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The Historical Experience of Estonia with the Plurality of Penal Law Acts

The state intervenes most intensively in a person's life through criminal law. For that reason, criminal law has to be implicit, in order to enable sufficient legal protection. This means that the state has an obligation toward its citizens to provide legal certainty through criminal law and enable people to receive adequate protection against the intervention of the state. One of the primary requirements in order for law to be implicit is for one to have knowledge as to which law is the one under which he or she is being punished. One possibility for ensuring that law is implicit by means of a legal technical remedy is codification through which the regulation of criminal law is exhaustive.

At present, in Estonia there essentially exists plurality of criminal law—coverage of crimes is incorporated into the Penal Code^{*1}, but misdemeanours are mostly scattered among a variety of special laws.^{*2} Whether or not this is purposeful is obviously questionable, but it cannot compare with a situation in which, for a given offence, there is more than one criminal law that can be applied. So far, there has been little harmonisation of substantive criminal law in the European Union—one example of such an attempt being Council Framework Decision 2003/568/JHA of 22 July 2003, on combating corruption in the private sector^{*3}—but with the entry into force of the Treaty of Lisbon^{*4} the so-called system of pillars has been abolished and successive acts will be directly applicable. If any further acts will be directly applicable, a situation arises wherein we have our national criminal law and the criminal law of the European Union, two parallel systems of penal legislation existing simultaneously. What the direct applicability of criminal-law acts will look like is not yet clear.^{*5} Insofar as we already have historical experience of the simultaneous validity of parallel criminal-law sources, it is possible and necessary to show the problems that could await us.

¹ Karistusseadustik. Adopted on 6 June 2001. – RT 2001, 61, 364; 2010, 11, 54 (in Estonian). English translation available at <http://www.legaltext.ee/et/andmebaas/paraframe.asp?loc=text&p.=et&sk=en&dok=X30068K8.htm&query=karistusseadus&tyyp=X&ptyyp=RT&pg=1&fr=no> (1.04.2010).

² See further P. Pikamäe, J. Sootak. Einheit der verfassungsmässigen Rechtsordnung: Entscheidungen und Lösungen im Strafrecht. – Juridica International 2002 (VII), pp. 127–137.

³ See J. Ginter. Criminal Liability of Legal Persons in Estonia. – Juridica International 2009 (XVI), pp. 155–156.

⁴ See <http://eur-lex.europa.eu/JOHml.do?uri=OJ:C:2007:306:Som:ET:HTML> (10.03.2010).

⁵ On problems concerning the so-called European criminal law see for example T. Weigend. Zu einem einheitlichen europäischen Strafrecht? – Nullum ius sine scientia. Festschrift für Jaan Sootak zum 60. Geburtstag am 16. Juli 2008. Tallinn 2008, S. 243–265.

In the first period of the Republic of Estonia, between the two World Wars (from 1918), there were three parallel codes in existence. In 1935, the Estonian Criminal Code⁶ entered into force. With the entry into force of the new criminal code, the situation in criminal law changed dramatically—the general part of criminal law was governed by one legal act and was applicable to the whole of the special part of criminal law: to the offences dealt with in the Criminal Code itself and to the minor offences addressed in special legal acts. It should be noted that criminal law became clearer—there were uniform general norms for all crimes and misdemeanours. The situation that came into being in 1935 is comparable to the current situation in criminal law—the general part of the Penal Code is applicable to all offences that are found addressed therein and in special criminal law. The reform of criminal law that resulted in the enactment of the Criminal Code played a major role in clarification of criminal law. It led to the termination of the applicability of parallel penal codes.

This article will focus on characterising the criminal legislation that was in force until 1935. After this, the principles of the application of each criminal law and problems in application will be dealt with.

1. The sources of criminal law until 1935

1.1. The conceptual choice of the Republic of Estonia in 1918

From the 18th century until the First World War, the three Baltic States of today were parts of Czarist Russia. After the 1917 February Revolution, rapid consolidation by nations for statehood followed. In Estonia, the republic was announced on 24 February 1918, but on the next day German troops reached the capital, Tallinn. After the end of the German occupation, in November 1918, it was decided to restore the criminal law of Czarist Russia.⁷ Mainly because the formation of a new criminal law code in an extremely short span of time was not possible, the provisional government decided to restore the old legislation. Doing otherwise would have also raised the question of what law to apply in the meantime when a new law had not yet been drafted or entered into force. During the German occupation, the new Penal Code (hereinafter ‘the New Penal Code’) was carried into effect. The New Penal Code, which had been completed in 1903, was held to be a modern and progressive codification, but it had only been enacted in part in Czarist Russia. There were many reasons the Estonian provisional government did not want to enact the New Penal Code in its totality as it had been during the German occupation. K. Saarmann found that most of our lawyers were not familiar with the New Penal Code, there was no law on enforcement of penalties, and the New Penal Code was not in compliance with procedural laws.⁸ Another element that argued against the New Penal Code was the lack of case law, which was, by contrast, represented in a great mass for what we refer to here as the Old Penal Code.⁹ G. Ambach also found that many Estonian lawyers had graduated from Russian universities (in St. Petersburg or Moscow) and were thus acquainted with the Old Penal Code.¹⁰

