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About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia^{*1}

At the end of the 20th century, on 28 June 1992, a referendum was held by which Estonia adopted a liberal constitution^{*2} based on people's natural and inalienable rights. The commentaries that were published on the tenth anniversary of the Constitution noted that our constitutional governmental system, which is characterised by parliamentary democracy based on legitimacy, the principle of the rule of law, republicanism, and sovereignty of the people, unitary statehood is derived from and based on the Constitution.^{*3} Principally, the 21st century brought a new epoch to the development of Estonia and its nation in relation to accession to the European Union. Everything connected to the European Union became especially topical.^{*4} The accession to the European Union was a relatively long process, as we know, and gave rise to conflicting opinions. I will present the viewpoint on the question of accession to the European Union that was adopted by L. Meri, the first president of Estonia after the nation regained its independence: "We do not need the European Union because of the Union itself. We need the Republic of Estonia. We need a state where Estonians would feel that the prerequisites for the increase in their standard of living and for education for their children are ensured. For the continuation of this Estonia, we need to accede to the European Union and not vice versa."^{*5}

¹ This is a continuation to the article R. Narits Principles of Law and Legal Dogmatics as Methods Used by Constitutional Courts. – *Juridica International* 2007 (12), p.15. It is published with support from ESF grant No. 6676.

² RT 1992, 26, 349; RT I 2007, 33, 210 (in Estonian). English translation available at <http://www.just.ee/23295> (8.05.2009).

³ Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Republic of Estonia Constitution. Commented edition). Tallinn: Juura, Õigusteabe AS 2002, p. 9 (in Estonian).

⁴ Referring to J. Tõnisson, R. Ruutsoo writes that even ardent Estonian nationalists started to advocate the advantages of the unified Europe and unavoidability of the participation of Estonia in it. The former states- and public man J. Tõnisson wrote: "I hope that the examples of the past are used when realising the idea of the European Federation. It should not be much easier than taming the individualism of European nations and overcoming the absolute excitement over sovereignty of statehood that based on federality in the spirit of freedom and the rule of law which makes life worthy to live." See J. Tõnisson. Euroopa föderatsiooni idee (The Idea of European Federalism). The ninth album of the Estonian Students Society: EÜS publishing 1940, 74 (in Estonian).

⁵ L. Meri. Euroopa Uniooni on vaja Eesti riigi püsimiseks (The European Union is Needed for the Continuation of the Republic of Estonia). – *Luup* (journal) 1997/26, p. 11 (in Estonian).

1. The necessity of the Constitution of the Republic of Estonia Amendment Act

Estonian accession to the European Union had to be formalised in a legally correct manner. For this, the Government of the Republic of Estonia decided to hold a referendum concerning the draft legislation titled the Constitution of the Republic of Estonia Amendment Act (CAA).⁶ Changing the Constitution in such a manner was necessary as § 3 of the Constitution of the Republic of Estonia provides the principle under which state authority is exercised solely pursuant to the Constitution and laws that are in conformity therewith. The Constitution of the Republic of Estonia does not refer to EU legislation in any of its paragraphs. The above-mentioned § 3 is among the so-called general provisions that can be changed substantially only via a referendum. The adoption of the CAA on 14 September 2003 and its entry into force on 6 January 2004 enabled the *Riigikogu* (Estonian parliament) to ratify the Treaty of Accession of the Republic of Estonia to the European Union, which had already been signed on 16 March 2003. At four paragraphs, the CAA is not a voluminous law.⁷ The same cannot be claimed about the constitutional content of the CAA. The fact is that at the accession of Estonia to the European Union, the text of the Constitution was not changed, but through and with the CAA, the Constitution was recurrently changed so that Estonia could accede to the European Union.⁸ Thus, the four paragraphs of the CAA are of immense importance for Estonian statehood; they contribute to the explanation of the present constitutional situation, and, in my opinion, elucidate the perspective of our statehood. The CAA has changed the whole judicial attitude toward the Constitution.⁹ Doctrinally, complementing the Constitution by a separate law is still changing the Constitution, even if there are no changes made in the text of the Constitution. To understand the Constitution in this situation, one should start reading both texts such that, in an applied sense, only that part of the text of the Constitution is imposed that is not in opposition to the CAA.¹⁰

2. The CAA and the principles of the Constitution

In the present article, I would like to concentrate on § 1 of the CAA, which provides: “Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia”, which is one of the most important provisions that necessitate the interpretation of the essence of the Constitution in the situation in which Estonia is a member state of the European Union from 1 May 2004. It is fortunate that this question can be handled in an academic manner. Also philosophers recognise that “[d]ispassionate, public, and serious thinking is a prerequisite for the continuation of Estonian statehood”.¹¹ Moreover, as the spirit of the Constitution does not fit only in the norms of the Constitution, its text and words, § 1 of the CAA similarly is a generalisation and a provision in need of interpretation. The specialist literature notes: “Through interpretation of constitutional law, dubious places in the Constitution are eliminated and constitutional law is developed.”¹²

⁶ CAA was adopted by the referendum held on 14 September 2003. 64% of the citizens with the right to vote participated in the referendum. 66.8% of them voted in favour of CAA and 33.2% voted against it. There were below 0.5% of invalid ballot papers. CAA was published in RT I 2002, 107, 636 (in Estonian). English translation available at <http://www.just.ee/23295> (8.05.2009).

