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# The Role of Foreign Law in the Courts' Application of Estonian Law

**Abstract.** It is difficult to overestimate the importance of comparative law in the legal developments of the restored Republic of Estonia. The country's legislative drafting and jurisprudence frequently refer to and study legal solutions adopted in other countries, with private-law practitioners having even cited the comparative method as the main approach to drafting legislation and the best-practice rules for legislative drafting adopted in 2011 directing that the experience of other countries be considered in both the proposal for drafting and the draft law itself. While the comparative approach is followed so often for legal articles and doctoral theses that foreign law has even been referred to as an everyday tool for Estonian lawyers, reference to solutions in other legal orders is a much rarer phenomenon in application of the law, whether in the case law of Estonia or in that of other countries. The article provides an overview, based on legal literature and Estonian case law, of the arguments related to the admissibility of the use of foreign law in court decisions and examines the role of foreign law in the application of Estonian legal provisions. Its discussion focuses not on decisions that refer to the case law of the European Court of Justice or European Court of Human Rights or that cite case law from other countries with regard to applying international conventions but on those situations in which courts have used references to other countries' legal provisions, case law, or legal literature (i.e., comparative arguments) when applying national law.

**Keywords:** comparative law, administration of justice

It is difficult to overestimate the importance of comparative law for how law has developed in the restored Republic of Estonia. In Estonian legislative drafting and jurisprudence, it is quite commonplace to study and refer to legal solutions adopted in other countries. Thus, in the field of private law, the comparative method has even been identified as the main technique applied in drafting of legislation[*1], and the rules adopted in 2011 for good legislative drafting[*2] direct that the experience of other countries be taken into account in the preparation of both the drafting proposal (per §1(1)(5) and the draft law (§43(1)(6)–(7). In

1 P Varul, 'Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia' [2000](5) Juridica International 104, 107.

2 Hea õigusloome ja normitehnika eeskiri, RT I, 29.12.2011, 228, English translation available at https://www.riigiteataja.ee/en/eli/508012015003/consolide (25.08.2023).

fact, the comparative approach is applied so often for legal articles and doctoral theses that foreign law has been referred to as an everyday tool for Estonian lawyers.[*3]

In the application of the law, on the other hand, reference to solutions in other legal orders is a much rarer phenomenon, both in the case law of Estonia[*4] and in other countries' application[*5]. While prior Estonian legal literature has expressed a need for more thoroughly analysing the meaning of foreign law as a source of law[*6], no fuller discussions of the topic in the Estonian milieu have emerged. This article provides an overview, based on legal literature and Estonian case law, of the arguments related to admissibility of reference to foreign law in court decisions and the role of foreign law in the application of Estonian legal provisions.

The article focuses on those situations in which courts have used references to other countries' legal provisions, case law, or legal literature – in other words, comparative arguments – when applying national law; accordingly, the discussion below does not cover court decisions that refer to the case law of the European Court of Justice or the European Court of Human Rights, and neither does it consider the use of case law of other countries in the course of applying international conventions.

# 1. Legitimacy of reference to foreign law

## 1.1. The meaning of legitimacy

There has been a debate in the legal literature as to whether comparison – i.e., recourse to foreign law as a reference in applying national law – is permissible or even legitimate at all. It has been noted that especially the US Supreme Court has been the forum for one of the sharpest discussions on the utility and legitimacy of comparative law.[*7] This may be explained by the fact that the legal system in the United States is often perceived as something unique and truly non-replicable, in a marked contrast against the experience of European lawyers who are used to seeing similarities between distinct legal systems arising from the common Roman legal heritage of European legal orders.[*8] Probably the most oft-quoted ardent opponent of the comparative approach has been US Supreme Court Justice Antonin Scalia. For example, he was decidedly not in favour of referring in a court's reasoning to foreign law as a model for the creation of a legal provision, often declaring such 'legislative drafting history' to be accidental. 'All it takes is a single committee report drafted by a staffer who spent his junior year abroad, or even a single floor statement by an out-of-control Italophile, to the effect that 'our understanding of this bill is that it will produce the desirable state of affairs achieved by the decisions of the Corte Costituzionale' and – *eccolo*! - Italian law becomes relevant to the meaning of the U.S. Code', Scalia has ironically remarked.[*9]

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3 I Kull, 'Legal Integration and Reforms – Innovation and Traditions' [2000](5) Juridica International 119, 119.

4 N Laas, 'Välisriigi õiguse kohaldamine võrdlev-õigusliku argumendina Eesti kohtupraktikas [The Application of Foreign Law As a Comparative Law Argument in Estonian Case Law]' (master's thesis, University of Tartu 2022); J Laffranque, 'Judicial Borrowing: International and Comparative Law As Nonbinding Tools of Domestic Legal Adjudication with Particular Reference to Estonia' (2018) 2(4) The International Lawyer 1287, 1299.

5 S D'Andrea and others, 'Asymmetric Cross-Citations in Private Law: An Empirical Study of 28 Supreme Courts in the EU (2021) 8(4) Maastricht Journal of European and Comparative Law 498. – DOI: https://doi.org/10.1177/1023263x211014693; B Markesinis and J Fedke, *Engaging with Foreign Law* (Hart 2009).

6 I Kull, 'Eesti tsiviilõiguse allikate tugev ja nõrk kohustuslikkus [Strong and Weak Mandatory Character of Estonian Civil Law Sources]' [2010](7) Juridica 463, 469.

7 M Andenas, D Fairgrieve (eds), 'Courts and Comparative law' (Oxford University Press 2015) 3. – DOI: https://doi.org/10.1093/acprof:oso/9780198735335.001.0001; see also J Resnik, 'Constructing the 'Foreign'. American Law's Relationship to Non-Domestic Sources' in M Andenas, D Fairgrieve (eds), 'Courts and Comparative law' (Oxford University Press 2015) 437–471. – DOI: https://doi.org/10.1093/acprof:oso/9780198735335.003.0023. At the same time, Julia Laffranque, too is among those to have identified the legitimacy of the use of examples from foreign law as one of the main problems with this practice, see Laffranque (n 4) 1295. For a comprehensive overview of the main arguments of the 'legitimacy debate' see T Kadner Graziano, 'Is It Legitimate and Beneficial for Judges To Use Comparative law?' (2013) 21(3) European Review of Private Law 687, 690. – DOI: https://doi.org/10.54648/erpl2013039.

8 J Smits, 'Comparative Law and Its Influence on National Legal Systems' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 528. – DOI: https://doi.org/10.1093/oxfordhb/9780199296064.013.0016.

9 A Scalia, 'Keynote Address: Foreign Legal Authority in the Federal Courts' (2004) 98 Proceedings of the Annual Meeting (American Society of International Law) 305. – DOI: https://doi.org/10.1017/s0272503700061504.

The reasoning presented in the literature emphasises that a valid question as to the legitimacy of the comparison can arise only in the case of judgements in which the reference to the foreign law constitutes a 'normative argument' – i.e., when information about the foreign law has influenced the decision of the judge.[*10] The main arguments put forward in relation to admissibility of the use of foreign materials by the courts are connected with democratic legitimacy and to the fact that the legal system, jurisprudence, and legal decisions are national in nature.

