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Constitution in a Blast of Changes

1. Introduction: about the road travelled

Time flies. It seems to fly quicker and quicker, often without leaving a chance to ponder over memories. It was not long ago when the Constitutional Assembly held heated discussions over each provision and meaning of the draft Constitution of the Republic of Estonia. This year we are already celebrating the jubilee of Estonia's thus far longest lasting Constitution, as the Constitution, adopted by the referendum of 28 June 1992, is now 15 years old. Jubilees and other anniversaries, especially those ending with the figures 5 and 0, are self-reminding, help organise the memory, and draw attention to and direct our thoughts along the timeline of the past, the present, and the future.

1.1. The first jubilee

On its jubilee, the Constitution is posing the same challenge, a reminder and a call for attention. On previous anniversaries, celebration ceremonies, conferences or receptions were accompanied by symbolical celebration of explaining and interpreting the Constitution. On the fifth anniversary, the materials of the creation of the two Constitutions were published; the Estonian Academic Law Society initiated a publication on the pre-constitutional acts of the re-independent Estonia and the Ministry of Justice edited the materials of the Constitutional Assembly.*² The long delay in the publication of the Assembly's materials was thus repaid.

If at first, the reality of life dictated the priority of establishing statehood and legal order based on the Constitution, and this left no time to assess what had been done, then later the corresponding conclusions have been made and errors have been corrected. A feedback mechanism was launched; the Constitution and its implementation results were observed and studied. This was greatly stimulated by Estonia's **main political objective of becoming a Member State of the EU**. This objective was formulated on 28 November 1995, in the Government of the Republic's official accession application, which the Estonian Prime Minister submitted to the European Commission.

The accession application and its acceptance implied the beginning of large-scale preparations, especially the harmonisation of Estonian law with EU law. As early as 30 January 1996, the Estonian government had drawn up the organisation of European integration — the necessary institutions and their functions.

¹ The paper expresses the author's personal opinions.

² Taasvabanenud Eesti põhiseaduse eellugu (Prologue of the Constitution of the Re-independent Estonia). Tartu: Juura, Õigusteabe AS 1997 (in Estonian); Põhiseadus ja Põhiseaduse Assamblee. Koguteos (Constitution and Constitutional Assembly. Anthology). Tallinn: Juura, Õigusteabe AS 1997 (in Estonian).

The Constitutional Committee of the Riigikogu addressed the Government of the Republic with a proposal to set up a group of experts to analyse the Constitution and propose amendments. On 14 May 1996, the government set up a Constitutional **committee of legal experts**³, whose task was to study the compliance of the provisions of the Constitution with the requirements imposed by the EU for its Member States, to analyse the possibilities of delimiting the competence of constitutional institutions, and to draft proposals for eliminating any legal gaps, conflicts and inadequacies, as well as any circumstances that could prevent Estonia's EU aspirations.

The committee of legal experts worked for nearly two years and produced valuable results. The results of the analysis were summed up in an activity report⁴, which together with the proposals and other topical discussions comprised 504 typewritten pages. The report is lengthy because it contains not only examination results but also explanations of the provisions and meaning of the Constitution, theoretical commentaries, generalisations of practice, legal overviews and analyses of the Constitution, and comparison with the constitutions of other countries and EU law. All these different approaches and facets of research are interrelated and the results have been presented as a systematic whole. The Government of the Republic decided to acknowledge the report of the committee of experts and consider its work completed.⁵ However, the committee of experts not only fulfilled its duties, but created added value with its report, as it helped lay the foundation for planning further studies into the Constitution of the Republic of Estonia.

This further discussion largely depended on what had been already done, because numerous proposals to amend the Constitution and, to some extent, the entire legal system were waiting to be implemented. A curious situation developed while resolving the situation. Although there were almost a hundred amendments and additions directly concerning the Constitution⁶, and they covered two-thirds of the sections of the Constitution, neither the experts themselves, the legislature, executive bodies nor representatives of the public ever seriously proposed the drafting of a new Constitution at once. Everyone hoped for "softer" and more flexible forms of implementation of the proposals. This was largely because the identified shortcomings were not so weighty as to hinder the development of the state and society. Implementation experience and theoretical focusing helped the problems of the Constitution to be understood more deeply upon the expert assessment than upon drafting the Constitution. Therefore, the proposals made in the course of the expert assessment cannot be viewed only as corrections of mistakes, but also as the programme for further development. This angle of departure was apparently also kept in mind in the grouping of the amendments.

1.2. The tenth anniversary reminds of itself

When planning the implementation of those proposals which look into the future, the idea arose to translate them into the language of commentaries to the Constitution. The idea grew and developed rapidly, because the hopes were for a broad-based interpretation of the Constitution, fed by the relatively high level of generalisation and the fundamental principles of the Constitution. The idea was also supported by the state. On 13 September 2000, the government committee set up to make preparations for celebrating the tenth anniversary of the Constitution decided to prepare a commented edition of the Constitution.

Two factors complicated the preparation of the edition: the **time factor** and **coordination of the content of the commentaries**. Hardly one and a half years were left for preparing the voluminous (757 pages) commented edition of the Constitution by the tenth anniversary of the Republic of Estonia. Publishing the commentaries in such a short period of time was possible mainly because of the availability of the expert assessment materials. As to the harmony of the content of the commentaries, it had to be taken into account that the purpose of the scientific commentaries to the Constitution was to create a single, coordinated and whole system of detailed study, generalisation, and interpretation of the substance and meaning of the Constitution.

