The certainty/stronghold of law, the world of yesterday and today's weather

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Hospites venerabiles, honorati et officiales, rector magnifice, collegium iudicum illustrissimum!

Thank you for the honour of being invited to speak on the 90th anniversary of the Supreme Court. This is the first 90th anniversary that we are happy to celebrate together. So, first of all – Congratulations and long live! I mean it sincerely and I hope that in 2083 another 90th anniversary of the Supreme Court of the Republic of Estonia – that of 90 years of uninterrupted activities – will be celebrated.

The topic of my today's lecture was announced to be „*Õiguse kindlus*". I want to explain to our foreign guests that this pair of words in Estonian has an ambivalent meaning. Namely, the word „*kindlus*" in Estonian means both certainty and sureness as well as a fortress or a stronghold. A few snowy weeks have passed since the topic was decided on, and the initially laconic title has grown longer by today. I would like to word it as follows: „Certainty/stronghold of law, the world of yesterday and today's weather." The latter, seemingly, poses no problems. Thanks to the efforts of our film restorers I believe that even the younger people among the audience have seen Grigori Kromanov's film „The Dead Mountaineer's Hotel" (1979). In this film Luarvik Luarvik gives an extraordinarily precise weather forecast to the group of people who have been cut off from the world by an avalanche of snow: „The weather, gentlemen! – Today we have snow!". That is very true.

I did not succeed in finding out what was the weather like in Tartu on the 14th of January 1920 at 2 p.m. when the „Supreme Court of the state was opened in the old-fashioned and rather confined grand hall of the Town Hall", as reported by daily „Postimees" the next day in a comparatively short article on the second page immediately before „local news" and after an overview of „the national congress of students", which had taken place in Tallinn from 3 to 5 January. Almost the entire front page of that newspaper was devoted to the events of the 14th of January, namely to those commemorating the liberation of Tartu city and county. The newspaper leaves no doubt - the war is still topical. Nevertheless, a new state was being built at feverish speed.

In the broader historical context of Europe the Republic of Estonia was born and needed to build up its judicial system at the time of yet another end of the world. I am not referring to the disintegration of empires, I am referring to the crumbling of the substance of law that people had

been believing in. The 19th century had referred to the death of Gods. In regard to law this meant the discarding of the belief in natural law, which had been considered suitable for centuries and which had been based either on divinity, universal human nature or common sense. The 18th century and, in fact, already previous centuries, had clearly shown that under the label of allegedly universal natural law a very particular and concrete arbitrariness could be exercised. A class society reflecting the heavenly Lord and the heavenly hierarchy could, indeed, be elevated by the idea of natural law out of the reach of human ordering; in the fraternity of the free and the equal such concept no longer had a place. What I am bearing in mind is the slogan of the French revolutions „*Liberté - Egalité – Fraternité*!"

The new bourgeois world needed a new stronghold and it believed to have found it in the law made by the people themselves. The separation, mutual control and balancing of powers; the subjecting of the exercise of the authority of the state to general, known rules; treatment of human and fundamental rights as the rights of defence of a man against the interference by the state – all these and a number of other legal mechanisms were invented in the 19th century in order to establish, maintain and guarantee the functioning of a new society of equally free subjects of law. The novel certainty of law found its apparent form in the written constitutions that were enacted „for ever". After the French revolution, during the period of only 15 years, as many as 7 of such „everlasting" constitutions were adopted and proclaimed. Certain nervousness and pulling back and forth can even be understood – there was a reason why that revolution was called "great". This did not amount to mere constitutional reform where the old regime -- *ancien régime* –was replaced by a new one, like by the Glorious revolution of England a century before (1688/89). In France the whole of the social order and the society itself were reorganised. The world of such big changes requires some support and strength. France proved to be the path finder in this respect, too, as it decided to start using a very specific statutory law – the codifications that regulated a branch of law exhaustively and, by idea, exclusively.

Les cinq codes :

Code civil (1804)

Code de procédure civile (1806)

Code de commerce (1807)

Code d'instruction criminelle (1808)

Code pénal (1810).

