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SOTSIAALTEADUSTE DISSERTATSIOONID

TALLINN UNIVERSITY
DISSERTATIONS ON SOCIAL SCIENCES

TANEL KERIKMÄE

ESTONIA IN THE EUROPEAN LEGAL SYSTEM: PROTECTION OF THE RULE OF LAW THROUGH CONSTITUTIONAL DIALOGUE

Abstract

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CONTENTS

LIST OF ABBREVIATIONS

EC – European Communities
ECHR – European Convention of Human Rights
ECJ – European Court of Justice
ECSA – European Community Studies Association
EU – European Union
FIDE – Fédération internationale pour le droit européen
ICJ – International Court of Justice
OECD – Organization for Economic Co-operation and Development
PORA – Estonian Principles of Ownership Reform Act
USSR – Union of Soviet Socialist Republics

PREFACE

Estonia has been a member of the European Union already for some years. After euphoria, disappointments, fears and dreams there is a time to discuss conceptual approaches and substantial concerns of our positioning in this developing politico-legal environment. I have been lucky in being invited to be observer, expert and participant of several essential developments, projects and frameworks that inspired me to critically research the relationship between national and supranational legal systems. I have also been lucky having encountered a number of academic and personal friends who inspired me to pursue this thesis.

Every research should, at least initially arise out of a sense of dissatisfaction. I truly believe that among other EU member states, Estonia has more capacity to prove its proactive approach to act as a responsible and future oriented political unit.

The thesis consists of a general article providing conceptual framework and contemporary theoretical circumscription on the transnational European state and deliberative supranationalism as a balanced approach in positioning a state in European Union. The thesis originates from five empirically oriented and theoretical articles on developments of constitutionalism and Estonian legal and educational policy. I hope that the following contribution can be used as a potential to stimulate the debate and provide readers with a coherent overview of the problematics in the field in searching balance between European Union and Estonia's interests.

The current thesis is a synthesis of long-term research, teaching and expertise experiences. The author initiated the academic discipline of European Union law in 1997 in Estonia (University of Tartu) and conducted teaching and research activities at Riga Graduate School of Law, Concordia International University Estonia, International University Audentes and Tallinn University of Technology. The author of the dissertation also contributed the first Estonian language analytical monograph (Kerikmäe 2000) and numerous articles on European law. Currently, the author stimulates excellence in teaching, research and reflection on European integration in higher education institutions throughout the world via membership of the network of Jean Monnet professors, supported by the European Commission (elected to Jean Monnet Chair from 2003, and Head of the Jean Monnet Centre of Excellence from 2007) and presidency in Estonian European Community Studies Association (EECSA).

During the last decade, the author has been involved in providing expert opinions to Estonian government on a) constitutional problems in accession to the EU; b) draft law of the Ministry of Justice on EU accession; c) Influences of European Constitution to Estonian Constitutional order (2000–2004). The author has been *ad hoc* expert for the Estonian Aviation Administration on the implementation of the Agreement on the Establishment of the European Common Aviation Area (2003); *ad hoc* legal expert for the ministry of Justice, Estonian State Government on a) validity of Tartu Peace Treaty; b) evaluating the human rights report on racial and religious discrimination of minorities, (2005); *ad hoc* legal expert for the ministry of Internal Affairs, Estonian State Government on implementation of Council directive 2003/109/EC (2005). The author has been member of panel for recruitment of legal revisers for the European Commission (2002); member of the Council for internationalization of Estonian science and education, Ministry of Education and Science, Estonian State Government and *ad hoc* substitute member of quality assurance committee, 2007; expert for the European Commission, Education Audiovisual & Culture Executive Agency (2008–2009).

The deliberations of the author have been reflected by his recent presentations, some of the most important listed below: University of Lucerne "Lessons to be Learned from EU New Member State", public lecture at law school, (2009); Vanderbilt University "EU Charter of

Fundamental Rights as turning point in building up a civil society" (2009); New Orleans, Southern Political Science Association conference, paper "EU Charter of Human Rights" (2009); "*Õigushariduse ja juristikutse ühtlustamise probleemid Euroopa Liidus*" (The problems of legal education and harmonzation of legal profession in EU). Presentation at Estonian Lawyers conference (Eesti õigusteadlaste päevad) Tartu, (2008); discussant at the workshop "Stimulating excellence and knowledge on European Integration studies – Good practice and future perspectives" at Jean Monnet Centres of Excellence Coordinators Meeting, organized by Education, Audivisual and Culture Executive Agency, Brussels (2008); Corvinus University "Higher education and internationalization from European perspective", Budapest (2008); Nottingham Trent University "Implementation of norms and values of European Union: Comparative experience" at Law School (2005). The author has been a member of the panel at the conference "Ratification of the European Constitutional Treaty: influences for national constitutions" organized by Estonian Lawyers Union, FIDE and University of Kent, Tallinn (2005). Currently, the author is involved as a researcher in the project at University of Lucerne (co-financed by Gerbert Rüf foundation) on the constitutional issues of the Central and Eastern European Countries (a compilation of articles will be published 2010).

Rule of law remains the most important criteria, which can be analyzed independently from the socio-economic and political environment. Estonia should avoid dogmatic and rigid approaches on supranationalism and use dialogue based, contemporary methods in implementation and interpretation of legal norms. The Estonian state should be able to make difference of negotiation (where the protectionist interests are at stake) and dialogue, which is a reciprocal process of learning how to achieve the best possible result for both parties.

INTRODUCTION

Today, Estonia has been member of the European Union already for more than 5 years. During this time, we have worked out basic strategies and mechanisms to accommodate to the new realities and in many ways reached a phase of reflection and improvement. In some fields of social sciences such works have already been published (cf. Kalev 2006, Kalev, Ruutsoo 2005 on citizenship and statehood) but there is clearly more space to reflect upon the developments in law.

There have been quite some authors analyzing the legal aspects of Estonia's membership in the European Union. In addition to the author of this thesis the interested researchers include i.a. Julia Laffranque (cf. 2006, 2007), Anneli Albi (cf. 2005) and others. These treatments have however been mainly directed to the questions of legal-technical analysis of the compatibility of legal systems. In the current thesis the author tries to complement this line of research with elaboration of Estonia's accommodation to the EU legal environment as the development of legal doctrine, i.e. an intellectual and politico-legal process embedding social representations (dispositions, attitudes etc.), legal norms, their interpretations and other relevant aspects resulting in a mainstream understanding of appropriate positions practically dominant in state and legal institutions.

The current thesis aims to reflect on the adjustment of the Estonian legal system to the new EU influenced legal setting. The structuring question is, how (to which extent and in which ways) has the Estonian legal system succeeded to intellectually and practically accommodate to the new legal environment structured by EU *acquis communautaire*. On the basis of the structuring question, the author reorganizes and synthesizes his previous research to a coherent generalizing discussion of the development and current situation of Estonia's legal systems adjustment to EU legal reality, combining law and other social scientific approaches and using qualitative methods of legal interpretation. The broader aim of this reseach is to develop a more structured framework to discuss the issues of rule of law and constitutionalism in the EU legal environment.

This vast problematic for research is approached via analyzing some key aspects of adjustments more comprehensively discussed below, especially in the section on hypothesis and methodology. The author is aware of the explanatory risks of such an approach but has tried to keep these minimal and is reassured by many mutually affirming results of his various research and expertise projects and especially their conformity with the numerous research reports and publications forming the thematic scholarly mainstream in the other EU member states (cf. used sources).

In his several contributions the author has criticized a rigid mentality in expounding supranationalism and underlined the importance of rethinking pre-accession understandings on models of statehood, separation of powers, legal order and legal education. All the spheres of activities mentioned in the articles are towards proving that a better grasp of the role of a state and a constitution in the context of globalization are essential elements for building a solid and sustainable constitutional dialogue with the European Union. In this dissertation, the ideas reflected in the five main articles are synthesized into coherent theoretical approach.

(Kerikmäe 2006) – in the article, the author indicates that in the situation of legal crisis, Estonia turns to the constitutional principles to find a solution; at the same time, the references to the constitution have remained vague and abstract. Prior to Estonia's accession to the EU, the Constitution was the main source of legal reasoning and there was a potential for development of a dynamic approach to EU.

(Kerikmäe 1998) – the article analyses the problems in uniform application of European Union Law from the perspective of distinction of supra- and international law that must both be applied by a member state. The article indicates that (as the position of international law on European Union legal system is not sufficiently clear), there can be situations where the interpretation of supranational law cannot be predictable.

(Kerikmäe 2001) – the author analyzes main theoretical discussions related to the compatibility of the constitution before the accession. The article makes an analytical overview of the proposed amendments.

(Kerikmäe 2009) – the article is an analytical overview of the expert opinions of the author ordered by the Chancellor of Justice (Ombudsman) of Estonia related to the steps taken by Estonia before, during and after the accession to the European Union. The common ground of values is discussed through the perspective of EU Constitutional law i.e Lisbon Treaty.

(Kerikmäe 2008) – the author analyses the negative impact of protectionism in higher education in the context of globalization and assumes that the rule of law requires legal professionals to be sufficiently aware of the methods of legal implementation in the context of multi-level governance.

The main argument deriving from the research and provided by the author is that the dynamic constitutional doctrine facilitates legal certainty and rule of law. However, the Estonian state has been rigid in communicating the challenges related to the issues of sovereignty and state competences. The current thesis concentrates on analysis of the political-legal choices of the Estonian Republic in positioning the relationship between EU supranational law and the Estonian constitution, attempts to demonstrate the lack of dynamic legal reasoning and interpretative pluralism within our legal system, characterizes pathways to a more viable model and also suggests that the prerequisite for paradigm depends on renewed foundations of contemporary legal education.

The current thesis presents a theoretical framework, explaining the interlink between rule of law, state and its constitution in the context of transnational statehood i.e. being member-state of the European Union. The modern theory of deliberative supranationalism is summarized to indicate possible developments for a member state to take a pro-active position in the European Union. The theoretical part concludes with the synthesizing table containing indicators of rigid approach (traditional supranationalism) *versus* dynamic approach (deliberative supranationalism) that are used to analyze the positions taken by Estonia in the field of developing its constitutional doctrine. The empirical part concentrates on the analysis of different stages and problems in the development of Estonian constitutional doctrine. It analyses the techniques and attitudes used by the Estonian state representatives (reflected in the formulation of the Amendment Act to the Constitution and the judgment of the Supreme Court relevant in the field) through the indicators elaborated on the basis of theoretical part of the thesis.

The focus of the thesis is to elaborate the mechanisms enabling to guarantee the rule of law in the environment of new EU legal environment. Conceptually, rule of law is a contested ideal that can be characterized in various ways. However, the recognition of the common elements of the rule of law can be proved through the constitutional texts and judicial practice. As the thesis is not targeted to conceptual redefinitions this widely accepted core of rule of law is used here broadly in line with Fuller (1964, cf. also section 1.1 of this article). The thesis approaches rule of law primarily as the situation where the subjects of law broadly understand the scope and limits of their rights and duties. As the empirical material focuses to basic documents and elite level I will further restrict my discussion on rule of law to EU and state institutions and the fundamental legal framework (e.g. the everyday technical implementation acts and practice are used only when of relevance for the fundamental framework). The author

seeks for an instrument or device in securing certain legal principles, common to all European states (cf Mann 2003). The discussion is addressed to the state institutions that are, in any conditions (i.e. EU membership) obliged to ground their decisions to the rule of law and create mechanisms (such as constitutional dialogue) to guarantee that the rule of law is protected. The "right and just" decisions in the society must be grounded to the main law – constitution, essential safeguard of the rule of law. The status and capacity to use constitution is a determinator of the adaptiveness of the state in changing world.

The disciplines used in the study field are balanced among governance, political, social and legal theories. Combination of methods in the field of state analysis and legal approach can always be seen as the symbiosis of realism and legalism (Kratochwil 2001: 37). Prevailing legal theory is reflected as the constellation of ideas that shape our conception of law: how it should be formed, the purposes of its development, and its meaning (Hackney 2007). In conclusion, the research in this particular field falls into the category of normative political theory, by which prescriptive or evaluative statements are treated as sets of *propositions* that must be internally consistent and must be defended against opposing views, rather than subjective *opinions* whose validity cannot be established through argument (Bauböck 2008: 41). The prescriptive or evaluative elements are seen in parts of the research that contain legal text or jurisprudence, analysed in the way that presents them in the light of the theoretical framework elaborated by the author, gives them a meaning deriving from conceptual approach and analyzes them through the determinative categories represented by the system of indicators (of diametric approaches of constitutional doctrine). The author is not trying to define "constitutional doctrine" neither "rule of law" as such but uses the term as to frame the aforementioned categories that should become vechicles or means to protect rule of law through identifying specific legal problems related to the EU membership. The complexity of the issues involved requires the focusing of the research to rule of law and methods for protecting it in the context of EU membership. Using the words of Alter, "the more law is flouted, the more law is instrumentalized to justify state actions, the less legitimate law and the judicial process are in the eyes of individuals or governments and the less states and individuals believe in the sanctity of law or the rule of law… the less there is a sense of reciprocity…respect for the law is eroded, and the rule of law becomes a sham" (Alter 2001: 211). The author finds that the arguments based on rule of law may efficiently change the nature of the political process that are often presented as excuses to abandon legitimacy and also provide a good analytical starting point to analyse the politico-legal processes of a member state adjusting to the legal environment established by European Union.