## 1.2. The question of democratic legitimacy

According to the first set of these arguments, those positing a lack of democratic legitimacy, the courts have neither an institutional nor a substantive basis for legitimately dealing in anything foreign.[*11] Institutional legitimacy (or, rather, the lack of it) means that the court as an institution does not engage in external relations – traditionally a task of the executive power. A lack of substantive legitimacy, on the other hand, is expressed via the fact that the judge is bound by the law in the administration of justice – more precisely, bound by the law only of the judge's country. Only the legislator makes the laws; therefore, only the democratically elected legislature of the jurisdiction's country (and not the judge) holds the power to decide what the law is that the judge is to apply. Hence, the judge shall not be bound by the law of any foreign country, nor would said law even be suitable as a source of inspiration for the interpretation of national law.[*12]

In contrast against these views, some scholars have argued that courts long ago ceased to be merely domestic institutions and that nowadays they are involved in several activities related to the 'outside world', such as taking part in international co-operation in judicial matters and acting as members of international organisations.[*13] With regard to the lack of substantive legitimacy of the courts in this sphere, it has been stated that, furthermore, if looking at the legislator's actions, one must recognise that in many cases the interpretation of a rule can no longer be based purely on the will of the national legislator, because the range of authoritative sources suitable or necessary for interpretation purposes has widened.[*14]

The question of the admissibility of comparison of law from the standpoint of democratic legitimacy has occasionally arisen in Estonian case law. For example, in 2009, the Constitutional Review Chamber of the Supreme Court of Estonia, in connection with a party's request to take into account the Constitution of the Federal Republic of Germany and the German case law based on it, stated that 'the Supreme Court of the Republic of Estonia can be guided in its decisions by the Constitution of the Republic of Estonia. The arguments of comparative law may have weight also in the interpretation of the provisions of the Estonian Constitution, but from them binding codes of conduct cannot be derived for the Estonian courts'.[*15]

In 2018, however, the Criminal Chamber of the Supreme Court dealt with the question, raised in an *obiter dictum*[*16] appeal by a prosecutor, of whether an Estonian court may rely on another country's laws, case law, and legal literature when making a decision thus: the Supreme Court stated that '[p]ursuant to §1 of the Constitution of the Republic of Estonia, Estonia is an independent and sovereign democratic republic

10 Smits (n 8) 526. The opposite of the normative argument involves a situation wherein the court's reference to foreign law is rather superfluous and does not add anything substantive to the reasoning behind the decision. An example from Estonian case law is a decision in which the court found that 'as a comparative digression, a brief reference can be made to how the problem in question has been solved in German law', from TrtRnKo 1-14-9728, 30.9.2015, para 83.

11 M Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013) 237. – DOI: https://doi.org/10.1093/acprof:oso/9780199680382.001.0001.

12 Antonin Scalia, for example, has pointed out that judges (of the United States) are the servants of the people, individuals who have sworn to apply the laws that they, rather than others, see as suitable; see A Scalia, 'Commentary' (2006) 40(4) Saint Louis University Law Journal 1119, 1122.

13 Bobek (n 11) 238. For example, the Estonian Supreme Court participates in the activities of the Association of the Presidents of the Supreme Courts of the European Union, the Association of the Supreme Administrative Jurisdictions of the European Union, the European Conference of Constitutional Courts, the Venice Commission, and the European Judicial Training Network; see the Supreme Court page on international co-operation 'Rahvusvaheline koostöö' <https://www.riigikohus.ee/et/riigikohus/rahvusvaheline-koostoo> accessed 10 May 2023.

14 Bobek (n 11) 239.

15 RKPJKm 3-4-1-16-09, 22.12.2009, para 42.

16 RKKKm 1-17-11509, 13.6.2018, paras 11–11.5.

in which, pursuant to §3, state power, including, without doubt, judicial power, is exercised solely on the basis of the Constitution and the laws in conformity therewith' (para 11.1). The ruling continued: 'It is true that the level of 'sophistication' of the various problems in German jurisprudence is unsurpassed, at least in the European context. However, neither from this nor from the fact, mentioned above, that Estonian contemporary law largely copies German law, does it follow that there is a legitimate possibility to refute the view expressed in paragraph 11.1 above: state power, including judicial power, is exercised in Estonia only on the basis of the Constitution of the Republic of Estonia and Estonian laws that are in conformity with it' (para 11.5). It should be stated for clarification's sake that the position quoted here stemmed from the style of the contested judgement, which in the opinion of the chamber rather resembled an academic article's and hence was castigated for excessive referencing and quoting of foreign law.[*17] This clarification is important because in my view the Criminal Chamber's position does not imply an outright prohibition of comparing sources of law so much as a direction to judges to distinguish more clearly in the text of their judgements between their own arguments and those of the sources used for developing those arguments. The fact that referring to material from other countries is not entirely forbidden in the application of Estonian law can be directly inferred from several other Supreme Court decisions.[*18]

For this reason, it is noteworthy that the judge in a recent decision[*19] of Harju County Court, when deciding on compensation for the costs of the proceedings, found that the costs incurred by the counsel of the accused from consulting German law firms in the preparation of the inquiry were not to be subject to compensation and justified this conclusion by citing the paragraphs of the Supreme Court order excerpted above (paragraphs 11.1 and 11.5).[*20] The county court's decision deserves attention in that the costs of gathering information on foreign law were denied of reimbursement not because there was no need to apply foreign law in the case[*21] but because 'state power, including judicial power, is exercised in Estonia only on the basis of the Constitution of the Republic of Estonia and Estonian laws in conformity with it'. A more subtle but nonetheless recognisable justification for the lack of democratic legitimacy can be found in another decision of Harju County Court, in which the judge refused to take into account the guidelines of the Finnish Road Administration cited by the plaintiff, stating that 'Estonian law applies in the Republic of Estonia and foreign law does not apply in this case'[*22].

## 1.3. State-centredness of the legal system

The second core argument against the use of comparative law in judicial decisions focuses on the nationality of the legal system and jurisprudence. This reasoning proceeds from the principle that each legal provision (or, in the case of case law, precedent) must be interpreted in a specific context, which is the (legal) system of the particular country concerned. An interpretation that is based on the law of foreign countries could thereby potentially undermine the domestic system.[*23]

The counter-argument is that, since the aim of all legal systems is to create and implement legal provisions that lead to the best and fairest solution to a problem, it is likely that some countries will have

17 Ibid, para 11.2: 'It is highly commendable if an Estonian judge is able to broaden their interpretative thinking on the basis of reading the literature. However, the result of such reading cannot be the referencing or even quoting of foreign law and its interpretation when [one is] interpreting Estonian law. It cannot be, and it does not have to be, because a judicial decision is not a scientific article that has to be written with meticulous precision according to a set of rules.'