Although more time would have been necessary for coordinating and organising the content of the commentaries, the commented edition⁷ was published on time and without great loss of content. From the evaluative point of view, it is important that the commented edition, like the report of the committee of legal experts, became a **written landmark** of the tenth anniversary of the Constitution. A number of other jubilee writings were published, in which members of the Constitutional Assembly, researchers, former and current politicians,

³ RT I 1996, 35, 725 (in Estonian).

⁴ See Justiitsministeeriumi põhiseaduse juriidilise ekspertiisi komisjoni aruanne (Report of the Ministry of Justice Committee of Legal Experts for the Constitution). Tallinn 1998. Available at www.just.ee/juridica2.html (in Estonian).

⁵ *Ibid.*, p. 1.

⁶ *Ibid.*, III osa. Muudatusettepanekud (Part III. Amendment Proposals); U. Reinsalu. Kas vajame uut põhiseadust (Do We Need a New Constitution)? – *Juridica* 2005/3, p. 148 (in Estonian).

⁷ Panel of editors led by E.-J. Truuvali. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition). Tallinn: Juura, Õigusteabe AS 2002 (in Estonian).

statesmen and public figures recall the creation of the Constitution, the development of the legal system and state institutions in line with the Constitution.⁸

The tenth anniversary of the Constitution was marked not only by active publishing, but also increased satisfaction with the Constitution. The constitutional act as a whole has been praised much more than criticised, compared to earlier times. The functional procedure and method of election of the President of the Republic, and the organisation of national defence have been issues of deep-rooted criticism since the days of the Constitutional Assembly. In both cases, the main shortcoming is seen to lie in excessive adherence to the former Constitution of 1938.

This mainly positive picture of the Constitution, with a few darker shadows, has developed when viewing and regarding the Constitution as the highest act of Estonia's domestic legal system. The highest act, the research, commentaries, and interpretations of which by the Supreme Court have strengthened the basis of the country's legal order and paved the way for increasing entrenchment of the word and meaning of the Constitution in the legal system. This is why the Constitution survived its tenth jubilee without amendments, in the same form as it was when adopted by the referendum.

In terms of appearance, this was a period of peaceful functioning for the Constitution, but in actuality it was a period of active preparations for accession to the EU. The analysis by the committee of experts already covered potential accession to the EU and the legal implications of accession for Estonia's constitutional law. The fact that the European Commission recommended launching accession negotiations with Poland, Hungary, the Czech Republic, Slovenia, Estonia, and Cyprus on 16 July 1997 built up tension. Estonia agreed and presented its plans concerning European integration. However, in the meantime, the committee of experts had reached a view that caused certain puzzlement. Problematic issues of the Constitution were already raised during the expert assessment, but they became more acute as accession negotiations progressed, and it had to be admitted that accession would be impossible without amending or supplementing the Constitution.

Certain confusion was and is also still perceivable in the EU. The European Constitutional Treaty was to enter into force on 1 November 2006, provided that all Member States had ratified the Treaty by that date and handed over their instruments of ratification to the Republic of Italy. However, feared ratification problems thwarted this time schedule because the French and Dutch showed a red light to the Constitutional Treaty at the ratification referendum. This black scenario had been spoken about, but no one really believed it would come about.

The Member States, especially the EU founders, largely built their hopes on the Constitutional Treaty. More than two years of work drafting the European Constitutional Treaty at the European Convention and the failure of ratification made a serious dent not only in the activities of the EU, but also of the Member States, which were left without central guidelines for amending and improving their constitutions before accession to the EU.

1.3. The fifteenth anniversary with great changes

Five-year development cycles, marked by the anniversaries of the Constitution, can be distinguished in the history described above. On the fifth anniversary of the Constitution, the new constitutional act was noted to have rapidly taken root in the statehood structure and legal system of the re-independent Estonia. This meant moving in the right direction. By the tenth anniversary, the aforementioned two landmark studies had been completed concerning the Constitution and its implementation efficiency. This created an informative feedback mechanism and the relevant investigative bodies and state institutions took the implementation of the Constitution under their care and control. Now, on the fifteenth anniversary of the Constitution, it is much harder to assess the results. This is because there is no single positive line of development. There have been rises, falls, and standstills. Estonia's great goal of becoming a Member State of the EU has been achieved. But this had a price — it took a toll directly on the Constitution. When all crucial and constitutional issues were previously solved by interpretation, based on and within the framework of the applicable Constitution, then

⁸ See, e.g., *Põhiseaduse tulek* (The Coming of the Constitution). Tallinn: SE&JS 2002 (in Estonian); *Presidendiraamat* (President's Book). R. Toomla (ed.). Tartu: Tartu Ülikooli Kirjastus 2002 (in Estonian); R. Ruutsoo. *Presidendi institutsiooni taustast ja kujundamisest 1992. aasta põhiseaduses: meenutusi ja arutlusi aastaist 1991–1992* (About the Background and Development of the President's Institution in the Constitution of 1992: Recollections and Discourse about the Years 1991–1992). – *Presidendiraamat* (President's Book). R. Toomla (ed.). Tartu: Tartu Ülikooli Kirjastus 2002 (in Estonian); L. Hänni. *Põhiseaduse mõju poliitilisele otsustusprotsessile* (The Effect of the Constitution on the Political Decision-making Process). – *Riigikogu Toimetised* 2002 (5) (in Estonian); R. Toomla. *Presidendivalimise kujunemislugu* (Development of Presidential Elections). – *Presidendiraamat* (President's Book). R. Toomla (ed.). Tartu: Tartu Ülikooli Kirjastus 2002 (in Estonian); J. Pöld. *Kas Eestis on vaja eraldiseisvat konstitutsioonikohut* (Does Estonia Need a Separate Constitutional Court)? – *Kohtute sõltumatus ja kohtusüsteemi toimimise efektiivsusest Eestis* (Independence of Courts and Efficiency of the Judicial System in Estonia). Tartu 2002 (in Estonian); W. Drechsler, T. Annus. *Die Verfassungsentwicklung in Estland von 1992 bis 2001*. – *Jahrbuch des öffentlichen Rechts der Gegenwart, Neue Folge* 2002 (50).

the conditions of accession to the EU and changes in the Member States' own status no longer fit into these frames. The course had to be taken to change and supplement the Constitution.

