The Influence of European Law in Civil Proceeding in the Republic of Estonia

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Throughout history, civil proceeding has undergone important changes, whereby, an important question is: on which principles is justice based on. Here, the distinction has been drawn between two different procedures:

1. **Investigation principle** or inquisition principle, where judges have the duty to demand evidence, to obligate parties to provide them and to identify facts.
2. **Adversary principle**, where parties have the obligation to file proof, allegations and objections and court's obligation is to implement proper law.

Since the function of civil proceeding is to solve and conclude legal disputes, it must occur in accordance with specific principles.

The principles judicial proceedings are based on have changed throughout history, whereas it is important, which public order we are dealing with and what kind of role the court has been given in resolving disputes; there have been differences between common law and legal systems of the states of Continental Europe.

During the pre-war period in the Republic of Estonia, civil proceedings were based on adversary principle, which was transposed into today's independent Estonia and it is effective since September 15, 1993. During the Soviet times, legislative proceeding was based on investigation principle, where judge had to be active in proceeding.

At the same time, understanding of adversariness has changed throughout history as well as the understanding of what kind of role should judges play in proceedings. The Code of Civil Procedure (TsMS) that took effect on January 1, 2006 gives judge conciliating and supporting role for guiding the dispute to be resolved with compromise.

Deriving from particular procedure of civil proceeding, there are several principles to go by in legislative proceeding, where there could be some differences in different states. Courts of all instances are guided by this principle.

Following principles are emphasized in today's civil proceedings of Germany:

1. **Principle of party autonomy** – it means the right of a person to decide whether one would have recourse to the courts, which legal remedy one would like to use and which proof one wants to file. From this principle derives the right of a participant in a proceeding to decide whether one uses the right to appeal or not.
2. **Deliberation principle** – it means providing needed factual circumstances by parties, which is the opposite of investigation principle, where court has to identify the facts on its own and independently.

Obligation imposed on parties to provide factual circumstances when having a recourse to the courts finds expression a legal-historic principle of *da mihi facta, dabo tibi tus* (give me facts and I'll give you the law). Therefore, the duty of providing factual circumstances lies on parties and the duty of knowing the law lies on the judge.

Legal problem in today's Germany is also the question to what extent the judge may and has to demand supplementing the provided factual circumstances, which at the same tie compromises judge's obligation of

neutrality. Solution is thought to be the obligation of parties to attend in person, which is possible in all steps of legal proceeding and gives the opportunity to reconcile the parties.[1] Reputedly, representatives may not know all important circumstances and it's not in their interest to terminate the civil proceeding.

3. **Principle of verbality** – Historically, written proceeding was used in Germany, which has the advantage of better filing of documentation, but verbal proceeding allows the judge to get direct impression of parties and disputes, as they communicate directly. At the same time, it is important in implementing the principle of public legal proceeding.

With this principle, it is important that it doesn't exist pure and simple because many important procedural acts of legal proceeding are done in writing.

4. **Principle of directness** – This principle is directly related to the previous principle of verbality.

5. **Principle of publicity** – judicial proceeding is open for the public and the parties, which gives the parties a greater right for getting the information.

6. **Principle of oral hearing unity or concentration principle** – which means that all hearings (preliminary hearing, main hearing) are equivalent and of equal meaning in terms of making judgment. This principle should give parties the right to decide when and which proof they file, but it is not so in reality. For the purpose of speeding up judicial proceeding, it is provided in the law when the proof should be filed.

7. **Strictness of formal requirements and the principle of good faith** – Procedural law is strictly formalized, which is very important in terms of equal treatment of parties. Rules of judicial proceeding must be uniform and they must be complied with. Disregarding legal provisions of procedural law brings legally negative consequences to the parties to a proceeding. For example, if the term has not been met when filing an appeal, it will be dismissed. Parties to a proceeding must use their rights in good faith and may not misuse their rights, which is important in avoiding delaying the proceeding. Examples are repetitive petitions of challenge and repetitive application of filing one proof (Paulus 2002, pp. 97–99).

8. **Honesty principle of judicial proceeding** – Foremost applies to judge and started to establish in Germany mainly from Anglo-American law and from its requirements of fair trial and due process of law. Such concepts as justice, impartiality, honesty are also under this principle.

Here is also the principle of making the judgment within reasonable period of time and "... the requirement to ensure a hearing in court", which has became the basis for constitutional complaint in respect of court judgment (*ibid.*, p. 99).

In Germany, they have the opinion that it is not enough when parties are given the possibility to provide their opinion, and the court must take note of what is provided by the parties and reckon with it in their considerations. If the court has made its decision on the basis of legislation, whose importance on making the decision has not been explained beforehand, it is considered the infringement of the right of judicial hearing (*ibid.*, pp. 99–100).

