by the need to adopt foreign policies. On the contrary, foreignness may seem imperialistic and thus invoking arguments based on foreign examples may be even counterproductive (**I**). Even the arguments based on the requirements of the EU may become risky in post-

communist countries, especially where the support for joining the union has not been overwhelming. Regarding the transition of the Estonian governance, this is demonstrated by the failure of the civil service reforms that would have been planned on the German models. The career system in civil service was never adopted, and not because no democratic country possessed such a system, but rather because the German example provided many negative signals. In advanced stages of transition, lesson-drawing should be evidenced much less often than in the initial stages.

### Governance and "transition losers"

Policy transfer from advanced democracies usually involves policies not specifically addressed to target the problems of one specific group in transition: the "transition losers." It is true that many of the elites retained their high status after the transition and cannot rightly be called transition losers. However, many ordinary people were unprepared for the social change, and faced considerable difficulties in the capitalist system. What made the situation worse for some of the "losers" was the fact that the transition states lacked either the ability or willingness to adopt policies to help them. Two groups who faced this situation usually come to mind: the poor and the minorities. Due to those two groups, transition has been often considered a failure.

As the political process has not been sympathetic to those groups, a totally new actor was to step up and protect their interests: the courts. As the previous discussion already suggests, the courts face a complex task in the transition process. The need for institutional and legal framework exemplifies their special roles as they have to guard the minimum rules of the game, whereas in the more advanced democracies, the existence and authority of such rules is more or less assumed (unless a crisis such as terrorist attacks bend the rules somewhat). The court is an important player in the governance of a transforming state, often also stepping in for the non-existent or weak interest groups who are not able even to exert influence regarding the very basic rules of the game. Yet, the judges in those courts are no more experienced in a democratic system than the new policymakers in other institutions — and firing the judges might not make a big impact. As this dissertation argues, turning to foreign examples is of no big help to the court (**I**).

The treatment of the two groups — the poor and the minorities — by the courts through constitutional interpretation exemplifies those difficulties and once again demonstrates how the legal framework, basic human rights, and the strong institutional structure (represented by the courts) are crucial in the transition governance.

## Social restructuring and the courts

The transition process has obviously created many social problems. Even though mass layoffs, especially from the civil service, never took place in most if not all post-communist countries (Drechsler 2003b), many previous workers were left with inadequate skills for the new environment. The unemployment, including long-term unemployment, rocketed, and the real salaries declined fast. No better is the situation with retired persons, whose income has often fallen below the official poverty line. The subjective economic well-being of people living in post-communist Central and Eastern Europe was dismal in the early 1990s (Hayo and Seifert 2003). The health care system has become over-burdened throughout the region (Marree and Groenewegen 1997). Cutbacks in the social security system have been inevitable (e.g. Standing 1996). Creating sufficient social safety nets for the transition "losers" has probably received less attention than deserved, while being an unavoidable concern to ensure stable democratization and economic development. Among the reasons is the weakness of interest groups and the lack of networks helping to formulate efficient policies (regarding the Czech welfare reform, see e.g. Seppanen Anderson 2003)

Under this pressure, it is not surprising that the courts have got involved in the social reforms. Remarkably many of the recently adopted constitutions contain social rights clauses (Glendon 1992), and the new constitutions in Central and Eastern Europe are no exception. For example, the Hungarian constitution (art. 17) provides that "The Republic of Hungary shall provide support for those in need through a wide range of social measures." The Slovenian constitution provides, among others, for the rights to social security (art. 50), health care (art. 51), specific rights of disabled persons (art. 52). The Estonian constitution similarly guarantees the right to health care and the right to state assistance for those in need (art. 28). Moreover, those provisions have been implemented in practice. Probably the most prominent examples where those provisions have been implemented in practice come from Hungary where the Constitutional Court has stopped various cutbacks in the system, basing its decision on constitutional provisions (Sajo 1996). Similarly, the Polish Constitutional Tribunal has stopped pension reforms that would have cut back benefits (Bugaric 2001: 263–264).

The Estonian courts have been under less pressure, at least until recently. In the first ten years of transition, the case law on the social rights provisions had been negligible (**II**). Only recently, claims to health care (**IV**, Riigikohus 2003), minimum income (Riigikohus 2002; 2004) and housing (**II**, Riigikohus 2000) have been debated in the Supreme Court. In the health care case, the Supreme Court argued that the constitutional provisions and international human rights instruments show that "those who are willing to work but are unable to find employment and suffer from need must possess at least some guarantee that they can access health services and receive reimbursements necessary for health

care" (Riigikohus 2003: para. 19). Often, it is the Legal Chancellor who took office in 2000 who raises those issues into the limelight, formulating those social problems as constitutional issues. For many, the constitution and the legal system in general, has become a source of hope for stopping the deterioration of the social welfare system. Thus, the courts have become a strong and natural player in the governance of the social welfare policies.

Such a role of the courts is highly debatable (some notable examples from the literature include Michelman 1969 regarding the U.S. Supreme Court and Böckenförde 1992 regarding the German constitutional jurisprudence). Those in support of the active role for the judiciary argue that social rights are indeed basic human rights, and that the courts have to step in if the political process is unable to provide for those rights. Arguably, the central reasons why constitutional rights exist at all is the need to protect those groups who are underdogs in the political process, be it during the transition or not (e.g. Strauss 1992).

Others point out that the courts cannot solve the complex social problems, and that the effectiveness of judicial activism is especially problematic in transition. The vague and abstract legal provisions that the courts operate with leave almost no clues for the court on which to base their decisions (Bugaric 2001: 261-262). The courts possess much less capacity than the other branches of government to solve complex problems facing the society as they are not equipped with the necessary policy creation tools. Their decision would have a polycentric effect, influencing policy areas far beyond what the court envisions, whereas the interests that are involved do not get representation before the court (Barber 2001). Their decisions would be costly, interfering with the parliamentary budgetary discretion. The involvement of the courts in social policy making would also infringe the constitutional separation of powers principle, as the courts would interfere with the powers of the legislature (e.g. the U.S. Supreme Court 1970: 487: "The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. [… P]roblems presented by public welfare assistance programs are not the business of this Court").

The essays in this dissertation take a middle position between those two opinions. The complex nature of the social problems is no excuse for the courts to avoid dealing with the problem completely — there are plenty of areas where courts already face complex issues and still issue decisions. For example, lessons learned from the administrative law may help the courts to adjudicate social rights (e.g. Sunstein 2001). Due to the specific problems faced by the transition "losers," the courts should interfere when the core social rights are violated and the basic resources for dignified life are not guaranteed (**IV**). This includes the duty of the courts to inquire whether the other branches of government have taken different interests into account. At least, the courts should analyze the issue and not completely avoid the discourse (**II**).

However, the overly enthusiastic interference with social policy making would seriously undermine the balance of powers between the democratically elected branches and the judiciary. No doubt the decisions guaranteeing social rights would be popular among the public; but yet the court is unable to weigh the potential long-term costs of those decisions emanating from financial burdens on the state. The executive and legislature branches would be seen in even a more negative light than before, and this might further diminish the trust in the overall political system. Courts are not necessarily the "wise men" who can avoid difficult choices that must inevitably be made in a transition process. The courts should appreciate the difficult choices made by the parliament and interfere only if the parliament was unwilling even to debate and consider enhancing social standards.

## Ethnic minorities and governance

The second group of transition losers discussed in this dissertation is the ethnic minority. It is obvious that the transition is not successful if a significant minority would face either outright discrimination or is more subtly positioned inferiorly in the society, compared to the period before transition. The success of transition cannot be measured with the well-being of the majority only. This is true in any Central and Eastern European country, but especially in Estonia where the minority makes up around one-third of the population. At least the Estonian government has been eager to contend that no international law has been breached (**V**), and no clearly visible outright discrimination exists.

The negative effect of transition on minorities and ethnic relations in general in Eastern Europe has been well documented. The atrocities ensuing from the break-up of Yugoslavia are the prime examples. Some of the most egregious instances of non-violent discrimination concern the Roma, whose treatment has led to the adoption of the General Recommendation 27 by the UN Committee on the Elimination of Racial Discrimination (2000a; see also Ringold 2000).

Whether Estonia has been successful in accommodating the new environment for the Russian-speaking minority, is doubtful (**II**). There is plenty of research arguing that the Russian-speaking minorities are located on the lower levels of social hierarchy in Estonia, or that the Estonian government has not been successful in integrating the minorities in the Estonian society (e.g. Council of Europe 2001; Committee on the Elimination of Racial Discrimination 2000b). The attitude towards ethnic "others" is quite negative, demonstrating the capacity for conflict and discrimination (Kolstø and Melberg 2002: 53–54). More importantly, whereas the Estonians view the ethnic Russians negatively, the inverse is not true. On average, the Russians view the Estonians in positive light (Valk and Karu 2001: 592–593). Several empirical studies document different outcomes for the ethnic minorities. For example, Kroncke and Smith (1999) discover significant ethnic wage discrimination

against ethnic Russians in 1994, whereas no such effect existed in 1989. One might even say that the policymakers are obsessed with the need to protect the prominence of Estonian language (**II**) and limit the allocation of citizenship, so that no reasonable debate over the well-being of all people living in Estonia, regardless of ethnic origin, has been possible. The debate about the minority situation in Estonia would considerably be improved if more of studies actually documenting the ethnic situation were available. Many arguments in the media reflect only opinions and beliefs, without solid grounding in the actual situation. The belief that there is no actual discrimination is widespread among the Estonians, both the ordinary people and top level politicians (Open Society Institute 2001: 188). Literature that will only repeat the arguments already known without offering further evidence of the actual situation will probably persuade neither the researchers nor the policymakers (**V**).

Due to the allegations of discrimination, it is not surprising that the courts become players in the ethnic policy process (Pettai 2002/2003). Even though the dockets are not dominated by cases involving minority rights (Schwartz 2000: 233), several cases are notable. The Estonian Supreme Court, for example, has declared parts of the Estonian Language Act unconstitutional, even though for technical reasons rather than due to content (Riigikohus 1998). It has also protected people of Russian ethnic origin from deportation where families would have been separated (Lõhmus 2000). As this dissertation shows, the lower courts are able to treat minorities independently and without significant bias when handing out criminal sentences (**III**).

Should the courts be similarly careful to interfere as they should be careful when protecting social rights? Probably not. Although it might be politically risky for the courts to interfere (Pettai 2002/2003), the decision would not produce unpredictable consequences or budgetary effects that would be similar to the social rights decisions. However, the courts would be an important safeguard against the unpredictable political process, and provide assurances to the minorities that their future is safe in the transition country.

By treating the minority issue as a governance issue carries an additional benefit besides seeing the enforcement of minority rights as a necessary institutional framework for stable development. The process of creating minority policies also becomes important. The integration of the representatives of other ethnic groups in the policy process, the creation cultural autonomy institutions and transferring powers when appropriate away from the state and to those institutions is what modern governance is all about (e.g. Gal 2002). The fact that there is no Russian cultural autonomy organization in Estonia should therefore not be considered as an example of discrimination; or as an example of the lack of motivation on the side of the Russian minority. Rather, it should be seen as a failure to create effective governance structures. The enthusiasm to support integration within the Estonian society, both of Estonians and the "others," has never existed. Many issues that are especially relevant for governance, such as creating a representative bureaucracy or ensuring the

necessary education for minorities, has not even been an issue debated on the wider political agenda. Integrating minorities in the decentralized political process would help to alleviate many of those deficiencies.

## Dealing with the past

The many disappointments in the future-oriented governance reforms, or the lack of such reforms from the political agenda for considerable time periods, may partly be due to the fact that agendas were often dominated by issues that dealt not with the future, but the past. Many lawyers were dealing with the historical injustice instead of commercial law reform, for example. Besides institutional struggles and human rights cases, transition justice was a dominant topic in the jurisprudence of the constitutional courts (Schwartz 2000: 234–235). Politicians for considerable time periods discussed not important policy issues but the past crimes of the former regime, facilitated by the possibilities of gaining political advantages over other politicians who were former communists (Szczerbiak 2002).

Among the often mentioned aspects of dealing with the past legacy is the issue of transitional justice. Transitional justice is a broad concept entailing issues such as lustration (change in personnel as part of the "purification" process), truth commissions, and retroactive or delayed criminal punishments for the collaborators of the oppressing regime. In the Estonian context, citizenship issues can easily be added to this list. Surely, a crucial aspect of getting good governance is to deal with the past as smoothly as possible, always keeping the future in mind.

In Estonia, many of those issues did not emerge very prominently in the policy agenda. For example, the lustration process was rather informal, with no formal investigations or official comprehensive lustration laws (**III**). There were no truth commissions, and the crimes by the occupation regime were rarely punished. The court cases have involved only very old people who allegedly committed crimes against humanity in the 1940s and 1950s. Those who ran for office had to take an oath that they were not part of the most repressive machinery, but the truthfulness of the oaths were never vigorously checked. The proposals to publicly declare the communist regime criminal emerged only in the new millennium.

Three areas, however, were quite significant and took up a lot of time during the political debates and later in the courts. Those areas were state continuity, the issue of citizenship and the property rights (**II**). In all of those areas, an early decision was made that the past should be restored as much as practicable. Thus, the official doctrine of continuous Estonian State from the pre-World War II until the current Estonian Republic has always been vehemently defended. Emanating from this, citizenship was only granted to the successors of the previous citizens, and the property nationalized by the Soviets in the

1940s was to be returned. The common characteristic of all of the three decisions is that the political arguments were often of an absolute nature — the state was to be viewed continuous, the citizenship could not be granted to anyone else but the legitimate successors, and the property had to be returned, no matter what. Of course, the practical solutions were not as strict, as the Soviet laws continued in force, many of the immigrants did become citizens, and the restitution of property was not always complete. However, the ideal was clear and the exceptions were mostly dictated by practical concerns, not by what is just and proper.

This dissertation contends that this absolute nature has its problems. The creation of good governance necessary for Estonia should probably start from a state concept appropriate for the present conditions, not from what the state was decades. The fact that the political ideal was in the past might easily have prevented some of the future oriented decisions. The property restitution is a case in point. Estonia basically lacks a housing policy until today, even though the need for such a policy is obvious (PRAXIS 2002). However, the debate over housing policy immediately turns into a debate over the historical (in)justice, the new property owners and the renters of those properties. Instead of creating a future-oriented housing policy, one usually starts off with arguing over what would have been the just solution in solving the previous owner-renter conflicts after transition.

## Conclusion

Governance reform is not limited to the public administration reforms, much less to the reforms dealing with the merger of organizational units or introducing New Public Management principles to the central government. Governance reform means that one has to keep all potential actors — in all branches of government, but also the interest groups and the people in mind when designing policies. The relations between government and private sector must receive attention — no public administration reform should be pursued as a goal in itself, but with the view towards protecting values important in a democratic society. For example, local government reform through merging them may even create strong local governments (a clearly debatable assumption; see Drechsler 1999), but endangers several aspects of good local governance, i.e. by breaking already existing ties between local officials and local population (see **II**). Governance reform is a failure if the government becomes omnipotent and communication would not take place in networks, but in hierarchical command lines. However, governance reform is also a failure if stable and sustainable institutional frameworks for creating and implementing policies such as a constitution guaranteeing effective human rights and the state to enforce the constitutional provisions are not in place. Those are the main lessons learned from this dissertation.

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# SUMMARY IN ESTONIAN

## Valitsemine ja õigus üleminekuriikides

Kesk- ja Ida-Euroopa üleminekuriikide ees seisnud väljakutsed demokraatlikuks riigiks muutumisel olid märkimisväärsed. Plaanimajandus tuli asendada turumajandusega ning äärmuslik poliitiline tsentraliseerimine tuli lõpetada. Nende kahe esimese suure sammu järel tuli aga saavutada täidesaatva ja kohtuvõimu ümberkorraldamine. See protsess oli reformide õnnestumiseks tõenäoliselt sama oluline kui majanduse ümberkorraldamine. Jätkusuutlik majanduslik ja sotsiaalareng on ilma riigi poolt kehtestatud poliitikateta ning nende ellurakendamiseta nimelt raske, kui mitte võimatu. Ka Euroopa Liiduga ühinemise protsess on seda seisukohta rõhutanud. Algsete majanduslike ja poliitiliste kriteeriumide kõrval omandas järjest rohkem tähendust kandidaatriikide administratiivne suutlikkus Euroopa Liidu poliitikaid rakendada. Käesolev dissertatsioon tegeleb mitme küsimusega, mis puudutab uuele demokraatiale kohaseid valitsemissüsteeme.

Käesoleva väitekirja juhtiv teema on valitsemine — inglise keeles kasutatava termini *governance* järgi. Tegemist on moodsa mõistega, mille tõlkimise osas eesti keelde puudub seni veel üksmeel. *Governance*, vaatamata mitmetähenduslikkusele ka inglise keeles, viitab eelkõige poliitikate elluviimisel kasutatavatele hierarhiliselt struktureerimata võrgustikele, mis vastanduvad traditsioonilisele hierarhilisele riigikäsitlusele. Käesolevas väitekirjas on lähtutud aga eeldusest, et selline selgepiiriline vahetegu valitsemise eri viiside vahel on ekslik. Ka võrgustikel põhinev valitsemine eeldab riigi keskset rolli selles võrgustikus. Üleminekuriikide kontekstis omab aga riigi keskne roll eriti suurt tähendust — riigi tugevdamine, et oleks võimalik luua põhilised demokraatlikud ja turumajanduslikud institutsioonid, on esimesi hädavajalikke samme. Ilma kindla riikliku poliitikata näiteks inimõiguste vallas võib värskelt iseseisvunud riiki tabada lausa sotsiaalne katastroof. Sealjuures on selles protsessis eriline roll õigusel — riigi poolt vastuvõetud reeglite kogumil. Tsiviilühiskonna arendamine saab toimuda üksnes käsikäes riigi arendamisega.

Riigi ja avaliku halduse arendamisel räägitakse eelkõige kolmest valdkonnast: avaliku teenistuse ja inimkapitali arendamisest, organisatsioonide tugevdamisest ning institutsionaalsest reformist. Käesolevas väitekirjas sisalduvad artiklid tegelevad peamiselt inimkapitali ja institutsioonidega. Eriline rõhk on poliitikate vastuvõtmise protsessil.

Paljud üleminekuriikide probleemid tulenevad kogenematusest. Avaliku sektori töötajatel puudus üldjuhul teadmine selle kohta, kuidas luua ja ellu viia demokraatlikus ühiskonnas kohaseid poliitikaid. Sellest kogenematusest tuli vajadus neid teenistujaid asendada uutega (**III**) ning vaadata poliitikate loomisel võõrriikide eeskujule (**I, II**).

Teenistujate väljavahetamine on Kesk- ja Ida-Euroopa riikidest kõige levinum olnud Ida-Saksamaal, kus sellist käitumist võimaldas uute ametnike sissevool Lääne-Saksamaalt. Muudes riikides on debatid olnud tulisemad. Väljavahetamise pooldajad viitavad sellele, et uued avalikud teenistujad tõstavad riigi ja avaliku halduse legitiimsust ning mainet ning et nad toovad kaasa uue halduskultuuri, mis aitab avalike teenuste kvaliteeti tõsta. Põhiline argument vanade teenistujate väljavahetamise vastu on seotud nende kogemuste ja teadmistega. Organisatsioonide juhtimise kogemus oli olemas siiski ainult endistel juhtidel ning selle kogemuse ärakasutamise vajadust toodi tihti põhjuseks, miks suuremahulisi personali ümbervahetamise programme ellu ei ole viidud.

Käesolev väitekiri (artikkel **III**) analüüsib lähemalt küsimust, kas uute ja vanade ametnike käitumises ka reaalselt mingi vahe eksisteerib. Artikkel tugineb Eesti kohtunikele, kelle hulgas läbiviidud reformi tagajärjel eksisteerisid kõrvuti nii Nõukogude kohtusüsteemis töötanud isikud kui kohtunikud, kellel taoline kogemus puudus. Analüüs näitab, et nende käitumises oluline vahe puudub — nende poolt langetatud otsused ei erine üksteisest millegi poolest. Artikkel ei võimalda asuda mingile kindlale seisukohale kõigi avalike teenistujate osas ega adresseeri legitiimsusega seonduvaid küsimusi, mistõttu kaugeleulatuvad järeldused on ennatlikud. Siiski viitavad need tulemused sellele, et õnnestunud (ümber)õpe ja personalivalik, mis tagavad sobiva tasakaalu kogemuse ning poliitilise aktsepteeritavuse vahel, võib olla õnnestunum strateegia kui personali täielik ümbervahetamine.

Nii nagu personalivalikul, kasutas Ida-Saksamaa ka sisulise poliitika kujundamisel Lääne-Saksamaa eeskuju. Selline poliitikate väljavahetamine Lääne-Euroopas levinud poliitikate vastu on omane kogu Kesk- ja Ida-Euroopale. Isegi selliseid poliitikaid, mis pealtnäha üleminekuriigis unikaalsed peaksid olema (nt sotsiaalpoliitika), on neis riikides kopeeritud. Puutumata ei jää ka põhiseaduse normid (**II**). Võõrriikide eeskuju kasutavad peaaegu kõik institutsioonid, sealhulgas kohtud. Võõrriigi kogemus on sellisel juhul põhiliselt abivahend otsuse veenvuse tõstmisel, mitte niivõrd otsuse juriidilise õiguse tagamisel (**I**). Demokraatia küpsedes võivad võrdlevad argumendid kohtuotsustes seetõttu kahaneda.

Poliitikate kopeerimine ei pruugi just alati õnnestuda ning üleminekuriigid on eriti ohtlikus olukorras. Samamoodi nagu on keeruline hinnata võõrriigi kohtuotsuse reaalset mõju (**I**) on raske hinnata tavaliste programmide ja projektide efektiivsust teises riigis. Üleminekuühiskonna probleemid on erinevad võrreldes arenenud lääneriikidega, kelle poliitikad ei pruugi üldsegi mitte kasulikud olla. Üleminekuühiskonna eripäraks on ka tugev surve moodsate poliitikate ülevõtmiseks nagu on seda NPM-stiilis haldusreformid, mis samuti ei pruugi tärkavale demokraatiale sobida. Üleminekuriikides peaks seetõttu igal üksikjuhul tõsiselt kaaluma mingi poliitika ülevõtmise otstarbekust.

Mõistagi ei tähenda ettevaatus eeskujude kasutamisel seda, et riiki peaks arendama isoleerituna muust maailmast. Käesoleva dissertatsiooni üks

argumente on teatud institutsioonide tähtsus üleminekuühiskonnas. Nende hulka kuuluvad näiteks inimõigused ja nende tagamiseks loodud üksused, aga ka nt. selged reeglid avalikus halduses.

Nagu mainitud, ei adresseeri Lääne-Euroopast ülevõetud poliitikad tavaliselt üleminekuühiskonnas aktuaalseid probleeme. Üheks selliseks valdkonnaks, mis Kesk- ja Ida-Euroopas tähelepanu on võitnud, on 'üleminekukaotajate' temaatika. Nimelt kaotasid teatud kindlad ühiskonnagrupid ülemineku käigus oma senise positsiooni ja sotsiaalse staatuse. Erilise hoobi said vaesed (tihti eakad) ning rahvusvähemused. Kuna mõlema grupi suhtes ei ole poliitiline protsess olnud helde, on just nende gruppide puhul oluline selgete inimõigusalaste reeglite olemasolu. Valitsemisreformi õnnestumiseks on lisaks aga vaja institutsioone, eelkõige sõltumatuid kohtuid, kes neid inimõiguseid ka praktikas kaitseks.

Sotsiaalse kaitse süsteemide ümberkorraldamine on tekitanud suuri probleeme vaatamata sellele, et massilised avaliku sektori töötajate vallandamised on olnud haruldased. Lisaks kasvanud tööpuudusele on tugeva surve all olnud ka näiteks tervisekaitse ning sotsiaalabi korraldus. Sellises olukorras on just kohtud tihti sekkunud ning asunud kaitsma inimeste põhiseaduslikke sotsiaalseid õigusi. Üllatavalt paljud Kesk- ja Ida-Euroopa riigid sisaldavad sotsiaalsete õiguste alaseid norme ning mitme riigi kohtud on oma otsustes kindlakäeliselt sotsiaalsete reformide vastu asunud. Kuigi Eesti kohtute roll sotsiaalpoliitika kujundamisel oli esimese kümne aasta jooksul tühine (**II**), on hiljuti mitmeid otsuseid juba langetatud, puudutades näiteks õigusi tervise kaitsele (**IV**) või elukohale (**II**). Tihti on kohtu tegevuse aluseks olnud õiguskantsler.

Kohtute aktiivne roll on põhjustanud küllaltki aktiivse teadusliku ja poliitilise debati. Kohtu tugeva positsiooni pooldajad lähtuvad sellest, et ka sotsiaalsed õigused on fundamentaalsed inimõigused, mida kohtud kaitsma peavad. Teiselt poolt viidatakse asjaolule, et kohtud ei ole õiged institutsioonid tegelemaks küsimustega, mis omavad seoseid väga paljudes ühiskonnaelu valdkondades. Lisaks olevat tegemist sekkumisega parlamendi pädevuses olevasse eelarve- ja sotsiaalpoliitikasse. Väitekirjas olevates artiklites on võetud vahepealne positsioon. Põhilised inimõigused tuleb tagada, tulenevalt üleminekuühiskonna spetsiifikast tuleb need tagada ka 'kaotajatele.' Kohus peaks hindama, kas teised võimuharud on põhiseaduslikke väärtusi vähemalt kaalunud. Vähemalt ei peaks kohtud diskussiooni ise täielikult vältima (**II, IV**).

Rahvusvähemuste õiguste kaitsel on kohtutel olnud samamoodi tähtis roll. Eesti ametlik positsioon on pidevalt olnud selline, et rahvusvahelise õiguse norme ei ole Eestis rikutud (**V**). Samas on ametliku poliitika aluseks tihti veendumus mitte-eestlaste keele ja kultuuri väiksemast väärtusest ning vajadusest eesti keelt peaaegu et pimesi kaitsta (**II**). Sarnased probleemid eksisteerivad mitmetes teistes üleminekuühiskondades, nt seoses mustlastega Kesk-Euroopas.

Samas eksisteerib vähe uurimusi, mis probleemiga erapooletult ja empiiriliselt tegeleks. Meediasse ja poliitilisse diskussiooni jõudvad seisukohad

põhinevad tihti vähesel informatsioonil; sarnane probleem on ka teaduslikel töödel, mis kaitsevad tihti ühte kindlat seisukohta (**V**).

Kohtute roll vähemuste õiguste kaitsjana selles keskkonnas ei tohiks olla üllatav. Kuigi Kesk- ja Ida-Euroopa riikides on kohtud rahvusvähemuste kaitsel ehk oodatust vähem silma paistnud, eksisteerib siiski mitmeid lahendeid, kus näiteks ülirange keeleseaduse nõudeid on leevendatud. Käesolevas väitekirjas on ühes artiklis näidatud ka seda, et Eesti madalama astme kohtud ei langeta rahvusvähemuste suhtes teistsuguseid otsuseid kui eestlaste suhtes (**III**). Tõenäoliselt peakski kohtutel olema vähem takistusi rahvusvähemuste õiguse eest aktiivselt seismisel võrreldes sotsiaalsete õigustega.

Rahvusvähemuste õigused viitavad viimasele teemale, millega käesolevas väitekirjas on tegeletud, nimelt minevikupärandiga võitlemine. Vaatamata sellele, et Eestis ei loodud mitmete teiste Kesk- ja Ida-Euroopa riikide eeskujul ametlikke ‘tõe komisjone,’ ei toimunud massilisi vallandamisi minevikutegevuse pärast (**III**), ega hakatud kedagi Nõukogudeaegse tegevuse eest vastutusele võtma, oli kolm valdkonda sellised, kus minevik on Eesti poliitikas olnud kesksel kohal.

Esiteks on palju tähelepanu pööratud riikliku järjepidevuse tagamise vajadustele. Ametlik seisukoht Eesti riigi järjepidevusest on kaasa toonud kodakondsuse omandamise järjepidevuse ning hulga kodakondsuseta isikuid. Kolmandaks valdkonnaks, kus on minevikku tagasi pööratud, on omandireform (**II**).

Käesoleva väitekirja eesmärk ei ole näidata, et tegemist on olnud väärate otsustega. Pigem on asutud seisukohale, et mõnikord ollakse nendes kolmes valdkonnas liiga absoluutsetel seisukohtadel. Riigi järjepidevuse küsimus on võib-olla takistanud edasiviivaid seisukohti piiriküsimuses. Kodakondsusküsimus on võib-olla takistanud mõistlikku diskussiooni integratsiooniküsimuste üle. Omandireform on saanud võib-olla takistuseks tänapäevase elamupoliitika teostamisel. Tulevikku suunatud valitsemine peaks lähtuma tulevikuperspektiivist, mitte niivõrd minevikupärandist.

Käesoleva väitekirja artiklid iseloomustavad seda, et valitsemisreform ei ole üksnes haldusreform, mis seisneb mõningate organisatsioonide funktsioonide ümbervaatamises ja nende liitmises-lahutamises. Valitsemise ümberkujundamine üleminekuriigis peab lähtuma sellest, kas reform aitab parandada inimeste heaolu. Eelkõige on selleks vajalik piisavalt tugeva riigi loomine, kes kaitseks põhilisi väärtusi ning kes tagaks institutsioonid stabiilseks arenguks.

# PUBLICATIONS

# I

Taavi Annus,
"Comparative Constitutional Reasoning:
The Law and Strategy of Selecting the Right Arguments."
*Duke Journal of Comparative and International Law*, in press.

# COMPARATIVE CONSTITUTIONAL REASONING: THE LAW AND STRATEGY OF SELECTING THE RIGHT ARGUMENTS

**Taavi Annus**[*]

## INTRODUCTION

The relevance of comparative law in constitutional adjudication has repeatedly been at the center of heated debates. During the 2001/2002 term, the Supreme Court continued to struggle with this issue. In *Atkins v. Virginia*,[1] where the Court invalidated the death penalty for the mentally retarded, this conflict was at its strongest. Chief Justice Rehnquist argued forcefully:

> I write separately . . . to call attention to the defects in the Court's decision to place weight on foreign laws. . . . In reaching its conclusion today, the Court . . . adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders . . . I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. . . . [W]e have . . . explicitly rejected the idea that the sentencing practices of other countries could serve to establish the first Eighth Amendment prerequisite, that a practice is accepted among our people. . . . For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant.[2]

Justice Scalia seconded this:

> [T]he prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. . . . [T]he

[*] This paper was prepared during my visit to the University of Michigan Law School as a research scholar. I thank the Center for International and Comparative Law for serving as the host. I thank Christopher McCrudden, Nancy Maveety, Rick Hills, and Margit Tavits for reading and commenting on earlier drafts of this article. I also thank the research scholars and the S.J.D. students at the University of Michigan who provided valuable comments during the presentation of a preliminary version of this paper. Support of the Estonian Science Foundation (grant no. 4352) is acknowledged.

[1] 536 U.S. 304 (2002).

[2] *Id*. at 322–25 (Rehnquist, CJ., dissenting) (citations and internal quotation marks omitted).

> practices of the "world community," whose notions of justice are (thankfully) not always those of our people, [are irrelevant].[3]

This stinging criticism was indeed caused by a single sentence in a single footnote.[4] In addressing the criticism of the dissents, Justice Stevens added that although comparative arguments "are by no means dispositive," they still lend "further support to our conclusion that there is a consensus among those who have addressed the issue."[5]

A second major case of the term, *Zelman v. Simmons-Harris*,[6] which involved school vouchers, also contained arguments relying on comparative experience. In this case, however, the comparative arguments were outlined by the dissenters.. Justice Stevens gave examples from the Balkans, Northern Ireland, and the Middle East in evaluating religious funding of primary education.[7] Justice Breyer, arguing that the funding of religious schools might contribute to "religious strife," referred to the British and French experience:

> I recognize that other nations, for example Great Britain and France, have in the past reconciled religious school funding and religious freedom without creating serious strife. Yet British and French societies are religiously more homogeneous — and it bears noting that recent waves of immigration have begun to create problems of social division there as well.[8]

These two cases from the U.S. Supreme Court show that debate over the use of comparative reasoning in constitutional interpretation[9] is far from concluded.

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[3] *Id*. at 347 (Scalia, J., dissenting).

[4] "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Id.* at 2249 (Stevens, J.).

[5] *Id.*

[6] 122 S. Ct. 2460 (2002).

[7] "Admittedly, in reaching that conclusion I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy." *Id.* at 2485 (Stevens, J., dissenting).

[8] *Id*. at 2506 (Breyer, J., dissenting).

[9] The Supreme Court also uses comparative experience in cases involving no constitutional law. For example, one argument put forward in support of the holding was that "courts in other nations, applying their domestic copyright laws, have also concluded that Internet or CD-ROM reproduction and distribution of freelancers' works violate the copyrights of freelancers." N.Y. Times Co. v. Tasini, 533 U.S. 483, 506 n.13 (2001) (Ginsburg, J.). In Verizon Communications, Inc. v. F.C.C., a major

Two issues in particular are left open in these decisions. The first issue is openly and vehemently brought out by the dissenters in *Atkins v. Virginia* — namely, whether the use of comparative constitutional law in domestic adjudication is appropriate at all. When courts choose to accept comparative constitutional arguments they must then address a second issue — the weight of comparative arguments relative to other methods of analysis. It is far from clear what Justice Stevens meant when he noted that foreign experience is "by no means dispositive" and that, when it is consistent with other sources, it "lends further support" to arguments supported by other interpretive methods.[10]

This article tries to provide answers to these two questions. It will make a contribution to the growing literature on comparative constitutional law in three ways. First, this paper systematically distinguishes between different uses of comparative law. I will show how comparative experience could theoretically contribute to solving both normative and empirical questions. However, because normative and empirical reasoning are each based on different types of materials, these forms of reasoning each result in unique legitimacy and practical problems. Thus, the weight of comparative arguments vary.[11] Moreover, different courts may not use employ comparative reasoning consistently, or at the same rate as other courts. The U.S. Supreme Court may have valid reasons for not using comparative constitutional law, whereas other courts might have no clear justification for declining to engage in comparative reasoning.

Second, this article outlines scholarly treatment of comparative reasoning by social scientists, and especially by political scientists. Increasingly, critics of legal analysis specifically highlight the deficit of interdisciplinary approaches to legal questions.[12] Even though one might not agree that interdisciplinary analysis is the future of legal scholarship in all respects, there is no reason to reject what other scholarly fields have to offer.

Finally, this paper distinguishes between strategic and legal purposes for utilizing foreign materials and comparative experience. I argue that there is a difference between what constitutes a good legal argument and what makes a decision useful in relation to strategic goals the court might pursue outside of

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telecommunications case, the opinion referred to the experience in several European countries. 122 S. Ct. 1646, 1696–97 (2002), (Breyer, J., concurring in part and dissenting in part).

[10] *Supra* text accompanying note 5

[11] This has also been often neglected. *See* Ulrich Drobnig, *The Use of Comparative Law by Courts*, *in* THE USE OF COMPARATIVE LAW BY COURTS 17–18 (Ulrich Drobnig & Sjef van Erp eds., 1999) (showing that the courts use both foreign rules and the information about effects of the rules, but discussing the weight of comparative arguments based only on the rules).

[12] Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 118 (2002) (arguing that the subfield of methodology of law should be developed by encouraging contact between several disciplines).

legal analysis. If comparative experience has not been used as the basis for a court's holding, I term this use strategic or "soft." I will show that the courts may invoke comparative arguments, or may specifically avoid these arguments, because of strategic calculations, both based on institutional and individual concerns The strategic or "soft" use enables a court to broaden acceptance of the decision in the eyes of the public or other political institutions, or may assist in achieving international goals. For example, strategic uses of comparative arguments may give a court's legal analysis the appearance of being based on "legal" considerations when decision itself is actually motivated by political concerns. This distinction between legal and strategic uses of foreign experience allows me to explain the differences in practice among various courts that cite foreign experience.

This paper begins with a brief overview of the relevant literature. The second part of the paper outlines three uses of comparative law. The next three parts of the paper describe the practice, strengths, and weaknesses of each approach. In the sixth part, I describe strategic uses of comparative arguments and show that these strategic uses might explain differences between courts in citing comparative experience. I conclude with a discussion of the possible ways in which research on the uses of comparative law can be developed.

## I. Five Areas of Comparative Constitutional Scholarship

Literature on comparative constitutional law[13] can be roughly divided into five strands.[14] First, there is literature on foreign countries' constitutional law from the perspective of an "outsider" or country evaluations on a general level.[15]

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[13] For an earlier thorough overview, *see generally* James A. Thomson, *Comparative Constitutional Law: Entering the Quagmire*, 6. ARIZ. J. INT'L & COMP. L. 22 (1989).

[14] Casebooks are exceptions, covering different fields of comparative constitutional law. *See* Mauro CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS (1979); VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999).

[15] *See generally* FRANCOIS VENTER, CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL STATES (2000) (comparing the constitutional law of four countries). On France, *see generally* JOHN S. BELL, FRENCH CONSTITUTIONAL LAW (1996) (giving an overview of the French constitutional law doctrine); Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982) (arguing that several constitutional issues could be solved with the help of separation of powers analysis as is the case in France); Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21 (1997) (broadly comparing the approaches of France and the U.S. in constitutional interpretation). On Germany, *see generally* EDWARD J. EBERLE & DONALD P. KOMMERS, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES (2002) (analyzing the approaches of

Such works may, but usually do not, involve "comparison" as such. Sometimes generalized conclusions may be offered.[16] A second type of literature focuses on constitutional theory, rule of law, and judicial review.[17] A third focuses on substantive constitutional law issues, and compares approaches by different countries, or otherwise reviews the solutions of one country from an "outsider" perspective or for an outside reader. Such issues are very diverse, ranging from free speech[18] to affirmative action.[19] Fourth, there are papers that advocate the

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Germany and the U.S. related to restricting personal freedoms); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (2nd ed. 1997) (giving an overview of the most important cases of the German Constitutional Court); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1994) (providing an overview of the German constitutional law).

[16] Bojan Bugaric, *Courts as Policy-Makers: Lessons from Transition*, 42 HARV. INT'L L.J. 247 (2001) (arguing that the East European constitutional courts have been poor policy-makers when deciding complex social and economic issues related to transition); HERMAN SCHWARZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE ) (2000) (arguing that the Eastern European constitutional courts have been helpful in maintaining the democratic system).

[17] *See generally* M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2nd ed., 1998) (describing the history of the concept of separation of powers); Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415 (2000) (arguing that learning from the experience of other countries can help decide constitutional issues); HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE (David Beatty ed., 1994) (describing the various judicial review systems); J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and its Discontents*, 17 NW. J. INT'L L & BUS. 354 (1996–1997) (analyzing the constitutionalization process of the European Union); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalis*m, 49 AM. J. COMP. L. 707 (2001) (describing models of judicial review).

[18] On texts involving just US-Canadian comparisons, *see* Ian Slotin, *Free Speech and the Visage Culturel: Canadian and American Perspectives on Pop Culture Discrimination*, 111 YALE L.J. 2289 (2002); Marie-France Major, *Comparative Analogies: Sullivan Visits the Commonwealth*, 10 IND. INT'L & COMP. L. REV. 17 (1999); Donald L. Beschle, *Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L.Q. 187 (2001); Kent Greenawalt, *Free Speech in the United States and Canada*, 15 LAW & CONTEMP. PROBS. 5 (1992).

[19] *E.g.*, HARISH C. JAIN ET AL., GLOBAL EQUALITY: A COMPARATIVE PERSPECTIVE ON AFFIRMATIVE ACTION AND EQUALITY IN THE WORKPLACE (2003); Jan Lodewyk Pretorius, *Constitutional Standards for Affirmative Action in South Africa: A Comparative Overview*, 61; ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 403 (2001); ANNE PETERS ET AL., WOMEN, QUOTAS, AND CONSTITUTIONS: A COMPARATIVE STUDY OF AFFIRMATIVE ACTION FOR WOMEN UNDER AMERICAN, GERMAN AND EUROPEAN COMMUNITY AND INTERNATIONAL LAW (1999); SUNITA PARIKH, THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA (1997); Kendall Thomas, *The Political Economy of Recognition: Affirmative Action Discourse and Constitutional*

adoption of a particular constitutional system[20] or specific solutions to constitutional problems.[21] This trend has especially gained momentum after the break-up of the Communist Block.[22] These papers usually address the issue of legal drafting[23] and do not consider legal interpretation as much, following the idea that the two questions are somehow different.[24]

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*Equality in Germany and the U.S.A.*, 5 COLUM. J. EUR. L. 329 (1999);THOMAS SOWELL, PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE (1990); POLITICS OF POSITIVE DISCRIMINATION — A CROSS NATIONAL PERSPECTIVE (S.K. Mitra ed., 1990).