So, while the Constitution survived without amendment for slightly more than ten years, then the last five years may be called a **period of amendments and additions to the Constitution**. This period was full of searching and tension, because accession negotiations and the EU accession treaty had to be finalised on the one hand, while a rational solution was necessary for changing the substance and form of the Constitution, so as to allow the nation to decide on EU integration issues, on the other.

It is well known that in order to move forward, one should look at and analyse what has been done, and decide what to take and what to leave. **Considering that EU accession necessitated amendments and additions to the Constitution and that constitutional amendments had been relatively little studied and discussed, the amendment of the Constitution will be discussed in greater detail below.** There is another reason for focusing on the constitutional amendments. This mainly concerns the Constitution of the Republic of Estonia Amendment Act adopted by a referendum on 14 September 2003⁹, which was already criticised before its adoption, but its meaning and importance have grown in the course of practical application. Doubts and scruples die hard, as at the time of the constitutional amendments the focus was on provisions that would allow for the nation state's competence to be exercised by the European Union as a supranational organisation. As the Constitution has now arrived at a round of amendments and additions, greater attention should be paid to identifying the future potential of these amendments and additions.

2. Round of amendments to the Constitution

The current Constitution has been open for changes since its adoption. There are few among the members of the Constitutional Assembly and other persons concerned who expected the Constitution to last long for a long time. Half a century of developmental delay had done its job. When difficulties and gaps arose in developing the content of the Constitution at the Assembly, where the wishes of foreign experts did not coincide with our conditions and understandings, solving the problems that arose in practice by constitutional amendments was the last resort. Maybe the leniency to constitutional amendment was also increased by historical experience, because the 1938 Constitution was predicted to last a long time, but it was actually the shortest-lived Constitution. Although the reason for this did not lie in the Constitution itself, its short period of validity is still a fact.

2.1. Initiation of constitutional amendments

Although the authors of the Constitution quite clearly perceived the need for amendments and additions to the constitutional act being drafted, they followed the principle of stability and did not make the Constitution easily amendable. In the drafts presented to the Constitutional Assembly, a majority of the Riigikogu and the head of state may initiate amendments to the Constitution. According to experts, the requirement for the composition of the Riigikogu was exaggerated, because it may have been necessary in the early years of re-independence to make corrections to the constitutional regulation. However, the method of amendment and the requirements for it protect the Constitution from excessive and thoughtless amendments. During legislative proceeding of the draft Constitution, the right to initiate amendments was first limited to one-fourth, and after that at least one-fifth of the composition of the Riigikogu.

At first there was also opposition to giving the President of the Republic the right to initiate constitutional amendments, but the right was vested in him at the proposal of the editorial team. This means that the President can interfere where there is a need to adjust the balance between the executive, legislative and judicial powers or solve another constitutional issue. Therefore, according to § 161 of the Constitution, the right to initiate amendment of the Constitution rests with not less than one-fifth of the membership of the Riigikogu and with the President of the Republic. **Vesting the right to initiate constitutional amendments in the President** is a somewhat unusual solution, as the head of state has no right of legislative initiative according to the state structure model provided by the Constitution. Apparently the solution relied not only on the balance of powers, but also continuity with the Constitution of 1938.¹⁰

A greater problem than vesting the right to initiate constitutional amendments in the President is the **omission of public initiative** from the Constitution as regards legislative as well as constitutional amendments. This even conflicts with logic. The Constitution clearly provides that the supreme power of state is vested in the

⁹ See Eesti Vabariigi põhiseaduse täiendamise seadus. – RT I 2003, 64, 429 (in Estonian).

¹⁰ Constitution and Constitutional Assembly (Note 1), pp. 123–124, 531, 953, 1216, 1282; Report of the Ministry of Justice Committee of Legal Experts for the Constitution (Note 5), pp. 438–442; Republic of Estonia Constitution. Commented Edition (Note 8), pp. 672–672; A. Leps. Eesti põhiseaduse muutmisest (About Amendment of the Estonian Constitution). – Akadeemia 1999/3, p. 455 (in Estonian).

people, who also adopted the Constitution by a referendum. However, this supreme power of state has no right to initiate amendments and additions to the Constitution which the very people adopted.

The first Constitution of Estonia and its amendments did recognise public initiative. Public initiative was also exceptionally functional for a short time at the beginning years of the current Constitution. According to § 8 (2) of the Constitution of the Republic of Estonia Implementation Act^{*11} (CREIA) the right to initiate amendment of the Constitution during the three years following the adoption of the Constitution by a referendum also rests, by way of public initiative, with not less than ten thousand citizens with the right to vote. One public initiative was undertaken during that period. On 28 June 1994, 10,632 Estonian citizens with the right to vote initiated a draft amendment which contained a proposal to amend § 28 of the Constitution by bringing the guaranteed pension into correspondence with the work contribution of people, and to add to § 56 of the Constitution the provision that the President should be elected directly by the people. At the proposal of the Leading Committee (now the Constitutional Committee), the Riigikogu decided to exclude the bill from legislative proceedings without discussion on 20 October of the same year, with 32 votes in favour, three against, and four undecided.^{*12}

The possibility to amend the Constitution by public initiative ended on 28 June 1995. Therefore, nobody except for **a minimum of 21 members of the Riigikogu and the President of the Republic** can initiate constitutional amendments. “The people being left out of from constitutional amendment initiatives cannot be regarded as a good solution, since, firstly, supreme power is derived from the people, and secondly, this inhibits the development of participatory democracy and the people’s political activity, thus alienating the Constitution and power from the people.”^{*13} Those words, spoken ten years ago, have been prophetic.

