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# General Objectives of Legal Theory and Significance of Values in the Context of Globalisation<sup>\*1</sup>

This article will discuss some of the important issues that are related to the developments and prospects that have taken place in legal orders over the past few years, proceeding from both the aspect of doctrine and that of legal practicality. It is important to note that for quite a while, the developments that have taken place, and the future prospects, are emerging in a completely new context — in the context of globalisation.<sup>\*2</sup>

## 1. Contemporary law as a global information and communication medium

Over the past few decades, developments in the world, including the integration process in Europe, have rendered societies and countries increasingly dependent on the efficiency and quality of communication. A number of countries, both in Europe and elsewhere, have set out to systematically explore the changes that

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<sup>1</sup> The postulates included in this article were presented by the author at the international conference “Ratification of the Treaty establishing a Constitution for Europe: impacts on national constitution”. Tallinn, November 2005; at the conference “Role of courts in developing the European common judicial area”. Tallinn, January 2006; at the international conference “Regulatory communication and communication structure in the rule of law, global and worldwide dimension”. Tartu, April 2006.

<sup>2</sup> At the same time, it is perfectly clear that not only the Estonian legal order has had to meet new challenges. For example, B. Rüthers writes in his article *Method Realism in Jurisprudence and Justice* that no country or generation of lawyers has acquired so much methodical know-how for reconceptualising the entire legal order as German jurists between the years 1919 and 1990. The German jurisprudence has had six different constitutions during a period of 70 years: the constitutions of the *Keiserreich*, Weimar Republic, Nazi and occupation regimes as well as the former constitution of the Federal Republic of Germany, the new constitutions of the German Democratic Republic and the Federal Republic of Germany, which were strongly influenced by the supranational law of the European Union. Professor B. Rüthers also writes that this is the very reason why German jurists have developed into ‘experts on change’ and world champions in the savoury discipline of ‘political change of system’. – B. Rüthers. *Methodenrealismus in Jurisprudenz und Justiz*. – *Juristen Zeitung* 2006/2, pp. 54–55.

are characteristic of information societies as well as the need for reflecting them in law, along with the possibilities of law in these new circumstances. At international fora, people are speaking more and more often about global legal integration since one of the most characteristic features of contemporary communication is its cross-border nature. However, applicable legal regulation is frequently limited in geographical, social, economic, information technology and other terms. The issue of the globalisation of law concerns the feasibility, reality, necessity and advisability of globally applicable law. M. Shapiro in his article recalls E. Zitelman, who as early as in 1888 raised the question of the feasibility of world law.<sup>3</sup> The concept suggests that global law is the worldwide (global) integration of law. This can be achieved if states are proclaimed to be subjects of global legal integration. Yet the subjects of such integration are not only individual states but also regional, supraregional and world organisations.

Historically, the European judicial area has been shaped primarily by two different types of legal culture: the continental European or regulation-based one, which can be conditionally referred to as civil law, and common law or the overall law generated by the work done by courts, in which the premier source of law is a court judgement or more specifically the binding part of it — *ratio decidendi*. The traditions have served as the bases for long-term developments in national legal orders. The Estonian legal order belongs, through historical developments, to the legal order based on civil law. That is why it has been important for our jurisprudence to proceed from the dynamic doctrine of continuity after Estonia re-established its independence. However, it was equally important to understand that the interrelationships of all societies structured as states, as well as other subjects of international law, were organised by international law as a system comprising provisions of law, generally recognised legal principles and customs, which regulated the relations between sovereign states and other subjects of international law. The law of the European Communities or European Union law must be regarded as the third structure of law. In fact, since 1993, it has been correct to speak about European Union law which is connected to the entry into force of the Maastricht Treaty. Fourthly, it must be noted that the European Union is an integration organisation, above all, through its law, and the European Court of Justice plays a very important role in it. According to article 7 of the Treaty establishing the European Community and according to article 3 of the Treaty establishing the European Atomic Energy Community, the tasks entrusted to the Community shall be carried out by the five central institutions which comprise the European Court of Justice, founded in 1952. Namely, the Court of Justice develops European law, shaping and even establishing the general principles of law, while also ensuring the protection of human rights in the European Union. The Court of Justice has a decisive say in interpreting European law and in determining its applicability. Thanks to the decisions of the Court of Justice, *ius scriptum*, or written law, may be reshaped.

All of the named legal domains are related to certain parts of reality and are thus relatively independent social systems when proceeding from the systems theory. The two main characteristics of each system are its non-amorphous nature and integrity. The non-amorphous nature means that the system may contain different elements that are related to each other in a particular manner, while integrity or homogeneity implies that the system is separated from other systems. Taking this underlying principle of the systems theory as the basis, we must understand and recognise at least the very nature of the legal realities existing in the European judicial area and their mutual relationships.

