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The Republic of Estonia Constitution on the Concept and Value of Law

1. Estonian legal order as a part of continental European legal culture

The re-establishment of Estonia's independence in 1991 brought along an important constitutional duty for the state of Estonia — to create a new and modern constitution. The problem is that the modern democratic organisation of society has some principal bases which aspirers for actual democracy must know and adhere to.¹ For the state the only option is to legitimate itself with and via law. It is important to take into account that the Estonian legal system has belonged, and still belongs, to the legal culture of continental Europe. Such a legal system is founded on the idea of ancient Roman legal culture. Already in the ancient world, the legal system was built via legislative drafting of norms. The state of Estonia, taking up the restoration and building of its legal system, is doing it via creating legal norms. The result of the creation of rules must be sufficiently general (abstract) while understandable to the addressees of legal norms. This is necessary so that laymen and the appliers of law are able to adopt decisions that have a legal meaning and are in compliance with law while employing minimal efforts. The Estonian Constitution² (hereinafter: Constitution) emphasises its origins in the continental European legal culture in its § 3 which sets out: “The powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith.” Thus the Constitution, in the formal sense, is a document concerning the formation and activities of political institutions, which provides for the legislative procedure and whose provisions are at the top of the hierarchy of legal norms. The catalogue of fundamental rights and

¹ For an overview about the history of the system of constitutional government of Estonia see: R. Narits, K. Merusk. Estonia. – International Encyclopaedia of Laws. Constitutional Law. The Hague, London, Boston: Kluwer Law International, 1998, pp. 17–42.

² Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). – Riigi Teataja (The State Gazette) 1992, 26, 349 (in Estonian). The English translation of the Constitution of the Republic of Estonia used is published in Estonian Legislation in Translation (Legal Acts of Estonia, 1996, No 1); Estonia. Text of Constitution. – R. Narits, K. Merusk (eds.). Constitutional Law – Suppl. 23 (April 1997). Kluwer Law International. H.-J. Uibopuu has provided a German translation of the Constitution: Brunner (compiler). VSO, Estland, 1.1.a; reprint: C. Thiele. Selbstbestimmungsrecht und Minderheitenschutz in Estland, 1999, p. 190 ff.

freedoms is also naturally a part of the Constitution. Here we should stress that the previously mentioned provision can be found in Chapter I of the Constitution which provides for the basic principles and norms of Estonia's statehood and its legal structure which have a paramount importance on all the other provisions of the Constitution as well as the legal order as a whole.³ Obviously this provision speaks about the priority of the Constitution, about the general reservation of law and the priority of law. We should mention that a similar provision was already present in the first constitution of the Republic of Estonia adopted in 1920. Thus, the state of Estonia has, since its inception, emphasised the democratic and constitutional solution in its national legal system. Several renowned jurists have regarded the Constitution very highly.⁴

2. Applicability of rules of law

Legitimation via rules of law should be characterised via their applicability. The problem is that even the legal applicability of a constitutional provision does not guarantee other important aspects thereof — factual and social ones. In other words, the legitimacy and applicability of rules are also two qualities.

One must support the standpoint, often expressed in professional literature, that based on the hierarchy of rules, we should recognise a justifying general rule.⁵ If one does not commit to that condition, he or she must admit not being a supporter of the Western legal ideal.⁶ A great role is played by how law is understood, or what law is.

In Estonia, some members of the parliament (the *Riigikogu*) have adopted the standpoint that “unlike several other tools of social control, the authoritative nature of law is the basis of the functioning of law, a kind of commanding force: law spreads like a protective shield over society, it is above society.” And: “.../ law is the command of the highest vehicle of power (sovereign) of the country. Sovereign is a part of society who has the right to subject the rest of the society to its power and whom that rest of society is accustomed to obey. In other words: in a legally structured society, the harmony of the life and activities of its members are not achieved by their direct interrelationship but via their shared subordination to the leading political authority /.../ and the set or rules established by it — the law.”⁷ Such an approach is an expression of the radical-positivist understanding of law introduced in continental Europe's legal culture already in the 17th century according to which the will of the sovereign is seen and recognised as the only source of law. Today we cannot accept the standpoint according to which law is the command. Reality is characterised by that in society order and security develop primarily as a result of the behaviour of the members of society. Modern legitimation of law is ultimately the communicative reality. According to modern jurisprudence, both law and the theory of law are primarily a normative system of information and communication.⁸ There can be as much law in society as “dictated” by the subjects of law by their behaviour. In order that legislative efforts be fertile, the requirements arising out of applicable law should be realised in the behaviour of the subjects of law. Just as naturally, contemporary understanding of law includes understanding the law in its objective sense, as the law written down by the sovereign. Just as natural is the understanding of law in its subjective meaning or the pattern of behaviour of and for the subject of law arising out of objective law. However, modern understanding of law adds the understanding of law as a normative system of information and communication to the traditional aspects. Law encompasses everything related to the part of human behaviour relevant for law. This normative correlation which exists between law and society must be seen and recognised. This must be especially emphasised in the context of constitutional provisions as their level of abstraction