Relationship and communication between national and supranational (EU) law, including implementation and collision issues have been discussed by several authors. Theoretical approaches can be divided on two main categories. From supranational level, the concepts of increasing differentiation have been critizised (Junge 2003; Nugent 2006). The main forms of differentiation discussed are:

- Multi–speed. All member states are moving in the same direction but, for reasons either of choice or capacity, are doing so at different speeds;
- *Á la carte*. All states participate in core policies, but outside the core choose the extent and nature of their involvement;
- Overlapping circles. States group together in different combinations in different policy areas, with overlappings occurring between the groupings;
- Concentric circles. All states participate in core policies, but some states (the inner circle) also participate in a wider range of integration policies while the other states (the outer circle(s)) are less integrationist (cf. Junge 2003).

In the context of the differentiation, the idea of the current thesis – to find a dialogue between national and supranational level is relevant. In the context of becoming "citizens Europe", there must be a common understanding of legal framework among member states and EU institutions to avoid or reduce protectionist elitism and non-equality of members.

From national level, the approaches are concentrated to the question, how to adjust member states legal orders with developing EU legal system. The supremacy of EU law has been separately discussed through the jurisprudence of ECJ but also as reflected by the national jurisprudence (see, for example, Coles 2004: 99–115). Beside of the papers of the authors mentioned in the theoretical part of the current paper (especially those who are reflected by the table of diametric measurement of constitutional doctrine), there are several attempts to analyze the legal problems of concrete jurisdictions, related to single member states and/or to legitimacy-building of the European constitutional law. Majority of these researchers, representing academic approaches from the point of view of concrete member state, are directly or indirectly related to the concept of *Rechtsstaat* as a common determinator of the discussion (Tanchev 2005; Kellermann 2005; Czuczai 2005).

As to the implementation and *techniques* of interpretation of EU law, there are numerous approaches explaining and analyzing the EU legal norms and judicial practice to clarify the concept of direct effect, unconditionality, clearness etc (for example, EU law to be capable for judicial enforcement in national courts) (see Deards, Hargreaves 2004: 77–90). Collision between national and supranational law can be avoided by the rules commonly understood from nationnal and supranational levels (Martinico 2008; Stihl 2007). Therefore, the constitutional dialogue can be seen as a device to achieve the best possible level of *Rechtsstaat*.

It is only natural that the knowledge and experiences of the European legal culture will become reflected in the formulation of Estonian constitutional doctrine in its position as EU member state. The current thesis contributes to the process by developing a conceptual framework to analyze the patterns for Estonian *modus operandi* in the light of European Union supranationalism. The suggestions made by the author are mainly addressed to Estonian state institutions (such as Courts, Parliament and Government). However, using constitutional dialogue as a method to secure rule of law would also benefit the whole society as the firm position of the constitution is a basis for legal certainty and clarity and creates relevant links between citizens and state institutions.

1. CONCEPTUAL FRAMEWORK

1.1. RULE OF LAW AS A DETERMINATOR OF THE MODERN STATE

Rule of law (sometimes called "the supremacy of law") has been a commonly understood criterion for analyzing how just and non-biased the activities of a state are. It is a legal principle which "provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application" (Black´s 1990: 1332). Law and state authority are interdependent. From historical point of view, most societies seem to have required that some rules, particularly those relevant to the protection of life and property, be set monopolistically. The fact that this has been the province of the state leads to the conclusion that from certain necessity autonomous state power ultimately derives (Mann 2003: 53). As the power of statehood derives from certain needs, legal norms are the essential pre-requisites of state existence. The law has a dialectic relationship with society and cannot be replaced long-term with arguments rooted merely from (supranational) policy, economic necessities etc. when implementing state power.

Law, by its nature, is linked with all the activities of the state domain. By Gearey who builds on Weber's insight that law's rational organization of economy is relevant for contemporary society: "...it makes for predictable decisions that, in turn, allow economic relations to be regulated and disputes determined" (Gearey 2005: 90). Therefore, rule of law is an essential element of a modern democratic state. (All of the constitutional texts of European states prioritize the rule of law, EU "screens" the implementation of the concept through its so-called Copenhagen criteria test) Vincent who analyses the reasons why representatives of schools of other social sciences and law do not always share similar methods, however emphasizes that "the rule of law is a central facet of the constitutional and *Rechtstaat* (the State organized around the rule of law and individual rights) traditions" (Vincent 1996: 115).

There are variety of definitions of rule of law *per se* (for example, the French concept of l'Etat de droit is having more emphasis on fundamental rights and was initially popularized by eminent scholars in order to promote the idea of judicial review) (Pech 2009: 36) but there are elements which have to be recognized as necessary for a society aspiring to institute the rule of law (cf. Fuller 1964):

a) Laws must exist and those laws should be obeyed by all, including government officials.
b) Laws must be published.
c) Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed.
d) Laws should be written with reasonable clarity to avoid unfair enforcement.
e) Law must avoid contradictions.
f) Law must not command the impossible.
g) Law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed.
h) Official action should be consistent with the declared rule.

At its core, this constitutional principle means that public power is constrained by law. Rule of law cristallyzes a variety of legal standards and values, it gives a coherence and purpose to the whole politico-legal system and legitimizes the state actions (see Pech 2009: 33, 44). In the contemporary context, constitutionalism and rule of law become almost indistinguishable (Verhoeven 2002: 18–20). In other words, constitutional dialogue should embrace society even in conditions of transition to guarantee that state is operating in the format of *Rechtstaat*. Also,

the concept of state is in constant development. Therefore, one must also consider the variety of academic views on the position of *Rechtstaat*. Even if one is to agree with the assumption that traditional *Rechtstaat* is getting replaced with the legislation-State, "rather a form of state devoted to the business of making continual improvements in the life of community by means of explicit legal innovations" (Verhoeven 2002: 18–20) it does not change the very nature of the concept of the rule of law but rather relates to the transformation of State activities. Despite of terminological differentiation in theory, the history of Europe has shown that the ignorance of law and justice when implementing state power leads to tragedy. Even and especially after prevalence of totalitarianism and cataclysms, Europe has always emphasized the element of law in rebuilding societies that frames human will and forces everyone to use his rights (Hattenhauer 2004). Pierson (2007: 14–15) states that as the constitution is the rule of the game of the political process; under a law-governed regime, politicians should themselves be subject to the constitutional order and the laws which they have themselves helped to make and enforce.

There are authors questioning the social contract as conceptual foundation for the state. However, it is rather an attempt to avoid societal slogans from being used in explaining the role of just and effective state apparatus (Verhoeven 2002: 24–26). Estonia has proved itself rather as "state made state" type of formation than "society made state" type of formation where elitism as a phenomenon plays great role in making law (Pierson 2007: ch 6). This is also reflected in the current thesis, discussing Estonia's choices in developing legal reasoning to find a proper constitutional doctrine.

Debates about the proper nature of the state have given rise to some of the most important and difficult problems in the whole of social sciences: the relationship between value judgements (the normative) and matters of fact (the empirical), between internal (endogenous) and external (exogenous) explanations of societal development, between contingency and determination, between generalizing and individualizing methodologies (Pierson 2007: 1).

In this thesis the author uses a more conventional Weber-based approach of the state relating it to the changed contemporary reality. Nowadays, instead of a very rigid perception of a state with unitary power concentration and exclusive borders it has become widespread to discuss statehood in a wider context with states, institutions and citizens operating in a more heterogenous local, national, regional and global setting. This is often characterized using the concept and theories of multi-level governance (cf. i.a. Marks 1993; Marks, Hooghe 2000; Bache, Flinders 2004) and analyzing the power interplay between various practical levels of contemporary governance with more sophisticated patterns of governance (cf. Pierre, Peters 2006).

In any case, rule of law cannot be sustained without taking into account the link between societal needs and state responsibilities. Normative technical – minimalistic reforms can be only temporary solutions. Even the dynamic policy of contemporary state has to be based on the principles closely related to the rule of law such as legal certainty.

The Estonian legal system has historically been based on constitutional values and the principle of continuity (*restitutio ad integrum*). Estonian scholars have always emphasized the relevance of rule of law (Kliimann 1939; Maruste 2004). In a democratic state, rule of law does not mean only that the decisions are made on the basis of enacted legal norms. It means that public interests and individual rights must be balanced. In the light of EU membership, there are several overlappings and common principles at both – member state and supranational level. Supranationality of EU law is an axiom. However, in case of *lex scripta* (written law) of any decision-making power contradicting with principles such as legal certainty, egality and other principles protected by rule of law, the political pragmatism should be rejected. The rule of law must remain a determinator of any state activity in any conditions i.e in the context of

being a member state of the European Union. A clear status of the constitution is a prerequisite of legal certainty and a guarantee for rule of law. The *leitmotiv* of the dissertation is the need for discovering proper legal doctrine and techniques of legal reasoning that can become a basis for Estonia's proactive selfpositioning in the European Union.

1.2. TRANSNATIONAL EUROPEAN STATE AND LAW

In recent years, the ascendancy of the neo-Weberian perspective has been challenged and one of the recent directions suggests that the concept and discourse of the state is one part of a broader process governing and shaping our very conduct and bringing it in line with various governing strategies (Hay, Lister 2006: 13; Chernilo 2007: ch 10 on Luhmann and Habermas). After becoming a member of the European Union, several states had to amend their constitution or rethink the interpretative mechanisms in their legal societies. To analyse the contemporary relations between state and law, certain dialectic moments are relevant. Thus, "today's European legal theorist needs to look beyond his own limited horizon, too cluttered up with specific codes and laws" (Grossi 1999: 7). Beside an understanding of how the rule of law is formulated in Europe, legal theory could be one of the major tools to understand the expected functions of contemporary state. There are several contextual aspects in implementing the rule of law where the European Union is imperfect (Grossi 1999) and the EU legal system cannot be clearly defined as a *Rechtstaat* (see: Kerikmäe 2000: 65–66). The EU rule of law, based on landmark judgment (article 6(1) makes reference to a "Union founded on the rule of law". Also, according to case-law of the ECJ (294/83 Les Verts v Parliament [1986] ECR 1339): European Community is "a Community based on the rule of law". By Pech, "this widespread support for the rule of law, unfortunately, has not helped clarify the meaning and the scope of the Court of Justice's formula") (Pech 2009: 4) has "progressively and rightfully become a dominant organizational paradigm, a multifaceted legal principle with formal and substantive elements which nonetheless lacks "full" justiciability" (Pech 2009: 1)

New developments in the context of globalization emphasize the importance of community (lawyers are particularly suited to this work because they can "promote reciprocity" and design a social system that has mass support because it is seen to be fair (Gearey 2005: 91). Acceptance of the principle of reciprocity and recognition of the rule of law as a "common principle" can be seen as a precondition for establishing dialogue between national and supranational levels. As Verhoeven rightly points out, the EU cannot define fundamental principles e.g. rule of law in an autonomous manner (Verhoeven 2002: 322). The author agrees that the Union is obliged to respect rule of law as it is common principle of member states and that "national constitutional traditions offer both the reason why fundamental principles are to be respected by the Union and a basis for determining what these principles mean in the Union context" (cf. Verhoeven).

The new phenomenon of global juridification implies the danger that constitutionalization processes may be played out outside national and political institutions (Walter 2001). Globalization, internationalization and transnationalization are actually terms that may be used interchangeably– this concept being the dominant paradigm not only for international politics (Stern 2001: 247) but also for the traditional nationstate. Globalization is seen as a relevant factor in altering the context of statehood, however, "yet this is in no sense to pronounce the death of the state" (Hay, Lister 2006: 15) even though some of the authors suggested *vice versa* more than decade ago (cf. i.a. Bellamy, Castiglione 1997: 91). The problematics of globalization is directly related with the issue of sovereignty. Lefebvre, introducing a theory on "space of a state", insists that globality *(mondialité*) forces the state to maintain certain func-

tions, including that of representation, and there must be a control over the external influences e.g. a production of a social space that consists i.a. of laws upheld by values (Lefebvre 2003: 84, 99–100). Thus, the values and interests of the society, represented by state institutions are legitimized by the legal norms, primarily by the constitution of a state. Habermas is referring to the "normative ambiguity" that derives from mixture of internal and external legitimacy, but finds that the relationship between cosmopolitanism and the nation-state should be complementary rather than oppositional (see Chernilo on Habermas, 2007: 156–158). Dogmatic prevalence of external legislation without interpreting it in the light of internal legislation (national constitution) may, therefore bring consequences such as weakening of the functions of statehood. A constitution, fundamental law of a state, comprises the principles upon which the state institutions are operating and rights and obligations of the citizens are prescribed.

Globalization for Estonia is primarily related to European Union as "mini-international society" (term used by Clark 2005: 175), which:

a) Increasingly harmonizes the laws and practices.
b) Filters and assimilates other international influences to the European context (One example of "filtering" is double bindingness of international legal norms, adopted outside of EU, but referred by EU law or European Court of Justice. The priority of European interpretation is evident, as international law is based on consensualism but EU legal system on supranational character and principle of loyalty).

Therefore, certain transformation of the state´s functions is unavoidable. The main question of how far the transformation can reach is directly related to the concept of (remaining) sovereignty which, "is a legal institution, it comprises constitutional independence and regulative rules" (Sorensen 2006: 199). I tend to agree with the authors who argue that the real debate is about interpretation of the new development or with those, who say that in the EU context, "the implementation is a key issue" (Sverdrup 2008: 197).

Bulmer, referring to Olsen, using the term "Europeanization", indicates that the most important elements of that process are related to legal society, namely "central penetration of national systems of governance" but also "exporting forms of political organization" (cf. Bulmer 2008). The term itself is deployed where the EU seeks to export its values which may take place from one EU member state to another, mediated by the EU (Bulmer 2008: 47). Transferring "Europe" means, above all, transferring European(ized) beliefs, values but also European rules and norms (and their interpretative concepts reflected in general legal culture).