⁷ CAA § 1: “Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia.”; § 2 “As of Estonia’s accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty.”; § 3 “This Act may be amended only by a referendum.”; § 4 “This Act enters into force three months after the date of proclamation.”

⁸ The amendments of the constitutions of EU Member States are either considering the possibilities of assigning competences and thereby the accession to the EU or regulating the situation in a Member State also after the accession. CAA is the second option as we wished to change the Constitution, when acceding to the EU, to such extent that it would not conflict with the fundamental principles of Estonian statehood.

⁹ The introduction of the commentaries of the Constitution of the Republic of Estonia note that “Despite the laconicism of the provisions of CAA, they embody the crucial constitutional questions related to the accession to the EU; they regulate the questions clearly enough and understandably for a person with a judicial education”. See *Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia. Commented edition). Tallinn: Juura 2008, p. 28 (in Estonian).

¹⁰ In the commentaries of the Constitution the CAA is noted as so-called “the third legal instrument of the Constitution”. The second legal instrument is the Constitution of the Republic of Estonia Implementation Act. See *Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 774.

¹¹ E. Loone. *Eesti riik ja rahvas maailmas. – Eesti tulevikusuundumus* (Estonia and its Nation in the World. The Future Trends of Estonia). E.-M. Tiit (ed.). Tartu: Estonian Union of Scientists 1996, p. 31.

¹² T. Würtenberger. *Auslegung von Verfassungsrecht – realistisch betrachtet. – Verfassung – Philosophie- Kirche. Festschrift für Alexander Hollenbach zum 70. Geburtstag*. Duncker und Humblot 2001, p. 223. Moreover, the specification and development the Constitution is in some respects changing the Constitution and connected to politics. Namely, the more the Constitution is being interpreted, the smaller its political development space will become. Therefore, the interpretation of the Constitution is limited by legislative and judicative. The constitutional

Initially, the draft text of the CAA did not contain the principles, nor did the explanatory memorandum mention them.^{*13} Then, the Chancellor of Justice at the time suggested that the Constitutional Committee complement the draft of the CAA with a so-called crisis reservation: “Estonia can be a member of a European Union that functions according to the principles of human dignity and the social and democratic rule of law, and which is founded on liberty, justice, and law, and which shall guarantee the preservation of the Estonian nation, language, and culture through the ages” (in Estonian, “Eesti võib kuulda Euroopa Liitu, mis vastab inimväärikuse ning sotsiaalse ja demokraatliku õigusriigi põhimõtetele, mis on rajatud vabadusele, õiglusele ja õigusele, mis peab tagama eesti rahvuse ja kultuuri säilimise läbi aegade”).^{*14} The Constitutional Committee supported the suggestion of the Chancellor of Justice, but, to prevent the repetition of the text of the Constitution in the CAA, the committee decided to use only the words ‘the principles of the Constitution’ in the law. The course of the draft proceedings demonstrates that the parliament accepted the suggestion of the Constitutional Committee.

Already the pre-CAA constitutional discourse often concentrated on the values expressed in the Constitution and the different characteristics of these values. It was wondered whether it is possible to find an ultimate value in the Constitution that is the foundation for our statehood. And it is so. This is the issue of the relationship between the individual and the state. In Estonian statehood, the individual is not for the state but the state is for the individual. Statehood is a constant search for balance between personal liberty and the state that is created to warrant personal liberty.^{*15} In fact, the ultimate value is not a legal concept but an ethical-cultural category. Once this concept is situated in the Constitution, it is transformed into a judicial and therefore binding category. The Preamble to the Constitution states that the idea behind strengthening and developing the state is to guarantee the preservation of the Estonian nation, language, and culture through the ages. Here, it is important to know that the individual’s priority over the state is not prescribed by the state, but the Republic of Estonia acknowledges this as a natural right of the individual. The state is competent to organise through its juridical precepts the behaviour of people to such extent that the organisation would not encroach groundlessly on their liberties but guarantee at the same time the realisations of public interests. This ultimate value has to be realised primarily by the state.^{*16} Therefore, the content of the questions about the continuation of the Constitution (read: statehood) is timeless and the questions cannot be sacrificed to objectively changing circumstances. It is obvious that membership in the European Union is of extreme importance to Estonia, but our considering this reality must not harm Estonian statehood, the ultimate goal of which is to guarantee the preservation of the Estonian nation, language, and culture throughout the ages.