³ The meaning of rules and principles has been explained by the Supreme Court of the Republic of Estonia: “Democratic countries are guided in their legislative drafting and in applying law and, *inter alia*, in administering justice by laws and the general principles of law which have evolved over the years.”— See decision of the Constitutional Review Chamber, 30 September 1994. — Riigi Teataja (The State Gazette) I 1994, 66, 1159 (in Estonian).

⁴ R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in the Estonian Constitution). — Juridica eriväljaanne, 2001, p. 5.

⁵ N. MacCormick introduced the concept of “underpinning reasons”. Briefly, it means that if you want to avoid chaos, you must bind yourself with the basic norm which says that the constitution must be complied with. — Vt N. MacCormick, O. Weinberger. An Institutional Theory of Law: new approaches to legal positivism. Dordrecht, Reidel, 1986.

⁶ A. Aarnio described the conditions which, if met, enable avoiding chaos. He calls them the social conditions of the bindingness of a legal order. See A. Aarnio. Laintulkinnan teoria. Porvoo: Werner Söderström Osakeyhtiö, 1988, p. 89.

⁷ M. Maripuu. Seaduse arusaadavuse arusaadavus (Comprehensibility of the Comprehensibility of Law). — Riigikogu Toimetised, 2000, No. 2, p. 90 (in Estonian).

⁸ In 1998 the journal *Rechtstheorie* published an issue dedicated to J. Habermas “The system of rights in a democratic state based on the rule of law and Habermas' discourse theory of law” in which W. Krawietz writes that in state organised systems of modern society, justice is administered in the context of (i) subjective rights, (ii) objective law, and (iii) the entire legal order, in particular the normative meaning of legislative texts. — *Rechtstheorie*, Bd. 27, H. 3, Duncker und Humblot, 1998, p. 272.

is, compared to the rest of the legal structure, higher and links to the social dimensions of law are more difficult to perceive.⁹

Below I will try to epitomise the modern understanding of law using § 1 of the Constitution as an example: “Estonia is an independent and sovereign democratic republic wherein the supreme power of state is vested in the people. The independence and sovereignty of Estonia are timeless and inalienable”. I will concentrate on the problem of sovereignty.