From the viewpoint of procedural hearing honesty, giving equal opportunities to both parties is also considered important, even on filing the proof. Today it is especially important with substantive law becoming more complicated, where legal position may fail due to unprovability. In Estonian civil procedure, there are analogous principles to the ones of German civil procedural law, but principles like judicial principle, which means performing civil matter procedural acts in accordance with the law in force at that time, should be added, (TsMS § 6) and proceeding the case by emanating from Estonian Code of Civil Procedure and in case of absence of legal provision regulating judicial proceeding relationship, a provision must be applied that regulates a similar relationship to the one in dispute. But if there is no such provision, analogy must be applied (TsMS § 8).

The principle of equal treatment of persons, which is also a constitutional right, means that parties and other persons are equal before the law and court (TsMS § 7).

Court language principle says that the language of judicial proceedings and court procedure shall be Estonian (TsMS (1) § 32). For persons who are not proficient in Estonian, the court shall involve an interpreter. Here, I would like to mention that civil proceedings before the war were based on the same principles in Estonia. T. Grünthal, the justice of the Supreme Court of this period has given the following principles:

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1 This possibility of parties attending judicial proceeding in person has been also used in Estonian circuit courts, which allows bringing parties to agree to compromise.

1. principle of party autonomy,
2. same rights of parties,[2]
3. principle of formality – i.e. prescribed procedure must guarantee regular discussion and that everyone knows what kind of measures and means are allowed on protection of rights.
4. principle of judicial management,
5. adversary principle,
6. principle of directness, which means the following:
    a. The same court that makes the decision must fix the material and verify it,
    b. The court must discuss the matter in the same composition,
    c. The court must fix evidence and personal evidence itself.
7. Concentration principle – which means that the court must take evidence and make a judgment in one court session.

In connection with Estonia joining the European Union, general principles of the European Law and administration of justice and principles of civil procedure should be taken into consideration.

The Committee of Ministers of the Council of Europe has repeatedly discussed the availability and improvement of justice in member states and has adopted several recommendations in this area. According to the article 10 of the statute of the Council of Europe, it has two bodies: the Committee of Ministers and the Parliamentary Assembly.[3] The Council of Europe cannot issue supranational legal instruments, it can give appropriate recommendations to the governments of member states and demand reports on the measures taken for observing them (Oppermann 2002, p. 25). The Charter of fundamental rights of the European Union, signed on 7 December 2000 in Nice, reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights (*Euroopa Liit* 2002, pp. 348–360).

Article 47 of Chapter VI, which handles justice, of this so called Charter, gives the general principle – right to an effective remedy and to a fair trial. According to article 47, „everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice (*ibid.*, p. 358).

According to article 6 (1) (former article F) of the **Treaty on European Union**, the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. According to article 6 (2) „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" (*ibid.*, p. 103).

One of the principles of the Treaty establishing the European Community according to article 3 (h) is the approximation of the laws of the Member States to the extent required for the functioning of the common market (*ibid.*, p. 127). The recommendations of the Committee of Ministers stress the meaning of article 6, i.e. Guaranteed right to a fair and public hearing, which has important meaning in democratic society and article

2 Even if the allegations of one other party are clear, it is important to listen to the other party – *audiatur et altera pars* (let's listen to the other party).

3 Every member state sends one representative to the Committee of Ministers, and basically it's the Minister of Foreign Affairs. But if the discussions are specific, the member states are represented by specific ministers – on the issues of human rights – Minister of Justice, etc. Partly the member states are represented by permanent representatives at the Council of Europe. According to the article 15 of the statute of the Council of Europe, the Committee decides on the necessary measures for performing the duties of the Council of Europe.

13, according to which national law should ensure the availability of legal remedy.

The author will bring out some more important recommendations of the Committee of Ministers of the Council of Europe, which will help to understand what way is the administration of justice developing and why has Estonian civil procedure been changed.

One important recommendation of the Committee of Ministers to member states was R (84) 5 on the principles of civil procedure, designed to improve the functioning of justice. Since this recommendation is based on the resolutions adopted by the European Ministers of Justice at their 12th Conference, held in 1980, then the problems of administration of justice in different states appear from it.

According to the preamble of the aforementioned recommendation, civil procedure should be simplified and made more flexible and expeditious, while at the same time maintaining the guarantees provided for litigants by the traditional rules of procedure and maintaining the high level of justice required in a democratic society. In order to attain these objectives, it is necessary to make available to the parties simplified and more rapid forms of proceedings and to protect them against abusive or delaying tactics, by giving powers to the court to direct the proceedings more efficiently.

There are nine principles of civil procedure given in the appendix of the recommendation:

Principle 1

1. Normally, the proceedings should consist of not more that two hearings, the first of which might be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments and, if **possible**, giving judgment. Adjournments are allowed only when new facts appear or in other exceptional and important circumstances.

2. It should be possible to impose sanctions when the terms of proceeding are not followed. This could be declaring the procedural step barred, awarding damages, and costs, imposing a fine and striking the case off the list.

3. The court should be able to summon the witnesses and appropriate sanctions should be applied in cases of unjustified non-attendance. To facilitate the taking of evidence, provision should be made for use of modern technical means, such as the telephone or video, in appropriate circumstances.

Measures should be also applied to an expert, who without good reason fails to communicate his report or does it late.