[20] Consider the recent discussion over the vices and virtues of the presidential system of government. *See generally* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong To Prefer the German To the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001).

[21] *E.g.*, Cass R. Sunstein, Against Positive Rights, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225, 229 (Andras Sajo ed., 1996) (arguing that social rights should not be included in a constitution); Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution*, 10 AM. U. J. INT'L L. & POL'Y 1233 (1995) (arguing that a constitution should contain positive rights).

[22] E.g., Cass R. Sunstein, American Advice and New Constitutions, 1 CHI. J. INT'L. L. 173, 179 (2000) (commenting on the Draft Ukrainian Constitution).

[23] To stress the importance of comparative law when drafting statutes is actually misleading. The benefits of comparison are the greatest when one considers the policy underlying the statute, not the statute as such. Also, it is important to consider comparative experience not only when drafting statutes (creating new policy), but also when analyzing the performance of existing statutes (existing policies). Comparative policy analysis has performed this task for a long time, and its usefulness has not been doubted in the political science literature as much as in the legal circles. *See generally* JESSICA R. ADOLINO & CHARLES H. BLAKE, COMPARING PUBLIC POLICIES: ISSUES AND CHOICES IN SIX INDUSTRIALIZED COUNTRIES (2000); FRANCIS G. CASTLES, COMPARATIVE PUBLIC POLICY (1999); HUGH HECLO ET AL., COMPARATIVE PUBLIC POLICY: THE POLITICS OF SOCIAL CHOICE IN EUROPE AND AMERICA (3rd. ed. 1990).

[24] Such is the view expressed by Justice Scalia in Printz v. U.S. 521 U.S. 898, 921 (1997) ("We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."). However, the arguments and methods put forward in this paper largely apply to legal drafting as well. When drafting constitutions or statutes, the same kinds of normative and empirical questions arise as when interpreting the law. *Cf.*, Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 476 ("In constitutional debates, one invariably finds a large number of references to other constitutions, as models to be imitated, as disasters to be avoided, or simply as evidence for certain views about human nature."); BERNARD H. SIEGAN, DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM ). (2d ed. 1994) (describing the influence of foreign constitutions in drafting the "new" constitutions); Rett R. Ludwikowski, *"Mixed" Constitutions — Product of an East-Central European Constitutional Melting Pot*, 16 B. U. INT'L L.J. 1

The fifth strand of literature deals with comparative constitutional law as a process or discipline and describes its value, tasks, and methods. This article belongs to this strand of literature. More specifically, this strand explores how courts employ comparative constitutional analysis.

Several authors have reviewed the use of comparative materials by appellate courts.[25] Some have undertaken statistical studies on citations to foreign law.[26] This approach has been combined by some with a more analytical approach to comparative constitutional law. Political scientists, relying on analytical approaches which focus on judges' motivations, have tried to explain the differences between various courts' citation practices.[27] However, other than

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(1998) (arguing that the constitution-drafters borrowed from a variety of sources). Comparative law can be helpful, but also inappropriate, when dealing with legislative change.

[25] Similarly, the use of comparative law generally, not only comparative constitutional law, has been thoroughly discussed. *See generally*, THE USE OF COMPARATIVE LAW BY COURTS (Ulrich Drobnig & Sjef van Erp eds., 1999) (surveys of 12 countries and the European Union); MARKKU KIIKERI, COMPARATIVE LEGAL REASONING AND EUROPEAN LAW 77–92 (2001) (based on interviews with the judges and functionaries of the courts in England, Sweden, Finland, Germany, Italy, and France). For the Netherlands, see T. Koopmans, *Comparative Law and the Courts*, 45 INT'L & COMP. L.Q. 545, 550–55 (1996).

[26] In Australia, *see generally* Paul E. von Nessen, *The Use of American Precedents by the High Court of Australia, 1901–1987*, 14 ADEL. L. R. 181h (1992). In Canada, *see generally* Peter J. McCormick, *The Supreme Court and American Citations 1945–1994: A Statistical Overview*, 8 SUP. CT. L. REV. (2d) 527 (1997**]**; Christopher P. Manfredi, *The Use of United States Decisions by the Supreme Court of Canada Under the Charter of Rights and Freedoms*, 23 CAN. J. OF POL. SCI. 499 (1990); C. L. Ostberg et al., *Attitudes, Precedents and Cultural Change: Explaining the Citation of Foreign Precedents by the Supreme Court of Canada*, 34 CAN. J. POL.SCI. 377 (2001). In the United States, the studies are usually combined with the studies on general citation practices. *See generally* Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 LAW LIBR. J. 129 (1994); William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850–1993*, 43 BUFF. L. REV. 121, 132–35 (1995); William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 BUFF. L. REV. 1273 (2001); William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267 (2002).

[27] *See*.C. L. Ostberg et. al., *supra* note 26 (arguing that the citation of foreign precedents is a form of policy emulation explained by the individual attitudes of the justices from the litigation strategies of the interest groups and from general values that the justices refer to); Shannon Smithey Ishiyama, *A Tool, Not a Master — The Use of Foreign Case Law in Canada and South Africa*, 34 COMP. POL. STUD. 1188 (2001) (arguing that judges rely on foreign precedent because of its utility in cutting information costs decreasing uncertainty, and providing justification). *See also* Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial*

these few rare positive analyses, the literature largely focuses on whether and how courts and other decision-makers should use comparative constitutional law.

In evaluating the use of comparative experience, three different types of issues are usually addressed: the systematization of the uses of comparative law, legitimacy problems of comparative reasoning, and practical difficulties of comparison.

Attempts to categorize uses of comparative law by courts are numerous. Although most authors claim that there are three uses of comparative constitutional law, there is a lack of coherency in these different approaches. For example, Tushnet discusses functionalism, expressivism, and bricolage.[28] Choudhry contends that there are three modes of comparative constitutional interpretation: universalist, dialogical, and genealogical. Universalist interpretation relies on the assumption that constitutional principles are based on similar universal norms. The dialogical approach focuses on assumptions underlying constitutional jurisprudence to justify or reject the use of foreign materials and experience. Finally, genealogical interpretation emphasizes the similar historical backgrounds of constitutions.[29] Another way of seeing the use of comparative law is to differentiate between defining and justifying relevant issues, and clarifying the reasoning behind comparative analysis in moral and policy balancing.[30] One can refer to "evaluative," "intentionalist," "textualist," and "authority-based" comparisons.[31] One might also distinguish between "necessary" and "voluntary,"[32] between "genealogical" and "ahistorical," and between "positive" and "negative"[33] recourses to comparative law. The court may use comparative experience by "referring to it in *dicta*," to "create a

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*Conversations on Constitutional Rights*, 20 OXFORD J.LEGAL STUD. 499, 516–27 (2000) (describing possible explanations for the use of comparative experience).

[28] Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

[29] Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 825 (1999).

[30] Louis J. Blum, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 SAN DIEGO L. REV. 157 (2002).

[31] Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 519–22 (2002). "Evaluative" comparison refers to the use of foreign materials to evaluate the likely consequences of certain interpretation. 'Intentionalist" comparison is used to ascertain the intent of the legislator, especially when "borrowed statute doctrine" applies. "Textualist comparisons" can ascertain the common meaning of the terms at the time a statute was adopted. "Authority-based" comparisons are made when the courts advance foreign statutes or decisions as per se arguments in favor of or against a particular interpretation.

[32] Drobnig, *supra* note 11, at 3.

[33] David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 550 (2001).

workable principle of law" or to "prove a 'constitutional fact.''[34] The court may use comparative law in order to "find a solution" or "justify a solution,"[35] as well as for the purpose of "internal utility" or "external utility."[36] The comparison may be "vertical" or "horizontal."[37] Or, one might distinguish between the "general and indirect," as opposed to "specific and direct," influence of comparative constitutional materials, as well as between explicit and non-explicit uses of comparative constitutional law.[38]

The diversity that we see in these classifications of comparative analysis illustrate that a systematic approach to this topic has not been developed . Certainly, the analyses of different authors overlap. There is no significant difference between what Tushnet calls the "functionalist" approach and the focus of other authors on foreign experience in understanding the functioning of legal institutions. However, none of these classifications attempts to be exhaustive, nor are any of these classifications mutually exclusive. I will turn to this issue in the next section of the article.

## II. Legitimacy and Practicability Issues in Comparative Analysis

While most authors focus on classifications of comparative law, few actually address its legitimacy. This is surprising, as there is a genuine dispute between U.S. Supreme Court justices on the issue, some of whom explicitly reject the legitimacy of comparative reasoning.[39]

Perhaps the most common discussion of legitimacy focuses on the universal character of some constitutional norms, particularly human rights provisions. It has been argued that courts should look at foreign practices because these reflect norms that have universal character. As an example, the universal character of human rights norms is argued to demand a universal application of these rights.[40] Drobnig, who writes about both comparative constitutional law

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[34] *Id.* at 552–56.

[35] Koopmans, *supra* note 25at 550.

[36] Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, at 254–63 (2001).

[37] KIIKERI, *supra* note 25, at 194, 298.

[38] McCrudden, *supra* note 27, at 510–11.

[39] Consider the dissents in Atkins v. Va., 536 U.S. 304 (2002); or the majority opinion in Stanford v. Ky., 492 U.S. 361, 369 (1989) (arguing that "it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant.") (Scalia, J.).

[40] For a discussion, *see* McCrudden, *supra* note 27, at 527–29; Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, at 121–23 (1994); Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 24–25 (1998) (arguing

and the use of comparative law in general, distinguishes between different types of comparison, basing the legitimacy of comparative arguments mostly on the international character of the norms.[41]

There are alternatives to this proposition. The question of legitimacy is the main issue in Dammann's analaysis.[42] Dammann contends that the legitimacy problem of the "intentionalist," "textualist," and "authority-based comparisons," is not considerable, as these analytical methods are based on traditional interpretation techniques. In order to justify "authority-based comparisons," Dammann refers to the general discourse theory developed by Habermas, who theorizes that the truthfulness of legal analysis is supported by the fact that legal decision-makers who follow similar basic procedural rules also reach similar conclusions.[43] According to Dammann, comparative analysis is therefore legitimate because courts in different countries follow similar basic procedural rules.

Tushnet similarly distinguishes between uses of comparative constitutional law. Tushnet sees no considerable legitimacy problems for functionalist or expressivist uses of comparative constitutional law, as they do not form an authority for the court.[44] Tushnet justifies the use of bricolage, the practice of constructing the legal argument from the arguments used by foreign courts, by the fact that foreign materials are often used unconsciously. Bricolage is thus nothing but a natural practice that warrants its own use.[45]

The practical problems of comparative constitutional law are often discussed. These include the difficulty of comprehending foreign law,[46] the tendency of decision-makers to take cases out of their wider social and cultural context,[47] the

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that the constitutions need to be interpreted in the light of international human rights obligations).

[41] Drobnig, *supra* note 11, at 19–21. He has no clear explanation for applying comparative law in "purely domestic" cases. He just presents two functions that comparative arguments might have — to fill legal gaps or to overcome an outmoded rule. *Id*. at 21.

[42] Dammann, *supra* note 32.

[43] *Id*. at 540–54.KIIKERI bases his justification for comparative reasoning also on discourse theory. *See supra* note 25 at 307–14.

[44] Tushnet, *supra* note 28, at 1234–37.

[45] *Id*. at 1237–38.

[46] Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640, 647 (1999) ("verbal similarities may be misleading").

[47] MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 4–5 (2d ed., 1994) (arguing that the legal problems are similar only on the technical level but substantively may differ due to the differences in the political, moral, social or economic values); Pierre Legrand, *How to Compare Now*, 16 LEGAL STUD. 232, 236 (1996) (the comparativists often "forget about the historical, social, economic, political, cultural, and psychological context which has made that rule or proposition what it is");

difficulty in determining the effects of laws abroad,[48] and the problems of transferring such experience into the domestic system.[49] The literature fares excellently in discussing practical problems in comparative analysis. However, there are limits to this literature. The literature does not distinguish clearly enough between different uses of comparative constitutional law and different types of practical problems that emerge with these uses. Also, the literature does not address issues that have been identified by scholars in other fields. Many of the practical problems arising from comparative analysis arise in all comparative studies, and have nothing to do with the legitimacy problems that judges have to address. Discussion of comparative legal analysis would profit immensely from an interdisciplinary approach. I will turn to these arguments later when discussing the uses of comparative constitutional law in more detail.

Finally, existing literature is often neither explicit nor consistent in defining what "comparative experience" means. Constitutional case-law from foreign courts certainly is included. However, it is less certain whether or not constitutions, statutes, and other kinds of information is included in comparative analysis. What about the text of the constitution or statutes? What about other kinds of information from foreign systems?[50] I will discuss whether different materials are suitable for different types of reasoning and why these materials give rise to various legitimacy and practical problems. In my own analysis, reference to comparative constitutional law (also termed comparative or foreign "experience") will be quite broad, and will include the use of any kind of information from other jurisdictions. The "information" can be contained in the texts of constitutions, statutes, cases, government documents, but also all other kinds of data which usually is available as either economic or social data.[51]

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Christopher Osakwe, *The Problems of the Comparability of Notions in Constitutional Law*, 59 TUL. L. REV. 875–76 (1985) ("Public law reflects an inner relationship — a sort of spiritual and psychical relationship — with the people over whom it operates.").

[48] *E.g.*, Tushnet, *supra* note 28, at 1265 (arguing that any number of variables could have determined the observed outcomes, not just the law that is being discussed).

[49] Fontana, *supra* note 33, at 556 (arguing that the courts could hire experts to solve such issues).

[50] Some authors are rather consistent. Consider the approach in Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 517–21 (2002). His starting approach is broad, as his purpose is to develop "a general justification for comparative reasoning in the context of interpretation", *id*. at 517, and describing "comparative reasoning" as "any reasoning that somehow refers to foreign law", *id*. at 519. However, when relying on discourse theory to develop the justification, he explicitly refers to "authority-based comparisons." *Id*. at 521.

[51] The authors are usually quite superficial when discussing this issue. Some explicitly deal with case law. *See* Choudhry, *supra* note 29, at 824 (the goal is "to describe and explain the interpretive methodologies used, and the normative justifications offered, by

This short overview of the existing literature shows its largely unsystematic nature. Different authors discuss similar problems, but do not directly communicate with each other. The most explicit example of this miscommunication is the incoherent nature of the classification of comparative constitutional law. Therefore, I will start my own argument from this puzzle.

## III. The Three Uses of Comparative Constitutional Law by the Courts

For all practical purposes, the uses of comparative law can be classified into three categories: soft use, comparative normative reasoning, and comparative empirical reasoning. First, a differentiation needs to be made between "soft" and "hard" uses of comparative experience. The former describes the process of discussing foreign statutes, cases, or practices in the decision-making process or in the text of judicial opinions without relying on this experience in reaching the holding. In these instances, foreign experience is mentioned, but it has no precedential value. The "hard" use of comparative experience, however, contributes directly to the holding of the case, and possesses at least some degree of authority and precedential value for the court. Of course, comparative experience need not be central to a holding. In these cases, foreign materials utilized in the opinion only add weight to the court's argument. What is important is that these materials have legal significance in the opinion. Their inclusion is not just a matter of judicial rhetoric, for omission of these materials would reduce the persuasiveness of the argument.[52]

The "hard" use of comparative experience serves two purposes. First, one might acquire help in making normative judgments, either when balancing different constitutional values or when interpreting broad constitutional principles.[53] Second, foreign materials may assist in making empirical observations and predictions about the consequences of a judicial determination. Essentially, comparative materials may be utilized in either normative or empirical judgments.

In making this sharp distinction between "hard" and "soft" uses, I argue that techniques of legal reasoning such as filling gaps in laws and creating legal tests

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courts for their use of comparative jurisprudence in constitutional interpretation."). Some refer to social data and case law interchangeably. *E.g.* Tushnet, *supra* note 28.

[52] *But see* Koopmans, *supra* note 25at 550 ("A method consisting of relying on comparative materials in order to justify the solution is not always interesting from a legal point of view. Very often, the court might have used a different argument to arrive at exactly the same decision. . . . It is more or less a matter of judicial rhetoric.").

[53] I do not need to delve into the discussion of whether normative judgments by the courts relying on broad principles are in themselves acceptable or not. I will be satisfied with the observation that the courts simply rely on these principles.

for the analysis of legal concepts[54] are in reality not merely techniques that can be adopted with the help of comparative reasoning. For example, Jackson recommends that the U.S. Supreme Court should look at comparative constitutional law to "discover" the "proportionality" analysis.[55] This analysis would require balancing restrictions to constitutional rights with the aims of such restrictions. At first sight, this might seem to be a rather technical application of a legal test. However, adopting proportionality analysis actually requires the adoption of a normative position carrying a certain empirical assumption. This adoption normatively assumes that it is "right" to balance different values in constitutional adjudication. Further, proportionality analysis carries an empirical assumption that courts are the suitable venue for balancing conflicting values, i.e. that certain positive consequences result from the fact that courts engage in this balancing. One could, of course, test this empirical assumption by analyzing available comparative evidence. Thus, it is obvious that proportionality analysis is not a technical process, and similarly other[56] "technical" issues that the courts face actually involve complex normative judgments and empirical predictions.

It is essential to distinguish between a court's use of normative reasoning in contrast to empirical reasoning. Different rules govern the use of comparative materials in each situation. Additionally, the legitimacy and practical limits of comparative materials is different when assessing normative questions on one hand and empirical questions on the other. For example, when making normative conclusions, courts may, in part, rely on foreign cases, but they may also rely on other materials. By contrast, when courts make empirical predictions, the cases are usually worthless in themselves, as they don't contain

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[54] This is where Drobnig sees great usefulness in comparative law. *See* Drobnig, *supra* note 11, at 21.

[55] Vicki Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999) (arguing that the U.S. courts could learn from the experience of foreign courts such as the Canadian Supreme Court and adopt proportionality analysis).

[56] There is some support from comparative experience that courts adopting extensive proportionality analysis might shape the policy process, giving rise to the "judicialization of politics." Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995) (using Canadian and French case studies and arguing that more-than-minimal judicial review causes policy distortion and poses difficult problems for democratic debilitation and operation of a stable and vigorous constitutional democracy); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000) (arguing that the European constitutional courts have features of a "third chamber" of the parliament); C. Neil Tate & Torbjörn Vallinder, *Judicialization and the Future of Politics and Policy*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 515 (C. Neil Tate & Torbjörn Vallinder eds., 1995) (describing the increase in power of judicial institutions around the globe).

information about their own consequences. They only may direct the courts to other sources.

Analyzing various uses of comparative law allows one to make recommendations regarding comparative analysis according to specific type of court at issue. Some courts might see problems in legitimizing their use of comparative constitutional law. This however means only that these courts cannot utilize some types of comparative reasoning (for the present purposes, normative reasoning), whereas other uses might be perfectly legitimate in the eyes of the court (mostly, empirical reasoning).

Having so identified the three uses of comparative law, I will turn to each of them in more detail. The next three sections of this article provide a description of each type of use of comparative reasoning and give examples from cases where foreign materials have been so used. Thereafter, I will turn to the legitimacy and practicability problems for each use and discuss the weight of each type of comparative reasoning. I will conclude each part with a discussion of the context where such type of reasoning could be useful.

## III. 'SOFT' USE OF COMPARATIVE EXPERIENCE

### *A. The Soft Use as a "Dialogue"*

The "soft" use of comparative experience takes place where a court refers to foreign materials but does not consider these material to have precedential weight. Choudhry describes this process as dialogical interpretation, under which the courts "identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions"[57] to "better understand their own constitutional systems and jurisprudence."[58] Engaging in such a dialogue is a variation of transjudicial communication,[59] or the "international traffic in ideas,"[60] resulting in "cross-fertilization" of decisions.[61] In the soft version of comparative reasoning, courts evaluate foreign experience[62] as a "source of inspiration."[63]

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[57] Choudhry, *supra* note 29, at 825.

[58] *Id.*at 836.

[59] Slaughter, *supra* note 40, at 99; Dammann, *supra* note 31, 547–49. However, Dammann himself argues that discourse theory warrants the consideration of foreign precedent as persuasive authority.

[60] MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 158 (1991).

[61] Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1116–19 (2000).

[62] *E.g.*, Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 350–60 (1998) (arguing that the foreign sources constitute a "source for ideas and solutions").

Soft analysis utilizes foreign decisions as "superstars amicus briefs."[64] Further, the sources used in "soft comparison" are almost exclusively constitutional cases, rather than state practice. In utilizing these materials, courts evaluate foreign case law to discover a variety of approaches to analyzing constitutional problems[65] and to reject "false necessities" — legal doctrines that seem indispensable, but really are not.[66] Tushnet sees the usefulness of foreign cases in even more general terms, arguing that "[w]e can learn from experience elsewhere by looking at the experience in rather general terms, and then by seeing how those terms might help us think about the constitutional problems we confront."[67] He calls this process the "expressivist" use of comparative experience, which helps "us see our own practices in a new light and might lead courts using non-comparative methods to results they would not have reached had they not consulted the comparative material."[68]

Courts may realize that the decision of a foreign court is persuasive and may adopt similar reasoning, not because the reasoning is contained in a judicial opinion, but because of the reasoning itself.[69] These uses do not mean that the foreign experience itself is a binding or persuasive authority for the court. The similarities between the two decisions may just be coincidental, and even if not, the decision may have been no different had the foreign decision not existed. The mere fact that a court has reached a conclusion that is similar to a foreign court decision does not mean that a borrowing from the foreign court has taken place.[70]

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[63] Koopmans, *supra* note 25, at 545.

[64] Shirley Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 287 (1997).

[65] Dammann, *supra* note 31 (taking this approach further and arguing that the discourse theory legitimizes the use of foreign precedents as an authority for the domestic court). "[T]here are two reasons why courts should resort to authority-based comparisons. The fact that another court has reached the same conclusion indicates that a particular interpretation is the result of a fairly rational discourse. In addition, a court can 'artificially' increase the number of participants in the legal discourse underlying its interpretation by considering the decisions of foreign courts." *Id*. at 559.

[66] Tushnet, *supra* note 28, at 1227 (arguing that the discovery of the false necessity in not easy).

[67] *Id*. at 1308.

[68] *Id*. at 1236.

[69] R. Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45 INT'L & COMP. L.Q. 2, 9 (1996) ("There are two ways of referring to a previous judgment: as with juridical opinion it can be used in order to quote a passage which seems to put something rather well; but this is quite different from citing the decision as something having those other qualities which make up a precedent.").

[70] Matthew D. Adler, *Can Constitutional Borrowing Be Justified? A Comment on Tushnet*, 1 U. PA. J. CONST. L. 350, 350–351 (1998).

The "soft" use of the comparative constitutional law deals mostly with foreign case law. This is rather logical, as foreign judgments are legal documents addressing legal issues similar to those that are in front of a domestic judge. Therefore, the "soft" use of comparative constitutional law is the type of comparative constitutional law that is most often referred to and probably most often used by different courts.

It is rather difficult to identify cases that limit the use of comparative constitutional law in "soft" ways. It is unusual for a court to discuss a foreign case, only to admit that the discussion was irrelevant for its holding. At the same time, courts do not refer to a foreign case as having precedential authority. Courts use terms such as "useful,"[71] "helpful," [72] or "instructive."[73] A court might state that it agrees with the reasoning of the foreign decision.[74] It may also mention foreign cases in passing and state that foreign courts have reached similar results, without giving explicit reasons why the reference was inserted into the opinion.[75] Courts may declare that a foreign precedent "supports" the court's own conclusion or otherwise offers "guidance" in making its conclusion. Often, such a reference is made only in a footnote.[76] Sometimes the line

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[71] *E.g.*, Knight v. Fla., 528 U.S. 990, 997–98 (1999) (Breyer, J., dissenting from denial of certiorari) (arguing that the views of foreign courts are "useful even though not binding"). This language has also been adopted by many commentators. *See* Lord Irvine of Lairg, *Activism and Restraint: Human Rights and the Interpretative Process*, 4 EUROPEAN HUMAN RIGHTS LAW REVIEW 350, 355 (1999) ("the jurisprudence of constitutional courts in other jurisdictions is a useful source of guidance.").

[72] *See* R. v. Keegstra, [1990] S.C.R. 697, 740 (Can.) (it is "helpful" and "useful" to look at the jurisprudence of the U.S. Supreme Court; the experience should not be "overlooked").

[73] *E.g.*, State v. Walters, 2002 (7) BCLR 663 (SA), *available at* http://www.concourt.gov.za; (arguing that Tenn. v. Garner, 471 U.S. 1 (1985) is "instructive" in determining the test of determining the permissibility of use of deadly force in making an arrest).

[74] For example, in Carmichele v. Minister of Safety and Sec. and Another 2001, 2001 (10) BCLR 995, ¶ 45. (SA), the South African Constitutional Court stated that it would "adopt [a] statement" from a case of the European Court of Human Rights, referring to the reasoning why the convention contains positive obligations on the state. In Jordan v. State, 2002 (11) BCLR 1117, ¶ 128 (SA), the court considered some of the "considerations" of the Canadian Supreme Court "as valid in South Africa as they are in Canada."

[75] Carmichele, 2001 (10) BCLR 995, ¶ 54 (SA) contains the following statement, together with the referral to the relevant German case: "Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system." There seems to be no argument made that the German decision was even useful, just an association to the foreign case was considered to be useful in developing the argument.

[76] This is where many of the recent citations to foreign cases by the U.S. Supreme Court have appeared. *See also* references by Justice Frankfurter in Staub v. City of

between mere referral and acknowledging the persuasive weight of a foreign decision is especially difficult to draw, as when courts refer to a foreign decision and then explicitly adopt the decision's reasoning.[77]

Sometimes courts discuss "helpful" foreign cases, only to admit later that the decision of the foreign court was inapplicable due to different legal, social, or economic circumstances. Canada has often rejected the use of U.S. precedents.[78] For example, in *R v. Keegstra*, the Supreme Court of Canada explicitly stated that:

> Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.[79]

The South African Constitutional Court in *S. v. Makwanyane* rejected the potential persuasive effect of U.S. decisions on the death penalty because of the difference in the text of the U.S. and Canadian constitutions.[80] In *Carmichele v. The Minister of Safety and Security*,[81] the same court rejected the holding of *DeShaney v. Winnebago County Department of Social Services*,[82] which pro-

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Baxley, 355 U.S. 313, 325–326 n.1 (1958) (Frankfurter, J., dissenting) and in Freeman v. Hewit, 329 U.S. 249, 251 n.1 (1946).

[77] In S v. Dodo, 2001 (3) SA 332, 39 (CC), the South African court stated that "the gross proportionality approach adopted by the US and Canadian Supreme Courts . . . can properly be employed and should be employed under our Constitution. For the reasons advanced in the Canadian cases, it would not be mere disproportionality between the sentence legislated and the sentence merited by the offence which would lead to a limitation of the section 12(1)(e) right, but only gross disproportionality." The authority remains to be the constitution and its analysis; the foreign decisions are used quite as if they were briefs by the parties — not an authority for the court, but worthy of agreement.

[78] David Beatty, *The Canadian Charter of Rights: Lessons and Laments*, 60 MOD. L. REV. 481, 482 (1997) ("Although US authorities are frequently referred to by the Court, it has, for the most part, treated them very cautiously and usually as not being very helpful in fashioning solutions that are appropriate for Canada.").

[79] R. v. Keegstra, [1990] S.C.R. 697, 740 (Can.). *See also* R. v. Rahey, [1987] S.C.R. 588, 639 ("While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances.").

[80] S v. Makwanyane, 1995 BCLR 665 (SA)

[81] Carmichele, 2001 (10) BCLR 995 (SA).

[82] 489 U.S. 189 (1988).

vided that the constitution does not impose positive duties on the government.[83] In *S. v. Mamabolo*, the court decided not to adopt an area of American First Amendment in deciding a case involving the crime of scandalizing a court, because the South African Constitution "ranks the right to freedom of expression differently" from the U.S. Constitution.[84] In *Mohamed v. President of the Republic of South Africa*, the South African court discussed partly supportive Canadian law, only to admit that South African and Canadian constitutional provisions are different.[85] The Australian High Court explicitly rejected U.S. case law on legislative malapportionment in *McKinlay v. Commonwealth*.[86]

Even when foreign case analyses might be supportive, courts are uneasy about applying them.[87] Courts do not cite foreign cases strictly as part of their holding, but as an illumination of issues surrounding the case. More commonly, courts admit that they were persuaded by the reasoning of foreign cases.

### *B. The Legitimacy and Weight of the Dialogue*

When courts limit discussion of foreign cases to being helpful guides in decision-making and do not rely on these cases as precedent, legitimacy issues usually connected with the introduction of innovative types of arguments do not arise. Technically, foreign decisions themselves have no precedential authority, and thus no binding effect, in domestic courts. Therefore, a court's discussion

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[83] "The provisions of our Constitution, however, point in the opposite direction." Carmichele, 2001 (4) SA 938, 45 (CC).

[84] S. v. Mamabolo, 2001 BCLR 449, ¶41 (CC) (SA).

[85] Mohamed v. President of the Republic of S. Afr., 2001 (3) SA 893, ¶53 (CC) ("whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice.").

[86] (1975) 135 C.L.R. 57, 63 ("It is simply not correct to say that provisions in our Constitution should receive the same construction as that given to similarly worded provisions in the United States Constitution which have a different context and a different history, more particularly when the suggested construction is of recent origin, reversing an interpretation previously accepted.").

[87] In *Mohamed*, 2001 (3) SA 833, ¶53 (CC), the South African constitutional court discussed the Canadian constitutional law on whether deportation into a country where the person might face the death penalty is constitutional if the death penalty is unconstitutional in the deporting country, only to admit that the decision of the court is based on South African law. The Hong Kong High Court has explicitly warned against using foreign precedent as "other domestic and international instruments are the product of very different circumstances and situations." R v. Town Planning Board, ex parte Kwan Kong Ltd, 5 H.K.P.L.R. 261, 300 (1995) (Waung J).

of foreign sources need not be justified from a legal point of view. If foreign sources are used selectively, they do not lead to "arbitrary decision-making,"[88] as long as the court's analysis is based on legitimate authorities.

Borrowing ideas from foreign jurisprudence is, in essence, no different from borrowing ideas from the briefs of the parties or law review articles. The fact that a foreign court has argued for the abolition of the death penalty is usually in itself no persuasive argument. If it were, completely different kinds of legitimacy issues would arise.

Also, the fact that a foreign court has used certain arguments does not mean that a domestic court needs to adopt the same arguments — they may be plainly unpersuasive, just as the arguments in the briefs may be unpersuasive. Most likely, the same arguments can indeed be found in legal journals or the briefs. It is only unfortunate when the parties and the real *amici* would not bring the same arguments out themselves.[89] The problem, of course, is when parties ignorantly fail to raise these arguments in their briefs. Even then, however, the court is technically not following a foreign court's decision, but being persuaded by arguments, similar to reliance, for example, on law review articles.

What about considering referring to and discussing foreign case law as persuasive authority? In contrast to precedential authority, persuasive authorities are not binding and thus only limit the arbitrariness of the decision-making and creation of mechanical decisions.[90] Foreign precedents, thus, are arguably not binding but persuasive.[91] This assertion, however, assumes that persuasiveness is a result of foreign authority. If we look at the courts' practice more carefully, we see that what is persuasive in foreign precedents is usually the reasoning of the case, not the fact that the foreign court has reached that specific decision. The fact that the reasoning of the foreign court was found persuasive does not mean that the authority itself was persuasive — similar persuasive arguments could be made in the briefs by the parties.[92] The foreign experience itself would not be a binding authority, but rather *dicta*. There are no particular constraints on what the judge may enter into *dicta*. Rather, one should ask, whether the *dicta* is practical and serves some purpose other than reaching the holding.

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[88] McCrudden, *supra* note 27, at 507 (referring to misuse of persuasive authorities).

[89] Fontana argues that the parties should be forced by the judge to discuss, when appropriate, the decisions of the foreign courts. Fontana, *supra* note 33, at 556.

[90] H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 264 (1987).

[91] Slaughter, *supra* note 40, at 124 (describing the use of foreign precedent as persuasive, but not binding); McCrudden, *supra* note 27, at 502–3 (claiming that the article deals with the use of foreign precedent as persuasive authority).

[92] The briefs of the parties in the South African Constitutional Court usually refer to foreign precedent when supporting the argument. Therefore, we cannot assess whether the court would be persuaded without the references to foreign precedent.

This means that judges probably discuss foreign decisions without recognizing them as binding if some strategic considerations persuade the judges to do so. That the use of foreign precedent is often strategic can also be demonstrated by the fact that courts omit precedents that do not support the holding. Even though the omission is not always intentional,[93] but due to lack of knowledge of foreign law,[94] precedents are used selectively. The strategic nature of discussing foreign cases becomes even more evident if we consider that judges often discuss foreign decisions among themselves or with the justices of different supreme courts.[95] Whether to make these discussions public is largely a strategic decision, as the opinion can also be written without inclusion of these discussions. Surely, the legitimacy of "soft use" comparisons

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[93] There seem to exist completely intentional omissions. In Mohamed, 2001 (3) SA 833, ¶ 53 (CC), the South African Constitutional Court dealt with a case where the South African government handed an alleged terrorist who illegally entered South Africa over to United States' authorities without seeking an agreement that no death penalty would be involved if Mohamed would be convicted of crimes. The court discussed several foreign cases, including a similar case from the European Court of Human Rights, Soering v. U.K. However, the court referred only to the part of the decision where the actions of the government were condemned, but not to the part where the court, contrary to the holding of the South African constitutional court, explicitly allowed the extradition of the person to a country applying the death penalty as long as the penalty is carried out in conformity with due process rules. *.Id.* at ¶ 56. Similar problems occurred in Prince v. President of the Law Society of the Cape of Good Hope, 2002 (3) BCLR 231 (SA), where the court found the prohibition of the use of cannabis for adherents of the Rastafari religion constitutional. The only reference of the minority opinion to foreign case law or practice was to the dissent by Justice Blackmun in Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 US 872, 911 n.54 (1990), which discussed only the question of which government interests such a prohibition might serve. The majority discussed the foreign practice more extensively, but limited the analysis to favorable case law only. *See* 2002 (3) BCLR 231,¶¶ 119–127 (CC) (S. Afr.).

[94] An example comes from the European Court of Justice, where Advocate General Tesauro used U.S. precedents on affirmative action only selectively, omitting the most similar case with different conclusions from the ECJ holding. *See* Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-3051 (citing Regents of University of Cal. v. Bakke, 483 U.S. 265 (1978); United Steelworkers of America, AFL-CIO-CFL v. Webster, 443 U.S. 193 (1979); City of Richmond v. J. A. Croson, 488 U.S. 469 (1989), but not citing Johnson v. Transp. Agency, 480 U.S. 616 (1987). This has been attributed to ignorance; not intentional omission. *See* McCrudden, *supra* note 27, at 526.

[95] Fontana, *supra* note 33, at 548 (describing the encounters between justices of different supreme courts); McCrudden, *supra* note 27, at 510–511. This applies to all kinds of comparative materials. For example, the European Court of Justice regularly has extensive comparative surveys made during the preparation of a case. *See* KIIKERI, supra note 25, at 149. However, it is doubtful that the U.S. Supreme Court Justices discuss precedents in the conference discussions where different kinds of arguments prevail.

does not become an issue when foreign decisions are not discussed in the published opinion, but rather used behind the scenes. Reading and drawing from foreign case law would be a part of the "general liberal education"[96] of the judge. To compare, it is legally not permissible to omit binding domestic cases or statutes from an opinion in this fashion.

When a court does refer to foreign materials, the question becomes whether it is advisable for it to do so. When making such references, courts must discuss materials that have no authoritative power, do not directly contribute toward the holding in a case, and yet demand an understanding of foreign laws and cases in all their complexity.[97] Because of this, referrals seem to be an unnecessary burden that may even distract attention from the rationale for a holding. By definition, foreign cases do not refer to the case at hand. Foreign cases not only take place in a different social setting, but also in a different factual setting. The informational advantage gained through deciding cases or controversies only, much emphasized when describing the courts' proper functions, would simply be lost. Courts should not decide issues abstractly, but stick to the relevant case facts. Foreign precedents necessarily demand discussing issues abstractly, as those cases have little to do with the case before the court. The reason for referring to foreign cases might then only be to demonstrate that the judge has a broad "liberal education," which does not seem to be a valid reason for using comparative materials.[98]

### *C. Conclusion*

Judicial use of foreign precedents as a source of ideas and arguments can be a useful enterprise. In any case, this use cannot be prohibited, as such use is not uniformly documented in the written opinion. However, a court's public admission that it was inspired by foreign decisions does not add or diminish weight from the legal argument. This admission may only serve strategic purposes about what the court wants to achieve with the decision. At the same

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[96] This is how Tushnet legitimizes expressivist uses of comparative constitutional law. *See* Tushnet, *supra* note 28, at 1236–37 ("[J]udges of wide learning — whether in comparative constitutional law, in the classics of literature, in economics, or in many other fields — may see things about our society that judges with a narrower vision miss. . . . In this aspect, comparative constitutional law operates in the way that general liberal education does.").

[97] R v. Town Planning Board, *ex parte* Kwan Kong Ltd, 5 H.K.P.L.R. 261, 300 (1995) (Waung, J.) (Courts should "decline to be seduced by the complex foreign jurisprudence and the seemingly inexhaustible literature from the European Court of Human Rights.").

[98] Drobnig, *supra* note 11, at 17 ("such tributes to comparative learning are superfluous ornaments at best and may even do a disservice to the serious study of comparative law."). Similarly Choudhry, *supra* note29at 828 (asserting that comparative jurisprudence is often used as "judicial 'window-dressing.'").

time, courts need to balance potential strategic gains with the possibility of misunderstanding and misapplying foreign case law.

## IV. THE USE OF COMPARATIVE LAW IN MAKING NORMATIVE JUDGMENTS

Constitutions often use terms that are difficult to interpret, such as the U.S. Constitution's Eighth Amendment prohibition of "cruel and unusual" punishment, or the German constitutional directive to protect "human dignity."[99] Similar difficulties are met in judicial balancing. Balancing is a process of weighing different values and making normative judgments on preferred values. Balancing different constitutional values, although often criticized,[100] is both common and theoretically unavoidable.[101] Most courts explicitly admit this, and some, like the German[102] or South African[103] constitutional courts, elevate balancing to the center of constitutional jurisprudence.

Much of constitutional jurisprudence is about deriving meaning from these broad principles and finding the right balance between different values. In determining the content of such broad principles and finding the right balance between conflicting values, one may apply different methods. One such method is moral philosophy.[104] Others evaluate constitutional content by looking at the constitutional framers' intent.[105] Further, some advocate the use of comparative materials.[106]

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[99] Article 1 of the Basic Law of Germany: "Human dignity is inviolable."

[100] T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

[101] The philosophical underpinnings of balancing decisions in constitutional law derive from the claim that the constitution embodies principles, and not rules with all-or-nothing character. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, *passim* (1977).

[102] The German lawyers talk about the principle of "practical concordance" (praktische Konkordanz), according to which the different constitutionally protected values need to be harmonized. *See* Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 851 (1991); Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 970.

[103] Richard J. Goldstone, *The South African Bill of Rights*, 32 TEX. INT'L L.J. 451, 460–64 (1997) (overview of the principles of interpreting the Bill of Rights of the South African Constitution).

[104] MICHAEL J. GERHARDT ET. AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 181-210 (2nd. ed., 2000)

[105] *Id.* 99–136.