18 For instance, see RKTKo 3-2-1-145-04, 21.12.2004; RKTKo 3-2-1-103-08, 9.12.2008; RKTKo 3-2-1-123-11, 7.12.2011.

19 HMKm 1-17-5176, 21.8.2019, para 10.

20 It is worth noting that the *obiter dictum* is not a binding part of the judgement. See E Kergandberg and P Pikamäe (eds), Kriminaalmenetluse seadustik. Kommenteeritud väljaanne [*Code of Criminal Procedure, Commented Edition*] (Juura 2012) ('Criminal Code'), s 363, comment 7; R Narits, 'Kohtupretsedendist [On Judicial Precedent]' [1995](9) Juridica 380, 382.

21 The absence of a need to apply foreign law has been among the grounds cited in the case law on several occasions to justify reimbursement for procedural costs below the amount claimed by the representative. The main argument in this regard is the low complexity of the case. See, for example, TlnRnKm 2-18-7906, 22.3.2021, para 13.2; TMKo 2-19-11142, 16.6.2021, para 20.2; HMKo 2-17-3716, 19.2.2018, para 7; HMKo 2-16-11889, 16.1.2017, para 10; TMKm 2-15-4142, 28.3.2016, para 2.

22 HMKo 2-19-8308, 2.2.2021, para 18.

23 See, for example, Judit Resnik's overview of the 'American Laws for American States' movement in the USA – Resnik (n 7) 458–461.

reached an appropriate solution to a particular problem before others have. Consequently, for finding the best solution, it is useful for the judge to know the experience of other countries.*[24]

Estonian case law features some examples of arguments that point to the inappropriateness of using the law of another country or that even allude to undermining of the domestic legal system. For example, the Constitutional Review Chamber of the Supreme Court found in 2010 that it cannot be considered appropriate to question the constitutionality of an Estonian legal provision on the grounds that similar provisions have not been laid down in the Federal Republic of Germany.*[25] By the same token, in that decision the Criminal Chamber expressed the view also that if a judge or the parties to the proceedings could refer to the reasoning of legal scholars from other countries to refute the arguments of the regional and district courts, such an opening would undermine legal certainty and create great confusion in judicial practice.*[26] The Supreme Court thus articulated the possible damage to the national legal system as lying primarily in undermining of the principle of legal certainty. This involves, in the main, the principle of legal clarity, which is a pillar of legal certainty according to which legal provisions must be sufficiently clear to their addressees and cause as little dispute as possible.*[27] Even from the latter admonition by the Supreme Court, it is still not possible to infer an outright prohibition that precludes a judge consulting materials pertaining to foreign law, though it does contain a warning pointing to the inappropriate consequences of a court decision that does not show 'the judge himself' (i.e., display the judge's own reasoning) sufficiently clearly with regard to applying the rule.

## 1.4. National context

Thirdly, objections to judges citing the law of another country have been raised on the grounds that multiple, unique circumstances and interests have to be weighed in the rendering of any judgement and that this weighing has to take place in the national context – that is, in light of the specificity of the situation in the given country, its history*[28], and its cultural background.*[29] In this connection, it is customary to return to the words of Scalia, who has held, among other things, that the Supreme Court of the United States of America '…should not impose foreign moods, fads, or fashions on Americans'.*[30]

That view is contradicted by the fact that, in today's globalising world, countries share many of the same principles and values, with one prominent domain in this respect being human rights.*[31] This is why, instead of rejecting comparisons for reason of cultural and historical peculiarities, modern legal literature maintains predominantly that, while these peculiarities must not be ignored, one should simply be careful and attentive when comparing the law across different countries.*[32]

There are no judgements in Estonian jurisprudence that explicitly reject the comparison of law on cultural or historical grounds. On the other hand, a few judgements draw attention to the positive influence

24 Smits (n 8) 529.

25 RKPJKm 5-17-10, 12.12.2017, para 64.

26 RKKKm 1-17-11509, 13.6.2018, para 11.4.

27 Ü Madise and others (eds), *Eesti Vabariigi Põhiseadus - Kommenteeritud Väljaanne* [Constitution of the Republic of Estonia, Commented Edition] (5th, revised and supplemented edn, Iuridicum 2020) ('Estonian Constitution'), s 10, comment 48 (H Kalmo and O Kask), available in excerpt online at <https://pohiseadus.ee/sisu/3481/paragrahv_10> accessed 10 May 2023.

28 GP Fletcher, 'Constitutional Identity' (1993) 14(3–4) Cardozo Law Review 737, 740.

29 F Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (1992) 14(3–4) Cardozo Law Review 865, 867; T Annus, 'Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments' (2004) 14(3) Duke Journal of Comparative and International Law, 328ff; L Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1993) 74(3) Indiana Law Journal 819, 831.

30 *Lawrence et al. v Texas*, 539 US 558 [2003] 598 (Scalia, J., dissenting, citing Thomas, J., concurring in *Foster v.Florida*, 537 U.S. 990, [2002].

31 Smits (n 8) 529.

32 See, for example, M Siems, *Comparative Law* (Cambridge University Press 2014) 21; F Reimer, *Juristische Methodenlehre* (Nomos 2020) 192. – DOI: https://doi.org/10.5771/9783845281926; Laffranque (n 4) 1301; J Husa, *A New Introduction to Comparative Law* (Hart 2015) 23. – DOI: https://doi.org/10.5040/9781849469531; R Wank, 'Rechtsvergleichung als Kulturvergleichung' [2015](4) Recht der Arbeit 294, 295; P Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat — Zugleich zur Rechtsvergleichung als „fünfter" Auslegungsmethode' (1989) 44(20) JuristenZeitung 913, 918; A Stone, 'Comparativism in Constitutional Interpretation' [2009](1) New Zealand Law Review 45, 56; E Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht' (2018) 78(4) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 807, 825.

of foreign law from a cultural point of view. For example, in 2014, Harju County Court found it necessary to cite material compiled from the Supreme Court's research competition[*33] and stated in so doing that 'treating the decisions of the Supreme Court as sources of law does not harm our legal culture, but rather enriches it with some features of Anglo-American law'[*34]. In 2019, Tartu County Court referred to the situation in other countries with an advanced legal culture (specifically, Germany) in its justification of the length of the prison sentence.[*35]

Perusing Estonian case law reveals only a few decisions that have met the use of foreign law with opprobrium. There are considerably more judgements in which the court has referred to foreign law among the sources of rationale in its reasoning even though there was no foreign element in the case. These attest that the comparison of Estonian and foreign law has been considered legitimate. The fact that familiarisation with foreign sources is almost expected in the work of a judge is evident too from the above-mentioned decision of the Criminal Chamber of the Supreme Court, which contains these comments: 'The conviction that, in accordance with the provision and the spirit of the Constitution, the legal reasoning of Estonian courts must be based only on the law in force in Estonia does not in any way imply an undervaluation of jurisprudence or a desire to discourage the interest of judges in reading and interpreting the law of other countries or comparative legal literature. On the contrary: without this kind of reading, and emphatically only looking at domestic law, it would also be difficult to imagine the work of a judge today.'[*36] According to Estonian jurist Julia Laffranque, all that should be avoided is foreign law becoming the judge's main foundation for the reasoning of a decision.[*37] Therefore, it is appropriate to examine the role of foreign law as a source of law in the Estonian legal system.