Principle 2

When a party brings manifestly ill-founded proceedings, the court should be empowered to decide the case in summary way and, where appropriate, to impose a fine on this party or to award damages to the other party.

2. In case of delaying the procedure, the court should be empowered to impose sanctions and in special cases it should be possible to require the lawyer to pay the cost of the proceedings.

3. Professional associations of Lawyers should be invited to make provisions for disciplinary sanctions in cases where one of their members has acted in the described manner (p. 2).[4]

Principle 3

The court should, at least during the preliminary hearing but if possible throughout the proceedings, play an active role in ensuring the rapid progress of the proceedings, while respecting the rights of the parties, including the right to equal treatment.

Court should have *proprio motu* powers to order the parties to provide necessary clarifications, to order the parties to appear in person, to raise questions of law, to call for evidence, at least in those cases where there are interests other than those of the parties at stake.

Control the taking of evidence and to exclude witnesses whose possible testimony would be irrelevant to the case and to limit the number of witnesses on a particular fact where such a number would be excessive. These powers should be exercised without going beyond the object of the proceedings.[5]

Principle 4

The court should, at least at the first instance, be empowered to decide, having regard to the nature of the case, whether written or oral proceedings, or a combination of the two, should be used except in cases expressly prescribed by law.

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4 In Estonian judicial practice the claims for damages against representatives have been filed rarely.

5 Clearly, this is an important principle to adjudicate the matter within a reasonable amount of time in order to execute the purpose of civil procedure, but the problem is how to recognize whether the evidence is relevant or not.

Principle 5

The parties' claims and evidence should be presented at the earliest possible stage of the proceedings and in any event before the end of the preliminary stage.

"On appeal, the court should not normally admit facts which were not presented at first instance unless:

a. they were not known at first instance;

b. the person presenting them was not a party to the proceedings at first instance;

c. there is some **special reason** for admitting them."

Principle 6

Judgment should be given at the conclusion of the proceedings or shortly after it. The judgment should be as concise as possible. It may invoke any rule of law but it should with certainty resolve, expressly or implicitly, all claims rose by the parties.[6]

Principle 7

Steps should be taken to deter the abuse of post judgment legal remedies.

Principle 8

Particular rules should be instituted in order to expedite the settlement of disputes:

1. in urgent cases;

2. in cases relating to an undisputed right or an established liquidated claim and in cases involving small claims;

3. in the field of road accidents, labour disputes, landlord and tenant issues and certain questions of family law, in particular the fixing and reassessment of maintenance.

To this end, one or more of the following measures, which could be compulsory, available on the application of any of the parties or be subject to the consent of all parties, could be utilised:

1. simplified methods of commencing litigation, no hearing or the convening of only one hearing or, as the occasion may require, of a preliminary preparation hearing, exclusively written or oral proceedings, prohibition or restriction of certain exceptions and defences,[7]

2. more flexible rules of evidence, no adjournments or only brief adjournments, the appointment of a court expert, either ex officio or on application of the parties, an active role for the court in conducting the case and in calling for and taking evidence.

In September 2002, the Committee of Ministers decided to establish a commission that would evaluate the efficiency of justice (CEPEJ), and this committee has developed a new framework program. The new purpose of court systems: conducting every case within optimal and prescribed period of time. There are three principles given in this activity plan:

1. principle of balance and quality;

2. need for effective measurement and analysing measures, determined unanimously by associated groups;

3. need to bring into conformity all conditions that are needed for fair justice.[8]

Principle 9

The most modern technical means should be made available to the judicial authorities so as to enable them to give justice in the best possible conditions of efficiency, in particular by facilitating access to the various sources of law and speeding up the administration of justice (p. 3).

Work load of judges is a problem in the courts of all Member States and they are looking for possibilities to harmonize it, which is also the central topic in Estonia, where by merging courts it has been attempted to alleviate the difference of work loads in courts. For this purpose, first instance courts and administrative courts have been merged, and the preparations for merging of circuit courts is taking place, i.e. there will be two circuit courts instead of three.

The author considers it positive that there are discussions about the work load of courts, but merging

6 One of the reasons behind quashing court judgment in Estonian judicial practice is that the court hasn't motivated its final decision according to the requirements of the law.

7 Code of Civil Procedure, effective from January 01, 2006, provides the basis of simplified and written proceedings.

8 Accessible on the website of the Supreme Court.

courts would not reduce it by itself. For that it is necessary to conduct a scientific study for verification the optimum work load of a judge and this would allow applying objective and effective measures. Otherwise the experiments may cause unnecessary confusions and stressful situations.

The Committee of Ministers adopted recommendation No. R (86) 12 to Member States Concerning measures to prevent and reduce the excessive workload in the courts, which states that

1. it is necessary to reduce the non-judicial tasks entrusted to judges.[9]
2. reduce any excessive workload of the courts in order to improve the administration of justice,
3. need to ensure a balanced distribution of cases among the courts,
4. make the best possible use of judicial system's human resources,

Measures that could allow reducing the excessive workload according to the Committee of Ministers are:

1. a friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings.
2. entrusting the judge, as one of his principal tasks, with responsibility for seeking to achieve a friendly settlement of the dispute in all appropriate matters at the commencement or at any appropriate stage of legal proceedings.
3. making it an ethical duty of lawyers or inviting the competent bodies to recognise as such that lawyers should seek conciliation with the other party before resorting to legal proceedings and at any appropriate stage of such proceedings.