The White paper for Multi-level Governance mentions five lead principles of good governance (openness, participation, accountability, effectiveness and coherence) (see Follesdal 2008: 22) (Follesdal is questioning why the principles of political equality and rule of law are not listed there). Furthermore, despite of the imperfection of *de lege ferenda* (what the law ought to be [as opposed to what the law is] i e the aforementioned White paper is a preparatory phase for adopting binding legal document), the whole process should be based on reciprocal reflection: member states are constructing the image of the European Union, which again, influences their being "European". The national and supranational legal systems are closely intervowen and interdependent, one cannot be read and fully understood without regard to the other (Martinico 2008: 3). However, European governance can be seen as paradox - there is a growing gap between the citizens' expectations and disappointment towards the resolution at the European level (Aragáo 2008: 52). The solution depends upon the openness of a member state to become a mediator between domestic society and European Union, using deliberative arguments. "Do we simply trust to the discretion of national bureaucracies to implement EU regulations with sufficient uniformity to be both fair and efficient…?" (Shapiro 1999: 33) or "do we really wish our officials, or our citizens, blindly to follow what they perceive from the European Union? (Martinico 2008: 28). These rhetorical questions refer to practical political and legal challenges.

From the perspective of approaching the rule of law, inter-national and supra-national legal norms differ substantially. The international community has never been claimed to be based on rule of law but rather on political consensus that is reflected in international public law. On the contrary, the European countries and EU itself see the rule of law as definite pre-requisite for just administration more in line with the pattern of national law (the phrase "rule of law" appears often in the judgements and opinions of the European Court of Justice, and is reflected in the preliminary rulings and opinions of the Advocate-Generals, see for example: Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 15 May 2008 (1) Case C-228/07Jörn Petersen v Arbeitsmarktservice Niederösterreich, Reference for a preliminary ruling from the Verwaltungsgerichtsh of Austria). Therefore, it follows that the rule of law presents great critical potential in relations of member states and EU: It exposes shortcomings of different kinds and at different levels in the shift towards global government and internationally induced legislation. Yet it might also help to repair, conceptually and even practically, the defences resulting from the shift suggesting ways of seeing, or reading the problems as opportunities (Eijsbouts 2001: 6).

The European Union brings us to multilevel governance that complicates the decision making process. Estonia as a member state of the European Union certainly has a variety of choices from non-critical obedience to parochial resistance to EU initiatives. While the latter is more a reaction than a future -oriented strategy there is also a contra argument for those who are praising political low profile pragmatism and ultra-superiority of EU rules over national initiative. Implementation (of supranational EU law) also involves a balancing act between, on the one hand, securing homogeneous implementation and, on the other hand, allowing for some domestic discretion (Sverdrup 2008: 199–200). This discretion can be based not so much on margin of appreciation and exceptions enabled by supranational EU law itself but rather on the principles inspired from usage of national constitution as a living instrument that reflects the values of society. The dialogue between two constitutional levels is inevitable for securing rule of law if we hope to build up the EU as a *Rechtstaat* that has legitimacy in decision-making. By Martinico: "As the distinction between interpretations and politics diminishes, the need for pluralism in interpretation increases". (Martinico 2008: 37). Even in the EU legal system the member state is not justified to abandon the rule of law assuming that due to the EU membership, the power of legal argumentation is monopolized by the supranational level.

2. CONTEMPORARY THEORETICAL CIRCUMSCRIPTION

2.1. DELIBERATIVE SUPRANATIONALISM

The membership in the European Union is an impulse for several reforms for member states in the context of rethinking their constitutionalism and legal reasoning. "Many of the vital problems that society is trying to deal with are *multidimensional*, *complex* and to some extent, *transnational* – in their origin, their causes and the problem solving stage. All these three qualities represent substantial challenges to our present political and legal decision-making systems" (Sand 2004: 62–63).

European (legal) identity cannot be seen as final but as an ongoing process. The European Union is not just post-national union, but it is rather a problem solving and value based construct. Habermas conceives the EU as a vehicle to preserve and further pursue the liberal and democratic achievements of the European nation-state (McCormick 2007: 19). On another hand, contributing to the establishment of European values that are common to the EU and member states can be seen as a primary task for any member state, including Estonia. The general recognition of a need for legitimacy as a component of the rule of law for the European project does not need another apologism and a shared (European) collective identity "would seem to be good means to the end envisaged" (Horváth 2007: 72).

However, the relationship between European Union law and national law is one of the most debated issues of European constitutional law (Mayer 2006: 87; Kerikmäe 2000: 40–44). There are three distinct views of member-states on primacy of EC/EU (in legal theory, the disdinction is made between EU and EC law. EU law presents the whole body of EU level regulation, including intergovernmental law II and III pillars, EC law can be seen as purely supranational legal institution) law:

a) Primacy of EC law according to ECJ case-law (Belgian *Cour de Cassation* in Le Ski 1971);
b) Primacy of EC law according to national law (French *Cour de Cassation* in Vabre 1975);
c) Primacy of EC law according to national law, but within certain limits (German Solange I 1974 and II 1987).

Primacy of EU law over member states constitutions has always been controversial as the national constitutions are the source of allowing the EU law to enter to the national legal system. Verhoeven proposes constitutional homogeneity to be a precondition for loyalty to European Union. The author agrees that multiple masters (EU law and national constitution) are *per se* a source of conflict but also states that "that conflict cannot be properly resolved *ex ante*, say, making the European law automatically "trump" national constitutions" (Verhoeven 2002: 319). This kind of homogeneity cannot be (legally) framed, but must be seen as a process where the values emerge and develop through the communications between the two levels. To assume that supranationalism is a dogma and the competence of the EU cannot be influenced by the member states is misleading, taking into account the principle of Maastricht treaty, art 6 (1):

"The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States"

A rather radical view is that supremacy (of EU law) can be conceived as a conflict rule, entailing, in the first place, the "obligation to disapply" (Prechal 2007: 55; Roosebeke 2007). The very idea is still not to deny the supremacy of EU law in general but to urge the national legislator to interpret, think and consult. Even if the hierarchical relationship between national

and supranational legal systems can be assumed, the automatic hierarchical relationship of the legal norms in the implementation process cannot be presumed. As Prechal suggests: "Despite some scholarly efforts, this conclusion cannot be drawn from the case law of the European Court of Justice which, moreover, leaves the necessary space to the national legal systems to accommodate Community law provisions" (Prechal 2007: 55–56).

There are also critical approaches to the well-known concept of the autonomy of European Union law. Under the rule of law, the absolute autonomy of European law cannot be presumed, even if the EU legal system is often declared to be *sui generis*. Barents warns, that in such an approach Community law is in danger of being conceived in a visionary way, strongly influenced by ideology and idealism" (Barents 2004: 16). However, the author does not agree with this kind of purely formalistic approach which prevailed decades ago to guarantee the sustainability of EU legal system.

In order to protect the rule of law, a legal judgement should be based on deliberations. The modern theories concerning the EU legal system and primacy of the supranational law are leading to the interpretation that takes into account arguments both from national and EU level. The so called "deliberative supranationalism" (deriving from the ideas of Habermas, Weiler, Haltern, Mayer and Koh) is concluded by Zürn, by whom, it must guarantee:

a) That in the deliberations surrounding the enactment of a particular regulation the grounds brought forward for and against it are acceptable to all the parties involved.
b) That it requires "arguing" about relevant problems.
c) That the general public is given the chance to articulate its opinions on matters. (Zürn 2005: 37).

In general, deliberative supranationalism seems to be a modified version of Habermas theory of "deliberative democracy" by which democracy is seen essentially as a process of institutionalized public deliberation on matters of common concern (Verhoeven 2002: 39–50). It follows, that real constitutions are never static or complete but are constantly open to *critique* and review. What the constitution is must rather be sought in the living and evolving "*aquis*" of constitutional rules and principles of a particular community (Verhoeven 2002: 53).

Walker's proposal to build a meta-constitutional frame with the cosmopolitan nature, "which lacks tradition, well-defined and well-respected rules of amendment, and live in the shadow of a pluralist conception of authority which shares and challenges their jurisdiction…" (Walker 2001: 29) is a utopian and vague concept. Deliberativist ideas are closer to, what can be called "common constitutionalism, by which "a constitution should be seen as a form of activity, an intercultural dialogue in which culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time…" (Shaw 2001: 347–351).

Non-dependency from direct political pressure is expressed by another aspect of deliberativism as a modern approach. The European Union supranational character can be seen as universal authority, described by Raadschelders, by whom "when the universal authority crumbles…, horizontal integration becomes the need to establish an absolute independence from neighbors" (Raadschelders 2000: 217). On the one hand, there is a contradiction – the EU is a combination of values (and norms reflecting them) that derive from systems of different cultures. However, the most influential member states are not changing their state functions and legal reasoning as dramatically as members that joined later, under the conditions, elaborated before their accession. On the other hand, there is no contradiction with the idea of reciprocity and deliberative supranationalism, as the EU authority should be autonomous or non-independent from any member-state. The *naïve* question of "bottom-up or bottom down?" could be rejected. The solution seeker could, instead rely to the concept of "societal constitutionalism" (which is an alternative to the normative, state-linked constitutionalism). The EU legal system

(including the legal systems of member states) must be based unconditionally on the rule of law, not economic and political influences of different interest groups.

Joerges, concluding and promoting Teubner's concept of societal constitutionalism, is giving a definition: "Societal is autonomous, self-creating and self-legitimating: globalization is not just about economy, but is driven by many more social sub-systems which create a new global pluralism which exerts (self-)control through a "decentralized multiplicy of spontaneous communication processes" (Joerges 2004: 373). This is a combination of, what can be described as "the ideal constitution" which self-constitutes in the form of ideas, and "the real constitution" (Allott 2001: 69) which self-constitutes through the everyday willing and acting of society members. This approach leads to the dialogue as an essential element included to the pro-active EU member states constitutional doctrine.

2.2. DIALOGUE AS AN ELEMENT OF MODERN CONSTITUTIONAL DOCTRINE

Even if the EU law can be considered less and less "foreign law" for Estonia (and other member states), the dangers and obstacles in the use of legislation not adopted by the national legislator can be analyzed by the following criteria (Markesinis, Fedtke 2006: 139–173):

a) lack of precise information
b) lack of up-to-date information
c) detailed consideration versus generalities
d) the impact of socio-economic and political environment
e) legal certainty
f) do domestic courts have enough time (willingness, knowledge) to deal with other legal system
g) the lack of "depth" of analysis of foreign legal ideas

In recent years, the metaphor of "dialogue" has become increasingly ubiquitous within constitutional theory as a way of describing the nature of interactions in the area of constitutional decision-making. In general, the greatest potential for achieving a normatively satisfying understanding of constitutional dialogue emerges when the contributions of equilibrium and partnership theories of dialogue are synthesized (the concept of constitutional dialogue has a discourse on participatory democracy i.e. the dialogue is open to the direction of civil society, the current paper is framed to discuss the techniques of constitutional dialogue between EU and member state levels) (Bateup 2006). This indicates that a member state must be able to construct constitutional doctrine to avoid the problems in implementing EU law. The term "constitutional doctrine" can be defined as "the currency of the law" (Tiller, Cross 2006: 517), the set of principles and techniques, legal reasoning used in the process of implementation of law through the test that derives from the interpretation of the constitution.

The vital idea of EU modern constitutional doctrine is to establish a ground for constitutional dialogue between supranational and national levels. The decisive comparatists and tools for effective reciprocity are primarily the judiciary in both levels of EU legal system, including the European Court of Justice. In its daily activities it is permeated with the values of the legal systems of the constituent countries (Lenaerts 2003).

The constitutional dialogue could be instrumentalized by using the system of EU general principles (Kordela's 2003: 581–582), by which the need for deliberativism can be tested. Before applying a European Union legal norm, the professional should test it by the system of principles:

a) substantial premise (justified by fundamental human rights, the principle of legitimate expectations)
b) formal premise (cannot contradict the principles clearly formulated, such as proportionality, legal certainty, non-retroactivity, equality, subsidiarity)
c) procedural premise (must be recognized)

Only after successfully examining the legal norm through the above mentioned test, the argument of praxeological necessity i.e. supremacy and direct effect can be assumed. The examining process should take into account the legal reasoning both from national and supranational levels.

EU law is not only about written norms, it is in large part related to and derived from the jurisprudence of European Court of Justice (ECJ) which reflects the implementation issues. Beside that, there exists a kind of European legal argumentative dualism, as the opinions of Advocate Generals (suggestions to the judiciary of ECJ) have at least the same relevance, operating in the field of "the discourse of the personal and subjective construction of purposive judicial solutions" (Lasser 2004: 141).

The problems in positioning the EU law into the domestic legal system are even more evident in the cases where the EU rule or precedent is not commonly understood or is differently interpreted. By Williams: "Identifying a central principle is an essential step in the process of judgment. But it is not enough. A mere rhetorical observation… is patently insufficient. We need to look further for guidance. What concerns us is how the principle is or not fulfilled. In other words, the principle is not the last word in values. We must also consider the means by which it is brought into effect. Only then can effective evaluation be made as to the extent to which the principle has been and is realized" (Williams 2007: 82).