## 2. Foreign law's place in the system of sources of law

The need for more thorough analysis of the meaning of foreign law as a source of law was pointed out in Estonian legal literature as early as 2010.[*38] The main characteristic for a source of law is its bindingness.[*39] Accordingly, for solving a legal problem, it is crucial to know which rules are binding when one is making decisions – i.e., where to find the relevant law.[*40] There is no uniform and universal conception of the sources of law: legal systems differ in their understandings of what can be regarded as a source of law, particularly with respect to whether among the sources of law are such sources that do not necessarily have to be taken into account but may be taken into account in the efforts to solve a legal problem.[*41]

According to legal scholar Aulis Aarnio, one can distinguish between sources of law in the broadest sense, in a broad sense, and in a narrow sense.[*42] In the broadest sense, sources of law encompass a wide range of interpretative arguments.[*43] In the broad sense, sources of law, i.e. legal arguments, can be categorised, *inter alia*, according to their degree of binding force in the practical activities of judges and administrative authorities. This categorisation entails three classes:

– strongly binding sources – those the lack of respect for which leads to negative sanctions for the party responsible for enforcement (e.g., nullification of the judgement);

33 J Lahe, 'Kohtunikuõigusest ning Riigikohtu rollist deliktiõigusliku vastutuse eelduste arendamisel. – Riigikohtu lahendid Eesti õiguskorras: tähendus ja kriitika' [On the Law of the Judiciary and the Role of the Supreme Court in the Development of Presumptions of Liability in Tort] in *Supreme Court Decisions in the Estonian Legal Order: Significance and Criticism* (a collection from the Supreme Court's research competition, Tartu 2005) 15.

34 HMKo 2-14-21509, 20.11.2014, para 11.

35 TMKo 1-18-4008, 21.2.2019, para 31.

36 RKKKm 1-17-11509, 13.6.2018, paras 11–11.2.

37 Laffranque (n 4) 1290.

38 Kull (n 6) 469.

39 S Vogenauer, 'Sources of Law and Legal Method in Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 878. – DOI: https://doi.org/10.1093/oxfordhb/9780199296064.013.0028.

40 B Rüthers, C Fischer, and A Birk, *Rechtstheorie mit Juristischer Methodenlehre* (CH Beck 2022) 143.

41 Vogenauer (n 39) 879.

42 A Aarnio, 'Õiguse tõlgendamise teooria' [*Theory of Legal Interpretation*] (Avatud Eesti Fond 1996) 172.

43 Semantic, syntactic, logical, legal, and teleological arguments; related values and judgements; and analogies and *e contrario* arguments (ibid 171).

– the weakly mandatory, for which not being taken into account does not constitute an error and hence is not subject to sanctions but whose absence from the reasoning may lead to the judgement being set aside;
– permitted sources – sources employed with the intent of strengthening the reasoning of the person applying the law.

Among the permitted sources are comparative-law and legal-history arguments, teleological arguments, jurisprudence, values, and value judgements.[*44] In particular, Aarnio stresses, the law of another country is a permissible source for legal decisions if the countries in question share 'common legislation and a similar tradition of interpretation'. In cases wherein the countries have similar legislation, the legal practice of the other country may serve as an interpretative argument. Otherwise, the foreign law has 'indicative value'. The latter means that, while the law of the other country may point to problems of interpretation that might arise and illuminate which interpretations might be possible, the interpretation of the domestic rule must still be rooted in arguments stemming from domestic materials.[*45]

In Aarnio's final category, sources of law in the narrow sense, are the so-called official sources: law, customs, the legislator's aims, and court judgements.[*46]

Estonian authors' approach tends to apply a relatively narrow meaning in defining the sources of law, with historical, teleological, and other arguments belonging to the doctrine of interpretation.[*47] In the associated narrower meaning, if one wishes to find the law, one has to turn first of all to the laws themselves, with the primary set of legal sources being acts that contain legal provisions – i.e., that make binding legal propositions.[*48] Therefore, the Estonian legal order can be regarded as based on statutory law, similarly to other legal orders in continental Europe.[*49]

In addition to the Constitution and the statutes, the body of sources of law in the Estonian legal system is considered to encompass subordinate legal acts, generally accepted principles and provisions of international law, directly applicable legal acts of the European Union, and international treaties.[*50] At the same time, practice of other countries, inclusive of legal practice, may become binding on Estonia if said practice has become customary international law.[*51] In the absence of a norm of treaty or customary law, it is possible to derive a binding rule of international law by analogy, proceeding from the general principles of the national law of other states.[*52] In this case, however, the practice of other countries is still to be regarded as customary international law and not as an independent source of law.

Estonian laws contain references to further sources of law. For example, §2(1) of the Act on the General Part of the Civil Code[*53] names custom as a source of civil law in addition to the statutory law, and §25 of the Law of Obligations Act[*54] obliges parties to contracts concluded in economic and professional activities to follow relevant customs and practices. In §2 of the Code of Criminal Procedure[*55] the criteria under which a decision of the Supreme Court must be regarded as a source of law in criminal proceedings are listed. A judicial decision may serve as a source of criminal procedural law if something is not regulated by the law at all – that is, if a gap exists (and consequently the problem cannot be solved by interpretation).[*56] As for other proceedings, court decisions have not been given the status of precedent, but in practice it is typical

44 Ibid 173–74.

45 Ibid 185.

46 Ibid 172.

47 For example, see R Narits, 'Õiguse entsüklopeedia' [*Encyclopaedia of Law*] (Juura 2007) 68ff, 145ff; Kull (n 6) 463ff; P Varul and others, 'Tsiviilõiguse üldosa' [*General Part of Civil Law*] (Juura 2012) 42ff.

48 Narits (ibid) 69.

49 Ibid 68, 71.

50 'Estonian Constitution' (n 27), s 3, comment 8ff (L Madise and L Mälksoo), available excerpted online at <https://pohiseadus.ee/sisu/3472/paragrahv_3> accessed 10 May 2023 and also s 146, comments 32–33 and comment 37 (M Laaring), online at <https://pohiseadus.ee/sisu/3630> accessed 10 May 2023; Kull (n 6) 463.

51 'Estonian Constitution' (n 27), s 3, comments 9–12 (L Madise and L Mälksoo), online at <https://pohiseadus.ee/sisu/3472/paragrahv_3> accessed 10 May 2023; J Klabbers, *International Law* (Juura 2018) 70.

52 'Estonian Constitution' (n 27), s 3, comment 9 (L Madise and L Mälksoo), online at <https://pohiseadus.ee/sisu/3472/paragrahv_3> accessed 10 May 2023); Kull (n 6) 465.