The newly formed republic dealt not only with different branches of law but also with the founding of the general basis for constitutional law. The Republic of Estonia declared itself already in the Constitution from 1920 as subject to the rule of law. The preamble to the Constitution of 1920 states: “The people of Estonia, in unwavering faith and in steadfast will to establish a country that is founded on justice and law and liberty, to protect the internal and external peace, and pledge to present and future generations for their social progress and an overall welfare, the Constituent Assembly adopted and appointed the following Constitution.” The part of the preamble that states that the country shall be founded on justice, law, and liberty sets forth the important principle of the rule of law. Near the end of 1920, Professor Eduard Berendts already had written about the Supreme Court of Estonia and the principles of the Constitution of 1920 with the words ‘*Justitia est fundamentum regnum*’ (that is, justice is the foundation of a state).¹¹ This is the rule of law. This idea is also the basis for the Constitution of 1920 of the Republic of Estonia and must rule over both the legislative

⁶ Kriminaalseadustik. Adopted on 26 March 1929. – RT 1929, 56, 396; RT 1940, 15, 112 (in Estonian). About the Criminal Code, see for example K. Saarmann. Die Einführung eines neuen Strafgesetzbuches in Estland – Zeitschrift für osteuropäisches Recht. N. F. 1 (1934/1935) nr. 4, pp. 182–186.

⁷ G. Ambach. Die strafrechtliche Entwicklung der Republik Estland in der ersten Seite des zwanzigen Jahrhunderts. – Rechtsgeschichtliche Vorträge, Publikation der Rechtsgeschichtlichen Forschungsgruppe der Ungarischen Akademie für Wissenschaften an dem Lehrstuhl für Ungarische Rechtsgeschichte Eötvös Loránd Universität. B. Mezey (Hrsg.). Budapest 2005, S. 3–6.

⁸ K. Saarmann. Uue Nuhlusseadustiku maksmapanemine (Imposition of the New Penal Code). – Õigusteadlaste päevad (Jurists’ Days). Õigus 1922, p. 137 (in Estonian).

⁹ E. Mailend, A. Rammul (compiled by). Kriminaalõigus. Konsepkt. Prof. K. Saarmann’i ja Riigikohtu prokuröri R. Räägo loengude, Kriminaalseadustiku jt. Alustel koostatud (Criminal Law. Lecture notes. Based on the lectures of Professor K. Saarmann and Prosecutor of the Supreme Court R. Räägo, the Criminal Code, and etc.). Tartu, 1935, p. 13 (in Estonian).

¹⁰ G. Ambach (Note 7), S. 4.

¹¹ E. Berendts. Eesti Vabariigi Riigikohus ja 1920. a. põhiseaduse printsibid (Supreme Court of the Republic of Estonia and the Principles of the 1920 Constitution). – Õigus 1920/2, p. 42 (in Estonian).

and the executive powers in government and their actions in court. The rule of law is related to the limitation of power through general provisions in force, through which the state power is responsible to the people for its activities.^{*12} According to § 9 of the Constitution of 1920, it was not allowed to punish a person in Estonia for an act that was not punishable by law and laws against which were not in force during the commission of the act. Thus, the Constitution included the warranty of *nullum crimen*, which states the obligation of specification—namely, that offences are to be sufficiently well defined. Because the state intervenes in a person's life intensively through criminal law, according to the rule of law and the principle of *nullum crimen*, criminal law must be implicit; there must be stipulations that designate the conditions for state intervention. So, we already have principles derived from the Constitution that support response to the fundamental need that criminal law be explicit.

It seems to be that, in direct conflict with the constitutionally required state of law, implicit and ascertainable criminal law was the situation that was caused with the introduction of Czarist criminal law. In Czarist times and before the German occupation, there were three parallel codes of criminal law applicable—the old Russian Penal Code of 1845, the Russian New Penal Code of 1903, and the Russian Penal Code for Peace Courts from 1864. Since the government of the Republic of Estonia decided to put into force the legislation pre-dating the German occupation, the three above-mentioned sources of criminal law entered into force. The Old Penal Code and the Penal Code for Peace Courts were in force completely, but only some parts of the New Penal Code were put into force. It can be suggested that, in situations where there is plurality of, and an overlap between, sources of criminal law, the options a person has to orient in and understand criminal law are restricted. In this kind of situation, is it possible to talk about the application of the rule of law? In addition, each of the above-mentioned legal codes had shortcomings and ambiguities in connection with the principle of the rule of law.