It was also found that the non-judicial tasks entrusted to judges should be gradually reduced by assigning such tasks to other persons or bodies.

One of the purposes of Estonian civil procedure is hearing a civil procedure within a reasonable period of time, but judicial practice shows that there are examples where civil procedure takes years, which could happen due to very different objective and subjective reasons, for example:

1. participant in the proceeding delays the proceeding (there are repetitive filings on amending the cause or object of the action, request for adjournment of hearing the matter due to illness or other reason);
2. due to particular complexity of the case, which means ordering expert assessments, inspecting additional evidence that can locate also in a foreign state and this means a greater period of time;
3. from the action of the court, who determines the hearing to take place after a longer period of time and has not prepared properly.

How important is hearing a civil matter within a reasonable amount of time has been stressed in the **Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, adopted on 12 May 2004 at its 114th Session.**

This recommendation stresses that the aim of the Council of Europe is the achievement of greater unity among its members, and that one of the most important methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms and for that it is necessary to enhance the availability and improvement of domestic remedies which is seen as one measure for reducing the workload of the European Court of Human Rights.

The Recommendation refers that the „effectiveness" of a „remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant, but it implies a certain minimum requirement of speediness and formed an opinion that improvement of available domestic remedies will most probably have quantitative and qualitative effects on the workload of the Court (p. 2).

Clause 20 of the recommendation states that the question of effective remedies is particularly topical in cases involving allegations of unreasonable length of proceedings, which account for a large number of applications to the Court (p. 2).

Important principle is that proceedings remain of **reasonable length** and for ensuring that, some member states provide it by various means, i.e. maximum length, possibility of asking for proceedings to be speeded up. In certain member states, a maximum length is specified for each stage in criminal, civil and administrative

9 The fact that there are several registers added to the courts, like land register, commercial register, etc. has arose a question from the beginning: should these registers be by the courts or by the executive power, for example by the Minister if Justice. But establishing them by the courts was still considered expedient. Today there is another discussion whether these registers should be removed from the courts.

proceedings.[10]

The integration of the Convention into the domestic legal systems of member states, particularly the requirement of trial within a reasonable time, as provided for in Article 6, has reinforced and completed these national law requirements (clause 21, p. 5).

Here are also examples about Estonia, where the Republic of Estonia has been punished for violating article 6 (1) of the European Convention on Human Rights. Namely, in the case of European Court of Human Rights JUR / 2007-01-23, the court decided on January 18, 2007 that the Republic of Estonia had violated article 6 (1) of European Convention on Human Rights, according to which everyone is entitled to a hearing within a reasonable time, and ordered a compensation in favour of the plaintiff in the amount of 900 Euros for non-proprietary damage and 300 Euros for compensation of incurred expenses.[11]

There is another civil case example of the Republic of Estonia being punished for violating article 6 (1) of the European Convention on Human Rights. The European Court of Human Rights, on case 48129/99 on 2 December 2003, Treial versus the Republic of Estonia, decided to order 3000 Euros to be paid by the Republic of Estonia for non-proprietary damages and 300 Euros for legal costs and cover all possible fees that may be taken.

In the given case, the European Court of Human Rights took the viewpoint that the reasonableness of the duration of the proceeding shall be assessed by the specific character of the case, considering the provisions provided in the case law established by the European Court of Human Rights, the action of the plaintiff and competent bodies of power. The court found that even though, it is true that the action of the participants in the proceeding contributed to the longevity of the proceeding, even in legal systems where applies the principle that the participants have procedural initiation right, regardless of their attitude, it doesn't release courts from assuring fast hearing, as article 6 (1) of the convention requires.[12]

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10 Estonian Code of Civil Procedure doesn't contain a term, during which the civil matter should be solved, but the provisions of procedural rights contain several terms for performing procedural acts, like terms for scheduling of court session and submitting a response. But the term for hearing the civil matter might be provided in a specific law, like it is with bankruptcy matters. According to § 27 (1) of the Bankruptcy Act, the court shall hear the debtor's petition for bankruptcy within 10 days, but with good reasons within 20 days from the date of initiation the bankruptcy proceeding and according to subsection 2 the bankruptcy petition of creditor within 30 days or, with good reason, within two months after commencement of the bankruptcy proceedings.