The quoted section contains the principles of the sovereign power of state, the sovereignty of people, democracy and republicanism. In the Constitutional Assembly the question about how to lay down the independence and sovereignty of Estonia in the Constitution so as to prevent a reoccurrence of the events of 1940 when Estonia was occupied by Soviet Russia. In essence they tried to find answers to the question of the legal and social relationship, the constitutional form of which would also serve as a constitutional guarantee. It was considered to insert in the Constitution a provision prohibiting the capitulation of Estonia.¹⁰ The guarantees of independence and sovereignty were spread over different chapters of the Constitution.¹¹ At the 16th session of the Constitutional Assembly, the head of the editorial committee of the Constitution proposed to the Assembly to word the section: “The independence and sovereignty of Estonia are timeless and inalienable.”¹² The editorial committee found that such a guarantee meant that the independence and sovereignty of Estonia could be alienated only by amending the Constitution at referendum.¹³ Later it was further wished to add the following text: “No one has the right to sign an instrument surrendering the Republic of Estonia”. The text was not added because the editorial committee believed that it did not add any weight to the already existing wording.¹⁴ Why this digression to recent past? Because formally the second sentence of § 1 does not have an independent regulative meaning. The timelessness and inalienability of Estonia’s independence and sovereignty derive from the first sentence of § 1. Nevertheless, the second sentence of § 1 demonstrates vividly the great importance attached to Estonia’s independence and sovereignty. The facts of actuality and social reality (including the events of 50 years ago) were carefully considered in developing the Constitution and an attempt was made to build a rational “bridge” between past and present, so that the solution offered would, as a kind of a social agreement, be the best possible one. Thus, for the Constitutional Assembly, working with the text of the Constitution did not just mean elaboration of the text in preparation for referendum. In order to cognise law, one must see and recognise the normative correlation which exists and has always existed between law and society. Therefore one must not just be able and willing to approach the social dimensions of law, but also behave accordingly. Law cannot be and is not barely the result of the decisions made by individuals or their associations. However, this is exactly what continental European legal positivism has been claiming for a long time. In the science of law, that which is understood as law has always been pivotal. The type of understanding law determines the paradigm of legal cognisance (the concept of corresponding jurisprudence), its conceptual pattern, and its scientific and legal content. Currently, the issue of Estonia’s independence and sovereignty is once again a burning issue. But an attempt is being made to analyse the so-called sovereignty section of the Constitution from a qualitatively new aspect. Namely, while at the birth of the Constitution the retrospective aspect dominated, today’s discussion is fuelled mainly by the future of Estonia’s statehood. It is not in vain that there are debates in Estonia — in view of legal issues — about the meaning of § 1 of the Constitution in the context of acceding to the European Union. Do we need to amend the Constitution if we want to become a member of the European Union? If we amend the Constitution, then which sections should we amend, *etc.*?¹⁵

⁹ The Constitution contains a number of principles determining the structure of the power of state and the main bases underlying its activities: democracy and the sovereignty of people (§ 1 first paragraph); sovereignty of state (§ 1 second paragraph); unitary state (§ 2 second paragraph); republican form of government (§ 1 first paragraph); separation and balance of powers (§ 4); lawfulness (§ 3); state based on social justice, democracy and the rule of law (§ 10); economical use of the natural wealth and resources (§ 5), *etc.* The positivised norms/principles of the Constitution are of varying degree of abstraction and therefore their scale of concretisation is different. For instance, the degree of abstraction of the principle of democracy is higher than that of the separation of powers.

¹⁰ Põhiseadus ja Põhiseaduse Assamblee. Koguteos (The Constitution and the Constitutional Assembly. Collection of Writings). Tallinn: Juura, Õigusteabe AS, 1997, pp. 202, 474 (in Estonian).

¹¹ *Ibid.*, pp. 202, 474.

¹² *Ibid.*, p. 526. Similar solutions were offered in the draft model of the Constitution of the Estonian Democratic Socialist Republic of I. Gräzin: “The sovereignty of Estonia is integral, indivisible, timeless and inalienable on Estonia’s accession to any unions whatsoever”. *Ibid.*, p. 1117. The draft Constitution of the Republic of Estonia prepared by the working group led by J. Raidla also contained the wording known from the Constitution. *Ibid.*, p. 1142.

¹³ *Ibid.*, p. 526.

¹⁴ *Ibid.*, p. 549.

¹⁵ For an overview about the opinions of local and foreign experts, also about the constitutional reforms of EU member states and the main trends of the sovereignty theory, see A. Albi. Põhiseaduse muutmise Euroopa Liitu astumiseks. Ekspertarvamused, teoreetilise ja võrdlevõiguslik perspektiiv ja protseduur (Amendment of the Constitution for Accession to the European Union. Expert Opinions, a Theoretical and Comparative Legal Perspective and Procedure). – *Juridica*, 2001, No. 9, pp. 603–615 (in Estonian).

It seems that the debate can only be fruitful if we can avoid the so-called legist thinking and understanding of law. It is the legist position that treats law as the product of the state (its power, discretion, even arbitrariness). Law is reduced to its formal sources, the so-called positive law. Law is identified with legislative texts in their broad sense.^{*16} It seems that such an approach no longer meets today's needs.