1.2. The Old Penal Code (1845)

The Old Russian Penal Code or ‘Code of Criminal Penalties and Corrections’, entered into force on 1 May 1846.^{*13} With the entry into force of this penal code, the situation of Russian criminal law changed quite dramatically—it was the first source of systemised criminal law in Czarist Russia. J. Sootak has found that it ended legal particularism and harmonised court practice.^{*14} Contemporary German writer and famous Baltic jurist A. Paucker esteemed the code very highly—for him, the code was a new creation of the 19th century, one that was free from earlier, outdated concepts of criminal law^{*15} and was the source of criminal law for nearly the whole territory of Czarist Russia^{*16}; he held also that the penal system was based on general and special prevention^{*17} and the corrective nature of punishments^{*18 *19}. Given the fragmentation of criminal law, the Penal Code of 1845 played a significant role in the organisation of contemporary law.

The legal act dating from the middle of the 19th century was unable to develop according to needs and had therefore become a heavily criticised source of legislation in the early part of the 20th century. Therefore, 75 years after the Old Penal Code came into effect, it was strongly criticised by various Estonian jurists. K. Grau found in 1921 that, in terms of its content, the Old Penal Code was long obsolete, was outdated, and had lost its reason—it stood far from the then-present-day needs and legal notions. He found that it was casuistic in terms of designations of crimes and misdemeanours and there were no general regulations as would include all the signs of a particular type of crime, as well as that there were fundamental contradictions between concepts in its individual chapters.^{*20} Grau did not consider it to be complete and opined that it consumed many words and often undetermined expressions, and it lacked solid legal technique. He also found that not very much was changed by the transposing of legislation into the Old Penal Code, because the content was intended to preserve the content of the legislation and the contradictions between different crimes could not

¹² T. Friedenau. Rechtsstaat in zweierlei Sicht. Berlin: Untersuchungsausschuß Freiheitlicher Juristen 1956, S. 13.

¹³ ПСЗ-2, nr. 19283. Уложение о наказаниях уголовных и исправительных. See also Gesetzbuch der Kriminal- und Korrektionsstrafen: nach dem russischen Originale übersetzt in der zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Knazelei. St. Petersburg 1846.

¹⁴ J. Sootak. Development of Estonian Criminal Law. – *Juridica International* 1996 (I), p. 53.

¹⁵ C. J. A. Paucker. Unsere neuesten Gesetzbücher und ihre geschichtlichen Begleiter. – Das Inland, H 36, S. 853.

¹⁶ *Ibid.*, S. 854. The Old Penal Code was only not in force in Finland. See T. Anepaio. Kriminaalõiguse muutumisest 1889. aasta reformi käigus (On the Changes in Criminal Law during the 1889 Reform). – *Tractatus Terribiles. A collection of articles for the 60th anniversary of Professor Jaan Sootak*. Tallinn 2009, p. 143 (in Estonian).

¹⁷ C. J. Paucker (Note 15), S. 854.

¹⁸ C. J. Paucker (Note 15), S. 857.

¹⁹ See also M. Luts-Sootak. Modernisierung und deren Hemmnisse in den Ostseeprovinzen Est-, Liv- und Kurland im 19. Jahrhundert. – Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert. Frankfurt am Main 2006, S. 181–182.

²⁰ K. Grau. Tarvidus Uue nuhtlusleadustiku mäksmapanemiseks Eesti Vabariigis (The Need to Impose a New Penal Code in Estonia). – *Öigus* 1921, No. 5/6, p. 97 (in Estonian).

be eliminated through supplementation and other amendments to the act.²¹ The same view has been put forth by Saarmann, who found that the makers of the law had set themselves two objectives: firstly, to collect all of the individual penal laws that had been issued in the 200 years directly prior to 1845 and position them in the code in such a way that they would not lose their historic appearance and, secondly, to create a uniform penal code.²² Consequently, Saarmann found that there is no reason to search for organic harmony in the Old Penal Code, that there are norms that deal with the same issue but are very different in their nature, and that the norms are very casuistic. He found that, since the writers of the Old Penal Code tried to preserve the historical appearance of the old laws, many grievous crimes had lighter punishments than did less severe crimes.²³ Also, Grau has said that the system of sanctions in the Old Penal Code is based on the idea of intimidating the perpetrator of the offence—there was no institution of parole, and punishments were extremely restrictive to the individual's rights.²⁴

Approximately 75 years later, the Old Penal Code is still described negatively. Although Sootak saw some positive aspects to it, he found that the Old Penal Code was patriarchal and held a feudal spirit and that it maintained criminal injustice among people.²⁵ Ambach has held that the deficiencies of the Old Penal Code are connected with the fact that 19th-century Russian criminal law had not reached punishment theories or punishments as general definitions.²⁶ The last may be considered why the Old Penal Code was considered to be outdated and to have insufficient general regulation—it was drawn up on the basis of practical needs with the hope of maintaining what was in force.