11 In the case JUR/2007-01-23, the marriage of parties was divorced in February 1997 and the plaintiff's spouse filed an action to Narva City Court for division of joint property in May 1997. In 2002, Narva City Court made a decision, which was annulled by Viru Circuit Court on 5 June 2001 and the civil case was sent for a new hearing to Narva City Court. Narva City Court made another decision on 10 October 2002, which county court annulled and made a new decision. Supreme Court decided on 16 April 2003 not to accept the appeal in cassation. Courts had different viewpoints whether the apartment or apartment association's shares are part of joint property and whether the price of the apartment should be specified in accordance with the payment of apartment association's share or with market price. Ultimately it was decided to set the apartment price in accordance with market price. The plaintiff found that his right for fair hearing of the case within reasonable time was violated. European Court found that article 6 (1) of the convention had been violated in the part of hearing the case within reasonable time. The court noted that even though, interpretation of the law during the national proceeding was difficult, especially in the part of whether the apartment or the share of apartment association were part of joint property, the facts and the object of the dispute were not complicated in their nature in this case. At the same time it was pointed out that the delay arose also from the excessive workload of judges, but the states must organise justice in a way the courts could comply with the provisions of the convention. (MEMO-JUR/2007-01-23, [03.03.2007], http://mamba.just.sise/ Juku/documents/ Intranet/Kohtuniku%20abimees/Euroopa%20In).

12 The European Court of Human Rights found that the proceeding which started in February 1994 had lasted over nine years and nine months. Since for Estonia, the convention entered into force on 16 April 1996, the time period before that does not fall under the competency of the European Court of Human Rights due to its duration. Hence the court decided on the basis of the proceeding that took place after April 16, 1996 and found that this case was complicated because during the proceeding there were new and additional claims filed and the list of marital property was long and included agricultural property, whose division was more difficult and there were repetitive applications against judges, but even though the total duration of the proceeding cannot be considered as one within the reasonable time. (European Court of Human Rights. Treial vs. Estonia, Application no. 48129/99. Court judgment December 2, 2003, [07.01.2004], http://www.coe.ee.)

Availability of appeal procedure and its principles have been discussed in the **recommendation No. R (95) 5 of the Committee of Ministers to member States concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases,** adopted on 7 February 1995 stresses that appeal procedures should be available not only in criminal cases, but in civil and commercial cases as well.

Thereat, the ineffective or inadequate procedures and the abuse by parties of the right to appeal cause unjustified delays and may bring the justice system into disrepute. According to the preamble effective appeal procedures are in the interests of all parties to litigation and of the administration of justice (p. 1).

It has been considered necessary that governments of member states adopt or reinforce, as the case may be, all measures which they consider necessary to improve the functioning of appeal systems and procedures in civil and commercial cases, in particular the following:

1. "In principle, it should be possible for any decision of a lower court („first court") to be subject to the control of a higher court („second court"). Exceptions should be consistent with general principles of justice. (Chapter I, article 1 (a, b), p. 1).

The author has the opinion that this principle is important based on the purpose of correcting a possible mistake of the court. Estonian civil procedure is also based on this principle, according to which the decisions of first court are appealed by way of appeal order, except for the default judgment, where a party against whom the judgment was made can file a petition to set aside a default judgment and appeal cannot be filed when the participants in the proceeding have waived the right to file an appeal.

2. Information should be provided to parties concerning their right to appeal and of how to exercise this right, such as time within which an appeal must be lodged (Chapter I, article 1 (c)).

This requirement has been met in Estonia in a way that the conclusion shall also set out the procedure for filing appeals, the court with which an appeal should be filed and the deadlines (TsMS § (6) 442).

3. Judges of higher courts should not be allowed to participate in the proceedings relating to cases with which they were involved in a lower court (Chapter I article 1 (d)).

Such principle is also in Estonia, which is the basis for removing a judge. (TsMS § (6) 23).

In the opinion of the author, there are important principles given in Chapter II of the recommendation No. R (95) 5 of the Committee of Ministers to member states about limitations on judicial control, according to which in principle, the issues of litigation should be defined at the level of the first court and all possible claims, facts and evidence should be presented to the first court (Chapter II, article 2 (a), p. 2). According to given recommendations, the states should consider passing such legislation.

In Estonia, civil proceeding is also based on this principle, since the appeal proceeding of civil matters is of a limited nature, according to which it is not allowed to file new circumstances, evidence nor claims. Filing new circumstances and evidence is possible only under exclusive circumstances if there are good reasons (TsMS § (3) 652).

The Committee of Ministers provided that it would help to limit the appeal if the first court gave **clear** and **complete reasons for its decisions by using language which is readily understandable** (Art. 2 (b), p. 2).

The author thinks that the motivation and clarity of the judgment is an important indicator of the quality of court's work and Estonian legislator hasn't considered it necessary without a reason to provide insufficient reasoning as significant violation of procedural law rules, which results in annulment of a decision and sending the civil case to the first court for a new hearing (TsMS (1.5) §).

Unfortunately it should be stated that there have been problems with judgment motivation in judicial practice and the court of appeal has itself tried to eliminate shortcomings, but it is not always possible.

In the opinion of the author, there are important principles given for appeal court in article 3 of the recommendation, according to which the second court should consider only **appropriate matters**, which would mean:

1. excluding certain categories of cases, for example small claims;
2. requiring leave from a court to appeal;
3. fixing specific time-limits for the exercise of the right appeal;
4. postponing the right to appeal in certain interlocutory matters to the main appeal in the substantive case (p. 2).