Clarity of conception, capacity for evolution and enforcement, transparency (Williams 2007: 87–107) (Williams is using the concept particularly in context of protecting human rights, however, it can be and must be used in broader terms) certainty and foreseeability, analysis of cost-benefit balance, cultural dimension and preconditions are the keywords that must establish EU related (legal) policy by the member state. Professionals should be aware of borderlines of competences and be able to use effectively different techniques and levels in making strategies that are working for Estonian welfare such as infranationalism (Weiler 2000: 277–278) (Such as infranationalism: opportunities in lobbying at forums related to comitology, as stated by Weiler: "comitology is responsible directly for fundamental societal decisions on the allocation of risk and its costs and indirectly for significant decisions on the allocation of resources and redistribution") intergovernmental negotiations and so called "forum shopping", a term that indicates seeking the consensus among professionals of several other member states before presenting a legal argument against the possible violation of the rule of law caused by the EU legislature (in general, European Union case law includes numerous examples where the secondary legislation regulations, directives, decisions are adopted in violating principles embodied to the primary legislation founding treaty and amending treaties. Also the problem of "deficit of democracy" still unbalanced legislative power and misinterpretation of new EU legislation may create the violation of legal certainty and rule of law in general) that can be explained through Fuller's definition of rule of law (compare with the 2.1):

a) There are several overlappings in EU legal regulation, the violation of EU law has not always been objective. Beside of probematics related to the European Commission, the European Court of Justice has been accused to be biased, protecting the interests of European institutions rather than member-states and individuals if the legal norms are not sufficiently clear and precise (Kerikmäe 2000: 10–11, 91, 118).

b) EU laws are not always possible to read in national language. For example, in its judgment in case Skoma-Lux sro v Celní ředitelství Olomouc (C-161/06) the Court of Justice held that the obligations contained in EC legislation which has not been published in the Official Journal in the language of the member State in which enforcement is sought cannot be enforced in that State.
c) There have been examples of retrospective legislation i.e *ex post facto* such as Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC (see also Raitio 2003)
d) EU laws are not always written with reasonable clarity, as admitted by EU institutions and proved by academic research (cf. Waterbury 2008).
e) Law must avoid contradictions. The amount of case-law in the field and planned reforms of EU legal system are indicating to the existing problems. (See also Kochenov 2008)

Definitely, every transition in the formation and development of European Union is a result of interaction of ideas. There are different approaches supporting the idea by social scientists (see: Zürn 2005: 37):
a) political scientists propose a qualitative step from executive multilateralism to a form of socially consented multilateralism in the age of globalization.
b) lawyers, by contrast, tend to develop a constitutional perspective of law production where the deliberation becomes the normative *leitmotiv* that inspires the organization of transnational problem solving and assessment.

It seems quite expected that in a multilevel system, there must be certain coordination between national and supranational orders. There are several synonyms to "constitutional dialogue", the term that reflects reciprocal and interactive relations between national and supranational legal societies. The authors are using phrases like "constitutional tolerance" and "cosmopolitan communitarism" inspired by Weiler and Bellamy (Martinico 2008, Weiler 2001: 33–35, Bellamy, Warleigh 2001: 55–72). Other authors are using the term "interpretative pluralism". Stihl argues that legal professionals believe less and less that law is science rather than politics but proposes that interpretative pluralism (or pluralist interpretation) can be used as "the absence of a single binding or authoritative interpretation" (Stihl 2007). The interpretative pluralism is a method of comparative law. Accordingly, Stihl is concluding his discussion with a more profound criticism posing the question "whether final interpretation is united in a single court or divided among many institutions, the rest of us are left subject not to the law itself but to the interpretations of the law handed down by fallible human beings, interpretations that may over time distance themselves greatly from the original legal sources (Stihl 2007). By Martinico, there must be judicial dialogue that represents a privileged perspective for studying the relations between interacting legal orders, especially looking at the multilevel and pluralistic structure of the European constitutional legal order. Martinico calls it "techniques of hidden dialogue" between the ECJ and the national Constitutional Courts (Martinico 2008, see also: Weiler 2001: 33–54 and Bellamy, Warleigh 2001).

The modern approach in multilevel governance is to secure the equilibrium and balance between national and supranational interests with having constitutional dialogue. In general, states with Supreme courts (Ireland, Greece, Denmark and Finland) have been innovative in keeping the dialogue as the member states with Constitutional Courts have avoided it as a rule. The Estonian judicial system with its Supreme Court (*Riigikohus*) belongs to the first category of member states and should become interested and able to participate in the constitutional dialogue (however, the judicial construction of the member state is not the obstacle for innovative approach or a ground for more dogmatic approach; the aforementioned classification may only demostrate wider flexibility of some legal systems that is also related with the legal culture and openness to the dialogue).

There are certain techniques of the dialogue explained by Martinico (2008). One of the most important is the technique which makes difference between supremacy and primacy. By Spanish higher court: "supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to the consequent invalidity of the latter if they contravene the provisions set forth imperatively in the former. Primacy, however, is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons" (Tribunal Constitucional declaración 1/2004, see also Martinico 2008: 13). Another technique consists the distinction between dis-application and nonapplication: a member state cannot disapply the national law that contradicts the EU norm but must "not apply" the national rule contrasting with directly applicable EU law (Martinico 2008: 19).

In general, the process of ascertaining conformity of national rules implementing EU norms to the constitution is not carried out through a strict application of the unassailable rule of EU law primacy over the whole domestic law, nor by assuming unconditioned supremacy of the constitution over any other source of law, but rather with the objective of identifying the best solution to fulfil the ideals underlying legal practice in the European Union and its Member States (Kumm 2005: 286). Today more than ever, the courts (especially, in relation to the national legal orders, the constitutional courts) are the institutions which, in their respective legal orders, occupy a privileged position to forge closer ties between different but interacting legal regimes (Pollicino 2008).

Analyzing the EU–member state relations from the perspective of legal communication, the Lisbon treaty cannot be ignored. The rejection of the Constitutional treaty was a kind of shock. Nevertheless, as Barnard points out, at least some of the opposition used the referenda (where available) "as an opportunity to give bloody nose to the incumbent national governments" (Barnard 2007) to revenge for their ignorance or non-transparency in European affairs. In the context of the current thesis, the author agrees with Weiler who remarked that "What Europe needs… Is not a constitution but an *ethos* and *telos* to justify, if they can, the constitutional order it has already embraced" (Weiler 1996: 518). There are many academic contributions about the "Constitution of Europe", "Constitutional Treaty for Europe", "Reform Treaty" or "Lisbon Treaty" to demonstrate the inevitable interlink between EU and member states constitutional law (Weiler 2004, de Witte 2004 etc). There are only some researchers who see the problem in creating common European constitutional space because of, for example, diffusion of responsibility and leadership (Monar 2004). It seems, however, that the success of constitutionalization of the European Union is depending on willingness of the member states to participate in constitutional dialogue.

The classical theories of law and politics have presupposed that politics can presume to handle any theme and any policy orientation, and that all such themes and policies are communicable or translatable into a common political language of social interests (Sand 2004). The solution lies in "continuous learning processes, deliberation, comparisons, exchange of experiences". Interdependence and reciprocity are the keywords that member-state should lead from to solve the *problématique* of transnational legal society.

The issue of how to interpret constitutional law is common to many legal societies. Trying to find an answer to the question, whether a specialized methodology is needed for European constitutional law we may assume that "the systematic and pan- European comparison of constitutional methodologies and its reflection onto issues facing Europe, as a whole, are still desiderata" (Dann 2006: 47). Even if Dann is not sure that *habeas corpus* of existing constitu-

tional practices of member states is able to compose the methodology of European Constitution, "the cognitive interests of academia (in contrast of those of courts)" (Dann 2006: 46) may have relevant influence to the process. Legal experts of member states should become encouraged and supported by the state authorities (Bodnar, Kowalski, Raible, Schoropf 2003).

As it is noticed by Kowalski, "…respect for various European identities, cultures, traditions should not be destroyed or hindered by European integration" (Kowalski 2006: 382). The interdependence of EU and its member states are demonstrated by several researches (Herbst 2006: 388). Estonia should recognize the unavoidable effect of reciprocity in relations with the European Union and follow the reasoning that derives from multilevel constitutional culture.

The previous theoretical analysis can be concluded as followes:

a) The rule of law is a major determinator of a contemporary state i.a transnational European state.
b) Reciprocal communication is presumed between the national and supranational levels to secure rule of law in the context of EU membership.
c) Deliberative supranationalism presupposes that member state is using its constitution as a tool for dialogue.

Chart 1. Rigid approach to constitutional doctrine (traditional supranationalism) Source: author

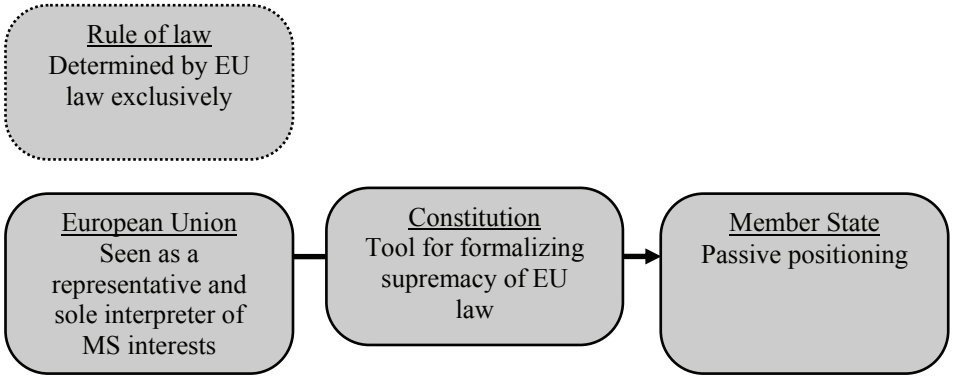
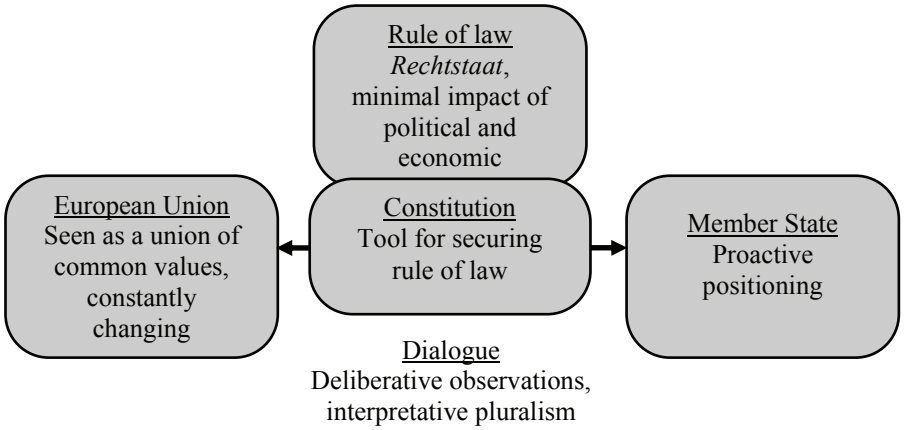


Chart 2. Dynamic approach to constitutional doctrine (deliberative supranationalism) Source: author



3. HYPOTHESIS AND DIAMETRIC MEASUREMENT OF CONSTITUTIONAL DOCTRINE

The following discussion/research concentrates on the analysis of determination of sustainability and effectiveness of the Estonian legal order in the light of EU membership. The author suggests that the debates may lead to the solutions assisting Estonia to self-position itself better as a pro-active European Union member state.

The research problem is the concordance of Estonia's constitutional legal policy with the European Union legal dynamism. The self-positioning in the context of European Union membership is seen as an adaptive capacity and establishment of proactive, coherent and consistent orientation in the dynamic, multilevel legal system. The principle of rule of law must remain the basis for the legal society and state activities e.g. in the context of European Union membership and the constitution should become a tool that achieves equiprobable harmony of the national and supranational interests. The main hypothesis of the empirical analysis of the thesis is:

The positioning of supranational law in Estonia through its constitutional doctrine is rigid in terms of capacity to effectively protect the principle of rule of law in the dynamic environment of European Union.

By effective protection of the rule of law the author means a situation where the national constitutional doctrine has found a coherent, consistent, dynamic and pro-active self-positioning *vis a vis EU aquis communautaire* and supranationalism.

To analyze the positions taken by Estonia, the author has constructed the conceptual framework summarized in the following table and further developed the approaches discussed in the theoretical part of the paper. The key idea is to generalize the diametric differentiation between rigid and dynamic approaches of constitutional doctrines in the context of EU membership. The indicators are elaborated by the author of the current thesis as a result of the analysis and generalization of theoretical approaches handled in the sections "Conceptual framework" and "Contemporary theoretical circumscription" of the dissertation.

The author works out generalized analysis based on the interpretation of the research of relevant authors in the field and his own empirical research (deriving from his expert opinions) from the position that enables to present the main features of contemporary constitutional doctrine in the context of EU membership, by which the rigid (traditional) and dynamic (deliberative) approaches can be evaluated and compared in sufficient manner to create theoretical methodology for further research.

The five indicators included are used further to measure and identify the positions of Estonia, discussed in the empirical part of the paper and prove the hypothesis of the dissertation.