The written constitutions and far-reaching codifications show how important a general rule called „a law/statute", which was equally and uniformly binding on everybody, proved to be. It

had to be accessible to everyone at any time after its public proclamation. Anatole France made the extravagant poet called Chulette speak with obvious irony about the „majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread.[1]". Indeed, a law proclaiming majestic equality prohibits equally the rich and the poor. Moreover, it poses – with equal strictness – prohibitions on everyone who is somewhere between the rich and the poor. This was the very core of the now order: the freedom that the revolution had strived for had to be equally available to everyone.

The teaching of the rule of law; penal law strictly based on the principle of legality; private law based on private autonomy; judicial control over the decisions of the executive; constitutional - although not yet judicial – guarantee of fundamental rights; independence of judges – the list of the framework of ideas worked out in the 19th century could go on much longer. All this was created against the background of the belief that the law, as a stronghold, could offer protection to the new world which had been proclaimed by the trumpets of revolution or the clapping of the hoofs of the Napoleon's great army or - rather and more often - by the applause of the parliament on the occasion of adoption of important reform laws. The belief in the steadfast nature of strong law in the protection of every man must have spread much further than the silence of the studies of legal scholars. Stefan Zweig described in his autobiography the times of the Habsburg empire before World War I in a manner that even in 1942, when the book was written, it must have sounded much more like a fairytale than a description of reality.

He wrote that "everything in the almost a thousand year old Austrian empire seemed to be establish to stay for ever, and the state itself was the guarantor of its permanence. The rights that the state granted to its citizens had been written down by the parliament – the representative body freely elected by the people -, and each obligation was clearly defined.[…] Everyone knew what he owned and what belonged to him, what was permitted and what was not. [...] Who had a property could precisely calculate how much interest it earned per year, an official or an officer could find in the calendar the year when he would be indisputably be promoted and when he will retire. Each family had a concrete budget, each family knew how much it could spend on living, on food, on summer holidays, for representation costs; and each family had a certain amount saved for unexpected events, for illnesses and doctor's expenses. Those who had a house deemed it as a secure home for their children and grand children; farms and businesses were handed down from one generation to another […]."[2]

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[1] Anatole France, The Red Lily, Chapter VII.

[2] Stefan Zweig, Eilne maailm: Eurooplase mälestused, tlk. J. Kross, Tallinn 1988, lk. 11 [The World of Yesterday; English translation by the translator of this text]

In contemporary Europe, I believe, even the Swedes are not naive enough to believe in the permanence of everything that is. The autobiography of Stefan Zweig is entitled accordingly: "The World of Yesterday".

Stefan Zweig was not a legal scholar, neither was he a lawyer by profession; nevertheless, he considered it necessary to open his description of the Golden Age of Security by the legal credo of that era: the rights of citizens are established in the laws enacted in parliamentary proceedings and „every obligation is clearly defined". The science and practice of law of that time is characterised by the aspirations to achieve clarity and precision as much as possible. In the law literature of the 20th century the definition of railway, worded in the judgment of the highest court of the German Empire, *Reichsgericht*, of 1879, was quoted as a model of cretinism in defining. I shall read this out, so that the parade example of history of law will have, at least once, have been quoted in this assembly hall of Tartu University:

[A railway is] "an undertaking arranged for the repetitive locomotion of persons or things over not wholly insignificant courses on a metal base which through its consistency, construction and smoothness is aimed at enabling operation of the transport of large weight masses or at reaching a proportionate significant speed of transport movement, and which, through this peculiarity in combination with the natural forces used to produce the transport movement (steam, electricity, animal or human muscular activity, and also, on inclined surface of the way, transport vessel's own weight and its load etc) is capable of taking on itself, in the running of the undertaking, a relatively important effect (according to the circumstances, only useful in the intended manner, or also destructive of human life and dangerous to human health).[3]"

As I already mentioned, this is mostly quoted when there is a need to refer to the top achievements of legal formalism and professional cretinism. This was translated into Estonian in Eric Hilgendorf's article which was published in our journal „Akadeemia". The title of the article speaks volumes: Why are lawyers disliked?". By the way, Hilgendorf himself is a lawyer and he is not only tolerated but held in high esteem by his students and colleagues in the Würzburg University where he is the professor of penal law. Yet, as regards the quoted judgment concerning private law, professor Hilgendorf, too, fails to explain the context thereof. Its is not conceivable that the highest court of the German Empire decided to define the term „railwlay" just like that, out of the blue. *Reichsgeriht* was facing a concrete accident which had taken place on