53 RT I 2002, 35, 216; RT I, 20.6.2022, 1.

54 RT I 2001, 81, 487; RT I, 17.3.2023, 5.

55 RT I 2003, 27, 166; RT I, 11.3.2023, 3.

56 'Criminal Code' (n 20), s 2, comment 18.

and expected that the court, when building its argumentation, refer to those decisions of the Supreme Court in which the applicable legal provisions have been interpreted.*[57]

If the legal relationship involves contact with the law of more than one country, the Estonian court may have to apply the law of another country when resolving the dispute. In accordance with §2(3) of the Private International Law Act*[58], the court's reasoning must be based on, alongside the legal provisions of the foreign country, both the interpretations provided for those provisions and the practice of application in said country. In other cases – i.e., in situations wherein there is no foreign element – foreign laws and court decisions are not a source of law in the Estonian legal system. Hence, for example, the Supreme Court has stated on several occasions that foreign case law cannot be automatically adopted.*[59] The lower courts too have expressed an opinion that it is not the duty of the courts to take foreign law as a starting point*[60] and that foreign states' law and case law shall not be regarded as sources for purposes of criminal proceedings.*[61] Laws and court judgements of other countries are regarded as admissible materials to inform ascertaining the content and meaning of the applicable law*[62], though, and foreign court judgements are cited as secondary sources of interpretation in court practice.*[63]

Therefore, one can state in a nutshell that the law of other countries is not to be considered a binding source for Estonian judges in the course of making a decision.

# 3. The role of foreign law in interpretation of national legal provisions

## 3.1. Aims and methods of interpretation

Interpretation is necessary when the content of an existing legal provision is unclear – i.e., when one must employ techniques of analysing the rule, by various means, so as to ascertain its content and meaning. Turning to the law of other countries in the interpretation of national law is seen as a sign of globalisation and simultaneously as proof that the natural development of legal systems takes place on the basis of ideas with external origins just as much as from within the system itself.*[64]

Following the example of Friedrich Carl von Savigny's approach*[65], which has become a classic one, Estonian legal theory identifies the four main methods of interpretation as grammatical (or linguistic), systematic (i.e., systematic-logical), historical (genetic or subjective-teleological), and teleological (more precisely, objective-teleological) interpretation,*[66] where the term 'method' can denote a set of certain techniques, a way of reaching a specified objective. In the case of the interpretation of the law, the objective is to understand the content of the law.

Section 3 of Estonia's Act on the General Part of the Civil Code states that '[a] provision of the law is interpreted together with other provisions of the law, based on the wording, meaning and purpose of

57 V Kõve and others (eds), 'Tsiviilkohtumenetluse seadustik II. Kommenteeritud väljaanne' [*Code of Civil Procedure II, Commented Edition*] (Juura 2017) ('Civil Code II') s 436, comment 3.1.1, para c (E-K Velbri and V Kõve).

58 RT I 2002, 35, 217; RT I, 10.11.2022, 1.

59 RKTKo 3-2-1-145-04, 21.12.2004, para 39; RKTKo 3-2-1-123-11, 7.12.2011, para 15.

60 TlnRnKo 2-18-6678, 18.3.2020, para 44.

61 TrtRnKo 4-17-6479, 22.2.2018, para 6.

62 Kull (n 6) 472; Varul and others (n 46) 90; K Saaremäel-Stoilov, 'Mõtteid Riigikohtu põhiseaduslikkuse järelevalve praktika võimalikest arengusuundadest. Sõnavõtt Eesti põhiseadusliku identiteedi kaitseks [Reflections on Possible Developments in the Constitutional Review Practice of the Supreme Court – a Speech in Defence of Estonian Constitutional Identity]' [2009] (8) Juridica 500, 501.

63 TlnRnKo 2-13-20300, 7.12.2015, para 30. In addition, legal literature written in Estonian (HMKo 2-08-1109, 27.10.2009, para 6; HMKo 2-08-24622, 21.4.2009, para 4) and in foreign languages (TlnRnKo 2-16-6665, 30.6.2020, para 56; TlnRnKo 2-13-45357, 29.10.2014, para 38; TlnRnKo 2-13-8609, 31.10.2013, para 5) has been named as a secondary source of interpretation.

64 J Bell, 'Comparative Law in the Supreme Court 2010–11' [2012](2) Cambridge Journal of International and Comparative Law 20. – DOI: https://doi.org/10.7574/cjicl.01.02.20.

65 FC von Savigny, *System des heutigen Römischen Rechts. Bd. 1* (Berlin, 1840) 213–14, available online at: <https://www.deutschestextarchiv.de/book/view/savigny_system01_1840/?hl=Rechtsquellen;p=269> accessed 10 May 2023. – DOI: https://doi.org/10.1515/9783111692302.

66 Narits (n 47) 152ff; Varul and others (n 47) 43ff.

the law'. The comments accompanying that act of law state that the interpretation methods mentioned in this provision are not presented in a hierarchical manner.[*67] Nor do the procedural codes prescribe to the judge deciding on a case which methods should be used to reach a solution, let alone the priorities in their order of application. However, it is usually stressed that the interpretation of a provision shall begin with linguistic analysis of the text that proceeds from grammatical rules.[*68] The Supreme Court has held that the grammatical interpretation cannot be regarded as sufficient on its own for identifying the content of a legal provision – among other elements, the purpose pursued via the enactment of the provision must be ascertained.[*69] Estonian legal literature has noted also that, generally, historical interpretation is not enough; a teleological method of interpretation too must be applied.[*70] The conception that it is justified to take a complex approach and apply several methods of interpretation at the same time when one interprets the law is prevalent in countries with a civil-law tradition.[*71]

## 3.2. Comparison as an independent method of legal interpretation?

Both in Estonian and in foreign legal literature, scholars note that the list of methods of interpretation is not limited to the four mentioned above[*72], and one can reach this conclusion likewise from Estonian case law[*73]. This leads to the question of whether comparison can be seen as an independent method of interpretation alongside those four classical methods. If the answer is in the affirmative, this would mean that the courts would be free to use comparative arguments without having to justify their choice of interpretation method. The question has arisen from time to time in legal scholarship ever since 1949, when Konrad Zweigert called comparison a 'universal method of interpretation' on the assumption that if the legislature uses the comparative method, so can a judge.[*74] On the basis of Zweigert's thesis, several authors[*75] have accorded comparison the appellation 'the fifth method'. In contrast, the prevailing view in, for example, German legal theory is that comparison should not be regarded as a customary method of interpretation, with the rationale that it seldom sees use in practice[*76] and that, when it does get employed[*77],

67 P Varul and others (eds), 'Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne' *An Act on the General Part of the Civil Code, Commented Edition*] (Juura 2010) ('Act on the General Part'), s 3, comment 1 (I Kull). It is noted in the German legal literature that all attempts to formulate a hierarchy of methods of interpretation have gone unacknowledged so far – see R Zimmermann, 'Juristische Methodenlehre in Deutschland' (2019) 83(2) Rabels Zeitschrift für ausländisches und internationales Privatrecht 241, 265. – DOI: https://doi.org/10.1628/rabelsz-2019-0021.

68 Narits (n 47) 152; 'Act on the General Part' (n 67), s 3, comment 3.1 (I Kull); 'Civil Code II' (n 57), s 436, comment 3.1.1, para b (E-K Velbri and V Kõve); RKHKo 3-3-1-72-03, 6.11.2003, para 15.