However, just as important as seeing and distinguishing between the various contemporary legal structures it is important to acknowledge that the legal systems of the modern world do not ultimately serve as different and independent structures. In the context of the systems and communication theory, this means that the legal structures of the modern world are not independent communication systems, but instead comprise a global information and communication system.<sup>4</sup> Here it is appropriate to recall that less than two years ago a collection of works with the bearing the interesting title “Constitution in Discourse with the World”, was published to celebrate the 70<sup>th</sup> birthday of the well-known European expert in constitutional law P. Häberle.<sup>5</sup> The problem is that integration processes in Europe and on a wider scale the globalisation process as a whole, have sharply highlighted relations between different legal orders. This means, *inter alia*, that questions about the legal order of a state and its legitimacy, have gone beyond the traditional legal paradigm and serve in essence as a problem of law as a cross-border regulatory communication.<sup>6</sup> In the bulletin of the

<sup>3</sup> E. Zitelman. Die Möglichkeit eines Weltrechts. Unveränd. Abdr. der 1888 erschienen Abhandlung. München 1916. *Ibid.*: M. Shapiro. The Globalization of the Law. – Indiana Journal of Global Legal Studies 1993/1.

<sup>4</sup> The contemporary literature on theory of law increasingly recognises that the theory of law has been structured proceeding from the information and communication theory. See, for example, W. Krawietz. Jenseits von national und staatlich organisierten Rechtssystemen – normative Kommunikation von Recht in der modernen Weltgesellschaft. – Kommunikation und Recht in der modernen Wissensgesellschaft – national oder international? Rechtstheorie 2003. Vol. 34. Book 3, p. 331.

<sup>5</sup> Verfassung im Diskurs der Welt: Liber Amirocum für Peter Häberle zum siebzigsten Geburtstag. A. Blankenagel (Hrsg.). Tübingen 2004.

<sup>6</sup> The author of this article consistently supports the concept of law as a regulatory information and communication medium, which, in other words, means that law and the legal order alike cannot be functionally and socially described and explained when proceeding in principle from the free *a priori* unrelated subjects of law. Law encompasses everything that is related to the legally relevant part of human behaviour. Hence, for perceiving law, it is very important to see and recognise the regulatory correlation that stands between law and society (societies). See also R. Narits. Õiguse entsüklopeedia (Encyclopaedia of Law). Tallinn 2004, p. 40 (in Estonian).

international conference “Regulatory Communication and Regulatory Communication Structure of Legal Systems in the Rule of Law, Global and Universal Dimensions” Tartu, 2006, the Associate Professor I. Kull writes in her theses: “Regulatory communication as interaction represents by nature the co-existence of at least two important dimensions, those being distribution and dissemination.” The harmonisation of law on the level of the secondary legislation of the European Union has reached the stage in which the formulation of uniform provisions on the level of *acquis* has given rise to the development of novel regulatory communication structures. The purpose of the EU common frame of reference<sup>7</sup> is to improve the logical coherence between the applicable *acquis* and the one to be adopted in the future and to promote the development of consumer policy strategy, specific guidelines, and the terms of contract comprising the entire EU, to furnish legal notions with clear definitions, to formulate the main principles of contract law and coherent exemplifying rules, proceeding from the legal order of the European Communities and the best solutions available in the legal order of the member states. Thus, regulatory communication structures are created by means of the guidelines determined by the Commission of the European Communities, through which new information will be distributed and disseminated in national legal orders. She rightly adds that the activities of jurists in introducing, explaining and extrapolating their national law are above all significant for the internal development of national law, contributing to the understanding of the development of law, influences originating from other legal orders and relation with the other walks of social life.<sup>8</sup> The contemporary literature on legal theory uses the term ‘glocalisation’ to denote a situation in which the global and the local are closely interrelated.<sup>9</sup> Every state that is shaping its national legal order today must take account of such regulatory and institutional relationships. We first mentioned the significance of the doctrine of continuity for the development of the Estonian legal order after the reestablishment of independence. In other words, restitutive legal policy was implemented in Estonia after restoration of independence. This was very reasonable; yet the multiplicity of legal reality — to be more precise, of legal realities — puts in the limelight not only relations between ethics, policy and law, but the question of a particular political and legal world ethos. This is ‘the foundation of a world union to be created’.<sup>10</sup> Regulatory landmarks that have been fixed by symbols and culturally shaped are found not only in ethics, politics or religion. They are also found in law. Hence, the methodologically verifiable legal perception must also be communicated rationally and not get stuck in some limited space and time. That is how the legal theory developing on the basis of perceptive and scientific programmes can offer ‘suggestions for conduct’.

## 2. Horizon of value jurisprudence<sup>\*11</sup>

The Estonian legal order is in a state of discourse, in a state of discourse with Europe and why not also with the entire world. T.-H. Ilves, who represents Estonia in the European Parliament, writes: “If you want to be with us, Europe announces, become like us. That was an offer that was hard to refuse. Chasing the carrot of European Union membership, the parliaments and governments had to overcome many difficulties that had seemed unsurpassable, and at times to also tolerate the blows of refusal and non-recognition. That process of self-colonisation, in which the states voluntarily adopted European Union laws and habits, was largely similar to the process of voluntary westernisation undergone by pagan Europe when it was illiterate and lacked a legal system in the 13th century, when towns adopted the Lübeck or Magdeburg law that granted them, for example, membership in the Hanseatic League. Just as such an agreement was beneficial to all parties, the same applies to agreement with the EU.”<sup>12</sup> However, one cannot agree with T.-H. Ilves, when he continues:

<sup>7</sup> C. von Bar. Working Together Toward a Common Frame of Reference. – *Juridica International* 2005 (X), pp. 17–26.