3. Constitution, modern cognisance of law and values

Modern understanding of the Constitution must be based on modern legal thinking. In the past decades, continental European legal thinking has witnessed a qualitative change and values have become one of the cornerstones of legal thinking. In Estonia there are signs that we wish to reach the level of a modern value-oriented structure of legal thinking. At the same time we should also agree with Estonia's first Chief Justice of the Supreme Court after re-establishment of independence, R. Maruste, who claims that our thinking is restrained by historical tradition, the positivist understanding of law which was prevalent in Europe, Estonia included, during the first half of the 20th century. He adds that this is not just the problem of judges, but of lawyers and legal politicians as a whole. While the rest of the world switched over to value jurisprudence in the course of decades, we are facing a situation where we have to make the transition in a relatively short time.^{*17} The chairman of the Estonian professional association of judges (current Legal Chancellor) A. Jõks said in 1997 that the judges were taken aback by the discussion about the place of a just and value-oriented administration of justice and law-based management of cases in the Estonian legal system.^{*18} These two manifestations demonstrate that in understanding a legal order one must be able to rely on values, and also that in the beginning the community of lawyers may be taken aback by orientation towards values. One point is clear however, we must be able to perceive the values behind the letter of the law, including the letter of the Constitution. Value jurisprudence acquires meaning through recognising and being bound by higher-standing value scales. An important aspect is added in understanding the Constitution, namely in understanding a constitution, one must be able to concretise value scales.

In view of the text of the Constitution, values are predominant in its preamble. The very universal values contained in the preamble "infiltrate" into the other provisions of the Constitution, thus moulding the spirit of the Constitution. Of course, we can find universal values in other parts of the Constitution too.^{*19} Furthermore, in connection with the Constitution, we need to stress the imperative nature of the values. The values are made imperative by the fact that they belong to the Constitution. It is clear that any one of us has value experiences which can either be approved or disapproved of. It is however much more difficult to achieve a wide base of value experiences which can be built on value scales.^{*20} We need to know that there is always something in society which ensures a broad harmony. The values contained in the constitution do not form a value structure which would be perfect or free of gaps. The values themselves, their essence are in constant change. Thus the issue of an "already dominant" or "no longer dominant" value is always topical. The values are not identical with the constitution from which we get information about them. It is especially important to stress this in the context of Estonia and its Constitution because the text of the Constitution is now ten years old, which is not a long period on the scale of time. Assessment of the events of that time period changes if we look at what society was like ten years ago and the developments which the state of Estonia has undergone during the past decade. Although professional literature speaks justifiably about "timeless values"^{*21}, according to which values can never be treated irrationally, in some cases there are problems in Estonia with cognising valid value scales in changed societal conditions.

¹⁶ Departure from narrowly positivist approaches can also be found in the recent works of Russian jurists. The Russian jurist V. Nersesyants notes that legistic understanding of law is often treated as legal positivism, although it would be more appropriate to treat it as legistic positivism as in reality legal positivism has always differentiated between law and justice. Legistic approach to law is characteristic of authoritarian, despotic, dictatorial, totalitarian approaches to law. – V. S. Nersesyants. *Jurisprudentsiya*. – Moscow: Norma, 2000, pp. 3–4 (in Russian).

¹⁷ T. Sildam, T. Mattson. *Kohtunik seaduse ja väärtuse vahel* (A Judge Between Law and Value). – Luup, 1997, No. 21, pp. 10, 13 (in Estonian).

¹⁸ T. Põld, T. Raag. *Riigikohtu esimees kaalub tagasiastumist* (Chief Justice of the Supreme Court Contemplates Resignation). – *Sõnumileht*, 8 November 1997 (in Estonian).

¹⁹ Political scientists W. Drechsler and T. Annus from the University of Tartu have written, in characterising the basic principles of the Estonian Constitution, that the basic principles of the Republic of Estonia are largely in concord with the broadly accepted values in Europe. See W. Drechsler, T. Annus. *Die Verfassungsentwicklung in Estland von 1992 bis 2001*. – *Jahrbuch des Öffentlichen Rechts der Gegenwart*, Bd. 50, 2002, p. 476.

²⁰ R. Zippelius sees prevailing images of justice as trend-setting. The prevailing legal ethos of a society is written down in the constitution itself. – R. Zippelius. *Wertungsprobleme in System der Grundrechte*, 1962, p. 48 ff.