69 RKKKm 1-17-11509, 13.3.2018, para 6.

70 Varul and others (n 47) 44.

71 J Smits, 'The Europeanisation of National Legal Systems' in M Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) 240. – DOI: https://doi.org/10.5040/9781472559586.ch-011.

72 'Act on the General Part' (n 67), s 3, comment 1 (I Kull); Zimmermann (n 67) 248; E Feteris, *Fundamentals of Legal Argumentation* (Springer 2017) 9; Reimer (n 32) 143. For example, the rule of economic interpretation applies in tax law; see, for instance, J Jõgi, 'Maksuseaduste tõlgendamine: kas maksumaksja kasuks või kahjuks? [Interpretation of Tax Laws: For the Benefit or Disadvantage of the Taxpayer?]' [2017](4) Juridica 203; V Lopman, 'Majandusliku lähenemise põhimõte Eesti maksuõiguses [The Principle of Economic Convergence in Estonian Tax Law]' [2005](7) Juridica 488. In German legal literature, normative interpretation is mentioned as one of the interpretation methods available – see F-C Schroeder, 'Die normative Auslegung' (2011) 66(4) JuristenZeitung 187. – DOI: https://doi.org/10.1628/002268811794656870.

73 RKHKo 3-3-1-72-03, 6.11.2003, para 15: 'In the further clarification of the determination of the will of the legislator, classical methods of interpretation, such as teleological, systematic, [and] historical, as well as, if necessary, other additional interpretation arguments[,] must also be used.'

74 K Zweigert, 'Rechtsvergleichung als universale Interpretationsmethode' (1949–50) 15(1) Rabels Zeitschrift für ausländisches und internationales Privatrecht 5, 8ff; expressing more doubt are authors such as B Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (Tübingen, Mohr Siebeck 1983).

75 Häberle (n 32); Kadner Graziano (n 7) 693; J Basedow, 'Comparative Law and Its Clients' (2014) 62(4) The American Journal of Comparative Law 821, 822. – DOI: https://doi.org/10.5131/ajcl.2014.0025.; K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford, Clarendon Press 1998) 15, 18.

76 A Janssen, 'Comparative Law in Germany: Yesterday's Hobby or Tomorrow's Science?' (2021) 1(1) Opinio Juris in Comparatione 157, 178.

77 U Drobning has noted that most legal doctrines are silent on the use of comparative law in the courts altogether, and the sources of civil-law methodology doctrine do not mention comparison at all in relation to interpretation. See U Drobning, 'Rechtsvergleichung in der deutschen Rechtsprechung' (1986) 50(3–4) Rabels Zeitschrift für ausländisches und internationales Privatrecht 610, 611. Similarly, see Zimmermann (n 67) 264; Bobek (n 11) 122.

reliance on comparative arguments is referred to as a technique under one of the classical methods of interpretation.*[78].

Also on the basis of approaches in Estonian legal theory, the conclusion may follow that comparison does not hold the status of a separate method of interpretation. For example, in the textbook on the general part of civil law, such a distinct position for comparison is not reflected in the subchapter devoted to methods of interpreting the law (in Section 7.2), but in a separate subchapter (Section 7.3. 'Opinions of legal scholars and practice in other countries') and in the sense of materials used in interpreting the law.*[79] That said, the comments to the Code of Civil Procedure draw a distinction between recognised rules of interpretation and reliance on foreign jurisprudence / legal literature.*[80]

Furthermore, the Supreme Court has striven to develop criteria that limit the use of comparative arguments. Accordingly, in 2004, 2008, and 2011, the Civil Chamber of the Supreme Court of Estonia held that 'the analogous laws and practice of other countries may be taken into account, at least in the case of private-law provisions, as reference material in determining the meaning and purpose of an Estonian law [...] primarily in a situation wherein we do not have a practice implementing the provision, but elsewhere it has developed in the case of a similar provision. This applies in particular to countries with which we share a broadly similar legal system and practice in the application of the law, especially the other Member States of the European Union and, above all, countries belonging to the continental European legal family'*[81]. With regard to situations in which case law addressing the application of the relevant Estonian legal provision exists, the Supreme Court does not consider it necessary to examine the analogous laws and practice of other countries.*[82]

From the foregoing discussion, it can be concluded that Estonian legal theory does not attribute a separate methodological meaning to the examination of foreign law as an activity within the process of ascertaining the content of a legal provision, and there is no evidence of a well-established methodological approach in the case law either. Therefore, analysis of material related to the law of other countries can be considered rather more to be one of the tools used in the process of interpretation.

## 3.3. The use of comparative arguments in application of interpretation methods

Grammatical interpretation is the examination of a legal provision's text by means of grammatical rules. The interpreter must take into account, among other factors, that the meaning of words can change over time, because language is a constantly evolving phenomenon.*[83] One might think that comparative arguments cannot be applied in the grammatical interpretation of Estonian legal provisions, but this is not quite true. Several judgements from Estonian case law provide evidence of this: on their basis, it can be argued that a glance at the law of other countries has helped the judge to understand, for example, the imprecision of Estonian legal terminology.*[84]

Historical interpretation, as a subjective method of interpretation aimed at ascertaining the intention of the legislator, is at the heart of the attempt to ascertain the intention of the historical legislators, its aims

78 In a comprehensive way; see Zimmermann (n 67), 263–64.

79 Varul and others (n 47), 42–45.

80 'Civil Code II' (n 57), s 436, comment 3.1.1, para b (E-K Velbri and V Kõve).

81 RKTKo 3-2-1-145-04, 21.11.2004, para 39; RKTKo 3-2-1-103-08, 9.12.2008, para 20; RKTKo 3-2-1-123-11, 7.12.2011, para 15. It is true that one should take note that the wording employed is not very categorical ('at least in the case of private law legal provisions', 'in the first place', 'primarily', etc.); therefore, the Supreme Court itself does not always adhere to these criteria (examples: RKTKo 3 -2-1-73-04, 22.2.2005; RKTKo 3-2-1-145-04, 21.12.2004, para 24), and neither do lower courts.

82 RKTKo 3-2-1-90-11, 12.10.2011, para 10. It should be added that if in the course of the practice of the application of an Estonian legal provision an understanding of the content and meaning of the rule has already been established (i.e., if a so-called interpretative precedent has been created), then it is probably not strictly necessary to interpret the rule; see M Luts, 'Lünga vastu tõlgendamise või analoogiaga? (Diskussioonist juriidilises meetodiõpetuses) [Against the Gap by Interpretation or Analogy? (On Discussion in Legal Methodology]' [1996](7) Juridica 348. Relevant at the same time is the position of the General Assembly of the Supreme Court in case 3-2-1-73-04, which states (in its para 25) that the decisive criterion for the interpretation of a provision should be the practice in the application of that provision.