Obviously, there is no doubt that our constitution embodies those European values on which European Union law is based and according to which it is being constantly improved. The Constitution of Estonia, in turn, is through the values embodied in it in accordance with European Union law. The opposite situation would not have enabled signing of the Treaty of Accession to the European Union. Signing the Treaty of Accession was preceded also by the process of harmonisation between Estonian legislation and European Union law. From this, an important conclusion can be drawn — the influence of the CAA is directed to the future. There is no doubt that, in the course of implementation of European Union legislation, the Constitution still has to be applied, and at the same time the rights and obligations arising from the Treaty of Accession have to be taken into account. As we know, the *expressis verbis* content of § 1 of the CAA prescribes that Estonia may belong to the European Union proceeding from the fundamental principles of the Constitution of the Republic of Estonia. This enactment gave the possibility to sign the Treaty of Accession to the European Union.^{*17} It is important to note that the European Union accepted the amendment of the Estonian Constitution by the CAA, notwithstanding the fact that the CAA introduced the new term ‘fundamental principles’ to the Constitution while leaving its content unexplained. It seems that the reason for the laconic approach was that views concern-

theory will give the points of departure for the interpretation of the Constitution. Namely, is it possible that the Constitution determines only the process and limits of the political forming process or does the constitutional order enable to be open to the future, adopting the scopes of economic, social, etc. development? Different schools of constitutional law and also the theory of the interpretation of the Constitution are searching the answer to this.

¹³ The original text of the draft CAA was: “Estonia can accede to the European Union.”

¹⁴ The modern Estonian law literature calls the present provision “crisis reservation”.

¹⁵ Chief Justice of the Supreme Court writes about regaining and keeping a balance between an individual and the state in the parliamentary journal *Riigikogu Toimetised* (The Proceedings of the Riigikogu) and he has chosen a motto for his essay by a known Estonian author, H. Runnel: “The state and an individual. The individual is weak; our dream was to create our own country to join our forces through the state. But a question rose at once: would not the state suppress an individual, a free person? It is a continuous search for a balance so that the state could be a powerful co-creation and there would be a free individual whose personal freedom would be warranted.” M. Rask. *Tänu põhiseadusele* (Thanks to the Constitution). – *Riigikogu Toimetised* (The Proceedings of the Riigikogu) 2007 (15), p. 11 (in Estonian).

¹⁶ See for example R. Narits. *Eesti Vabariigi põhiseadus kestab ka uues Euroopas* (The Constitution of the Republic of Estonia will Continue also in the New Europe). – *Riigikogu Toimetised* (The Proceedings of the Riigikogu) 2003 (7), p. 47 (in Estonian).

¹⁷ The *Riigikogu* ratified the Treaty of Accession to the European Union on 21 January 2004 unanimously. The European Parliament ratified the Treaty of Accession on 9 April 2004. When the Treaty entered into force on 1 May 2004, Estonia became a full member of the European Union.

ing the fundamental principles were conflicting, and, indeed, consensus has not been achieved to this day.^{*18} There is no doubt that the CAA is a link between the Estonian national legal order and European Union law. The force that forms the whole is binding, while in the present case two laws that have different importance and meaning are linked to each other. Although the content of law of the linked subjects is different, they have at least two common features: the indicator 'law' and the roots 'the fundamental principles'. And here lies the solution for creating cognition of the fundamental principles and for understanding any further developments. Until the CAA was adopted, the Constitution fully encompassed the criteria for legality of norm creation. After introduction of the fundamental principles to the CAA, a category was created to which the Constitution has to comply. The fundamental principles are the new standard for legality.

3. The juridical essence of fundamental principles

Apparently, we should not doubt that the fundamental principles have a legal meaning in addition to an intrinsic one, as they are provided by a legal provision. Thus, a question arises as to their ability to be legally binding. We find the answer when reading the text of § 1 of the CAA, from which a conclusion can be drawn that, on the basis of § 1, the fundamental principles of the Constitution are binding only for Estonia because the paragraph discusses the fundamental principles of the Estonian Constitution.^{*19} Estonia could sign the Treaty of Accession provided that said treaty was in accordance with the fundamental principles of the Constitution. Therefore we have to agree with the commentaries to the Constitution, which stated: "The accordance of the Treaty of Accession with the fundamental principles of the Constitution had to be verified before signing of the treaty, during adoption of the ratification law in the *Riigikogu*, and in proclaiming the ratification law".^{*20} At the same time, we cannot agree with the viewpoint according to which the proclamation of the ratification law of the Treaty of Accession by the President of the Republic could not be a final guarantee for the accordance of the treaty with the fundamental principles of the Constitution. It is not rational to doubt in the legitimacy of the Treaty of Accession, even in the present situation where it is not clear which principles are part of the set of fundamental principles. Instead, Estonia should be careful when signing other treaties with the European Union. In each individual case, the direct or indirect influence of the treaty being signed on the fundamental principles has to be assessed. Entering into a treaty that is in conflict with the fundamental principles should be avoided. As the doctrine of the fundamental principles is in constant development, it may be that a treaty already signed may newly appear to be in conflict with the fundamental principles of the Constitution. It seems that in this situation European Union law still has to be applied, notwithstanding any conflict with the fundamental principles^{*21}, but this conflict should be resolved by achieving change in the primary or secondary legislation of the European Union. The authors of the commentaries to the Constitution see a third possibility here — leaving the European Union.^{*22} It seems that this option is not a method for resolving conflict between the national legislation and European Union law but a result of a certain political decision, after which the institutional and also legal connections are severed between the European Union and a Member State.