²¹ See H. Coing. *Grundzüge der Rechtsphilosophie*. 4th ed., Berlin, 1985, p. 158.

The values contained in the Constitution have very different natures. Thus, we can differentiate between moral, social values, those of the state based on the rule of law, *etc.* Can we however pose a question about the value which in the meaning of the Constitution is the ultimate value, the value which is the basis of Estonia as a state organised on the basis of the rule of law? It seems that we can ask that question and that in principle the answer to the question is affirmative. We are speaking about the relations between the man and the state. In terms of Estonia's independent statehood, the state has been created for the man and not vice versa. The preamble of the Constitution sets out that the strengthening and development of the state purports to guarantee the preservation of the Estonian nation and culture through the ages. The priority of man over the state is not imposed by the state, but the state recognises as a status naturally inherent of man. The state regulates the behaviour of the man to the extent that the state does not groundlessly infringe man's freedom; and naturally the state guarantees public interests in that. The ultimate value is not *per se* a legal concept but rather an ethical category. But being one of the underpinning values of the Constitution, a value becomes a binding principle. It acquires a legal nature. I should add that the ultimate value must be accepted and its realisation must be guaranteed first and foremost by the state of Estonia. All three powers of the state — legislative, executive and judicial — must act in the name of ultimately guaranteeing the rights and freedoms inherent of man. Figuratively speaking, the state must subject itself to what arises out of law. Only then will the state's behaviour correspond to law, *i.e.* it becomes just power of state. The preamble of the Constitution, setting out the elements of the "foundation" of the Estonian state — liberty, justice and law — is justified in emphasising justice. And it is not important whether the legislator distributes law between the subjects of law (*ius distributiva*) or equips the subjects of law with equal rights (*ius commutativa*). What is important is the principle to the effect that the behaviour of the state must, besides honouring liberty and law, also be built on justice. Thus, in understanding the constitution, the state's assessment of the realisation of rights and freedoms cannot be based, for example, on purposefulness, but instead these rights and freedoms must always be preferred. Therefore, recognising man and his rights and freedoms as the highest value would mean that the state cannot, without a legal basis, interfere with man's freedom to act. Such a principle is realised in the work of the state's mechanism of power which involves all the bodies of the state and whose functioning requires the entire legal system.^{*22} Below I will try to illustrate this thesis with the help of a decision of the Constitutional Review Chamber of the Supreme Court.^{*23} There was a situation which involved a conflict in approaches to the state's right to positive action and the restriction of a fundamental right or freedom. Namely, the Aliens Act provided for a situation which did not foresee any exceptions in the issue or extension of residence permits for aliens if they were or there was good reason to believe that they had been employed by an intelligence or security service of a foreign state. The Constitution does not grant aliens the fundamental right to reside and settle in Estonia, however, if an alien has a lawful residence permit, every right, freedom and obligation listed in the Constitution extend to him or her. Therefore, not extending the residence permit of an alien with the aftermath that the alien is required to leave the country may infringe a fundamental right or freedom protected by the Constitution. The Constitution also gives courts the right to inspect compliance of the legislation issued by the *Riigikogu* — the legitimate representative assembly — with the Constitution. A court may declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution (Constitution, § 15 second paragraph). And the Supreme Court declares invalid any law or other legislation that is in conflict with the provisions **and** spirit of the Constitution (Constitution, § 152 second paragraph). The Supreme Court, however, does not have to assess the political will and expediency expressed in law, but the compliance of legislation with the provisions and spirit of the Constitution. At that the court will comply with the practice not to interfere with the sovereign activities of the legislator unless the restriction of rights and freedoms provided by law is unnecessary in a democratic society or distort the essence of the rights and freedoms restricted. Fundamental rights and freedoms would be merely declarative if the constitutional review court did not have the power to identify whether the activities of the legislator are or are not in compliance with the provisions and spirit of the Constitution. In that very same judgment the court sets out that the interpretation of the Constitution is more than just identifying the meaning of the words.^{*24} Or there is another example. The Constitutional Review Chamber

²² In analysing the principle of the legal basis of restricting fundamental rights and freedoms, H. Vallikivi has written: "The keywords of the concept of a state based on the rule of law developed in the European cultural context are the separation of powers, lawfulness and the guarantee of legal protection. These formal features of the concept of a state based on the rule of law are completed by the substantive feature, expressed mainly in adherence to human rights and fundamental freedoms and other value categories not explicitly written down in positive law". – H. Vallikivi. *Põhiõiguste ja -vabaduste piiramise seadusliku aluse põhimõtted* (On the Principle of the Legal Basis of Restricting Fundamental Rights and Freedoms). – *Juridica*, 1997, No. 5, p. 241 (in Estonian).