[106] Kathryn A. Perales, *It Works Fine in Europe, So Why Not Here? Comparative Law and Constitutional Federalism*, 23 VT. L. REV. 885, 904–05 (1999) ("These broad principles of justice demand natural law arguments, found in international law and the practice of other countries."). The approach is even recommended by the advocates of pragmatic jurisprudence. *See* Richard Posner, *Pragmatic Adjudication Approach*, 18 CARDOZO L. REV. 1, 2 (1996) (arguing that the standards of decency can be determined through comparative adjudication).

*A. The Opinions of the World Community in the Jurisprudence*

Cases where comparative materials are used in normative reasoning abound.[107] As an example, this is seen in the area of the Eighth Amendment's prohibition of "cruel and unusual punishment," a leading area of U.S. constitutional analysis. In *Atkins v. Virginia*, an Eighth Amendment case mentioned in the beginning of this article, much of the court's analysis utilized normative use of comparative materials. The *Atkins* decision is preceded by several other cases. In *Trop v. Dulles*, one of the arguments against denationalization as a punishment was that statelessness is a condition "deplored in the international community of democracies."[108] In *Rudolph v. Alabama*, the dissenters from denial of writ of certiorari contested the permissibility of the death penalty for rape based, in part, on international experience.[109] Finally, the Court's decision in *Coker v. Georgia*, which finally held the death penalty for conviction of rape unconstitutional, directly discussed international experience in its analysis of the

[107] Often, two different types of normative reasoning are identified — positive and negative. In positive analysis, the court refers to the practice of several countries, determines that such practice is widespread, and argues that the court should follow this practice. In negative reasoning, the court refers to the foreign practice, determines that this kind of practice is associated with unacceptable regimes, and rejects the practice as normatively unacceptable. *See* Fontana, *supra* note 33, at 551. However, there is no clear-cut difference between the two approaches. The positive argument assumes that the unacceptable regimes do not have similar practice — otherwise the practice could be rejected as being widespread among those countries under the negative argument. The argument would be consistent only if it could be shown that the practice is widespread among the acceptable regimes and non-existent among the unacceptable regimes. This, of course raises a practicability issue discussed below.

[108] 356 U.S. 86, 103 (1958) (Warren, CJ). "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids that to be done." (footnotes omitted).

[109] 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari). Justice Goldberg thought that the following question was worth answering: "In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate 'evolving standards of decency that mark the progress of [our] maturing society,' or 'standards of decency more or less universally accepted?'" Id., 889–90 (footnotes omitted).

issue.[110] In *Thompson v. Oklahoma*, the Court invalidated the death penalty for persons under age 16, and again noted that a contrary decision would be inconsistent with the practice of many advanced democracies.[111] The use of foreign experience did receive a blow in *Stanford v. Kentucky*, a death penalty case for juveniles under age 18,[112] but has been reestablished, as indicated by the *Atkins v. Virginia* decision.[113]

*Atkins v. Virginia* was succeeded by *Patterson v. Texas*,[114] where Justice Stevens, joined by Justice Ginsburg and Justice Breyer, argued in a dissent from denial of stay of execution that there is an "apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender."[115]

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[110] 433 U.S. 584, 596 n.10 (1977) ("It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.").

[111] 487 U.S. 815, 830 (1988) (footnotes omitted) ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed . . . by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."). The case is especially interesting for the remark that "[J]uvenile executions are also prohibited in the Soviet Union." *Id*. at 831. References even to the practices of non-democratic countries may thus play a role.

[112] 492 U.S. 361, 369 (1989).

[113] *See supra* n. 1–5.

[114] 536 U.S. 984 (2002). About two months later, Justice Stevens, with whom Justice Souter, Justice Ginsburg and Justice Breyer joined, dissented from denial of petition for writ of habeas corpus, but the six-page dissent did not refer to foreign experience at all. *See In re* Stanford, 537 U.S. 968 (2002) (Souter, J., dissenting). However, on the same day, Justice Breyer referred to foreign experience when dissenting from denial of certiorari in a case dealing with the delays in carrying out capital punishment. Foster v. Fla., 537 U.S. 990 (2002) (Breyer, J., dissenting) ("Courts of other nations have found that delays of 15 years or less can render capital punishment degrading, shocking, or cruel. . . . Consistent with these determinations, the Supreme Court of Canada recently held that the potential for lengthy incarceration before execution is a 'relevant consideration' when determining whether extradition to the United States violates principles of 'fundamental justice.'"). Justice Thomas wrote a concurrence from denial of certiorari, condemning the use of the foreign precedents. *Id.* (Thomas, J., concurring)

[115] Patterson v. Tx., 536 U.S. 984 (2002) (Stevens, J., dissenting). The issue was decided by the court in favor of the constitutionality of this punishment in *Stanford v. Ky*., 492 U.S. 361 (1989). The dissent is more remarkable because in *Atkins v. Va.* Justice Stevens, writing for the majority, implicitly denied that *Stanford v. Ky.* should be overturned. The majority discussed the difference between the death penalty for mentally retarded and juveniles: "A comparison to Stanford v. Kentucky, in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided Stanford on the same day as Penry, apparently only two state legislatures have raised the threshold age for imposition of the death penalty." Atkins v. Va., 536 U.S. 304, at 316 (2002) (citation omitted). It has been

Courts engaging in other areas of constitutional analysis have also utilized comparative analysis. For example, the dissent by Justice Rehnquist in *California v. Minjares*, where he claimed that he felt "morally certain that the United States is the only nation in the world in which the most relevant, most competent evidence as to the guilt or innocence of the accused is mechanically excluded because of the manner in which it may have been obtained"[116] implies that other nations would not condemn at least some use of illegally obtained evidence. Justice Harlan argued in his *Poe v. Ullmann* dissent that criminal punishment for the use of contraceptives is unconstitutional, supported by the fact that other democracies take no similar measures.[117] In *Washington v. Glucksberg*,[118] foreign experience was used to show that suicide has been condemned by many countries,[119] and that assisted suicide is prohibited by most.[120] The Supreme Court has in several instances referred to the importance of free speech, arguing that freedom of speech is essential for democracy by referring to contrary practices in non-democratic countries.[121] However, at the same time, the Court has justified certain limitations on free speech by referring to the practice of similar democratic

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speculated that this change of mind might be a result of the growing influence of the international community of judges on the Supreme Court Justices. Michael C. Dorf, *The Story Behind the Supreme Court's Refusal to Hear a Recent Juvenile Death Penalty Case*, FINDLAW'S LEGAL COMMENTARY (Sept. 4, 2002), available *at* http://writ.news.findlaw.com/dorf/20020904.html.

[116] 443 U.S. 916, 919 (1979) (Rehnquist, CJ., dissenting).

[117] 367 U.S. 497, 554–55 (Harlan, J., dissenting) ("a diligent search has revealed that no nation, including several which quite evidently share Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here.") (footnotes omitted).

[118] 521 U.S. 702 (1997). In this case, empirical arguments based on foreign evidence were also made. *See infra* note 188 and accompanying text.

[119] *Id.* at 711 ("for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide"); *Id.* at 774 (Souter, J., concurring) ("The dominant western legal codes long condemned suicide.").

[120] *Id.* at 711 ("[A] blanket prohibition on assisted suicide . . . is the norm among western democracies." (quoting Rodriguez v. British Columbia (Attorney General), [1993] D.L.R. (4th) 342, 404 (Can.)). The foreign experience was also discussed in the oral arguments. *See* Christopher McCrudden, *A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court*, *in* LAW AT THE END OF LIFE 125, 134–37 (Carl E. Schneider ed., 2000).

[121] For an extensive overview, see Fontana, *supra* note 33; Slaughter, *supra* note 59;Dammann, *supra* note 59.

countries.[122] There are several cases where the Court has condemned the practice of some countries that would not serve as a good example to the United States.[123]

Foreign courts and legislative bodies have also utilized foreign materials. The House of Lords has rejected the right to assisted suicide based on the lack of consensus among different countries.[124] The South African Constitutional court, when limiting the use of deadly force for making arrests, declared that "South African law on this topic is brought into line with that of comparable open and democratic societies based on dignity, equality and freedom, for instance *Tennessee v. Garner* in the United States and *McCann v. United Kingdom* in Europe."[125] In a case involving the constitutionality of mandatory life sentences, the court noted that "there are many examples of other open and democratic societies which permit the legislature to limit the judiciary's power to impose punishments."[126] The court has noted that "open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself. Many societies also accept limits on free speech in order to protect the fairness of trials."[127] In *Jordan v. State*, where the court decided that the prohibition of prostitution does not excessively infringe the constitutional right to economic activity or privacy, it explicitly relied on comparative arguments.[128]

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[122] R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (Scalia, J.) "[O]ur society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas." . This quotation seems to imply that limitations are justified, partly because the other countries accept them. Of course, the citation does not answer the counterfactual — what if other countries would not accept such limitations?

[123] For an exemplary list, see Fontana, *supra* note 33, at n. 275–77. However, this kind of reasoning from comparative analysis could be persuasive only if the line of argument could be "turned around" by showing that the practice is characteristic to the "pathological" case only, and that no other country has adopted it. *See* Fontana, *supra* note 107.

[124] Regina (Pretty) v. Dir. of Pub. Prosecutions, [2001] UKHL 61. E.g. LJ Bingham, at para 28, relied on the "very broad international consensus." Other justices held similar opinions.

[125] S. v. Walters, Case CCT 28/01, ¶ 52, *available at* http://www.concourt.gov.za (references omitted).

[126] S. v. Dodo, 2001 (3) SA 382, ¶ 27 (CC). Thereafter, the court discussed the practice and case law in the United States, Canada, Australia, Germany, India, New Zealand, the United Kingdom, and Namibia.

[127] Islamic Unity Convention v. Indep. Broad. Auth., 2002 (5) BCLR 433, ¶ 29 (SA) (holding unconstitutional certain regulations of broadcasting).

[128] Jordan v. State, 2002 (11) BCLR 1117, ¶ 56 (SA) (footnotes omitted), *available at* http://www.concourt.gov.za (Open and democratic societies adopt a variety of different ways of responding to prostitution, including outright prohibition. The European Court recently underlined the wide discretion that states have in relation to prostitution as an economic activity. In the circumstances, therefore, we are satisfied that [criminal punishment for prostitution] constitutes a measure designed to promote or protect the

Sometimes, courts admit that a single foreign case amounts to persuasive authority. The Irish Supreme Court, for example, referred to the German experience as being "persuasive authority (as a comparative constitution) on fundamental principles of democracy and equality which, as a basic tenet, are common to both Constitutions."[129]

Supranational courts, such as the European Court of Justice, use similar ideas.[130] Already, in the very first group of cases before the court, comparative analysis was the basis for creating principles of Community law.[131] The practice was continued in the *Internationale Handelsgesellschaft* case, where the court mentioned that in determining the extent of fundamental rights in the community, it was "inspired by the constitutional traditions of the Member States."[132] The parties to the cases usually refer to the practice of Member States, and opinions of the Advocate General often contain comparative

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quality of life as contemplated by [the constitution] and that it is a measure considered justifiable in open and democratic societies based on freedom and equality. It is therefore not inconsistent with the right [freely to engage in economic activity]."). In regard to privacy, the court held that "open and democratic societies vary enormously in the manner in which they characterise and respond to prostitution. Thus practice in such countries ranges from allowing prostitution but not brothel-keeping to allowing both; suppressing both; to setting aside zones for prostitution; and to licensing brothels and collecting taxes from them. The issue is generally treated as one of governmental policy expressed through legislation rather than one of constitutional law to be determined by the courts. We are unaware of any successful constitutional challenge in domestic courts to laws prohibiting commercial sex. The matter appears to have been treated as one for legislative choice, and not one for judicial determination. The issue is an inherently tangled one where autonomy, gender, commerce, social culture and law enforcement capacity intersect. A multitude of differing responses and accommodations exist, and public opinion is fragmented and the women's movement divided. In short, it is precisely the kind of issue that is invariably left to be resolved by the democratically accountable law-making bodies." *Id.* ¶ 90 (footnotes omitted).

[129] *In re* Bunreacht Na hEireann; McKenna v. Taoiseach, [1996] 1 I.L.R.M. 81 (Ir.) (citing the Official Propaganda Case, 46 BVerfGE 125 (1977)).

[130] KIIKERI, *supra* note 25, at 99–152; McCrudden, *supra* note 27at 522–23; Nanette A. Neuwahl, *The Treaty on European Union: A Step Forward in the Protection of Human Rights*, *in* THE EUROPEAN UNION AND HUMAN RIGHTS 1, 7 (Nanette A. Neuwahl &Allan Rosas eds., 1995); J.H.H. Weiler & Nicholas J.S. Lockhart, *"Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence*, 32 COMMON MKT. L. REV. 51 (1995); C.N. Kakouris, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 PACE INT'L L. REV. 267 (1994)

[131] Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656, 663 (1997).

[132] Case 11/70, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide, 1970 E.C.R. 1125.

assessments of the legal situation in the Member States,[133] although the Court itself normally refrains from express citations to foreign cases and laws.[134]

Commonalities between countries, such as a common history or constitutional approach, have also been used as the basis of normative reasoning through reference to foreign materials.[135] The most obvious example of "genealogical," or historical commonality reasoning, is the jurisprudence by the Commonwealth courts. For example, the Australian,[136] Canadian,[137] and Pakistani[138] courts have long held examples from English law to be persuasive, as did the U.S. Supreme Court in the beginning of its existence. Justice Calabresi famously argued that "[w]ise parents do not hesitate to learn from their children."[139] The main reason for this is the shared heritage of common law. Similarly, in *Knight v. Florida*, Justice Breyer argued for review of a case involving the execution of death row inmates after long delays (19 and 25 years), arguing that the Courtourt "has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances. In doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal

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[133] Case C-353/99 P, Council of the European Union v. Hautala, Opinion of the Advocate General Léger, ¶ 56 (footnotes omitted) (concerning access to E.U. documents and analyzing the practices of Member States):

> According to consistent caselaw now enshrined in the Treaties, fundamental rights form an integral part of the general principles of law with which the Court of Justice ensures compliance. To that end, it draws on the constitutional traditions common to the Member States and on evidence provided by international instruments concerning protection of human rights in which Member States have cooperated or to which they have acceded

[134] Kakouris, *supra* note 130, at 276 ("Not only is there usually no detailed reference, but there is no reference at all.").

[135] *See* Pradyumna K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319, 323 (1957) (arguing that historical association between different courts has primary importance in explaining the persuasiveness of foreign precedents).

[136] *See* Jianfu Chen, *The Use of Comparative Law by Courts: Australian Courts at the Crossroads*, *in* THE USE OF COMPARATIVE LAW BY COURTS 25 (Ulrich Drobnig & Sjef van Erp eds., 1999).

[137] H. Patrick Glenn, *The Use of Comparative Law by Common Law Courts in Canada*, *in* THE USE OF COMPARATIVE LAW BY COURTS 59 (Ulrich Drobnig & Sjef van Erp eds., 1999).

[138] Tayyab Mahmud, *Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT'L L.J. 40, 47 n.17 (1995) ("Pakistan's judiciary, like that of other post-colonial common law jurisdictions, treats case law and other authoritative texts from other common law jurisdictions as strong persuasive authority.").

[139] U.S. v. Then, 56 F.3d 464, 469 (2d Cir. 1995).

tradition that also underlies our own Eighth Amendment."[140] However, Justice Breyer viewed these precedents as "useful even though not binding,"[141] though he did not delineate the features of that "usefulness."

These positive examples of applying foreign experience in normative reasoning are by no means conclusive evidence that the courts unequivocally do, or should, accept the use of international standards or the practice of courts in similarly situated countries. The dissenters in *Atkins v. Virginia* have made it clear that the use of foreign materials continues to be viewed as illegitimate by some.[142]

### *B. The Legitimacy and Weight of Comparative Normative Reasoning*

There are two basic arguments against courts drawing normative conclusions based on foreign experience. The first of them is a general argument against normative reasoning and balancing as such and warrants no thorough discussion here.[143] The second argument, based on the democratic basis of judicial decision-making, is directed against comparative reasoning and warrants closer inspection.

#### *1. The World Community and the Democratic Nature of Judicial Decision-Making*

The democratic basis argument n is concerned with the fact that courts are part of a national constitutional system, and thus exercise public power "for the people." Only the views and the values of the people living in the particular country are thus argued to be relevant.[144] Each country is based on different culture and values, and thus it is argued that their experience is hardly transferable to another system. This argument is concerned with cultural relativism."[145]

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[140] 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari).

[141] *See id.*

[142] *See supra* notes 1–5.

[143] *See* Aleinikoff, *supra* note 100, at 1004 ("Severe problems beset balancing approaches to constitutional law.").

[144] *See* Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119, 1122 (1996) (" . . . we judges of the American democracies are servants of our peoples, sworn to apply, without fear or favour, the laws that those peoples deem appropriate. We are not some international priesthood empowered to impose upon our free and independent citizens supra-national values that contradict their own.").

[145] *E.g.*, Choudhry, *supra* note 29, at 831. Note that this cultural relativism argument only looks similar to the particularism argument when "borrowings" are refuted on practical accounts. Here, relativism is the question of legitimacy. In particularism, the relativism is the question of practicability and feasibility. This reflects what Fontana,

Cultural relativists argue that standards of justice in the Western world are not similar to standards in the East, and the standards are not similar in the countries of the Western world, even within the same country.[146] A specific country may consider certain values much differently than others because of historical[147] or present concerns in the society. For example, the fear of terrorism after the terrorist attacks of September 11th, 2001 has considerably changed notions of justice and the permissible extent of limiting civil liberties in the U.S. general population. Whether the courts will reflect this shift in case analysis is not yet certain. Past experience certainly demonstrates that this is possible in crisis situations.[148] The fact that many other countries have particular values does not mean that these values will be shared by all countries, nor that such values should be enforced by the courts in those countries. Only if the values are contained in binding international law and if courts have to enforce international law should this be the case.

The same problems in evaluating international law arise in balancing different legal values. The most common form of legal balancing deals with juxtaposing individual and community values. Certainly, there are some guidelines in a constitution's structure regarding its balance between individualist and communitarian values. However, the most significant determinant of finding the right balance of legal values lies in the present society. If the society supports communitarian values, the courts should be more able to uphold limits on individual rights such as free speech.[149] Social scientists have spent considerable time researching the extent to which countries are 'individualist' or 'collectivist.' The results of this research support the hypothesis that countries differ in legal values and that these differences are at times quite significant,[150]

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*supra* note 33, at 615–18, describes as the difference between 'cultural particularism' and 'pragmatic particularism'.

[146] Political scientists use information generated by the World Values Surveys project led by the Institute of Social Research at the University of Michigan to describe and analyze those differences. *See* RONALD INGLEHART ET AL.,, HUMAN VALUES AND BELIEFS: A CROSS-CULTURAL SOURCEBOOK (1998)*; see also* the project homepage *at* http://wvs.isr.umich.edu (last visited Sept. 13, 2003).

[147] The German jurisprudence on freedom of speech is exemplary in this case. *See* Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz" — and Other — "Lies,"* 85 MICH. L. REV. 277 (1987) (showing how German history influenced debate over criminalizing assertions that the Holocaust never existed]).

[148] *E.g.*, Korematsu v. U.S., 323 U.S. 214 (1944) (claiming that the internment of individuals of Japanese origin is permissible due to the concerns about national security).

[149] KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH (1995).

[150] For a review of the research see Daphna Oyserman et al., *Rethinking Individualism and Collectivism: Evaluation of Theoretical Assumptions and Meta-Analyses*, 128 PSYCHOL. BULL. 3 (2002).

as in where values of democratic and authoritarian countries are compared. Therefore, balancing decisions in some countries will not necessarily reflect the values of other countries.

Even assuming that international opinions can contribute to the determination of domestic rights, one must still determine what the international consensus is, leading to several practical problems. Is it enough if the numerical majority of all countries have adopted a certain position? Or is it enough if most of the "democratic" countries[151] have adopted such position?[152] How does one determine what the opinion of a country is? One could certainly argue that one only needs to look at the laws adopted in the particular state. If different parliaments would adopt similar positions on a moral issue, a consensus among societies would be evident.[153] There are additional problems with this method, however. What if the Supreme Court has determined the law, overriding the opinion of the parliament? What if the opinion of the parliament does not reflect the consensus within the state? The opinion polls might reveal different dominant values within the society. Such questions are hard to answer and

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[151] It is far from easy to determine which countries are democratic and which not. There are various classifications. For example, probably the most prominent study, conducted by the Freedom House, uses a continuous scale from 1 to 7, *See* RAYMOND D. GASTIL, FREEDOM IN THE WORLD: POLITICAL RIGHTS AND CIVIL LIBERTIES 1987–1988 (1988) . Some do use dichotomous classifications, *see* ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990 (2000). For recent reviews, *see, e.g.*, Zachary S. Elkins, *Gradations of Democracy? Empirical Tests of Alternative Conceptualizations*, 44 AM. J. POL. SCI. 293 (2000); Kenneth A. Bollen & Pamela Baxton, *Subjective Measures of Liberal Democracy*, 33 COMP. POL. STUD. 58 (2000); David Collier & Robert Adcock, *Democracy and Dichotomies: A Pragmatic Approach to Choices About Concepts*, 1999 ANN. REV. POL. SCI. 537.

[152] See the overview of such problems surrounding the interpretation of the European Convention of Human Rights in Ost, *supra* note 164, at 305.

[153] See the dissent by Rehnquist in Atkins v. Va:

> [T]the work product of legislatures and sentencing jury determinations . . . ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values. . . . I would take issue with the blind-faith credence [the Court's decision] accords the opinion polls brought to our attention. An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results.

536 U.S. 304 at 322–27.

demand careful comparative analysis of the countries that are being studied. Often a thorough comparison is simply not possible.[154]

As mentioned in the introduction to this article, comparative analysis was at the center of the dispute in *Atkins v. Virginia*. In *Atkins*, the majority found evidence that there was a consensus among states that executing mentally retarded criminals constituted cruel and unusual punishment. However, the finding was based on complex considerations: "It is not so much the number of these States [abolishing death penalty for mentally retarded] that is significant, but the consistency of the direction of change."[155] The dissenters could not agree with this analysis:

> The Court attempts to bolster its embarrassingly feeble evidence of "consensus" with the following: "It is not so much the number of these States that is significant, but the consistency of the direction of change.". . . But in what other direction could we possibly see change? Given that 14 years ago all the death penalty statutes included the mentally retarded, any change (except precipitate undoing of what had just been done) was bound to be in the one direction the Court finds significant enough to overcome the lack of real consensus. . . . In any event, reliance upon "trends," even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication. . . .[156]

In fact, it is quite hard to figure out what a "national consensus" is. It is doubtful that there can be such thing at all, particularly considering the difficult nature of cases involving broad principles of justice. Even if a court decision on an issue exists, it is not guaranteed that the decision is accepted by the majority of the population. Also, the decision could be based on the fad of the time and could later be overruled.[157] These issues show that even if one is compelled to follow a single foreign court, deciphering a consistent view informing a consensus is difficult. Employing the *stare decisis* principle in a single legal system is difficult enough.. Overturning and distinguishing precedents is what a lawyer faces in all countries, not only common law countries, every day.[158]

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[154] Rudolf Bernhardt, *Thoughts on the Interpretation of Human-Rights Treaties*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 65, 67 (Franz Matscher & Herbert Petzold eds., 1990).

[155] *Atkins*, 536 U.S. 304, 304.

[156] *Id*. at 344–45 (Scalia, J., dissenting).

[157] *E.g.*, the concurrence in Foster v. Fl., 537 U.S. 990, 990 (2002), by Justice Thomas ("[T]his Court's Eighth Amendment Jurisprudence should not impose foreign moods, fads, or fashions on Americans.").

[158] On the *stare decisis* principle, *see generally* D. NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (1997). On the rate of overturning precedent in the U.S. Supreme Court, see BRENNER, SAUL & HAROLD J.

These legitimacy and practical problems can be overcome with several types of different arguments, depending of the type of normative reasoning used. These arguments stem from international law, the text of the constitution, and the borrowed statute doctrine.

*2. International Law as a Basis for Comparative Normative Reasoning*

The use of international law is the principal way of legitimizing normative reasoning through comparison. This is somewhat surprising. Surely, if a court does not consider itself bound by international law, customary or treaty-based, international arguments lose their force. Even if the courts do have to apply international norms, the use of foreign cases and laws might seem surprising. When obligatory norms of international law exist, it is those norms that the court should follow, not the practice of other countries. However, if binding international law does not exist, it is for the particular states to determine how to balance values and how to interpret broad principles of justice.[159] One must bear in mind that international custom does not become customary international law merely because of general state practice — international legal doctrine demands that the practice be "accepted."[160] Therefore, one might argue that, where no general state practice exists, the opinions of the other countries are in fact irrelevant.

Three arguments can be put forward against this assertion. First, comparative analysis is still necessary to determine whether customary international law in fact exists. Second, it might be efficient to interpret constitutional norms "internationally." Third, one must take into account the way international law is developed.

The first argument is based on the fact that courts must refer to foreign practice whenever they analyze whether customary international law exists

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SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE U.S. SUPREME COURT, 1946–1992 (1995).

[159] Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1218–19 (1998) ("[If comparison is used to] fashion fundamentally new human rights claims, it could lead to the flattening of the diversity of national practices and cultures simply because a certain number of states have made common political decisions regarding contested social values."); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391 (2001) (arguing that the development of international law needs to take into account the particularities of different cultures).

[160] *See* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 47–55 (2nd. ed., 1997).

regarding an issue.. For example, one can make a legitimate argument that the death penalty as applied to the mentally retarded violates customary international law.[161] Therefore, it is unavoidable to analyze foreign practice in a case involving the alleged unconstitutionality of juvenile death penalty. In a similar vein, the German Constitutional Court analyzed international practice when it had to determine whether constitutional rules against double jeopardy prohibit bringing criminal charges if an earlier criminal sentence had been applied abroad.[162] The existence of customary international law needs to be determined, even if it does entail similar practical problems mentioned above. The courts, if bound to apply international law, cannot simply argue that they lack the time and resources needed to determine what the international practice is.

The second argument for uniform application of international law among different countries involves policy considerations. For example, use of foreign practice when interpreting public policy clauses in when resolving conflicts of laws "eliminates the parochial character of the clause and it tends to narrow and internationalize its application."[163] This argument reflects the international duties of the state and the courts in ensuring efficient communication between different states. Uniformity is not a norm in itself, but a means to other ends.

The third argument for uniform application deals with the development of international law. The application of international standards is most clearly visible in international human rights adjudication. The European Court of Human Rights repeatedly refers to the state of law in the Member States when deciding controversial issues, thus deciding international disputes according to the standards common to the Member States.[164] For example, the court has demanded recognition of gender re-assignment of transsexuals in official government documents as part of the right to privacy based on the "clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."[165] In *Dudgeon v. United Kindgom*,[166] the court relied on the European consensus in striking down laws criminalizing sodomy in Northern Ireland. Further, an array of cases concerning minority rights have discussed the need to protect the lifestyles of minorities. In

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[161] Harold Hongjuh Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1121–29 (2002).

[162] 75 Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] 1, 15 (1987) (Germany).

[163] Drobnig, *supra* note 11, at 15.

[164] KIIKERI, *supra* note 25, at 153–90; McCrudden, *supra* note 27, at 522; François Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, *in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS (Mireille Delmas-Marty ed., 1992) 283, 305–09 (giving an overview of the cases utilizing this approach).

[165] Goodwin v. U. K., 22 Eur. Ct. H.R. (ser. A) (1996), at ¶ 85.

[166] Dudgeon v. U. K., 45 Eur. Ct. H.R. (ser. A) (1981).

these cases, the court has relied on an "emerging international consensus amongst the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle."[167]

In contrast, the Inter-American Court of Human Rights is not as eager to analyze the human rights standards of the parties to the American Convention of Human Rights, but this might be caused by the fact that it mostly deals with gross human rights violations where reference to such norms is simply unnecessary.[168]

When national courts cite international human rights cases in determining the content of domestic civil rights,[169] the use of comparative experience by the international human rights court indirectly impacts the jurisprudence of domestic courts. In these cases, domestic courts follow the lead of other countries, "brokered" by the international human rights court.[170]

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[167] Lee v. U.K., application no. 25289/94, ¶ 95, *available at* http://www.echr.coe.int/Eng/Judgments.htm However, the consensus is not "sufficiently concrete" in order to create standards for particular situations. *Id*. ¶ 96.

[168] David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 1, 11–12 (David Harris & Stephen Livingstone eds., 1998).

[169] The European Court of Human Rights has had a significant impact on the domestic adjudication in Member States. *See* Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on 11 May, 1994*, 15 HUM. RTS. L.J. 81 (1994) (reviewing the influence in Austria, Belgium, Netherlands and Ireland). After the enactment of the Human Rights Act, the courts in the United Kingdom are forced to apply not only the provisions of the European Convention of Human Rights as transposed into the British law, but they need to interpret those provisions in the light of the jurisprudence of the European Court of Human Rights. Human Rights Act, 1998, c.XXX § 2(1)(a)(Eng.) ("A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights."). *See generally* Michael Supperstone & Jason Coppel, *Judicial Review after the Human Rights Act*, 3 EUR. H.R. L. 301 (1999)

[170] The similar approach has been taken in other types of litigation, for example in transnational commercial litigation. This is even the case where no international dispute settlement body exists, including such treaties as Vienna Convention on the International Sale of Goods. In such cases, the need for uniform interpretation of the treaty mandates the court to compare foreign judgments. See the decision of the House of Lords in Fothergill v. Monarch Airlines Ltd., 2 All E.R. 696 (H.L 1980) ("Our courts will have to develop their jurisprudence in company with the courts of other countries," Scarman LJ). *See also* John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* 95–97 (3rd ed., 1999) and Drobnig, *supra* note 11, at 8–9 (arguing for the uniform interpretation of the convention).

Similar justifications for using comparative experience exist for federal systems and the European Union.[171] The member states of a federation are surely not bound by the practice or jurisprudence of the other states. However, they are bound by the practice of federal courts. The federal courts, in turn, engage in "law canvassing" of the states.[172] The state courts thus follow the practice of other states "brokered" by the federal courts.

*3. Constitutional Text*

In some cases, a country's constitution directs national courts to take into account foreign experience. The most famous provision directing this type of analysis is probably contained in the South African Constitution, stating that the courts "may consider foreign law."[173]

Some courts use more implicit constitutional provisions to justify utilizing foreign materials. Where a constitution contains standards that that refer to "democratic society" in general,[174] courts may look at standards common to democratic societies. The European Convention on Human Rights contains similar clauses in Articles 8–11, allowing for restrictions to convention rights only if the restrictions are "necessary in a democratic society." This clause has warranted inter-state comparisons to determine the permissibility of such restrictions.

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[171] The European Court of Justice is obliged to turn to the jurisprudence and legislation of the member states as a matter of the EU Treaty. Article 6.2 provides: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." According to the Article 288 of the EC Treaty, the Court has to create its jurisprudence on the tort liability of the Community "in accordance with the general principles common to the laws of the Member States."

[172] *See, e.g.*, Atkins v. Va, 536 U.S. 304, 313–16.

[173] Section 39 provides: "When interpreting the Bill of Rights, a court, tribunal or forum — (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law." S. Afr. Const. § 39 (1996).

[174] *E.g.*, according to the Article 1 of the Canadian Charter of Rights and Freedoms, the charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The South African Interim Constitution, section 35(1) provided: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality." Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

However, these provisions could also be interpreted as providing that convention restrictions must be necessary for democracy to function in a particular state. This second interpretation demonstrates that relying on a constitutional provision mandating to use standards necessary in a democratic society is more controversial than it might seem at first. Moreover, interpretation of supranational clauses by the European Court of Human Rights shows that using international consensus as a human rights standard is problematic also because of the wide latitude left to individual states. Namely, the jurisprudence of the European Court of Human Rights has often allowed states a wide "margin of appreciation" to determine what is really necessary for democracy in a particular state.[175] Occasionally, as shown before, the court attempts to determine what is necessary through examining standards adopted by the signatories to a treaty. This approach is troubling because the commonality of standards between the states does not tell us when we should appreciate a divergence from these standards in a particular country.[176] Similarly, a domestic constitutional provision calling for adopting a standard necessary in a democratic society has to take into account that different societies have different values and different necessities. It is the duty of the court to appreciate these differences.

The preceding discussion has shown that international law, federal law, and the text of the constitution can legitimize the use of international standards. However, it must be borne in mind that not all courts are part of a federal system or have to apply international norms themselves, and that not all constitutions contain general clauses directing courts to look at international standards. Moreover, it may actually be the duty of the court not to succumb to international pressures and thereby preserve the particular culture of the society in which it operates. Further, the legitimacy of applying international standards does not eliminate the practical problems of determining what the international standards actually are. This problem must be kept in mind when determining the content of broad constitutional principles or making balancing decisions.

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[175] HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996) (discussing the doctrine of margin of appreciation generally); Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights* 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 240 (1996) (discussing the doctrine of margin of appreciation in the jurisprudence of the European Court of Human Rights).

[176] Carozza, *supra* note 159, at 1233 ("inter-state comparison will not itself give us the reasons to choose in any instance whether to affirm a uniform international standard of human rights or whether to allow the play of difference and discretion among states.").

*4. The Borrowed Statute Doctrine*

The final argument for the legitimacy of comparative normative reasoning is concerned with the borrowed statute doctrine. This doctrine provides that when a statute or constitution has foreign origins, the court may feel especially compelled to follow foreign interpretation of that statute or constitution.[177] In such cases, the courts are not bound by a hard-to-establish "international consensus," but rather by a more limited set of cases. Thus a court would look to the "parent" constitution and its interpretation in resolving constitutional problems. The very fact that a constitutional provision has been borrowed, or that the legal system more generally has roots in a foreign system, makes the courts in this other system an authority. Choudhry[178] and Fontana[179] call this "genealogical" interpretation. Dammann justifies this approach with the fact that this might have been what the drafters of the constitution or the statute wanted, thus making this type of comparative reasoning an 'intentionalist' comparison.[180]

However, the borrowing statute doctrine is not very persuasive on closer inspection, as demonstrated by how the common law has developed in the Commonwealth. The influence of English precedents has waned a lot in recent decades, as in Australia and Canada.[181] The use of precedent from previous colonial powers is sometimes even seen as inherently unnecessary. For example, a justice in the Namibian Supreme Court has stated that "the Namibian people are now in the position to determine their own values free from such foreign values imposed by their former colonial rulers."[182] Therefore, the borrowed statute doctrine may provide great interpretive assistance, but may not possess enough legitimacy to be extensively relied upon in interpreting domestic laws.

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[177] In fact, comparative arguments in practice are usually made only when interpreting statutes, not constitutions. In Germany, see Ulrich Drobnig, *The Use of Foreign Law by German Courts*, *in* THE USE OF COMPARATIVE LAW BY COURTS 134–35 (Ulrich Drobnig & Sjef van Erp, eds., 1999) (discussing cases where the German Federal Supreme Court has referred to Swiss and Austrian practice because the rules they applied were inspired by the Swiss and Austrian rules).

[178] Choudhry, *supra* note 29, at 866–85.

[179] Fontana, *supra* note 33, at 550.

[180] Dammann, *supra* note 31, at 520–21.

[181] Chen, *supra* note 136; Glenn, *supra* note 137.

[182] Ex parte Attorney-Gen., Namib. (In re Corporal Punishment by Organs of the State), (1992) 103 I.L.R. 81 (Namib.) (Berker, CJ). The court cited several foreign authorities in this case, *see* Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 143–45 (2002) (discussing the corporal punishment case).

### *C. Conclusion*

It appears that the use of comparative experience when defining broad constitutional categories or balancing conflicting values is rather limited. Each country has its own unique values and, unless binding international obligations exist, domestic courts should not import foreign values. Moreover, foreign values are hard to determine. Instead of applying some mathematical method to determine the "average" or "dominant" foreign values, courts should look at the values of its own society. The majority opinion of the world community might in fact be worthy of rejection.

## V. THE USE OF COMPARATIVE LAW IN EMPIRICAL ARGUMENT

### *A. Comparison and Prediction*

Balancing decisions in constitutional jurisprudence not only involve normative issues, but also involve empirical questions. One of the basic tenets of proportionality analysis is to ask whether the challenged measure in fact pursues the aim that has been brought forward to justify the measure. In order to determine this, a prediction has to be made.[183] Use of comparative experience in creating empirical arguments[184] thus seems logical. In fact, how else can one find empirical evidence that an interpretation is valid? Governments and courts are not equipped with laboratories where they could have two "experiments" run at the same time, with different interpretations of the law. Similarly, as the states in a federal system might serve as laboratories,[185] foreign countries could serve as laboratories in the world community.

As an example of this method, the famous Brandeis brief in *Muller v. Oregon* contained scientific evidence collected from several countries in 1908.[186] In *Printz v. U.S.*, Justice Breyer argued that the court should look at the experience of the European federal systems in order to determine whether it is dangerous to

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[183] *E.g.*, David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991).

[184] For an overview of the issues and problems *see* Perales, *supra* note 106, at 901–03 and Tushnet, *supra* note 28, at 1238–69.

[185] DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 85–88 (1995); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397–400 (1997).

[186] Brief for Defendant in Error, Muller v. Or., 208 U.S. 412 (1908), *reprinted in* 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63 (XXX ed.,1975). Technically, this was not a comparative analysis. True comparative analysis would have established whether in those countries where minimum-hour laws for women existed, fewer problems could be observed.

assign the States some enforcement powers under federal laws.[187] In *Washington v. Glucksberg*, the experience of Netherlands was discussed thoroughly.[188] In *Zelman v. Simmons-Harris*, Justice Breyer referred to the British and French experience of regulating religious schools.[189] However, this type of comparative analysis is not extensive and the foreign courts appear to make similar inferences with even less frequency than the U.S. Supreme Court.[190]

*B. The Legitimacy and Weight of 'Empirical Use'*

There is one fundamental objection to the use of comparative experience in constitutional empirical argument, which relies on the rejection of empirical arguments across the board. Thus, some authors reject the use of empirical arguments of any type, arguing that these kind of arguments cannot solve

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[187] At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well.

521 U.S. 898, 976–77 (1997) (citations omitted).

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This concern [that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia] is further supported by evidence about the practice of euthanasia in the Netherlands. . . . [The Dutch government's own study] suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia. . . . There is . . . a substantial dispute today about what the Dutch experience shows. Some commentators marshall evidence that the Dutch guidelines have in practice failed to protect patients from involuntary euthanasia and have been violated with impunity. . . . This evidence is contested.

521 U.S. 702, 734, 786 (1997)

[189] 536 U.S. 639, 725 (2002).

[190] McCrudden, *supra* note 27, at 526 ("This approach appears to be much less frequent in courts outside the USA."); McCrudden, *supra* note 120, at 145 (concluding that the U.S. court relies on empirical evidence from abroad more than other courts, based on assisted suicide cases).

constitutional questions.[191] However, the objection is weak, as courts do in fact rely on empirical predictions. If a court's holding is based on empirical predictions, one needs any evidence possible to support those predictions.

*1. The Practical Problems of Comparison*

The weight and legitimacy of comparative reasoning depends on successfully solving practical problems by drawing inferences from comparative empirical analysis. Whereas the legitimacy of comparative reasoning for empirical purposes raises few questions, there is much less agreement on whether comparative reasoning can in fact produce a sound basis for decision making. Some are optimistic, but many are cautious.[192] There are several reasons for this.

First, courts use economic and social data in making empirical arguments, as opposed to statutes or cases.[193] Courts are often not equipped with the skills necessary to deal with this kind of data. Empirical analysis, or "constitutional fact-finding," has not been the strongest skill of the U.S. Supreme Court.[194]

Second, experience gathered from one country might shed very little light on its possible consequences in another country. This argument is usually brought

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[191] *See* Matthew A. Edwards, *Posner's Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 328–32 (2002) (providing an overview of the controversy).

[192] *E.g.*, Tushnet, *supra* note 28, at 1269 ("[W]e might properly be rather skeptical about what we can truly learn when we think about constitutional experience elsewhere in functionalist terms.").