From the approaches described above, it follows that the crisis reservation is not of an offensive nature and does not automatically allow not applying European Union law when it is in conflict with the fundamental princi-

¹⁸ Until CAA entered force, the exact elucidation of the fundamental principles of the Constitution was not a topical issue. Actually, no difference was often made between the fundamental principles of the Constitution, the principles of the Constitution or principles. After CAA entered into force, the situation changed as § 1 of CAA provided the fundamental principles in a legal provision. The question is how to do this. We will find a known author from the literature, who presents a thesis about 'one right answer'. Also in case of so-called hard case there is one right answer. See R. Dworkin. *Bürgerrechte ernstgenommen*, Frankfurt a. Main: Suhrkamp 1990, p. 448 (The original title: Taking rights seriously); R. Dworkin. *No right answer?* FS Hart. Oxford 1977, p. 58; R. Dworkin. *A Matter of Principle*. Cambridge (Mass.)/London: Harvard Univ. Pr. 1985, p. 119. For the criticism of this opinion (also the author of the present article agrees with the criticism to a large extent) see A. D. Wooley. *No right answer*. – M. Cohen (Ed.). *Ronald Dworkin and contemporary jurisprudence*. London 1984, p. 173. When trying to find the answers one should rather contribute to a rational discourse and argumentative procedures. See R. Alexy. *Theorie der juristischen Argumentation*. 2. Aufl. Frankfurt a. Main: Suhrkamp 1991; R. Alexy. *Probleme der Diskurstheorie*. – *Recht, Vernunft, Diskurs*. Frankfurt a. Main: Suhrkamp 1995, p. 109. K.-E. Hain writes figuratively about the "one right answer": "It is clear that this thesis is, philosophically speaking, not on the solid ground but rather on thin ice." See K.-E. Hain. *Unbestimmter Rechtsbegriff und Beurteilungsspielraum – ein dogmatisches Problem rechtstheoretisch betrachtet*. – *Die Ordnung der Freiheit*. Festschrift für Christian Starck. Tübingen: Mohr Siebeck 2007, p. 40.

¹⁹ The fundamental principles of the Constitution are not binding for Estonian members of the European Parliament, for the members of the European Commission, for the judges of the European Court and for the judges of the European Court of First Instance in their professional work.

²⁰ *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 777.

²¹ This is the opinion also of the Supreme Court of the Republic of Estonia in the case 3-4-1-3-06 of 11 May 2006 – RT III 2006, 19, 176 (in Estonian). English translation available at <http://www.nc.ee/?id=663> (8.05.2009).

²² *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 778.

ples of the Constitution.^{*23} At the same time, the provision in § 1 of the CAA is clearly a provision curtailing the primacy of European Union law. The commentaries to the Constitution allege that jurists have difficulties agreeing on this provision, as different juridical schools have fundamentally different opinions about applying the crisis reservation.^{*24} Expecting agreement from the research community betrays a rather simplified conception of the role of the practitioner of jurisprudence. The idea found in the commentaries to the Constitution in relation to the fact that Estonia could not belong to the European Union if it were to nullify the functioning of the fundamental principles of the Constitution or were to jeopardise their functioning could serve as a good reference point for the appliers of law. The commentaries to the Constitution claim justifiably that the fundamental principles of the Constitution belong to a category the origins of which lie in the Preamble to the Constitution. As the Preamble is not an adjunct to the Constitution but the integrating and regulating core of the Constitution, the category of the fundamental principles will become even more important. The broader the generalisations made about the Preamble, the more significant is its integrative role and its impact on the other provisions of the Constitution.^{*25}

4. The possibility of creating a catalogue of the fundamental principles

It seems that the conflict between the high level of abstraction of the fundamental principles and their regulative core is at least one of the reasons we cannot grasp them. So far, neither Estonian legal scholars nor lawyers have done much to explain the essence of the fundamental principles.

Our understanding of the Constitution has to be based on structured thinking. To be more exact, it has to be based on ordered legal thinking. The purpose of understanding law is always to obtain an adequate overview of the relevant reality with the help of the law. The commentaries to the Constitution of the Republic of Estonia (2002) note that, figuratively speaking, it creates an integrated notion of law and that “[f]ormation of this integrated notion — at the same time taking into account the national legal order — has to rest both on the legal order as a specific whole and, as its peak, on the idea of the coherence of the Constitution”.^{*26} It is interesting to note that the commentaries also apply the category ‘fundamental principles’. This is done by highlighting two cognitive achievements (fundamental principles) of the theory of law. These are the principles of consistency and contextuality. The commentary material states: “To understand the Constitution, one has to handle these fundamental principles such that there would not be conflicts between the different parts of the Constitution (consistency) and there would form a clear-cut conception of the place of the constitutional provision in the text of the Constitution (contextuality).”^{*27} It seems that the fundamental principles belonging to the theory of law — or, rather, knowledge and use of them — are the first starting point for creating necessary cognition about the fundamental principles of the Constitution.

