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Co-existence of the Estonian Constitution and European Law

The Constitution of Estonia has remained in force unaltered for ten years. During these ten years, Estonia has developed in every sense — definitely including legal policy and legislative drafting — more rapidly than stable democracies have in decades. The status of a European Union candidate state has undoubtedly affected our legal order and placed us not infrequently in situations where it is more difficult to find a legal solution than it would be if Estonia were already a full member of the EU.

How has the fundamental act of the Estonian State — the Constitution — sustained such influence? What is the co-existence of the Estonian Constitution and European law in Estonia, which is preparing for accession to the European Union, like? These questions, which may initially seem theoretical, have largely remained out of the focus, although indeed, an analysis of the possible supplementation of the Constitution/constitutional acts has become topical again recently.

This article attempts to take a wider look at the co-existence of the Estonian Constitution and European law to date, proceeding from the origins of the applicable Constitution, the theory of the general principles of law and the practice of the association process, while not disregarding the possible future of such co-existence.

1. European law upon drafting of Estonian Constitution

In developing the current Constitution of the Republic of Estonia, European law in its wider sense, embracing, above all, the legal treasury of the human rights and fundamental freedoms of the Council of Europe in the form of the European Convention on Human Rights (ECHR) and the practice of the European Court of Human Rights, was taken as the basis. This means that from the aspect of European law, the Constitution has been written in the spirit of the Council of Europe. At the beginning of the nineties, it was also a considerably closer and more tangible organisation for Estonia than the European Communities. During the activities of the Constitutional Assembly (hereinafter: CA), the European Union did not officially exist yet. Although the Maastricht Treaty was concluded four months before the adoption of the Estonian Constitution at a referendum, it entered into force only the following year. The European Communities were not discussed in detail when drafting the Constitution, not to say that they were not discussed at all. It was certainly more important for a country that had recently established its independence to emphasise the protection of human rights and honouring of the other principles of democracy than to consider a possible accession to the then

primarily economically-oriented European Communities that consisted of only 12 Western European welfare states.

Besides local experts elected from the Supreme Council and the Congress of Estonia, foreign experts also participated in the work of the CA. E. Harremoës from Denmark, H. Ragnemalm from Sweden, R. Herzog from Germany, K. Berchtold from Austria, P. Gremer from Denmark, M. Russell from Ireland, G. Carcassone from France, A. Suviranta from Finland, J. MacPherson from Canada and others provided their advice as experts of the Council of Europe. The issues related to international agreements were discussed in the fourth committee of the CA, whose other task was to discuss the institution of the President of the Republic. The latter received considerably more attention in the committee.

It is interesting to note that the combination of the president and international agreements plays an important role also today, when the draft Constitution Amendment Act has been presented to introduce the direct election of the President¹, and constitutional amendments are topical in relation to the accession to the European Union. However, this does not mean that the performance of the fourth committee of the CA with its task had been poor in the past. These are simply sensitive areas that find it difficult to endure the changes brought about by time. Yet people do not wish to introduce the amendment proposals for political reasons, as the time-consuming and debatable nature of the general amendment of the Constitution may impede the processing of constitutional supplements that are important upon the accession to the European Union.²

Nevertheless, points of contact can be found in the issue of the president and international agreements even today: the direct election of the president depends upon the president's competence, while the participation of the president in European Union issues also depends on the extent of the president's competence. In Finland, where the president has been elected through direct public election since the mid-1990s, clarification of competence and liability relations in international issues served as an important topic during the preparation of the new constitution. In Finland, the emphasis on the institution of the President, stronger than in the Estonian Constitution, now shifted notably to the *Eduskunta* (Finnish parliament).³

Returning to the work of the CA, it may be concluded on the basis of the documents reflecting thereof that international agreements were discussed in very general terms. They were primarily associated with UN treaties and conventions, the boundary agreement, also issues of security. Discussing the possible neutrality of Estonia, it was contrasted with the possible accession to NATO in the future.⁴ Thus, the draft Constitution, prepared by the then royalist K. Kulbok did not include any provisions concerning foreign relations and international agreements.⁵ The draft constitution version of I. Gräzin, in contrast, contained § 103, according to which the agreements under which the republic entered union relations and the decisions to discontinue such relations were ratified by the people at a referendum.⁶ At the 17th session of the CA, I. Raig noted that the assembly had worked very little on the chapter regarding international agreements, keeping in mind, above all, the relevant UN provisions.⁷ He arrives at a similar conclusion also when looking back at the activities of the CA, "When discussing international relations, the members of the CA were often trammelled by the generalisation of past relations and could not picture the new role of the nation state in the globalising society. There were relatively few people among the members of the CA, who were ready for and interested in discussion of the topic of foreign relations and international agreements. This issue very rarely served as an object of debates at the sessions of the CA. Discussions of international relations primarily focused on the relations between Estonia and Russia."⁸

In their opinions, foreign experts pointed out, above all, the instruments of the Council of Europe and the Conference on Security and Cooperation in Europe (CSCE). One of the few exceptions was the following proposal, made by Mr. Germer at the 10th session of the CA, ".../ In this connection I want to mention that

¹ See draft acts 734 SE and 864 SE. Available online on the home page of the *Riigikogu* at: <http://www.riigikogu.ee/ems/index.html> (11.03.2002) (in Estonian). The former draft act was initiated by the members of the Centre Party faction of the *Riigikogu* on 9 April 2001 and the latter by the president L. Meri on 8 October 2001.

² For example, a plan according to which the round table of the chairmen of the factions of the *Riigikogu* or the board of chairmen has decided to establish a separate working group by the Constitutional Committee to draft the constitutional amendments to reflect the EU aspects. – L. Hänni. Jah, härra justiitsminister (Yes, Minister of Justice). – Postimees, 22 January 2002 (in Estonian).