<sup>8</sup> The French civil law expert P. Ancel writes that the draft general private law regulations within the framework of Europe concern an altogether different question. These drafts do not originate from European agencies but have been born in universities, they are products of legal teaching and created under the auspices of scientific traditions. He refers to the Principles of European Contract Law, developed by the Lando group, to the European Contract Code by the European Academy of Law, and the draft European Code prepared under the leadership of professor von Bar. However, many French jurists have reservations about these drafts and have frequently demonstrated their negative attitude. French jurists have been convinced over a long period of time that their *Code civil* is the king of law books. See P. Ancel. Der französische Code civil im Jahr 2005 – Monument oder Gespenst. – *Juridica International* 2005 (X), pp. 40–41. P. Ancel has a positive attitude toward European Union directives, since at the beginning, they do not influence national legal order, but can be integrated into it later on. See P. Ancel. *Ibid.*, p. 40. It seems that such an approach is entirely justified and conforms to the principle of *mutatis mutandis*.

<sup>9</sup> See, e.g., W. Krawietz. Glokalisierung der Rechtskommunikation? Zum Globalisierungsdiskurs in der modernen Rechts- und Gesellschaftstheorie. – *Gewohnheitsrecht – Rechtsprinzipien – Rechtsbewusstsein. Transformationen der Rechtskultur in West- und Osteuropa. Rechtstheorie* 2004. Vol. 35. Book 3/4, pp. XVII–XXI.

<sup>10</sup> *Ibid.*, p. XVII.

<sup>11</sup> Discussion about values continues to be one of the most important areas, above all, in philosophy of law. See, e.g., the collection *Values, Rights and Duties in Legal and Philosophical Discourse* compiled on the basis of the 21<sup>st</sup> World Congress of the International Association for Philosophy of Law and Social Philosophy held in Lund (Sweden). – *Rechtstheorie. Beiheft* 21. Berlin: 2005.

<sup>12</sup> T.-H. Ilves. Suur laienemine ja suur Hiina müür (Great Enlargement and Great Wall of China). – *Riigikogu Toimetised (Proceedings of the Riigikogu)* 2003 (7), p. 29 (in Estonian).

“Eastern Europeans are willing to do whatever is necessary to act like the European Union, to adhere to its laws and customs [...]”<sup>13</sup>

It is clear that the integration process in Europe has shaped new forms that articulate the economic, social, political and legal reality and that put to test a number of the ordinary concepts of the categories which have become familiar and customary to us.<sup>14</sup> There is no way one could stay away from the objective processes taking place in Europe. M. Nutt who continues to be active in politics today, already wrote in 1991: “Estonia cannot become a viable country by staying away from the European integration processes and the EC. The transition to it will require thorough reorganisation both in the economy and in the legal system”.<sup>15</sup> Yet the question is not only about reorganisations as such, but in the very content of these reorganisations. We must also know that even today there is much that has stood the test of time and that must be consistently protected. This includes, for example, the well-known and recognised principles of law. But what is most important — changes must be made and accepted in the context of values. The majority of the European national legal orders have transitioned over to value jurisprudence both in the perception of the legal orders themselves and in planning and implementing the changes. Jurisprudence in Estonia cannot and must not be left behind this trend. Naturally, it is good when something has stood the test of time and consequently proven to be of value. At the same time, values are not absolute categories but to a great extent relative, as a certain *topoi*’s they maintain a certain topographic value. U. Reinsalu, the Chairman of the Constitutional Committee of the *Riigikogu*, writes: “As a result of diverse legal cultures and political influences, the legal system of the European Union is very hard to grasp. There are several reasons for that, beginning with the interests of the member states and ending with the effects of the relations between the legal services of two EU institutions, the Commission and the Council.”<sup>16</sup> Although the legal reality is hard to grasp, Estonia is showing visible signs that ‘the horizon of jurisprudence’ is not an ambiguous entity somewhere in the distance, but is instead a clear landmark. In order not to go astray in the world of values, it would be necessary — which would be a value on its own already — to agree, at least in Europe, on the essential connection between the different actually existing legal orders through our own analytic discourse and in the course of it. Such an agreement presumes a preliminary agreement on how to treat the integrated and integrating Europe. That is why I believe that eastern Europeans are not willing to do whatever it takes to act like the European Union.

### 3. ‘Umbrella’ or ‘home’

If we are not ready to take the steps required, then what steps are we prepared to take and on what conditions will we take them?

The first, and perhaps not the most effective method, regards Europe proceeding from the principle of the separation of the institutions and sources of law. In that case, EU matters and member state matters would belong to different domains. This would, in principle, also imply different legal orders. However, such a view would be incorrect mostly because it would not mirror reality. In reality, communication works and all attempts to exclude it are not in line with reality. In professional literature, it is referred to as the umbrella principle<sup>17</sup> and can be applied to a federal state system or to the cooperation between states in some narrow area. However, there is also another possibility. Namely, to regard the European Union as a combination of institutions and sources of law on all levels. This principle can be referred to as the principle of home.<sup>18</sup> Although the umbrella principle seems to be easier to understand at first glance and seems to protect the sovereignty of the state, while the principle of home does not seem so clear at first glance, the principle of home protects the national diversity of Europe and is in every way competent with regard to law. From the point of view of the philosophy of science, the principles described are metatheoretical, but the selection between them largely determines the content of theory of law and the later practice based upon it. In the final

<sup>13</sup> *Ibid.* pp. 29–30.