The other starting point for explaining the essence of the Constitution could be the rapid developments in continental European legal culture over the last two decades. Such developments had been hindered by natural law for a considerable time. Namely, in such a system one has to see, know, and perceive the correlation between society and law. In fact, law embodies all that is connected to the legally relevant part of human

²³ In the current situation, it is not possible to find any support from Estonian court practice, as the Supreme Court has not treated the relation of the primacy of the European Union law with the fundamental principles yet. The European Court of Justice has indeed said in its judgment C-11/70 *Internationale Handelsgesellschaft* that the validity of legal provision of the European Union cannot be influenced by the conflict with the constitution of a member state. The specialised literature notes that neither the higher instances of the courts of the European Union nor the constitutional courts of Member States have been ready to admit the primacy of European Union law over the constitutions of Member States. See for example J. Laffranque. Euroopa Liidu õigussüsteem ja eesti õiguse koht selles (The Legal System of the European Union and the Place of Estonian Law in It). Tallinn: Juura 2006, pp. 487–524 (in Estonian).

²⁴ Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 8), p. 774. When one reads this commentary (16) carefully, it appears that according to its authors’ opinion, different schools have different viewpoints both on the meaning and application of § 1 of CAA. It seems, however, that the agreement on the meaning is far stronger than on its application.

²⁵ The content of the fundamental principles is not limited only with those mentioned in the Preamble. Already during the preparation of the constitutions of 1920 and 1938, often an expression “the historical constitution of our nation” was used in the National Constituent Assembly and the National Assembly, and when seeking for solutions to problems, the statesmen ceaselessly reached the roots of our constitution — the abundant experiences, values and beliefs of our ancestors, which have been proved by the constant everyday struggle and are proven to be useful also today. See Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 36.

²⁶ The commentaries of the Constitution of the Republic of Estonia have a viewpoint according to which systematical interpretation is being considered as one of the most complicated ways of interpretation that embodies the consistency and contextuality arguments, the notional-systematical arguments, the arguments of principle, special judicious, prejudicial and comparative arguments. See Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 8), p. 31.

²⁷ *Ibid.*, p. 29.

behaviour and the human condition. This connection has a normative (binding) nature. Law is therefore a normative medium not only for information but also for communication. In the context of the fundamental principles of the Constitution, we must turn special attention to this fact, as the level of abstraction of the legal provisions of the Constitution is higher when compared to the majority of the other elements of the legal order. This is why it is more difficult to recognise the social dimensions of law in constitutional law. Thus, in isolating and explaining the fundamental principles, it is extremely important which method or methods we use to reach this goal.

A discussion has begun, however, on the strictness and efficiency of the study of legal methods in the modern specialist literature. German legal scholar B. Rüter represents a viewpoint according to which, in application of the law, the study of legal methods is a necessary protective element for the Constitution. Also, the questions of method are constitutional questions. The answers to these questions show whether the state is a democracy based on the rule of law or is changing into an oligarchic judge state.^{*28} At the same time, another well-known jurist, W. Hassmer, claims that his colleague is overestimating the binding element of the study of legal methods. The study of legal methods is only one of the possibilities for determining law. Determining law is a complex phenomenon and one that remains not fully explained in legal theory, to this day.^{*29}

How are we to act in the light of these almost conflicting opinions? The Constitution does not restrict interpreters and appliers of law to using a certain method.^{*30} Clearly, the Constitution does not prescribe a method for this. How can we find a method, or multiple methods, that can guarantee full coherence with the Constitution? In those states with codified law, the real situation has always been that the systematised collection of law demands connection of the interpreter and applier to the law. Here I agree with the above-mentioned jurist W. Hassmer, who finds that without knowing and using certain rules it is impossible to create a connection with law and that as the connection with law grows closer, the better is the choice of the method.^{*31} Thus, we can put aside the understanding that the more stringent the method the better it is for understanding the fundamental principles of the Constitution. The latter approach may be suitable for a state of law wherein the law decides the case and the judge has the role of a subsuming automaton.^{*32} In trying to perceive the fundamental principles of the Constitution, we face a problem — the Constitution allows neither specifying the fundamental principles without interpretation nor determining how binding they are. Determination of the fundamental principles is not a traditional subsumption problem. Here I would like to remind the reader of Savigny's classical teachings on the study of legal methods. Namely, to find the solution, one has to read the text of the law in full, in order to take into account the systematic connections of the constitution^{*33} and the purpose of regulation, and to find the present-day meaning of the constitution.^{*34} Thus, it seems that the study of methods has never been connected to law but has maintained a rather indifferent, outside position. Yet, by making use of the achievements of the study of methods, one is enabled to connect oneself with law in the most successful way possible and to create the necessary cognition of law.

We have already noted that the fundamental principles of the Constitution of the Republic of Estonia form an undefined legal conception and this situation has not emerged incidentally. The authors of the commentaries to the Constitution conclude: "Therefore, we have to proceed from the list of the fundamental principles of the Constitution offered in the specialist literature and expert opinions, and also from the list of the principles developed in legal practice related to the fundamental principles of the Constitution (if such exists)."^{*35} One can agree with the above only if the necessary conditions have developed for forming the necessary cognition of law proceeding from the study of judicial methods.^{*36}

²⁸ B. Rüter. Methodenrealismus in Jurisprudenz und Justiz. – Juristen Zeitung 2006, pp. 53, 60.