The casuistic nature of the Old Penal Code is shown by configurations for the commission of an act or resources used to commit that act.²⁷ Its casuistic nature is manifested also in the very small degree of abstraction. For example, the killing of a clergyman is, in § 212, regulated among crimes against religion, but, in fact, it could be regulated as killing of a person performing official duties and regulated among crimes against persons. In addition, this example shows that the crime of killing was addressed in several chapters of the code. This could hardly have facilitated the work of a judge, a prosecutor, or defence counsel.

Another drawback of the regulation of the Old Penal Code can be seen in the lack of consistent conceptualisation. For example, negligent tort is regulated in § 110 as a reckless movement of the body, which results in unintentional infraction of the law and as any other illegal act in the absence of intent. This means that the person did not have enough foresight or did not recognise the consequence of his act. Was negligent tort possible with every type of crime, or was it necessary to identify it on the basis of the special section of the code? This question is not conclusively answered by the regulation set forth in the code. However, there are crimes included in the special part that involve negligent tort. For example, according to § 1458 of the code, “if a person who knew and foresaw that, because of his unlawful act, another person or several persons may be endangered and nevertheless commits the act and, though acting without direct intent of an act of killing, causes someone’s death, then, depending on the type and importance of the unlawful act and type and size of risk that the offender had to anticipate and also with consideration of other factors, the offender will be punished with the type of penalty and rate for the specific crime”. This means that in the special part of the code we can find descriptions of negligence associated with different crimes.²⁸ The shortcomings of the general regulation of the code made it necessary to describe more precisely what negligence meant in the context of each specific crime.

The inequality of people in the Old Penal Code is evidenced most by the difference of sanctions. Penalties might, for example, depend on the religion of the person. Indeed, § 58 provided that, in addition to criminal and corrective punishments, as provided by law, a person might be obliged to complete spiritual repentance on the order of a clergyman. In the Old Penal Code, crimes with this punishment were, for example, negligent homicide (dealt with in § 1470) and killing with the crossing of self-defence boundaries (in § 1467). There were also different regulations for crimes against family members, which reflect the patriarchal nature of the code.²⁹

²¹ *Ibid.*

²² See K. Saarmann. Uue Nuhtlusseadustiku maksmapanemine (Imposition of the New Penal Code). – Ōigusteadlaste päevad (Jurists’ Days). Ōigus 1922, p. 138 (in Estonian).

²³ *Ibid.*, pp. 138–139.

²⁴ *Ibid.*

²⁵ J. Sootak. Veritasust kriminaalteraapiani (From Vendetta to Criminal Therapy). Tallinn: Kirjastus Juura. 1998, p. 210 (in Estonian).

²⁶ G. Ambach. Karl Saarmann kui Eesti kriminaalõiguse formeerija ja arendaja (Karl Saarmann as the Shaper and Developer of Estonian Criminal Law). 2006, p. 67 (in Estonian).

²⁷ See for example § 1453 (1), which lists aggravated killing that is committed in a way that is publicly dangerous: “Intentional killing or murder, if committed using ignition or an explosion, whether through a gas explosion or using gunpowder, with the destruction of building, or if the offender causes a flood, for example by destroying a water dam or in any other way or by destroying a bridge or a railway or a violation in a people’s shooting range, although the aim was to kill only one person and all other ways that generally endanger or cause deaths.”

²⁸ E.g., the Estonian Penal Code from 2002 does not describe negligent torts in the specific parts, it only gives punishments and shows that the crime can be committed negligently.

²⁹ J. Sootak (Note 25), p. 211.

Similarly, the system of penalties was different from what we currently know—the penalties were divided into classes, and, depending on the crime, the penalty fell into a certain class.^{*30} For some crimes, it was possible to change classes.^{*31} Since the classes were not very wide, a judge had very little freedom in making a decision concerning the length of the sentence.

1.3. The New Penal Code (1903)

The draft of the New Penal Code^{*32} was ratified by Czar Nikolai II on 22 March 1903.^{*33} In contrast to the Old Penal Code, the New Penal Code was divided into a general and special part, which made the law more systematic and easier to use. The New Penal Code was more abstract than the Old Penal Code. Similarly, the system of penalties was clearer—the sanction for a crime was given as a minimum and maximum penal rate, which gave the judge much more discretion than he would have had with the Old Penal Code. When compared to the Old Penal Code, the New Penal Code was considered to be more scientific, clearer, and more complete. Although there were no provisions for the objectives of punishments, it was still considered to be European law.^{*34} Grau described the New Penal Code as a scientific, specific, implicit, and comprehensive law.^{*35} Because the New Penal Code was scientific and modern when compared to the Old Penal Code and the Penal Code for Peace Courts, it was used as one key basis for preparation of the Estonian Criminal Code of 1929/35.