Table 1. Diametric measurement of constitutional doctrine. Source: author

	INDICATORS (and authors whose contributions have been the basis in ascertaining the indicators)	**A. RIGID APPROACH** (traditional supranationalism)	**B. DYNAMIC APPROACH** (deliberative supranationalism)
1	**Relationship** and communication between national and supranational (EU) law Pollicino 2008 McCormick 2007 Kordela 2003 Martinico 2008 Kowalski 2006 Zürn 2005 Walker 2001 Shaw 2001 Warleigh 2001	Passive positioning. Communication is unilateral (*ex parte*). Supremacy and primacy are synonyms. Supranational character of EU law is sufficient basis for validating legal norms in domestic legal system. Interaction of national and supranational legal systems is not supported. Member state is acting under the principle of constitutional loyalty assuming that supranational interests take account the national interests	Pro-active positioning. "Primacy" (distinction between the scopes of application) is distinguished from "supremacy" as a general principle. Legitimacy of EU norm is analyzed by a test composed of the constitutional principles and substantial, formal and procedural premises (see Kordela´s test in section 3.2). Member state attempts to generate a interactive dialogue (based on equilibrium and balanced interests) between *domain reservé* of national and supranational levels (reciprocity)
2	**Implementation** and *techniques* of interpretation of EU law Bateup 2008 Williams 2007 Stihl 2007 Lasser 2004 Lenaerts 2003 Bodnar, Kowalski, Raible, Schoropf 2003	Implementation is automatic, based on technical-grammatical interpretation and rhetorical observations. Subsidiary sources (court decisions, opinions of Advocate Generals and *academia*) are often rejected. Only European Court of Justice (ECJ) can interpret EU legal norms and analyze the compliance of domestic law with supranational law	Implementation is based on deliberative observations, teleological interpretation and the doctrine of *effet utile*. Subsidiary sources are having great relevance. Interpretative pluralism prevails, skills of legal reasoning of the public officials are relevant determinators of the member state's capacity
3	**Collision** between national and supranational law Aragáo 2008 Grossi 1999 Hay, Lister 2006 Sorensen 2006 Kumm 2005	Conflict is eliminated *ex ante* by disapplication of domestic legal norm. Exceptions and deviations (margin of appreciation) from EU rule must be prescribed by the EU legal norm	Conflict is possible or even assumed. Domestic legal norm is not applied until the just argument is adopted through interpretative *techniques*. Margin of appreciation is deriving from common European constitutional values reflected by the member state's constitution

	INDICATORS (and authors whose contributions have been the basis in ascertaining the indicators)	A. RIGID APPROACH (traditional supranationalism)	B. DYNAMIC APPROACH (deliberative supranationalism)
4	Status and relevance of the **Constitution** Sverdrup 2008 Martinico 2008 Mayer 2006 Prechal 2007 van Roosebeke 2007 Zürn 2005 Raadschelders 2000 Joerges 2004	Constitution is seen as a text to acknowledge of the supreme position of the EU law in general. EU law determines the validity and content of the constitution of the member state. The scope of legal bindingness of the constitution as independent legal text remains unframed. The continuous dynamics of EU legal environment is not taken into account due to the principle of absolute autonomy of EU law. Amendments in interpretation of EU law can be initiated only from supranational level	Constitution is seen as a living instrument that safeguards the position of member state in the EU. The content and bindingness of the constitution is not formally dependent from EU law. The constitution can be interpreted through "common constitutionalism" and "constitutional dialogue". Changing legal environment is taken into account by analyzing EU developments, using constitutional dialogue and interpretative pluralism
5	**Approach to the Rule of Law** Mann 2003 Gearey 2005 Vincent 1996 Verhoeven 2002 Pierson 2007 Markensis, Fedke 2006 Weiler 1996; 2000; 2004	Rule of law is determined by the EU exclusively. For state authorities, it becomes an apologist construct in justifying interference of political and economic influences that prevail over the legal framework. The dependence from other member states is significant. Rule of law is endangered because of recognition of only one interpreter of EU law (ECJ)	Rule of law remains to be the most important criteria, which can be analyzed independently from socio-economic nand political environment. The impact of other member states in domestic decision-making and implementation of EU law is minimized as much as possible

On the basis of the conceptual framework the author reorganizes and synthesizes his previous research to a coherent generalizing discussion of the development and current situation of Estonia's legal systems adjustment to EU legal reality combining law and other social scientific approaches and using qualitative methods of legal interpretation.

I will first generally discuss the trends based on the empirical articles, complementing these empirical articles of the thesis with the findings of expert analyses and articles. Thereafter I will interpret the results in the developed conceptual framework. The five indicators of the table are used to measure and identify the positions of Estonia as empirically discussed in the other articles of the thesis and now synthesized and reinterpreted in the empirical part of the paper in order to test the hypothesis and sub-hypotheses of the current research.

4. ESTONIA´S POSITIONS: EMPIRICAL AND THEORETICAL ANALYSIS

4.1. CONSTITUTION AS A MAIN SOURCE OF LEGAL REASONING IN ESTONIA

The article representing the problems analyzed: (Kerikmäe 2006).

The constitution has been an important factor in building up rule of law in Estonia after regaining independence. Despite a few disputability's, the constitution built a solid legal base for a state, which made it easier to do the following restructuring work. Laws and the importance of their suitability for a whole society in the process of a systematic restructuring cannot be underestimated (Vahtre 2005: 264). Moreover, the question of constitutional compliance became important in the context of desired European Union membership. However, there were several legal problems that the Estonian state faced before the accession to the European Union that concerned securing the rule of law. The author has analyzed them as a legal theorist but also as an expert for the Estonian Government (see introduction). The area of research concerned implementation of constitutional principles, relation between international law and Estonian constitution, the recognition of foreign judgments, understanding developments at the EU level (e.g. teleological interpretative method of the European Court of Justice) as the *acquis* had to be taken into account far before the accession to the European Union.

One of the essential examples is analyzed in the article on ownership reform (Kerikmäe 2006). The case analyzed demonstrates the complicated progress in seeking for just and fair solution in the context of legal crisis. The research (Kerikmäe 2006) suggests that the endless search for balance between economic interests of the state and democratic rights of the citizens (or other entitled individuals) should not be based on pragmatic decisions but rather be guided by rule of law (indicator 5b) and common heritage of European legal culture. The article written in the field is directly related with constitutional issues (the part of the ownership law has been declared unconstitutional) and search for teleological interpretation in the light of European values. The case analyzed in the main article is demonstrating the formation of Estonian constitutional doctrine as it concludes that in the situation of legal crisis, Estonia turns to the constitutional principles to find a solution. The conflict situation between Estonian Parliament and the Supreme Court described in the article is a basis to claim that the constitutional doctrine of Estonia has not been sufficiently elaborated already before the accession to the European Union.

However, prior to Estonia's accession to the EU, the Constitution was the main source of legal reasoning and there was a clear potential for development of a dynamic approach to EU (see indicator 4b).

4.2. THEORETICAL PROBLEMS IN UNIFORM APPLICATION OF SUPRANATIONAL LAW

The article analysing the problems in the field: (Kerikmäe 1998).

The article analyses the problems in uniform application of European Union law from the perspective of distinction of supra- and international law that must both be applied by a member state. The article indicates that (as the position of international law in the European Union legal system is not sufficiently clear), there can be situations where the interpretation of supranational law cannot be predictable. The author indicates that the European Court of Justice cannot always act as a sole interpreter of the EU law. As stated in the article: "There are many legal questions that remain unanswered or that can be offered a multitude of answers. Examples

include the principle of subsidiarity, the relationship between international law and EC rules, and the value of rulings of the ECJ among rulings of international judicial bodies" (Kerikmäe 1998: 43).

The author demonstrates that the essence of the EU law is not always compatible with the techniques and doctrines that have been used by Estonia before the accession in implementing traditional international law. The article analyses theoretical difficulties in interpretation of the EU legal norms and gives examples of European practice by which the European Court of Justice (ECJ) has been using quite declarative expressions such as the "objective of general interest so fundamental for the international community" (Kerikmäe 1998: 47) following the approach of the International Court of Justice (ICJ) in adopting the *erga omnes* doctrine. This is evidence that even at the level of the EU, interpretation of valid legal norms can be inspired from sources and theories initiated originally outside of the EU legal system. In conclusion, the article, written before the accession, warns that upon launching into the problems of European law, a certain shift of one's former legal thinking is necessary for adaptation and foresees the problems in implementation of supranational law.

4.3. ESTONIAN CONSTITUTION IN THE LIGHT OF EU MEMBERSHIP AND CHOICES IN INTERPRETATION OF EU CONSTITUTIONALISM

The main articles representing the frames of the *problematique* (Kerikmäe 2001; Kerikmäe 2009):

In the first main article (Kerikmäe 2001), reference is provided to the main theoretical discussions that experts and politicians had before the accession. As the (delegation of) sovereignty has been the central topic, the article makes an analytical overview of the proposed amendments. The author supports the idea that a constitution should be deemed to be a type of contract and discusses the problems of *pouvoir constituant* related to the (re)delegation of the sovereignty. Estonian constitution cannot be seen just as a channel to the EU legal system, but as a forum for state authorities by which the mediation of reciprocal Europeanization process to (legal) society is made possible. The article concludes with the assumption that the answer to the question "what is the constitutional future of the Union?" is also the answer to many questions of how to reach a compromise in Estonian legal society (Kerikmäe 2001).

Another article (Kerikmäe: 2009) is an analytical overview of the expert opinions of the author ordered by the Chancellor of Justice (Ombudsman) of Estonia related to the steps taken by Estonia before, during and after the accession to the European Union. The common ground of values is discussed through the perspective of EU Constitutional law i.e Lisbon Treaty.

The author is using a critical approach to the technique used by the Estonian state in positioning the supranational EU law through the Estonian constitution. The future of the EU (and its own developing constitutionalism) is also taken into account: the article includes suggestions and analysis of the most sensitive areas of Estonian public interest. The analysis of the articles can be presented by the following sections representing historical periods in chronological order:

4.3.1. Preparing the accession

The European Union leaves free choice to a candidate state, if, when, and how to amend or modernize its constitutional law. The criticism of the European Commission in so called "success reports" never concerned questions related to the constitution. Of course, the compliance

of the potential member states constitutions with certain criteria set up by the Copenhagen criteria are taken into account during the process of accession (cf. also Sommer 2008). At the same time, neither the European Commission nor other institutions have inferred that the Constitution of the Republic of Estonia does not meet the criteria. Calls for pre-accession constitutional reforms in candidate states have been finalized with a conclusion that it is not possible to form a sample constitution, which provisions should be copied into the prospective member state's constitution.

At the period of pre-accession, the special legal expert commission (Government of the Republic established constitutional commission of legal experts with the order of 4th of May 1996) came to the conclusion that "current constitution does not allow Estonia to access the European Union" (see also Varul 2008). At the same time, the commission has not taken into consideration the character of the Constitution "as a living legal document". The author of the current thesis suggested that the goals of Estonian State could be achieved efficiently through membership of the European Union without contradicting the Estonian Constitution. Accession to the European Union had to be viewed as process under international law based on people's right to self-determination. I suggested that state's authority is an intermediary between individual and the EU, constitution is a regulator for relations between national and supranational level. At the time of pre-accession period, the state's main function is to explain to the electorate how the EU can be useful to Estonia.

In his opinion to the Chancellor of Justice 2002 (XVI), the author assumed, that first, people have the right to decide the accession to the European Union and only afterwards the need for amendment of the constitution may arise. Insofar as Estonian objectives are in conformity with the principles prescribed in constitution they should be realized in a new historical situation by interpreting constitutional provisions according to the European Union's primary law (seen as international treaties). In case, the principles contained in the constitution are not (anymore) protected by the EU, then, according to the international law it is possible to step out from contractual relations. Therefore, the constitution would not provide an obstacle for Estonia to become Member State. A constitution cannot *per se* be restriction to people's performance of self-determination. On the other hand, it cannot be precluded that performing such right can further establish a need for the constitutional amendment. In Estonia, the implementation of EU law has been an automatic process, based on technical-grammatical interpretation and rhetorical observations (See also indicator 2a).

The main theoretical question asked at the time of pre-accession on what conditions and reasons constitution should be amended was left without solution. Today, it is clear that the answers can vary from general (conceptual) questions to specific questions. The general questions are dealing with delegation of jurisdiction to international organizations e.g. to the European Union. A specific question, which has provided great discussions, is the transfer of legislative drafting and decision-making from parliament to government representing Estonia at supranational level. A suitable solution can be found in the effective performance of European Union Affairs Committee in Estonian Parliament. The role of Estonian people's representation – the Parliament, is changing in the context of EU membership and the state faces the problem of how to provide the control over executive power (Kerikmäe: IV, Hargreaves: 37–44) at the European level. If at first the question was not deemed relevant, then later, *Riigikogu* amended its statute in March 2004. Such amendments gave methods to the parliament to exercise control over activities of the government at European level. It also ensured the involvement of legislative power into EU's decision-making process and solved questions of internal coordination mechanisms (clarification regarding the nature of amendemnts by European Union Affairs Committee 25.01.2008).

The Treaty of Accession, concluded with the European Union is by its nature an international agreement. The dispute in the context of EU membership has been the scope of interpretation of § 123 of the (Estonian) constitution. Although the provision sets forth *ex-ante* control mechanism in order to measure the compliance between international agreement and constitution, it does not set forth a *posteriori* control. In case of ratified agreement, the Constitution should be, then, interpreted in the light of an international agreement. According to the Article 46 of the Vienna Convention on the Law of Treaties, a state may not invoke its noncompliance of international obligation on internal law.

The author also differentiates the aspect of delegation of sovereignty "from final transaction" and assumes that the process can be turned back. The part that has been delegated can be taken re-delegated. This means that the delegated powers cannot either decrease or increase without respective authorization. One of the eurosceptical views according to which the departure from the European Union is impossible, relies on the Vienna Convention on the Law of Treaties (Convention on the Law of Treaties RTII, 11.05.1993, 13/14, 16). Article 54 provides: *"The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.* EU Treaty of establishment (Rome treaty) and treaties amending and improving it do not regulate *expressis verbis* the termination of treaty. It would still get politically complicated for a Member State to get the consent of contracting parties. Second option would be contained in the convention's Article 56 that sets out the general rule: (1). *A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.*

The solution lies in the convention's Article 60 (2) a by which: *material breach of a multilateral treaty by one of the parties entitles: the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either*. According to the Article 60(3) b a material breach of a treaty consists in the violation of such a provision, which has significant meaning. The right for denunciation of treaty according to this provision would be the guarantee that the institutions of EU would not misuse what has been delegated to them by Estonia. The emphasis can be put on the interpretation of the constitution: it should be assumed that the constitutional law protects Estonian sovereignty. Potential conflicts or collision between two legal orders must be possible to be solved by the constitution. In case of hesitation how to interpret internal law including constitutional provisions, judges can preferably use interpretation that is in compliance with the EU primary law – international treaties that Estonia is part to. Estonia by this approach had all the necessary means to use the methods described in indicator 3b: Conflict is possible or even assumed and the domestic legal norm is not applied until the just argument is adopted through interpretative techniques.