83 Narits (n 47) 152–53.

84 TMKo 1-18-10376, 17.4.2019, para 18; TMKo 1-17-105, 6.11.2018, para 30; TMKo 1-07-12674, 3.9.2018, para 13; TMKo 1-17-1804, 31.5.2018, para 190; TrtRnKo 1-19-4802, 21.01.2021, para 67; TMKo 1-17-6453, 1.3.2018, para 24.

and conceptions of the legal provision at the time of its creation.[*85] This method involves examining the history of a piece of legislation by considering, among other components, the preparatory work carried out in the drafting process (explanatory memoranda, minutes and shorthand notes from parliamentary committees, etc.).

It follows that if the explanatory memorandum accompanying a draft act describes a foreign solution as a model for the creation of a corresponding Estonian legal provision, the interpreter of that provision could, in the event of ambiguity, consult the foreign source. This is how the Civil Chamber of the Supreme Court proceeded in 2004 in a case[*86] in which the method for determining the fair amount of compensation for a share takeover was subject to dispute: firstly, it was established with the aid of the transcript of the Riigikogu (Estonian Parliament) session that the preparation of the relevant provisions of the Commercial Code took German provisions as a model, and then those provisions found in German law and the practice of their application were analysed.[*87] Similar examples can be found in the case law of county and circuit courts.[*88]

Identifying the foreign legal provision that needs to be analysed may be complicated if the explanatory memorandum on the draft provides merely a general list of foreign countries that have been treated as models, without any information on individual rules. Handling the situation is easier when comprehensive information covering the precedents for the legal provision has been supplied either in the explanatory note on the draft or in the comments on the law. The official comments on the Law of Obligations Act[*89], the Code of Civil Procedure[*90], the Law of Property Act[*91], and the Act on the General Part of the Civil Code[*92] are structured in precisely that manner.

Professor R. Narits has pointed out that, even if the Estonian legislator has adopted legal provisions and institutions following the example of another country, it cannot be assumed that the Estonian laws are going to be interpreted in the same way as the corresponding ones in the country of origin.[*93] One might ask, then, why the interpreter of the provision should be interested in the foreign example of the provision in the first place when attempting to ascertain the legislator's intention. In my opinion, this statement must be understood in the sense that even if the model for the drafting of a legal provision is known, it is not always possible to proceed from its foreign interpretation at the time of application of the Estonian law, because the practice of the provision's application in the foreign country and even its wording may have changed since the time when the Estonian legislator used it as a source of inspiration. The Estonian legal provision too may have changed, so it may no longer be relevant to look at what was once a foreign model. It is also possible that an Estonian legal provision has the same wording as a foreign legal provision, but the so-called background systems of the provisions compared remain different. For example, the scope of application of the foreign legal provision may be narrower or broader due to other norms in force in that foreign legal system. Therefore, historical interpretation should not lead to uncritical attribution of 'foreign content' to an Estonian legal provision.

It has been noted in the legal literature that in certain cases – for example, in that of the application of legal provisions harmonised with the law of the European Union – the ascertainment of the 'will of the

85 Narits (n 47) 155. Legal literature has noted that the question of the (national) legislator's intention at the time is becoming of less and less importance in a context of globalisation, as it is more important whether the rule is compatible with, for example, EU law. See Bobek (n 11) 239.

86 RKTKo 3-2-1-145-04, 21.12.2004.

87 Ibid, paras 14 and 23.

88 For example, see TlnRnKo 1-19-6307, 30.11.2020, para 37: Examples from Anglo-American law are analysed in the interpretation of s 288(3)(9) of the Code of Criminal Procedure.

89 P Varul and others (eds), 'Võlaõigusseadus I. Kommenteeritud väljaanne' [*Law of Obligations Act I, Commented Edition*] (Juura 2016); P Varul and others (eds), 'Võlaõigusseadus II. Kommenteeritud väljaanne' [*Law of Obligations Act II, Commented Edition*] (Juura 2019); P Varul and others (eds), 'Võlaõigusseadus III. Kommenteeritud väljaanne' [*Law of Obligations Act III, Commented Edition*] (Juura 2021); P Varul and others (eds), 'Võlaõigusseadus IV. Kommenteeritud väljaanne' [*Law of Obligations Act IV, Commented Edition*] (Juura 2020).

90 V Kõve and others (eds), 'Tsiviilkohtumenetluse seadustik I. Kommenteeritud väljaanne' [*Code of Civil Procedure I, Commented Edition*] (Juura 2017); 'Code of Civil Procedure II. Commented edition' (note 56); V Kõve and others (eds), 'Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne' [*Code of Civil Procedure III, Commented Edition*] (Juura 2018).

91 P Varul and others (eds), 'Asjaõigusseadus I. Kommenteeritud väljaanne' [*Law of Property Act I, Commented Edition*] (Juura 2014); P Varul and others (eds), 'Asjaõigusseadus II. Kommenteeritud väljaanne' [*Law of Property Act II, Commented Edition*] (Juura 2014).

92 'Act on the General Part' (n 67).

93 Narits (n 47) 66.

legislator' consists simply in the presumption that the legislator sought the conformity of the legislative act with internationally accepted obligations.[*94] Therefore, the next step in these cases is to examine how the legal provision fits into the framework of the obligations referred to, which entails a systematic method of interpretation.

In the course of systematic (or systematic-logical) interpretation, the relationships between provisions within a single piece of legislation are examined, and so too are the interrelations with provisions of other pieces of legislation, if examining these is necessary.[*95] The interpretation here consists of finding the place of the provision in the legal system, the relevant branch of law and field of law, and the logic- and functionality-related connections between provisions.[*96] Thus the interpreter examines the structure of the law, its classification, the titles of the various sections and paragraphs, etc., and the process must take account of several clarifying rules of interpretation also (such as the priority of special provisions (*lex specialis derogat legi generali*) or the principle that later law repeals an earlier law (*lex posterior derogat legi priori)*).

Estonian case law offers several examples of how courts have used references to foreign law as benchmarks in the systematic interpretation of domestic legal provisions. In one of these, Harju County Court, in the course of affirming the possibility of expiry of the claim to correct an entry in the Land Register (per §65(1) of the Law of Property Act), pointed out for comparison that German law explicitly excludes the expiry of the corresponding claim.[*97] In another, Tartu County Court, considering a provision (in §201 of the Criminal Code) regulating embezzlement as a general norm or catch-all provision, noted that this is the way embezzlement is understood in Germany as well.[*98]

In the case of teleological (or objective-teleological) interpretation, the interpreter examines the meaning of the legal provision, *ratio legis*. In other words, it asks what is the objective that the provision aims to achieve.[*99] For example, in 2005 the General Assembly of the Supreme Court analysed a provision of the Law of Succession Act in force at the time according to which the right to inheritance of a compulsory portion was vested in the incapacitated relative and spouse of the deceased. Recognising the impossibility of taking a position on the provision simply on the basis of grammatical interpretation (as noted in para 21) or on the basis of the history of the provision's development (addressed in para 22), the General Assembly applied a systematic interpretation method and concluded that, since legal acts differ in the understandings they express of the notion of incapacity, the regulations laid down in the Law of Succession Act must be evaluated in line with the objectives of the institution of compulsory portion (see para 31). In this connection, the General Assembly noted in the same paragraph that '[also] an analysis of the practice of other countries reveals that there is no clear and unified position as to which goals the compulsory portion fulfils or can fulfil'. Accordingly, it was considered possible that the objectives for the institution of the compulsory portion under Estonian law could be clarified by means of the law of other countries.