³ This was stated, *inter alia*, by the Finnish Legal Chancellor P. Nikula in his presentation "New Finnish Constitution", made at the Institute of Law. Background material for the presentation, 19 June 2001.

⁴ See collection *Põhiseaduse ja Põhiseaduse Assamblee (Constitution and Constitutional Assembly)*. Tallinn: Õigusteabe AS Juura, EV Justiitsministeerium, 1997 (in Estonian).

⁵ *Ibid.*, pp. 1184–1190.

⁶ *Ibid.*, p. 1127.

⁷ *Ibid.*, p. 543.

⁸ I. Raig's presentation "Põhiseaduse Assamblee ei suutnud ette näha Eesti võimalikku ühinemist Euroopa Liiduga" (The Constitutional Assembly Could Not Foresee Estonia's Possible Accession to the European Union). Academy Nord, Research Centre Vaba Euroopa, seminar "Eesti Euroopa Liiduga ühinemise põhiseaduslikud ja poliitilised probleemid" (Constitutional and Political Problems of Estonia's Accession to the European Union). Tallinn, 22 February 2002.

the draft contains no provision concerning transferral of power to supranational organisations like the European Community. It may not happen in the near future, but some day Estonia may join the European Community, and then you might want to have — you might need — a special constitutional provision to this effect. In most countries there are special provisions to that effect, and I suggest that you take up the idea of introducing in your Constitution a special provision concerning transfer of powers to supranational organisations like the European Community.⁹ Unfortunately, the proposal was not taken into account in 1991. We will see what will be decided concerning the supplementation of the Constitution over ten years later, when accession to the European Union has become reality. Now, in this context, the speech by L. Hänni at the 16th session of the CA has been repeatedly mentioned, where she reasoned why the review committee eliminated from the draft Constitution the section, according to which the law under which the Republic of Estonia enters political, economic and military unions of states shall be adopted only by referendum. Namely, during the CA, the review committee found that if the provision “the independence and sovereignty of Estonia are timeless and inalienable” were included in the Constitution, this would mean automatically that if the Estonian State concluded agreements that restricted its sovereignty, it could be done only through the amendment of the Constitution and referendum.¹⁰

This aspect of the origins of the Constitution certainly gives rise to different interpretations — what could be understood as political, economic and military unions? Would NATO also qualify as one? Does “through the amendment of the Constitution and referendum” mean amendment of the Constitution by referendum or can they also be separated from each other — to amend the Constitution without a referendum and to conduct a referendum concerning the accession to a union mentioned above?

The European Union does not prescribe to the candidate countries whether and how they should lay down their membership in their constitutions. Thus, the European Union does not “demand” that the candidate countries amend/supplement their constitutions in relation to the accession to the European Union. The European Union could not impose such conditions, as it lacks competence to have a say in the constitutional context of the member states. The constitutional order is an internal matter of each member state and candidate country, in which the European Union does not intervene. Thus, Finland could renew its Constitution, replacing four different constitutional acts by one constitution, and Estonia may, on the contrary, supplement the applicable Constitution, if necessary, by the so-called third act, so that Estonia could act as a member of the European Union, if this is acceptable for our legal culture and traditions.¹¹ However, the so-called Copenhagen criteria apply to the accession to the European Union, which include, *inter alia*, the stability of institutions guaranteeing the principle of the rule of law, democracy, protection of minorities and human rights¹² — consequently, all the issues commonly regarded also by internal constitutional provisions and the judicial practice of constitutional review. The application of these principles can be assessed from the point of view of constitutional law and judicial practice.

2. General principles of European law and the Estonian Constitution. Use of European law by the Supreme Court

According to the generally accepted classification, European law is divided into European law in a broader (the law of the EU and the other organisations related to Europe, above all, the European Convention on Human Rights) and narrower sense (EU law).¹³ I referred to European law in the broader sense above also as one of the bases for the preparation of the Estonian Constitution. The European Union member states are characterised by a three-fold legal protection — national law, the European Convention on Human Rights and European Union, including the European Community, law. European Union law should supersede ECHR, which has been adopted as a law in some countries. In order that the above-mentioned law(s) applied, a dialogue is held between the European Court of Justice and the courts of the member states, to a certain

⁹ The collection Constitution and Constitutional Assembly (Note 4), p. 331.

¹⁰ *Ibid.*, p. 530.

¹¹ See the opinion of the Minister of Justice M. Rask about supplementation of the Constitution by the so-called third act. – M. Rask. Kas põhiseadust muuta või mitte (To Amend or not to Amend the Constitution)? – Postimees, 16 January 2002 (in Estonian).

¹² See, for example, the report prepared in the monitoring programme of accession to the European Union of the Open Society Institute: Kohtuvõimu sõltumatus Euroopa Liiduga ühinemise protsessis. Kohute sõltumatus Eestis (Judicial Independence in the EU Accession Process. Judicial Independence in Estonia). Tartu: Iuridicum, 2001, p. 11 (in Estonian).

¹³ See J. Laffranque. Euroopa Liit ja Euroopa Ühendus. Institutsioonid ja õigus (European Union and European Community. Institutions and Law). Tallinn: Sisekaitseakadeemia, 1999, pp. 65–66 (in Estonian).

extent also between the European Court of Justice and the European Court of Human Rights: however, this does not preclude a collision between the practices of the European Court of Justice and the European Court of Human Rights.

For the time being, Estonia is subject to two-fold legal protection — to national law and ECHR —, but through association law indirectly arises the requirement to also comply with the European Union standards in considering the human rights and the general principles of law, which has to a certain extent been taken into account in the Supreme Court practice described below.