In order to prevent any abuse of the appeal system or procedure, the Committee of Ministers recommended that the states should consider taking several measures:

1. requiring appellants to give reasoned grounds for their appeals,

2. allowing the second court to dismiss in a simplified manner any appeal which appears to be manifestly ill-founded, unreasonable or vexatious.

This principle has been also provided in § 637 of Estonian Code of Civil Procedure, where grounds for refusal to accept appeal have been provided and according to clause 1 (6), the court would not accept an appeal if presuming that the allegations presented in the appeal are right, the appeal clearly cannot be satisfied.

In this case, such a refusal can turn out to be quite problematic and in judicial practice it has been used rather carefully, which in the opinion of the author is right. But due to this legal basis, it is possible to save the money of participants in the proceeding as well as of the state for further control function of completely unreasonable actions and through that give the possibility to fasten the proceeding for hearing other appeals.

3. where the judgment is immediately enforceable, allowing a stay of execution only where it would cause the appellant irreparable or serious harm, or would make it impossible for justice to be done at the second stage. This principle could cause serious legal argumentations.

It derives from the aforementioned recommendation that for faster hearing a matter in European administration of justice it has been considered necessary to think through considering using limiting measures in appeal courts that have been given in article 5 of chapter II (p. 2) of the recommendation, according to which, in order to ensure that appealed matters are examined by the second court, the states should consider taking the measures for:

a. allowing the court or the parties to accept some or all of the findings of fact of the first court;

b. allowing the parties to seek a ruling limited to certain aspects of the case;

c. where leave to appeal is necessary, enabling the court to limit the scope of the appeal, for instance to point of law;

d. including restrictions concerning the introduction of new claims, facts or evidence in the second court unless new circumstances have arisen or there were other reasons specified by the internal law why they were not introduced in the first court;

e. limiting the hearing of the appeal to the reasoned grounds of the appeal, subject to cases where the court may act on its own motion.

In an appeal proceeding, there have been problems arisen in the issue whether all procedural acts should be performed collectively or can certain acts be performed by a judge sitting alone and what kind of acts could be performed by an assistant judge.

In addition, the issue of involving a judge of his territorial jurisdiction in participating in an appeal proceeding has been also discussed in Estonia.

Here, Estonian circuit courts saw the opportunity of the judges of their jurisdiction for acquiring experiences in higher courts and to see what kind of mistakes can occur in the work on first instance courts. The legislator gave this opportunity at the time of establishment of courts of appeal (TsKPS § 14).[13]

The author sees it as a positive solution for first court judges to acquire experience.

According to the Code of Civil Law that came into force January 1, 2006 the number of procedural acts performed by assistant judges or court officials, which earlier were judges' competence, have been increased. In an appeal proceeding, a competent court official may make, under supervision of a judge, a ruling in preparation of the adjudication of the matter or other rulings of organisatory nature which are not subject to appeal including, a ruling on refusal to accept an appeal (TsMS (5) § 640).

Pursuant to § 173 of the current Code of Civil Procedure the court determines only the division of procedural expenses and their proportions, but the ruling on determination of procedural expenses can be done by assistant judge (Code of Civil Procedure (6) § 174). In practice, there are several problems arisen from the amendment of this law: for example, the movement of files in county courts from one court house

13 The Code of Civil was passed 19 April 1993 and it entered into force 15 September 1993. TsKPS Section 14. Panel of circuit court in adjudication of civil matters
(1) Circuit court shall adjudicate civil matters collegially by way of appeal procedure.
(2) Upon hearing a matter by way of appeal procedure, the chairman of a circuit court has the right to include a county or city judge of the same circuit in the panel of the circuit court.
(3) The chairman of the circuit court or the chairman of the Civil Chamber of the Supreme Court: 1) for adjudication of a civil matter forms a panel of three circuit court judges or two circuit court judges and one county or city court judge; ..

to another for ruling that determines procedural expenses, which is also connected to the postal expenses. One problem, which the legislator hasn't envisaged in this case, is ordering court expenses, especially state fees, in favour of the state. According to § 174 (1) of the current Code of Civil Procedure, a participant in a proceeding has the right to demand, within thirty days after the court decision concerning the division of costs enters into force, that the court of first instance which adjudicated the matter determine the procedural expenses in money based on the proportional division of expenses set forth in the court judgment. Whose initiative should it be to file a request if state's representative did not participate in the proceeding? For example, in case of claims for support, the plaintiff is released from payment of state fees, but if the action is satisfied, state fees are ordered to be paid by defendant. Until the January 1, 2006, there was no such legal problem because in making the court judgment, the court had to determine the amount of procedural expenses and this was not a problem.

In the opinion of the author, the transposition of German civil procedure has not been done systematically; therefore there are several unsolved issues.

The fact that Estonian administration of justice has gone in a way to release judges, also in appeal proceedings, from performing their procedural acts, which court officials are capable of doing, is in the opinion of the author proper and in accord with indicative guidelines of the European Union.