<sup>14</sup> There are multiple manifestations of increasingly close cooperation in Europe. In the constitutional law perspective, the relevant notion would be constitutionalisation. The ever-increasing integration leads step by step to the formalisation of legal structures that make way to the development of a constitutional order on the continent. See A. von Bogdany. *Konstitutionalisierung des europäischen öffentlichen Rechts*. – *Juristen Zeitung* 2005/11, pp. 529–540; G. F. Schuppert, C. Bumke. *Die Konstitutionalisierung der Rechtsordnung: Überlegungen zum Verhältnis von verfassungsrechtlichen Ausstrahlungswirkung und Eigständigkeit des „einfachen“ Rechts*. 1<sup>st</sup> ed. Baden-Baden 2000; J. H. H. Weiler. *The Constitution of Europe*. Cambridge 1999, p. 221 et seq.

<sup>15</sup> M. Nutt. *Kas me oleme iseseisvad (Are We Independent)? – Postimees*, 30.09.1991 (in Estonian).

<sup>16</sup> U. Reinsalu. *Märkmeid Eesti õigussüsteemi tulevikuks (Notes about the Future of the Estonian Legal System)*. – *Riigikogu Toimetised (Proceedings of the Riigikogu)* 2005 (12), p. 42 (in Estonian).

<sup>17</sup> M. Rosentau. *Suveräänsus Euroopa Liidus (Sovereignty in the European Union)*. – *Riigikogu Toimetised (Proceedings of the Riigikogu)* 2003 (8), pp. 14–15 (in Estonian).

<sup>18</sup> “This principle may be called compositional all-inclusiveness — all public things that take place on any level in Europe serve simultaneously as European matters and those of the relevant level”. – M. Rosentau (Note 17), p. 15.

stage, the legal status or subjection of Estonia, for example, depends on the entry into the relevant preliminary agreement.<sup>\*19</sup>

No matter which walk of life we are speaking about, we always find ourselves at the identity problem. This means that we arrive at attitudes, culture, language, traditions and values. The identity of every nation has developed in its own characteristic way and, as it seems to me, that one of the key questions facing Estonia as a member of the European Union is the preservation of its identity. It is only natural that all of us in Europe have a set of common values such as democracy, human rights and rule of law; yet besides that there exists today and in the future, the obligation to preserve and develop national identity while acknowledging European values. And here national parliaments have a certain mission to carry out. In principle, the role of national parliaments in shaping European Union legislation must increase. The reason for this is not the ambitions of national parliaments. The problem is, however, that the law, which has been collectively prepared in the European Union, concerns the organisation of concrete reality in a concrete space, that is, in a member state. To put it yet more precisely, legislation is not drafted in Europe for some abstract body but for the people living in the member states. National parliaments that are closest to local people are perhaps best at knowing and perceiving the interests and needs of the people. However, until recently there was quite a bit of discussion about the decreasing role of national parliaments in the European Union. Today, Benelux is very seriously discussing how to become stronger and more cooperative. The same issue is on the agenda in the Nordic Council; the activities of the Baltic Assembly are gaining impetus. The enlargement of the European Union has itself stimulated this type of closer regional communication.<sup>\*20</sup>

Returning, specifically, to the perception of the Estonian legal order, it seems to me that when acting in line with the principle of home we do not come into conflict with the doctrine of the European single — perhaps it would be more appropriate to say common — judicial area. Estonia's membership in the European Union would thus, in the context of the European common judicial area, mean the recognition and implementation of the principle contained in § 1 of the Republic of Estonia Constitution ("Estonia is an independent and sovereign democratic republic") that is more in line with the actual contemporary reality. It means that it is possible to successfully ensure the continuation of the Constitution of the Republic of Estonia and consequently its legal order, while being part of the European Union. I would put it even more precisely: we must find measures to ensure the control of the *Riigikogu* over the impact of the European Union, including its legal influences, and guarantee for the Estonian people, as the highest vested bearers of sovereignty, the realisation of their principal needs as Europeans.<sup>\*21</sup>

## 4. Contribution of jurists

It is clear that political discourse is not the domain of jurists. What can jurists and jurisprudents still do and continue to do for shaping one of the important features of a state — legal order — and more specifically for developing its conceptual foundations, taking into account the objective movement towards a European common judicial area?

It is my opinion that the help and support of jurisprudents can consist in the application of the very theory of legal order to contemporary circumstances. This theory can in principle be broken down into the two underlying principles that have, through their approximation (even harmonisation), made their way into modern legal thinking. They involve the theory of institutions on the one side and the normative theory on the other side. According to the theory of institutions, the legal order is not a mere set or group of regulations but involves inherent unity that is very difficult to explain by means of scientific abstractions, i.e. notions. Pursuant to this approach, legal provisions are the goal of a legal order and they make the legal order active.

<sup>19</sup> In the University of Tartu, jurisprudents proceed from the principle of home. Namely, the research topic financed by the Department of Law of the University of Tartu TOIAO1782 "Estonian judicial area in a global judicial area" for the first time sets as its goal to systematically study law, taking as the basis Estonia's reality and its legal order, but linking it through all fields of law to the global judicial area.