[3] Vt. Eric Hilgendorf, Miks juriste ei sallita, tlk. Eva-Liisa Sutrop [Why are lawyers disliked?]. – Akadeemia 2000, nr. 8, lk. 1692.[German original and English translation available at: http://books.google.com/books?id=bXm6CQ_wN7sC&pg=PA69&lpg=PA69&dq=Reichsgericht+1879+railway&source=bl&ots=eJ37lWiW2P&sig=XfxzLETG-MB5GYj_TH8QSXwVBJQ&hl=et&ei=fApXS820Bsjb4gbpkuXLAw&sa=X&oi=book_result&ct=result&resnum=2&ved=0CAwQ6AEwAQ#v=onepage&q=Reichsgericht%201879%20railway&f=true]

the state railway which was under construction. For the construction purposes the construction company was using a temporary railway and that is where the accident happened. The question was whether the risk liability established by law in regard to so called completely finished railways was also applicable to that case and whether the victim could claim compensation for damage from the construction company without proving the quilt of the company on the sole ground that dangerous machinery had been used. Or, as the *Reichsgeriht* said: the use of railway is capable of taking on itself, in the running of the undertaking, a relatively important effect which, according to the circumstances, can be only useful in the intended manner, or also destructive of human life and dangerous to human health. The precise definition of railway was necessary in order to word a general norm, so that the existing legal rule could be applied, by way of analogy, to the cases not clearly referred to in the law. We can not deny that the court has been admirably patient in giving reasons for its judgment, and in regard to each argument the court has presented the full reasoning so that it could be double checked.

The duty of courts to substantiate their judgments was an important requirement of the new doctrine of rule of law, and it is still important. One of the sore points of the idea of separation of powers has been, from the very beginning, the question of which of the powers should check the courts. In disputable cases it is the court who says what is the law in the concrete case. The judgment of the court acquires the effect of law and is subject to execution, if necessary through enforcement by state. Consequently, the uncontrollability of the courts could prove to be the weakest joist in the edifice of separate powers. Today this problem is even more acute than in the 19th century, because the judicial power has acquired extensive competence, through constitutional review, in checking the executive power. Setting aside international courts in certain specific spheres, the only functioning control at the state level is exercised by the general public, just as Immanuel Kant envisioned. The public does not necessarily mean the press who is hungry for sensation. In many countries there is a functioning and efficient legal public acting through law literature. In this context it is very good and it deserves recognition that recently our one and only law journal „Juridica“ has come to contain a column concerning judicial practice.

Before touching briefly on the current weather in the Estonian legal life I would like to speak about one more example from the already referred „world of yesterday“ as described by Stefan Zweig. In 1896 the German Civil Code was adopted, which entered into force on 1 January 1900. The draft of the Code had been written by two very high-level committees. The first of these acted between 1874 and 1888, that is almost 15 years, and the second committee from 1890 to 1895, i.e. 5- to 6 years extra. Plus the discussions in the parliament. And then there was the period of vacation – 4 years between the adoption of the law and the entering of it into force. So,

in the end of the 19th century the Germans took 26 years to prepare their Civil Code. Already during the period of vacation the first commentaries, text-books and discussions on individual topics were published. It is not hard to imagine how much support all this provided for practice, when the new Code was started to be applied. By the way, the Republic of Estonia, which existed between the two world wars, took its time to prepare the most important Codes. For example, the Criminal Code, which was adopted in 1929, entered into force in 1935, together with the new Code of Criminal Procedure.

Now I have come to today's weather. We know that in the Republic of Estonia, which regained its independence in 1991, an extensive law reform at the level of legislation was started and dealt with intensity. In the international and historical context the Estonian legislator took radical steps during the times of reform, although it also showed some signs of nervous haste. No wonder then that our practitioners have not been supplied with commentaries, text-books and studies of individual topics by the time the Codes enter into force; these are published too late or not at all. In any case, the big wave of bulky reform laws should be followed by a time when the legislator withdraws from active moulding of law and allows the positive law to strengthen its positions through daily practice. Nevertheless, the Estonian legislator has carried on in a revolutionary fever, as if wanting to score off the constitutional legislator of the young French Republic of the late 18th century.