Chapter III of the Recommendation No. R (95) 5 of the Committee of Ministers to member states concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases talks about taking the measures for ensuring the efficiency of appeal proceedings, based on which no more judges should deal with one case than necessary.

In Estonia also, a judge sitting alone dealt with preparatory proceedings on appeals of appeal proceeding, but since January 1, 2006, the possibility of making judicial decision in appeal proceeding by the judge sitting alone has been increased, on hearing the appeal against a ruling (TsMS § 666).

Namely, TsMS § 666 (1) provides that in a circuit court, an appeal against a ruling is heard and adjucated by one judge of the circuit court.

At the same time according to § 666 (1), a ruling by a county court on refusal to accept or hear an action or on termination of a proceeding shall be heard and adjudicated by a three-member panel of the civil chamber of a circuit court, except in the cases where the object of the proceeding is a proprietary claim and the value of the civil matter does not exceed 10 000 kroons.

An appeal against a ruling on termination of proceedings in a proceeding on petition shall be heard by a three-member panel of the civil chamber of a circuit court.

The provision of the Code of Civil Procedure is not clear enough and causes legal disputes in judicial practice; whether it is justified that appeal against court ruling is heard by a judge sitting alone.[14]

If a circuit court should hear an appeal against court ruling sitting alone, but in fact the appeal is adjudicated collegially, do we have an illegal panel that is significant violation of procedural legal provision and which will cause the annulment of the decision?

The author thinks that in the interest of clarity of the law, hearing the appeal in appeal proceeding by judge sitting alone should have been provided more precisely in the Code of Civil Procedure.

In the Recommendation R (95) 5 of the Committee of Ministers to member states it has been considered useful in hearing an appeal to allow several procedural acts, such as applications for leave to appeal, procedural applications, where the case is manifestly ill-founded, etc., to be done by a single judge.

In Estonia, procedural acts of preliminary proceeding are done by a single judge in appeal procedure and this is totally expedient, but the author does not consider excessive broadening decisions made by sitting alone in appeal procedure of being proper. And for this reason that court of appeal has the function of controlling

14 Civil Chamber of the Supreme Court took a position in the civil case No. 3-2-1-23-07 of April 2, 2007, where the question was imposing a fine on UJUMA OÜ for late presenting of the annual report, that the appeal against court ruling was heard by a circuit court judge sitting alone, but according to TsMS § 666 (3) it should have been heard by the panel of three circuit court judges since it was a ruling on entry denying the petition for entry (RT III 2006, 34, 290). Civil Chamber of the Supreme Court took a position in the civil case No. 3-2-1-79-06 of October 3, 2006, that under a ruling on termination of proceedings in the sense of TsMS § 661 (1) should be considered all rulings in a proceeding on petition that adjudicate the matter, including rulings adjucating petitions for entry in registry matters with appeal against the ruling. At the same time, the ruling terminating the proceeding should not be seen just as the ruling terminating the proceeding in the sense of TsMS § 428.

legality of judgments of lower court and such control should be generally done collegially in the appeal level, which also adds a greater authority to the judgment.

Since January 1, 2006, appeals against court ruling usually are heard by judge sitting alone, but this is not the way Latvia and Lithuania have gone.

It has been considered necessary in the recommendation that where oral hearings take place, it should be ensured that they are completed as soon as possible, i.e. the judgment should be passed immediately after or within a short time period as provided for by law.

Providing adequate technical facilities to the second court has also considered necessary. In this regard, there has much been done in Estonia since 1993 for providing modern technology, for example court sessions are prepared through computers, but there are no libraries that comply with modern requirements in courts like there are in Finland, Sweden and Germany. There are no necessary conditions for recording court sessions and for hearing the witnesses and participants in the civil proceeding in the form of procedural conference.

For ascertaining objective truth and solving disputes in a civil case, there is a principle in the aforementioned recommendation of giving the second court a more active role in the hearing of the case in order to regulate its progress for friendly adjudication (Chapter III, article 6 (g)), which in the opinion of the author is duly reasonable.

But this requires the willingness to compromise by the participants in the proceeding, which in Estonian judicial practice doesn't go easily.

The recommendation tries to draw the attention of member states to promoting the use of qualified lawyers, acting for parties in the court and improving contacts between the court and lawyers and others involved in litigation, for instance by arranging seminars involving the court and the bar associations or enabling discussion on how to improve procedures.

In the opinion of the author, the given recommendation is very practical and allows improving the quality of administration of justice and the discussions would help to bring out the weaknesses.