Ten initiatives have been undertaken to amend the Constitution during the period following its adoption; draft amendments have been submitted to every composition of the Riigikogu, including the present 11th composition. Members of the Riigikogu have been behind most (eight) of these initiatives. In one case, as already mentioned, the initiative came from Estonian citizens with the right to vote. The President of the Republic also initiated a constitutional amendment in one case.

2.2. Failed amendment initiatives

The first initiative to amend the Constitution was made by 24 members of the Riigikogu on 28 January 1993, i.e., six months after the adoption of the Constitution by referendum, requesting that the President of the Republic be elected by the people at general, uniform and direct elections. The draft was first read on 11 March 1993, and rejected at the proposal of the Leading Committee with 41 votes in favour, 27 against and 4 undecided.^{*14}

The second draft to amend the Constitution was initiated by 27 members of the Riigikogu on 14 March 1994. The bill concerned amendment of the Constitution and direct presidential elections. The draft was read three times: on 19 April, 22 September and 9 November 1994. Since the initiators of the draft amendment did not supply the draft amendment with a draft decision to organise a referendum, the Riigikogu had to choose between the two methods of amendment laid down in clauses 2 and 3 of § 163 of the Constitution. The decision to treat the draft amendments as a matter of urgency was taken with 51 votes in favour and 17 against. The votes for adopting the constitutional amendments were 25 in favour, 39 against, and three undecided.^{*15} According to § 8 (1) of the CREIA, at least a majority of votes would have been required.

Neither was the **third** attempt to amend the Constitution successful. The public initiative was made on 28 June 1994, but the draft was left out of legislative proceeding, without discussion, on 20 October. **The fourth and fifth** draft amendments, initiated on 27 October 1994 and 16 November 1995 respectively, also ended in failure; the former amendment concerned § 147 of the Constitution, according to which judges are appointed for life, and the latter concerned public presidential elections. Both amendment proposals seem to be based on a misunderstanding of the nature of parliamentary democracy. The need for amending § 147 of the Constitution seems to lie in the argument that appointment of judges for life is unsuitable for a democracy, not having regard to the independence, stability, and also liability that the profession entails. General election of the president is often seen as the implementation of a presidential public order.^{*16}

¹¹ See Eesti Vabariigi põhiseaduse rakendamise seadus. – RT I 1992, 26, 350 (in Estonian).

¹² See Riigikogu stenogrammid 1994 (The shorthand notes of the Riigikogu 1994). Vol. IV. Tallinn 1995, p. 2178 and Vol. V. Tallinn 1995, pp. 551–552 (in Estonian); R. Maruste. Põhiseadus ja selle järelevalve. Võrdlevad selgitused. Kommentaarid. Tekstid (Constitution and Constitutional Review. Comparative Explanations. Commentaries. Texts). Tallinn: Juura, Õigusteabe AS 1997, p. 43 (in Estonian).

¹³ See R. Maruste (Note 12), p. 43.

¹⁴ For details see A. Leps (Note 10), pp. 460–461.

¹⁵ See Riigikogu stenogrammid 1993 (The shorthand notes of the Riigikogu 1993). Vol. II. Tallinn 1994, pp. 198–201 (in Estonian).

¹⁶ See Riigikogu stenogrammid 1994 (The shorthand notes of the Riigikogu 1994). Vol. V. Tallinn 1995, p. 639; and Vol. VI. Tallinn 1995, pp. 1057, 1057–1060, 1062–1063, 1064 (in Estonian).

Out of the ten constitutional amendment initiatives so far, three have found a final solution in the second half of the decade. The remaining drafts were either rejected at the first reading or discarded before the first reading.

2.3. The first amendment of the Constitution

The committee of legal experts for the Constitution already concluded in its 1998 report that Estonia cannot integrate into the EU without amending and supplementing its Constitution. This was confirmed by the EU accession negotiations that lasted for five intensive years. At the beginning phase of preparations for accession, the subject of constitutional amendments was treated cautiously, since the conditions and possibilities of accession had to be weighed and the compatibility of the Estonian Constitution and entire legal system with the applicable EU law had to be analysed along with the constitutional differences and the practice of overcoming these differences in the Constitutions of Germany, France, Italy, the Netherlands, Spain, Finland, Sweden, and other old EU Member States. An important issue upon EU accession, which also related to all the other issues, was the relation between Estonian law and Community law of direct application. The need to amend our Constitution mainly arose from the principle of supremacy of the law created in the sole competence of the European Community and the rigid constitutional regulation of Estonia's sovereignty.