[193] *See* McIntyre v. Oh. Elections Comm'n, 514 U.S. 334, 381–82 (1995). One of the issues facing the court was whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections. One of the arguments Justice Scalia uses is that the Australian, Canadian, and English parliaments have all enacted such laws. Under these circumstances, Justice Scalia asks:

> how is it, that . . . all of these elected legislators, from around the country and around the world, could not see what six Justices of this Court see so clearly that they are willing to require the entire Nation to act upon it: that requiring identification of the source of campaign literature does not improve the quality of the campaign?

*Id.* at 381–82.

This argument is flawed, because the existence of the laws do not in themselves provide evidence about the consequences of the laws. Parliament or ruling parties may have incentives to produce laws contrary to the general good, for example by stripping alternative candidates the possibility of finding financing, if it were true that anonymous financing usually benefits "alternative" candidates.

[194] For a critical overview of the Supreme Court, see Donald N. Bersoff & David J. Glass, *The Not-so Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279 (1995) and Faigman, *supra* note 183 at 565–600. In the comparative constitutional law context see Fontana, *supra* note 33, at 541.

forward by opponents of transplanting legal theories from one country into another.[195] Legal transplants might not work when there are significant differences between the "donor" and "recipient" countries. Political differences between countries are a great impediment to such transplantations because differences in the form of government or the prominence of interest groups may be significant. Further, complex relationships between different institutions complicate the transferability of just a part of the legal system from one country to another.[196] In constitutional law jargon, "[p]articular institutions serve complex functions in each constitutional system, and there is little reason to think that directly appropriating an institution that functions well in one system will produce the same beneficial effects when it is inserted into another."[197] Following these arguments, we cannot predict how a certain legal institution will work in one country based on its performance in another.

Such obstacles to learning from foreign experience are alleviated by the insights that comparative political research has given, particularly the methodological advances of social sciences in comparative research. However, despite these advances, obstacles to gaining significant and meaningful empirical evidence remain.

### *2. Comparative Politics and Empirical Inferences*

Drawing inferences from social and economic data is the basis for empirically oriented social sciences. A considerable amount of literature dealing with the methodology of drawing such inferences has been developed by social science research. Courts usually draw inferences from foreign experience in two ways — either by making references to a single foreign case,[198] or by utilizing several cases.[199]

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[195] *E.g,*. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); John H. Langbein, *Cultural Chauvinism in Comparative Law*, 5 CARDOZO J. INT'L & COMP. L 41 (1997); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995). For a prominent support of legal transplants, see ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2nd. ed., 1973).

[196] Kahn-Freund, *supra* note 195, *passim*.

[197] Tushnet, *supra* note 28, at 1307.

[198] Washington v. Glucksberg, 521 U.S. 702 (1997) (relying on the experience of the Netherlands).

[199] Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Justice Breyer, relying on British and French experience). One of the briefs relied on the experience of Netherlands, Australia, and United Kingdom, see *infra* note 203.

The most obvious advantage of case studies[200] is that they enable a court to analyze the experience of another country in detail. Thus, when referring to foreign experience, the court is essentially concluding that similar outcomes would be expected at home. This conclusion is based on the assumption that there is a causal linkage between rules and outcomes and that this causal linkage also exists in the different system, possibly even under different circumstances. Both of these assumptions are heavily contested in evaluating the usefulness of case studies.

The first assumption, that a causal link between rules and outcomes exists, presupposes that it is relatively easy to identify the consequences of adopting a rule. We could thus easily determine that what followed was caused by the rule, rather than merely being a coincidental byproduct of the rule. The critique to this assumption points to the fact that there is no certain way to establish the causal linkage between adoption of a rule and subsequent consequences. Any number of variables might actually have caused the observed outcome, not just the adoption of the rule. The experience is thus hard to generalize to a wider array of cases.[201] For example, a recognition of multi-variable causation was seen in *Zelman v. Simmons-Harris*, where the court noted that a long period without serious religious strife, such as experienced in Great Britain and in France, may be a consequence of a number of factors. Religious financing of schools may in fact have had nothing to do with this. Rather, other factors might have had such a strong influence on the relationships of the different religious groups that the financing of religious schools did not cause major upheavals.

Thus, relying on the experience of a single or a few countries provides barely anecdotal evidence. When using anecdotes in comparative legal analysis, the winner of the case is the one who knows a better anecdote than those arguing for a different outcome. This "battle of anecdotes" should not be viewed as a permissible legal strategy. For example, the deterrent effect of the death penalty cannot be dispositively proven by comparing crime rates in a death penalty state to rates in another state where the death penalty has been abolished. Similarly, one may argue that it is not wise to base constitutional analysis on the experience of a single foreign country. For social scientists, selecting only those cases that support an argument, or selecting cases because they support an argument, is one of the basic violations of the rules of empirical inference.[202] *Zelman*, the school voucher case, is a good example of this error. The dissenters in *Zelman* relied on the experience of France, Great Britain, and the countries in the Balkans, where they found evidence that religious schools might have

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[200] On the usefulness and methodology of case studies in comparative politics, see B. GUY PETERS, COMPARATIVE POLITICS: THEORY AND METHODS 137–155 (1998); GARY KING, ROBERT KEOHANE, & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY 211 (1994).

[201] Tushnet, *supra* note 28, at 1265–7.

[202] Epstein & King, *supra* note 12, 112–114

harmful effects. The dissenters never discussed contrary foreign experience, as extensively discussed in the respondent's brief.[203]

Case studies, when supported by sound theory, can assist in legal analysis. However, case studies by themselves do not warrant generalized conclusions.[204] Case studies at best offer tentative hypotheses that must be tested before any generalized conclusions can be made.[205] An anecdote may assist in refuting absolute claims, by referring to positive experience from other countries. This does not mean, however, that the foreign solution is necessarily reasonable or acceptable in the domestic context.

Besides case studies, comparisons involving just a few countries (small-n) and statistical studies involving a large number of countries can be utilized. In the first instance, comparisons usually rely on evidence from countries selected consciously for the analysis. The "most similar systems design" method is based on the assumption that if two "otherwise similar" countries adopt different institutions or legal rules on one issue and obtain different outcomes, the difference in these outcomes is most probably explained by the difference in the institution or the rule.[206] The basic argument in support of legal transplants is similar — any difference in outcomes between two countries must be caused by different legal rules, as the other variables are held constant.[207] However, such comparisons suffer from similar deficiencies as case studies, simply because different countries are never sufficiently similar.

Statistical studies involving a large number of countries purportedly compensate for the impossibility of drawing general conclusions from case studies. The statistical methods (usually multiple regression analysis) attempt to find relationships when controlling for the variation in other variables. The use of statistical methods in judicial decision-making seems limited, though, as such studies establish general trends that might not apply in specific cases. The U.S.

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[203] Brief of Amici Curiae on Behalf of the Assoc. of Christian Schs. et al., Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), *available at* 2001 WL 1699133 (discussing the experience of foreign countries, especially Netherlands, England and Australia). In fact, the discussion by Justice Breyer shows the other practical problem with drawing empirical conclusions — that of comparability and transferability of the conclusions. He admits that the British and French experience might not be very significant because these countries are religiously more homogeneous than the United States.

[204] *But see* Tushnet, *supra* note 28, at 1267 ("Inferences from small numbers are possible, however, if they are supplemented by a theoretical account that provides reasons for thinking that particular cases exemplify more general social tendencies.").

[205] KING ET AL., *supra* note 200, at 211.

[206] ADAM PRZEWORSKI & HENRY TEUNE, THE LOGIC OF COMPARATIVE SOCIAL INQUIRY 39 (1970).

[207] Fontana, *supra* note 33, at 560 ("the more similar to the United States the legal issue, legal system, legal history, and social situation that the other country faces, the more desirable the use of refined comparativism becomes").

Supreme Court is likely not interested in what happens in the world 95% of the time; it is interested in what will happen in the United States. Therefore, it is not surprising that there is no single U.S. Supreme Court decision where a comparative statistical study has been used,[208] in contrast to other types of statistical analyses.

These methodological problems clearly show that conclusive evidence is almost never found through comparative analysis[209] When courts base their decisions on inconclusive evidence, the results are neither beneficial to comparative law nor legal analysis. Some empirical inferences are clearly reasonable. For example, the advantages of democracy over authoritarianism may not always be clear in detail,[210] but generally the benefits of democracy are evident. The purpose of preserving human rights is quite tangible, yet the impact of specific human rights may not be clear.[211] In addition, the consequences of limiting human rights are not clear.

Many major issues in comparative politics are still open to argument. Thus, even the use of expert witnesses in the courtroom to explain and support the transferability of foreign law[212] to the domestic context helps little. Meaningful comparative studies take time, and the results of such studies would be far from conclusive evidence for judges. Of course, the situation would be different if

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[208] The survey of how many countries have adopted one or another solution is not a proper statistical study, as no inferences are drawn from the data. The rules on the use of comparative experience in creating normative arguments are profoundly different from drawing empirical inferences. This has been missed by Fontana, *supra* note 33, at 554–56, where he describes "law canvassing" that would combine both uses.

[209] Jennifer Widner, *Comparative Politics and Comparative Law*, 46 AM. J. COMP. L. 739, 744–45 (1998) (showing that comparative research entails tradeoffs between accuracy, generality, and parsimony).

[210] PRZEWORSKI ET. AL., *supra* note 151 (showing that being a democracy does not necessarily bring about superior economic growth).

[211] Consider the freedom of association. It is by no means clear that labor union strength has positive societal consequences. James W. McGuire, *Labor Union Strength and Human Development in East Asia and Latin America*, 33 STUD. IN COMP. INT'L DEV., 3–34 (1999) (arguing that there is a negative overall effect of labor strength on human development).

[212] Fontana, *supra* note 33, at 556 ("a judge should encourage litigants to argue comparative constitutional law to courts . . . sometimes even using expert witnesses on foreign law who can help the judge determine the relevant comparative constitutional law and its transferability") ; "If the court is concerned about contextual differences and how a comparative rule would work in the American context, the court may appoint someone trained to study differing institutional contexts who may look at sources beyond written constitutional, statutory, and decisional law to determine how the law has actually worked in another country." *Id.* at 564

comparative research were already available, but research is  is rarely available on the very issue before the court.[213]

### *C. Conclusion*

The use of comparative experience to make empirical predictions is theoretically a cure for many ills of legal reasoning. However, its "wrong" use can be as harmful as the misapplication of any social science data. The "right" use of comparative experience, however, is enormously difficult to achieve. Even when accomplished, there are few clear-cut conclusions to be drawn from its application. The practical hopes for finding help from comparative analysis are thus modest.

The benefits of comparative empirical reasoning appear to be greatest when foreign experience is taken from a very similar country or system, as is the case in comparative normative analysis. When using similar countries, comparative empirical reasoning benefits from the "most similar systems design," whereas comparative normative analysis benefits from federal or international "brokerage." Comparative experience can serve as a persuasive authority in legal decision-making when utilized to compare similar countries.

## VI. THE STRATEGY OF COMPARATIVE REASONING

Thus far, this article has discussed the role of comparative analysis in reaching conclusions in a legal argument. As shown, comparative constitutional law can provide only modest help to judges. At the same time, it is suggested that the reasons for inserting comparative elements into judicial opinions may be strategic. I will now turn more closely to the issue of strategic considerations and discuss the circumstances where one can expect to find such strategically-based comparative references. The following is a positive analysis. Its goal is not to persuade or justify comparative references, but to explain them. The question at hand is why some courts utilize comparative analysis more than others.[214]

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[213] The courts lack not only relevant comparative research, but any research. Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 22 (1998) ("one thing that we may hope for through the application of the methods of scientific theory and empirical inquiry to constitutional law is the eventual accumulation of enough knowledge to enable judges at least to deal sensibly with their uncertainty about the consequences of their decisions.").

[214] There are some attempts to do that. *See* Tripathi, *supra* note 135, at 344–45; McCrudden, *supra* note 27, at 516–27.

*A. Comparative Reasoning as an Element of Judicial Strategy*

The search for explanations regarding comparative reasoning must begin with analyzing the motivation of the relevant actors — the judges or the court in general. This is a field that has drawn considerable attention from scholars from both political science[215] and the law.[216] Based on the motivation of judges, specific models can be set up. This can be done on two levels — individual and institutional.

*B. Institutional Motivation to Engage in Comparative Reasoning*

Institutional analysis evaluates the court as a unitary actor and deals with the goals of the court as a single institution. Institutional predictions look at the strategic behavior of the court, hypothesizing that the court wants to persuade its audience.[217] One prominent predictive model is based on separation-of powers considerations, which hypothesizes that the court wants to make policy that will not be overturned by subsequent executive or legislative action.[218] In applying this predictive model to a court's use of comparative reasoning, one would hypothesize that courts use comparative arguments in order to persuade other branches of government that the court's analysis is sound. However, if the comparative arguments would have a negative impact on the view of other political bodies, the court would probably refrain from using these arguments.

The previous analysis has provided a rationale for the greater use of comparative experience by relatively young constitutional courts than established regimes. This may not be a consequence of legal necessity, but of the need to seek judicial legitimacy by referring to more experienced constitutional courts. Young constitutional courts can justify entering certain areas of

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[215] *E.g.*, Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749 (1994).

[216] RICHARD A. POSNER, OVERCOMING LAW 117–23 (1995); Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 832–44.

[217] McCormick, *supra* note 26at 528–29 (1997) ("a case is cited because it contributes to convincing the relevant audience (which includes, but is by no means limited to, the immediate parties) of the appropriateness of the outcome.").

[218] The literature on this model is abundant. Besides political scientists, several legal scholars have engaged in this kind of analysis. Among the prominent works are Jeffrey A. Segal, *Separation of Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) and William N. Eskridge Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991); *See also* Cornell W. Clayton, *The Supply and Demand Sides of Judicial Policy-Making (Or, Why Be So Positive About the Judicialization of Politics?)*, 65 LAW & CONTEMP. PROBS. 69 (2002).

policymaking by referring to other courts which have acted similarly.[219] In addition, these courts can persuade other governmental bodies that their judgment is substantively in line with the practice of other democratic countries.[220] This might be especially true for courts in countries undergoing political transition, in order to show the way for democratic development.[221] Further, showing that courts all over the world have dealt with a question might help prevent accusations that the court is interfering with political questions more appropriately addressed by other branches of government.

This discussion pertains only to the legitimacy of the court, which is important for how its decisions will be perceived, not for making the legal argument better in and of itself. Moreover, for some courts referring to foreign case law might diminish the legitimacy of a holding, rather than enhance it.[222] Indeed, people may view borrowing ideas from foreign decisions as surrendering to "legal imperialism."[223] The courts in more powerful countries might be less enthusiastic than courts in less powerful countries, because the powerful political organspossess unilateralist aspirations and would normally not consider the country bound by the opinions and attitudes of other countries. For example, this might explain why the U.S. Supreme Court does not readily

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[219] On Zimbabwe, see Lovemore Madhuku, *The Impact of the European Court of Human Rights in Africa: The Zimbabwean Experience*, 8 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ 932, 943 (1996) ("references to comparative international cases is a part of a well-designed judicial policy of activism. Judges do not want to be seen to be openly making law. . . . [T]he ECHR has been a great help.").

[220] Slaughter, *supra* note 40, at 116 ("[B]y pointing to the actions of fellow states, a national court can reassure itself (and its government) that it will not disadvantage the nation in dealing with other nations. On the other hand, an advocate arguing before such a court can urge the government to get in line with fellow governments, suggesting the possibility of exclusion if a government remains a hold-out.").

[221] Developments in the Law--International Criminal Law, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2060–62 (2001) ("[T]he new constitutional courts use comparative experience both in order to find persuasive legal arguments as well as to remedy "unfortunate international reputations" and to "improve their status in the world community."). The argument is similar to the contention that emerging democracies are more willing to enter into international human rights organizations with supranational adjudicative powers. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

[222] This seems to be the case with the U.S. Supreme Court. Even courts that use comparative case law often make the point that they do not apply foreign law, but just get ideas from it. *See supra* notes 71–76 and accompanying text.

[223] JAMES A. GARDINER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID TO LATIN AMERICA (1980) (on United States' assistance to South America); TRANSPLANTS, INNOVATION, AND LEGAL TRADITION IN THE HORN OF AFRICA (Elisabetta Grande ed., 1995) (on the dangers of one-sided exportation of legal rules).

use foreign experience.[224] The fact that the Court is left out o international dialogue may be troubling,[225] but is an unfortunate result of strategic calculations. The desire to maintain legitimacy in the eyes of the domestic constituency might also explain the fact that courts in liberal democracies cite precedent from liberal systems only, to the exclusion of authoritarian regimes.[226]

Another reason why the courts are motivated to cite foreign precedents is that the court identifies itself with other courts around the world. Citing foreing precedent would contribute to the legal discussion worldwide. By engaging in comparative analysis, the court may be seen as a part of an "international community" of higher courts.[227] In this way, the American courts could exert influence on foreign judicial practices[228] and spread the American way of thinking and legal reasoning, announcing the American "constitutional gospel."[229] One of the reasons that the U.S. Supreme Court has not been cited by foreign courts recently is arguably because it does not engage in international discussions.[230] The court that wants to have international influence, and who

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[224] Louis Henkin, *Constitutionalism and Human Rights*, *in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE U.S. CONSTITUTION ABROAD 392 (L. Henkin & A. J. Rosenthal eds., 1990) ("To some extent there is an unwillingness by Americans to admit such influence: that we should be governed by ideas from foreign sources is not congenial to us."); McCrudden, *supra* note 27, at 519–20.

[225] Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM.. L. Rev. 537, 561 (1988) ("[T]he apparent reluctance of the U.S. Supreme Court to consider overseas interpretations of its own cases [is troubling]."); L'Heureux-Dube, *supra* note 40, at 40 ("It is to be hoped . . . that the United States Supreme Court will begin to consider, in more depth, the opinions of other high courts around the world.").

[226] McCrudden, *supra* note 27, at 517–18.

[227] Bernard E. Harcourt, *Mature Adjudication: Interpretive Choice in Recent Death Penalty Cases*, 9 HARV. HUM. RTS. J. 255 (1996) (while discussing the jurisprudence of the South African Constitutional Court, arguing that "the court uses comparative law to define its own peer group while simultaneously creating its individual identity in the international community"); Slaughter, *supra* note 40, at 123 (arguing that the judges in higher courts are autonomous actors with autonomous relationships with foreign or supranational judges); Amnon Reichman, *"When We Sit to Judge We are Being Judged." The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation*, 9 CARDOZO J. INT'L & COMP. L. 41 (2001) (arguing that the judgments of domestic courts are discussed by other courts, creating a system of dialogue and peer-review).

[228] Justice Stevens has explicitly argued this in a dissent: "The Court of Appeal of South Africa, indeed, I suspect most courts throughout the civilized world — will be deeply disturbed by the 'monstrous' decision the Court announces today." U.S. v. Alvarez-Machain, 504 U.S. 655, 687 (1992).

[229] Fontana, *supra* note 33, at 572. Again, whether this is the proper role of the court and the proper source of legitimacy is not clear.

[230] *See supra* note 221, at 2072. ("The Canadian court's citation in Burns to Justice Breyer's dissent, rather than to any other recent U.S. state or federal court decision

perceives that its audience is the international community of lawyers and judges, is expected to pay more attention to comparative arguments.

### *C. Individual Motivation to Engage in Comparative Reasoning*

Another perspective on comparative reasoning offered by political science models focuses on the attitudes and goals of individual justices. This approach is based on the fact that a court, as such, cannot have preferences and opinions — courts always reflect the preferences and opinions of the individual justices sitting on the bench. There is little controversy among political scientists that justices seek to influence legal policy. Political scientists do differ on their theories of how justices behave in order to achieve their policy objectives. The attitudinal model suggests that justices vote their sincere preferences.[231] According to rational choice models, judges are constrained by both internal and external factors. Internally, they need to accommodate and bargain in order to gain support from the other justices. Externally, they need to consider interaction between different branches, like the court as a single actor would.

Applying these notions to comparative constitutional analysis, we may posit the following hypotheses: attitudinalists would predict that judges use a comparative constitutional law argument whenever it supports their position.[232] Under a rational choice model, however, a judge would not use comparative arguments so readily, but would first consider how these arguments might be perceived by the other institutions as well as by other judges. We know that three of the justices on the U.S. Supreme Court, namely Rehnquist,[233] Scalia,[234] and Thomas,[235] have openly declared that they do not consider comparative analysis appropriate in legal analysis . Given these declarations, if the remaining Supreme Court justices desire to have an impact on their peer justices' votes,, they should probably avoid the use of comparative arguments. A possible test of this hypothesis would involve analyzing individual opinions in order to find

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regarding the death row phenomenon, suggests that Justice Breyer's willingness to look to outside jurisprudence renders his opinions more influential in foreign and supranational jurisdictions.") (footnotes omitted); L'Heureux-Dube, *supra* note 40, at 30, 37–38 (arguing that the opinions of the Rehnquist court, which does not often cite foreign precedents, are less often cited by foreign courts).

[231] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

[232] In fact, almost all of the Justices on the U.S. Supreme Court have used comparative constitutional law arguments. *See* Fontana, *supra* note 33, at 545–48 for the overview.

[233] *Atkins*, 536 U.S. at 2252–54 (Rehnquist, CJ., dissenting).

[234] *Id.* at 2264 (Scalia, J., dissenting).

[235] *Patterson*, 536 U.S. 984 (2002).

patterns of agreement or disagreement where comparative arguments are used in comparison to opinions not using foreign materials.[236]

### *D. A Role for Law in Comparative Constitutional Reasoning*

The individual and institutional approaches described above seem to neglect the position of law in judicial decision-making. Should we not expect to find comparative arguments in those cases when reference to foreign opinions makes the legal argument better? At the very least, the foreign experience might offer pedagogical guidance in finding good legal arguments or help the court to fill a vacuum that exists. Would we not expect a court to use comparative reasoning at least in the early years of its jurisprudence? After enough time has passed and domestic precedents suffice, the recourse to foreign judgments would become unnecessary.[237] Smithey, using case law from the Canadian Supreme Court and African Constitutional Court, finds evidence that judges rely on precedent because of its utility in cutting information costs and decreasing uncertainty.[238] Using foreign decisions might thus offer self-assurance for courts that they have employed a sound method of legal analysis.[239] However, self-assurance could be achieved after consulting foreign experience, and it would thus be unnecessary to engage in time-consuming discussions in the opinion, thereby saving the court from the possibility of embarrassing itself and the public by misunderstanding an area of foreign law.

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[236] Of course, this analysis cannot explain why Scalia, Rehnquist, and Thomas reject comparative arguments.

[237] McCrudden, *supra* note 27, at 523–24.

[238] Smithey, *supra* note 27; *See also* Koopmans, *supra* note 25, at 545 (stating that the use of comparative experience is "occasioned by the lawyer's search for fresh perspectives, in particular when completely new legal problems are to be solved"); Glenn, *supra* note 90, at 280 ("The idea gains currency that the extent of borrowing of foreign authority is a simple function of the adequacy of local sources, and that local sources *can* be adequate if enough law is produced suitable to local conditions"); Yash Ghai, *Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights*, 60 MOD. L. REV. 459, 479 (1997) ("The courts are willing to consider cases from foreign jurisdictions, although as some areas get explored, there is less need for them."); Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205, 281 (1998) ("As the Court gains experience and precedents take root, the Court's need to canvass international and foreign comparative jurisprudence for insights and guidance may diminish.").

[239] McCrudden, *supra* note 27, at 518.

We would still expect a court to use comparative constitutional arguments for legal purposes, if they help to improve a legal argument.[240] There are several factors that make comparative reasoning a good argument in one court, but not another. For example, different societies might disagree on what appropriate legal decision-making entails. Whenever consensus exists that the constitution should be interpreted according to original intent behind a constitutional provision, references to foreign precedent are less likely to occur than when judges assert that the constitution should be interpreted in light of the evolving societal standards.[241]

The foregoing analysis shows that for some courts comparative arguments are more compelling than for others. The courts in a federalist system or the courts bound by international law should use comparative arguments more readily than courts in a more independent system. Also, courts in similar societies and legal systems should be better able to use empirical arguments based on comparative analysis.

However, the legal model cannot account for the "soft" use of precedent. Citing and discussing foreign decisions does not add to a holding's legal significance as a matter of precedent. There are necessarily other strategic factors which a court keeps in mind when citing foreign authorities. Maximizing an argument's persuasive power is argely determined by legal strategy, and not by some abstract rules of what counts as a good legal argument.

## VII. CONCLUSION

The analysis has shown that the use of comparative constitutional law by courts is rather limited. Discussing foreign judgments may provide inspiration for judges, but citing them in the opinion does not make the argument itself

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[240] Of course, no consensus as to what constitutes a perfectly legitimate argument exists. However, there are some lines of analysis that are universally accepted as being sources of legal argument, such as text, intention of the framers, precedent, and purpose of the statute. For a comparative overview, see D. Neil MacCormick & Robert S. Summers, *Interpretation and Justification*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY 511–44 (D. Neil MacCormick & Robert S. Summers eds., 1991). This article cannot answer the empirical question whether the courts actually do follow legal arguments, a claim contested by political scientists. *See e.g.*, JEFFREY SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 279–311 (2002); HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO THE PRECEDENT ON THE U.S. SUPREME COURT (1999) (arguing that the individual justices do not follow precedent). *But see* Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465 (2001) (arguing that the behavioralists oversimplify the "legal model").

[241] McCrudden, *supra* note 27, at 524–25.

stronger in terms of precedential authority. Interpreting broad constitutional principles or balancing constitutional values needs to take into account the particular cultural and social setting of the court more than the hard-to-establish "international consensus." Learning from the experience abroad may help to conceptualize legal approaches, but foreign experience will not provide information about a decision's potential domestic impact.

However, analysis of comparative constitutional reasoning has shown its potential utility. Empirically analyzing predictive theories on the use of comparative reasoning by different courts may help shed light on judicial decision-making itself. Do the younger constitutional courts indeed discuss foreign decisions more than their more experienced counterparts? If yes, why do they do so? Is it because these courts want to deceive their public that they are interpreting law even though they have in fact entered the realm of politics — whatever the difference between these two disciplines may be? Or do courts refer to foreign experience because they genuinely want to reach the best legal conclusion? Support for the latter hypothesis would certainly be an important finding for those who believe that judges are generally not over-ambitious policy-makers, but sincerely aiming to reach the best legal decisions.

# II

Wolfgang Drechsler and Taavi Annus,
"Die Verfassungsentwicklung in Estland von 1992 bis 2001."
*Jahrbuch des öffentlichen Rechts der Gegenwart, NF*, vol. 50 (2002),
Tübingen: Mohr Siebeck, pp. 473–492.

# DIE VERFASSUNGSENTWICKLUNG IN ESTLAND VON 1992 BIS 2001

von

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## I. Einleitung

Die Verfassung der Republik Estland, die vor nunmehr einer Dekade — bald nach Untergang der Sowjetunion — durch Referendum vom 28. Juni 1992 angenommen wurde,[1] hat mittlerweile eine fast ebenso lange Zeit der Anwendung absolviert. An die Verfassung waren mit Recht hohe Erwartungen geknüpft worden, u.a. war sie als „sehr modernes, in vielen Punkten äußerst innovatives Dokument" bezeichnet worden, welches für die vergleichende Verfassungsjurisprudenz interessant bleiben dürfte.[2] Die einzelnen Bestimmungen der Verfassung sind bereits mehrfach beschrieben und analysiert worden, weswegen im vorliegenden Aufsatz vor allem die Entwicklung der Anwendung dargestellt und damit auch diskutiert werden soll, ob auch die estnische Verfassungsjurisprudenz diesen hohen Erwartungen gerecht geworden ist.[3] Vor allem werden wir die Rechtsprechung des Staatsgerichtshofs, des

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[1] Eine deutsche Übersetzung von *H.-J. Uibopuu* findet sich in Brunner (Hrsg.), VSO, Estland, 1.1.a; wiederabgedruckt in *C. Thiele*, Selbstbestimmungsrecht und Minderheitenschutz in Estland, 1999, S. 190ff. Auf Englisch siehe *State Chancellery of the Republic of Estonia and the Estonian Translation and Legislative Support Centre* (Hg.), Eesti Vabariigi põhiseadus / The Constitution of the Republic of Estonia, 1996. Einführend siehe *R. Steinberg*, Die neuen Verfassungen der baltischen Staaten, in: JöR 43 (1995), S. 55ff.; *S. Kofmel*, Rechtsentwicklung in Baltikum: die neue Verfassung der Republik Estland vom 28. Juni 1992, ZaöRV, 53. Jg. (1993) Nr. 1, S. 135ff.; *M.H. Wiegandt*, Grundzüge der estnischen Verfassung von 1992, in: JöR 45 (1997), S. 151ff., die wohl beste Veröffentlichung zu diesem Thema.

[2] *M.H. Wiegandt* (Fn. 1), S. 174.

[3] Für eine allgemeinen Beschreibung des estnischen Staatsrechts siehe *R. Narits* / *K. Merusk*, Estonia, in: International Encyclopaedia of Laws. Constitutional Law, 1999; auf Estnisch *T. Annus*, Riigiõigus [Verfassungsrecht], 2001. Über die estnische

estnischen obersten Gerichts, und besonders seiner Verfassungskammer[4] behandeln (obwohl Estland kein selbständiges Verfassungsgericht hat, wurden dem Staatsgerichtshof die Funktionen des Verfassungsgerichts zugeordnet[5]), unter Einbeziehung zumal der deutschen Literatur.[6] Hierbei liegt der Schwerpunkt auf der Darstellung des notwendigen Diskussions- und auch Handlungsbedarfs. Bei solch einem Verfahren ergibt sich naturgemäß eine gewisse Konzentration auf Schwächen und Fehlstellen der Verfassungsentwicklung, was nicht davon abhalten sollte, diese, zumal im Vergleich mit Ländern ähnlichen Hintergrunds, als insgesamt erfolgreich zu bezeichnen.

## II. Staatskontinuität oder Staatsgründung?

Die estnische Verfassung wurde laut Präambel „aufgrund § 1 der 1938 in Kraft getretenen Verfassung“[7] durch Referendum angenommen. Anders als Lettland

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Verfassungsentwicklung wird regelmäßig in der East European Constitutional Review von *V. Pettai* berichtet.

[4] Der Begriff Staatsgerichtshof (oder Staatsgericht) entspricht am besten dem estnischen Begriff *Riigikohus,* weniger passend ist „Oberstes Gericht“ oder „Nationalgericht“; vgl. *M.H. Wiegandt* (Fn. 1*)*, S. 167.

[5] Der Staatsgerichtshof hat vier Kammern, von denen eine oder das Plenum zu Verfassungsfragen entscheiden. Zum System des estnischen Verfassungsprozesses *R. Maruste / H. Schneider*, Constitutional Review in Estonia — its Principal Scheme, Practice and Evaluation, in: *R. Müllerson / M. Fitzmaurice / M. Andenas* (Eds.), Constitutional Reform and International Law in Central and Eastern Europe, 1998, S. 91ff.; *P. Roosma*, Constitutional Review under the 1992 Constitution, Juridica International 3 (1998), S. 35ff.; *T. Marauhn*, Supreme Court or Separate Constitutional Court: The Case of Estonia, European Public Law 5 (1999), S. 301ff.

[6] In Estland erscheint nur eine einzige juristische Zeitschrift, „Juridica“, herausgegeben von der Juristischen Fakultät der Universität Tartu [ehem. Dorpat]. Die Artikel sind mit englischsprachigen Kurzzusammenfassungen versehen. Jährlich wird eine englischsprachige Ausgabe, „Juridica International“, veröffentlicht, die für den ausländischen Leser wohl die beste Quelle für Diskussionen zum estnischen Rechtssystem ist. Rechtswissenschaftliche Abhandlungen auf Englisch oder Deutsch kann man auch in der geistes- und sozialwissenschaftlichen Zeitschrift „Trames“ finden. Estnische wissenschaftliche Monographien gibt es kaum; selbständige Veröffentlichungen sind überwiegend entweder (Kurz-) Lehrbücher oder Übersetzungen ausländischer, nicht Estland-bezogener Texte (siehe aber unten Fn. 87). Für der Herbst 2002 ist das Erscheinen eines vom Justizministerium in Auftrag und von E.-J. Truuväli herausgegebenen Verfassungskommentars geplant.

[7] Im Folgenden verwenden wir die Übersetzung von Uibopuu. Sie ist jedoch nicht ganz fehlerfrei; so bestimmt § 64 Abs. 2 Nr. 4 der Verfassung, daß das Mandat eines Parlamentsmitgliedes vorzeitig erlischt, wenn, so Uibopuu, „die Staatsversammlung entschieden hat, daß er ständig unfähig ist, seine Aufgaben zu erfüllen.“ Statt

hat Estland sich nie für eine Fortgeltung der Verfassung von 1938 entschieden, jedoch hat die These der Staatskontinuität für die heutige Republik Estlands konstitutiven Charakter. Die Staatskontinuität ist daher ein Tabuthema des öffentlichen Diskurses.[8]

Die praktische Ausführung der Staatskontinuität ist jedoch in den vergangenen zehn Jahren nicht konsequent gehandhabt und nur in einigen Fällen bedeutsam geworden. Die bei weitem folgenreichste der darauf beruhenden politischen Entscheidungen ist die Wiederanwendung des Staatsangehörigkeitsgesetzes von 1938[9] mit der Folge, daß Menschen, die in Zeiten der Sowjetunion nach Estland übersiedelten, die Staatsbürgerschaft nur durch einen Einbürgerungsprozeß erlangen konnten und können.[10] Ein anderer in diesem Zusammenhang relevanter Bereich ist der des Eigentums der Republik Estland.[11] Auch der Staatsgerichtshof[12] hat in völkerrechtlichen Disputen die Kontinuitätsthese vertreten.[13]

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Staatsversammlung (d.h. Parlament, *Riigikogu*) muß es jedoch Staatsgerichtshof (*Riigikohus*) heißen.

[8] Zur Staatskontinuitätsfrage siehe *W. Drechsler*, The Estonian State at the Threshold of the 21st Century, in: Eesti maailmas 21. sajandi künnisel, Conference in Honor of the President of the Republic of Estonia, Lennart Meri, on Occasion of his 70th Birthday, Aula Lectures, University of Tartu, 1999, S.27ff.; *L. Mälksoo*, Professor Uluots, the Estonian Government in Exile and the Continuity of the Republic of Estonia in International Law, Nordic Journal of International Law 69 (2000), S. 289ff.; *R Müllerson*, The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia, International and Comparative Law Quarterly 42 (1993), S. 473ff.; *T. Kerikmäe / H. Vallikivi*, State Continuity in the Light of Estonian Treaties Concluded before World War II, Juridica International 5 (2000), S. 30ff.; *M.H Wiegandt* (Fn. 1), S. 153.

[9] Übersetzung in *W. Meder*, Das Staatsangehörigkeitsrecht der UdSSR und der baltischen Staaten, 1950, S. 89ff.

[10] *C. Thiele* (Fn. 1), S. 63ff. Dadurch bleiben nach zehn Jahren Unabhängigkeit noch fast 300 000 Einwohner ohne estnische Staatsangehörigkeit; mehr als 100 000 haben diese bekommen; etwa 100 000 weitere Einwohner haben sich für die russische Staatsangehörigkeit entschieden. Die genaue Zahl der russischen Staatsangehörigen in Estland ist unbekannt.

[11] Z.B. die Gebäude der diplomatischen Vertretungen im Ausland (darunter diejenige im Berliner Tiergarten) oder die nach dem Zweiten Weltkrieg in England befindlichen und jetzt zurückgegebenen Goldreserven. Jedoch werden alte Schulden nicht konsequent zurückgezahlt, siehe Paper Chase, The Economist, 18. Nov. 2000, S. 88.

[12] Englische Übersetzungen der Entscheidungen der Verfassungskammer des Staatsgerichtshofs werden im Internet unter *www.nc.ee/english/const/decisions.htm* (Stand Jul. 2001) veröffentlicht. Die Entscheidungen der Zivil-, Straf- und Verwaltungskammer werden nicht übersetzt. Sie werden hier nach dem Veröffentlichungsort im estnischen amtlichen Anzeiger *Riigi Teataja* (RT) zitiert.

[13] Entscheidung vom 21. Dez. 1994. Der Staatsgerichtshof entschied, daß die Okkupation Estlands nach dem Zweiten Weltkrieg völkerrechtswidrig war, und daß

In den meisten dem Gericht vorgelegten Fällen wurde die Kontinuität und eine vollständige *restitutio ad integrum* aber abgelehnt, was sicher auch die einzig praktikable Möglichkeit ist. Während der allgemeinen Eigentumsreform wurde ehemaligen Eigentümern nur ein subjektives Recht auf Rückerstattung und kein Recht auf Vindikation zugesprochen.[14] Bis zur Übertragung des Eigentums bleibt der estnische Staat selbst Eigentümer.[15]

Die Frage der estnisch-russischen Grenze bleibt weiterhin ungelöst. Einen Vertrag zwischen Estland und der Russischen Föderation gibt es bisher nicht. Der Friedensvertrag von Dorpat vom 2. Februar 1920[16], der laut § 122 Abs. 1 der estnischen Verfassung[17] die Grenzen festschreibt, bleibt ohne praktische Bedeutung, da Rußland ihn als mittlerweile ungültig betrachtet. Das Prinzip, das die Russische Föderation benutzt, ist klar — *ex factis ius oritur*. Dies stellt den Gegenpol des von estnischen Politikern benutzten *ex iniuria ius non oritur* dar.[18] Verhandlungen über einen neuen Grenzvertrag brachten, selbst nach zehn Jahren Unabhängigkeit, immer noch keine Ergebnisse.[19]

Vielleicht das größte Problem in diesem Zusammenhang ist aber die Tatsache, daß die Diskussion in Estland sich vor allem auf den Beweis der Kontinuität an sich konzentriert. Die praktischen Folgen und notwendigen Maßnahmen für den heutigen Staat, sowohl innerstaatlich als auch in völkerrechtlicher Hinsicht, sind bisher ungeklärt. Das ausschließliche Rekurrieren auf die Kontinuitätsthese, die als Grundlage der politischen und nationalen Identität

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damit die Streitkräfte der Sowjetunion nie Eigentümer estnischen Bodens und estnischer Gebäude geworden sind. Damit wurde ein Gesetz für verfassungskonform erklärt, das alle Verkaufsverträge mit sowjetischen Streitkräften über Boden und Gebäude für nichtig erklärte. Zur Staaskontinuitätsdiskussion siehe allgemein *C. Marek*, Identity and Continuity in Public International Law, Genf 1968.

[14] Als Estland der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten, die eine Eigentumsschutzklausel beinhaltet, beitrat, geschah dies unter Vorbehalt bezüglich der Eigentumsreform, da derartige subjektive Rechte auch gegen jetzige gutgläubige Besitzer durchgesetzt werden können. Eine verfassungsrechtliche Diskussion wurde jedoch nicht ausgelöst, obwohl § 32 der Verfassung eine ebensolche Eigentumsgarantie festsetzt. Die Besitzer versuchten vielmehr, politische Mittel zum Schutz ihrer Rechte einzusetzen, was aber ohne Erfolg blieb. Auf der Verfassung basierende Klagen gegen die Restitution wurden erst nach mehreren Jahren erhoben, als die Gerichtsschutzfristen bereits weitgehend abgelaufen waren.

[15] Z.B die Entscheidung der Verwaltungskammer vom 8. Dez. 1995 (RT III 1996, 5, 72).

[16] RT 24/25 (1920); League of Nations Treaty Series 11 (1932), S. 30ff.

[17] Im Folgenden beziehen sich alle Paragraphenangaben ohne weitere Kennzeichnung auf die Verfassung der Republik Estland.

[18] *R. Müllerson* (Fn. 8), S. 487.

[19] Es kann wohl gesagt werden, daß dies an rein strategischen Erwägungen der Russischen Föderation liegt.

des Staates gesehen wird, läßt jedenfalls außer Acht, daß faktisch jetzt durchaus ein anderer Staat besteht als vor dem Zweiten Weltkrieg.[20]

## III. Hauptprinzipien der Verfassung

Die Hauptprinzipien der estnischen Republik entsprechen weitgehend den in Europa gemeinhin akzeptierten Werten. Laut Kommissionsbericht der Europäischen Union (EU) erfüllt Estland die von ihr gesetzten politischen Kriterien für Beitrittskandidaten, da es die Merkmale eines demokratischen Staates aufweist und stabile Institutionen besitzt, die Rechtsstaatlichkeit und den Schutz der Menschenrechte gewährleisten.[21] Jedoch ergeben sich durch die stark nationalstaatliche Tendenz der Verfassung und ihrer Interpretation immer wieder Spannungen.