The general high quality of the code was overshadowed by the fact that it was recognised to be valid only partially. The parts that were applied were the chapters concerning crimes against religion (§§ 73–80, 82–90, and 93–98, applicable in the Republic of Estonia as long as these provisions were not in contradiction with § 11 of the Constitution of the Republic of Estonia); crimes against the state, amongst them crimes against the higher power (§§ 99–107, which were changed in 1925 in consequence of new state institutions that had been formed, though how these sections were to be implicated until 1925 is not certain) and treason (§§ 108–120), as well as crimes against public order (§§ 121, 123–132, and 134); resistance to authorities (§§ 155 and 155¹); offences against the administration of justice (§§ 163, 164, 166, 168, 170, and 173); offences against the public peace (§ 279 (5)); violations against public performances and printed matter (§ 309); forgery (§§ 437—not applicable in the Republic of Estonia—and 449–452); offences against personal freedoms (§ 500, part I (2) and parts II and III); sexual offences (§§ 530–540); failure to report a finding; intake of foreign welfare and abuse of trust (§§ 579 and 580); offences concerning bankruptcy; usury and other illegal acts related to property (§§ 601, 604, and 605); offences against copyright and exclusive rights (§§ 620 and 622); and offences against official duties (§§ 643–645 and 652). The general part of the New Penal Code applied to these regulations. Many of these regulations were altogether new (for example, those pertaining to offences against copyright and exclusive rights), since there were new legal situations that had to be regulated by law. On the other hand, there were regulations that were already governed by the Old Penal Code, and, therefore, a situation arose wherein some norms were in the New Penal Code and others remained in the Old Penal Code.

Since the New Penal Code was originally designed for full application, the partial enactment of it could not have been a good idea. In a situation where only a portion of a new law is enacted and the old law that was meant to lose its validity remains the main source for criminal law, the legislation is not implicit and there is confusion in law. Obviously, we can see a violation of the rule of law here. Further, in addition to the coexistence of the two above-mentioned laws, there was a third one applicable.

³⁰ E.g., according to § 19 of the Old Penal Code the term of forced labour were divided into seven classes:

- 1st class: unlimited forced labour;
- 2nd class: 15–20 years of forced labour;
- 3rd class: 12–15 years of forced labour;
- 4th class: 10–12 years of forced labour;
- 5th class: 8–10 years of forced labour;
- 6th class: 6–10 years of forced labour;
- 7th class: 4–6 years of forced labour.

³¹ For example § 1451 (4) according to which if a woman killed her child at birth, who had been born outside of a marriage could have her punishment lowered to the 4th class of forced labour.

³² Уголовное Уложение. – Свод Законовъ Российской Империи. Т.XV. С.-Петербург, 1909. See also O. S. Bernstein (Übersetzer). Das Neue russische Strafgesetzbuch: (Ugolovnoje Ulozenje): allerhöchst bestätigt am 22. März 1903. Berlin 1908.

³³ With regulations from 7.06.1904, 16.07.1905, 14. 27.03.1906, 25.12.1909 and 20.03.1911.

³⁴ B. B. Есипов. Уголовное право. Часть особенная. С.-Петербург 1902, стр. 139.

³⁵ K. Grau (Note 20), p. 98.

1.4. The Penal Code for Peace Courts (1864)

In 1864, the Penal Code for Peace Courts^{*36} was introduced alongside the Old Penal Code. Both Ambach and T. Anepao have found that it was a product of major judicial reforms^{*37} and that its content was much simpler and easier to understand than the Old Penal Code and clearly represented indications of its own time.^{*38} Many norms from the Old Penal Code were transferred to the Penal Code for Peace Courts^{*39}; thus, the judicial reform of 1864 plays a significant role in criminal law—the idea was to organise criminal law and make it easier to understand, but the process resulted in two laws that were contradictory in many respects. The Penal Code for Peace Courts was applied to only minor crimes and misconduct. In cases in which the Penal Code for Peace Courts did not provide a resolution, sections of the Old Penal Code had to be used. Efforts to align and harmonise the Old Penal Code and the Penal Code for Peace Courts failed.^{*40}

As an example from the Penal Code for Peace Courts, there was an offence described in § 110 that consisted of threat in the event of which there was no profit to the self or any other such aim to it. Another example could be the various offences concerning theft (content regulating theft of forest property, dealt with in §§ 154–168¹; theft of a value under 1,000 kroons, in §§ 169 and 170; theft without a special element, handled in § 170¹; and special regulations in §§ 171–172). The regulation does not differ much from that of the Old Penal Code, which is why it was possible for questions to arise concerning the application of the right law.

The code was very casuistic, comparable with the Old Penal Code. It had separate regulations for theft with breaking into a house and theft by breaking a gate lock. This shows that the regulations were indicative of their time.

Another very important remark about the Penal Code for Peace Courts is that the procedural rules that applied to it were different from those for the previously mentioned codes. Offences under the Penal Code for Peace Courts were prosecuted by private persons, not public prosecutors. This means that criminal acts under this code were prosecuted only if a private person brought a complaint against the offender in court.