²⁹ W. Hassemer. Juristische Methodenlehre und richterliche Pragmatik. – Rechtslehre. 39. Band, 2008, Heft 1, p. 3. As B. Rüter's rules on the situation where judges are like pianists, W. Hassemer finds that the legislator is like a composer and the applier of law is a pianist who interprets more or less masterly, but of course the piece cannot be forged.

³⁰ The commentaries of the Constitution of the Republic of Estonia note that "Primarily the interpretation of constitutional law has a nature where the methodical preciseness does not guarantee solid results." See Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 30. This does not mean that we should not try to find a suitable method.

³¹ W. Hassemer (Note 29), pp. 3–4.

³² Already K. Engisch wrote in his book 'The Introduction to Judicial Thought' that the judicial logic (thesaurus) does not belong to this world and even in the best circumstances, it is not possible to formulate laws explicitly. See K. Engisch. Einführung in das juristische Denken. Stuttgart: Kohlhammer 1964, pp. 63, pp. 72.

³³ See Note 25.

³⁴ Juristische Methodenlehre. Stuttgart: Koehler 1951, p. 19. H.-M. Pawlowski finds that exactly this means the connection with law (law is taken seriously). See H.-M. Pawlowski. Methodenlehre für Juristen. Theorie der Norm und des Gesetzes. 3. Aufl. Heidelberg: Beck 1999, p. 263.

³⁵ Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 778.

³⁶ We cannot make any final conclusions about the fundamental principles based on the CAA proceedings in the *Riigikogu*. At the second reading of the draft, the chair of the Constitutional Committee referred to the viewpoint of Chancellor of Justice, who was the initiator of the crisis reservation. Also at the second reading of the draft, one of the initiators of CAA claimed that the fundamental principles are the principles that are in the Preamble and the first paragraph of the Estonian Constitution.

The team performing constitutional analysis of the Treaty establishing a Constitution for Europe formed by the Constitutional Committee of the *Riigikogu* contributed significantly to elucidating the fundamental principles of the Constitution. The fifth part of the description of the positions adopted by the team notes that in the applicable law there is no legal definition of the fundamental principles. According to the theoretical treatise, the fundamental principles of the Constitution are first and foremost derivable from the Preamble to the Constitution, from Chapter I ('General Provisions'), and from §§ 10 and 11 of Chapter II ('Fundamental Rights, Freedoms and Duties'). Proceeding from the above, the task force adopted a position that the fundamental principles can be determined either as a closed catalogue or as an open catalogue. The team preferred an open catalogue. A closed catalogue could hinder the further development of Estonian statehood.³⁷ This understanding gave the team the possibility of creating an open catalogue for the fundamental principles. The fundamental principles in this catalogue were stated to be the following: national sovereignty; a state that is based on liberty, justice, and law; the defence of internal and external peace; preservation of the Estonian nationality and culture through the ages; human dignity; the social state; democracy; the rule of law; honouring of fundamental liberties and freedom; and the proportionality of the actions taken under state authority.

It is very important to note that we can find a direct link between the fundamental principles of the Constitution and the values expressed in the position adopted by the team conducting constitutional analysis of the Treaty Establishing a Constitution of Europe: "The fundamental principles of the Constitution are principal values"³⁸, and without them Estonia and the Constitution established on behalf of it lose their essence. The fundamental principles of the Constitution have a universal nature — the constitutions of all other democratic states are based on the same or similar principles. At the same time, when determining the fundamental principles of the Constitution we do not have to proceed from the values set forth in the Treaty Establishing a Constitution for Europe, other treaties of the European Union, or other constitutions of European states."³⁹ It is indisputable that the essence of the Constitution is more than the text of the Constitution. That essence runs significantly deeper than the ideas and opinions that direct community life; enshrine certain moral values, traditions, and customs; and represent a considerable element of sanity and logic. Although the Constitution adopted in 1992 has seen inevitable changes over time, it has not lost its essence oriented toward principal values (read: fundamental principles). At the same time, it is important to remember that "[n]ot all values but only long-lived permanent values, which have been verified by practice countless times and that have always been useful, can be such a criterion."⁴⁰

The specialist literature in the field of law has discussed the historical conditionality of the state and its normative basis enough. A view to the historical conditionality and the highlights of the jural society behind them together are a part of the classical reservations of constitutional law.⁴¹ For that reason, it is not possible to adopt a position according to which the principal conceptions of the Constitution (e.g., human dignity or the fundamental principles) are only conceptions of positive law. They are a kind of art condominium, the essence of which can be perceived both through specifying natural law and via natural cognition.⁴²

Still, I consider it important to note that the modern specialist literature turns our attention also to the dangers of the pronouncement that one must take hyper-positivist law (standing above natural law) into account. Namely, it is considered the case that application of this pronouncement has a tendency to limit liberties. The greatest danger accompanying the pronouncement that one must use hyper-positivist law is thought to be its potential to destroy the unity of the legal order of a heterogeneous society.⁴³ It is claimed that a pluralistic

³⁷ During the proceedings of CAA, Chancellor of Justice made a proposition to use not the concept "fundamental principles" but give the list of the fundamental principles in § 1 of CAA. During the proceedings of the draft, this proposition was abandoned. Nevertheless, the viewpoint of Chancellor of Justice speaks against the closed catalogue of the fundamental principles.