### *1. Demokratie*

Das Demokratieprinzip ist in der estnischen Verfassung von erheblicher Bedeutung. Die Entwicklung hat gezeigt, daß die demokratischen Institutionen gut funktionieren und daß keine grundsätzlichen Probleme aufgetreten sind. Es gibt jedoch einige Bereiche, in denen die Entwicklung besser verlaufen könnte.

#### *a) Minderheitenschutz*

Der Minderheitenschutz ist der außerhalb Estlands wohl meistdiskutierte Aspekt des estnischen Rechtssystems. Schon vor Annahme der Verfassung wurde besondere Vorsicht empfohlen, um die Prinzipien des Minderheitenschutzes, des Pluralismus und der Toleranz nicht zu vernachlässigen.[22] Seit Inkrafttreten der Verfassung wurde immer wieder geprüft, ob die estnischen Gesetze[23] dem Völkerrecht und der Verfassung entsprechen. Immer wieder wurde dabei festgestellt, daß höherrangige Normen nicht[24] oder nicht eindeutig verletzt werden;[25] allenfalls wird auf einige völkerrechtliche Probleme hingewiesen.[26]

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[20] Siehe das ausführliche Argument hierzu in *W. Drechsler* (Fn. 8), S.27ff.

[21] *European Commission*, 2000 Regular Report from the Commission on Estonia's Progress towards Accession, 8. Nov. 2000, S. 20.

[22] *P. Häberle*, Dokumentation von Verfassungsentwürfen und Verfassungen ehemals sozialistischer Staaten in (Süd)Osteuropa und Asien, in: JöR 43 (1995), S. 105ff., S. 174, 179.

[23] Die wichtigsten estnischen Gesetze werden von einer Behörde, dem „Zentrum für Juristische Übersetzung" (Estonian Legal Translation Centre), übersetzt und sind auf Englisch im Internet unter *www.legaltext.ee* (Stand Jul. 2001) verfügbar. Sie finden sich auch in der von derselbe Behörde herausgegebenen Veröffentlichung „Estonian Legislation in Translation".

[24] Zuletzt eindeutig *C. Schmidt*, Die Rechtsstellung der Minderheiten in Estland, in: *G. Brunner / B. Meissner* (Hrsg.), Das Recht der nationalen Minderheiten in Osteuropa, 1999, S. 327ff. Ihr Fazit lautet: „Gegen völkerrechtliche Bestimmungen verstoßen Regelungen und Praxis sicherlich nicht", S. 349.

[25] *M.H. Wiegandt* (Fn. 1), S. 157ff.

Es wird weiter die — auch sonst gelegentlich angeführte — Meinung vertreten, daß die estnische Situation eine Notwendigkeit der Neuauslegung völkerrechtlicher Regelungen erfordere; so soll etwa der Minderheitenbegriff auch diejenigen Volksgruppen einbeziehen, deren Mitglieder keine Staatsbürgerschaft besitzen.[27]

Gleichzeitig wird immer wieder auf Probleme hinsichtlich des Minderheitenschutzes hingewiesen, die nicht rechtlichen, sondern politischen Charakter haben. Das allgemeine Fehlen eines pluralistischen Konzepts in den osteuropäischen Verfassungen wird vielfach betont.[28] Wiegandt beschreibt diese Situation zutreffend: „Insgesamt ergibt sich ein sehr nationalistischer Zug der Verfassung, der den nichtestnischen Einwohnern sublim zu verstehen gibt, daß sie im Prinzip unerwünscht sind. Dabei wird dieser Weg zwar auf dem Boden geltenden Völkerrechts beschritten. Dieses wird auf der anderen Seite aber auch so weit wie möglich für die nationalistischen Ziele ausgeschöpft."[29] Die Entwicklung der estnischen Praxis zeigt in dieselbe Richtung.[30]

Der bekannteste und auch bedeutendste Fall in diesem Bereich ist jedoch ein rechtlicher, und zwar die durch Gesetz eingeführte Beschränkung des passiven Wahlrechts.[31] In Parlaments- und Kommunalwahlen kann nur kandidieren, wer ausreichend Estnisch beherrscht; die Überprüfung der Sprachkompetenz unterliegt der Wahlkommission. Diese Gesetzesbestimmung wird auch angewandt. Da die Verfassung (§ 60 i.V.m. § 12) und völkerrechtliche Verträge wie der Internationale Pakt über bürgerliche und politische Rechte (Art. 25 i.V.m. Art. 2 Abs. 1) und die Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten (EMRK, Art. 3 1. Zusatzprotokoll) Freiheit der Wahl und

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[26] *C. Thiele* (Fn. 1), 1999, S.179f. für die Zusammenfassung der Probleme; generell zum Thema *T. Annus*, German Authors on Estonian Minority Rights, Trames 3 (1999), S. 223ff., mit der Besprechung von *G. Brunner / B. Meissner* (Fn. 24) und *C. Thiele* (Fn. 1).

[27] *C. Thiele* (Fn. 1), S. 182; viel vorsichtiger *R. Visek*, Creating the Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia, Harvard International Law Journal 38 (1997), S. 315ff., S. 356f.

[28] *P. Häberle*, Verfassungsentwicklungen in Osteuropa — aus der Sicht der Rechtsphilosophie und der Verfassungslehre, in: AöR 117 (1992), S. 169ff., S. 184.

[29] *M.H. Wiegandt* (Fn. 1), S. 159.

[30] Vgl. „Multiculturalism as such and in Estonia", Podiumsdiskussion mit *J.M. Berry*, *M.H. Bond* und *M. Heidmets*, geleitet und herausgegeben von *W. Drechsler*, Trames 2 (1998), S. 274ff.

[31] Ebenfalls von Interesse ist in diesem Zusammenhang die Möglichkeit der Beschränkung des passiven Wahlrechts der ehemaligen Mitarbeiter der Sicherheitsorgane. Da das Einführungsgesetz zur Verfassung eine solche Beschränkung nur bis zum 31. Dez. 2000 vorgesehen hat, wird z.Zt. diskutiert, ob einfachgesetzlich eine Verlängerung möglich wäre. Am 21. Feb. 2001 fand eine erste Anhörung dazu statt; seitdem hat es jedoch keine weiteren Entwicklungen gegeben.

Diskriminierungsverbot auch hinsichtlich der Sprache garantieren, wird geltend gemacht, daß das Sprachgebot verfassungswidrig sei.[32]

Die Entscheidung der Verfassungskammer des Staatsgerichtshofs zu dieser Frage[33] fiel jedoch so aus, daß die Sprachanforderungen zwar das passive Wahlrecht beschränken und daher einen Eingriff in dieses Grundrecht darstellen, daß aber dieser Eingriff in einem demokratischen Staat notwendig sei. Die Präambel der Verfassung konstituiere nämlich „die Erhaltung des estnischen Volkes und der estnischen Kultur durch alle Zeiten" als Verfassungsziel, für deren Schutz die Sprachanforderungen eine sowohl notwendige als auch verhältnismäßige Maßnahme seien.[34] Zusätzlich wurde darauf hingewiesen, daß Demokratie „funktionieren" müsse und daß Parlamentsmitglieder ohne Sprachkenntnisse nicht an der Parlamentsarbeit ausreichend teilnehmen und daher keine vernünftigen Entscheidungen treffen könnten. Die Sprachanforderungen wurden damit für verfassungskonform erklärt. Eine Klage beim Europäische Gerichtshof für Menschenrechte (EGMR) wurde bisher nicht eingereicht.[35]

Nicht von Bedeutung ist bisher § 52 Abs. 2, der die Möglichkeit einer anderen Sprache als Estnisch für den inneren Geschäftsverkehr von Kommunen mit mehrheitlich anderssprachigen Einwohnern schafft,[36] da gemäß Sprachgesetz hierfür eine Genehmigung der Regierung notwendig ist.[37] Bisher hat die Regierung alle derartigen Anträge der Kommunen abgelehnt, von denen aber in Nordostestland viele fast rein russischsprachig sind. Diese und andere von der nationalstaatlichen Tendenz der Verfassung geleiteten Maßnahmen[38] haben auch der Europäischen Kommission Anlaß gegeben, den Integrationsprozeß in Estland zu kritisieren.[39]

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[32] *C. Thiele* (Fn. 1), S. 144: „Sprachanforderungen als Voraussetzung für ein passives Wahlrecht widersprechen sowohl der estnischen Verfassung als auch völkerrechtlich bindenden Verträgen".

[33] Entscheidung der Verfassungskammer von 4. Nov. 1998 (RT I 1998, 98/99, 1618).

[34] Dies entspricht auch der generellen Perspektive in Estland, zumal der der politisch-intellektuellen Elite, die einen engen Zusammenhang von Sprache und Identität vermutet und daher zahlreiche diesbezügliche Regelungen in vielen Bereichen aufstellt und auch implementiert.

[35] Jedoch wurde ein ähnlicher Fall gegen Lettland vom EGMR angenommen, s. Podkolzina contre la Lettonie, Décision sur la recevabilité de la requête nº 46726/99, 8. Feb. 2001.

[36] „In Ortschaften, in denen Estnisch nicht die Sprache der Mehrheit der Einwohner ist, können die Kommunen im gesetzlich festgelegten Umfang und Verfahren die Sprache der Mehrheit der ständigen Einwohner dieser Ortschaft als interne Geschäftssprache verwenden." Sehr ähnlich lautete schon § 22 der Verfassung von 1920.

[37] § 11 des Sprachgesetzes, „Estonian Legislation in Translation" 2000, Nr. 4; abgedruckt in *C. Thiele* (Fn. 1), S. 241ff.

[38] Übersichtlich vor allem *C. Thiele* (Fn. 1), *passim*.

[39] *European Commission* (Fn. 21), S. 20ff.

*b) Kommunale Selbstverwaltung*

Die kommunale Selbstverwaltung in Estland hat eine lange Tradition und ist im XIV. Kapitel der Verfassung verankert. Estland ist 1994 der Europäischen Charta der Kommunalen Selbstverwaltung des Europarates beigetreten. Zur Zeit gibt es in Estland 247 Gemeinden und Städte, die die einzige Selbstverwaltungsstufe darstellen.[40] Die der kommunalen Selbstverwaltung zugrundeliegende Idee, den Bürgern die Möglichkeit zu geben, selbst für ihre kommunalen Angelegenheiten verantwortlich zu sein, ist in Estland aber in vielen Punkten gefährdet.

Zunächst betrifft dies die Frage der kommunalen Kompetenzen. Die Verfassung garantiert den Kommunen Selbstverantwortlichkeit in „Fragen des örtlichen Lebens" (§ 154 Abs. 1); eine Konkretisierung oder gar Definition dieser Bestimmung haben die Gerichte aber bisher nicht vorgenommen. In denjenigen Fällen, in denen der Staatsgerichtshof hier urteilen mußte, ging es für ihn jeweils um offensichtlich staatliche Fragen.[41] Der Staatsgerichtshof hat nie eindeutig festgestellt, daß der Gesetzgeber örtliche Angelegenheiten nicht durch Gesetze regeln und in den Kompetenzbereich der Gemeinden und Städte nicht eingreifen darf. Es wurde lediglich festgestellt, daß die Kommunen keiner gesetzlichen Ermächtigung fürs eigene Handeln bedürfen, wenn es um örtliche Angelegenheiten geht.[42] Auf der anderen Seite dürfen die Gemeinden und Städte ohne gesetzliche Ermächtigung nicht in die Grundrechte eingreifen.[43]

Stärker noch würde die kommunale Selbstverwaltung durch die seit einigen Jahren geplante und nach einem Regierungserlaß vom Juni 2001 nunmehr wohl anstehende Verwaltungsreform eingeschränkt, wenn diese auch in jüngster Zeit innerhalb der Regierungskoalition parteipolitisch umstritten ist. Obwohl die meisten Kommunen der Reform, gemäß der von den 247 Einheiten nur etwa 80 übrigbleiben würden, nicht zustimmen,[44] wird der Plan von den Zentralbe-

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[40] Bis 1993 hatte Estland auch eine zweite Ebene der Selbstverwaltung, die aber aufgelöst wurde. In der Verfassung wurde die Frage nach den Ebenen der Selbstverwaltung absichtlich offengelassen. Zur Übersicht über das estnische Selbstverwaltungssystem s. *T. Kungla*, Die estnischen Kommunen und ihre Finanzen, in: *W. Drechsler* (Hrsg.), Die selbstverwaltete Gemeinde: Beiträge zu ihrer Vergangenheit, Gegenwart und Zukunft in Estland, Deutschland und Europa, 1999, S. 111ff.

[41] Etwa in der Entscheidung vom 6. Sept. 1993 (RT I 1993, 61, 890, Referendum für eine Autonomie für einige nordöstliche Gemeinden) oder vom 9. Feb. 2000 (RT III 2000, 5, 45, Verkehrsregulierung an der Grenze).

[42] Entscheidung vom 22. Dez. 1998 (RT I 1998, 113/114, 1887; Einführung einer Gebühr zur Einfahrt in die Altstadt der Stadt Tallinn).

[43] Entscheidung vom 6. Okt. 1997 (RT I 1997, 74, 1268, kommunale Sperrstunde für Minderjährige).

[44] *A. Ammas*, Alla 8000 elanikuga vallad kaovad [Gemeinden mit weniger als 8 000 Einwohnern verschwinden], Eesti Päevaleht, 29. Dez. 2000; siehe Regierungserlaß vom 25. Jun. 2001 (RTL 2001, 80, 1102).

hörden vehement verfolgt. Dabei wird der wirtschaftliche Nutzen nur postuliert, aber nicht einmal überschlagsmäßig kalkuliert (er wäre bestenfalls gering, wahrscheinlich sogar negativ); die Bedeutung der Selbstverwaltung für die Demokratie wird nicht bedacht.[45] In der Diskussion dieser Fragen, soweit sie vorkommt, wird die Herabstufung der Gemeinden und Städte zu bloßen Verwaltungseinheiten und die Zuweisung einer Rolle fast außerhalb des Staates kaum einmal problematisiert.[46]

### *2. Rechtsstaat*

Obwohl die Verfassung Estland nicht ausdrücklich zum Rechtsstaat erklärt,[47] hat der Staatsgerichtshof den Rechtsstaatscharakter zu einem ihrer tragenden Prinzipien werden lassen. Die allgemein anerkannten rechtsstaatlichen Prinzipien wie Gesetzesvorrang und -vorbehalt,[48] Gewaltenteilung,[49] Rechts- und

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[45] Umfassend zur Gemeindegebietsreform *W. Drechsler*, Kommunale Selbstverwaltung und Gemeindegebietsreform: Deutsche Erfahrungen, prinzipielle Erwägungen, estnische Perspektiven, in: *ders.* (Hrsg.) (Fn. 40), S. 97ff.

[46] Die besondere Rolle der Kommunen zeigt sich auch darin, daß Parlamentsmitglieder an der Arbeit der Kommunalvertretungen teilnehmen können, obwohl sie laut Verfassung (§ 63 Abs. 1) „kein anderes Staatsamt ausüben" dürfen. Daß diese letztere Bestimmung alle Verwaltungspositionen umfaßt, wurde vom Staatsgerichtshof bestätigt, s. die Entscheidung der Verfassungskammer vom 2. Nov. 1994 (RT I 1994, 80, 1379). — Wir werden auch im Folgenden gelegentlich auf mangelnde gesellschaftliche Diskussion derartig zentraler Fragen stoßen. Wir müssen uns aber mit dem Hinweis selbst zufrieden geben, da „nationalpsychologische" Erwägungen nicht Sache dieses Aufsatzes sein können. Siehe aber *A. Annist*, Progress without Protest, Central European Review 2, No. 27, 10. Jul. 2000; historisch vgl. *W. Drechsler / R. Kattel*, Karl Bücher in Dorpat, Trames 1, S. 322ff., S. 346ff.

[47] Auch von *M.H Wiegandt* (Fn. 1), S. 160, bemerkt.

[48] Übersichtlich *K. Merusk*, The Right to Issue Regulations and its Constitutional Limits in Estonia, Juridica International 1 (1996), S. 38ff., und die Entscheidung der Verfassungskammer vom 20. Dez. 1996 (RT I 1997, 4, 28).

[49] Übersichtlich H. Schneider, The Principle of Separate and Balanced Powers in Estonian Constitutions, Juridica International 2 (1997), S. 35ff. Aus der Rechtsprechung z.B. die Entscheidung der Verfassungskammer vom 2. Nov. 1994 (RT I 1994, 80, 1379), wonach Parlamentsmitglieder nicht im Bereich der vollziehenden Gewalt tätig sein können, oder die vom 14. Apr. 1998 (RT I 1998, 36/37, 558), nach der alle Verfassungsorgane eine gewisse Organisationsautonomie haben müssen, auch gegenüber dem Gesetzgeber. Also hat das Gewaltenteilungsprinzip eine Bedeutung bekommen, die auch den „Kernbereich" der Funktionen der Verfassungsorgane schützt — a.A. *M.H Wiegandt* (Fn. 1), S. 168.

Vertrauensschutz[50] sind gut bekannt und haben auch einen mehr oder weniger klaren Inhalt bekommen.

Das Rechtsstaatsprinzip ist daher keine abstrakte Erscheinung mehr. Dennoch kommt es nicht selten vor, daß die rechtsstaatlichen Prinzipien allzu starr gesehen werden.[51] Das hängt schon mit dem unten (V.2.) behandelten Problem der Auslegung zusammen, denn wenn man sich ausschließlich auf den Gesetzestext konzentriert, was in Estland generell der Fall ist, wird der Rechtsstaat leicht zum unflexiblen Gesetzesstaat.

Eines der wichtigsten rechtsstaatlichen Probleme selbst hat mit der Rolle der Gerichte in Öffentlichkeit und Staatsleben zu tun. Der Rechtsweg ist nicht nur etwas Neues, sondern auch kompliziert und in vielen Fällen teuer. Noch fehlt ein effektives System für eine Prozeßkostenhilfe in Zivil- und Verwaltungsverfahren,[52] obwohl dies sogar ein menschenrechtliches Problem darstellen könnte.[53] Die Reputation der Gerichte ist ebenfalls nicht besonders hoch. Dazu tragen einige unpopuläre bzw. nicht nachvollziehbare Entscheidungen[54] sowie gelegentliche Bestechungsaffären in bei Gerichten liegenden Registern bei. Die Europäische Kommission hat — u.a. aufgrund von Berichten des Justizministeriums — wiederholt auf die Schwächen des Justizsystems hingewiesen.[55] Das Spannungsverhältnis zwischen der Notwendigkeit einerseits, dieses weiter zu reformieren, und der Wahrung der Unabhängigkeit der Gerichte andererseits bleibt für Estland ein Problem.

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[50] Entscheidung der Verfassungskammer vom 30. Sept. 1994 (RT I 1994, 66, 1159), wonach eine Steuerbefreiung, die den Landwirten für fünf Jahre gewährt wurde, nicht vorzeitig aufgehoben werden konnte.

[51] Siehe *W. Drechsler*, Avalik haldus kui riigiteadus [Verwaltungswissenschaft als Staatswissenschaft], in *ders.* (Hrsg.), Avaliku halduse alused [Grundlagen der Verwaltung(swissenschaft)], 1997, S. 11ff., S. 17.

[52] Im Strafprozeß wird ein Pflichtverteidiger vom Staat benannt. Alle bisherigen Versuche, ein allgemeines Rechtshilfesystem durch private, vom Staat berufene Anwälte oder durch Staatsbeamte zu garantieren, sind gescheitert.

[53] Airey vs Ireland, European Court of Human Rights Judgements and Decisions Series A (1979) 32 (Rechtshilfe in komplizierten Fällen nötig).

[54] Z.B. wurde eine Anwältin von der Anklage der Bestechung einer Richterin freigesprochen, obwohl ihre Handlungen auf Videoband aufgezeichnet worden waren. Paradoxerweise hat das Gericht gerade in dieser Entscheidung wichtige rechtsstaatliche Prinzipien verteidigt, da erklärt wurde, daß rechtswidrig erworbene Beweismittel nicht vor Gericht zulässig sind. Entscheidung der Strafkammer von 17. Juni 1997 (RT III 1997, 23, 244).

[55] Der „Progess Report“ von 2000 hat deutlich die Verbesserung des Justizsystems verlangt. Für eine kritische Meinung über das estnische Justizsystem allgemein siehe *J. v. Altenbockum*, Zwischen Anspruch und Wirklichkeit. Die Reform der Justiz in Estland, Frankfurter Allgemeine Zeitung, 27. Okt. 1998.

### *3. Sozialstaat*

Das Sozialstaatsprinzip hat noch keine eigenständige Bedeutung erlangt. Es bleibt abzuwarten, ob sich aus diesem Prinzip unmittelbar subjektive Rechte ergeben können. Mit der Ratifizierung verschiedener Artikel der Europäischen Sozialcharta hat Estland auch einige diesbezügliche Pflichten übernommen.[56] Subjektive Rechte im Sozialbereich hat man aufgrund der Verfassung nicht durchgesetzt.[57] Auch dies steht im Einklang mit der herrschenden politischen Meinung in Estland, der das Sozialstaatsprinzip dem Sozialismus wohl zu sehr zu ähneln scheint und daher suspekt ist.[58]

## IV. Grundrechtsschutz

Im Bereich des Grundrechtsschutzes führt die estnische Verfassung einen umfangreichen Katalog auf.

### *1. Die Rolle der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten*

Estland ist 1996 der EMRK beigetreten. Nur das 6. Zusatzprotokoll (Verbot der Todesstrafe) wurde erst 1998 nachträglich ratifiziert.[59] Der EGMR hat schon

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[56] Ob völkerrechtliche Verträge unmittelbar anwendbar sind und ob sich aus ihnen subjektive Rechte überhaupt ergeben können, ist in Estland wie überall strittig. Die herrschende Meinung und Rechtsprechung hat sich zugunsten der Unmittelbarkeit entschieden. Für die Anwendbarkeit der EMRK siehe die Entscheidung der Verwaltungskammer des Staatsgerichtshofs vom 6. Juni 1997 (RT III 1997, 21/22, 234), wonach der Schutz des Familienlebens das Recht verleihen kann, in Estland seinen Wohnsitz zu wählen. Aus der Literatur: *U. Lõhmus*, Välismaalased ja õigus perekonnaelu puutumatusele [Ausländer und das Recht auf Schutz des Familienlebens], Juridica 2000 Nr. 7, S. 415ff.

[57] In der Rechtsprechung der Zivilkammer wurde jedoch befunden, daß es Pflicht des Staates sein kann, einen Mietvertrag nicht vorzeitig zu beenden, wenn der Mieter objektiv nicht in der Lage ist, die Miete zu bezahlen. Es wurde auch auf § 28 hingewiesen, wonach kinderreiche Familien und Behinderte unter besonderer Fürsorge des Staates stehen; Entscheidung der Zivilkammer vom 18. Okt. 2000 (RT III 2000, 25, 278). Ein ähnlicher Fall wurde jedoch abweichend entschieden: ein Unternehmen wurde von einer solchen Pflicht freigesprochen, obwohl der Staat sämtlich Aktienanteile an ihm hielt; siehe Entscheidung der Zivilkammer vom 16. Nov. 2000 (RT III 2000, 28, 307). Insofern hat die „Flucht ins Privatrecht" in Estland wirklich stattgefunden.

[58] Vgl. *Annist* (Fn. 46).

[59] Zuvor hatte der Staatsgerichtshof abgelehnt, die Todesstrafe — die allerdings seit langer Zeit nicht mehr angewandt worden war — für verfassungswidrig zu erklären;

nach kurzer Zeit Einfluß auf die estnische Verfassungspraxis ausüben können. Daß der Staatsgerichtshof schon mehrfach bei seinen Entscheidungen die Straßburger Rechtsprechung herangezogen hat, deutet darauf hin, daß die Auslegung der Verfassung unter dem Einfluß der europäischen Rechtsprechung vollzogen werden wird.

Der erste vom EGMR entschiedene, Estland involvierende Fall betraf einen Strafgefangenen, dessen Korrespondenz ständig geöffnet und durchgelesen wurde. Nach Klage beim EGMR akzeptierte Estland, daß damit Rechte aus Art. 8 EMRK verletzt werden, und schloß ein „*friendly settlement*".[60] Schon während der Vorbereitung der Vereinbarung hat der Gesetzgeber die notwendigen entsprechenden Änderungen in das Haftgesetz[61] eingefügt.

Die Bestimmungen der EMRK im Bereich der Freiheit der Meinungsäußerung (geschützt von § 45) haben lebendige verfassungsrechtliche Diskussionen ausgelöst. Der Status von Presse und Journalisten gemäß der Verfassung war eines der Hauptthemen in einem Fall, in dem ein Journalist wegen Beleidigung verurteilt wurde. Da auch der Staatsgerichtshof die Verurteilung bestehen ließ,[62] wurde Klage beim EGMR eingereicht. Der Straßburger Gerichtshof befand zugunsten des Staates.[63]

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Entscheidung des Plenums des Staatsgerichtshofs vom 25. Sept. 1996 (RT III 1996, 28, 369) mit einem Sondervotum des damaligen Vorsitzenden Richters *R. Maruste*, der jetzt estnischer Richter am EGMR ist. Das Fehlen des Verbots der Todesstrafe in der Verfassung wurde von *M.H Wiegandt* (Fn. 1), S. 163 als „auffällig" bezeichnet. Siehe auch *N.J. Brennan*, European integration and human rights' cultures in Eastern Europe: the EU and abolition of capital punishment in Estonia, University of New Brunswick Law Journal, vol. 47 (1998), S. 49ff.

[60] Slavgorodski vs Estonia, Application no. 37043/97, Entscheidung des EGMR vom 12. Sept. 2000.

[61] Vangistusseadus (RT I 2000, 58, 376), unter *www.legaltext.ee* als „Imprisonment Act" übersetzt.

[62] Enscheidung der Strafkammer vom 26. Aug. 1997 (RT III 1997, 28, 285) und des Plenums des Staatsgerichtshofs vom 9. Apr. 1998 (RT III 1998, 19, 190), wieder mit einem Sondervotum von Richter *Maruste* (siehe Fn. 54).

[63] Tammer vs Estonia, Application no. 41205/98, Entscheidung vom 6. Feb. 2001 (Beleidigung innerhalb eines Zeitungsinterviews). Im Lichte der vorherigen Entscheidungen des EGMR bleibt jedoch anzumerken, daß diese Entscheidung nicht recht nachvollziehbar ist; vgl. etwa Oberschlick vs Austria (No. 2), European Court of Human Rights Reports of Judgments and Decisions, 1997-IV, 1276; Oberschlick vs Austria, European Court of Human Rights Judgments and Decisions Series A (1991) 204.

### *2. Grundrechtstheorie*

Den „allgemeinen Teil" des Grundrechtskatalogs hat der Staatsgerichtshof in seinen Entscheidungen zwar herangezogen, jedoch ist es noch zu früh, hier eine Verallgemeinerung der Rechtsprechung vornehmen zu können. Es gibt bisher lediglich Ansätze einer allgemein gültigen Grundrechtstheorie. Die Fragen der Drittwirkung und Verhältnismäßigkeit[64] sind nur in einigen Fällen näher untersucht worden. In früheren Entscheidungen hat der Staatsgerichtshof fast keine Grundrechtseingriffsprüfungen aufgrund des Verhältnismäßigkeitsprinzips durchgeführt.[65] Die Entwicklung geht aber eindeutig in diese Richtung, sehr ähnlich der deutschen Lösung. Es wird vom Staatsgerichtshof demgemäß untersucht, ob in den Schutzbereich des Grundrechts eingegriffen wurde und ob dieser Eingriff gerechtfertigt und auch verhältnismäßig war.[66]

Die Problematik der Drittwirkung wird in der Rechtsprechung fast gar nicht behandelt.[67] Es bleibt abzuwarten, ob § 14, der der gesetzgebenden, vollziehenden und auch rechtsprechenden Gewalt die Pflicht zuordnet, Rechte und

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[64] *M.H. Wiegandt* (Fn. 1), S. 162, hat angedeutet, daß das Verhältnismäßigkeitsprinzip nicht ausdrücklich in der Verfassung normiert ist und es die Aufgabe der Rechtsprechung sei, entsprechende Kriterien zu entwickeln.

[65] Der Staatsgerichtshof hat etwa befunden, daß die Versetzung eines Polizeibeamten aufgrund dienstlicher Notwendigkeit ohne Zustimmung des Beamten verfassungswidrig sei, da gem. § 34 keine Schranke der Freiheit der Wohnsitzwahl existiert. Ob eine verfassungsimmanente Schranke gegeben ist, oder ob gar ein solcher Eingriff im demokratischen Staat notwendig oder verhältnismäßig ist, wurde nicht untersucht. Entscheidung der Verfassungskammer vom 25. Nov. 1998 (RT I 1998, 104, 1742). Bei der oben behandelten Entscheidung zu den Sprachgesetzen (Fn. 33) handelt es sich ebenfalls um keine Verhältnismäßigkeitsüberprüfung, da diese nur postuliert, aber nicht untersucht wurde.

[66] Dies wird auch aus § 11 abgeleitet, der für Beschränkungen eine „Notwendigkeit im demokratischen Staat" verlangt. Die beste Entscheidung gemäß dieses Instituts betraf die Aufhebung der Alkoholverkaufserlaubnis. Laut Gesetz mußte diese Erlaubnis aufgehoben werden, wenn der Unternehmer Alkohol an Minderjährige verkaufte, auch wenn es nur einmal und in geringer Menge geschah. Der Staatsgerichtshof befand, daß hierdurch ein Eingriff in die Freiheit der unternehmerischen Tätigkeit (§ 31) vorlag. Es sei unverhältnismäßig, in solch einem Falle ohne jegliche Abwägung die Erlaubnis aufzuheben. Entscheidung der Verfassungskammer vom 28. Apr. 2000 (RT III 2000, 12, 125).

[67] Die Verfassung bietet jedoch eine interessante Möglichkeit zur Frage der Drittwirkung: gem. § 25 hat jeder das Recht, vom jeweiligen Verursacher für jeglichen Schaden kompensiert zu werden. Dadurch erlangt wenigstens § 25 unmittelbare Drittwirkung, wie auch in der Rechtsprechung bestätigt wurde, z.B. Entscheidungen der Zivilkammer vom 12. Dez. 1996 (RT III 1997, 2, 11) und vom 26. Feb. 1998 (RT III 1998, 9, 96).

Freiheiten zu gewährleisten, einen eigenständigen Inhalt gewinnen kann. Wie die Zivilgerichte diese Bestimmung auslegen würden, ist noch völlig offen.[68]

### *3. Einzelne Grundrechte*

Hinsichtlich der einzelnen Grundrechte existiert bereits höchstrichterliche Rechtsprechung in erheblichem Umfang.[69] Familie,[70] Privatleben, Wohnung und Korrespondenz,[71] Eigentum,[72] Vereinigungsfreiheit[73] und Berufs- und Unternehmensfreiheit[74] des Einzelnen hat der Staatsgerichtshof erfolgreich geschützt. Dies ist als sicherlich einer der positivsten und wichtigsten Aspekte der Verfassungsentwicklung Estlands deutlich zu unterstreichen.

Jedoch gibt es Bereiche, denen bisher keine angemessene Aufmerksamkeit zuteil wurde. Obwohl § 10[75] häufig als eine der interessantesten Klauseln der Verfassung bezeichnet wurde, ist dieser Paragraph nur für einige wenige Fälle bedeutsam geworden. Vor allem hat § 10 allen rechtsstaatlichen Prinzipien Geltung verschafft.[76] Die weitgehende Fortentwicklung der Idee einer

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[68] In der Literatur wird nur die mittelbare Drittwirkung empfohlen, *M. Ernits*, Holders and Addressees of Basic Rights and Freedoms in Estonian Constitutional Jurisprudence, Juridica International 4 (1999), S. 11ff.

[69] Als Übersicht siehe *P. Roosma*, Protection of Fundamental Rights and Freedoms in Estonian Constitutional Jurisprudence, Juridica International 4 (1999), S. 35ff.

[70] Siehe oben (Fn. 56).

[71] Ein Gesetz, das den Steuerbeamten das Recht gab, breite Maßnahmen im Prozess der Steuererhebung zu treffen, wurde für verfassungswidrig erklärt; Entscheidung der Verfassungskammer vom 4. Nov. 1993 (RT I 1993, 72/73, 1052). In zwei Entscheidungen vom 12. Jan. 1994 (RT I 1994, 8, 129; 130) hat die Verfassungskammer des Staatsgerichtshofs Sondermaßnahmen der Polizei ohne ausführliche gesetzliche Regelung für verfassungswidrig erklärt.

[72] So die Entscheidungen vom 12. Apr. 1995 (RT I 1995, 42, 655) und vom 8. Nov. 1996 (RT I 1996, 87, 1558), in denen die Verfassungskammer in der Pflicht einer juristischen Person des Privatrechts, die Wohnungen ihrer Mieter zu privatisieren, eine Enteignung sah.

[73] In der Entscheidung der Verfassungskammer vom 10. Mai 1996 (RT I 1996, 35, 737) wurde etwa Minderjährigen das Recht zugesprochen, Vereine zu gründen.

[74] Entscheidung der Verfassungskammer vom 28. Apr. 2000 (RT III 2000, 12, 125), siehe oben Fn. 65 (Verhältnismäßigkeitsgebot; Aufhebung der Alkoholverkaufserlaubnis).

[75] „Die im vorliegenden Abschnitt aufgezählten Rechte, Freiheiten und Pflichten schließen keine anderen Rechte, Freiheiten und Pflichten aus, die sich aus dem Sinn der Verfassung ergeben oder mit ihr im Einklang stehen, sowie den Grundsätzen der Menschenwürde und des sozialen und demokratischen Rechtsstaates entsprechen."

[76] Aus der Verfassungsrechtsprechung ist auf die Entscheidung zum Vertrauensschutz hinzuweisen; siehe oben Fn. 48.

Konstituierung der Rechte und Pflichten, die sich „aus dem Sinn der Verfassung ergeben oder mit ihr im Einklang stehen“,[77] hat aber bisher nicht stattgefunden. Die Vorhersage von Wiegandt, daß eine so offene Fortentwicklungklausel die Rechtsprechung vorsichtig machen würde,[78] hat sich nur zur Hälfte erfüllt, da solche Fragen bislang überhaupt nicht diskutiert wurden. Die Furcht, daß § 10 wegen der Möglichkeit der Fortentwicklung von Pflichten „eine Aushöhlung der Garantietatbestände der verfassungsrechtlich verbürgten Grundrechte“[79] zur Folge haben würde, hat sich aus den gleichen Gründen ebenfalls nicht bestätigt.

Das Prinzip Menschenwürde[80] ist bisher praktisch ohne Bedeutung geblieben.[81] Einen dem deutschen Grundgesetz vergleichbaren Wert haben die estnischen Gerichte der Menschenwürde nicht zugesprochen. Die neuerdings immer öfter diskutierten Fragen wie Datenschutz, Bioethik oder Asyl — Grundrechte, die jüngst in der Charta der Grundrechte der EU festgeschrieben wurden[82] — haben in Estland kaum verfassungsrechtliche Relevanz.[83] Ebenso ist es hinsichtlich anderer ähnlicher Fragen, z.B. der akademischen Freiheit, und selbst eine Diskussion zum Schwangerschaftsabbruch hat es in Estland nie gegeben.[84]

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77 Eine solche Bestimmung sei „meisterhaft“, *P. Häberle* (Fn. 22), S. 177.

78 *M.H. Wiegandt* (Fn. 1), S. 161.

79 *M.H. Wiegandt* (Fn. 1), S. 151.

80 Menschenwürde als ein Hauptwert wurde nicht ausdrücklich in der Verfassung verankert, obwohl z.B. Häberle dies empfohlen hat, *P. Häberle* (Fn. 22) S. 177. Auch in Estland wird das Fehlen einer klaren Bestimmung zum Schutz der Menschenwürde beklagt, siehe *E. Kergandberg*, Fundamental Rights, Right of Recourse to the Courts and Problems Connected with the Guaranteeing of the Right of Recourse to the Courts in Estonian Criminal Procedure, Juridica International 4 (1999), S. 122ff., 124f.

81 Da Estland ein umfangreiches und außergewöhnliches Gesetz über Genomforschung verabschiedet hat, könnte man annehmen, daß es öffentliche und rechtliche Diskussionen über den Entwurf gegeben hat. Ein Diskussionsprogramm wurde zwar angeboten, s. *T. Mullari*, Genoomianalüüsi inimõiguslik problemaatika [Menschenrechtliche Problematik der Genomanalyse], Juridica 1998 Nr 5, S. 222ff., ist aber ohne Folgen geblieben. Das Gesetz findet sich in Übersetzung unter *www.genomics.ee* (Stand Apr. 2001); Auszüge mit Analyse: „‘Gesetz über die Forschung am menschlichen Genom’ — Estlands Lex Genom in Auszügen“, Frankfurter Allgemeine Zeitung, 3. Feb. 2001. (Es sei hier angemerkt, daß die Berichterstattung der Frankfurter Allgemeinen Zeitung über das estnische Genomprojekt und seine Kommentierung sicherlich die ausführlichste und kenntnisreichste Darstellung eines estnischen auch juristischen und staatstheoretischen Vorganges in Deutschland ist, das Projekt aber relativ einseitig und kaum hinterfragend unterstützt.)

82 Charta der Grundrechte der Europäischen Union, ABl. 2000, C364/1, Art. 3, 8, 18.

83 Siehe jedoch *J. Sootak / M. Kurm*, A Wish to have a Baby and the Dignity of the Child and Embryo: About the Law on Artificial Insemination and Embryo Protection of the Republic of Estonia, European Journal of Health Law 5 (1998), S. 191ff.

84 Eine solche Diskussion wurde für „vorprogrammiert“ gehalten, *M.H. Wiegandt* (Fn. 1), S. 163.

Es gibt noch andere interessante und „fortentwicklungsfähige“ Normen der Verfassung wie das allgemeine Gleichheitsrecht (§ 12) oder die freie Entfaltung der Persönlichkeit (§ 19), die bisher relativ unbeachtet geblieben sind. Zehn Jahre nach Inkrafttreten der Verfassung wurde ein Gesetzesentwurf über die Gleichheitsgewährleistung der Geschlechter vorbereitet. Wenn man § 14 betrachtet, der die „Gewährleistung der Rechte und Freiheiten“ zur Pflicht des Staates macht, hätte man ein solches Gesetz schon vorher erwartet.[85] Was das Recht der freien Entfaltung der Persönlichkeit betrifft, so hat der Staatsgerichtshof nie überprüft, ob irgendwelche Handlungen oder Rechtsakte § 19 Abs. 1 entsprechen.[86] Daher gibt es kaum Hinweise darauf, welche Bedeutung dieses Recht haben könnte. Ob sich ein mit der deutschen Lösung vergleichbares allgemeines Freiheits- und Persönlichkeitsrecht entwickeln wird,[87] bleibt abzuwarten.[88]

Eine moderne Verfassungsbestimmung, der in § 44 Abs. 2 garantierte Auskunftsanspruch gegenüber staatlichen Behörden, ist viele Jahre ohne wirkliche Bedeutung geblieben. Erst am 1. Januar 2001 ist ein konkretisierendes Gesetz in Kraft getreten;[89] bis dahin hatten die Behörden solche Ansprüche einfach abgelehnt. Der Gerichtsweg gegen diese Auskunftsverweigerungen wurde jedoch nie eingeschlagen.