It was therefore necessary and useful to join our knowledge of our Constitution and legal order with the practical experience of EU Member States. This was done **in two ways**: by conferences, seminars and consultations where foreign researchers and implementation specialists made their presentations and speeches, and by commissioning opinions, proposals and suggestions from those researchers and specialists. Most of these types of consultations and seminars on European integration were organised by the Ministry of Justice. The Supreme Court organised international seminars in this field in Tartu on three occasions: in 2000 with the Venice Commission and in 2001 and 2002 with the Supreme Administrative Court of Sweden. While the 2000 seminar discussed the new activities of constitutional courts in connection with the turn of the century and aspiration to the European structures, the seminars of 2001 and 2002 focused on an analysis of the experience of Sweden and Finland, which acceded to the EU in 1995. In addition, constitutional amendment issues were discussed in the autumn of 2001 during the discussion series "Does the current Constitution need amendments for accession to the European Union?" held by the EuroCollege of the University of Tartu and the Eurosceptics movement.

Foreign experts helped Estonia a great deal in analysing the mutual relations between the Constitution and EU law. Six foreign experts prepared a special written opinion on the conformity of the Constitution with EU law and proposals for overcoming the deviations. The work of foreign experts was somewhat facilitated and simplified by the fact that some of them had already participated in the Constitutional Assembly and in the earlier expert assessment, such as Guy Garcassonne from France, Matti Niemivuo and Antti Suviranta from Finland, Erik Harremoes from Denmark, Roman Herzog, Robert Alexy and Jochen Abr. Frowein from Germany, Eivind Smith from Norway, and many others.

Such an analysis of materials, which had been collected in various ways from various sources over quite a long time, gave increasingly more assurance that the **Constitution needed to be amended and what needed to be amended, but less help as to how it should be amended.**

The need to amend the Constitution was reasoned by the following circumstances. **Firstly**, because of the wish to build a common future with the European Union, which is why Estonia had to assign part of its competence to the EU for the pursuit of common goals, while the Estonian Constitution did not contain a provision allowing for international or supranational organisations to exercise the power of the state.

Secondly, Estonia was a typical unitary state by its Constitution, according to § 3 of which the state authority is to be exercised solely pursuant to the Constitution and laws which are in conformity therewith. As a Member State of the EU, state authority also has to act on the basis of and in conformity with European Union law. This results in a situation where the state has to exercise law that it has not created and cannot create, such as the provisions carrying the principles of direct application, supremacy, and subsidiarity.

Thirdly, § 111 of the Constitution provides for the sole right of the Bank of Estonia to issue Estonian currency. Considering the transfer to the single currency as stipulated in the Maastricht Treaty and the European Central Bank's right to issue the euro, the relevant right of the Bank of Estonia upon the introduction of the single currency has little hope of survival.

Fourthly, a frequent subject of discussion at the committees, conferences, seminars and consultations were the changes that accession to the EU will bring to the Member State's volume of work, composition and structure of institutions, the Member State's participation in the legislative drafting of the EU, separation of powers, legal regulation and the sovereignty theory, as well as terminology and interpretation issues.

Fifthly, all the aforementioned issues pertain to the state's sovereignty to a lesser or greater extent. It is therefore not incidental that the question of sovereignty was part and parcel of every discussion. All the more so

because interpretation of the idea of an independent nation state and democracy had already caused problems at the time of the drafting of the Constitution. Section 1 of the Constitution stipulates, quite categorically, that Estonia is an independent and sovereign democratic republic, while the independence and sovereignty of Estonia are timeless and inalienable. Namely because the Constitutional Assembly cemented Estonia's independence in timelessness and inalienability, Estonia's constitution stands out as one of Europe's most "sovereigntist" or closed Constitutions.^{*17}

The next question was how to amend and supplement the Constitution in order to get rid of these obstacles. Although diverse material — experience of the EU Member States in adapting to European integration, opinions of Estonia's own and foreign experts about the Estonian Constitution and potential amendments to its text, as well as conceptual disputes about the legal nature of the European Union, and post-enlargement development scenarios were available for the seeking of a solution, the question "how" proved to be **the most difficult**. This was because individual characteristics dominated. As every country has its own face, so is every country's Constitution unique. This rendered systematisation and use of the EU Member States' experience, opinions, and research results complicated.

Despite the difficulties, Anneli Albi synthesised three models for constitutional amendment. **In the first model**, based on an analogy of the French and Austrian models, the Constitution would be supplemented by a separate chapter about the European Union which would cover all EU issues and any future amendments. According to the **second model**, which was the choice of most foreign experts, amendments should be made to the problematic provisions, following the examples of Germany and Portugal. This model allows for a greater number of and more precise amendments. **The third model** is the minimal amendments model. If it is decided on the political level that the nation state's Constitutional principles and minimum harm to these principles are primary, the Constitution can be amended by introducing only one amendment section. This provision would cover two important issues: delegation of sovereignty and democratic legitimation via the national parliament. The remaining potential conflicts would be solved by the reference taken from Guy Carcassonne's amendment proposal to "conditions provided in the European Union treaties". This would make it possible to leave the other conflicting provisions of the Constitution unchanged.^{*18}

The idea of the minimal amendments model became more popular in the course of discussions between lawyers. Especially when the trains of thought were framed with border marks such as the following: (1) amendments concerning accession to the EU should be made separately without awaiting constitutional amendments concerning other issues; (2) the amendments should concern the European Union specifically and not international organisations in general; (3) the amendments must not involve re-writing of all the potentially conflicting provisions in the Constitution, but should rather constitute an application or interpretation of the Constitution in the light of integration.^{*19}

This opened an original way into the European Union for Estonia, namely via a so-called **third constitutional act**. The first of such acts is the Constitution, the second one is the CREIA, and the third is the Constitution of the Republic of Estonia Amendment Act. A referendum was necessary for adopting the amendments, as the amendments concerned provisions which can only be amended by a referendum. A legal basis had thus been created for the nation's legitimation of EU accession.^{*20}

By the decision of the Riigikogu of 18 December 2002, adopted with 88 votes in favour and one against, the following question was placed on the ballot:

Are you in favour of accession to the EU and adoption of the Constitution of the Republic of Estonia Amendment Act?