Examples of references to the law of other countries in the context of the teleological method of interpretation exist also in the case law of Estonia's regional and district courts. For instance, in 2022, Tallinn Circuit Court resolved the issue of compensation in connection with the loss of an owner's building right by taking into account, among other things, the provisions of German law when examining the purpose of §244²(2) of the Law of Property Act.[*100] In another case, Tartu County Court has cited German law among the various arguments put forth in analysis of the purpose of §6(1) of Estonia's Imprisonment Act.[*101]

If, in the course of interpreting a rule, the judge comes to the conclusion that using comparative arguments is justified, the sole objective cannot be to interpret a national rule in conformity with foreign law. Quite the contrary: it is worth reiterating the position of the Supreme Court that '[i]t is also understandable if a judge, on the basis of their reading of professional literature from other countries, is deeply convinced of the lack or even inadequacy of a legal regulation in Estonia. If a judge aware of such a situation has doubts

94 Bobek (n 11) 239.

95 Narits (n 47) 153.

96 Ibid 154.

97 HMKo 2-20-4747, 8.6.2021, para 29.

98 TMKo 1-18-117, 2.5.2018, para 45.

99 Narits (n 47) 157.

100 TlnRnKo 2-19-4952, 18.3.2022, para 9.4.3.

101 TMKo 1-15-6338, 28.8.2015, para 13.

as to whether a given law is in conformity with the Constitution, said judge may initiate a procedure of constitutional review, and it is undoubtedly possible for the judge's own *de lege ferenda* opinion to find its way into a scientific article.'[*102]

## 4. The role of foreign law in filling legal gaps

Situations may present themselves wherein the interpretation of the law proves insufficient for resolving the real-world case at hand. Although the legal order is constantly evolving, it might not always respond to genuine societal needs; that is, some problems that need to be solved may remain unresolved or new situations may have arisen that the legislator did not foresee when adopting the legal provisions. In these circumstances, we can talk about a gap.

The 'inspirational' function of foreign law in filling gaps in domestic law gets stressed by many authors.[*103] Thus, for example, Basil Markesinis and Jörg Fedke have stated that examples from foreign law can aid in resolving situations wherein a gap exists in domestic law or in which a need for modernisation of the legal system is evident.[*104] Ulrich Drobning differentiates between situations wherein a comparison with foreign law permits solving a problem analogous to ones that have already been solved in other countries and situations wherein the judge, inspired by foreign law, develops domestic law further, finding a solution contrary to the existing provision.[*105] Jan Smits, on the other hand, cites reform to national law as among the functions of comparison.[*106]

Estonian legal literature categorises gaps into genuine, apparent, and value gaps.[*107] A genuine gap is considered to exist where there is no legal regulation of a fact of life that definitely should be regulated, an apparent gap presents itself when the legislator did not intend to regulate certain situations, and a value gap is deemed to exist when the regulation in place is not precise enough (e.g., when the legal provision takes the form of a general clause with overly general wording or when the legislator has employed a vague or imprecise legal concept).[*108] Alternatively, gaps can be grouped into two classes: gaps in the law (which emerge when the existing body of provisions turns out to be incomplete) and gaps in the legislation (from some areas in need of regulation not having been regulated at all).[*109]

Whichever typology one follows, it is possible – except in criminal law[*110] – to fill the gaps by using analogy. This notion (analogy of the law, or individual analogy) involves situations in which a legal provision similar to the one at issue (here, the one that is absent) serves as a basis in the decision-making process. In the case of the analogy of law, the decision is based on a legal principle that can be derived from many provisions that stand on the same legal and political foundations.[*111] Legal scholars have noted that if the law provides for the possibility of using an analogy (as in the case of §4 of the Act on the General Part of the Civil Code), then the judge's actions can be viewed as implementation of the law rather than creation of a new law.[*112] If, however, it is not possible to fill the gap by means of analogy, one can speak of judicial law – i.e., of judges having to 'create' a new law themselves to resolve the situation before them.

In the specialist literature, practitioners note that a judge must be careful when resorting to analogy and further developing the law; it grows all the more dangerous to adopt similar solutions from foreign law without sufficient analysis and reasoning.[*113] The position taken in Estonian case law can be described

102 RKKKm 1-17-11509, 13.6.2018, para 11.3.

103 E.g., T Koopmans, 'Comparative Law and the Courts' (1996) 45(3) International & Comparative Law Quarterly 545. – DOI: https://doi.org/10.1017/s0020589300059352; Zweigert and Kötz (n 75) 18.

104 B Markesinis and J Fedke, Judicial Recourse to Foreign Law: A New Source of Inspiration? (Routledge 2006) 121. – DOI: https://doi.org/10.4324/9780203723357.

105 Drobning (n 77) 628.

106 Smits (n 8) 529.

107 Narits (n 47) 162.

108 Ibid.

109 Luts (n 82).

110 For comments and clarification, see Luts (n 82).

111 Narits (n 47) 163.

112 Luts (n 82).

113 Laffranque (n 4) 1294.

as similarly cautious. Thus it was that, in a decision made in 2014, the Civil Chamber of the Supreme Court identified a gap in company law, consisting in the fact that the holder of a small share in a public limited company could not demand the payment of a dividend, and pointed out that in such a situation it is not permissible to appeal to the mechanisms that protect small shareholders under German law as an example. The decision did state that creation of such protection mechanisms should be considered by the Estonian legislator.*[114] In 2019, the Civil Chamber of the Supreme Court presented a similar argument in a judgment*[115] explaining that there are no special provisions in Estonian law that address the repayment of loans granted to a company by its partners or shareholders in bankruptcy proceedings. The Supreme Court recognised that the gap in question cannot be filled by analogy, because the legislator did not want to regulate the disputed legal relationship (para 24), despite such special provisions existing in several other countries (such as Germany and Sweden), and it stated, therefore, that the Estonian legislator could consider adding the relevant rules to national bankruptcy law (para 25).

Hence, one can argue on the basis of Estonian case law that, although comparative arguments are visible in the interpretation of existing legal provisions, drawing inspiration from the law of other countries when filling gaps in the legal system is not commonplace in this country. Decisions in which courts have opted to use analogy do not seek to draw inspiration from the solutions to analogous legal problems in other countries; rather, the reference to foreign law serves the mere function of demonstrating the existence of a gap.

## 5. Conclusions

While engaging with foreign experience is favoured and customary in the Estonian legislative process, in court judgements references to the law of other countries play only a supplementary and secondary role. Crucially, comparison cannot reasonably be regarded as an independent method of interpreting the law. Instead of being a method in its own right, it functions as one of the traditional tools of interpretation. Even in the case of pressing gaps in the legal order, information on the law of other countries serves in the role of a means for identifying the gap rather than for filling it.

114 RKTKo 3-2-1-89-14, 29.10.2014, para 27.

115 RKTKo 2-17-17217, 5.6.2019.