Limits of interpretation of the constitution are determined by the will of the carrier of the supreme power – people. Intention of the people can be clarified by referendum. Accordingly, the author was not supporting the idea to amend the constitution before the accession with a purpose to put the Treaty of Accession to a vote (as the Constitution prohibits to hold a referendum on international treaties). Instead, the author concluded his vision as follows: amendment of the constitution is necessary only when it cannot be interpreted according to the provisions it contains (indicator 2b). Mandate, or in other words limits on interpretation can be given by referendum. The author found that the Treaty of Accession should not be put to a vote (after the amendment of the Constitution, which would not allow international agreement to be put on referendum). In his expert opinion to the Chancellor of Justice, the author suggested to have referendum with a question: "*would you delegate the powers to state authorities*

in order to take steps, which would lead Estonia to the European Union membership?". That option would further give a good ground to establish dynamic approach defined by indicator 1b. Be consistent if you spell Constitution with big or small "C"!

4.3.2. Accessing the European Union

At the referendum (Amendment Act to the Constitution. (Eesti Vabariigi Põhiseaduse täiendamise seadus), RT I 2003, 64, 429. Referendum was followed by court action: K.Kulbok submitted a claim, by which he challenged the action of Government's electoral committee regarding the validity question on a ballot paper. The Court found that a question put to a vote and wording entered on a ballot paper was not decided by the Government's electoral committee but with a decision of Riigikogu on the 18th of December 2002 and the deadline for challenging the text was overdue. Also, according to the law, individuals are not entitled to challenge the accordance of the foreign treaty, accession treaty and the constitution directly from the Supreme Court. See: Decision No 12 of the Constitutional Review Chamber of the Supreme Court 29.09.2003, RT III 2003, 28, 287) on the 14th of September 2003 Estonian people, according to the constitution § 162 adopted following the law to amend the Constitution of the Republic of Estonia:

§ 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.*

Prior to the accession the author gave an expert opinion on draft of Amendment Act of Constitution proposed by Ministry of Justice (2003, XVII). The author suggested that the relation of draft legislation into the Constitution and into the Constitution Implementation Act needs additional explanation to determine the role of the Estonian Constitution. The author took into consideration a definition from § 3 of draft legislation and arguments in § 2 that provided that the draft law is planned to become "a ground for interpretation and implementation of the Constitution." The author also found that it needs to be explained what is meant by the "modified content" of all the Constitutional provisions (as set by §1).

Clearly, the proposed Amendment Act was a result of a compromise solution by which the text of the Constitution was not amended directly. However, to guarantee the supremacy of the Constitution by declining the amendment procedure of the Constitution would be arguable as the interpretation of the Constitution by Act, which is hierarchically positioned as subordinated law.

In the same expert opinion (2003), the author also posed a question regarding the change of Estonia as monist State to become a dualist State (in monistic countries internal and international law form single legal order internally, but for dualistic countries in order to adopt international treaties they adopt special act, which limits the implementation of the treaty within the state's legal order), which would amend current understanding of approaching Estonian constitution. In other words: the question is whether the Amendment Act is part of constitutional legislation or just incorporation act to the Treaty of Accession. Though the theory of dualism/monism does not have important relevance to member state's law when implementing (argument does not originally only apply with regard to supranational law. As the community's legal system itself is dual and regulates the status of international agreements in the commu-

nity's legal order then member states are subject to their own frame of delegating foreign jurisdiction judicially as it comes from the loyalty principle of The Rome Treaty) the Union's supranational law, favoring the dualism can contravene the constitution (§3 and §123) and endanger former judicial practice (important examples contained in the practices of Supreme Court, e.g. decision from 30th of December II-4/A-5/94) with giving different subjects of law ground to demand further additional incorporation of international law (a few deviations from the principle of monism have done see e.g notice of Ministry of Defence No 2) 10.07.1998, RT Annex 1998 238/239, but they have been rather mistakes then applications). Treaty of Accession referred to in the text of draft legislation was itself kind of (international) incorporation act, which form did not depend from Estonia. The author qualified the draft legislation similarly with its authors as an internal implementation act by which the constitution is interpreted (opinion to the Chancellor of Justice about the draft legislation of Ministry of Justice "Põhiseaduse rakendamine Euroopa Liidu liikmeks oleku tingimustes" 21.03.2002). During the assessment of draft legislation I conducted comparative analyzes considering different (member) states' specific laws as practical solutions in accessing to the European Union. The aim of bringing out similar features was used to study the experiences deriving from different "techniques". The amendment act does not fall clearly into rigid (indicator 4a) neither dynamic (indicator 4b) approach, leaving the options open for interpretation.

Relying on the previously given opinions I found that the amendment of the constitution would not be legally correct and would bring along political and legal complications. Proposed draft legislation was political compromise between the ones who considered its amendment necessary and those who considered it unnecessary. This means that the text of the constitution shall not be amended but an act supplementing the constitution would be adopted instead (see different opinions from the State's Chancellery information sheet "Eesti ja Euroopa Liit": Põhiseadus ja rahvahääletus, Euroopa Liidu Infosekretariaat: 1-2).

In the context of current dissertation, it is relevant to relate the discussion also to a phrase in § 1 of the Amendment Act: "in accordance with the fundamental principles of the Constitution of the Republic of Estonia". As the Constitution itself does not list *expressis verbis* fundamental principles it can be presumed that referred principles are contained in the preamble of the constitution and in chapter 1 of general provisions. However, it can be assumed that the clause was added with the clear purpose to protect the independence of the Estonian Constitution as a legal instrument protecting the national interests, as evidenced by indicators 1b and 2b. The initiator of the clause, Chancellor of Justice of Estonian Republic has stated, that Amendment Act "certainly does not confirm supremacy of EU law in an "ultimate form"" and that "a so called crisis clause was entered... according to which Estonia sets a precondition to supremacy of European law" (Jõks: 2003)

Through the debates about accession to the European Union and conditions regarding to membership, Estonian legal society reached a certain maturity. However, the Amendment Act to the Constitution could not have taken into account the dynamic nature of the EU. Therefore the text of law and previously mentioned problematic areas needed more analysis concerning status and relevance of the constitution in the context of EU membership (see also indicator 4).

4.3.3. Avoidance of constitutional dialogue

In order to understand whether the concept of deliberative supranationalism could be employed by Estonia, one had to interpret the possible scope of implementation of the Amendment Act to Estonian Constitution (see the discussion in 4.2.2). On 25 January 2006 the *Riigikogu* passed a resolution to request the opinion of the Supreme Court on the interpretation of § 111 of the

Constitution in conjunction with the Constitution of the Republic of Estonia Amendment Act and the European Union law. In its opinion, the Constitutional review Chamber of the Supreme Court of Estonia (11 May 2006, 3-4-1-3-06), Estonian judiciary demonstrated its rigidity concerning dynamic approaches in implementation of the EU law. As the Supreme Court opinion is unproductive from the point of view of more advanced understanding of the position of the EU law, it is important to take account not only the opinion of the Supreme Court but also the statements made by the participants in the proceeding.

According to the facts included in the opinion: The Chancellor of Justice considers that the situation wherein the grammatical provision of the Constitution and the actual substance thereof have gown apart is a regrettable one. According to him, the best solution for ensuring the applicability of the Constitution "would be a Constitution wherein the amendments arising from the Accession Treaty and following from the transposition of European Union law were introduced". On the contrary, the Minister of Justice is convinced that "only a grammatical (formal) conflict is possible" (indicator 3a). However, it is mentioned by the minister that the national provision not compatible with the European Union law shall remain in force. This is indicative of the differences of approach on how the doctrine should be developed: teleological approach versus technical-grammatical approach (see indicators 2a and 2b).

The opinion of the Supreme Court attempts to clarify the position of the Amendment Act adopted by a referendum of 14 September 2003. The Court states that:

"the text of the Constitution must always be read with the amendments and only that part of the constitutional text shall be applied which is not in conflict with the amendments. Thus, the Constitution of the Republic of Estonia must be read together with the Constitution of the Republic of Estonia Amendment Act, applying only the part of the Constitution that is not amended". This is clearly rigid approach as EU law determines the validity and content of the Constitution (indicator 4a). The scope of legal status of the constitution as independent legal text remains unclear. This is further explained by the Court:

"To find out, which part of the Constitution is applicable, it has to be interpreted in conjunction with the European Union law, which became binding for Estonia through the Accession Treaty. At that, only that part of the Constitution is applicable, which is in conformity with the European Union law or which regulates the relationships that are not regulated by the European Union law. The effect of those provisions of the Constitution that are not compatible with the European Union law and thus inapplicable, is suspended. This means that within the spheres, which are within the exclusive competence of the European Union or where there is a shared competence with the European Union, the European Union law shall apply in the case of a conflict between Estonian legislation, including the Constitution, with the European Union law".

In general, the Supreme Court ignored the possibility of taking into account the dynamics of the relationship between two legal systems and endorsed the rather dogmatic view that unconditionally subordinated the Estonian Constitution. This is passive positioning supporting unilateral authoritative communication provided by the supranational European Union law (indicator 1a).

There were two dissenting opinions supplemented to the opinion of the Supreme Court (arguing against the use of approaches in indicators 1a and 3a). First, dissenting opinion of Justice Kõve argues that the legal effect of the opinion is doubtful because of the constitutional review mechanism is established by the Constitution itself. According to Justice Kõve: "Consequently, in the present case, it would have been necessary at least to consider the issue of constitutionality of the amendments to the Constitutional Review Court Procedure Act". Also the criticism towards improper use of the "defense clause" (phrase included to the § 1 of the Amendment

Act) is presented in the dissenting opinion. By the Justice, "for the time being, the relationship between §§ 1 and 2 of the Amendment Act as well as e.g. the meaning of Chapter I of the Constitution in its entirety, after accession to the European Union, remain unclear". In general the dissenting opinion finds that "the Chamber "overestimated" the principle of supremacy of the European Union law over Estonian legal order when it found that as a result of the Amendment Act the Constitution in its entirety has been changed and that that the Constitution continues to have an effect only to the extent that it regulates the issues not regulated by the European Union law or to the extent that it is in conformity with the European Union law". Justice Kõve agrees with the primacy of the Accession Treaty upon application over the Constitution but disagrees with the methods by which priority has been substantiated. In general, the assumption of unconditional constitutional loyalty was condemned by Justice Kõve (indicator 1a).

In the second dissenting opinion, Justice Kergandberg agrees with previously mentioned dissenting opinion concerning the non-use of the "defense clause", stating that "it is regrettable that the opinion of the Supreme Court contains no explanation as to why it has not considered necessary to include the provisions of § 1 of Amendment Act into the analysis of constitutionality. He also finds that "such an analysis, one related also to the fundamental principles of the Constitution of the Republic of Estonia, would have been imperative…" The opinion makes reference to the possibility of conflicts between supranational and national legal systems and suggests a more dynamic approach (indicator 3b). The legal relevance of the § 1 (concerning "fundamental principles") has, therefore been left aside. Fundamental principles are best described by Rait Maruste (Maruste 2004: 93–125), according to whom, Estonian Constitution includes nine principles such as democracy, parliamentarian nature of the republic, unity of state order, supremacy of international law, separation of powers, social state, human dignity, respect to human rights. Among them, the principle of rule of law is having a central position. Each and every principle listed is supported by several academic opinions and court jurisprudence. It would be assumed that Estonian legal culture is composed of these academic and legal experiences, which would lead to framed and certain constitutional doctrine. However, the Supreme court opinion avoids the emergence of Estonian constitutional doctrine and displaces it with technical loyalty to European Union legal system.

Laffranque, one of the judges who contributed to the aforementioned majority opinion, justifies the opinion afterwards: „the Estonian Supreme Court finally clarified the meaning of the Amendment Act of the Constitution, rightly stating that the Estonian Constitution must be read together with the Amendment Act of the Constitution, applying only those parts of the Constitution that were not amended by the Amendment Act" (Laffranque 2007: 88). This remark concludes a view supporting traditional supranationalism as explained by the table on rigid and dynamic approaches (see especially indicator 5a). Another Estonian scholar concludes that "the unconditional acceptance" of the principle of supremacy of European law in Estonia is in accordance with the jurisprudence of the European Court of Justice and that "within the framework of European law, attempts to limit the supremacy of European law *via* national constitutions are out of place" (Ginter 2008: 21–22). Ginter also adds: "accordingly, it may be concluded that the approach of the Supreme Court was pro-European and there were no signs of a defensive approach towards EU law" (Ginter 2008:24). Ginter represents the view that as there are several evidences when Estonian Supreme Court used EU legal principles and "the court had no difficulty to accept supremacy" (cf 20), the dialogue between multilevel actors is not needed.