It is quite evident that in those circumstances where there is a plurality of criminal laws, we cannot talk about the realisation of the rule of law. The laws overlapped, they were meaningfully different, and this will be made even more obvious through description and illustration of the application of the laws.

2. Principles and problems of application of the criminal codes

2.1. Application of the codes in principle

The above-mentioned Old Penal Code, New Penal Code, and Penal Code for Peace Courts were used in general courts until 1935, when the Criminal Code was introduced. There are many elements to consider in relation to the application of the three codes until 1935.

First of all, the parallel existence meant that various criminal offences were settled under different criminal laws. Less serious offences were governed by the Penal Code for Peace Courts, mainly crimes against the state and religion were stipulated in the New Penal Code, and other grievous crimes were regulated in the Old Penal Code. This, however, meant that the first task, the first thing—in terms of logic—that a person needing to apply the law had to do, was identify the correct legal act that regulated the concrete situation at hand. The enforcement of the Penal Code for Peace Courts alongside the Old Penal Code meant that less serious crimes were processed under the Penal Code for Peace Courts and grievous crimes under the Old Penal Code. However, it has been found that the Old Penal Code and the Penal Code for Peace Courts were incompatible, which could have led to problems in finding of the right law to apply (and hence proper application of the law)—there might have been questions of whether to apply one or the other act in view of a person's actions. For example, § 140 of the Penal Code for Peace Courts stipulates the nature of threats, and the same composition is handled in § 823 of the Old Penal Code. The situation went from bad to worse when the New Penal

³⁶ Уставъ о наказанияхъ, налагаемыхъ Мировыми Судьями. – Свод Законовъ Российской Империи. Т. XV. С.-Петербург, 1885. Until the situation as at 24 October 1917 and some changes. See also G. J. H von Glesenapp (vlj). Gesetzbuch der Criminal- und Correctionsstrafen und Gesetz über die von den Friedensrichtern zu verhängenden Strafen: nach der Russischen Ausgabe vom Jahre 1885 nebst den Ergänzungen und Abänderungen bis zum Mai 1887. Tartu, 1892.

³⁷ G. Ambach (Note 26), p. 66 and T. Anepao (Note 16), pp. 141–142.

³⁸ G. Ambach (Note 26), p. 66.

³⁹ T. Anepao (Note 16), pp. 141–142.

⁴⁰ G. Ambach (Note 26), p. 66.

Code was introduced to the legal system. Although the Old Penal Code and the Penal Code for Peace Courts had their differences, the New Penal Code was of a very different cast. Grau has described the situation in criminal law in Estonia at that time as ‘sad and impossible’, holding that a judge when administering justice embraces the idea of the law but this cannot function if there are laws with different ideas.^{*41}

Since there were three different criminal laws, all of the above-mentioned codes were supposed to regulate different crimes and each of them had separate regulation for the general rules.

Imagine the situation wherein, on the one hand, the Old Penal Code, like the Penal Code for Peace Courts, did not have a general part, while the New Penal Code, on the other hand, did. Already in principle the laws were different: the New Penal Code was considered scientific and European, and the other two were not. A person applying the law has to, in this situation, know and understand the logic of all the laws, understand how to apply them, and probably know in what sense they must be applied differently. For example, in the Old Penal Code, punishments were regulated through different classes; in the New Penal Code, the sanction system resembles that of the Criminal Code in effect at present. This means that in the New Penal Code, as in the Criminal Code, the punishment is given as a range from the least to the greatest possible punishment for a given offence. Already such differences provide a different understanding of a possible punishment—with the system of classes, the punishment was narrowly defined, which significantly restricts the understanding of a given sentence, whereas in the case of a wide range, the judge has much broader discretion concerning the length of the sentence. If already a judge might have found it difficult to work in different systems of criminal law, then, on the assumption that most people lack such legal expertise, there was a lack of clarity in Estonian criminal law due to the plurality of criminal laws.

There existed a major problem concerning the application of the correct law. It proves to be problematic, because we are able to find to some extent overlapping provisions in all of the above-mentioned codes. For instance, both the Old Penal Code and the New Penal Code governed offences against religion. Let us consider an example. Sections 180 and 176–178 and § 73 of the New Penal Code stipulated crimes against the public peace, which were all characterised by profanation of God, religion, or the church. Although all of these offences had the same type of punishment—deportation or forced labour—the scale of the penalties differed. And because the judge had broader discretion when imposing a sentence according to the New Penal Code, this was of great importance. Moreover, for example, when comparing § 85 of the New Penal Code and § 201 of the Old Penal Code, which stipulated punishment for voluntary castration committed using violence, one finds it apparent that they are practically the same. According to the New Penal Code, the punishment for committing this crime would have been up to six years of forced labour, whereas according to the Old Penal Code it would be 4–6 years of forced labour and loss of all special rights. This shows that, although the punishments are quite similar, the judge had much broader discretion if he were to employ the legislation of the New Penal Code. Another example may be found in § 212 (3) of the Old Penal Code and § 98 (2) of the New Penal Code (which deal with use of violence against the person of a clergyman), for which the sentence in the old code is 8–10 years of forced labour while in the new code it is unlimited time spent in a reformatory. The above examples only confirm that the regulations concerning offences against religion overlapped, but these were not the only parts of the codes with similar or the same regulation.