<sup>20</sup> A situation in which the system of international relations acquires a new quality can be witnessed in Europe for quite some time already. As J. Zielonka writes, the international system of Westphalia is being replaced by a neo-medieval international system. In the opinion of the author of this article, this neo-medieval international system has several qualities and among them are collective bargaining over laws, procedures and the institutional structure of the empire. The Westphalian nation state that developed in its classical form in the 19<sup>th</sup> century and was based on a single centre of power is no longer a reality. See J. Zielonka. *Europe as Empire. The Nature of the Enlarged European Union*. Oxford 2006. 293 p.

<sup>21</sup> As it is known, perhaps the most vivid wording of the parliament's role with regard to the state and the European Union can be found in Finland. According to the amendments made to the Constitution in 2000, the *Eduskunta* must participate in the preparation of issues related to the European Union, while the responsibility for that lies with the Government of Finland. In Sweden, the role of the parliament has been established by four main statutes and the rules of procedure of the *Riksdag*. Pursuant to that, the Government is obliged to inform the *Riksdag* about all issues related to the European Union. Denmark applies a practice, in which the Government is obliged to inform the Parliament about all issues concerning the European Union, which directly or indirectly affect Denmark.

In the normative theory, the legal order itself is the element that helps define law. As we can see, both approaches take order as the basis for defining law and furnishing it with the content. Now we have to proceed to the next step and describe the order, not forgetting that order is founded upon regulations. A rationally perceived unity (in the European context common) judicial area, as an order, is applicable, because applicability is an immanent quality for order. However, applicability is not an inseparable characteristic of regulations that serve as the basis of order. For regulations, applicability is only one of their features. This means that the applicability of order surpasses the limits of strict legal study since we can speak about the validity of an order founded on regulations, as well as about unity, only together with society. Particularly with the behaviour of the members of society. The inference is that order is in fact applicable only when the regulations aimed at a society organised as a state are adopted by the members of such society. It should be clear that law does not exist only to supply work for parliaments. In the hands of a state, law is in essence the only means through which, and with the help of which, the state can organise and guide the behaviour of subjects of law, doing it imperatively, if required. Figuratively speaking, the question how much law there is in society is ultimately answered by subjects of law when they “demonstrate” it with their behaviour.<sup>\*22</sup> It is this kind of communication that both the national legislator and the European Union legislator must keep in mind when creating law. In the context of what has been said, it is only natural that the debates in legislation on the level of states and in the European Union are not becoming simpler but more complicated.<sup>\*23</sup> The law must not remain a mere ‘dead letter’ but must be manifested in the behaviour of subjects of the law. And here I share the view that the continuing internal development of law, its enrichment on a local, regional and supranational level, contributes to, rather than jeopardises, the adaptation of the understanding of law with social reality. Though the process of globalisation may develop a vision of national identities being lost, including the legal order or even legal culture. However, rational understanding still implies that the strength of integrating Europe lies in the diversity of national legal orders. Therefore, along with solving the development problems of national legal orders, jurists have to continually participate in shaping supranational federalism today. Language, cultural, social, economic, ideological, geographical, traditional and other differences must not become a source of problems in the European Union. Perhaps the greatest challenge for the European Union is to overcome objective and major differences between its member states. I believe that it is necessary to receive a certain part of national legal orders at a supranational level. Above all, time naturally requires receipt of the constitutional key institutes. Only in this way is it possible to shape federal collective existence in terms of its diversity. Doctrines, schools, legal positions, etc. have developed in different European countries over a period of centuries. Thus, the legal order of the European Union also necessitates finding a certain common ground for the sake of the common judicial area. Supranational federalism is the instrument that allows for transposing legal figures (figures of dogmatics) to EU law. The development of such positions can be explained by the fact that the European Union has evolved and is developing on the basis of nation states that have an independent identity, which strive for a European type of common coexistence, yet do not intend to form by regions a European federal state.<sup>\*24</sup>

## 5. Methods to develop legal order

At the beginning of the article, we noted that the primary subjects of global legal integration were states, alongside which regional, supranational and even world organisations had to be recognised. Below, we will discuss the measures of global legal integration, the implementation of which could lead to the provision of

<sup>22</sup> The *Riigikogu* discussed as an important national item ‘the future of Europe’ on 6.04.2006. Although no decision was adopted as a result of the discussion (it was not planned either), the underlying idea expressed was that Europe would be stronger if France remained France, the UK remained the UK and Estonia remained Estonia. It would be rather silly to force them into a framework of a fictitious European identity (K. Ojuland). One of the opinions expressed was that the fear that the European Union would transform into a federation or super-state was exaggerated (E. Eesmaa). See <http://www.riigikogu.ee/ems/stenograms/2006/04/m06040610.html> (in Estonian).

<sup>23</sup> At the already mentioned discussion ‘the future of Europe’, the Chairman of the Constitutional Committee U. Reinsalu spoke about problems in relation with the Treaty establishing a Constitution for Europe or in other words with the future of European legal integration. He said that the Treaty was not a goal in itself but a tool for increasing wellbeing in the European area and for providing additional safeguards to rights and security. The good practice of reaching a compromise between different countries for setting common goals persists but it has self-evidently become harder. The member of the Parliament I. Gräzin, however, had a different opinion: “Things turned out in the way they did; today, Europe has come to a legal standstill [...] the former life of the Constitutional Treaty has come to an end, it is over, *finita, adieu, schluss, alta la vista...*” See *ibid*.