The author of the current thesis finds that the task of the Supreme Court is not to question the EU legal supremacy but to analyse the accordance of Estonian constitution with the EU legal system, measuring the jurisdiction for non-applying the supranational law and setting the methods of testing dynamic nature of the EU law (The Supreme Court did not indicate to the difference of EC law and EU law from the perspective of three pillar system that has impor-

tance from point of view of bindingness of norms and decisions). In general, the Supreme Court decision can be seen as a disappointment as the position of the Amendment Act (e.g. the constitution) remained vague and meaningless. The expectations that the Supreme Court would finally provide a doctrine that positions the relationship between the national and supranational law through the constitution were not fulfilled. As set by Cox: "Values, interests and capacity to act matter, but so too do vision and political will. Reflecting actual and perceived national and regional issues and interests, many EU states and regions clearly struggle to assimilate new global realities. Too often, our leaders – and I refer here not just political leaders – preach radical reform but practice conservative corporatism. They crave for transformation but resist change. They preach cure but refuse the necessary medicine" (Cox 2007). By establishing the constitutional dialogue between national and EU constitutional levels, Estonia could minimize any foreign political impact and secure the prevalence of rule of law.

4.3.4. Estonian choices in interpretation of emerging European constitutionalism

The term "constitutionalism" has been directly related with European Union integration process. Although "the constitutional treaty" has been transformed into "reform treaty" and later into "the Treaty of Lisbon" (Chalmers, Hadjiemmanuil, Monti, Tomkins: 2006, 57–85) it is difficult to underestimate the paradigm that the document introduces (there are also many theoretical opinions on the amendments to the treaty, Weiler calls this process „fetish to farce") (Weiler: 2005, Weiler: 2007). The Lisbon Treaty will definitely influence member states' legal order and understanding of constitutionality. In general, constitutional projects of the EU have contained several objectives, including the idea of unified understanding of supranational legal order in its entirety. Churchill's call for creation of "European States" in the university of Zürich and speeches of de Gaulle, Spinelli, Ficheri *et al* (See Charles de Gaulle: L'Europe – Charles de Gaulle [1970] Mémoires d'espoir. Plon, Paris; Altiero Spinelli – Ernesto Rossi: The Ventotene Manifesto, 1941 - Walter Lipgens (eds.) [1985]: Documents on the History of European Integration. 1. Continental Plans for European Union, 1939-1945. Walter de Gruyter, Berlin; Joschka Fischer, Vom Staatenverbund zur Föderation Humboldt University 12 May 2000, Frankfurt 2000) still have certain influence to the process. At the same time – it is not correct to relate constitutional manifestations purely with the *desiderata* for creating European super-state.

Discourse of European legal constitutionality has taken philosophical dimensions (cf. Habermas: 2001). The crucial question – how "the main act" should be validated, is still widely discussed. It is clear today that the European Union does not want to be only common market or economic union. According to a leading scholar, the Lisbon Treaty derives from pragmatic need to constitutionalize the European integration process (Búrca: 2008, 8). Leaders of 27 member states try to take the European integration into a new era that is reflected by the amended compromise version of the Constitutional Treaty (which, however, in 2005 failed in French and Dutch referendums). In the last redaction of the Treaty of Lisbon certain deconstitutionailzation can be seen. It includes for example giving up certain symbolics, justifying the principle of supranationality and cutting the reform of legislative acts. Estonia is among the supporters of the renewed treaty. However, the previous version has also been ratified. Thus, it may be that a) Estonia agrees with any normative text initiated in the European level; b) or Estonia is just supporting useful and well-reasoned developments. However, as stated by Chancellor of Justice, there are no expert opinions presented to the Estonian Parliament (*Riigikogu*) concerning the content of the Lisbon Treaty (Jõks: 2004).

The author argues that the ratification acts did not take account the concept of common constitutionalism. As to take account the failures to enforce the Lisbon Treaty because of unsuccessful referenda, the idea of European *res publica* has not become reality (Zetterquist 2008)

(in ideal, European res publica is a dynamical concept according to which societal dialogue in the member states could be a ground for European Constitution). It can be assumed, by relying on classical cases such as *van Gend en Loos and Costa v. ENEL* (Case 6/64 Costa v. ENEL, ECR [1964] 585) that the EU is distinctive and independent legal order, which creates rights and obligations not only for member states but also for European citizens as direct subjects of legal order. Last year when the referendum failed in Ireland (see Smyth 2008: 12–14), *Riigikogu* ratified the Treaty of Lisbon with which Treaty on European Union and the Treaty Establishing European Community will be amended. Insofar as it is qualitatively innovative legislation, it seems necessary to amend also the Amendment Act to the Estonian Constitution, insofar as the latter relies on the Treaty of Accession. At the same time, we have to understand that the Treaty of Lisbon has the objective of moving towards the world based on common values (Paun 2007: 4–8) and legal certainty. If a state is for the person and not *vice versa*, a European Union which receives its legitimacy from member states can be assumed to be the same. Jean Monnet has said "*nous ne coalisons pas des Etats, nous unissons des hommes"* (not the union for states but the union for people). Whether this ideal is going to identify with the common understanding of Europeans regarding the future of EU, will be evident upon the repeated referendum in Ireland in October 2009. In my article (Kerikmäe 2009), I analysed the *pro* 's of the Lisbon Treaty to Estonia as a member state (based to my expert opinion to the Chancellor of Justice, 2004, XVIII). As already stated in the section 3.2 of the current article, the failure of the Lisbon treaty has been caused by a poor level of dialogue between interest groups. However, it can be seen as an opportunity for Estonia to establish a renewed doctrine for constitutional dialogue.

4.4. EUROPEAN HIGHER EDUCATION AS A PRE-REQUISITE FOR BASIS OF DYNAMIC LEGAL APPROACH

The main article introducing the problems (Kerikmäe 2008).

In the main article (Kerikmäe 2008), based on presentation for European Community Studies Association colloquium 2008 in Coimbra, the author analyses the impact of protectionism in higher education in the context of globalization. It is stated that the internationalization of education is a pre-condition for furthering competitiveness at European educational landscape. The article is directly related to the current thesis as the new educational standards are necessary prerequisites to change the mentality of Estonian public officials, lawyers, politicians and other decision makers. In the article, the obstacles for more effective implementation of the Bologna process are discussed and the author specifically analyses the protectionism in the field of legal education.

The rule of law requires legal professionals to be sufficiently aware of the methods of legal implementation in the context of multi-level governance.

As the author presented for the European Law Faculties Association in Leuven conference 2006 (XI): It seems often that developers of study atmosphere must play with double standards. The research presents a set of problems that might become obstacles for generating new legal ideology necessary for the capacity of the member state to have the constitutional dialogue as a method of balancing the interests of national and supranational levels that mainly concern poor skills of professionals in understanding and using EU law. Maruste has indicated (Maruste 2004: 77) that the prevailing opinion (see cf. Narits 2002) that in Estonian legal culture, a doctrinal approach has secondary, non-relevant position – is not justified and should be reviewed.

In Europe, higher education is not the subject of common European policy and the Bologna declaration is not giving answers concerning how to develop *curricula* in the field of European integration studies. Competence for the content and the organization of studies remains at the national level. (Kerikmäe 2008). The establishment of educational strategies is a relevant issue in Estonia today. Protectionism in education is not the only problem for Estonia. However, we could avoid the problems involved with jurisdiction of other member states and generate the new generation of lawyers, capable of developing commonly understandable and sustainable legal doctrine in relations with the European Union. This new generation can employ techniques of deliberative supranationalism which requires sufficient knowledge of the law and jurisprudence of the EU legal system (indicator 2b). So far, EU legal professionals (e.g. judiciary) are not accustomed to shifting from the "normative" interpretation to the teleological (*telos* – purpose) interpretation, which, as has been suggested by several authors is the method much beloved by the European Court (Hartley 2004: 118) and represents the principle of "legal effectiveness" or "*effet utile*", used by the European Court of Justice as a main doctrinal method. Representatives of the Estonian state can obtain knowledge not only of technical implementation procedures of EU laws but they may also obtain knowledge concerning the legal reasoning that relates to the dynamic development of EU law. It is suggested that legal pluralism be constantly taken into account of those who apply or prepare the implementation of EU norms. As set by Director-General for Education and Culture of the European Commission: "the knowledge and skills we equip young Europeans with will help determine the course of the Union as a whole; because it is in education that we nurture our capacity to face the challenges of the future (Quintin 2009: 19).

5. GENERALIZING INTERPRETATIONS, CONCLUSIONS AND SUGGESTIONS

Summing up the articles we can establish that the constitution has been the main source for legal reasoning in Estonian legal society before accession to the European Union. Hence the potential for development of a dynamic approach to EU existed as also indicated by the debates in that period. Currently, however, Estonian constitution is not used as a central tool in pro-active communication between national and supranational legal systems to secure rule of law. The legal status of the Estonian constitution in the context of EU membership is not clearly determined. There is a clear necessity to develop the constitutional doctrine and also its basis in terms of legal education.

In the more detailed analytical framework developed in the article, the findings derived from the thesis demonstrate that the used *modus operandi* to position Estonian constitution in EU context may not be sufficient to secure rule of law.

Table 2. General characterization of constitutional doctrine in Estonia. Source: author

	INDICATORS (according to the diametric measurement presented by table 1)	**WHICH TYPE OF APPROACH PREVALENT IN ESTONIA: EVIDENCE**	**TOWARDS MORE DYNAMIC APPROACH**
1	**Relationship** and communication between national and supranational (EU) law	Estonia belongs to the category of rigid approach due to the passive positioning of its constitution. The text of Amendment Act to the Constitution did not exclude the possibility to more dynamic approach (see especially the wording of § 1). However, according to the opinion given by the *Riigikohus*, the further communication between national and supranational levels is unilateral (*ex parte*). Supreme Court avoided constitutional dialogue and method of deliberative supranationalism. Supremacy and primacy are seen as synonyms. In conclusion, interaction of national and supranational legal systems is not supported. EU unilateral authoritative communication prevails (unconditional constitutional loyalty).	As recently suggested by the Commission of European Affairs of the *Riigikogu,* more pro-active positioning should be our main goal. To continue as a state, one of the state's main function - control over the legislation must be achieved through interactive dialogue between *domain reservé* of national and supranational levels. **European Commission recent debates and discussions on more pro-active positioning should take into account the legal issues and be based on Estonian constitutional values.**

	INDICATORS (according to the diametric measurement presented by table 1)	WHICH TYPE OF APPROACH PREVALENT IN ESTONIA: EVIDENCE	TOWARDS MORE DYNAMIC APPROACH
2	**Implementation** and *techniques* of interpretation of EU law	Implementation of the EU law is automatic, based on technical-grammatical interpretation and rhetorical observations. Deliberative interpretation of the constitution is not preferred. Estonian legal professionals are not accustomed to shifting from the "normative" interpretation to the teleological.	Implementation is based on deliberative observations, teleological interpretation and the doctrine of *effet utile*. Legal professionals must become aware of contemporary theories i.a deliberative supranationalism and methods such as argumentative dualism. Legal professionals should use the test, (see test presented in section 3.2). **There is a need to review the *curricula* of Estonian universities related to the European Union and its legal system (content, teaching staff, interactive methods of teaching, interrelation of EU courses with other parts of the *curricula*)**
3	**Collision** between national and supranational law	Conflict is eliminated *ex ante* by disapplication of domestic legal norms. Exceptions and deviations (margin of appreciation) from EU rule must be prescribed by the EU legal norm. By the Estonian Minister of Justice (2003) only the grammatical conflict is possible, followed by the Supreme Court opinion. Dissenting opinions to the Supreme Court opinion are, however, making references to the possibility of conflicts between supranational and national legal systems.	Conflict between EU and domestic legal norm must be possible. Domestic legal norm cannot be applied until the just argument is adopted through interpretative *techniques*. Margin of appreciation is deriving from common European constitutional values reflected by the member state's constitution. **Training sessions for decision-makers and legal professionals should be organized. Besides of developments in EU law, the conceptual approaches should be taught with emphasis to learning outcomes.**
4	Status and relevance of the **Constitution**	Prior to Estonia's accession to the EU, the Constitution was the main source of legal reasoning. There was a clear potential for development of dynamic approach, the Amendment Act to the Constitution (although not directly supporting the dynamic approach) was open for interpretations. However, Estonia has clearly taken a position of the rigid approach through the opinion of the Supreme Court. The Constitution is seen as a text to acknowledge the supreme position of the EU law in general. The scope of legal status of the constitution as independent legal text remains unclear.	Constitution can be seen as a living instrument that safeguards the position of member state in the EU. The content and bindingness of the constitution cannot be formally dependent from EU law. The constitution can be interpreted through "common constitutionalism" and "constitutional dialogue". **Estonian Government could reinitiate the expert commission on constitution to agree on conceptual basis for constitutional doctrine. Changing legal environment of EU should be taken into account. Estonian Parliament should demonstrate its control over the government initiatives and decision-making process at the supranational level.**

	INDICATORS (according to the diametric measurement presented by table 1)	WHICH TYPE OF APPROACH PREVALENT IN ESTONIA: EVIDENCE	TOWARDS MORE DYNAMIC APPROACH
5	**Approach to the Rule of Law**	Rule of law is determined by the EU exclusively as the Estonian constitution, according to the Supreme Court must be read together with the Amendment Act of the constitution, applying only those parts of the constitution that were not amended by the Amendment Act.	Dynamic constitutional doctrine facilitates legal certainty and rule of law which must remain the most important criteria for adopting decisions that have consequences to the rights and obligations of the institutions and people. Decision makers and legal professionals must be aware of elements of rule of law and its possible violations by EU as non-ideal unit (see examples provided in section 3.2). Estonia has to mediate the EU legislation through its constitution that can be amended only if the interpretative pluralism is not possible. **The research on development of EU legal system must be encouraged among scholars. The outcomes of critical in depth analysis should be taken into account by the state institutions.**

According to the diametric measurement of constitutional doctrine (indicators created by the author on the basis of theoretical research), the author finds that Estonia (even if the pre-accession doctrine supported the more pro-active approach) belongs to the category of passive positioning. The communication between Estonia as a member state and the EU is unilateral and Estonia does not make a distinction between supremacy and primacy. Interaction between Estonian and supranational legal systems is not supported. Estonia is prioritizing the principle of constitutional loyalty assuming that supranational interests cannot contradict domestic interests. Implementation of EU law is rather automatic, based on technical-grammatical interpretation and rhetorical observations. The use of subsidiary sources is not validated i.e the European Court of Justice (ECJ) has monopoly to interpret EU legal norms and analyze the compliance of Estonian law with supranational law. The possible conflict or collision of the supranational and domestic legal norm is eliminated *ex ante* by disapplication of domestic legal norm. It follows that all exceptions and deviations (margin of appreciation) from EU rule must be prescribed by the EU legal norm. Estonia has taken the position of using the constitution as a text which acknowledges the supreme position of the EU law in general and leaves the validity and content of the constitution to the EU. The scope of legal bindingness of the constitution as an independent legal text has been unframed. The continuous dynamics of EU legal environment is ignored due to the dogmatic approach to the supremacy and the principle of absolute autonomy of EU law. Interpretation of EU law can, according to the current approach be initiated only from supranational level. It concludes that rule of law can, in this situation, be determined by the EU exclusively.