At the referendum held on 14 September 2003, the Estonian nation answered "yes" to the question and thus adopted the Constitution of the Republic of Estonia Amendment Act (CAA); 64.06% of voters participated

¹⁷ About the needs for constitutional amendments see also the Report of the Ministry of Justice Committee of Legal Experts for the Constitution (Note 4), pp. 407–414; A. Albi. Põhiseaduse muutmise Euroopa Liitu astumiseks. Ekspertarvamused, teoreetiline ja võrdlevõiguslik perspektiiv ning protseduur (Amendment of the Constitution for Accession to the European Union: Expert Opinions, Theoretical and Comparative Law Perspectives and Procedure). – *Juridica* 2001/9, pp. 603–615 (in Estonian); R. Maruste, A. Albi. Eesti Vabariigi põhiseadus Euroopa Liidu õiguskorras (The Constitution of the Republic of Estonia in the Legal System of the European Union). – *Juridica* 2003/1, pp. 3–7 (in Estonian); J. Laffranque. Eesti põhiseaduse ja Euroopa õiguse kooselu (Coexistence of the Estonian Constitution and EC law). – *Juridica* 2003/3, pp. 180–190 (in Estonian); Eesti ühinemisleping Euroopa Liiduga, Seletuskiri (Accession Treaty between Estonia and the European Union, Explanatory Memorandum). Välisministeerium (Ministry of Foreign Affairs): Tallinn 2004, pp. 38–43 (in Estonian); T. Kerikmäe. Supranational Law as International Law and Vica Versa. – *Juridica International. Law Review* 1998 (3), pp. 43–47; T. Nymann. Euroopa Komisjoni delegeritud õigusloome ja komiteede süsteem (Comitology of the European Commission). – *Juridica* 2003/6, pp. 383–390 (in Estonian).

¹⁸ See A. Albi (Note 17), pp. 611–613.

¹⁹ See K. Merusk, J. Põld, J. Laffranque, M. Rask, Ü. Madise. Põhiseaduse täiendamise seaduse eelnõust (Draft Act to Amend the Constitution). – *Juridica* 2002/8, especially p. 565 (in Estonian).

²⁰ See J. Laffranque. Euroopa Liidu õigussüsteemi ja Eesti õiguse koht selles (Legal System of the European Union and the Role of Estonian Law in It). Tallinn: Juura 2006, pp. 70–71 (in Estonian).

in the referendum and 66.83% of the participants were for the amendment. On 5 October 2003, the President of the Republic proclaimed the CAA and it entered into force on 6 January 2004.

The CAA consists of only four sections. Only the first two of them are substantive. The first section expressly confirms that Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia. This opened up the constitutional possibility for Estonia to enter into an accession treaty with the EU. The Riigikogu unanimously ratified the treaty on 21 January 2004 with 77 members of the Riigikogu present.^{*21} The European Union also acted efficiently: on 9 April 2004, the European Parliament ratified the accession treaty; 520 of the 556 MEPs present voted for the treaty. Upon entry into force of the accession treaty on 1 May 2004, Estonia became a full member of the European Union. It is important to note that the **EU recognised** the addition to the Estonian Constitution as a third constitutional act.

2.4. The CAA allows for broader implementation

The EU Member States' constitutions and their amendments may be divided into two categories: those which focus on the possibility to assign competence and access to the EU and those which also remain to regulate affairs after accession.^{*22} Our CAA belongs to the latter category, as it defines the relations between Estonia and the EU, the conditions of Estonia's membership in the EU — compliance with the Constitution and fundamental principles — and the supremacy of EU law and its direct applicability over Estonian law under certain conditions. The idea of the CAA was to amend the Constitution upon accession to the EU so that Estonia could delegate to EU institutions the exercise of the power of state arising from the Constitution insofar as this is necessary for implementation of the EU treaties and provided that this is not contrary to the fundamental principles of Estonia's statehood as laid down in the preamble and first chapter of the Constitution. The CAA is thus the **connecting link** between Estonian law and EU law.

If we regard the CAA as the connecting link between Estonian law and EU law, a number of questions arise: what does it link, how does it link, and why is it necessary?

The connection has the power of creating a whole. Both similar and different things, phenomena and ideas can be connected. The CAA is the connecting link between laws of differing weight, meaning, and importance. Although the law of the connected subjects is substantially different, they have two common features: the name (law) and the roots — the fundamental principles, i.e. the universal values. Fundamental principles are not a favourite topic of lawyers, but the development of not only the law of the EU and its Member States, but of law in general, is closely related to them. While thus far it was the Constitution that served as the yardstick of regular legislation and the **legitimacy of all legislative drafting**, the CAA introduced to the Estonian Constitution the concept of "fundamental principle", which the Constitution itself has to comply with if Estonia belongs to the EU. This is a new yardstick of legitimacy.