The general principles of European law are expressed both in written and unwritten law. More of them are manifested as unwritten law; thus, it has been said that the general principles of law are unwritten law, not based on the Treaty establishing the European Community (EC), but on the legal orders of the EU member states. These are dogmatically collected thoughts, which are not rules of law, but achieve integrity only in combination with several principles.^{*14} The general principles of law are created and derived by the European Court of Justice, relying on article 220 of the Treaty establishing the EC and using the method of comparative law. In doing so, the European Court of Justice draws inspiration, above all, from the EU member states' and international law (including ECHR). The general principles of EU law have been affected the most by German and French law. As the source of the general principles of law is the law of the member states, and the member states are the creators of the primary law of the EU, the general principles of law also occupy a position among the primary law and the member states are in principle always entitled to amend them and also to withdraw from them. The general principles of EU law have been created primarily for filling the gaps in EU law, to protect the citizens of the EU against the public authority of the EU.

The general principles of European law express particularly well the impact of EU law on Estonian law, but the converse is also true — our law could influence EU law in the future. As the European Court of Justice derives its legal principles from the law of the different member states (prohibition against retroactive effect — French law; the principle of purposefulness — German law; legal privilege — English law, regular administration — Belgian and Dutch law), using the so-called value jurisprudence and comparative law (the law of the member states that would best help achieve the EU goals serves as the basis), it would certainly have something to “derive” from Estonian law, if Estonia were a member. The European Court of Justice has frequently been criticised for such an approach, as creation of law in such a manner is unpredictable. However, nobody has offered a better solution either.^{*15}

As the main general principles of EU law, we could point out the general principles, reflecting the fundamental freedoms, fundamental rights and main procedural rights. Under the fundamental rights are regarded such widely known principles as legality, equal treatment, legal certainty, the principle *ne bis in idem*, legitimate expectation, disallowance of retroactive effect, the right to good administration and the principle of proportionality. The fundamental procedural rights are considered to include guarantees of judicial proceedings, such as access to administration of justice (while the court may not refuse to administer justice), the principle of independent judiciary (so-called structured impartiality), good/efficient legal protection/judging, hearing/deliberation of a matter during a reasonable period of time (article 6 of ECHR), accessibility of sitting and execution of sentences (if a sentence has not been executed, the principle of accessibility of sitting has not been satisfied either).^{*16}

In the context of the possible amendments to the Estonian Constitution, people have discussed the relation between the legal solutions of accession to the European Union and the provisions of the Constitution concerning foreign relations and referendum, and the impact of European law on the Constitution as a whole, including the principles presented in its preamble and general provisions.^{*17} European law indisput-

¹⁴ T. Schilling. Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Rechtsgrundsätze des Gemeinschaftsrechts. – Europäische Grundrechte Zeitschrift (EuGRZ), 2000, p. 30.

¹⁵ *Ibid.*, p. 8.

¹⁶ See J.-P. Costa. Le droit au juge indépendant et impartial en matière administrative. Le principe vu par la Cour européenne des droits de l'homme. – L'Actualité juridique droit administrative (AJDA), 2001, No. 6, pp. 514–518; E. Pache. Der Grundsatz des fairen gerichtlichen Verfahrens auf europäischer Ebene. – EuGRZ, 2000, pp. 601–606; V. Schlette. Der Anspruch auf Rechtsschutz innerhalb angemessener Frist – ein neues Prozessgrundrecht auf EG-Ebene/ Zum Urteil des EuGH vom 17.12.1998, Baustahlgewebe GmbH/Kommission. – EuGRZ, 1999, p. 38, EuGRZ, 1999, pp. 369–373.

¹⁷ See report of the Committee for the Legal Expert Analysis of the Constitution. Võimalik liitumine Euroopa Liiduga ja selle õiguslik tähendus Eesti riigiõiguse seisukohalt (Possible Accession to European Union and its Legal Meaning from Aspect of Estonian Constitutional Law), 1998. Available at: <http://www.just.ee/index.php3?cath=1613> (11.03.2002) (in Estonian); J. Laffranque. Constitution of the Republic of Estonia in the Light of Accession to the European Union. – Juridica International, No. 4, 2001, pp. 207–221; T. Kerikmäe. Estonian Constitutional Problems in Accession to the EU. – A. Kellermann (ed.). EU Enlargement. The Constitutional Impact at EU and National Level. The Hague: T.M.C. Asser Press, 2001, pp. 291–300; R. Maruste. Põhiseadust tuleks siiski muuta (Constitution Should Still be Amended). – Postimees, 30 January 2002 (in Estonian); A. Albi. Euroliit ja kaasagne suveräänsus. Üks võimalikke vastukajasid Põhiseaduse ekspertkomisjoni aruandele (European Union and Contemporary Sovereignty. One Possible Response to Report of Committee for Legal Expert Analysis of Constitution). – Juridica, 2000, No. 3 (in Estonian); A. Albi. Põhiseaduse muutmise Euroopa Liitu astumiseks: ekspertarvamused, võrdlevõiguslik ja teoreetiline perspektiiv ning protseduur (Amendment of Constitution for Accession to European Union: Expert Opinions, Legal-comparative and Theoretical Perspective and Procedure). – Juridica, 2001, No. 9 (in Estonian).