²³ Decision of the Constitutional Review Chamber of the Supreme Court, 5 March 2001 (3-4-1-2-01). – *Riigi Teataja* (The State Gazette) III 2000, 7, 75 (in Estonian).

²⁴ We should add that the administrative court arrived, in settling this petition, at the conclusion that as the author of the petition had received a temporary residence permit on five occasions, and as he had a family, job and property in Estonia, his expectation to have the residence permit extended unless new information is unveiled about him was grounded. The non-granting of an exception in respect of him violated the constitutional principle of legitimate expectation. See *Riigikohus* 2001. *Lahendid ja kommentaarid* (The Supreme Court 2000. Judgments

of the Supreme Court discussed, in 1995, the request of the Tallinn Administrative Court to declare a provision of § 21 (1) of the Aliens Act^{*25} null and void.^{*26} Namely, § 21 (1) of the Aliens Act contained a rule according to which an alien who had permanent address registration in the Estonian Soviet Socialist Republic who has no residence and work permit to stay legally in Estonia, may, in order to apply for such permits, submit an application with the Citizenship and Migration Board. The Supreme Court concluded that the provision according to which an alien with permanent address registration in the Estonian SSR may apply for a residence and work permit at the Citizenship and Migration Board is an unconstitutional restriction of rights and freedoms which is unnecessary in a democratic society and distorts the nature of the right and freedoms restricted. Namely, under § 11 of the Constitution, rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and must not distort the nature of the rights and freedoms restricted.^{*27} The Supreme Court stated that the provisions of § 21 (1) of the Aliens Act do not exclude that a procedure established by the Government of the Republic may allow aliens with permanent address registration in the Estonian SSR to apply for residence and work permits at the Citizenship and Migration Board. This provision does not restrict rights or freedoms and therefore there is no substantive connection between § 21 (1) of the Aliens Act and § 11 of the Constitution. It is just that the object of regulation of § 11 of the Constitution is another. We should add that it is evident from the materials of the case that the representative of the Supreme Court, the representative of the legal Chancellor and the Ministry of Justice all held the position that there is no contradiction between § 21 (1) of the Aliens Act and § 11 of the Constitution.

4. Conclusions

Understanding of law always aims to achieve adequate cognition of law. Figuratively speaking, the process involves the shaping of a special integral model of law. Such a shaping in the context of a legal system must be based, on the one hand, on the legal order as a whole and, on the other hand, on the idea of uniformity and coherence of its ultimate instrument — the constitution. Taking the cognitive achievements of the theory of law as the basis, we must take both the principles of consistency and contextuality as the basis. To understand the Constitution, these underlying principles must be used so that there would be no conflicts between the parts of the constitution (consistency) and so that there would be a clear conception of the place of a provision of the constitution within the text of the constitution (contextuality). It is clear that in this article it is not possible to follow the underlying principles in full. This is because of the limited length and the subject matter analysed in it. Nevertheless I would like to remind the already mentioned emphasis on modern cognisance of law. It is about the role of normative communication. To understand the Constitution one must therefore carefully follow and analyse the interpretations of the Constitution by courts and in particular by constitutional courts. Examples from Estonian court practice were not inserted by chance. Such an analysis of legal reality helps ultimately improve the actual linking and integration power of law. But attention should also be paid to society's hopes and expectations. It is perfectly natural that the interpretations of the constitution are acceptable in society. Of course, we could argue about the extent to which a judgement made by a judge on the basis of the constitution needs public or private acceptance. The experience of, at least, European countries shows that the objectified forms of understanding the Constitution — and especially the rulings of constitutional courts — have a substantial impact on the social life structured by the state and also on the relations between people. The problem is that sometimes constitutional courts have been in conflict with the legal awareness of the so-called silent majority. These are the people whose loyalty to the state and constitution is undisputed. Although acceptability cannot be the sole determiner of the