A certain compromise was reached on the fundamental principles quicker than usual. This was facilitated by the fact that all earlier Estonian Constitutions contained a preamble that reflected, in the most general and generalised way, the vital ideas, understandings, values, feelings and convictions of the nation, which were taken into account in drafting the Constitution. Other principles of a democratic state governed by the rule of law, derived from § 10, were added to these fundamental principles. The following principles can thus be regarded as fundamental principles: national sovereignty; the state's foundations of liberty, justice and law; protection of internal and external peace; preservation of the Estonian nation and culture through the ages; human dignity; social statehood and the rule of law; respect for fundamental rights and freedoms; balanced exercise of the authority of the state.^{*23}

These fundamental principles, with their degree of generalisation, cover all the provisions of the Constitution. The same may be said about the values laid down in Article I-2 of the European Constitutional Treaty, on which the European Union is based. Legal literature also points out tolerance, morality, solidarity, equality between men and women, proportionality, and many others as independent values. Considering that values are inseparably related to the needs of every person, collective, and society, which differ to a great extent, values also vary and have varying cognitive and applicable weight. In the Estonian Constitution, the issues of public morality, solidarity, tolerance, and the equality of men and women have been protected by the value of respect for human dignity, justice and democracy.

²¹ See RT II 2004, 3, 8 (in Estonian).

²² See and compare J. Laffranque (Note 20), pp. 72–82, 487–524.

²³ Compare with the positions of the constitutional analysis team for the European Constitutional Treaty on the issue of ratification of the Constitutional Treaty. Draft of 9.11.2005. Available at http://www.riigikogu.ee/?id?=38141&parent_id=33404 (6.02.2006) (in Estonian); J. Laffranque (Note 20), p. 72; H. Schneider. Põhiseaduse aluspõhimõtete seonduvaid probleeme ja võimalikke lahendusi (Problems and Possible Solutions Relating to the Fundamental Principles of the Constitution). – Riigikohus 2005. Lahendid ja Kommentaarid (Supreme Court 2005. Judgments and Commentaries). Tallinn: Riigikohus (Supreme Court) 2005, pp. 1322–1332 (in Estonian).

It may be concluded from the above that the CAA, which has roots in both EU and Estonian law, is not only a connecting link between these laws, but in the event of enforcement of the fundamental principle of the Constitution also a **protective clause** with conditions that the EU itself has to meet. Estonia is a member of an EU that corresponds to the fundamental principles laid down in our Constitution. Of course, from a formal legal viewpoint, the EU is not tied to any conditions that the constitutions of its Member States may pose to it, but respects the principles of democracy and the rule of law based on the EU's own underlying treaties, but still proceeds from the constitutional principles and traditions of its Member States via this and the case-law of the European Court of Justice.

Estonia has been a Member State of the EU for three years now. These years have also been difficult for the EU, since the fate of the European Constitutional Treaty is still unresolved. Ignorance is a poor companion. Years pass, but it is still not clear whether the CAA is domestically applicable or not. Life continues to be controlled by the Constitution and not the fundamental principles of the Constitution. Neither has the CAA been able to seriously exercise its force when it comes to the conflict between EU law and Estonian law. Upon eliminating shortcomings, especially when exercising judicial constitutional review, account should be taken of both the need to ensure the unity of the Community's legal order and the need to protect the fundamental principles of the Member States' constitutions. This has proved to be a complicated task both in practice as well as theory.

But this complicacy is not relevant to finishing the work, but rather serves as a notice to pay greater attention to continuing the work. This is especially true when one owes activities for a length of time. In many ways, the legal systems of the EU and Estonia need to be recreated from scratch. EU law is difficult to comprehend especially because its sources are not only the treaties, but also the acts of its institutions and the precedents of the European Court of Justice. Since the treaties of the European Community and European Union do not clearly provide for the sole competence of the EU, it is not always easy to draw the line between the competence of the EU and that of its Member States, and this sometimes causes tension between the EU and its Member States, especially the courts of the Member States.

The direct applicability of EU law is a phrase with a nice ring to it. In actuality, the principle of direct applicability has gone undergone development over the years. While it was at first applicable only to the negative obligations of the Member States, it was also later extended to positive obligations. The principle of direct applicability was also extended to other laws in addition to contractual provisions. However, not all contractual provisions of the Community are directly applicable: the Court has declared only a limited number of articles to be directly applicable.

Regulations are the EU legal acts with the most far-reaching power. They are adopted by the European Parliament together with the Council, or the Council or the Commission in their individual capacities. All regulations, as all other Community legal acts, are published in all official languages of the EU in the Official Journal of the European Union, which is accessible to everyone. When published this way, regulations become a part of the legal systems of the Member States without domestic harmonisation. As a general rule, Member States are prohibited from establishing domestic legislation in the areas governed by regulations. Regulations are characterised by two features which are generally unfamiliar to international law: (1) regulations are uniformly applicable throughout the Community's territory. As a rule, regulations are mandatory and directly applicable in their entirety; (2) regulations are directly applicable equivalently with the domestic laws of the Member States. Regulations establish direct rights and obligations for the Member States and their citizens.

The purpose of directives, on the other hand, is to harmonise the legislative drafting of the Member States. Directives are established by the Council alone or together with the European Parliament, or by the Commission on the basis of a mandate from the Council. As opposed to regulations, directives are usually not directly applicable but need to be transposed to domestic law. When a directive has not been transposed or properly transposed, the lack of direct applicability does not preclude a certain impact of a directive, namely that domestic legislation must be interpreted in conjunction with the wording and objectives of the directive.