<sup>24</sup> Regulatory communication between national legal orders has largely taken place through the private initiative and activities of research groups. The work of the *Study Group on a European Civil Code* could serve as an example. As a result of years of work, the principles of European contract law have been prepared, which proceed from the principles, notions and concepts generally recognised in national legal orders. In many cases, the principles lack similarity with the regulations of any national legal order, yet they reflect the common part found through cooperation. For instance, on the 3<sup>rd</sup> European Jurists’ Forum, held in Geneva on 7.–9.09.2005, one of the sections worked to develop the European Code of Civil Procedure. 4. One section will assemble on the European Jurists’ Forum in Vienna (in May 2007) to discuss the feasibility of the European Criminal Code.

solutions for each national legal order, including the Estonian legal order, in the context of globalisation. At the same time, the measures of legal integration should not only involve the traditional concept of a measure as a mere activity. In the context of legal integration, measures should be seen as activities, sources as well as doctrine. All in all, measures in their wider sense should be seen as (a) unilateral legal integration, which above all means review and presentation of national realities and possibilities; (b) multilateral activities (*sponsoring organization*), referring to a situation in which perception must still be rendered to serve different legal orders, even in the absence of supranational legislators; (c) a voluntary unilateral parallel legislation that involves use of different sources of law (those that provide an example and deserve to be incorporated); (d) use of transnational economy both based on self-regulation and objective right (*lex mercatoria*); (e) recognition of regulations applying to the judiciary and examination of the opportunities provided by them. This problem has been unjustifiably left aside in the continental European legal culture; (f) doctrine or jurisprudence as a whole, which can be referred to in the context of the topic of this article as general legal theory principles.

It seems that the body of these measures, or more precisely, the use of the body of these measures, which is naturally accompanied by analytical discourse, helps to find not only the necessary links between legal orders but also helps provide modern solutions in the judicial area as a whole, integrating the judicial area into the global judicial area, creating a catalogue of forms of regulations and creating a model of the development of a national legal order. And one more thing. The observation of the methods of developing legal order and their mobile use perhaps also identifies and helps *inter alia* feel the boundaries of legal order. One must simply admit that law is only one of the social regulators. Along with law, several other social norms 'produce' law in society. This also means that not everywhere and not at all times is law the social phenomenon that is most efficient in organising the behaviour of subjects of law.

## 6. Practical enhancement of legal order: 'case of the adoption of the euro'

Perhaps it does not suffice to attempt only to furnish the 'principle of home', the principle of supranational federalism or modern methods of legal integration. It is necessary to see, recognise and implement them in legal practice.

In January of this year, the *Riigikogu* of the Republic of Estonia requested the position of the Supreme Court in the case of the interpretation of § 111 of the Republic of Estonia Constitution in conjunction with the Republic of Estonia Constitution Supplementation Act and European Union law.<sup>25</sup> The problem was that the adoption of the single currency of the EU member states, the euro, when the conditions necessary for adopting the single currency have been met, is an obligation of a member of the European Union on the basis of article 4 of the Act of Accession to the European Union and article 122 (2) of the Treaty establishing the European Communities as defined in § 2 of the Constitution Amendment Act.<sup>26</sup> At the same time, § 111 of the applicable Republic of Estonia Constitution provides that the Bank of Estonia has the sole right to issue Estonian currency. However, the Republic of Estonia Constitution Supplementation Act provides that the Republic of Estonia Constitution shall be applied when Estonia is a member of the European Union, taking into account the rights and duties arising from the Accession Treaty. It is known that after Estonia becomes a full member of the Economic and Monetary Union, the Estonian kroon will no longer be used and the European Central Bank shall have the exclusive right to authorise the issuing of bank notes within the Community, according to article 105a (1) of the Treaty establishing the European Community. Thus, the *Riigikogu* took interest in the position of the Supreme Court concerning § 111 of the Republic of Estonia Constitution in conjunction with the Republic of Estonia Constitution Supplementation Act and European Union law.

It should not be forgotten here that at the time when the Constitution applicable in Estonia was developed, at the beginning of the 1990s, democracy on the one hand and ideas of strong national sovereignty on the other hand certainly prevailed. Furnishing of legal order — i.e. furnishing of constitutional law — today requires its analysis in conjunction with European Union law. Thus, finding the answer presumes interpretation of § 111 of the Constitution in conjunction with § 2 of the Republic of Estonia Constitution Supplementation Act and the relevant provisions of EU law. The Supreme Court assumed the position that the Bank of

<sup>25</sup> See decision No. 550 of the *Riigikogu* of 25.01.2006 — X "Request for the position of the Supreme Court concerning the interpretation of § 111 of the Republic of Estonia Constitution in conjunction with the Republic of Estonia Constitution Supplementation Act and the European Union law".

<sup>26</sup> According to article 1 (2) of the Accession Treaty, the Act of Accession to the European Union is an inseparable part of the Treaty (Accession Treaty) meant in § 2 of the Constitution Supplementation Act. — Riigi Teataja (State Gazette) II 2004, 3, 8 (in Estonian). At the same time, pursuant to article 2 of the Act of Accession to the European Union, the entire *acquis communautaire* becomes binding on the new member states, including Estonia.