### *4. Pflichten*

Die Auslegung der verfassungsrechtlichen Pflichten ist noch keiner allgemeinen Systematik unterworfen. Von den einzelnen Fällen ist das Fehlen einer Diskussion um Wehrpflicht und Gleichberechtigung interessant. Wiegandt hatte vermutet, daß die Tatsache, daß es keine eindeutige Regelung zur Wehrpflicht

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[85] *M.H. Wiegandt* (Fn. 1), S. 161: „Es darf sicherlich mit Spannung abgewartet werden, welche Bedeutung diese Klausel bei der Interpretation des Gleichheitssatzes ... erlangen wird.“

[86] Nur in einer späten Entscheidung hat die Verfassungskammer angedeutet, daß die Entziehung der Erlaubnis, Waffen zu tragen, das Recht aus § 19 Abs. 1 beeinträchtigen könnte. Eine weitgehende Analyse fehlt jedoch; Entscheidung vom 6. Okt. 2000 (RT III 2000, 21, 233).

[87] Dies wird empfohlen von *R. Alexy*, Grundrechte in der estnischen Verfassung. Unveröffentliches Manuskript, angefertigt für das estnische Justizministerium, 1997. (Hierzu mehr unten Fn. 116)

[88] Die Verfassung garantiert auch viele spezielle Persönlichkeitsrechte, die etwa in Deutschland keinen ausdrücklichen Schutz genießen. Vor allem den Schutz der Privatsphäre kann man sehr weit auslegen. Das Recht auf informationelle Selbstbestimmung in der Praxis der Strafkammer wurde schon erwähnt; Entscheidung vom 26. Aug. 1997 (RT III 1997, 28, 285).

[89] Avaliku teabe seadus (RT I 2000, 92, 597), unter *www.legaltext.ee* als „Public Information Act“ übersetzt.

ausschließlich für Männer gibt, einen Trend zur Gleichbehandlung gezeigt hat.[90] Jedoch ist in Estland die Wehrpflicht einfachgesetzlich nur für Männer geregelt.[91] Die Möglichkeit zum Ersatzdienst wird garantiert, auch wenn zunächst nur ein Dienst ohne Waffe innerhalb der Streitkräfte möglich war.[92] Die unterschiedliche Länge des Ersatzdienstes im Vergleich zum Wehrdienst ist bisher kein verfassungsrechtliches Problem geworden.[93]

## V. Verfassungsanwendung in Estland

Wie die Verfassungsnormen ihre wirkliche Geltung bekommen, muß näher aus dem verfassungsprozeßrechtlichen System und der Praxis der Verfassungsauslegung erklärt werden. Obwohl die Verfassungsrechtsprechung bisher nur geringen Umfang hat, können durchaus einige Verallgemeinerungen vorgenommen werden.

### *1. Institutionen*

Noch fehlt im estnischen Verfassungsprozeß die Möglichkeit, Streitigkeiten zwischen Verfassungsorganen zu lösen.[94] Nur wenn der Gesetzgeber strittige Punkte reguliert hat, kann eine Klage gegen das entsprechende Gesetz erhoben werden. Bislang hat vor allem der Staatspräsident von dieser Möglichkeit Gebrauch gemacht;[95] in vielen Fällen ist dies aber nicht ausreichend.

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[90] *M.H. Wiegandt* (Fn. 1), S. 166.

[91] Kaitseväeteenistuse seadus (RT I 2000, 28, 167), § 3 Abs. 1, unter *www.legaltext.ee* als „Defense Forces Service Act" übersetzt. Zum Rollenverständnis der Geschlechter in Estland siehe kurz *R. Taagepera*, Estonia — Return to Independence, 1993, S. 226.

[92] Die Einhaltung sowohl des Wehr- als auch des Ersatzdienstes wird durch strafrechtliche Sanktionen gewährleistet; siehe die Entscheidung der Strafkammer vom 27. Aug. 1996 (RT III 1996, 26, 312). Auch hier wurde die Verhältnismäßigkeit des Eingriffs in die Religionsfreiheit überhaupt nicht diskutiert. Ab Ende 2000 ist ein Ersatzdienst auch in sozialen Einrichtungen möglich; siehe § 73 Wehrdienstgesetz (Fn. 91).

[93] Vgl. die Vorhersage von *M.H. Wiegandt* (Fn. 1), S. 166.

[94] Die Situation ähnelt der Verfassung von 1920, die schon damals dafür kritisiert wurde: „Das Grundgesetz gibt leider keine Antwort auf die Frage: welches Organ entscheidet Verfassungsstreitigkeiten." *E. Berendts*, Die Verfassungsentwicklung Estlands, JöR 12 (1923/24), S. 195ff. Kritisch wegen des Fehlens eines Katalogs von Verfassungsstreitigkeiten auch *M.H. Wiegandt* (Fn. 1), S. 167.

[95] So geschehen z.B. im Fall der Streitkräfte, bezüglich derer die Kompetenzen der Regierung und des Präsidenten voneinander abgegrenzt waren, wobei dem Präsidenten seines Erachtens nach eine zu geringe Leitungsfunktion zugeordnet wurde; Entscheidung vom 21. Dez. 1994 (RT I 1995, 2, 35). Der Präsident hat sogar behauptet, daß eine Regulation seiner Befugnisse durch Gesetz überhaupt nicht möglich sei. Dies wurde von der Verfassungskammer zurückgewiesen. Der Gesetzgeber habe sogar die

Die Kompetenzen des Präsidenten selbst sind nach wie vor unklar.[96] In Fällen, in denen er Nominierungsanträge für hohe Positionen anderer Verfassungsorganen abgelehnt hat, wurde heftig diskutiert, ob er ein solches Recht habe oder nicht. Der Staatsgerichtshof konnte bisher nicht klärend einschreiten.[97] Dies ist aber nur ein Beispiel; die Entwicklung des Staatsorganisationsrechts vollzieht sich insgesamt eher nicht im Rahmen der Verfassungsrechtsprechung, sondern im politischen Willensbildungsprozeß.

Die Institution des Rechtskanzlers (*Õiguskantsler*) ist eine der interessantesten innerhalb der estnischen Staatsorganisationsrechtspraxis. Der Rechtskanzler übt laut § 139 die Aufsicht über die Verfassungs- und Gesetzesmäßigkeit aller Rechtsnormen aus. Er hat die Befugnis, demgemäß Änderungen in Rechtsakten vorzuschlagen. Wird der betreffende Akt nicht mit Verfassung oder Gesetz in Einklang gebracht, kann er Klage beim Staatsgerichtshof erheben.

Schon früh wurde daher vorhergesagt, der Rechtskanzler als „Verfassungs- und Rechtshüter" werde eine zu wichtige Rolle spielen können.[98] Sein Einfluß auf die Entscheidungen des Staatsgerichtshofs ist recht gering, der auf die Verfassungsüberprüfung von Rechtsnormen jedoch erheblich, denn seine Meinung zu Verfassungsfragen wird fast immer akzeptiert — vor allem wegen seiner hohen Autorität und wegen der Langwierigkeit des Prozesses, sollte man ihm nicht zustimmen.[99] So wird auf seine Vorschläge § 142 sehr oft einge-

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Pflicht, Verwaltungsverfahren innerhalb der Präsidentialkanzlei zu regeln, Entscheidung der Verfassungskammer vom 14. Apr. 1998 (RT I 1998, 36/37, 558, Begnadigung).

[96] Wegen solcher Unklarheiten hat der Amtsinhaber einen großen Einfluß auf die Entwicklung der Institution ausüben können. Da der erste Präsident, *L. Meri*, außergewöhnlich aktiv am politischen Leben teilnahm, wird die Institution des Staatspräsidenten mittlerweile als viel wichtiger als z.B. der laut Grundgesetz mit ähnlichen Funktionen ausgestattete deutsche Bundespräsident betrachtet. Zur Rolle des Präsidenten siehe das (zum Gebrauch des Präsidenten angefertigte) Gutachten von *H.-J. Uibopuu*, Die Kompetenzen des estnischen Staatspräsidenten nach der Verfassung von 1992, 1993 [auch in: ROW, 37 Jg. (1993), S. 65ff, S. 107ff.]. — Insgesamt kann festgestellt werden, daß es sich beim gesamten politisch-administrativen System Estlands immer noch um ein prä-Weberianisches handelt, da Amt und Amtsinhaber oft nicht getrennt betrachtet werden können und z.B. das Amt des Präsidenten „an sich" (noch) gar nicht existiert.

[97] Zu den letzten Streitigkeiten über die Ernennung des Präsidenten der Zentralbank siehe den Landesbericht Estlands, East European Constitutional Review Vol. 9 Nr. 3 (2000), S. 16f. Gerade in diesem Falle war die Qualität der aus dem Nominierungsprozeß zuerst hervorgegangenen Kandidaten jedoch so gering, daß dies das ganze Verfahren in Frage stellte. Zu den entsprechenden Kompetenzen des Präsidenten generell siehe *Uibopuu* (Fn. 96), 41–52.

[98] Diese Rolle des Rechtskanzlers stellt laut *M.H. Wiegandt* ein „interessantes rechtsstaatliches Experiment" dar und es sei nicht sicher, ob seine „gewaltenübergreifende Position" sinnvoll sei; (Fn. 1), S. 168.

[99] Auch dies hat wieder mit der persönlichen Kompetenz und Reputation des bis ins Jahr 2000 tätigen Rechtskanzlers *E.-J. Truuväli* zu tun.

gangen, was für die öffentliche Verfassungsentwicklung durch die Gerichte nicht gerade günstig ist. Der Rechtskanzler übt seinen Einfluß auf die Verfassungsauslegung auch dadurch aus, daß auch die Verfassungsorgane wegen der mangelnden Möglichkeiten für Organstreitverfahren ihm ebenfalls oft Streitigkeiten vorlegen, und seine Meinung wird auch hierbei in der Regel akzeptiert. Daß der Rechtskanzler seine Einflußmöglichkeiten auch während der Vorbereitungsphase von Gesetzen, einschließlich seiner Beteiligung an Kabinettssitzungen (§ 141 Abs. 2), ausübt,[100] verstärkt seine Bedeutung noch.

Überraschend ist, daß der Kompetenzbereich des Rechtskanzlers 1999 durch die Zuordnung der Funktionen des Ombudsmanns nochmals deutlich erweitert wurde.[101] Der Rechtskanzler hat laut Gesetz nunmehr auch das Recht, „alle staatliche Behörden u.a. hinsichtlich der Gewährleistung der Grundrechte und -freiheiten der Bürger zu kontrollieren." Seine Befugnisse sind dabei sehr weit gefaßt. Man muß auch beachten, daß er für sieben Jahre ernannt wird und eine vorzeitige Beendigung seiner Amtszeit nicht möglich ist. Ob eine solche Machtkonzentration in den Händen der Einzelperson des Rechtskanzlers prinzipiell gerechtfertigt ist, ist zu bezweifeln.[102]

Eine andere Ursache für die geringe Verfassungs-Interpretationspraxis in Estland liegt in der Entwicklung der Interessengruppen. Es gibt fast keine Gruppen, die vorwiegend gerichtliche Mittel für die Erreichung ihrer Ziele einsetzen. Das ist einer der Gründe für die ja nicht nur negative Tatsache, daß in Estland, im Gegensatz zu den meisten anderen europäischen Ländern, nicht alle kontroversen Grundsatzfragen am Ende regelmäßig von den höchsten Gerichten entschieden werden.

Es mag auch sein, daß die estnischen Juristen im Bereich des öffentlichen Rechts zu wenig Erfahrung, oder die „falsche" Erfahrung, haben.[103] Es ist sehr

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[100] In den Parlamentssitzungen hat der Rechtskanzler bisher fast nie das Wort ergriffen, obwohl § 141 Abs. 2 ihm auch dieses Recht gibt.

[101] Das Gesetz über den Rechtskanzler (Legal Chancellor Act), „Estonian Legislation in Translation" 1999 Nr. 16.

[102] Der Rechtskanzler bildet mit dem Staats-Sekretär (*Riigisekretär*, § 95) und dem Generalauditor (*Riigikontrolör*, Kap. XI; die Bezeichnung „Vorsitzender des Rechnungshofes" geht in die Irre, da alle Kompetenzen der Einzelperson zugeordnet sind) die auffällige Trias höchst unabhängiger und einflußreicher Figuren der estnischen Verfassung, deren Gestaltung nicht unproblematisch und dem System der Verfassung eigentlich fremd ist. Hierbei hat sich der Staats-Sekretär zu einer Art Serviceminister entwickelt; zum Generalauditor siehe das Gutachten von SIGMA unter *www.riigikontroll.ee/Eng/indexreview.html* (Stand Jul. 2001).

[103] Eine Studie hat gezeigt, daß fast alle Richter in Estland ihre Ausbildung ausschließlich während der Sowjet-Zeiten erhielten und keine ausreichende Fremdsprachkompetenz besitzen; siehe *T. Anepaio,* Eesti kohtunikud [Die estnischen Richter], in *Tartu Ülikool (Hg.),* Akadeemiline õigusharidus ja juristide täienduskoolitus [Akademische Rechtsausbildung und Weiterbildung der Juristen], 1997, S. 112ff.

schwierig, erfahrene, aber politisch akzeptable Juristen sowohl für höchstrichterliche als auch für andere höhere juristische Positionen zu finden.[104] Hinzu kommt, daß der Beruf des Juristen in Estland fast völlig unreguliert ist, da jeder, auch ohne juristische Ausbildung, eine Kanzlei eröffnen und juristische Dienstleistungen anbieten kann. Unter den Universitäten, die staatlicherseits für die Juristenausbildung akkreditiert sind, befinden sich zudem auch Institutionen bezweifelbarer Qualität.[105] Der Qualifikation und dadurch auch der allgemeinen Reputation des Berufsstandes hat all dies keinen guten Dienst erwiesen.[106]

### *2. Verfassungsauslegung*

Wenn auch verfassungsrechtliche Fragen in Rechtsprechung und Literatur diskutiert werden, so fehlt es doch vor allem an einer öffentlichen wissenschaftlichen Diskussion über den Staat, seine Verfassung und die politische Ordnung.[107] Ob die estnische Verfassung eine liberale oder eher eine soziale Neigung hat, kann man auch deswegen noch nicht beantworten.[108] Die Rechtsprechung hat hierauf keine Antworten; die Einstellung der Richter spielt keine bekannte Rolle. Das zeigt sich auch bei Richterernennungen, die nur sehr selten politisch kontrovers gewesen sind, obwohl die Richter am Staatsgerichtshof vom Parlament ernannt werden.

Die Diskussion leidet auch dadurch, daß nur eine einzige rechtswissenschaftliche Zeitschrift, „Juridica", existiert, in der Rechtsprechungsübersichten oder -analysen, zumal kritische, gänzlich fehlen. Die Zeitschrift wird von der Juristischen Fakultät der Universität Tartu herausgegeben; ihre Autoren stammen fast ausnahmslos ebenfalls von dort. Da viele von ihnen entweder als

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Letzteres ist in Estland wegen des Mangels an juristischen Literatur in der Staatssprache (siehe Fn. 6 oben) von besonderer Bedeutung.

[104] Die Stelle des Rechtskanzlers konnte auch deswegen für fast ein ganzes Jahr nicht besetzt werden. Der erste Versuch, einen kaum formell oder inhaltlich ausgewiesenen, 28 Jahre alten Beamten des Justizministeriums zu nominieren, wurde — obwohl Vorschlag der Regierung — durch das Parlament abgewiesen. Ein folgender Bewerber, der Londoner Völkerrechtsprofessor *R. Müllerson*, scheiterte u.a. aufgrund seiner Haltung zur Staatskontinuitäts- (siehe II. und Fn. 8 oben) und Minderheitenfrage.

[105] Das Gesetz vertraut hinsichtlich der Qualitätskontrolle von Hochschulen weitgehend auf die Kräfte des Marktes; das Akkreditierungsverfahren einzelner Studiengänge kann nicht immer als völlig seriös bezeichnet werden.

[106] Es gibt eine Anwaltskammer (eine juristische Person des öffentichen Rechts), die jedoch nur sehr begrenzte öffentliche Kompetenzen hat; so haben nur ihre Mitglieder das Recht, vor dem Staatsgerichtshof anzutreten.

[107] Siehe *W. Drechsler* (Fn. 8), S. 27ff.

[108] Zum Ansatz einer Diskussion siehe *R. Narits*, Comprehension of the Constitution (from the Communitarian Point of View), Juridica International 4 (1999), S. 3ff.

Richter oder als Berater oder Mitarbeiter beim Staatsgerichtshof tätig sind, müßten sie aber auch gleichsam über sich selbst urteilen.

Ein besonderes Merkmal der Verfassungsauslegung in Estland ist der immense Einfluß der deutschen Jurisprudenz.[109] Vor allem im Grundrechtsbereich sind deutsche Vorbilder sehr deutlich, was wegen der einfacheren Übertragbarkeit der EGMR-Praxis eine gewisse Überraschung darstellt. (Es ist sogar noch auffälliger, wenn man weiß, daß die meisten estnischen Juristen — im Gegensatz zu einer noch häufig zu hörenden Meinung — als Fremdsprache nicht Deutsch, sondern Englisch beherrschen.) Die Verhältnismäßigkeitskontrolle z.B. unterliegt mehr und mehr denselben Bedingungen wie in Deutschland — ein Eingriff muß geeignet, notwendig und verhältnismäßig im engeren Sinne sein. Ob die Grundrechte eine Drittwirkung besitzen, wird in der Literatur fast nur aufgrund deutscher Autoren diskutiert.[110] Ähnliches gilt für das rechtsstaatliche Prinzip des Gesetzesvorbehalts und der damit verbundenen Erfordernis, daß Rechtsverordnungen eine gesetzliche Ermächtigungsgrundlage haben müssen. Die sehr strengen Anforderungen, die vom Staatsgerichtshof aufgestellt wurden, ähneln denen der deutschen Rechtsprechung und Literatur.[111] Der Staatsgerichtshof knüpft häufig an diese Literatur an, obwohl in den Entscheidungen selbst kaum auf Lösungen in anderen Ländern, darunter Deutschland, verwiesen wird.[112]

Vielleicht am problematischsten ist, daß, z.T. aus obengenannten Gründen des Hintergrunds der Richter, Gesetzesauslegung fast nur anhand der grammatischen Methode geschieht. Obwohl z.B. die geschichtliche Entstehung der Verfassung gut erforscht ist,[113] wurde in keiner der Entscheidungen des

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[109] Allgemein siehe *J. Sootak / M. Luts*, Rechtsreform in Estland als Rezeptions- und Bildungsaufgabe, JZ 1998, S. 401ff.

[110] Die Literaturhinweise von *M. Ernits* (Fn. 68) beziehen sich z.B. fast ausschließlich auf deutsche Autoren. Die ähnliche amerikanische *State Action* — Doktrin ist z.B. völlig unbekannt.

[111] Auch in diesem Bereich werden in der Literatur fast ohne Ausnahme deutschsprachige Quellen verwendet; vgl. etwa die Literaturhinweise in *K. Merusk* (Fn. 48). Der unterschiedlichen Praxis des französischen oder gar amerikanischen Rechts wird keine Aufmerksamkeit gewidmet.

[112] Der ehemalige Vorsitzende des Staatsgerichtshofs *Maruste* hat in einem Sondervotum ausnahmsweise einmal die Entscheidungen des — für Estland ja nicht zuständigen — Gerichtshof der Europäischen Gemeinschaften verwendet; Entscheidung der Verfassungskammer vom 6. Okt. 1997 (RT I 1997, 74, 1268). In einem Sondervotum hat Richter *Kergandberg* darauf hingewiesen, daß die Richter ausländische Vorbilder, vor allem russische und deutsche, diskutiert haben; Entscheidung des Plenums des Staatsgerichtshofs vom 22. Dez. 2000. Entscheidungen des EGMR werden häufiger herangezogen.

[113] Die Aufzeichnungen der Sitzungen der Verfassungsgebenden Versammlung wurden in vollem Umfang veröffentlicht, siehe *Eesti Vabariigi Justiitsministeerium*, Põhiseadus ja Põhiseaduse Assamblee. Koguteos [Verfassung und Verfassungsgebende

Staatsgerichtshofs die historische Methode verwendet. Es gibt auch keine Ablehnung dieser Methode; es scheint vielmehr, als ob sie gar nicht existiere, obwohl in der Literatur oft auf sie hingewiesen wird. Für die Anwendung systematischer oder gar teleologischer Auslegungsmethoden kann man kaum Ansätze finden, von etwaigen rechtshermeneutischen Überlegungen ganz zu schweigen.

Abschließend fällt das Fehlen des Anführens von sozialwissenschaftlichen Grundlagen für Entscheidungen auf. Da der Staatsgerichtshof die Notwendigkeit von Grundrechtseingriffen überprüft, müßte er auch eine Analyse der Folgen der umstrittenen Rechtsnormen anstellen. Eine ökonomische Analyse des Rechts z.B. ist jedoch nicht nur dem Staatsgerichtshof fremd, auch in der Literatur wird sie kaum verwandt.[114]

## VI. Verfassungsreform und Beitritt zur Europäischen Union

Das Einführungsgesetz zur Verfassung (§ 8) sah die Möglichkeit vor, Volksinitiativen für Verfassungsänderungen zu nutzen.[115] Diese Möglichkeit wurde nie wahrgenommen, was aber kaum ein Zeichen dafür ist, daß die Verfassung eine hohe Akzeptanz besitzt, sondern vielmehr darauf beruht, daß einschlägige Probleme bisher nicht aufgetreten sind. Jedoch hat die Regierung schon 1997 einen Sachverständigenrat berufen, um die Anwendungspraxis der Verfassung zu untersuchen und Änderungsvorschläge zu unterbreiten. Mehrere hundert Seiten von Materialien, darunter z.T. hervorragende Gutachten ausländischer Experten,[116] wurden zwei Jahre später dem Parlament übergeben;[117]

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Versammlung. Gesamtwerk], 1996. Einen geschichtlichen Überblick gibt *R. Maruste u.a.* (Hrsg.), Taasvabanenud Eesti põhiseaduse eellugu [Vorgeschichte der Verfassung des wieder selbständigen Estlands], 1997.

[114] Ansatz der Diskussion bei *E. Ilves*, Miks juristid peaksid õppima majandust ehk sissejuhatus õigusmajandusse [Warum die Juristen Ökonomie studieren sollten oder eine Einführung in Rechtsökonomie], Juridica 1999 Nr. 1, S. 31ff.

[115] Innerhalb von drei Jahren hatte eine Gruppe von zehntausend wahlberechtigten Staatsbürgern das Recht, auf dem Wege eines Volksbegehrens eine Verfassungsänderung vorzulegen.

[116] U.a die Berichte *von R. Alexy* zum Schutz der Grundrechte und Grundfreiheiten, von *J.A. Frowein* zur Regelung der Staatsorganisation und von *R. Stober* zu den Bestimmungen über die örtliche Selbstverwaltung. Die erwähnten Gutachten stellen wohl die besten Abhandlungen zur Estnischen Verfassung auf dem Gebiet des öffentlichen Rechts dar.

[117] Leider ist fast nichts von diesen Materialien veröffentlicht worden. Nur die Hauptergebnisse der Sachverständigengruppe wurden im Internet auf der Heimatseite des Justizministeriums zugänglich gemacht (*www.just.ee*; Stand Jul. 2001). Diese Materialien gäben sicherlich den Anstoß, eine lebendige Verfassungsdiskussion zu beginnen; ihre Veröffentlichung in zugänglicher Form auf Estnisch und Deutsch oder

es wurden insgesamt mehr als hundert Empfehlungen für eine Verfassungsänderung vorbereitet. Daß diese sich vielfach auf unbedeutende Fälle beziehen oder die Probleme auch durch Auslegung gelöst werden könnten,[118] zeigt aber schon die Tatsache, daß das Parlament sich mit nur zwei Bereichen der Gutachten ernsthaft beschäftigt hat: mit der Streitkräftereform und dem Beitritt zur EU.

Die verfassungsrechtlichen Bestimmungen hinsichtlich der Streitkräfte und des Staatsschutzes waren am meisten von der Vergangenheit geprägt und werden dadurch dem Geist der heutigen Verfassung nicht gerecht. Daß der Staatspräsident „Oberbefehlshaber" der Streitkräfte ist, entspricht eher der halbpräsidentialen Verfassung von 1938. Die Empfehlungen betrafen deshalb vor allem die Demokratisierung der Streitkräfte und eine deutlichere Unterordnung der Streitkräfte unter die Zivilgewalt.

Die Diskussion über die Verfassungsmäßigkeit des Beitritts Estlands zur EU, der im Land generell und zumal innerhalb der politisch-wirtschaftlichen Elite kaum umstritten ist,[119] hat sich auf die Tatsache konzentriert, ob es notwendig ist, vor Beitritt eine Verfassungsreform durchzuführen, und wenn ja, welche Bestimmungen verändert werden müßten. Es wird von vielen Experten[120] darauf hingewiesen, daß der Beitritt einen Verlust an Souveränität bedeuten könnte, die in der Verfassung aber sehr hoch eingeschätzt wird (§ 1).[121] Was fehlt, ist eine Diskussion über die Demokratisierung des Staates und über Entscheidungsstrukturen im europäischen Prozess.[122]

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Englisch ist ein dringendes Desiderat und die Veröffentlichung von *Alexy* (siehe oben Fn. 87) ein wichtiger Schritt zu dessen Erfüllung.

[118] Z.B. wurde der Änderungsvorschlag gemacht, den Schutz der körperlichen Unversehrtheit in die Verfassung einzufügen. Laut Entscheidung der Strafkammer vom 30. Mai 2000 (RT III 2000, 19, 202) ist dieses Grundrecht jedoch bereits in der Verfassung verankert.

[119] In der Bevölkerung aber schon, wie recht spät bemerkt wurde. Gegenüber den Umfrageergebnissen der in Estland tätigen Meinungsforschungsinstitute ist jedoch große Vorsicht angebracht, da diese nicht generell verläßlich sind.

[120] In diesem Bereich haben viele Experten ihre Meinung schriftlich abgegeben. Eine Veröffentlichung der Gutachten fehlt auch hier; die Literatur diskutiert sie kaum. Siehe v.A. *A. Albi*, Euroliit ja kaasaegne suveräänsus. Üks võimalikke vastukajasid põhiseaduse ekspertiisikomisjoni üleskutsele aruteluks [Europäische Union und heutige Souveränität. Eine mögliche Antwort auf den Aufruf des Sachverständigenrates zur Verfassung], Juridica 2000 Nr. 3, S. 160ff.

[121] Jedoch hat der im März 2001 nominierte neue Rechtskanzler eindeutig die Meinung vertreten, daß eine solche Verfassungsänderung nicht nötig sei; siehe Riigikogu kinnitas Allar Jõksi õiguskantsleriks, Postimees, 20. Feb. 2001.

[122] Einen Ausschuß für Europäische Angelegenheiten gibt es zwar im Parlament, aber welche Bedeutung dieser hat, ist nur schwer einzuschätzen. Zur Rolle des Parlamentes siehe *K. Ahi*, Rahvuslik parlament Euroopa Ühenduse õiguse kontekstis [Nationales Parlament im Kontext des Rechts der europäischen Gemeinschaften], Juridica 1999 Nr. 6, S. 297ff.

## VII. Abschlußbemerkung

Obwohl die Verfassungsentwicklung in Estland sicherlich die eines demokratischen Rechtsstaates ist und insofern zumal aus der Perspektive von 1992 einen Erfolg darstellt, hat sie nicht ganz den hohen Erwartungen entsprochen, die mit dem Text der Verfassung verbunden waren. Eine Diskussion um die genauere Bedeutung der Verfassung sowie ihrer Prinzipien und Bestimmungen hat noch nicht wirklich begonnen. Vielmehr ist die Verfassungsinterpretation in Estland noch rückwärts gewandt, da die meistdiskutierten Probleme immer noch mit von der Vergangenheit bestimmten Fragen wie Minderheitenschutz oder Eigentumsreform zu tun haben. Besonders bemerkenswert ist, daß der Staatsgerichtshof selbst im Vergleich mit anderen Verfassungsorganen in der Verfassungsentwicklung eine geringere Rolle spielt, als man angesichts der Verfassung hätte erwarten können.

Es bleibt abzuwarten, welche Rolle die Verfassung im estnischen Staat weiterhin einnehmen und auf welchen Wegen sich ihre Entwicklung vollziehen wird. Gerade der kommende Beitritt Estlands zur EU gibt jedoch zu der berechtigten Hoffnung Anlaß, daß eine Verfassungsdiskussion auf hohem Niveau geführt werden kann. Die Verfasser sind sich sicher, daß gerade die jüngste Generation der estnischen Juristen auf dem richtigen Weg ist.[123]

[123] Für inhaltliche und formelle Kritik, die sie allerdings nicht immer beherzigt haben, bedanken sich die Autoren bei Frau *Gisela Drechsler* (Marburg), Herrn Dr. *Hans-Peter Folz* (Universität Augsburg), Herrn OStR i.H. Dr. *Joachim A. Groth* (Ruhr-Universität Bochum), Herrn Dr. *Rainer Kattel* (Universität Tartu und Philipps-Universität Marburg), Herrn *Daimar Liiv* LL.M. (Universität Tartu), Frau *Ülle Madise* (Estnisches Justizministerium), Herrn *Lauri Mälksoo* LL.M. (Humboldt-Universität Berlin) und Herrn *Ivo Pilving* LL.M. (Estnischer Staatsgerichtshof).

# III

Taavi Annus and Margit Tavits,
"Judicial Behavior in Transition: The Effects of Judge and Defendant Characteristics"
*Law & Society Review*, in press.

# JUDICIAL BEHAVIOR IN TRANSITION: THE EFFECTS OF JUDGE AND DEFENDANT CHARACTERISTICS

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In a consolidated democracy, an independent, impartial and efficient judiciary is an inevitable player for securing human rights, the rule of law and democracy. After the fall of communism, countries in Central and Eastern Europe have all faced the task of reorganizing their judiciaries to correspond to these values. In many countries, however, this process is taking place in the context of increasing conflict between different ethnic groups. In the former Soviet Union, the democratic transition and the restoration of independence of small nation-states brought about also the transformation of the minority status: the formerly dominant ethnic group — the Russians — became a minority. Give these developments, is it possible to build an impartial judiciary? To what extent do the ethnic tensions enter the arena of judicial decision-making? In order to answer these questions we need to understand the empirical regularities of judicial behavior in ethnically divided transition societies. The fact that judges decide cases not only based on the relevant legal provisions but are also influenced by their individual attitudes, beliefs and values, is well known in the political science literature. In the U.S., for example, this has been observed both on the level of the Supreme Court (Baum 1997; Segal & Spaeth 2002) as well as trial courts (Ashenfelter, Eisenberg, & Schwab 1995; Hagan & Bumiller 1983; Steffensmeier & Britt 2001).

In this paper, we examine two potential sources of bias in the transition judiciary. First, we examine the assumption that service under the old regime taints judges in their later decision making. The replacement of unqualified or unacceptable personnel from the pre-transition period with newly trained judges is an important aspect of the judicial reform in many transition countries. Such replacement also assumes that judges from the previous regime behave differently than the newly appointed ones, who are arguably not been "corrupted" by the old system. Testing the empirical validity of this assumption both advances our understanding of the judiciary in transition and has explicit policy relevance to the decisions about the court personnel reform in new democracies.

Second, we analyze whether judges in the newly democratic courts can be fair to people of the very ethnic group that used to oppress them. The

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integration of different cultures in a single society is a prominent challenge facing former communist countries (and beyond). In Eastern Europe, ethnic discrimination is a well-known problem, addressed by different international organizations. Knowing that the courts can, in fact, be impartial and protect minorities from discrimination assures that strengthening the judiciary is a necessary part of the anti-discrimination policies.

The first section of the paper gives some background information about the transition country under study — Estonia. This is followed by the presentation of the theoretical framework, methods, and the results of our empirical analysis on trial level courts. We have created for the analysis an original dataset of a sample of decisions by trial level judges in Estonia. The findings indicate that the judge's experience under the previous regime does not seem to be an important factor in judicial decision-making. We also find that the Russian ethnic minority does not fare differently in the courts from the current ethnic majority. We believe that the study serves as a useful basis for further investigations and theory building on judicial behavior in nascent democracies.

## JUDICIAL REFORM AND DISCRIMINATION IN ESTONIA

Estonia regained its independence in 1991 after half a century of Soviet rule and, like other Central and East European countries, went through a regime change. This country is a particularly interesting locus for the current study for two reasons. First, during the judicial reform in the early 1990s, the court personnel were partially replaced. As a result, those judges who were members of the criminal justice system under the previous regime now work side by side with the "new" judges. Second, Estonia is one of the countries that were dominated by ethnic Russians under the Soviet regime. This dominant group, however, suddenly became an ethnic minority after Estonia regained its independence, creating a situation where discrimination against Russians was especially prone to emerge.

### *The change in judicial personnel*

After Estonia became an independent democratic nation in 1991, it faced a challenge of transforming the Soviet judiciary into a democratic and independent one. The selection of personnel was among the most difficult tasks in this process. A supply of new personnel was never available, and the dismissal of the "old" judges was not very easy — the mere fact that a person had been employed by the government structures of the previous regime was not sufficient for dismissal in Estonia.

The major judicial reform took place only in 1993. As part of this reform, all judges, including those nominated during the Soviet regime, had to go through a reappointment procedure. In order to become a judge, a recommendation by the Supreme Court plenary and an appointment by the president of the Estonian

Republic were necessary. All new applicants (i.e. not including those who were judges before the reform) had to pass a judicial examination before the Supreme Court could consider their candidacy. The reform did not concern the Supreme Court that was a new institution created after independence and whose members had been appointed by the Parliament before the major judicial reform.

Before the reform in 1993, the courts employed altogether 83 judges. On January 1, 1996, i.e. about three years after the beginning of the reform, the number of judges had already increased to 206. Of those, 54 had worked as a judge before the reform. Many others had previously worked in the criminal justice system as prosecutors. The 29 judges who did not retain their position were disqualified at various stages of the process: eleven of them did not apply for reappointment, eight were dismissed by the Supreme Court plenary, and the president refused to appoint another ten. Compared to the overall statistics, the number of dismissals of the former judges was not exceptional: out of 276 total candidates, the Supreme Court refused to recommend 48 candidates and the president did not nominate a further 38 (data compiled from Riigikohus 1996). Altogether, 75% of the applicants were appointed. Thus many of the judges who wanted to stay in office could do so. This gives us a good variance on the "Soviet experience" of a judge allowing to examine whether it makes a difference for case outcomes if a judge has been in office before the transition or not.

The reasons for not nominating or appointing certain candidates were not publicly disclosed. We do know that several of the Supreme Court recommendations were denied because no vacancies existed. However, we do not know the exact criteria for choosing between different candidates. The refusal by the president to appoint a candidate was made on a discretionary basis without any justification at all (Maruste 1994). Even though we cannot identify any discernable bias against the former judges or other representatives of the former criminal justice system in this process, it may still be possible that the screening effectively selected out certain types of judges, for example the ones who were expected to perform significantly differently from the rest. Therefore, our analysis cannot determine whether judges from previous regime would behave differently from others. However, we can still test whether the "old" judges are prevented from behaving similarly to the judges who had not participated in the authoritarian criminal justice system.

*Ethnic minorities and discrimination in Estonia*

The territory of Estonia has for centuries been inhabited mostly by ethnic Estonians, even though the country has rarely been under Estonian rule. In 1922, just after establishing an independent state for the first time, the Estonian population of 1.1 million consisted of 87.7% Estonians, the biggest minority being Russians with 8.2% (Raun 2001: 271). The ethnic homogeneity together with effective minority rights protection remained unchanged until Estonia lost its independence in 1940. However, the situation changed considerably under

the Soviet rule. In 1989, the Soviet Population Census registered 34, 9% of Russophones (30, 3% of whom were ethnic Russians) living on the territory of Estonia (Zevelev 2001: 96-97). Although the Estonian government officially supported the emigration of Russians to the Russian territory, not many took the opportunity. According to the Estonian Population Census of 2000, ethnic Russians formed 25.6% of the Estonian population, with the total of Russian-speaking minority amounting to 29.7% (Statistical Office of Estonia 2001: 9).

Various international organizations and academics have undertaken surveys of the minority situation in Estonia, reporting issues that demonstrate insufficient attention towards the situation of minorities (e.g. UN Committee on the Elimination of Racial Discrimination 2002; Council of Europe 2001).[1] Thus, the discrimination of the national minority is a topical issue in that country and discrimination through the criminal justice system is highly plausible. Obviously, there is no official policy mandating discrimination of national minorities through the justice system. At the same time, the sentencing outcomes demonstrate that the potential for discrimination exists. In 2001, only 41% of prison inmates were ethnic Estonians, although ethnic Estonians committed most of the crimes (Saar et al. 2002). The overrepresentation of minorities in the prison population is not surprising (see Mauer 1999 for the U.S.), but demands explanation. Whether the difference is caused by legally relevant criteria (e.g. non-Estonians commit more serious crimes) or is due to discriminatory sentencing practices is relevant from the point of view of securing basic human rights. Although our focus is not solely on testing the sentencing practices regarding the in/out decision, our analyses are targeted towards detecting different kinds of discrimination in the criminal justice system.

## LITERATURE REVIEW

### *Judiciary in transition*

The literature on judicial behavior in transition societies is rather limited. The existing political science (and also legal) studies on the judiciary in transition have predominantly discussed the role of the supreme or constitutional courts in the transformation process. This includes work on the highest courts in different parts of the world, including Eastern Europe (Randazzo & Herron 2003; Bugaric 2001; Epstein, Knight, & Shvetsova 2001; Schwartz 2000), East Asia (Ginsburg 2003), South Africa (Gibson & Caldeira 2003; Webb 1998), the Southern Europe (Magalhães 2003), and Latin America (Helmke 2002; Schatz 1998). Although this literature is useful for understanding the democratic processes in those countries, most of such work ignores the fact that the supreme courts or specialized constitutional courts handle just a fraction of all cases. Ordinary courts may play a much greater role in the transition process than the supreme or constitutional court especially because they are closer to the citizens

and influence the public perception about the fairness and acceptability of the new regime. An empirical study of ordinary courts also gives a broader basis for making generalizations, while a study of the supreme or constitutional court would necessarily remain limited due to the small number of judges and the small number of cases handled.

The work of trial courts during and after transition has got some scholarly attention. Markovits (1995) gives an observational account of the judicial system, including the trial courts, during the East German transition. Hendley has extensively worked on the Russian *arbitrazh* courts (e.g. Hendley 1999). Widner (2001) discusses the role the courts play in post-conflict transitions in Africa. Stotzky (1993) presents a compilation of studies on the role of the judiciary in regime transitions in Latin America. There is plenty of literature on the judges of Nazi Germany in terms of who they were and how they were integrated into the post-World-War II German legal profession (e.g. Müller 1991). Similarly, there is research on the (mostly non-)integration of the East German judges into the united German legal profession (Markovits 1996). Some authors have discussed the politics of judicial reform in the ordinary courts (Dakolias 1995; Rowat, Haider, & Dakolias 1995; Solomon & Foglesong 2000; Strohmeyer 2001). However, the approach is usually either descriptive or policy-oriented, recommending possible solutions to the problems that a country in transition faces. At the same time, the effects of the choices already made during such reforms are not well understood, and the literature does usually not examine the behavior of individual judges, but is limited to the outputs of the whole court. There are also several studies, usually conducted by lawyers, on the "transitional justice," analyzing the substantive laws dealing with the past (e.g. see Teitel 2000; Kritz 1995; and the reviews by Dyzenhaus 2003; Valls 2000). Yet this research does not involve analyzing the behavior of the old judges after the regime change.

The literature on the Estonian courts and judicial system is extremely limited, especially concerning the non-legal studies. The most interesting essay is written by Pettai (2002/2003), who discusses the outcomes of several ethnopolitically relevant cases from the Estonian and Latvian Supreme Courts. He argues that by deciding both in favor as well as against minorities, the courts have been balancing "issues of fairness with concerns regarding credibility, since in both countries the courts are new, and they have yet to consolidate their position within the political system." However, more systematic analyses have not been carried out so far.

In sum, there is little theoretical guidance for the current study in terms of explaining and predicting the effects of judicial experience under the previous regime and the existence as well as sources of discrimination towards the representatives of the previously dominant but currently minority groups by courts in transition societies.