Unfortunately, in Estonia, these common discussions take place rarely and such viewpoints of lawyers have been revealed during Court en banc. But there should be more of these discussions and very experienced judges have such experiences, which could also be acquired from foreign states.[15] Good opportunities for acquiring experiences on the level of judges is the cooperation organised by the Council of Baltic Association of Judges and in the coarse of this cooperation annual conferences take place on the issues of Lithuanian, Latvian and Estonian justice. The founding the Council of the Baltic Association of Judges was decided on 16 November 1993 in Jurmala, Latvia and since its foundation, the author of the present paper has been the member of this council, where there are four judges from each state. [16]

R. Lang, the Minister of Justice, talked about the need of cooperation with the Bar Association also during the general assembly of the Bar Association on 13 March 2007, where he mentioned that "the question worthy of discussion by the general assembly would be – how could the Bar Association contribute that the proceedings were more effective and the society more pleased with the functioning of the legal protection system as a whole? "[17]

Chapter IV is about the role and functions of the third court and points out that the cases have already been heard by two courts and therefore through appeal proceeding develop the law or contribute to the uniform interpretation of the law (chapter IV, article 7 (b, c)). In principle, new facts or new evidence may not

15 The author was in Ahausi Amtsgericht in Germany and at that time also participated in the region's deliberation, where the topic was traffic accidents in the area and the reasons behind them. Representatives of traffic police, court, the Bar Association and local government participated in this deliberation and together they discussed the weaknesses in police's work in certain records, inadequacy of evidence and in the action of local government – placing traffic signs, placement of pedestrian crossings, and explanation among schoolchildren. Since these discussions are held regularly, they also agreed upon the next meeting and on how to eliminate shortcomings.
The question arose: why couldn't there be more such common deliberations in Estonia.

16 See www. kohus.ee News Bulletin of the Administration of courts division of the Ministry of Justice of the Republic of Estonia. Amicus Curiae November 3, 2006. Mare Merimaa. Overview of Supervisory Board of the Association of Judges of the Baltic States, pp. 10–11.

17 Minister of Justice: the Bar Association should apprehend its liability for entire administration of justice. Mart Siilivask. The speech of the Minister of Justice to the Bar Association.pdf, [15.03.2007], http://www.just.ee/28027.

be presented in the third court. This principle has been also provided in Estonian civil proceeding.

According to § 15 of the Constitution of the Republic of Estonia, everyone whose rights and freedoms are violated has the right of recourse to the courts. This general right of recourse to the courts is the right of each and every person, which means that it also extends to legal persons, and this requires *prima facie* the best judicial protection[18] and is a fundamental right without a reservation in the law. It is important that a person has an opportunity to file a claim and „legal order provides a possibility for free legal aid. "[19]

Hence, the conventional right of a person is also one of the important principles of civil procedure and it brings up a question of availability of justice from the following aspects:

1. For a recourse to a court, it is necessary to file a procedural document that conforms to the requirements and depending on the civil matter, pay state fees, which might be too much for this person.

2. In a proceeding a person needs legal aid since the matter in dispute and procedural legal provisions are quite complicated. Legal aid is not inexpensive and a person might not have money to pay for it.

Hence, the constitutional right of recourse to the courts must be also guaranteed in reality.

In Committee of Ministers' Recommendation No. R (81) 7 to member states on measures facilitating access to justice, it has been stressed that according to the article 6 of European Convention on Human Rights, it is an essential feature of any democratic state to guarantee the right of access to justice and to a fair hearing. Court procedure is often so complex, time-consuming and costly that private individuals, especially those in an economically or socially weak position, encounter serious difficulties in the exercise of their rights.

Committee of Ministers' recommendation No. R (93) 1 to member states on Effective access to the law and to justice for the very poor also discusses the availability of administration of justice.

In this recommendation, by referring to Resolution (76) 5 on legal aid in civil, commercial and administrative matters, Resolution (78) 8 on legal aid and advice, Recommendation No. R (81) 7 of the Committee of Ministers on measures facilitating access to justice and United Nations resolutions on human rights and extreme poverty, Resolution 46/121 of 17 December 1991 of the General Assembly and Resolution 1992/11 of 18 February 1992 of the Commission of Human Rights, the study by the Movement ATD-Fourth World entitled "Towards justice accessible to all: legal aid machinery and certain local initiatives as seen by families affected by severe poverty" has found that completely effective administration of justice can exist only, when it is part of a comprehensive, consistent and far-reaching policy that aims to co-operation with certain groups of the society and to combat poverty. At the same time keeping in mind the indivisibility principle of human rights, which means that exercising such civil and political rights, has been expressed in European Convention for the Protection of Human Rights and Fundamental Freedoms.

In Estonia, ensuring the availability of legal aid is one of the main principles in civil procedure, but the problem is that not all persons want to admit their need of assistance and are afraid to turn to the state for help.

The development of Estonian civil procedure shows that it is based on the recommendations of the Committee of Ministers of the Council of Europe and of other states, especially Germany's civil procedural law, but I consider redundant rush in quite frequent changing of procedural law being a negative side, which causes legal problems in interpreting provisions of procedural law and it is one of the reasons why we cannot still talk about a stable judicial practice.

18 RT III 2001, 2, 14, Supreme Court *en banc* ruling December 22, 2000.

19 The Constitution of the Republic of Estonia. Section 15. Commented by LL. M. M. Ernits. Commented publication, Juura, Tallinn, 2002, p. 140.