The next problem we consider existed in relation to the Old Penal Code and the Penal Code for Peace Courts. As mentioned above, when the Penal Code for Peace Courts was enforced, the aim of systematising criminal law was not met and the two codes were not in compliance. This is most evident when one reads the two texts. These examples will be analysed below, in the light of court practice.

How the prosecutor was supposed to prosecute a crime or how a judge was supposed to administer justice, how he was supposed to decide whether the indictment had been drawn up on the basis of the right law, is very unclear. The conflict between the laws applicable in general courts and also their multitude undoubtedly hampered the application of the law and the work of people who used it. In addition, it cannot be ignored that, in fact, this kind of confusion in legislation was affecting all who were subject to the law. Obviously, not all subjects of the law understand it, but in this kind of case, they probably wouldn’t even have the opportunity to do so.

2.2. Some practical examples

To illustrate the problem that existed as a result of the plurality of criminal laws, it is necessary to provide introduction to some relevant practice. There is a case from the Supreme Court, for example, wherein the offender was accused of killing the victim. The accused shot the victim with a gun as a consequence of a public quarrel while in an agitated state, but the victim did not die from the gunshot. Unfortunately, the victim died in hospital, but because of an infection he developed after a minor operation performed on him. For this, the court of first instance convicted the accused of murder under §§ 1455 (2), 311, 9, 115, 134, and 135

⁴¹ K. Grau (Note 20), pp. 99–100.

of the Old Penal Code. The attorney filed a complaint to the Supreme Court saying that, since there was no causal link between the act of the accused and the death of the person, his deed should be qualified as causing bodily harm as regulated in § 1482 of the Old Penal Code. The turn and total surprise comes in the Supreme Court's declaration that the lower courts had applied the wrong law to start with. The Supreme Court found that, since there was little damage caused in the first place and there was no causal link between the act of the accused and the death of the victim, the Penal Code for Peace Courts should be applied. The Supreme Court annulled the decision of the court but, unfortunately, gave no hint of which section of the Penal Code for Peace Courts should be applied.*⁴²

This is in very many ways an extremely tricky case. First of all, both laws regulate causing of bodily harm, and it is quite difficult to understand the difference. Since the punishments for the two offences are quite different, it is important that the choice of law be correct in the first instance. This situation may prove to be highly restrictive to the rights of the accused. How can an accused person defend himself if he does not know what law will be applied, and how could he then foresee the possible punishment? § 1482 of the Old Penal Code stipulated that if the offender inflicts harm on another person the act will be punished with imprisonment of eight months to a year and four months or the offender will be sent to a reformatory in accordance with § 31 (fifth class) and, in addition, will lose all of his personal and acquired-status rights.

The other problem is that the procedural norms obtaining in application of one or the other code are significantly different. When the Supreme Court annulled the decision, it was not clear whether the court should discuss the matter further or whether that is properly an assignment for the private prosecutor. The main reason this turns out to be such a problem is that the procedural norms for the Penal Code for Peace Courts demanded that prosecution take place with a private prosecutor and there was no involvement of a public prosecutor. Who would in this case be entitled to bring forward a prosecution if the qualification were changed by the Supreme Court, and, moreover, what happens to the evidence already collected by the public prosecution—may it be used by the private prosecutor, or not? These questions show that there was more that resulted from the problems of which law to choose. The choice of law was thus important from not only the perspective of protection of the accused; it also played an important role in relation to the procedural rules. It is certainly a very interesting and disturbing case showing that there were problems within the laws.

Another case to consider is one in which a person was accused of theft. The defendant removed a broken lock from a gate and through an unlocked window entered the victims' house. He stole two candlesticks and some silverware from the house. For this, he was found guilty by the court of committing the crime stipulated in § 170¹(1) of the Penal Code for Peace Courts and was sentenced to imprisonment for one year. The Supreme Court annulled the decision, finding that the act meets the conditions for the case stipulated in § 1647 of the Old Penal Code. According to § 170¹ (1) of the Penal Code for Peace Courts, a person may be sentenced to imprisonment of six months to one year and six months when theft has been committed through breaking of barriers that prevent access to the yard, access to a building, or getting from one of these places to the other, except in the cases mentioned in § 1647 of the Old Penal Code. According to the latter section, a person may be sentenced to imprisonment in a reformatory for 12–15 years, with loss of all special, personal rights or rights and benefits acquired in consequence of one's status, if the theft was committed from an inhabited building, its courtyard, or buildings within the courtyard when the offender has previously breached a gate that prevented access to the yard, the inhabited building, or access from one to the other, or if the bolt on the gate has been broken. The Supreme Court concluded that removing the lock from a gate is considered to be breaking the gate.*⁴³ How to differentiate these sections on the basis of the facts given is apparently unknown. Whether removing a broken lock constitutes breaking barriers or breaking a gate is actually unclear. This also shows that courts had concrete problems applying the so-called correct law. The two offences are very difficult to distinguish. Moreover, the crime stipulated in the Penal Code for Peace Courts is supposed to be less serious, but how can courts assess this question when there is another law that describes the act in almost the same way? The Supreme Court's explanations were not at all thorough in this case; in contrast, the wording of the description of the crime and the judgement in the first instances imply that there were already practical problems in applying the law correctly.