*The effect of judge background characteristics and judicial discrimination*

The lack of relevant theorizing and previous empirical studies makes the current analysis an exploration guided by relevant literature developed for the advanced democracies. The guidance, however, is anything but firm. Previous research on judicial behavior, mostly based on the datasets collected from the U.S., is not in agreement as to whether judges' background characteristics are consequential to how they make their decisions (Ashenfelter, Eisenberg, & Schwab 1995; Dixon 1995; Kramer & Steffensmeier 1993; Rowland & Carp 1996; Spohn 1994; for an earlier review see Hagan & Bumiller 1983). For example, Steffensmeier & Hebert (1999) show that women tend to be harsher in sentencing decisions. Hogarth (1971) argues that judges with longer working experience impose harsher sentences. The same is considered to apply for older judges (Spohn 1990). Partisanship is considered to be influential in that Democratic judges in the U.S. tend to be more liberal than the Republican ones (Rowland & Carp 1996). One of the latest studies also indicates that black judges tend to be harsher in the sentencing decisions than white judges (Steffensmeier & Britt 2001). However, the results are controversial — Ashenfelter, Eisenberg, and Schwab (1995) conclude, for example, that "[i]n the mass of cases that are filed, even civil rights and prisoner cases, the law — not the judge — dominates the outcomes."

Discrimination in judicial decision-making, especially sentencing, has attracted extensive interest again in the U.S., mostly from the perspective of race relations. Among the most famous of them is the notorious Baldus study (Baldus, Pulaski, & Woodworth 1983) on the death penalty considered by the U.S. Supreme Court in *McCleskey v. Kemp*. The contemporary literature on sentencing disparities is voluminous. There are plenty of death penalty studies claiming that discrimination does in fact exist (Baldus, Woodworth, & Pulaski 1990; Baldus, Woodworth, Zuckerman, & Broffitt 1998). In other sentencing contexts, the research has found mixed results (for reviews see Mustard 2001; Weitzer 1996). Modest discrimination has been found during the in/out decision, as well as in the choice of sentence length (Sampson & Lauritsen 1997; Spohn 2000). However, after controlling for various legitimate grounds for differences in sentences, no systematic bias against minorities has been found (Sampson & Lauritsen 1997).

## THEORETICAL FRAMEWORK

As already stated, two puzzles drive this research. We are, first, interested in whether and how the working experience of a judge in the judicial system of the communist regime influences his or her decision-making as a judge under the new democratic regime. This question has not been researched before. In policy arguments, however, it has been often claimed that "old" judges (and public officials in general) are influenced by their past. This assumption has usually

been made by the policymakers. For example, the Estonian judiciary was changed almost completely in the 1940 after the Soviet Union took over (Järvelaid & Pihlamägi 1999). A notable example is the change among the East German judiciary after the unification — less than 10% of the judges and prosecutors could retain their offices by 1994 (Markovits 1996: 2271). The dismissal of East German public officials, including judges, was motivated by their perceived incompetence or political unreliability (see Kommers 1997 and Quint 1997 for the reasons lying behind the change in personnel). Lustration practices in Eastern Europe have been justified not only because of the need of retribution, but also because of the risk that those former officials would pose to the orderly functioning of democracy (Offe 1996: 93; Letki 2002).[2]

We are also interested in determining whether there is any ethnic-based discrimination in the judicial decision-making. The dependent variable in our study is the case outcome, including the guilty/not guilty decision and the severity of the sentence. These are the most significant and easily observable outcomes of any criminal case.

*The judge's background and the case outcomes*

In the context of transition, the decision whether to convict or not is an especially interesting issue. The analysis of the determinants of the conviction rates is also relevant in the Estonian context as there are no jury trials. The judge decides both on conviction or acquittal as well as sentencing. During the Soviet regime, the acquittal of a person was rare, and even considered to be as a failure of the criminal justice system. This exerted considerable pressure on the judiciary to avoid acquittals (Solomon 1987). Even though towards the end of the Soviet Union "telephone justice" was not as common as previously and conviction rates dropped (Foglesong 1997), the pressure on the judges from the Communist Party and the executive power still existed (Huskey 1992: 224). High conviction rates are considered to be typical among the post-communist judiciaries and, thus, the Soviet and post-Soviet judges are usually expected to find defendants guilty.

Further, the judges from the previous regime may want to appear more loyal to the state than the newly appointed ones. Regime loyalty may not be a unique feature of the judges of the former Soviet Union (see Kritzer 2003), however, the pressure to appear loyal to the state during the transition may be exacerbated, as the representatives of the previous regime may fear reprisals. For example, Helmke (2002) argues that the Argentine Supreme Court justices showed considerable independence from the previous regime when it appeared that the regime was changing, presumably in order to please the new regime that was emerging. Thus, deciding in favor of the state can also be interpreted as pledging allegiance to the new regime. This aspect is important for the "old" judges as their legitimacy is constantly threatened and winning over the new political elite is crucial for their well-being.[3] At the same time, newly appointed judges are expected to pay more attention to the rights of the individual (the

suspect) and be better prepared in their mentality to overturn the prosecutor's case in favor of the suspect. They also feel less pressure to prove their suitability to serve the new regime. These arguments can be summarized into the following hypothesis:

*Hypothesis 1a: The judges who have worked in the criminal justice system of the communist regime are more likely to convict suspects than the newly appointed judges.*

The Soviet background of the judges may also influence the decisions about the harshness of the sentence. The "old" judges are more constrained by the concern about their image not only in the eyes of the political elite of the new regime but also in the eyes of the public. According to the popular belief, the public servants of the old regime carry the ideological baggage of that regime due to their training and working experience. Also, the public in the East European countries has usually supported the screening and possible exclusion of high officials, including judges, for their past activities (see Szczerbiak 2002 for the data on Poland) as the officials of the former regime are perceived to be less able to adapt to the new environment. One way of gaining legitimacy in the eyes of the public is to appeal to people's immediate concerns. It is generally accepted that the public expects judges to be "tough on crime."[4] Due to the increasing crime rates after transition, lack of security has become an important concern (see Saar 1999 for the discussion on Estonia). At the same time, criminal cases receive the most widespread media coverage. The visibility of criminal cases and their prominence in the eyes of the public may encourage "old" judges to decide against the defendant and to hand harsher sentences in order to advance their public image. The argument is summarized in the following hypothesis:

*Hypothesis 1b: The judges who have worked in the criminal justice system of the communist regime hand more severe sentences than the newly appointed judges.*

*The discrimination of minorities in sentencing*

According to the literature on sentencing, the judge selects between different sentences based on three "focal concerns": the offender's blameworthiness, the protection of the community, and practical or organizational reasons (Steffensmeier & Demuth 2001; Steffensmeier, Ulmer & Kramer 1998). The discrimination of ethnic minorities occurs usually due to the fact that the past and future behavior of the defendant is associated with the prevalent stereotypes about the ethnic group of the defendant. Thus, if a minority group is associated with crime, the representatives of this group would receive harsher sentences, because they are more blameworthy and dangerous to the community than the representatives of the majority. That is, as those prejudices exist among the majority of the population and the political elite, they may also be present among criminal justice officials, including the judges. Such prejudices may lead to the belief that minorities are less likely to rehabilitate if a mild sentence is

imposed, and that only harsh sentences would have a preventive impact (see Steffensmeier, Ulmer & Kramer 1998). This reasoning applies not only to the sentencing decision, but also to the decision to convict, as evidenced by the numerous experimental studies (Sommers & Ellsworth 2000).

The stereotypes of the Russians among Estonians are certainly not positive. Kolstø and Melberg (2002: 53-54) report the results of a mass survey that asked ethnic Estonians to compare themselves to ethnic Russians on 12 different characterizations. They found that Estonians tended to "attribute good qualities to ethnic Estonians and reserve the negative ones for Russians." Among other things, the Estonians perceived the Russians to be less trustworthy and more drawn into conflicts.

Another aspect of the post-communist transition may breed discrimination in many East European countries: During the Soviet regime, the Russian-speaking population, and not locals, often occupied important political and judicial positions. For example, after 1950, the two top positions of the Estonian Communist Party were always occupied by ethnic Russians (Raun 2001: 191) and many ethnic Russians occupied important positions in the criminal justice system (Järvelaid & Pihlamägi).[5] Moreover, in Estonia 73.3% of the ethnic Estonians partly or completely agree with the claim that they as an ethnic group were oppressed in the Soviet Union (Kolstø and Melberg 2002: 45). It is, thus, reasonable to argue that after the transition, the ethnic majority would seek "revenge" against the representatives of the former oppressing regime. Furthermore, at least 48.3% of the Russians living in Estonia believe that the Estonians want to take revenge on them (Kolstø and Melberg 2002: 43). Whereas official policies are under strict scrutiny from various international organizations, informal policies and actions, including criminal justice practices, can most effectively be used to seek such revenge. The arguments elaborated allow concluding with the following hypotheses:

*Hypothesis 2a: Minority suspects are more likely to be convicted than majority suspects.*
*Hypothesis 2b: Minority defendants are expected to receive harsher sentences than their majority counterparts.*

In addition to the Soviet background of the judge and the ethnicity of the suspect or offender, other variables may account for the variation in judicial decision-making. These include the factors foreseen by the laws that limit the discretion of the judges such as the characteristics of the crime and the background of the criminal (Steffensmeier & Britt 2001; Ashenfelter, Eisenberg, & Schwab 1995). According to the Estonian criminal code, the judges had to consider the offenders' prior criminal record and/or voluntary confession and regret in determining the sentence. The existence of a prior criminal record should, thus, increase, and the voluntary confession decrease the severity of the sentence.[6] Further, there may also be other illegitimate factors

determining the sentence. Studies have usually shown that women receive more lenient sentences (Albonetti 1998; Simon & Landis 1991; Steffensmeier, Kramer, & Streifel 1993; Nagel & Johnson 1994) and that less educated criminals are often viewed as less capable of understanding the consequences of their crimes and, thus, needy of harsher sentences.

Unfortunately, we cannot include a potentially influential variable — the ethnic background of the judge — into our analysis because we cannot determine the ethnicity of the judge with certainty, as this information is not provided in the official records. One option would be to consider judges' names and code those with Russian-sounding names as Russians. There are two problems related to such coding, however. First, although Estonian and Russian names are very distinct, not everyone having a Russian name is necessarily Russian and vice versa. Second, our dataset includes only 4 judges (who made in total 45 decisions) with Russian-sounding names allowing for very little variance on this variable. We still performed two alternative analyses to those described below. For one of those alternative estimations we included a dummy variable for decisions by judges with Russian-sounding names while for the other we excluded all decisions by those judges. The control variable for Russian judges did not have a significant coefficient and the substantive results of either analysis did not differ from the ones presented below.

## METHODS AND DATA

Our data comprise a sample of decisions of trial level judges for years 1995 through 2001. We obtained the decisions from the Estonian Supreme Court that collected copies of the opinions of the trial courts under an informal agreement. For these six years we selected all cases involving embezzlement. There are both practical and theoretical justifications for such a decision. The total number of embezzlement cases for the period covered is manageable so that we are able to include the universe of all cases. Further, by concentrating on one type of crime only, we can avoid comparing the severity of punishment for crimes with significantly different levels of seriousness. Such comparison would have been meaningful if we had been able to code a considerably large number of crimes of different type — a task too difficult to accomplish for two researchers. Further, our research questions require the range of sentences to vary. In order to achieve this, we had to consider a complex crime that usually allows for more variation than simple crimes on the decision about guilt. Indeed, the average rate of acquittal in Estonian courts is 2.7% (Ministry of Justice 2001), compared with 8.4% in the case of embezzlements. Unfortunately, there is no official data on the acquittal rates when charges are contested (in our sample, the rate is 35.3%). We acknowledge that this makes embezzlement not a totally representative crime for all crimes handled by the Estonian courts. Yet, to a certain extent, such non-representativeness is also desired. That is, the embezzlement

cases constitute the "hard" cases for a part of our theory: The effect of judge characteristics on this type of crime may be more pronounced than on other types of crime, as embezzlement — a crime against socialist property — was a serious crime during the Soviet rule (Łoś 1988), especially so towards the end of the Soviet era when the economic performance declined (Smith 1996: 142). The perception of the seriousness of embezzlement cases may compel the "old" judges to be stricter about conviction and to hand harsher sentences. However, if we find that the Soviet background of a judge has no effect on the decision-making in the embezzlement cases, there is less reason to believe that it has any significant effect on judicial decision-making concerning other types of crime. Further, we can see no theoretical reason for why embezzlement cases would not be representative for the purposes of determining the effect of the other variable of interest — the ethnic background of the defendant.

Our analysis would be impossible if the judges possessed no discretion in determining the sentences or if the possible range of sentences would be limited with no variation in our dependent variables. Fortunately, the Estonian criminal justice system allocates a lot of discretion to the judge in determining the sentence. Sentences are usually limited only by statutory lower and upper bounds. A list of factors is given in order to help the judge choose the appropriate sentence within the boundaries. However, there are no sentencing grids similar to the U.S., and therefore, the list of sentencing factors does not limit the discretion significantly. In exceptional cases, the judge may even choose a sentence below the lower limit. In many cases, the judge may also choose between a fine and a prison sentence. The mandated sentences for the embezzlement were: a fine or a prison sentence of up to four years for little damage, a prison sentence from three up to eight years for greater damage. Within these limits, there are considerable differences in the decision outcomes (see the Appendix for the descriptive statistics).

The cases and decision motivations were not centrally filed before 1995 and, thus, not available for coding. However, the universe of a specific type of cases for six years — involving altogether 749 suspects — gives us a reasonable basis for making inferences. As stated, we coded most variables included in the analyses from the motivations of the trial court decisions. The data about the background information of judges were coded from Riigikohus (1996) and the personnel files of the Ministry of Justice.

*Operationalization of variables*

In order to measure decision outcome, we coded four different variables. The first of these measures captures the *determination of guilt*. As argued above, we believe that it is a valid indicator of the harshness of a judge showing the willingness of the judge to protect individuals against the state. That is, holding the legal provisions constant, if a judge overturns the prosecutor's case and acquits the suspect, he or she is supportive of individual rights against the

arbitrary intervention by the state. The measure for the determination of guilt is binary, coded 1 when suspect is found guilty and 0 otherwise.

The severity of punishment is measured by three different indicators: the *in/out decision*, the *length of incarceration* and *the amount of fine*. The first of these measures indicates whether the prison sentence was administered or not. It is coded 0 if the judge chose the punishment by fine and also if the prison sentence was suspended. Thus, only those cases where the convict actually faced imprisonment were coded 1.

In Estonia, even if the sentence were suspended, the length of imprisonment would still be determined in the same decision in years and months. If the offender were to break the parole rules, the length of imprisonment would be automatically determined according to the previous decision. Thus, we also coded a variable capturing the length of incarceration as stated in the decisions (regardless of whether it was actually administered). Certain caution has to be taken about using this measure, though, as in the overwhelming majority of cases probation was administered instead of actual incarceration. Thus, it may be that as the judge is aware that the convict will actually not face incarceration, the length of punishment may appear not a real but only a symbolic punishment. However, we believe that differences in the length of incarceration, even when the sentence was not in fact administered, should be informative for detecting discrimination. Indeed, given that various international organizations and domestic actors constrain judges by scrutinizing the easily observable aspects of their behavior, much of the actual discrimination may take a symbolic form. The length of incarceration is measured in months coded from the court decisions.

The *amount of fine* is yet another indication of the severity of punishment. The variable is measured in FY 1995 constant Estonian kroons, coded from the court decisions and re-calculated based on the official statistics of the Estonian Statistical Office. In Estonia, the amount of fine is not dependent on the offender's income.

The two independent variables of interest — the *defendant nationality* and the *Soviet experience* — are measured by dummy variables. We coded the Estonian defendants as 0 and the rest of the defendants as 1. As the court decisions contained explicit information on the ethnicity, we did not have to infer the ethnicity from the names of the defendants. The overwhelming majority of non-Estonians were Russians or Russian-speaking people.

The Soviet experience variable was coded 1 for those judges that had served as judges or prosecutors during the previous regime and 0 for judges without such experience. A note is in order about such measurement. One might argue that any binary classification of judges to those with Soviet experience and those without one is arbitrary because even if a judge is nominated or appointed to office some years after the regime change, his or her previous experience and education dates back to the Soviet era. However, we expect that the experience of actively participating in the criminal justice system of the previous regime is

more consequential to the behavior and attitudes of judges than just having lived and studied under that regime.

The measurement of the control variables is explained in the Appendix, which also presents the descriptive statistics for all variables included in the analyses.[7] Certain variables have some missing values, which is why the total number of cases does not always add up to 749.

## ANALYSIS AND RESULTS

We estimated four different models according to the dependent variable used. As we have multiple observations for individual judges, these observations are not independent. Thus, we use the Huber/White/sandwich estimator of the variance instead of the conventional MLE variance estimator within the clusters of observations by judge for all four models. The first model uses logit estimation to predict the determination of guilt. Excluding cases where the suspects confessed their crime, 156 decisions are included in the analysis.

TABLE 1: LOGIT MODEL PREDICTING CONVICTION RATES

| **Variable** | **Odds ratio** | **b (robust SE)** |
|---|---|---|
| Soviet experience | .575 | –.554 (.374) |
| Defendant nationality | .695 | –.364 (.394) |
| Defendant sex | 4.872 | 1.583 (.494)*** |
| Defendant education: secondary | 1.119 | .112 (.602) |
| Defendant education: higher | 1.249 | .222 (.690) |
| Defendant previously convicted | 2.643 | .972 (.836) |
| Constant | 1.602 | .471 (.614) |
| N | 156 | |
| Chi square | 17.212 | |
| Percent correctly predicted | 69.4 | |
| Pseudo-$R^2$ | .146 | |

Note: Robust standard errors in parentheses, *p< .05, **p< .01, ***p< .001.

As presented in Table 1, the logit model is significant with a chi-square of 17.212 and a pseudo-R-square of .146. The full model is able to predict correctly 69.4 percent of times whether the suspect is found guilty or not. This is a 5% improvement in the prediction over the model that does not include any of the independent variables. With regard to the conventional indicator of variable importance — the level of statistical significance — only one variable

exceeds the significance level. We find that defendant's sex has a significant effect on the determination of guilt: the odds of female suspects to be found guilty are estimated to be 4.9 times as high as male suspects, other things being equal.

Most importantly, however, neither defendant nationality nor the Soviet experience of the judge has a significant effect on the determination of guilt. The failure to reject the null hypothesis that there is no relationship between a decision on conviction and suspect nationality supports the argument about non-discrimination in judicial decision-making. Further, we find no support for the argument that there is a significant difference between the "old" and the "new" judges in their decisions about the determination of guilt.

Table 2 presents the results for the logit model predicting the probability of actual incarceration. The analysis excludes the cases where the defendant was not found guilty. Excluding also the observations with missing values, the sample size for this analysis is 580. The overall model is significant with a chi-square of 53.847 and the pseudo-$R^2$ of .134. However, as was the case with the determination of guilt, the probability of actual incarceration is independent of the Soviet experience of the judge and the ethnicity of the defendant. The only two significant predictors of the likelihood of actual incarceration are the level of education and the previous criminal record of the defendant. That is, defendants having secondary and higher education are less likely to face actual imprisonment than defendants with primary education only, while the previous criminal record of the defendant increases the probability of imprisonment significantly.

TABLE 2: LOGIT MODEL PREDICTING ACTUAL INCARCERATION

| **Variable** | **Odds ratio** | **b (robust SE)** |
|---|---|---|
| Soviet experience | .502 | –.688 (.479) |
| Defendant nationality | 1.889 | .687 (.384) |
| Defendant sex | .756 | –.279 (.475) |
| Defendant education: secondary | .365 | –1.007 (.394)** |
| Defendant education: higher | .425 | –.855 (.385)* |
| Defendant previously convicted | 4.077 | 1.405 (.412)*** |
| Defendant confesses | 1.032 | .031 (.629) |
| Amount of damage | .990 | –.009 (.322) |
| Constant | .034 | –2.514 (1.493) |
| N | 580 | |
| Chi square | 53.847 | |
| Percent correctly predicted | 94.4 | |
| Pseudo-$R^2$ | .134 | |

Note: Robust standard errors in parentheses, *p< .05, **p< .01, ***p< .001.

The next two models estimate the severity of punishment — the amount of fine and the length of incarceration respectively. The nature of these two dependent variables creates a potential for selection bias as not all decisions impose a fine, and those that do, cannot impose an incarceration. The result of this problem is that simple OLS regression of the amount of fine or the length of incarceration on a set of predictors may lead to downward-biased estimates. As standard with these types of data, Heckman modeling is used to correct for the selection bias. (Peterson & Hagan 1984). The Heckman procedure will account for the propensity to impose a fine (or imprisonment) when estimating the effect of the set of independent variables on the amount of fine (or the length of imprisonment).[8] Both the amount of fine and the length of incarceration are highly skewed with small fines and short punishments being more frequent than big fines and lengthy punishments. Thus, as common in the sentencing research (Albonetti 1997; Weisbud et al. 1991), we use the natural log of both variables in the analysis.[9]

Table 3 presents the results for both the analysis of the amount of fine (column 1) and that of the length of incarceration (column 2). The chi-square and log likelihood statistics indicate a good fit for both models. The two models are also rather consistent in terms of the significant explanatory variables associated with the severity of punishment. This is comforting given the concerns about the appropriateness of the length of incarceration measure discussed above. That is, as the two alternative models behave in similar manner, we can be somewhat more confident that both of these measures of the dependent variable are capturing a similar underlying concept of the severity of punishment.

In terms of substantive findings the null hypothesis that defendant's nationality and the severity of punishment are related cannot be rejected based on either estimation. Similarly, the working experience within the Soviet judicial system does not appear a significant predictor of the severity of punishment in both models. Furthermore, neither of these variables is a significant predictor also in the selection model. That is, defendant's nationality appears to have no effect on the decision of whether the punishment will be in form of a fine or incarceration. This decision does also not depend on whether it is made by an "old" or a "new" judge. In other words, we find no evidence of discrimination based on nationality in court decisions and no significant difference between judges with experience under different regimes. The consistency of these findings across models increases the confidence in the empirical validity of the non-discrimination claim.

Among the control variables, the most significant predictors of the severity of punishment in both models are, intuitively as well as statistically, the amount of damage and the prior conviction of the defendant. The increase in these variables is associated with an increase in the severity of punishment. Guilty plea is associated with smaller fines while it has no significant effect on the length of incarceration. There is a weak effect of the defendant's level of

education on the length of incarceration with those having higher education receiving lengthier sentences.

TABLE 3: HECKMAN MODELS PREDICTING THE DETERMINANTS OF THE SEVERITY OF PUNISHMENT

| | Dependent variable: the amount of fine | Dependent variable: the length of incarceration |
|---|---|---|
| **Selection equation** | | |
| **Variable** | **b (robust SE)** | **b (robust SE)** |
| Soviet experience | .117 (.113) | –.119 (.181) |
| Defendant's nationality | –.192 (.139) | .095 (.099) |
| Defendant's sex | –.210 (.131) | .388 (.060)*** |
| Defendant's education: secondary | .323 (.135)* | –.323 (.079)*** |
| Defendant's education: higher | .413 (.225) | –.429 (.125)*** |
| Defendant previously convicted | –.135 (.157) | .187 (.139) |
| Defendant confesses | –.028 (.181) | .498 (.098)*** |
| Amount of damage | –.985 (.032)*** | .797 (.050)*** |
| Constant | 3.269 (.478)*** | -3.053 (.274)*** |
| **Outcome equation** | | |
| **Variable** | **b (robust SE)** | **b (robust SE)** |
| Soviet experience | .012 (.055) | .005 (.079) |
| Defendant's nationality | –.009 (.049) | .103 (.099) |
| Defendant's sex | –.045 (.067) | –.119 (.076) |
| Defendant's education: secondary | .060 (.055) | .219 (.121) |
| Defendant's education: higher | .019 (.105) | .346 (.141)* |
| Defendant previously convicted | –.236 (.066)*** | –.044 (.119) |
| Defendant confesses | .392 (.078)*** | .671 (.088)*** |
| Amount of damage | .172 (.065)*** | .302 (.095)*** |
| Probation | | .885 (.291)*** |
| Constant | 2.156 (.274)*** | –1.072 (.505)* |
| Number of observations | 656 | 656 |
| Uncensored observations | 218 | 419 |
| Log likelihood | –371.809 | –840.081 |
| Chi-square | 60.12*** | 289.6*** |

Note: Robust standard errors in parentheses; *p< .05, **p< .01, ***p< .001.

Overall, none of the four analyses performed provide evidence of any significant discrimination based on the nationality of the defendant in judicial decision-making. Non-Estonians are not more likely to be convicted than Estonians and minorities do not face harsher sentences once convicted. Further, none of the models supports the claim that there are significant differences in the decision-making of "old" and "new" judges. Rather, the empirical findings presented here allow concluding that in their most important decisions — the

determination of guilt and of the severity of punishment — the former Soviet judges are not different from the new generation of judges who have no experience in the governing structures of an authoritarian regime.

## CONCLUSION

The current study was an exploration of the judicial behavior in Estonia after transition. Our empirical tests do not find difference in the behavior of the judges with working experience in the judicial system of the previous regime compared with the judges without such experience. Also, we find no evidence that the Russian minority — who used to be the dominant group just a decade before — is treated differently from the Estonian majority by the Estonian judicial system. However, our study is limited by the focus on one type of crime in one country only. Therefore, our findings about the impartiality of the judicial system can form only a basis for further theorizing on and empirical investigation of the determinants of judicial behavior in nascent democracies. As the Estonian situation is similar to many other transition countries, our work does have some general implications.

The finding of suitable court personnel is a problem faced by all transition countries. Those judges who worked as a part of the totalitarian regime are generally not perceived as suitable for the fulfillment of the judicial duties in the democratic regime. Our finding that the Soviet era criminal justice system experience in itself is not a significant determinant of judicial behavior in transitional period leaves room for alternative explanations such as personal characteristics of judges, their knowledge and competence. Our study implicates that the screening of judiciary with the goal of establishing a qualitatively different judicial system from the previous one should not result in dismissal of most of the "old" judges. Replacing existing judiciary *in toto* appears much less relevant than, for example, investing in the education and training of judges as well as in the resources of courts.

The discrimination of ethnic minorities is also a problem facing many transition countries. The activities of the OSCE High Commissioner for National Minorities offer ample proof that discrimination is a serious issue throughout Central and Eastern Europe (Kemp 2001). Moreover, like Estonia, most transition countries were under international surveillance with regard to their official policies towards minorities. Our analysis supports the argument that the transition judiciary can be an independent actor established to fairly determine case outcomes and not a tool in the service of promoting the fortunes or agenda of the new ethnic 'in' group. The judiciary can be viewed as an institution where ethnic minorities may claim equal rights with the majority. Further studies in different national settings are necessary to make more firm generalizations, but if it is confirmed that no discrimination occurs in general,

new democracies might consider trusting their judges with more discretion so that more equitable solutions can be found in specific cases.

Further work on judicial behavior in transition would be highly valuable. People's trust in the courts and the judicial system are important preconditions for regime stability and the impartiality of courts is essential for securing this trust (Rothstein & Stolle 2002). The more is known about the subjective determinants of judicial decision-making, the easier it is to ensure the fairness of that system.

## NOTES

[1] There is a vast literature on the situation of minorities in Estonia as well as Estonian minority policies. According to Ruutsoo (2002), more than 200 books, book chapters, or journal articles have been written on the issue.

[2] There may be other reasons to exclude judges of the previous regime, including retribution for past behavior or the need to bolster the trustworthiness and general appeal of the criminal justice system. Therefore, no attempt is made here to conclusively answer the question of whether former judges should be excluded or not.

[3] Although there was no threat of outright dismissal after the judge was reappointed, tenure was granted only after a three-year probationary period. This probation period may have influenced the behavior of "old" judges and compelled them to appear more loyal to the new regime in order to secure tenure. Later, however, it became clear that the probation was only nominal, not substantive as no review was performed on any judge after the three years (in fact, no procedures or institutions were created to perform a review) and all of the judges were tenured automatically. Further, it should be noted that insufficient knowledge of Estonian was also not a reason for outright dismissal when the judicial reform started in 1993. The judges were to learn Estonian by 1995, and a few judges who did not do so were then dismissed.

[4] The 2003 elections point to this direction. One of the most visible campaign promises of the newly founded Res Publica party, whose leader became the prime minister after the elections, was to increase criminal penalties. This promise found considerable support among the population.

[5] Even today Estonians express strong feelings about the injustice towards their ethnic kin protesting against the Soviet regime. For example, in 2002, the Minister of Internal Affairs was forced to resign after it became public that he participated as the Soviet Supreme Court judge in a case on appeal where three young men were sentenced to prison for vandalism, whereas vandalism mostly consisted of writing anti-Soviet slogans on the walls.

[6] We cannot use sophisticated previous criminal record scores that are common in the U.S. sentencing literature as such scores are not calculated in Estonia and the judges are only obliged to take into account the previous record of the defendant in general.

[7] In addition to the variables listed in the Appendix, we also coded the following indicators for the preliminary analyses: defendant's employment, defendants' age in years, judge's age in years, judge's sex, the type of victim (either public or private

entity), and dummy variables for decision years. As none of these variables appeared significant in any of the preliminary analyses and we dropped them from the final models presented here.

[8] The models are estimated using the full maximum likelihood (heckman) method in STATA 7.0.

[9] For similar reasons, the independent variable of the amount of damage is also logged before it is used in the analyses.

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**Description of control variables**

| Variable name | Description |
|---|---|
| Defendant's sex | 1 = female |
| Defendant's education: primary | Defendant's highest educational attainment, 1 = primary |
| Defendant's education: secondary | Defendant's highest educational attainment, 1 = secondary |
| Defendant's education: higher | Defendant's highest educational attainment, 1 = higher |
| Defendant previously convicted | The Estonian Criminal Code (Art. 38 (1)) states that defendant's prior record is a significant factor in sentencing. A criminal with a prior record is considered more dangerous and less likely to undergo rehabilitation if sentences are too mild. 1 = yes |
| Defendant confesses | The Estonian Criminal Code (Art. 37) states that voluntary confession and regret should lead to a milder sentence. 1 = yes |
| Probation | Although the Estonian Criminal Code does not mandate specifically when to administer probation instead of incarceration, it allows for the former. 1 = yes |
| Amount of damage | FY 1995 constant Estonian kroons, log-transformed for the analyses. |

**Descriptive statistics and frequencies for all variables in the analysis**

| Variable | N | Mean | SD | Min | Max |
|---|---|---|---|---|---|
| Amount of fine (Estonian kroons) | 232 | 1731.243 | 1365.864 | 61.6 | 9799.79 |
| Ln(amount of fine) | 232 | 3.103 | .370 | 1.79 | 3.99 |
| Amount of damage (Estonian kroons) | 705 | 124,092.4 | 780,146.5 | 92.4 | 18,542,000 |
| Ln(amount of damage) | 705 | 4.026 | .831 | 1.97 | 7.15 |
| Length of incarceration (months) | 439 | 22.331 | 14.248 | .2 | 70 |
| Ln(length of incarceration) | 439 | 2.763 | 1.009 | 1.609 | 4.248 |
| | **N** | **0 (count)** | **1 (count)** | **0 (%)** | **1 (%)** |
| Guilty (excluding suspects pleading guilty) | 156 | 55 | 101 | 35.3 | 64.7 |
| Soviet judge (number of decisions) | 729 | 390 | 339 | 52.1 | 46.5 |
| Suspect sex | 749 | 499 | 250 | 66.6 | 33.4 |
| Suspect nationality | 749 | 579 | 170 | 77.3 | 22.7 |
| Suspect previously convicted | 749 | 604 | 145 | 80.6 | 19.4 |
| Suspect confession | 748 | 156 | 592 | 20.9 | 79.1 |
| Probation | 455 | 38 | 417 | 8.4 | 91.4 |
| Suspect education: primary | 735 | | 140 | | 18.7 |
| Suspect education: secondary | 735 | | 524 | | 71.3 |
| Suspect education: higher | 735 | | 71 | | 9.7 |

# IV

Taavi Annus and Ants Nõmper,
"The Right to Health Protection in the Estonian Constitution."
*Juridica International: University of Tartu Law Review* vol. 7 (2002), pp. 117–126.

# THE RIGHT TO HEALTH PROTECTION IN THE ESTONIAN CONSTITUTION

**Taavi Annus and Ants Nõmper**[1]

## Introduction

In April 2002, the headlines in the Estonian newspapers were dominated by a story about a woman suffering from a rare form of leukaemia. There was a medicine which had good, although not guaranteed, prospects for curing her. The problem, however, was that she could not afford the medicine, and the Estonian Health Insurance Fund refused to compensate for the expensive medicine. This case stirred considerable debate. During this debate, also the constitutionality of the refusal was raised as an issue.[2]

The right to "health",[3] the right to "health protection,"[4] or the right to "health care"[5] has been included in the human rights discussion already for a considerable time. The possibility of a person to live a healthy life is a necessary precondition for a dignified life and for enjoying many other fundamental rights. It is no wonder that the fight for a healthy life is one of the most important activities of human rights organisations — one cannot enjoy political liberties if one is critically ill.[6] The right to health protection is tightly connected

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[1] The authors would like to thank Ms. Berit Aaviksoo for her helpful comments on an earlier draft of the article. The research was partly funded by the Estonian Science Foundation grant No. 4532.

[2] *E.g.* T. Koch. Verevähi juhtum näitab ebaõiglust raviraha jagamisel (The Case of Leukaemia Demonstrates the Injustice in Distributing Health Care Finances). — Eesti Päevaleht, 10.04.2002. Available at http://www.epl.ee/leht/artikkel.php?ID=201161 (15.04.2002) (in Estonian).

[3] B. Toebes. The Right to Health. — A. Eide, C. Krause and A. Rosas (eds.). Economic, Social and Cultural Rights: A Textbook. 2nd. ed. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 2001, pp. 169-190; B. Toebes, The Right to Health as a Human Right in International Law. Antwerpen *et. al.*: Intersentia, 1999; S. D. Jamar, The International Human Right to Health. — S.U.L. Rev. 1994, p. 1; V. Leary. The Right to Health in International Human Rights Law. — Health and Human Rights, 1994, Vol. 1 No. 1, p. 24.

[4] *E.g.* The Revised European Social Charter (hereinafter ESC), article 11 is titled "The right to protection of health."

[5] A. Exter; H. Hermans (eds.). The Right to Health Care in Several European Countries. The Hague, London, Boston: Kluwer, 1999; T. J. Bole III and W. B. Bondeson (eds.). Rights to Health Care. Dordrecht *et. al.*: Kluwer Academic Publishers, 1990.

[6] Among the most important international organisations, the World Health Organisation is devoted to the single issue of health. In the last years, however, even

to many other rights, such as the right to food, shelter, healthy working conditions, healthy environment and access to health information.

The right to health protection has found its way into the Estonian Constitution — § 28 provides that "everyone has the right to health protection." At the same time, the right to health protection and social rights in general have so far drawn little attention in the Estonian legal literature. For instance the most comprehensive legal analysis of the Constitution prepared under the auspices of the Ministry of Justice[7] does not contain guidelines on furnishing the scope of the right to health protection.

We base our discussion on two main sources. Firstly, we show how the social rights in the constitution have been applied by the Estonian courts and interpreted by the Estonian scholars in general. The interpretation of the right to the protection of health should fit into the general understanding of the nature and importance, and especially the justiciability of social rights. Secondly, we discuss how the international obligations Estonia has entered into influence the understanding of the social rights in general and specifically the right to the protection of health.[8]

As the constitutional right to health has not been an object of legal battles, we show how the courts should interpret this provision and whether and to what extent rights in the field of health protection actually do exist.

## 1. Historical and international background of the right to health protection

### 1.1. The constitutional history

The constitutions of 1920 and of 1938 contained several provisions related to social rights,[9] although their general application and enforceability in the courts was doubtful. In this respect, the provisions of the Constitution of the Soviet

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Amnesty International, known for its fight for civil and political rights, has broadened its sphere of activity and promotes the protection of health, see http://web.amnesty.org/rmp/hponline.nsf (15.04.2002)

[7] Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpparuanne (The Final Report of the Constitutional Expert Commission). Available at http://www.just.ee/index.php3?cath=1581 (15.04.2002) (in Estonian).

[8] There are a couple of bibliographies available on the topic of health and human rights. At the UC, Berkeley, Molly Ryan has compiled a bibliography as of Fall 1997, see http://globetrotter.berkeley.edu/humanrights/bibliographies (15.04.2002). Amnesty International provides a bibliography also as of 1997, http://www.web.amnesty.org/ai.nsf/index/ACT750031997 (15.04.2002).

[9] For example, Article 25 of the Constitution of 1920 provided that the regulation of economic life should be based on the principle of justice, which aims to secure decent maintenance in case of youth, old age, incapacity for work and accident.

Union were radically different, providing for the maintenance of a net of health care facilities (Art. 24) and for the right to health care (Art. 42). This right was assured in practice in several ways, including the provision of qualified health care services for free in state-owned health care facilities, implementation of comprehensive disease prevention programs etc. Ability to provide services for free had to do with the communist economy system, which kept salaries of doctors low, set forth fixed prices for infrastructure services rendered to health care facilities and allowed to use mainly only low-priced domestic pharmaceuticals and medical equipment.[10]

In contrast, the inclusion of social rights in the post-soviet constitutions has not been easy in any Eastern European country. The need to abandon the socialist system has also meant the tendency to neglect anything "social." Civil and political rights that people were deprived of under the previous regime seemed to claim priority.[11]

However, some social rights do exist in the Estonian current Constitution. Besides the most important article, namely Art. 28 (guaranteeing also the right to health protection), several other rights like the right to education and several work-related rights are ensured. Article 10 of the constitution enshrines the principle of the social state and one may easily say that the specific social rights give clear content to the general principle. As the constitution also determines that the Estonian State is founded on justice and human dignity,[12] the constitution receives a certain social accent besides the generally liberal tone.[13] However, a clear-cut choice between liberal, conservative or social democratic welfare models[14] has not been made in the Estonia, with all three models being prominent in the political discussions.

The constitution provides for a dignified life for everyone. According to the article 14, "guaranteeing rights and liberties shall be the responsibility of the legislative, executive, and judicial powers, as well as of local government." The

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[10] I.Sheiman. Excessive State Commitments to Free Health Care in the Russian Federation: Outcomes and Health Policy Implications. — A. Exter, H. Hermans (eds.) (Note 5), p. 103.

[11] C. Taube. Constitutionalism in Estonia, Latvia and Lithuania: A Study in Comparative Constitutional Law. Uppsala: Iustus Förlag, 2001, p. 230*ff.*; W. Drechsler, T.Annus. Die Verfassungsentwicklung in Estland von 1992 bis 2001. — Jahrbuch des öffentlichen Rechts, N.F. Bd. 50, 2002, S. 481.

[12] According to the preamble, the Estonian State is founded on "liberty, justice and law" and shall "serve to protect internal and external peace and provide security for the social progress and general benefit of present and future generations." Human dignity as a value is protected by § 10.

[13] For the liberal interpretation of the basic rights see R. Alexy. Põhiõigused Eesti Põhiseaduses (Basic Rights in the Estonian Constitution). — Juridica 2001.a. eriväljaanne (in Estonian).

[14] G. Esping-Andersen. The Three Worlds of Welfare Capitalism. Cambridge: Polity Press, 1990.

Estonian constitution deliberately does not distinguish between "positive" and "negative" obligations, or civil/political rights and social rights. These rights are universal, indivisible, interdependent and interrelated.[15]

### 1.2 Impact of international Law on the right to health protection

An important source of interpretation of the right to health protection derives from the international law. Its role in interpreting the Estonian constitutional provisions, especially the human rights provisions, has been considerable.[16] Most often, the Constitutional Court has used the European Convention on Human Rights[17], some references to the ICCPR[18] and the Convention on the Rights of Child[19] have been made as well. Besides the fact that the international human rights law has direct domestic applicability in the Estonian courts, the treaty had often been used for interpretation of the Estonian Constitution and other legal provisions. Considering the "friendliness" of the court towards international law, the use of social rights treaties is highly probable.

Estonia has recently ratified several international documents regulating more or less directly the right to health protection. Such provisions are included in the 1948 Universal Declaration of Human Rights (Art. 25 (1)),[20] the International

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[15] For the inseparability of civil/political and social rights see United Nations, World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, Part I, paragraph No. 5.