³⁸ The concept here is clear evidence that Estonia sees values as a key to reaching the solution that corresponds to law. Value jurisprudence recognises the value scopes that stand above law and considers them binding. To understand the Constitution, we have to know how to specify value scopes. See *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia. Commented edition) (Note 8), p. 21 (Chapter 'About the conception of law in the context of the Constitution, the fundamental principles of the Constitution, values and the methods of interpretation').

³⁹ *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 779.

⁴⁰ *Ibid.*, p. 30.

⁴¹ See, for example, J. Isensee. *Staat und Verfassung. – Handbuch des Staatsrechts der Bundesrepublik Deutschland*. P. Kirchhoff (Hrsg.). Bd. II, 3. Aufl. Heidelberg: Müller 2004, paragraph 15; M. Herdegen. *Verfassungsinterpretation als methodische Disziplin. – Juristen Zeitung* 2004, p. 873; M. Herdegen. *Verfassungsauslegung und meta-konstitutionelle Interpretationsreserven. – Recht. Wirtschaft. Kultur. Festschrift für Hans Halblitzel*. Berlin: Duncker & Humblot 2005, p. 177.

⁴² K.-E. Hain. *Konkretisierung der Menschenwürde durch Abwägung? – Der Staat* 2006, pp. 192; J. Isensee. *Menschenwürde: die säkuläre Gesellschaft auf der Suche nach dem Absoluten. – Archiv des öffentlichen Rechts*. Bd. 131. Tübingen: Mohr Siebeck 2006, p. 195.

⁴³ The modern proclamation to acknowledgement hyperpositive law is not aimed against state arbitrariness but against the so-called and disapproved advances connected to the development of natural sciences. And finally, it can lead to the distrust of the democratic legislator. See M. Herdegen. *Das Überpositive im Positiven Recht. Von der Sehnsucht nach der heilen Wertewelt zum Kampf der Rechtskulturen. – Staat im Wort. Festschrift für Josef Isensee*. Heidelberg: C.F. Müller Verlag 2007, pp. 137, 142.

society considers thinking in hyper-positivist categories to be a threat.^{*44} But there is a way out of this situation — namely, that hyper-positivist categories state certain demands for legal methodology, and when all that can be called hyper-positivist in connection with law is consistently subjected to the interpretation mechanisms adopted by natural law, the methodological demands stated in those categories are met.^{*45} At the same time, the study of legal methods is not the only way to hyper-positivist cognition. This process is in many ways subjective cognition that has a strong intuitive element to it.^{*46}

I noted above that the fundamental principles of the Constitution are binding only for Estonia. In relation to this claim, a question arises as to whether it is possible that the fundamental principles are valid for all of *genus humanum* but are binding only for us and should be separately explained. Or are the fundamental principles at least partly valid more broadly — regionally and inter-culturally (with so-called Estonian hyper-positivist law)? This question has no single answer, but German specialist literature in the field has noted: “In general, the German hyper-positivists have to go through unpleasant experiences as the constitutional doctrines developed by them are much more their standards of natural dignity than that of legislators of EU institutions or other Member States of the EU.”^{*47} At the same time, the search for hyper-positivist law in Germany has aimed more at the fundamental principles developed by the German constitutional order.^{*48}

To conclude, I think that in searching for the fundamental principles through value-based action, it is sensible to find connections with culture.^{*49} Law has always been, and it remains today, one of the world’s cultural elements.^{*50} Culture has always been one of the ways in which a nation expresses its will and a result of self-actualisation; in many cases, culture is nothing more than an obligatory pattern of human behaviour. We should study the Constitution through the many faces of culture. We have to agree with those legal scholars who proceed from the assumption that the Constitution is not only the basis for the legal order but also an expression of the level of cultural development, a reflection of the nation’s cultural heritage, and the basis for the nation’s hopes.^{*51} Therefore, cultural study of the Constitution is clearly necessary, as the Constitution not only indicates the level of development of a nation’s culture but incorporates a cultural heritage that has stood the test of time. Just as it is not easy to find results by applying value-jurisprudence, it is not easy to find them in a cultural context either. Maybe I am mistaken, but it seems to me that the Newtonian worldview has effects also on jurists. And rightly so. Nevertheless, this worldview is not without its problems, as the mechanistic worldview does not offer solutions to socio-cultural problems. Also, Estonian judicial practice has repeatedly demonstrated that linguistic interpretation is considered better than, for example, interpretation focusing on values.