and Comments). Tallinn: Juura, Õigusteabe AS, 2002, pp. 33–34. The Supreme Court has recognised the principle of legitimate expectation as a general principle of the applicable (binding) law: “The principle of legitimate expectation is a general principle of Estonian law according to the spirit of the Constitution. According to this principle every one has the right to act with reasonable expectation that the applicable law remains in force. Every one must be able to exercise the rights and freedoms granted to him or her by law at least during the term set out in law. An amendment to law must not be perfidious in respect of the subjects of law.” – Decision of the Constitutional Review Chamber of the Supreme Court. – Riigi Teataja (The State Gazette) I 1994, 66, 1159 (in Estonian).

²⁵ Riigi Teataja (The State Gazette) I 1993, 44, 637 (in Estonian).

²⁶ Riigikohtu lahendid (Judgments of the Supreme Court). Tallinn: Õigusteabe AS Juura, 1996, pp. 18–20 (in Estonian).

²⁷ Already the Constitutional Assembly treated this provision as a general rule which guides all the other rules whereas the wording “necessary in a democratic society” is derived from the European Convention on Human Rights. See Põhiseadus ja Põhiseaduse Assamblee. Koguteos (The Constitution and the Constitutional Assembly. Collection of Writings). Tallinn: Juura. Õigusteabe AS, 1997, p. 762 (in Estonian); R. Narits. Põhiõigused ja põhivabadused (Fundamental rights and Fundamental Freedoms). – K. Merusk, R. Narits. Eesti konstitutsiooniõigusest (On Estonian Constitutional Law). Tallinn: Õigusteabe AS Juura, 1998, p. 192 (in Estonian); M. Ernits. Konkreetne normikontroll *de lege lata* ja *de lege ferenda* (Specific Control of the Rules *de lege lata* and *de lege ferenda*). – Juridica, 2001, No. 8, pp. 588–599 (in Estonian).

constitutional quality, it must also not be overlooked. In an open society, the circle of interpreters of the constitution is broad, the process of cognising the constitution is open; therefore alternative options are possible and even necessary. At any rate, it should be obvious that the text of the constitution is not sufficient for cognising and that the circle of interpreters of the constitution is wide in an open society.

Rendering a rational meaning to a legal system begins and ends with the legislative process, on the one hand, and with the application of law, on the other hand. Both factual elements of rendering rational meaning to the legal system are interrelated. In daily legal practice, and also in legal theory, the question on how to achieve rationality in cognising law, in legal behaviour, in implementing law is often asked. On which premises and within which limits rationality in law and the science of law can be achieved? What is important for us is that in cognising a legal system as a whole and its ultimate instrument — the constitution — rules which we might call “the laws of the science of law” are applied. Of course I do not mean laws in the sense of objective law but the rules, procedures, principles applicable to the understanding of law knowledge and use of which helps render sense to the legal reality, to the valid constitution. Thus, it is possible to differentiate a legal understanding from a nonlegal one, that distinction between *larghissimo sensu* and *sensu stricto* is possible whereas the latter requires explanations based on the theory and practice of law. It is important that the lawyers should attempt to interpret and not to criticise. The state of Estonia purports to be a state based on the rule of law and therefore every one should be guaranteed access to information providing for their legal status as well as to everything inherent of a reality structured by law.

At the scientific conference “Five years of Estonian Constitution” (1997) the then president of Estonia L. Meri said: “I would like to universalise the public opinion and current political practices in the hope that we can find in ourselves a moral strength to assess the Constitution in a balanced way.” This year comments to the Constitution will be published, written by Estonian lawyers who tackle this project as a moral obligation. The 1992 Constitution effectively fills the role of a foundation of a democratic organisation of society. What is as obvious is that the development of the constitution should be another value of the constitution, besides the tradition of the constitution or the perseverance of the constitution. The comments to the Constitution to be published aim to examine and provide comprehensive and systemic explanations of the law, taking the constitution as the basis, and interpret it critically and self-critically, substantiating their standpoints. In this article I tried to communicate to the reader how the authors of the comments understand law in the context of the Constitution and which its main values are, albeit not forgetting other constitutional values.