[16] Generally on the role of international law in the Estonian domestic system see H. Vallikivi, Domestic Applicability of Customary International Law in Estonia. — In the present issue, p. 28-38; H. Vallikivi, Välislepingud Eesti õigussüsteemis: 1992. aasta põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus (Treaties in the Estonian Legal System: The Domestic Validity and Applicability of Treaties Concluded under the Constitution of 1992). Tallinn: Õiguskirjastuse OÜ, 2001.

[17] H. Vallikivi, Euroopa inimõiguste konventsiooni kasutamine Riigikohtu praktikas (Use of the European Convention on Human Rights in the practice of the Supreme Court). — Juridica, 2001, No. 6, p. 399 (in Estonian).

[18] For example, the decision of the Criminal Chamber of the Supreme Court, 24 September 2001 (3-1-3-11-01). — Riigi Teataja (The State Gazette) I 2002, 2, 12 (concerning the right to be present during the court proceedings) (in Estonian).

[19] The decision of the Constitutional Review Chamber of the Supreme Court, 10 May 1996 (3-4-1-1-96). — Riigi Teataja (The State Gazette) I 1996, 35, 737 (concerning the right of minors to form unions) (in Estonian).

[20] "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Covenant on Economic, Social and Cultural Rights (Art. 12 (2) d)[21] and the European Social Charter (Art. 11, 12 and 13), as well as in more specific human rights treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (Art. 12), Convention on the Rights of the Child (Art. 24) and the Convention on Human Rights and Biomedicine (Art. 3).[22] Estonia is also a member of the World Health Organisation, whose constitution states that the "enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being."[23] The most recent human rights instrument, the Charter of Fundamental Rights of the European Union, also provides for the right to health care (Art 35).[24]

These international provisions have been interpreted by the relevant treaty enforcing institutions. Two important institutions should be mentioned here. Firstly, in May 2000 the UN Committee on Economic, Social and Cultural Rights issued the General Comment No. 14, interpreting the right to the highest attainable standard of health. Secondly, the European Committee of Social Rights has developed a considerable case-law on the health protection rights.

The Estonian Supreme Court has not yet referred to a treaty guaranteeing social rights, including the ESC. Part III of the Appendix to the ESC contains the clause that it "is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof." However, the court is by no means prevented from interpreting the domestic constitutional provisions by including the ESC case-law in its considerations.[25]

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[21] "States shall take steps, including the creation of conditions which would assure to all medical service and medical attention in the event of sickness, to achieve the full realisation of everyone's right to the enjoyment of the highest attainable standard of physical and mental health."

[22] "Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality."

[23] WHO Constitution. Preamble. Available at: http://www.who.int/ism/mis/WHO-policy/index.en.html (15.04.2002)

[24] "Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities."

[25] In fact, several courts have applied the charter in the domestic practice. See D. Harris and J. Darcy. The European Social Charter. Ardsley: Transnational Publishers, 2001, pp. 395–396.

## 2. Justiciability of the right to health protection

The enforceability of social rights in the courts (justiciability) is clearly controversial.[26] The court system and court procedures are usually designed to protect the interests represented before it. Health care financing decisions are called "polycentric", which means that they involve a number of different competitive and antagonistic interests and in a common legal procedure, where a single plaintiff faces a single defendant it would be difficult to ensure that all these interests were adequately represented before the court.[27] It is accepted that the legislator has considerable margin of appreciation in determining the adequate measures for protecting social rights and that the courts must not excessively interfere with social policy making.[28] This is especially important in the transition process from socialist to the market-based economic system.[29] At the same time, the justiciability is not *a priori* impossible. Whenever the social rights provisions are clear enough and enable the courts to apply them to concrete cases, they are fully entitled to do so.[30] The European Committee of Social Rights has taken the similar position and demanded that states provide for a justiciable right to health protection.[31]

The Estonian Supreme Court has rarely considered social rights in its decisions so far. However, it has clearly obliged the state to engage in positive action to protect family life.[32] The Civil Chamber of the Supreme Court has gone quite far and demanded that a municipality must not evict insolvent and indebted tenants from municipal buildings even when they have not paid rent

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[26] R. Maruste. Põhiseadus ja selle järelevalve (Constitution and Its Review). Tallinn: Juura 1997, lk. 100 (in Estonian). Generally see T. Annus. Riigiõigus (Constitutional Law). Tallinn: Juura 2001, lk. 92 (in Estonian).

[27] See *e.g.* N. W. Barber. Prelude to the Separation of Powers. — Cambridge Law Journal, 2001, Vol. 60 No. 1, p. 75.

[28] Decision of the German Constitutional Court Bundesverfassungsgericht. — Neue Juristische Wochenschrift, 1971, p. 366 (in German).

[29] A. Sajo. How the Rule of Law Killed Hungarian Welfare Reform. — East European Constitutional Review, 1996, Vol. 5 No. 1, p. 31; generally in Eastern Europe after transition see H. Schwartz. The Struggle for Constitutional Justice in Post-Communist Europe. Chicago and London: University of Chicago Press, pp. 63–65, 91–94, 154–156, 232–233; B. Bugaric. Courts as Policy-Makers: Lessons from Transition. — Harvard International Law Journal, 2001, Vol. 42, p. 247.

[30] Among many authors, see G.J.H. van Hoof, The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views. — P. Alston and K. Tomaševski (eds.). The Right to Food. Dordrecht: Martinus Nijhoff Publishers, 1984, pp. 97–110.

[31] M. Scheinin. Economic and Social Rights as Legal Rights. — A. Eide *et. al.* (eds.) (Note 3), pp. 29–54, 43.

[32] Decision of the Constitutional Review Chamber of the Supreme Court, 5 May 2001 (3-4-2-1-01). — Riigi Teataja (The State Gazette) III 2001, 7, 75 (in Estonian).

for a considerable time period. If the tenants are qualified for social assistance because of unsatisfactory income, the municipality must provide for housing.[33] From these few decisions we see that the court is willing to enforce at least some social rights. Therefore, the rights to health protection should also be justiciable in principle.

The most important consideration behind not recognising justiciability of the right to health protection is the financial one.[34] The level of protection might depend on the availability of resources. For example, the CESCR provides for "progressive realisation" of social rights, accepting that full realisation of all economic, social and cultural rights is not possible immediately or even in short term.[35] To this corresponds the "dynamic" interpretation of certain provisions of the ESC, where "dynamic" represents the idea that level of protection is dependent on the level of resources available.[36]

The Estonian Constitution does not explicitly provide for the dynamic or progressive character of social rights, but it allows for restrictions in the fundamental rights as long as they are necessary in the democratic society (Art. 11). Long-term economic stability, and the balance of economic development might certainly be goals that justify the limitations for providing free health care to everyone. Also, the social rights must not mean that some groups in the society become privileged at the expense of others by demanding certain free services from the state. Under limited resources, all public welfare services need sufficient attention.[37]

The dynamic nature of the social rights does not mean, of course, that the rights exist only at will of the state. Certain "core rights" should be guaranteed immediately.[38] The inactivity of the state must not mean that no constitutional objections could be presented. The international law demands that the state has to move as expeditiously as possible towards the full realisation of the rights.

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[33] Decision of the Civil Chamber of the Supreme Court, 18 October 2000 (3-2-1-104-00). — Riigi Teataja (The State Gazette) III 2000, 25, 278 (in Estonian).

[34] Of course, civil and political rights cost as well. Therefore, the specificity of social rights is not as great as often claimed. See S. Holmes, C. Sunstein. The Cost of Rights: Why Liberty Depends on Taxes. New York *et. al.*: Norton, 1999.

[35] M. Craven. The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development. Oxford: Clarendon Press, 1995, pp. 128-134. See also CESCR General Comment No. 3, UN Doc. E/1991/23, 1990.

[36] D. Harris, J. Darcy (Note 25), p. 27.

[37] On the example of higher education, see BVerfGE 33, 303, 334*f.* (Numerus Clausus I).

[38] B. Toebes 2001 (Note 3), pp. 175-177; UN CESCR. The Right to the Highest Attainable Standard of Health. General Comment No. 14, pp. 43–45. Such core rights include maternal and child health care, immunization, provision of essential drugs, education concerning health prevention and adequate supply of water and sanitation.

The state has to have at least a "plan of action" to achieve higher standards of health protection.[39]

## 3. Elements of the right to health protection

The obligations of the state with respect to the right to health protection can be divided into the obligation to respect, to protect and to fulfil. The obligation to respect prevents the state from damaging one's health; the obligation to protect demands action from the state to prevent interference from third parties. The obligation to fulfil forces the state to adopt various measures to protect the health of the individuals.[40] We do not follow this widely used distinction, but discuss three types of most common rights concerning the health protection: the liberal right to non-interference by the state, the right to "underlying conditions"[41] for healthy life and the right to health care.

It is inevitable that no state can guarantee the healthy life for everyone.[42] As health "is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity,"[43] reasons for lacking health can be various. Socio-economic reasons such as unhealthy nutrition, unsanitary conditions of living, unhealthy working practices certainly play a role. For many diseases, the unhealthy person is responsible him- or herself, for example because of smoking or little exercise. It is obvious that the state cannot be responsible for each and every health-related problem. Also, the state cannot be held responsible for curing all health-related problems. Therefore, it is not necessary and from economic point of view also impossible to interpret and furnish the right to health protection and its elements as comprehensively as possible.

### 3.1. Right to be free from invasion of health

The right to health protection includes traditional liberal self-determination rights. Alexy points out that the Constitution does not explicitly include the

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39 UN CESCR General Comment 14 (Note 40), p. 43 (f).

40 On these categories, see A. Eide, Economic, Social and Cultural Rights as Human Rights. — A. Eide *et. al.* (eds.) (Note 3), p. 13*ff.* In the field of health protection, see UN CESCR. The Right to the Highest Attainable Standard of Health. General Comment No. 14. Un. Doc. E/C.12/2000/4, p 34–37; and B. Toebes 2001 (Note 3), pp. 178–180.

41 Either "underlying determinants" or "underlying preconditions" is used. For former, see UN CESCR General Comment No. 14 (Note 40), p. 4; for the latter, see B. Toebes 2001 (Note 3), p. 174

42 UN CESCR General Comment No. 14 (Note 40), p. 8.

43 WHO Constitution (Note 23), preamble.

obligation of the state to abstain from hazarding health of people calling this a serious gap within the catalogue of the basic rights under the Constitution.[44] However, the obligation of the state to refrain from interfering with the health and bodily integrity has never been set in doubt by the courts[45] and Alexy adheres to point of view that it would be inconsequent to argue that the state has an obligation to finance the protection of health but has no obligation to abstain from invading health of its habitants.[46]

Additionally, the state is obliged to secure proper protection of different aspects of self-determination rights such as right to informational or bodily self-determination in case of providing health care services by third parties. The principle *voluntas aegroti suprema lex est* (patient's will is supreme) is somewhat controversially protected under Estonian law.[47]

The state has duties to protect people from the invasion of health by third parties also when medical treatment is not involved. Probably the most well-known situation when the state has neglected such duties involve direct environmental risk. For example, the European Court of Human rights saw the violation of the right to privacy in the fact that the government failed to protect inhabitants from the high night noise level of the Heathrow Airport, operated by a private enterprise. The court was clearly motivated also by health considerations, accusing the government of conducting too little research on the "impact of the increased night flights on the applicants," especially in the areas of "the nature of sleep disturbance and prevention."[48] As to the access to health information, the ECHR has found that the state has to provide advice to people if they are under risk to their health. This obligation arises for example when the risk has created by the state in weapons testing[49] or by private enterprise through pollution.[50]

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[44] R. Alexy (Note 13), lk. 77.

[45] The Criminal Chamber of the Constitutional Court has explicitly stated that the right to bodily integrity is protected by the constitution. Decision of 30 May 2000 (3-1-1-63-00). — Riigi Teataja (The State Gazette) III 2000, 19, 202 (in Estonian).

[46] R. Alexy. (Note 13), lk. 77.

[47] This principle has also been recognised in the Law of Obligations Act (Võlaõigusseadus. — Riigi Teataja (The State Gazette) I 2001, 81, 487 (in Estonian)). This is a contractual obligation of a service provider. Medical treatment without informed consent is, however, not considered as a criminal offence according to the new Penal Code (Karistusseadustik. — Riigi Teataja (The State Gazette) I 2001, 61, 364 (in Estonian)).

[48] *Hatton and Others v. the United Kingdom*, 2 October 2001, application 36022/97, at paragraph No. 103.

[49] *L.C.B. vs. The United Kingdom*, 9 June 1998, application 23413/94. In this case, the court did not find a violation, as it was not foreseeable during the nuclear testing that the health of the daughter of the person tested might have been endangered. Under similar circumstances, the state has to provide access to available information about the

Closely connected to the liberal right to bodily integrity is the principle of non-discrimination in provision of health services. The ECHR has additionally declared that depriving a person of medical care by expelling him or her while the person is suffering from a terminal and incurable illness, might violate Article 3 of the Convention, protecting from inhuman and degrading treatment.[51]

### 3.2. Rights to "underlying determinants for health"

The "underlying determinants" for health are conditions such as "access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health."[52] The interpretation of the ESC Art. 11[53] has shown that vaccination and epidemic control,[54] AIDS prevention[55] and environmental protection[56] all play a role. Such measures are more or less protected by the Public Health Act[57] and the Health Services Organisation Act.[58] These rights are rather general, and it is quite hard to find individually guaranteed subjective rights for a specific individual in a specific case, especially as regards to treatment on demand.

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radiation levels, see *McGinley and Egan vs. The United Kingdom*, 9 June 1998, applications 21825/93; 23414/94.

[50] *Guerra and Others vs. Italy*, 19 February 1998, application 14967/89. The State did not inform inhabitants for several years before advising them of risks associated with a chemical factory.

[51] *D. vs. The United Kingdom*, 2 May 1997, Application No. 30240/96.

[52] UN CESCR General Comment No. 14 (Note 40), p. 11. See also B. Toebes 2001 (Note 3), p. 174.

[53] "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;

2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;

3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents."

[54] C I, p. 60.

[55] C X-1, p 109.

[56] C IX-2, p 13; C X-1, p. 110 (air pollution in Italy)

[57] Rahvatervise seadus (Public Health Act). — Riigi Teataja (The State Gazette) I 1995, 57, 978; 2002, 32, 187 (in Estonian).

[58] Tervishoiuteenuste korraldamise seadus (Health Care Services Organization Act). — Riigi Teataja (The State Gazette) I 2001, 50, 284 (in Estonian).

### 3.3. Rights to health care

The rights to health care are the most controversial area,[59] as considerably more resources are needed and spent in this area of health protection.[60] At the same time, they are the most important ones to the people. It is in human nature not to think so much on protecting of underlying determinants of health, but worrying about getting help in case of illness. Considering the opportunities and costs of modern medicine it is clear that the state cannot provide for free all health care services anyone wants or needs. It would be therefore more appropriate to speak about the responsibility of the state to guarantee the availability of health care services. This includes the question of financial availability, concerning both the regular health care as well as treatment in extraordinary or emergency situations, where the right to life plays an important role in interpreting the constitutional guarantees.[61]

#### 3.3.1. Availability of health care services

The Constitution does not oblige the state to provide health care services by itself. Privatisation of hospitals is not prohibited in principle, as is not prohibited the organisation of the medical profession based on the liberal professions tradition. As a result of a recent major reform Estonia has established a system of private general practitioners for primary health care, with mostly state-controlled hospitals on the second and third level. All health care providers in Estonia are independent legal persons in private law, enjoying considerable independence from the state and local governments.

The state still has the obligation to ensure that an adequate number of hospitals and other health-related buildings exist.[62] This means that the state has to ensure that necessary legislation to carry out control over health care providers is enacted and that the hospitals comply with it. Such legislation

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[59] For example, see R. Epstein. Mortal Peril: Our Inalienable Right to Health Care? Reading: Addison-Wesley, 1997 and the reports of the symposium on this book published in University of Illinois Law Review, 1998, pp. 683*ff*.

[60] For example, the 2002 health insurance budget was 4.85 billion kroons. At the same time, funds for disease prevention and health promotion programs were only 63.5 million kroons.

[61] On different dimensions of the right to health care see H.Leenen. The Right to Health Care and its realisation in the Netherlands. — A. Exter and H. Hermans (eds.) (Note 5), p. 34.

[62] UN CESCR General Comment (Note 40), p. 12 (a). From the case law of ESC, see C XIII-3, p 343 (Portugal). Access to services has to be guaranteed without losing excessive amount of time. A hospital master-plan approved by the Estonian government sets forth that specialised medical care should be available from every place in Estonia within 60 minutes i.e. a hospital shall not be farther away than 70 kilometres. Available at http://www.tervishoiuprojekt.ee/index.php?page=2,9 (15.04.2002).

should regulate establishing of hospitals, borrowing limits, certificates of need, state's step-in rights in case of failure to operate a hospital or on bankruptcy of a hospital, pre-emptive rights on transfer of hospitals etc. Currently, these issues are not regulated in Estonia and the situation does clearly not correspond to the state duties in ensuring the availability of health care.

Besides hospitals and other buildings, the number of qualified doctors receiving a competitive salary must be sufficient. This includes a need for a sound education and training system for the medical staff, when no private universities provide these services.[63]

The right to health protection does not require only the availability of any kind of health care services, but services of reasonable quality.[64] This can be secured by setting forth certain requirements for professional competence of doctors, medical equipment, medicines, hospital buildings etc. Additionally, there has to be a mechanism for supervising and monitoring the quality. Both sides of the quality of health care services are well regulated under Estonian law.[65] There is a special agency being founded under the Health Services Organisation Act which purpose is to licence hospitals. Receiving a licence depends on the quality of rendered services and adherence of quality management guidelines. Recently a Bill on Patient's Rights was submitted to the Estonian Parliament. This Bill sets up a mechanism how patients can submit their complaints about the quality of health care services to a patients' ombudsman. Protection of patients rights is one important instrument by assuring the quality of health care services.

Probably the more important aspect of availability of health care is the financial availability. The constitution does not explicitly oblige the state to introduce a universal health protection system. However, under article 12 of the ESC the state is obliged "to establish or maintain a system of social security." This includes the obligation to establish or maintain a health insurance system.[66] Moreover, the system has to be maintained at a level "at least equal to that necessary for the ratification of the European Code of Social Security" and even more importantly, the states have "to endeavour to raise progressively the system of social security to a higher level." The health insurance system has to be based on the solidarity principle, meaning that it must include people who are not able to contribute themselves, e.g. minors and retired persons.[67]

Similar demands are also part of the constitutional principle of the social state. This principle demands that the state must protect people from risks, in case they are unable to do that themselves. This protection is effective only if

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63 UN CESCR General Comment (Note 40), p. 12 (a).

64 See UN CESCR General Comment No. 14 (Note 40), p. 12 (d).

65 There is a number of regulation adopted under the Health Care Services Organisation Act regulating the quality of services.

66 C XIV-1, p. 160 (Cyprus), p. 222 (Finland), p. 534 (Malta).

67 C XIV-1, p. 308 (Germany), pp. 561–562 (Netherlands).

there is some security for everybody that in case of need they will receive assistance. This is possible only through a public health insurance system that is based on the solidarity principle.[68] Such a national compulsory tax financed system based on solidarity of insured people already exists in Estonia, with more than 90% of the people having insurance cover. This, however, does not determine to what extent are the payments to the insured guaranteed.

### 3.3.2. Reducing the availability of health care services

It has been argued that the constitutional right to health protection does not allow for co-payments by the insured patients. Such payments could put a heavy burden on the people with lower income. There are several arguments why this practice is necessary and constitutional, however. First of all, there is a systematic argument that contrary to Art. 37 (1) of the Constitution, which sets forth the right to education for juveniles without charge, Art. 28 (1) of the Constitution does not state that the health protection has to be completely free of charge to habitants. Secondly, the complete responsibility of the state does not motivate people to protect their own health by abandoning unhealthy practices, for example. Patients' contributions may be considered as a kind of self-liability. Thirdly, the financial burden might be unbearable for the state and prevent the state to engage in other necessary policies.[69]

The adoption of legislation introducing self-liability and responsibility to contribute towards the payment of health care services can be set under question also in the light of the obligation to raise the health insurance system progressively to a higher level. This means that reducing benefits, increasing the contributions of the patients for the services and restricting financing for certain services demands clear justification. However, there is no absolute prohibition of such measures. The European Committee of Social Rights has in principle accepted such practice, as far as it is "necessary to ensure the maintenance of the social security system and provided that any restrictions still allow members of society to be effectively protected against social and economic risks and do not tend to gradually reduce the social security system to one of minimum assistance."[70] The need to consolidate public finances and the goal of preserving

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[68] Certainly, this can also be achieved by the national health service model as in the United Kingdom. However, when the insurance model is already introduced, those unable to pay for insurance must also be entitled to health care services.

[69] The introduction of co-payments has been one of the main methods of cost-containment in the health care sector in all democracies, see *e.g.* M. Harrop, Health Policy. — M. Harrop (ed.), Power and Policy in Liberal Democracies. Cambridge: Cambridge University Press, 1992, p. 162.

[70] *E.g.* as regards to France, Conclusions XIV-I, p. 260-265; Germany XIV-I, p. 305–312. Reference omitted. See also general observation on Art. 12 (3), C XIII-4, p. 143.

balanced health insurance budgets therefore allow to restrict payments from the Health Insurance Funds.

Another mechanism for reducing availability of health care are waiting lists, which are commonly used to reduce the financial burden on the Estonian Health Insurance Fund's budget. The maximum waiting periods are not set forth by any legislative document. Moreover, criteria providing for preconditions to be fulfilled in order to be entered into the list or moved upwards on the list are not regulated. This causes a clear constitutional problem — the availability of health care services is not guaranteed sufficiently well as the procedures for decision-making are not well elaborated.

### 3.3.3. Provision of emergency and extraordinary care

In case a person has no resources to bear his or her burden of the services, or if the person is not insured, the state still has to provide social assistance as guaranteed by Art. 28 (2) of the Constitution. Art. 13 of the ESC provides that the state has to undertake "to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition."[71] For those not covered by compulsory or voluntary insurance in Estonia, the right to receive emergency care for free is granted by the Health Care Services Organisation Act. Against that background it might be argued that the State has created a system which guarantees financial availability of health care services for all.

The controversial issue here is however, to what extent must the state provide for the services for the poor or uninsured; and to what extent must the state provide for care involving extraordinary costs for treatment, such as in the case mentioned in the beginning of this article. The Health Services Organisation Act understands under emergency care such services "which are provided by health care professionals in situations where postponement of care or failure to provide care may cause the death or permanent damage to the health of the person requiring care."

Such measures start from a simple injection of insulin and end with a hearth-lung transplantation and gene therapy. Considering the life-preserving nature of the essential services, the rights seem to be protected by the right to life instead of the right to health protection. The human life has a very high value in the Estonian society, and it does not seem to be justified simply to refer to tight

[71] Similarly, the state has to take care of the health deprived of liberty. See, e.g. *Hurtado vs. Switzerland*, Comm. Report 8 July 1993, Series A no. 280, p. 16, § 79; *Ilhan v. Turkey* [GC] no. 22277/93, ECHR 2000-VII, § 87; *Keenan vs. The United Kingdom*, 3 April 2001, Application no. 27229/95.

resources when refusing potentially life-saving care. It seems unavoidable that a rational decision-making procedure has to exist, together with rules for making the decision.[72] The right to life must be given enough attention and reasons for refusing treatment have to be well founded, e.g. the probability of the treatment to cure the disease might not be high enough to justify the costs (so called principle of cost-effectiveness).

However, in this issue it is very hard for the courts to interfere with the professional judgement of the doctors and health care organisations in a concrete case. In some cases, it is justified to refuse potentially life-prolonging treatment.[73] Cost considerations also play a role. The long-term provision of health care services is possible only if the short-term health budgets correspond to the general economic situation in the country.[74] Therefore, the court should exercise considerable self-restraint in deciding on the issue whether the care must be provided for or not.

Comparative law demonstrates that the rights to high-cost health care in specific cases are in fact rarely enforceable in the courts. Under the English or Scottish law the patients do not have a legal right to receive treatment or any particular standard of health care services. The health care rights are not justiciable.[75] In Canada and the United States the right to receive health care services has not been approved as a constitutional right at all.[76] Despite the fact that the Russian Constitution of 1993 states that health care is provided free-of-charge in public and municipal health care facilities, the state is *de facto* giving

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[72] For the British practice, also considering the Human Rights Act 1998, see D. Feldman. Civil Liberties and Human Rights in England and Wales. 2nd. edition. Oxford University Press 2002, p. 228–233.

[73] Here, the decison of the South African Constitutional Court in the case *Soobramoney v. Minister of Health, Kwa-Zulu Natal* is often referred to, *e.g* in Toebes 2001 (Note 3), p. 188. Generally see also D. O'Sullivan. The Allocation of Scarce Resources and the Right to Life under the European Convention on Human Rights. — Public Law 1998, pp. 389–395.

[74] For instance the prevailing philosophy of courts of Italy in 1980s was that all services, which were technologically possible should be provided to citizens. By the beginning of 1990s the courts were basically forced to alter their point of view, since public health expenditure started to increase dramatically. G. France. The Changing Nature of the Right to Health Care in Italy. — A. Exter and H. Hermans (eds.) (Note 5), p. 43. For a similar change in mind in Germany see H Genzel, Die Aufgaben der Krankenhäuser im gesundheitlichen Versorgungssystem. — A. Laufs u.a. (Hrsg.), Handbuch des Arztrechts. München: Beck, 1999, p. 606.

[75] D. Feldman (Note 72), p. 229. It has been speculated that the adoption of the Human Rights Act might change this situation, see D. O'Sullivan (Note 73), p. 391.

[76] D. Sprumont. The Right to Health Care in Swiss, Canadian and American Law. — A. Exter and H. Hermans (eds.) (Note 5), p. 70.

up its commitments.[77] Also the provision of the German Basic Law guaranteeing the right to life has been interpreted as giving no right to free medical treatment.

## Conclusions

The right to health protection as guaranteed by the Estonian Constitution is a big step towards the realisation of dignified life for everyone. The obligation of the state to take measures in this respect must not be neglected. Also, the state might be under the constitutional duty to provide treatment in order to protect the lives of people. At the same time, the level of health protection, especially the provision of health care services depends on the availability of resources. The debate in newspapers in connection with the above mentioned leukaemia case clearly showed that the newspapers and members of society are not capable to see the scarcity of resources as an argument to refuse treatment when someone is seriously ill. Even though the courts will face considerable social pressure in making their decisions in such cases, they have to be careful in interfering in these questions having a high impact on health policy. In order to secure a just judgement while allocating resources available for health protection clear guidelines for making such judgements must be adopted by the Parliament.

[77] I. Sheiman. Excessive State Commitments to Free Health Care in the Russian Federation: Outcomes and Health Policy Implications. — A. Exter, H. Hermans (eds.) (Note 5), p. 104-105.

V

Taavi Annus,
“German Authors on Estonian Minority Rights.”
*Trames, vol.* 3 (1999/2000), pp. 227–232 (review essay).

# GERMAN AUTHORS ON ESTONIAN MINORITY RIGHTS

*Selbstbestimmungsrecht und Minderheitenschutz in Estland*, by Carmen Thiele. Berlin: Springer, 1999.
*Das Recht der nationalen Minderheiten in Osteuropa*, edited by Georg Brunner and Boris Messner. Berlin: Berlin Verlag Arno Spitz, 1999.

The two books under review, published this year, contribute to the discussion on the status and rights of national minorities in Estonia, and Central and Eastern Europe generally. The first, by Carmen Thiele, is a monograph of legal character, the other a collection of overview articles from all Central and Eastern European countries, introduced by two general articles by Rainer Hofmann ("Das nationale Minderheitenrecht in Osteuropa. Gegenwärtiger Stand un aktuelle Perspektiven", 9–37) and Georg Brunner ("Minderheiten-rechtliche Regelungskonzepte in Osteuropa," 39–73). The Estonian overview is given by Carmen Schmidt ("Die Rechtsstellung der Minderheiten in Estland", 327-350). For this review, which focuses primarily on Estonia, these three articles are of main interest.

The aims of the two books are rather different. The editors of the collection hope that it would provide "a better understanding of present legal situation of national minorities in Eastern Europe, so that one can know more exactly where the situation is satisfactory and where further improvements could be made" (6; all translations from German are my own). Schmidt has higher aspirations — besides presenting, she also aims at analyzing the situation compared with the norms of international law (3). In fact, the book is a legal recommendation, very much like a "*Gutachten*" written by a German lawyer, involving the presentation of the international law provisions, the facts in Estonia and a subsumption. The analysis is meant not only for the international audience interested in the situation in Estonia, but also seems to be directed towards Estonian decision-makers. The main conclusions of the paper have also been published in English, after a presentation in a seminar including many Estonian officials. (Thiele 1999)

Both goals require one common condition in order to be fulfilled — updatedness. One cannot give an overview of the present situation if the data date back several years; one cannot analyse the present situation and make recommendations if the situation is already different or the recommendations have long been adopted. This is especially true in the field of minority protection in Eastern Europe, where changes in the legal situation have been and are being made continuously. From this viewpoint, in spite of a certain delay in the publication of scholarly books being both customary and unavoidable, the collection could easily be better — the most recent sources used

by Carmen Schmidt date back to May 1997, which for an overview book of 1999 is certainly not good.

In that sense, Thiele is more successful. The work was completed in December 1998, according to the introduction (V), the legislation is incorporated even up to February 1999. This does not mean, however, that some points are not already outdated for the present reader. Two examples suffice. According to p. 126, the translations of Estonian legal texts are published according to the State Gazette Act of 1993, but a new Act was adopted in early 1999, and besides, the 1993 Act had been amended several times after the 1994 version which was used by the author — also on the topic of the translation of the acts. Most importantly, the version of Law on Aliens used by the author, a crucial tool for analysis, has been amended several times in 1999.

As to the literature, Thiele's sources are far from excellent. The viewpoint of the Estonian authorities is not handled thoroughly and many easily available sources in English about the problems discussed are not used at all (see only Heidmets 1998, Lauristin et. al. 1997; Realo 1998). Many current data have been obtained from Russian newspapers — hardly a source beyond reasonable doubt in accuracy, since they often, if not usually, have their own axe to grind. Schmidt is rather different in that respect, using sources mostly from Estonian-language newspapers. That the conclusions are finally different is not a surprise considering this fact only. However, the negative side of this is that the international reader is unlikely to get an objective view of the situation.

Thiele starts, quite rightly, with a historical overview of the Estonian situation. The argument most often heard in Estonia is that the historical situation justifies the present policies. This is also the basis of the Government official programme "Integration of Non-Estonians into Estonian Society" (printed in English in Järve and Wellmann 1999: 39–42). The starting point, therefore, is good. One would then expect an analysis to the questions, if, why and how the historical situation plays such an important role in the minority policies. This is one of the questions where also Estonian positions are rather unclear. It has been rightly pointed out that the Estonian language has been suppressed for centuries, yet it has survived without any state protection and might not need state protection through suppressing other languages today. (Järve and Wellmann 1999: 34). Unfortunately, Thiele hardly refers back to the introductory part later in her analysis.

All authors neglect the question of discontinuation of the Estonian state during the Soviet occupation. Thiele states expressly that this question bears no importance to the legal requirements of attaining a minority status (2). This simplification is very doubtful. Even if the acquisition of the minority status does not depend on this international law question, the treatment of people living in a country must depend on the time of the creation of the state. As for the Estonian situation, this has been discussed by Drechsler (1999)

The main topics covered in Thiele and Schmidt include citizenship, minority rights and the treatment of aliens.

As to citizenship, all reviewed authors start from the assumption that it is up to every country to whom this status is to be awarded. Both Schmidt and Thiele admit that the requirements to the applicants in Estonia are not very easy. Schmidt sees no big problems and supported by an opinion poll, concludes that "the citizenship regulations have been generally accepted today" (332). Thiele analyses the matter further in order to show that the Estonian rules are too strict and leave many people stateless or force them to take another (mostly Russian) citizenship.

The section on the Estonian situation starts with a comparison of the three Baltic states. Thiele says without any further explanation that Lithuania, after collapse of the Soviet Union, granted citizenship to all Lithuanian residents (63), thus she points out the ease by which citizenship could be granted. This fact has been often demonstrated elsewhere with the unavoidable addition that in Lithuania, the non-Lithuanian population amounted to only around 10 per cent, compared with over 35 in Estonia, which makes the situation wholly different.

Another problematic conclusion is connected with the principle of genuine link (or close connection), which she describes as the necessary criterion to which the person to whom citizenship is given must correspond. She later uses the genuine link argument for supporting one of her main conclusions, viz. — that the granting of citizenship should be made much easier, with lesser requirements as to the language skills and the knowledge of the constitutional system. (181) According to her, a genuine link can be established with less. This is surprising, as the purpose of this connection is to prevent the states from granting citizenship to too many people.

Her strongest argument concerning citizenship rights is that integration should be taken as a priority ahead of exclusion and this would require easier naturalization. (181) That integration is important has been well recognized by the Estonian government. The discussion in Estonia is, however, whether citizenship laws are the best laws to achieve integration or whether integration should happen before granting citizenship rights — not an unfamiliar discussion in most European countries, including Germany, where this was one of the most hotly debated public policy issues of the past year.

Surprisingly, the possible accession of Estonia into the EU and the requirements concerning the naturalization do not receive attention from Thiele. In fact, the European Union has been neglected for all issues. Of the reviewed authors, only Hofmann (19) restates these requirements. As it is recommended that Estonia would speed up the naturalization process, it is crucial that the EU dimension is not simply forgotten in this context.

The minority rights discussion starts off with a definition of minorities. Schmidt takes it as a traditional view of international law and practice, that the minority status is granted only to the citizens. Thiele accepts this as the traditional view, but argues that minority protection (e.g cultural autonomy) in Estonia should also include non-citizens, as minority rights should be human

rights. (176) This recommendation, not followed in most European countries, is highly problematic. One cannot demand of the countries of Eastern Europe what one oneself does not, is not willing, to have. As Hofmann says (17), "Nothing would be more fatal to minority protection on the European level [...] than accepting double standards for a longer time period." The double standards, often used in Estonian official argumentation cannot be neglected also concerning the definition of minorities (Järve and Wellmann 1999:30).

These different arguments in two books have a deeper background. Hofmann (12) says that it is certain both the point of view of both the international and comparative law that membership of a minority depends in the first place on the will of the respective person. Thiele does not think that this would be crucial. This is not surprising considering her attitude towards minority rights as group rights. The individual rights approach is based on subjective willingness to identify oneself as minority and to act accordingly; the group rights approach has inevitable problems with that, as Brunner (48) rightly points out. (see also Hillgruber and Jestaedt 1994: 89-63).

This has a close connection with the opportunity of establishing a cultural autonomy granted by the Estonian constitution. Brunner goes quite far in this respect, stating that the fact that the non-Estonian population has not used the right to form a cultural self-government means in a democratic society that they are satisfied with their destiny and that no further steps are necessary (68). This obviously corresponds to the overall attitude of the collection defining minority rights as individual rights dependent on individual action. Thiele whose preference is group rights approach naturally contradicts that — according to her, the cultural self-government has not been used because the non-citizens have been left without the minority protection because of no citizenship. Had the non-citizens of ethnically different origin than Estonian the right to form cultural self-government, this would have certainly already been used (181).

Surprisingly, an analysis of the Estonian constitution shows that the definition of minorities in Estonia is not clear at all. It is only certain that minorities mentioned in Paragraph 51 include also non-citizens. In other places of the constitution, the definition is left open to concretization by the legislation. None of the authors mentions this question.

Of great interest is the handling of minority languages in connection with political rights. Probably the most controversial case in the practice of the Constitutional Review Chamber of the Estonian National Court involved the question of the constitutionality of an Act which requires Estonian language skills from candidates to the parliament and local councils. The quick and firm conclusion of Thiele (144), without a single hint as to the argumentation of the Court (the decision itself has been referred to in another context), who validated the Act, is that the Constitution has been violated. The saying that "constitution means what the supreme court says it means" might not be absolutely correct, but a dissent needs far more support. The relevant literature on similar provisions of the European Convention of Human Rights could be elaborated

further; there is also case law which discusses the problems concerned with restrictions to stand for elections. Thus, the book will certainly not convince Estonian officials or lawyers that the decision of the Court validating the Act was wrong, but might lead into misunderstanding that the issues were not debated in detail, as they actually were.

As to the legal status of aliens, the conclusions are more on the positive side from the Estonian viewpoint. The right to vote in local elections is quite far-reaching compared with other European states. Thiele also admits that the human rights and freedoms are guaranteed in Estonia — the minor problems she sees have not been of practical importance.

As has been stated earlier, Thiele and Schmidt conclude differently. Schmidt states (349): "The practice and rules certainly do not violate the rules of international law." The more reserved attitude of Thiele has been shown before. At one point, she even sees "a serious danger of assimilation", (118) which is demonstrated by the fact that several hundred applications a year are submitted to change Russian names to Estonian ones. She finally concludes that human rights should acquire more importance compared with national sovereignty, that minority rights should be defined as human rights and that the position of long-term residents should be strengthened to match those of the citizens. By this, the international law viewpoint is mostly lost, in order to better argue the minorities' case. "It would contribute to the integration of different national groups in the Estonian society in a new Europe". (182)

With these conclusions, Thiele leaves the realm of international law and starts advising policy issues. She weighs the Estonian policy, based on national identity and culture preservation (described in Smith et al 1998: 105–107) against the need to preserve internal stability and piece, but does not bring out the arguments in their entirety. Remarkably, the Estonian situation is rather stable and conflicts based on ethnic nature are almost non-existent, which has been pointed out by western authors as a comparison to other former Soviet republics (Smith et al 1998: 95), but are noteworthy also in countries with much less ethnic diversity.

Thiele unfortunately fails to produce an additional convincing argument to change the Estonian policies. That changes in policy are necessary, has been admitted by many, including the government itself when it adopted the official policy paper on integration. The recommendations would never be considered by Estonian authorities unless they were convinced that the one who makes the recommendation understands the historical, political and cultural situation in Estonia, especially if the recommendations are not based on certain and universally accepted international law principles. Even then, the arguments used at the moment in Estonia need to be considered. The mutual misunderstanding can be overcome only if the language (and I do not mean that literally) is the same.

The goals of the books, namely presentation and analysis with recommendations, are not fully achieved. The presentation of both Thiele and Schmidt

bear a certain bias by not presenting the cases of both sides fully. The recommendations may fail acceptance for this very reason. At the moment, the Estonian decision-makers, representatives of minorities, and also the international community need a balanced and objective argumentation which takes into consideration all arguments. Only this would further the scholarly discussion and help the situation of all people living in Estonia.

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### Scholarly Work

| | |
|---|---|
| Main interests: | Estonian and comparative public law, especially constitutional law<br>Judicial politics<br>Relationship between law and social science |

# CURRICULUM VITAE

## Taavi Annus


| | |
|---|---|
| Kodakondsus: | Eesti |
| Sünniaeg: | 6. juuli 1977 |
| Perekonnaseis: | Abielus |
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### Haridus

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| 1999–2004 | doktoriõpe, avaliku haldus ja sotsiaalpoliitika, Tartu Ülikool |
| 1998–1999 | *LL.M (magna cum laude)*, Marbrugi Ülikool |
| 1994–1998 | *B.A* (õigusteadus), *B.A* (avalik haldus), Tartu Ülikool |

### Teenistuskäik

| | |
|---|---|
| 2000– | Lektor, avaliku halduse osakond, Tartu Ülikool, (kuni veebruarini 2002 — avaliku halduse ja sotsiaal-poliitika osakond) |
| 1999–2000 | Erakorraline lektor, *ibid.* |
| 1999 | Erakorraline assistent, *ibid.* |
| 1995–1998 | Juriskonsult, Riigikontroll. |

### Teadustöö

Peamised teemad: Eesti ja võrdlev avalik õigus, eriti riigiõigus
Kohtud ja poliitika
Õigus- ja sotsiaalteaduste vahekord

# DISSERTATIONES RERUM PUBLICARUM UNIVERSITATIS TARTUENSIS

1. **Rainer Kattel.** The Constitution of the *Polis*. Tartu, 2001.