5. Words in the stead of a conclusion

As the fundamental principles of the Constitution have a regulatory effect – they are binding – the need for finding them is undoubted. We should begin our search with the general legal theoretical knowledge (the fundamental principles), and for forming the integrated notion we have to consider the principles guaranteeing consistency and contextuality. We should continue by focusing on the search for a method, and one effective method seems to be that connected to value-jurisprudence. As the fundamental principles of the Constitution belong to a category of values, with the help of value-jurisprudence we can, and indeed have to, specify the scope of these values. It is in this way that the catalogue of the fundamental principles of the Constitution is being compiled. This catalogue cannot be a closed catalogue. Using value-jurisprudence is an approach that does not allow any closedness; the catalogue of the fundamental principles can **only** be open. As we can see,

⁴⁴ B. Rüthers. Zwischenruf aus der methodischen Wüste. – Neue Juristische Wochenschrift 2006, p. 958.

⁴⁵ *Ibid.*, p. 138.

⁴⁶ M. Herdegen calls this the authority dilemma of hyperpositive law. See M. Herdegen (Note 43), p. 139.

⁴⁷ M. Herdegen (Note 43), p. 141.

⁴⁸ *Ibid.*, p. 143. Herdegen notes that the violent potential for a conflict through the proclamations to hyperpositive law to elucidate the legal order in the modern multi-cultural Germany is illustrated solely by the different understanding of human dignity in the fight against *hijab* or in the education of girls!

⁴⁹ The commentaries of the Constitution of the Republic of Estonia note that the object of shaping the understanding of the Constitution is the text; at the same time the text has to be dealt as a legal-cultural phenomenon. – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 30.

⁵⁰ Already R. von Ihering characterised law as a cultural element of the modern world. – R. von Ihering. Geist der Römischen Rechts auf der verschiedenen Stufen seiner Entwicklung. 1. Teil. 7. und 8. Aufl. Leipzig: Breitkopf und Hartel 1924, p. 14. It is not surprising that one of the sharpest critics of the conception jurisprudence wanted to see law having this quality. It is claimed in the specialised literature that law and understanding it could be considered as a part of cultural sciences. – Festschrift für Otto Sandrock. Heidelberg: Verl. Recht und Wirtschaft 2000, p. 408.

⁵¹ P. Häberle. Vom Kulturstaat zum Kulturverfassungsrecht. – P. Häberle (Hrsg.). Kulturstaatlichkeit und Kulturverfassungsrecht. Darmstadt: Wiss. Buchgesellschaft 1982, p. 21.

the compilation of the catalogue of the fundamental principles is a necessary but difficult task. To complete this task, application of the study of legal methods is not enough. We need the application of modern jurisprudence — value-jurisprudence. Alongside value-jurisprudence and the cognition of the fundamental principles, also consideration of the authority dilemma — a situation involving the problem of method and of the finder of the fundamental principles as a jurist / legal practitioner — has its place. It appears that we can be certain that, if an important part of hyper-positivist law is a part of the normative heritage of human society, it should be possible to find and articulate the content of the natural norms (the fundamental principles). We should not forget that in attempting to find the fundamental principles, we should be able to connect ourselves with our cultural background in both the modern and retrospective context. Taking the cultural context into account is related to historical interpretation but is not reducible to only this, as the Estonian constitution is formally only a century old. At the same time, the roots of the Estonian constitutional order lie in the distant past, as by the 13th century a distinctive socio-political order had been formed in relation with economic, social, and spiritual development and precipitated in part by conflicts with foreigners.^{*52} Certainly, finding and articulating the fundamental principles is not an everyday task for jurists. One can reach all the way to the fundamental principles (to specifying values) not through deductive decisions, which are a usual method for jurists, but through values. It is the non-conditionality of the fundamental principles that enables finding suitable and at the same time different specifications. I would call this aspect of the work of a practitioner of jurisprudence the ‘specification of the fundamental principles’. This is not work with the text of the Constitution but involves interpretation of the Constitution, the aim of which should be development of the constitutional order (statehood) that is open for the future. The goal is, as is written in the specialist literature, “that less of the central parts of material constitutional law would stand in the text and more of them be found in court files”.^{*53}

The Constitution should be realised in the way Prof. J. Uluots spoke of on the 20th anniversary of our constitution: “I personally think that applying and supporting the Constitution peacefully, in mutual understanding and co-operation, would be the most beautiful and powerful evidence of support for democratic statehood and, at the same time, of the maturity of this kind of statehood”.^{*54} These words are of a modern nature. The jural society should be able to find the fundamental principles of the Constitution, respect them, and apply them in the everyday work of its jurists. When this is accompanied by taking into consideration human values — such as peacefulness, understanding, and co-operation — the Republic of Estonia will continue not only for the present but also far into the world of the future.

⁵² J. Uluots. *Eesti Vabariigi konstitutsioonilised aktid (The Constitutional Acts of the Republic of Estonia)*. – J. Uluots. *Seaduse sünn (The Birth of Law)*. H. Runnel (ed.). Tartu: Ilmamaa 2004, p. 278 (in Estonian).

⁵³ T. Würtenberger (Note 12), p. 234.

⁵⁴ J. Uluots. *Eesti poliitiline areng kahekümne aasta jooksul (The Political Development of Estonia during 20 Years)*. – J. Uluots. *Seaduse sünn (The Birth of Law)*. H. Runnel (ed.). Tartu: Ilmamaa 2004, p. 361 (in Estonian).