ably affects many aspects provided in the Constitution and is certainly related to the treatment of the general principles of law in the Estonian constitutional order. According to § 3 of the Estonian Constitution, generally recognised principles and rules of international law are an inseparable part of the Estonian legal system. Will the generally accepted principles of European law also automatically become an integral part of the Estonian legal system according to the relevant section of the Constitution or should a supplementation arising from the special nature of European law be inserted in this section of the Constitution? Thus, already the first provisions of the Constitution give rise to a question of whether the relations deriving from European law can be identified with the so-called common foreign relations, based on international law and mentioned in the Constitution? Relying on the collection “Põhiseadus ja Põhiseaduse Assamblee (Constitution and Constitutional Assembly)”, one of the drafters of the Constitution, J. Raidla regarded the following as the generally recognised principles of international law, “There are rather many criteria on the basis of which general recognition is decided, one of them is the principles decided by the Hague Court, they are generally recognised and indisputable as such. It is perfectly clear that a large part of the generally recognised provisions and principles are contained in conventions to which Estonia intends to accede in the nearest future through the relevant resolutions of the *Riigikogu*.”¹⁸ This implied article 38 (1) (c) of the Statute of the International Court of Justice — “the general principles of law recognised by civilised nations”. In the European Union context, it is comparable with article 6 of the Treaty on European Union — “principles which are common to the Member States, /.../ as they result from the constitutional traditions common to the Member States” or, in other words, the general principles of law originating from national legal systems.

This gives rise to important questions related to accession to EU and the principle of superiority of the European Union law: what is the position of the general principles in the hierarchy of the Estonian legal system, *i.e.* whether they are located between law and the Constitution or on the same level as the Constitution or higher than the Constitution and whether the general principles of law are directly applicable? How are things with the consideration of the EU common laws of nature (*e.g.* the principles of good faith and deprivation of the right to object), *etc.* in Estonian law and how is the logic known to jurists being used in EU law?¹⁹ Unlike the Constitutions of Germany or Greece, for example, the Estonian Constitution lacks the provision of who decides on § 3 of the Constitution and determines whether one or another rule and principle belongs to the Estonian legal order. The Supreme Court regards in § 3 of the Constitution besides the principles of international law the general principles of law derived from the national legal systems of other countries, which reach the Estonian legal system through the decisions of international courts and the Council of Europe and the institutions of the European Union. Namely, in its decision of 30 September 1994 that was fundamental from the aspect of European law, the Constitutional Review Chamber of the Supreme Court referred to the general principles of the Council of Europe and EU law as the sources of Estonian law, regardless of the fact that according to the Estonian Constitution, the courts shall administer justice in accordance with the Constitution and the laws (§ 146 of the Constitution — thus, not directly in compliance with international agreements or European law).²⁰ It may be concluded from this that although the Constitution demands that the principles be generally recognised, it will apparently suffice to comply with the condition “generally recognised”, if the principles are recognised in the European Union or by the Council of Europe.

As Estonia is not a full member of the EU to date, there is relatively little space in the decisions of the Estonian courts to rely on EU law — this can be done, above all, taking the general principles of EU law as the basis, since the only treaty relation — the association agreement — does not yet render EU law directly applicable in Estonia. On the basis of the decision of the Supreme Court, we may assume a position that the generally recognised principles of European law serve as an integral part of the Estonian legal system already prior to the accession. Taking into account the wording of the second sentence of § 3 (1) of the Constitution, these principles should also be directly applicable in Estonia. The Supreme Court repeated the same opinion in a later ruling of the Administrative Law Chamber, dating from 24 March 1997, where it recognised the principle of equal treatment, regarded in the practice of the European Court of Justice as one of the general principles of European Union law also as a general principle of Estonian law and found that according to the principle of equal treatment, similar situations were to be handled in the same manner.²¹

Here we have a question of whether the 1994 decision of the Supreme Court entitles us to identify all the general principles of European law with the general principles of Estonian law or only these general principles that the Supreme Court has identified in each individual case in its decisions? The judicial practice

¹⁸ The collection Constitution and Constitutional Assembly (Note 4), p. 59.

¹⁹ *E.g. lex specialis derogat legi generali* and *lex posterior derogat legi priori* — we know that the latter applies also in EU law, but this is not entirely true about the relations between the EU and national law, for example, in the case of a conflict between earlier European law and later national law.

²⁰ Decision of the Constitutional Review Chamber of the Supreme Court, 30 September 1994 (III-4/A-5/94). – Riigi Teataja (The State Gazette) I 1994, 80, 1159 (in Estonian).

²¹ Decision of the Administrative Law Chamber of the Supreme Court, 24 March 1997 (3-3-1-5-97). – Riigi Teataja (The State Gazette) III 1997, 12, 136 (in Estonian).

does not provide an answer to the question of what would happen, if a general principle of Estonian law, conflicting with a principle recognised in European law, already existed traditionally. Which would be superior in such a case and would it be possible to resolve the situation, interpreting the principle characteristic of Estonian law, proceeding from the European one?

A question also arises of why should the member states in their law be bound to such principles of EU law that the EU has derived/created for its legal order? Such interpretation maxims will certainly limit the independent decision-making by the member states. The requirement to take into account the criteria deriving from the decisions of the European Court of Justice exists in the decision of the Association Council between Estonia and the EU already.^{*22} Is this not in conflict with the principle of legal certainty, as the interplay between the written national law and the unwritten general principles of EU law would be too difficult to perceive for the residents of Estonia who are not EU citizens yet?