Estonia would not have the sole right to issue Estonian currency and the Estonian kroon in the circumstances of the full membership of the Economic and Monetary Union.<sup>\*27</sup> The decision also includes an explanation of what was brought about for Estonian constitutional order by the Constitution Supplementation Act adopted at the referendum on 14.09.2003 and often called ‘the third act’.<sup>\*28</sup> At the referendum on accession to the European Union, a model was used for amending the Constitution, according to which the provisions of the Constitution were not formally changed but the obligation to implement the requirements arising from the Accession Treaty was contained in a separate constitutional act. Section 2 of the Constitution Supplementation Act serves as an interpretive rule, according to which the text of the Constitution must always be regarded together with the Supplementation Act, and everything contained in the text of the Constitution, which is not in conflict with the accession conditions, can be further applied. In other words, with the adoption of ‘the third act’, European Union law became an immanent basis for the interpretation and implementation of both the Constitution and other parts of the legal order. Figuratively speaking, a legal order consists of many layers, starting from the fact that the Constitution itself has changed in regards to the parts that are not in line with European Union law. The applicability of the provisions of the Constitution, which are in conflict with European Union law, will be suspended. Hence, in order to explain which part of the Constitution is applicable, the Constitution must always be compared to the European Union law that became binding on Estonia through the Accession Treaty.<sup>\*29</sup>

Still, we have to elaborate on the discussion to find out whether such an interpretation of the Constitution is in line with the underlying principles of the Constitution. Namely, § 1 of the Constitution Supplementation Act provides that Estonia may belong to the European Union, proceeding from the underlying principles of the Republic of Estonia Constitution. During the legislative proceeding of the Constitution Supplementation Act in the *Riigikogu*, it was noted in relation to the corrections made to the text in the explanatory memorandum that the objective of § 1 of the Act was: “To ensure adherence to the underlying principles of the Estonian Constitution in a situation in which European Union law comes into conflict with the Estonian Constitution contrary to the Accession Treaty or interpreting the competence of the European Union institutions in an expanding manner [...] The underlying principles of the Constitution should be considered to comprise, above all, the democratic principles listed in the preamble and §10 and 11 of the Constitution.”<sup>\*30</sup>

Since the Constitution Supplementation Act and its explanatory memoranda provide only very general guidelines for defining the underlying principles, we must refer to the existing constitutional writings concerning the underlying principles of the Constitution.

Although the jurists who have written about the Republic of Estonia Constitution, so far, share the view that the underlying principles of the Constitution are the most important principles, the list of specific principles that have been regarded as the underlying principles of the Constitution by jurists varies to an extent.

Thus, in its final report, the Expert Commission on the Republic of Estonia Constitution lists as the main principles of the Constitution the principles of human dignity, a state based on social justice, democracy, a state based on the rule of law, freedom, equality and a nation state.<sup>\*31</sup> In the opinion of R. Alexy, the following main principles have been set out in the Estonian Constitution: human dignity, freedom, equality, a state based on the rule of law, democracy, a state based on social justice, and Estonian identity.<sup>\*32</sup> The comments on the Constitution agree with the catalogue of the main principles offered by R. Alexy.<sup>\*33</sup> T. Annus considers the underlying principles of the Constitution to be the principle of democracy, parliamentary order,

<sup>27</sup> See the opinion of the Constitutional Review Chamber of the Supreme Court about the interpretation of § 111 of the Constitution in matter 3-4-1-3-06.

<sup>28</sup> The series of acts include the Constitution *per se*, the Constitution Implementation Act and the Constitution Supplementation Act.

<sup>29</sup> In his annual overview of the courts administration, administration of justice and uniform application of laws in the *Riigikogu*, the Chief Justice of the Supreme Court M. Rask said in the part of his presentation concerning the above-mentioned case: “With the explanations provided, the Supreme Court did not intend to start another discussion about whether Estonia needs a new constitution, but pointed out the fact how complicated and multilayered our constitutional legal system has become.” He even considered it necessary to add: “Perhaps it is a question of perception when the text of our Constitution loses its simple regulative effect through such interpretations and becomes a document of legal history.” See the shorthand notes of X *Riigikogu*, VII session, 8 June 2006. Available at <http://www.riigikogu.ee/ems/stenograms/> (in Estonian). At the same time, M. Rask has also expressed an idea that the interpretation acts themselves cannot be everlasting: “If a court decision cannot convince society, society will, sooner or later, convince the court to reevaluate its decisions and will do that through social values, not by the majority of decision-makers.” – *Riigikohtu lahendid Eesti õiguskorras: tähendus ja kriitika* (Decisions of the Supreme Court in Estonian Legal Order: Significance and Criticism). *Riigikohtu teadustööde konkursi kogumik* (Collection of Papers of the Research Contest of the Supreme Court). Tartu 2005, p. 5 (in Estonian).

<sup>30</sup> See <http://www.just.ee/10731> (in Estonian).

<sup>31</sup> *Ibid.*

<sup>32</sup> R. Alexy. *Põhiõigused Eesti põhiseaduses* (Fundamental Principles in Estonian Constitution). – *Juridica eriväljaanne 2001* (Special edition of *Juridica*), p. 89 (in Estonian).