All this EU law also needs to be screened through the principles of supremacy, direct applicability and hierarchy. Unwritten common law and the general principles of law, which are common to the legal orders of the Member States, are considered to be primary EU law. Primary law also covers agreements, such as agreements between the Community and third countries and international organisations, and agreements between Member States. Primary Community law is called constitutional law because in the legal hierarchy it may be equalised with the constitution in the domestic legal order.²⁴

Although the EU sources of law generally move toward the legal orders of the Member States, common law and the fundamental principles of law move in the opposite direction. Considering that the impact of the EU legal order largely depends on how the Member States implement EU law, it is a good place for gaining practical experience and making generalisations, a powerful employer for the intellectual worker. Accession

²⁴ See U. Lõhmus. Euroopa Liidu õigussüsteem ja põhiseaduslikkuse kontroll pärast 1. maid 2004 (European Union Legal System and Constitutional Supervision After 1 May 2004). – *Juridica* 2006/1, pp. 3–16 (in Estonian); Eesti ühinemislepung Euroopa Liiduga. Seletuskiri (Accession Treaty between Estonia and the EU. Explanatory Memorandum) (Note 17), pp. 38–46 (in Estonian).

to the EU brought about changes in the work and requires interpretation of many concepts such as the separation and balance of powers, institutional balance, ascribed and derived competence, legal order, order of authority, legal system, system of provisions, hierarchy of law and of sources of law, primary and secondary law, the supremacy of validity and applicability of law, etc. The sovereignty theory and its status offer plenty of food for thought.

Thus, it needs to be stressed that the CAA is not simply permission for Estonia's accession to the EU. It is equally important that the Constitution be interpreted in the context of the EU membership based on the CAA and its ideas.^{*25}

2.5. The second amendment of the Constitution

The second constitutional amendment was the Act to Amend the Constitution of the Republic of Estonia for Election of Local Government Councils for Term of Four Years, which was adopted as a matter of urgency on 25 February 2003, and entered into force on 17 October 2005.^{*26} The amendment was justified by two facts. Firstly, the three-year term of authority of local councils was relatively short, especially when compared with most other European countries. The term was too short for keeping various labour-intensive promises. Secondly, because of the different terms of the Riigikogu and local councils, the election periods were running too close to each other. The terms of local councils were therefore equalised with those of the parliament so that the interval between elections would remain approximately two years.^{*27}

The initiators of the bill believed that the time was ripe in 2002 to allow local government councils to make plans with a somewhat longer perspective. A legal opinion on the bill was commissioned from the Faculty of Law of the University of Tartu, which also confirmed that the bill was justified.

The bill was read three times. After the last reading, the Constitutional Committee proposed to treat the bill as a matter of urgency, which meant that 91 votes in favour were required for adopting a decision. All 92 parliament members present were in favour of an urgent legislative proceeding. In the voting over the adoption of the Act, 91 members of the Riigikogu were in favour; there was nobody opposed or undecided. The Riigikogu had thus adopted the aforementioned constitutional amendment. Since the amendment entered into force only after a period of two and a half years, it is discussed here not in the first, but in the second order.

2.6. The third amendment of the Constitution

The third constitutional amendment entered into force on 21 July 2007.^{*28} It provides in the preamble of the Constitution for the preservation of the Estonian language through the ages. While the previous 10th composition of the Riigikogu adopted the Act on 20 February 2007, with 66 votes in favour, the new composition of the Riigikogu elected in 2007 supported the amendment on 12 April 2007, with 93 votes in favour. There are always those who doubt as to what one word in the Constitution can mean. However, where the word "language" has the status of a fundamental principle of the Constitution and is placed in the preamble of the Constitution side by side with the other fundamental principles, it is the projector of our culture.

All our constitutional amendments and additions so far have taken place in different ways. According to § 163 of the Constitution, the Constitution shall be amended by an Act which has been passed by: (1) a referendum; (2) two successive memberships of the Riigikogu; (3) the Riigikogu, as a matter of urgency. The CAA was adopted by a referendum; the terms of local government councils were extended by the Parliament as a matter of urgency, and the latest one-word "language" amendment was adopted by two successive memberships of the Riigikogu.

2.7. Amending continues

The tendency of amending and adding to the Constitution continues. In May 2007, the President of the Republic initiated draft amendments based on § 78 8), § 103 (1) 5), and § 161 (1) of the Constitution. According to the explanatory memorandum, the objective of the draft is to reorganise the management of national defence and

²⁵ See J. Laffranque. Eesti põhiseaduse ja Euroopa õiguse kooselu (Coexistence of the Estonian Constitution and EC law). – *Juridica* 2003/3, pp. 180–190 (in Estonian); K. Maimann. Integratsiooniõiguse põhiseaduslikkuse kohtulik järelevaade Eestis (Constitutional Court Review of Integration Law in Estonia). – *Juridica* 2006/6, pp. 423–435 (in Estonian).

²⁶ See RT I 2003, 29, 174 (in Estonian).

²⁷ Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=022810001&login=proof&password=&system=ems&server=ragne11> (21.07.2007) (in Estonian).

²⁸ Eesti Vabariigi põhiseaduse muutmise seadus. – RT I 2007, 33, 210 (in Estonian).

to specify the national defence competence of constitutional bodies.²⁹ The committee of legal experts for the Constitution was critical about the national defence chapter of the Constitution and considered the obscurity in the relations between the highest military command and highest political leadership to be one of the most serious shortcomings of the Constitution.

3. Conclusions

Five-year walks along the paths of the Estonian Constitution lead to many things which are familiar, but also to a larger dose of the unfamiliar and unknown. This may be called disorder or renewal, with diversity being the common motto. We have to experience and admit that where differences are great, success of synthesis is greater.

Even the CAA was at first seen as merely the opportunity to accede to the EU, while new visits show increasing development based on values.

²⁹ Available at http://www.riigikogu.ee/?page=pub_ooc_file&op=emsplain&content_type=text/html&file_id=93073 (21.07.2007) (in Estonian).