The more EU law mixes with Estonian law, the more complicated but legally interesting the situation will become. Will an Estonian citizen find protection against public authority only according to the principles of the Estonian Constitution, which constitute the Estonian legal order, or may he or she rely also on the general principles of EU law, for example, in addition to the nationally recognised general principles of law when resisting the national public authority? The European Court of Justice does not consider itself as competent to exercise supervision over the implementation of nationally recognised principles of law.^{*23}

The fundamental freedoms of the EU (the free movement of goods, persons, capital and services) are primarily binding on the member states, consequently, also the future member state Estonia. However, the fundamental rights of the EU and the general principles of law are binding on the member states only in exceptional cases, they are, above all, aimed at the EU institutions (see also the European Charter of Fundamental Rights^{*24}) and have only a subsidiary impact on the member states, insofar as the member states apply European law in its narrower sense. It is frequently rather difficult to draw a line here. The general principles of EU law are aimed at the persons applying the law of the member states also if there is a conflict between the national and EU law and the principle of superiority of EU law is applicable. The candidate countries are expected to recognise the general principles. However, the questions of when the member/candidate states act in the area of EU law still remain unanswered. When are they subject to the “discretion” of their own legislation, when to EU law?

In Estonia, characterised by a transfer from one legal system to another and significant gaps or conflicts in law, the use of the general principles of law will definitely be very necessary.^{*25} The Supreme Court has used the principles created by the Council of Europe institutions in addition to the sources of law also as a means of interpretation. For example, in its decision of 3 May 2001, the Constitutional Review Chamber of the Supreme Court commences the inspection of the compliance of § 11 of the Surnames Act with the Constitution, analysing the practice of the European Court of Human Rights, *i.e.* not even from ECHR.^{*26} This gives rise to a question of whether it places the practice of the European Court of Human Rights in a superior position to the Estonian Constitution or it is still used as a foundation for interpretation, as the law created by the Council of Europe and the European Union institutions was regarded upon deriving the general principles of Estonian law?

Thus, the Supreme Court of Estonia uses the instruments of the Council of Europe and to a certain extent also EU law as a means of interpretation of Estonian law already. The practice of the Supreme Court confirms that the general principles of EU law belong among the principles recognised in Estonia. Suitable examples here include Rait Maruste’s dissenting opinion concerning the decision of the Supreme Court, relying on the association agreement between the European Communities, its member states and Estonia (Europe Agreement) and finding that the principle of equal treatment is also a general principle of European law, and some other dissenting opinions of primarily the judges of the Supreme Court.^{*27}

²² See decision of the Association Council between the European Communities and their member states and the Republic of Estonia, adopting the implementing rules of the provisions concerning the state aid indicated in article 63 (1) iii) and (2) of the Association Agreement (Europe Agreement) between the European Communities and their member states and the Republic of Estonia) according to article 63 (3), approved by Government of the Republic order No. 32 of 14 January 2002. – Riigi Teataja Lisa (Appendix to the State Gazette) 2002, 12, 162.

²³ T. Schilling (Note 14), pp. 5 and 6.

²⁴ Final text of the EU Charter of Fundamental Rights has been published in the Official Journal of the European Communities. – OJ 2000, 364, p. 1. Available at: http://europa.eu.int/comm/justice_home/unit/charte/index_en.html (11.03.2002).

²⁵ See U. Lõhmus. Rahvusvahelise õiguse üldtunnustatud põhimõtted Eesti õigussüsteemi osana (Generally Recognised Principles of International Law as Part of Estonian Legal System). – Juridica, 1999, No. 9, pp. 425–430 (in Estonian).

²⁶ Decision of the Constitutional Review Chamber of the Supreme Court, 3 May 2001 (3-4-1-2-01). – Riigi Teataja (The State Gazette) III, 2001, 15, 154 (in Estonian).

²⁷ Decision of the Constitutional Review Chamber of the Supreme Court, 27 May 1998 (3-4-1-4-98). – Riigi Teataja (The State Gazette) I 1998, 49, 752 (in Estonian).

The general impression is that the Supreme Court is still careful about EU law. For example, in its decision of 10 May 1996, the Constitutional Review Chamber of the Supreme Court does not analyse the allegations that the Act is in conflict with the European Union legal system, provided in the application of the President of the Republic to the Supreme Court for declaring the Non-profit Associations Act unconstitutional.^{*28} Namely, the president found in his application that the Non-profit Associations Act was, *inter alia*, also in conflict with the Europe Agreement^{*29}, according to article 68 of which, Estonia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community. The Supreme Court declared that the Non-profit Associations Act was unconstitutional and in conflict with the UN Convention on the Rights of the Child, but made no mention of the Europe Agreement or European Union law. Maybe the reason is that the Europe Agreement signed in 1995 entered into force only in 1998. However, the Constitutional Court of Hungary found in its decision analysing the Europe Agreement as a political compromise that although EU law was the law of a foreign state, it was so to say indirectly applicable or affecting the interpretation of national law.^{*30} The same should apply to the general principles of European Union law.

Disputes about Estonian legislation harmonising the European Union directives have rarely reached Estonian courts or if they have, it is very difficult to ascertain whether they involve interpretation of purely Estonian legislation or indirectly also of EU legislation. This can be partly blamed on the fact that the legislative drafting notes reflecting EU directives that served as the basis when drafting laws are removed from the laws adopted in the parliament. For example, the Supreme Court ruling of 5 October 1999 was indirectly related to EU law; in the ruling, the preparation of an administrative offence report and collection of fines due to the violation of the package labelling requirement was legally unfounded, as an Estonian standard had not been adopted on the basis of the Packaging Act harmonising EU law.^{*31} However, as both the Europe Agreement and the future accession presume the introduction of European standards as Estonian standards and there was no European standard yet, people had to wait for the preparation of the European standard. Consequently, there was no offence, since the relevant standards had not been established and it was impossible to apply the law. The future will certainly bring more disputes where EU law and the general principles shall be applied.