It is clear that such activism of the legislator adversely affects the certainty and stability of law. It would be interesting, also in the international context, to establish through a scientifically competent empirical study of Estonia's recent history, how the functioning of the courts is affected by the fact that rules of procedure are amended by laws that are enacted almost overnight. Estonia's history, which is not to be proud of but which is, nevertheless, eventful, has rendered this piece of land an experimental field in the legal history of Europe. When we are among ourselves we have the tendency to blame all bad things on outside forces. The reality is that the recent legal history of Estonia shows our incredible willingness under the label "the Estonians' experiments with themselves"; and these experiments come by surprise through legislation which in private law interferes enthusiastically and in penal law , sometimes, rather hysterically. One of the theoreticians of modern civil society and respective social order, John Locke, did not see any reason to keep a legislative body functioning permanently – there must come a time when important laws are there and then the people's representatives must return to their former activities and try to learn by the laws they themselves have enacted.[4]

[4] John Locke, Teine traktaat valitsemisest. Essee tsiviilvalitsuse tegelikust algusest, ulatusest ja eesmärgist, tlk. A. Kilp, Tartu 2007, lk. 90; XII, 143.[The Second Treatise of Civil Government. English version available at: http://oregonstate.edu/instruct/phl302/texts/locke/locke2/2nd-contents.html]

A legislative machinery working at full speed even though revolutionary reforms have been concluded is not a problem of the parliament only. The ministers and the bureaucrats of ministries have their role, as do various social and economic interest groupings. When, as a result of all this, legislation proves to be a weathercock of current political preferences, this signifies much more than a mere wish to please the voters. Quick changes of legislation was one of the tools utilised by the totalitarian regimes of the beginning of the 20th century to implement their political objectives and ideologies. In 1935, the most popular publication of German laws, compiled by Heinrich Schönfelder, was – for the first time – published with exchangeable pages. Exactly the same technique was used in the Soviet Union, whereas it has never been used for example in Scandinavia. Its is true that this is but an exterior sign, nevertheless, this speaks about the content of respective legal culture. It is possible that our modern electronic State Gazette (Riigi Teataja) where we replace pages without even noticing it, has made out law more vulnerable than we can conceive. On the new year's eve the President of the Republic expressed his satisfaction with the fact that even during the difficult times in the economic sense no forces have emerged in Estonia who would like to steer the state away from the course of the rule of law state, based on freedom. I hope very much that this will remain so, because an experienced eye can detect in our current legal reality quite a few structurally familiar things, which remind us of those times in the 20th century that were evil and threatening both the security of law and individuals, and not of the world of yesterday of Stefan Zweig with its golden age of security.

I do not want to end on a pessimistic note on this festive day. The more so that in the beginning I did express my hope that even if not being present in flesh and bone I expect to witness from the other world the 90th anniversary of uninterrupted activities of the Supreme Court of Estonia. I may be that I am just as naive in my belief as was Europe before World War I. Or, as Stefan Zweig put it:

„Nobody believed in wars, revolutions or changes. Everything radical, everything violent seemed impossible in the era of reason.“[5]

Afterwise, we know how naive this belief was. Stefan Zweig knew, too, and in 1942 he could no go on any longer.

But a man must be able to believe in something, be it something as trivial as a belief in warm underwear in a cold winter-day. I believe that it is reasonable to search for models and ideas from the history of law. If our objective is a rule of law state with secure law, we should look for models in the era that highly appreciated the security of law. In any event, that era promises more

[5] Stefan Zweig, Eilne maailm: Eurooplase mälestused, tlk. J. Kross, Tallinn 1988, lk. 12, [The World of Yesterday; English translation by the translator of this text]

than can be offered by the times that distorted the high tide of security of law through polemical criticism, the times that wilfully produced legal uncertainty with the aim of keeping the people fearful. Legal formalism, which in the 20th century was deemed an enemy by quite a few, could prove to be the long-lost key to the legal thinking of the 21st century. Rudolph von Ihering wrote in 1858 that "form is the sworn enemy of arbitrary rule and the twin sister of liberty". We have many reasons to care very much for the great achievement of that modern era - the universal equal freedom to everybody. So, my wish to the hero of today's ceremony is the following: may the Supreme Court have courage for that old-fashioned formalism in its activities. This should be the steady foundation on which the tower of strength of both law and freedom can stand.