<sup>33</sup> *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (Republic of Estonia Constitution. Commented Edition). Juura, Õigusteabe AS 2002, p. 105 (in Estonian).



statehood based on the rule of law, statehood based on social justice, republic, unitary state, nation state and protection of fundamental rights.<sup>\*34</sup>

The working group for the constitutional law analysis of the Treaty establishing a Constitution for Europe presented a catalogue of the underlying principles of an open constitution in its report: the protection of the sovereignty of people, the foundation of the state on freedom, justice and law, internal and external peace, the preservation of the Estonian nation and culture through time, respect for human dignity, statehood based on social justice, democracy, statehood based on the rule of law, fundamental rights and freedoms and the proportionality of the activities of the state authority.<sup>\*35</sup> The catalogue of open underlying principles is also supported by H. Schneider, according to whom the Constitution of the Republic of Estonia highlights the following generally recognised values and underlying principles: respect for human dignity, the protection of freedom, justice, foundation on justice, democracy, internal and external peace, social success and overall benefit, preservation of the national identity, development of continuity and cooperation between states.<sup>\*36</sup> In addition, H. Schneider thinks that the underlying principles should include a selective number of provisions of the general principles, and Chapter I of the Constitution and the Constitution Supplementation Act as a whole.<sup>\*37</sup>

The regulation under examination does not generally prejudice the principles considered to be the underlying principles of the Constitution mentioned above. The exceptions are perhaps the principle of the state based on the rule of law via the requirements of legal certainty and legal clarity, since the competence of the Republic of Estonia has been cut by a feature of independent statehood — the right to issue currency. The combined effect of the Constitution and the EU law arising from § 2 of the Constitution Supplementation Act counterbalances the above prejudice. The combined effect of the rights and duties derived from the Accession Treaty with EU law ultimately also changes the content of the underlying principles of the Constitution, mainly as concerns the emphases.

One must also take into account that the Constitution Supplementation Act adopted at the referendum, pursuant to which the Constitution is applied insofar as this is in accordance with the obligations accompanying the EU membership, proceeded from an assumption that there was no conflict with the underlying principles of the Constitution since the Accession Treaty already provided for the conditions of joining the Monetary Union.

## 7. Conclusions

In an ideal situation, the dimensions of law in a legal order should be homogenous both in the quantitative and qualitative sense. The quantitative homogeneity would mean that the judicial area is 'covered' by legal texts and the addressees of the texts have a clear understanding of their content, and hence, law carries a practical significance, i.e. it creates order and provides security. The quantitative homogeneity would mean that people's ideas of law conform to the content of law and also the solutions of legal disputes are in line with their idea of conformity with law. The existence of a legal system is always a matter of degree.<sup>\*38</sup> Firstly, law cannot operatively cover all situations in need of resolution and secondly, globalisation has rendered legal orders objectively multi-layered. However, neither the first nor the second option means that there is no law or that it has been somehow automatically positioned outside a particular judicial area. Law has always meant not only creation of law as a text but its interpretation and introduction into practice. The analysis of each legal order must include dynamics. Law itself lives in different periods of time — a legal text, its interpretations and implementation of law usually follow each other in time. The theory of law and the implementation decisions of law help clarify and specify the meaning of legal texts, pinpointing their logical interpreter, and as correctly noted by H. T. Klami for more than a couple of decades ago, the interpretations clarifying the content of such texts could gain greater weight in explaining the content of law over time than the original one, so that one is tempted to say as if they replaced the original text.<sup>\*39</sup> The understanding of law as a medium of communication dispels such fear and compels over and over again, keeping in mind the horizon of value jurisprudence, the search for and finding of (modern) solutions that conform to law. Perhaps Roman jurists were right when they said that *in magnis et voluisse sat est* — will suffices for great things.

<sup>34</sup> T. Annus. Riigiõigus (Constitutional Law). Tallinn, 2001, pp. 49–95 (in Estonian).

<sup>35</sup> Euroopa põhiseaduse lepingu riigiõigusliku analüüsi tööühma seisukohad lepingu ratifitseerimise küsimuses (Positions of the Working Group on the Constitutional Analysis of the Treaty Establishing a Constitution for the European Union Concerning the Ratification of the Treaty). See [www.riigikogu.ee](http://www.riigikogu.ee) (in Estonian).

<sup>36</sup> H. Schneider. Põhiseaduse aluspõhimõtete seonduvaid probleeme ja võimalikke lahendusi (Problems and Potential Solutions Related to the Underlying Principles of the Constitution). – Riigikogu lahendid 2005 (Decisions of the *Riigikogu* 2005). Juura, Õigusteabe AS 2006 /accept/, pp. 7–8 of the manuscript (in Estonian).

<sup>37</sup> *Ibid.*, pp. 9–10.

<sup>38</sup> L. L. Fuller. Positivism and Fidelity of Law – a Reply to Professor Hart. – Lloyd's Introduction To Jurisprudence. M. D. A. Freeman (ed.). London 1994, p. 397.

<sup>39</sup> H. T. Klami. Anti-legalism: Five Essays in the Finalistic Theory of Law. Turku 1980, p. 69.