As it was said, the Constitutional Review Chamber of the Supreme Court derived the validity of the general principles of law from the principle of a state based on democracy, social justice, and the rule of law provided in § 10 of the Constitution and the preamble to the Constitution, according to which the Estonian State is founded on liberty, justice and law.^{*32} As the catalogue of the fundamental rights, freedoms and duties listed in the Constitution is not comprehensive and eternal, this leaves an opportunity to recognise new rights, freedoms and duties by interpretation or amendment of the Constitution on condition that they conform to the principles of human dignity and of a state based on democracy and social justice, and the rule of law. A large share of the general legal principles (*e.g.* proportionality, legal certainty, legitimate expectation) have been derived on the basis of § 10 of the Constitution and have found expression in the decisions of the Supreme Court, particularly those regarding administrative law. Will this suffice upon accession to the European Union or should Estonian constitutional law also be supplemented, inspired by the human rights developments, such as the EU Charter of Fundamental Rights? For example, some of the member states have introduced into their constitutions the principles of non-discrimination, inspired by the new initiatives of the European Commission in regulating the area of the fight against xenophobia, *etc.*

However, the mere written law is not enough to consider EU law. In a state based on the rule of law, the quality of the application of legal protection as well as the general principles always depends on courts that must offer such legal protection. "Law alone cannot offer an adequate security of legal certainty. The binding nature of judge's right is also important in guaranteeing legal certainty."^{*33} So far, decisions cannot generally be regarded as sources of law in Estonia. "At first, it is unclear whether the supplementation of the Code of Criminal Procedure of 13 May 1998^{*34}, which recognises as sources of criminal procedural law also the decisions of the Supreme Court in issues not settled in other sources of criminal procedural law or that have arisen upon the application of a law (§ 1 4) of the Code of Criminal Procedure), changes the former understanding of the meaning of a court precedent as a formal source of law [more precisely, of the fact that

²⁸ Decision of the Constitutional Review Chamber of the Supreme Court, 10 May 1996. – Riigi Teataja (The State Gazette) I 1996, 35, 737 (in Estonian).

²⁹ Riigi Teataja (The State Gazette) II 1995, 22–27, 120 (in Estonian).

³⁰ See decision of the Constitutional Court of Hungary 30/1998 (VI.25) 22 June 1998 in matter 483/B/1996/10. Published in Magyar Közlöny 55/1998, pp. 4565–4575.

³¹ Decision of the Administrative Law Chamber of the Supreme Court, 5 October 1999 (3-3-1-34-99). – Riigi Teataja (The State Gazette) III 1999, 25, 240 (in Estonian).

³² See decision of the Constitutional Review Chamber of the Supreme Court of 30 September 1994, referred to above (Note 20).

³³ See M. Sillaots. Kohtunikuõigus Euroopa õiguses (Judge's Right in European Law). – Juridica, 1998, No. 5 (in Estonian).

³⁴ Riigi Teataja (The State Gazette) I 1998, 51, 756 (in Estonian).

court decisions are not currently regarded as formal sources of law — J.L.].”³⁵ A similar provision is contained also in § 2 of the new draft Code of Criminal Proceedings, “The sources of criminal procedural law are: /.../ 4) decisions of the Supreme Court in issues not settled in other sources of criminal procedural law, but which have arisen upon the application of a law.” It differs according to country as to what branch of law is the most closely related to case law. In Estonia, for example, recognition of decisions as sources of law commences, above all, in criminal proceedings, in France in administrative proceedings, for example. In the European Union it has developed in areas which lack the all-inclusive harmonisation competence. Under such circumstances, the European Court of Justice and the Supreme Court alike develop *de facto* case law to fill the gaps in the written law.

This gives rise to a question: if the importance of decisions increases in the European Union, where will the law created by decisions be located in the hierarchy of Estonian rules of law? Instead of law or even between law and the Constitution and how will the status of a decision be affected by written law adopted later?

3. European law and interpretation of provisions of Constitution concerning foreign relations. Some issues

In the article published in the 6th issue of *Juridica International*, I discussed why the integration process into the European Union until now might be considered as legitimate, which does not preclude the need to supplement the constitutional order accompanying the accession.³⁶ Although it has been observed in the preparation process for the accession to the European Union that the integration process would not come in conflict with our Constitution and the superiority of the Constitution has been ensured, certain borderline situations occur, which are manifested, above all, in that the provisions of the Constitution concerning foreign relations require a somewhat different approach in the light of European law. In other words, as we could conclude, when examining the origins of the Constitution, the applicable Constitution is not as broad as to accommodate everything entailed by EU law. The relations with the European Union, which will definitely continue to be foreign relations until the accession, should be discussed in greater detail in our legal framework, as these relations are so much different from the ordinary foreign relations. I will only present some examples.

Firstly, the position of the decisions of the Association Council (hereinafter: AC), established on the basis of the Europe Agreement in the hierarchy of Estonian rules of law, which has given rise to several questions. The expansion of the role of the executive power as compared to the legislative power, resulting from the accession to the European Union, is unfortunately unavoidable; thus, consideration of and respect for the parliament are very important when making national decisions on EU accession. Yet as long as the decision-making mechanisms of the European Union lack democracy, the member states have more say. This means that the European Union faces a dilemma if it should increase democracy within the EU, which simultaneously decreases the influence of the member states, or *vice versa*. By ratifying the Europe Agreement, the *Riigikogu* has authorised the AC, the membership of which includes, in addition to the Ministers of Foreign Affairs of the EU member states and the representatives of the European Commission, the Minister of Foreign Affairs of Estonia, to adopt decisions.³⁷ These decisions pass both the Council of the EU and the European Parliament to be approved by the European Union. In Estonia, they are approved as the Government of the Republic orders and published in the Appendix to the State Gazette. The decisions are binding on the parties according to the Europe Agreement and the parties undertake to implement necessary measures to execute the adopted decisions. According to the European Court of Justice, the decisions of the AC are an integral part of European law, as they are related to the association agreement, for the performance of which the decisions have been issued and the European Court of Justice is competent to decide on their interpretation. From the point of view of Estonian law, the decisions of the AC are international agreements entered into by the Government of the Republic. According to § 123 of the Estonian Constitution, on the one hand, only preventive supervision of international agreements is possible; moreover, proceeding from the Vienna Convention on the Law of Treaties³⁸ and the general principles of international law, a unilateral amendment of treaties after their entry into force should be precluded, and on the other hand, the superiority

³⁵ U. Lõhmus (Note 25), pp. 425–430.