There certainly exists evidence in the legal literature and in the practice of the Supreme Court that shows there to have been a problem with application of the 'right' law. In addition, it is apparently the case that this problem was more acute in lower instances of the court system. This assumption is mainly based on the fact that the Supreme Court dealt mainly with legal issues of a case, whereas the lower instances dealt with the facts of the matter. The facts of the cases are the basis for questioning the appropriateness of the law applied. That is why it is more probable that we can find issues here regarding the choice of application of the law. Unfortunately, it is not possible to raise examples of problems concerning the application of the Penal Code for Peace Courts and the Old Penal Code, on the one hand, and the New Penal Code, on the other, because

⁴² Supreme Court decision No. 928, 1926. FOND: ERA.1356.4.81. The Supreme Court's decisions are located at the Estonian National Archive in Tallinn. The number 1356 means the Supreme Court of Estonia, number 4 documents of the criminal department and the last number a number for a group of court decisions from a certain period that have been put in a separate folder.

⁴³ Supreme Court decision No. 799, 1934. FOND: ERA.1356.4.104 (see Note 42).

too little research has been done in this field. Nonetheless, when accepting the perspective of Grau, one finds that there had to be a major problem.^{*44}

2.3. The light at the end of the tunnel?— the Criminal Code (1929/35)

When the Criminal Code came into effect, in 1935, the substantive legal basis became undeniably clearer and people's rights were better assured. Although misdemeanours were generally dealt with in special laws (*lex specialis*), rights were still better guaranteed, on account of the fact that all crimes were assigned a classification in the Criminal Code. It is not possible to say that the structure and form of the offences were very straightforward—there was a totally new situation wherein the level of abstraction was much higher than ever before. It can be said, of course, that the high level of abstraction shows the development in the legislation, but it is doubtful whether that legislation was clearer for the people in general. Maybe that is why it is possible to consider a six-year *vacatio legis* period (1929–1935) to be positive. In such a situation, there was time for discussion among jurists, and the specialist literature is an excellent example of this. In the Estonian journal *Õigus* (in English, 'The Law'), we can find many articles dating from the time prior to the enforcement of the Criminal Code that deal with questions concerning the new law. Also, the specialist journal for the police, *Eesti Politsei* (in English 'Estonian Police'), published an article by L. Vahter already in 1929 that dealt with the general part of the newly published but not yet valid Criminal Code.^{*45} The elaboration on various conceptual issues among lawyers certainly facilitated the subsequent transition from the old law to the new.

3. Conclusions

Estonia remained under a plurality of criminal laws until 1935. There were three criminal codes applicable in general courts. The offences tended to overlap, making it hard to decide which law to apply. These problems were also the reason a new criminal law—the Criminal Code—was introduced.

If we recognise the situation in Estonia from 1918 to 1935 as a problem, we can learn from it. The question that needs to be answered is whether or not we are prepared to understand and cope with the existence of several different criminal laws and whether it is consistent with our own legal system as in force today. If there is one thing that we can learn from our history, it is that criminal law divided among various legal acts is not a good sign for legal certainty. Whether or not this problem already exists in our criminal law, with the crimes handled in one place and misdemeanours mainly addressed by special laws, might have to be answered in the affirmative. Firstly, it is not possible with the amount of legislation regulating misdemeanours for all people to know the regulations. Secondly, it could even constitute a problem for the judge or prosecutor. An even more acute question arises in relation to the probable intersection with European Union law. If we look at the historical experience in Estonia, then we can undoubtedly say that we should in all ways try to avoid being in a situation where criminal law is divided among several different acts—such a situation goes against the principle of *nullum crimen* and the rule of law; it is implicit and violates the rights of individuals. We have to be careful not to step over the very thin line that stands between a country subject to the rule of law and a country violating people's rights, and our historical experience offers one way to show how this could come about and what could be the results.

⁴⁴ K. Grau (Note 20), pp. 99–100.

⁴⁵ L. Vahter. Eesti kriminaalseadustiku üldosa ülevaade (Overview of the General Part of the Estonian Criminal Code). – *Eesti Politseileht* 1929, No. 35/36, pp. 431–436 (in Estonian).