³⁶ J. Laffranque (Note 17), pp. 207–221.

³⁷ Article 111 of the Europe Agreement.

³⁸ *Riigi Teataja* (The State Gazette) II 1993, 13–14, 16 (in Estonian).

of application applies in the case of a conflict with national law only in treaties ratified by the *Riigikogu*. Thus, we have to note that in the case of a conflict with an Act, only treaties ratified by the *Riigikogu* shall be applied instead of the Act, such superiority arising from the Constitution does not extend to the treaties entered into by the Government of the Republic. At the same time, it has been noted in § 25 of the draft Foreign Relations Act prepared by the Ministry of Foreign Affairs, probably also largely as a result of the need to efficiently apply the decisions of the AC, that if an Act of the Republic of Estonia is in conflict with a treaty (*i.e.* any treaty), the treaty shall be applied.³⁹ Such arbitrary extension of the Constitution should not be allowed, irrespective of the reasons. Yet it is here that the weakness of the wording of the provisions of the Constitution concerning treaties is manifested. Instead, in this issue, we might proceed from analogy with § 87 6) of the Constitution. If the government has no right to issue *contra legem* regulations, it has no right to enter into treaties that are in conflict with Estonian laws either. If such a treaty has been entered into and its application contested, the judge would theoretically have the right not to apply the treaty as it is in conflict with the Constitution. At the same time, the above-mentioned Vienna Convention does not distinguish between ratified and unratified treaties, as a result of which all treaties have obligatory force after their entry into force (*pacta sunt servanda*). Thus, conflicts with the Constitution can be avoided primarily through preventive supervision.

Another issue is related to § 123 of the Constitution, which has arisen in the course of the legal debates about the accession to the EU, namely: what should be understood by “enter into” referred to in § 123 (1) of the Constitution. As according to § 123 (1) of the Constitution, the Republic of Estonia shall not enter into international treaties which are in conflict with the Constitution, the representatives of the Estonian eurosceptic movement find that the government cannot sign the treaty on the accession to the European Union before the Constitution has been amended, since in their opinion, a conflict exists between the applicable Constitution and the accession to the EU. As supplementation of the Constitution is a time-consuming process, it would still be possible to sign the accession treaty first and after that supplement the Constitution by a referendum or decide the accession to the EU by a referendum. As it is known, an accession treaty does not enter into force from signing but also requires ratification by both parties. Those persons familiar with international law thus face no difficulty in interpreting “enter into”, but linguistically, the forces impeding the accession to the EU may also take advantage of it, creating a legal vicious circle. Again, if we recall the origins of the applicable Constitution, it is suitable to quote J. Adams, who found the following at the 15th session of the CA, “There has been criticism about that (the chapter “Treaties”), but I think that the criticism is more on the level of terms. A precise terminology has not evolved yet in Estonian constitutional law. What we understand as entry into a treaty and what we understand as ratification of a treaty. And in addition, this involves a conflict between the special language and general language meanings. I think that we have language specialists for that, we do not necessarily have to take the terminology used before the Second World War as the basis.”⁴⁰

When returning to the decisions of the AC, then firstly, it is my opinion that EU legislation creating subjective rights and not published in Estonian, which is simply referred to in the decisions of the AC (although the association agreement itself unfortunately also contains such references), should not be transferred to the Estonian legal system by the decisions of the AC, not to mention the practice of the European Court of Justice of certain areas to which ambiguous references have been made in a decision of the AC, which give rise to criteria that the persons applying Estonian law should consider.⁴¹ Such references may be in conflict with §§ 1 and 3 of the Constitution and EU law cannot be rendered a part of the Estonian legal system by references only. Referring to the practice of the Supreme Court, it may be claimed that, under certain circumstances, Estonia is also subject to international law provisions not published in the State Gazette, such as the UN Convention on the Rights of the Child⁴², but I would still not compare it with the requirements of EU law, as we had approved the accession to the Convention, and not directly to the EU rulings provided in the decision of the AC. With regard to the Constitution, it would be more acceptable to publish all the EU legislation mentioned in the decision of the AC as annexes to the same decision in Estonia and in the Estonian language, *i.e.* to integrate them into the text of the decision of the AC.

We have to find solutions to the issues related to EU rulings for some more time, as according to the principle of legal certainty, the fate of those EU rulings rewritten into Estonian law prior to the accession is questionable after the accession, when the rulings will directly apply to Estonia as a member state. Duplica-

³⁹ See home page of the Ministry of Foreign Affairs: <http://web-static.vm.ee/static/failid/196/valissuhtlemisseadus.pdf> (12.03.2002) (in Estonian).

⁴⁰ The collection Constitution and Constitutional Assembly (Note 4), p. 142.

⁴¹ See decision of AC Riigi Teataja Lisa (The Appendix to the State Gazette) 2002, 12, 162, and also the draft decision of AC, adopting the conditions for Estonia's participation in the Community programme “Fiscalis”. The draft Agreement on Accession to European Common Airspace, *etc.* (unpublished).

⁴² See decision of the Constitutional Review Chamber of the Supreme Court, 10 May 1996 (3-4-1-1-96). – Riigi Teataja (The State Gazette) I 1996, 35, 737 (in Estonian).

tion would be confusing, the revocation of the duplicated provisions retroactively would render some of the Estonian Acts difficult to understand and decrease trust in the parliament.

Secondly, I do not think that merely the decisions of the AC approved by the government, under which the Estonian State assumes proprietary liabilities, are legally adequate. Here I mean accession to the European Communities programmes, which concerns various areas and where the participation fees of the programmes in the annual budgets of the ministries amount to millions of kroons despite the fact that half of the costs related to the accession to the programmes is covered by PHARE.^{*43} Unfortunately, no decisions of the Supreme Court and comments of the Constitution are available regarding what is meant by the proprietary obligations referred to in § 121 4) of the Constitution as well as in §§ 104 15) and 65 10). The Legal Chancellor has also voiced the problem; he has acknowledged the need to provide by an Act a legal definition, which would describe the notion “proprietary obligations of the state”.^{*44} H. Vallikivi finds that although entry into almost any treaty entails proprietary obligations of the state, the phrase mentioned in § 104 (2) 15) of the Constitution should at least extend to treaties, which expressly impose the periodic or significant proprietary obligations not foreseen in the state budget (*e.g.* payment of a membership fee of an organisation).^{*45} Consequently, the Acts enforcing treaties should take account of the requirements of § 104 of the Constitution. Perhaps the precise specification of this expenditure in the State Budget Act would help render the accession to the Community programmes more transparent and legitimate.

It appears from the information above that some sections of the Constitution need to be specified in relation to the pre-accession process.

Conclusions. Future of Estonian Constitution in the context of European law

In conclusion we must admit that a certain short-sightedness in preparing the Estonian Constitution, which did not consider Europe’s future more globally and Estonia’s role therein, can be felt in the process of Estonia’s accession to the European Union and the work not done at the beginning of the 1990s must be done ten years later. At the same time, the applicable Constitution upholds the idea of respecting the fundamental rights and freedoms laid down in the European Convention on Human Rights, which can be successfully observed, with particular supplementation, also in the European Union context. Consideration of the general principles of European law entails a series of questions that cannot be answered now — the general principles are derived and used primarily by the Supreme Court, at the same time, the relationship between the general principles of European law and Estonian law in the pre-accession process is not very clear. It is also difficult to find interpretations and solutions to the legal problems of the integration process from the provisions of the Constitution concerning international relations. The Constitution does not permit using the same legal measures before the accession as it should allow in the case of membership. The premature use of such measures should not become a goal, on the contrary, all the obligations arising from the associated status must be performed considering and honouring the Constitution, not evading its provisions. The latter concerns both reference to EU legislation and accession to the EC programmes. In this respect, the membership presumes specification of the constitutional foundations and allows for simpler solutions that are suitable for a full member.

When discussing the future of the Estonian Constitution in the context of European law, the issues discussed above form a logical relation. The future of the general principles of EU law is related to the EU Charter of Fundamental Rights solemnly declared in Nice in December 2000 and its future. Whether the Charter becomes legally binding in the future or not largely depends on the view that the current Future of the EU Convention has of the development of the EU and whether a uniform constitution is prepared for the EU, of which the fundamental rights and freedoms together with the general principles of law would also constitute a part. The constitution of the European Union may entail supplementation of national constitutions, *i.e.*

⁴³ For example, Government of the Republic order No. 628-k of 28.05.1999, approval and granting of the powers of the draft decision of the Association Council between the European Communities and their member states and the Republic of Estonia, adopting the conditions of Estonia’s participation in the research and technology development and introduction activities programmes of the European Community (1998–2000) (Riigi Teataja (The State Gazette) II 1999, 14, 89) or, for example, Government of the Republic order No. 552-k of 24.07.2001, approval of the decision of the Association Council between the European Communities and their member states and the Republic of Estonia, adopting the conditions for the participation of the Republic of Estonia in the programme “Culture 2000”. – Riigi Teataja Lisa (Appendix to the State Gazette) 2001, 96, 1337 (in Estonian).

⁴⁴ Presentation of the Legal Chancellor to the Riigikogu 28 September 2000. Available at: http://www.oiguskantsler.ee/tegevus/ylevaated/28sept2000_ettekanne.rtf (12.03.2002) (in Estonian).

⁴⁵ H. Vallikivi. *Välislepingud Eesti õigussüsteemis* (Treaties in Estonian Legal System). Tallinn: Õiguskirjastus, 2001, p. 35 (in Estonian).

these processes are reciprocally and dynamically interrelated. The possible supplementation of the Estonian constitution in relation with the accession to the EU must be decided in the nearest future, but this is a separate topic not to be discussed in this article. Nevertheless, the creation of constitution this time should take account of the dynamic development of the European Union and look into the future more than before. The supplements made to constitutional law today may prove to be too narrow for the future scenario of the EU as early as tomorrow. Estonia may choose and supplement its constitution accordingly, to the extent that it wishes to participate in the acceding Europe and whether it wishes to amend its Constitution accordingly each time the competencies of the EU are amended.

In addition to the possible amendment of the text of the Constitution and/or constitutional acts, European Union membership also entails a new approach to constitutional review, although internally it will continue to be within the competence of Estonia. This concerns, above all, the possible subordination/non-subordination of EU law and national law affected by EU law to the constitutional review of Estonia. The European Court of Justice may exercise supervision over EU legislation, which does not, however, mean the preclusion of national judicial remedies. National courts must allow for efficient legal protection both against the arbitrary action of the national and EU public authority. The European Union provides a completely new dimension to national judicial power and facilitates the inclusion of decisions in sources of law.