The author suggests that the primacy of EU law cannot be taken as dogma and supranational should not be taken as meaning suprarational. European Union and its legal system are dynamic and could, therefore, be tested by constitutional values. According to the reciprocity as a

principle in multi-level governance arrangement such as the European Union, the interpretation of these values could be combined with the emerging European constitutional principles. Rule of law can be guaranteed only if the rigid approach prevailing today would be replaced with interpretative pluralism.

Estonia is recommended to take into account the approach of deliberative supranationalism to secure the rule of law. Automatic transformation of EU legal norms leads to stagnation in legal reasoning and restricts Estonia to become pro-active member state as purely political impacts may have priority over the rule of law. The interpretation of the position of EU law can combine arguments both from national and EU level.

A constructive relationship with the EU on the basis of certainty and stability provided by the rule of law and constitutionalism would be a basis for pro-active positioning of Estonia. The normative-technical understanding, purely rhetorical observations and the lack of depth of analysis of EU legal system can create asymmetric positioning of Estonia as a member state. Autor suggests that the current rigid constitutional doctrine should be replaced with constitutional dialogue between national and supranational level. Estonian state institutions should avoid acting in apologist manner but instead secure its positions in the EU through legal reasoning that derives from constitutional dialogue. In implementation of EU law, Estonia is suggested to take into account the general principles, innovative methods of interpretation (*effet utile*) and reciprocal character of the EU multilevel system.

Ideally, Estonian and EU constitutional law become corresponding sources for inspiration for the further constitutional dialogue. Estonia cannot underestimate its possible contribution in the process of building up *espace juridique européen* (European legal space or area). Estonia is suggested to take serious steps to support legal education that provides awareness of theories, sources and techniques in implementation of EU normative acts.

The complexity of the issues involved requires the further focusing of the research to rule of law and developing the methods for ensuring it in the context of EU membership. The author finds that the arguments based on rule of law may efficiently change the nature of the political process that are often presented as excuses to abandon legitimacy.

The authors position on the cruciality of the constitutional dialogue has at least in a general level been recently (04.05.2009) reflected by the debate at the commission of European affairs, Estonian Parliament (*Riigikogu*) (ELAK: 2009) by statements that draw attention to the need of Estonia to become a more pro-active member state; test the decisions related to the implementation of EU law through the Estonian constitution and guarantee the high-level training of the public officials whose professional activities are related with the EU issues. More consistent formation of constitutional doctrine (i.e. interpretative pluralism) is indirectly supported by the commission as one of its suggestions includes the demand for deliberate alternative solutions when implementing EU law. This is a clear sign that Estonia needs to be acquainted with modern theories of deliberative supranationalism to become better positioned member state on the basis of solid legal arguments derived from constitutional dialogue between national and European Union level.

In conclusion, the hypothesis of the current thesis was appropriate and proved by the analysis of Estonia´s practice: Estonia, in positioning supranational law through its constitutional doctrinal approach is rigid in terms of self-positioning and capacity to protect the principle of rule of law in dynamic European Union. The knowledge and experiences of the European legal culture can become reflected in the formulation of Estonian constitutional doctrine. For Estonia, taking account the modern approaches in securing rule of law in the context of the EU membership is an essential challenge. Usage of the methods of deliberative supranationalism secures pro-active position of Estonia and gives an additional opportunity for further integration.

Constitutional dialogue with EU also improves the role of state in protection of the interests of Estonian society. With replacing dogmatic approach to EU supranational character with deliberativism, Estonia supports interests of its society. Societal interest-groups can better realize their constitutional rights in the context of inter-cultural dialogue, multi-level governance and European citizenship. Implementation and *techniques* of interpretation of EU law have to be reviewed through the principle of rule of law. Promoting deliberative thinking at the State level means promoting innovative and creative thinking at a broader level. The formation of a knowledge-based society is one of the main goals of the EU. If the EU wishes to become "citizens Europe", there must be a common understanding of legal framework among member states, EU institutions and citizens to avoid non-equality of EU members. This understanding has to be grounded on rule of law and supported with continuous dialogue in which the constitutional norms are playing a central role.

The main analytical contribution of the thesis has been the development of a more detailed framework to analyze the problems of positioning the constitution of the member state in the EU legal environment widely discussed in the theoretical literature by researchers of many states and to test and elaborate it on the basis of the Estonia's case. As demonstrated by the discussion above the analytical framework both covers the main aspects of scholarly debate in a more structured manner and the results of the analysis of Estonia's case are in general concordance with the results of the empirical research in other countries. Thus the framework seems suitable as the basis for a wider comparative research.

This has already been asserted by the researchers on the field. The author presented the main outcomes of his research at Lucerne University project (roundtable meeting July, 2009) and the experts from other states (Bulgaria, Hungary, Switzerland, Greece, Chezh Republic etc) found the methodology of the author appropriate as a basis for comparative research and it will be used as one of the tools of the collaborative international research project on the topic.

Even if the legal systems, backgrounds and legal practice related to constitutional law(s) differ by member states, the criteria elaborated by the author can be commonly used. Furthermore, using the methodology of diametric measurement of constitutional doctrine comparatively would clarify the problems in multilevel legal system and help to find solutions that respect the dialogue between EU and member state.

However, the author is aware of the need to further develop the framework both in aspects revealed by comparative research and in terms of the development of EU legal space both in terms of union and member state level legislation and doctrine. The constitutional dialogue is suggested to be leaded by rule of law as a central principle and the mechanisms of ensuring the effective operation of the rule of law will constantly be adjusted as the legal space changes. However, as stated before, the principle of rule of law must remain the basis for the legal society and state activities also in the context of European Union membership and the constitution should become a tool that achieves equiprobable harmony of the national and supranational interests.

SUMMARY

The above discussion was aimed at analyzing the problematique of securing the principle of rule of law in the context of Estonia's European Union membership. The author presumes that rule of law cannot be abandoned in any circumstances and suggests to take account of contemporary theories reflected in the concept called "deliberative supranationalism". The author proposes that in the context of EU membership, only the dynamic constitutional doctrine facilitates legal certainty and rule of law.

The current thesis draws on the interlink between rule of law, state and its constitution in the context of transnational statehood. The author discusses modern theory of deliberative supranationalism to determine developments for a member state to take pro-active position in the European Union. The research is conducted with the assistance of the indicators (elaborated on the basis of theoretical research) that exemplify the antipathetical conditions of rigid approach (traditional supranationalism) and dynamic approach (deliberative supranationalism). These indicators have been used to analyze the positions taken by Estonia in the field of developing its constitutional doctrine.

The empirical part focuses on the analysis of the historical stages and specific problems in development of the Estonian constitutional doctrine. The author demonstrates that prior to Estonia's accession to the EU, the Constitution was the main source of legal reasoning and there was potential for development of dynamic approach to EU membership. Furthermore, the opportunity for practicing interpretative pluralism was possible to identify even in the level of the EU as the interpretation of supranational legal norms can be inspired from sources and theories initiated originally outside of the EU legal system. The main emphasis is put to the pre-accession considerations and the analysis of the Amendment Act to the Estonian Constitution (2003). The Supreme Court opinion (2006) on the positioning of the EU law in Estonian legal system is discussed to demonstrate the unwillingness of our judiciary to participate in constitutional dialogue between national and supranational level. Lack of legal certainty is exemplified with the fact that the Amendment Act to the Estonian Constitution and the opinion of the Supreme Court interpreting it are not sufficiently clear.

The role of the Estonian constitution in the context of EU membership is vague and the author argues that Estonian constitution is not interpreted in the way to become the central tool of mediation between national and supranational legal systems. The outcome of the research suggests that the principle of legal certainty in Estonia is hardly guaranteed taking into account the interpretations of the Supreme Court on validity of the Constitution after the accession to the European Union. Therefore, the deficiency of constitutional dialogue exists and the dynamic nature of the European Union cannot been taken into account. The author suggests that Estonian contemporary legal education needs to be in accordance with the need of a member state from the point of view of generating European legal thinking and reasoning.

EESTI EUROOPA ÕIGUSSÜSTEEMIS: ÕIGUSRIIGI KAITSE KONSTITUTSIOONILISE DIALOOGI ABIL

Kokkuvõte

Doktoriväitekiri keskendub Eesti ja Euroopa Liidu vaheliste suhete positsioneerimisele läbi õigusriigi prisma. Väitekirja eesmärk on analüüsida Eestis kasutusel olevat konstitutsioonilist doktriini ning teha soovitusi selle moderniseerimiseks. Uurimuses toodud väited on välja kujunenud enam kui kümneaastase õppe- ja teadustöö kogemuste põhjal.

Väitekiri põhineb käesoleval katusartiklil ja viiel temaatiliselt seostataval artiklil:

I. Tanel Kerikmäe 2009. *Euroopa* Zeitgeist *ja Eesti valikud Põhiseaduslikkuse mõtestamisel* (European *Zeitgeist* and Estonian Choices in interpretation of Constitutionalism). Tartu: Tartu Ülikooli kirjastus.

II. Tanel Kerikmäe 2008. Globalisation and Higher Education from European Perspective. – Temas de Integracao 1 semestre de 2008 n 25. *After Fifty Years: The Coming Challenges/Governance and Sustainable Challenges*. *Coimbra*. Almedina, 39–49.

III. Tanel Kerikmäe 2006. Achilleus Heel of Estonian Ownership Reform: The Case of Baltic Germans. – *European Journal of Law Refor*m (EJLR), Utrecht. Eleven Publishing, 271–285.

IV. Tanel Kerikmäe 2001. Estonian Constitutional Problems in Accession to the EU. – A. E. Kellermann, J. W. de Zwaan, J. Czuczai (eds). *EU Enlargement. The Constitutional Impact at EU and National Level*, The Hague. T.M.C Asser Press, 291–300.

V. Tanel Kerikmäe 1998. Supranational Law as International Law and *vice versa*. *– Juridica International. Law Review University of Tartu*. Tartu Ülikooli õigusteaduskond ja sihtasutus Iuridicum III, 43–47.

Katusartikli teemal on autor avaldanud mitmeid rahvusvaheliselt ja ka Eestis publitseeritud artikleid ning andnud ekspertiisarvamusi nii õiguskantsleri ametkonnale kui Eesti vabariigi valitsusasutustele.

Uurimus põhineb eeldusel, et õigusriik peab olema kaitstud ka Euroopa Liidu liikmesriigi poolt ning parim vahend selleks on kahesuunaline kommunikatsioon mitmetasandilise valitsemise tingimustes (konstitutsiooniline dialoog). Oleme juba ammu jõudnud välja läbirääkimise tasandist, kus osapoolena püüdsime fikseerida parimaid tingimusi oma huvide kaitsel, ning peame end positsioneerima partnerina – eesmärk on mõlema osapoole ühiste huvide kaitse läbi argumenteeritud dialoogi. Autor peab põhiseadust jätkuvalt vahendiks, mille abil saab Eesti oma huve kaitsta ning (kasutades nn kaalutleva üleriikluse teooriat) leida õigusliku argumentatsiooni tehnikad, mis tooksid Euroopa Liidu õiguse rakendamisel Eestile parimad väljavaated. Hetkel prevaleeruvaid otsustusi, mille kaudu Eesti põhiseadust positsioneeritakse, peab autor Eesti valikuid piiravaiks ja õiguskindlust riivavaiks. Töös sisalduvad soovitused on eelkõige mõeldud Eesti riigi võimuorganitele, kes oma pädevuse piires saavad võtta arvesse töös toodud kaalutlusi ja neid võimalusel rakendada. Samas on konstitutsioonilise dialoogi kasutamine võimalus vähendada õiguslikku nihilismi, luua õiguskindlust ja läbi põhiseaduse selge rolli lähendada riigivõimu esindavad institutsioonid rahvale kui riigivõimu kandjale.

Töö esimene osa keskendub õigusriigi ja riigi lahutamatu suhte analüüsile ning seejärel teeb autor teoreetilise analüüsi viimastel aastatel tekkinud dünaamilise konstitutsioonilise doktriini uurimuste suhtes. Uurimuse hüpotees seisneb väites, et **Eesti, kohandades üleriiklikku õigust siseriiklikku õiguskorda, on jäänud põhiseaduse kui olulisima õigusliku teksti juures jäiga doktrinaalse lähenemise juurde, mis võib takistada õigusriigi põhimõtete tagamist kiirelt muutuvas Euroopa Liidu keskkonnas.**

Autor leiab samuti, et põhiseadus on olnud peamiseks õigusliku lahenduse leidmise vahendiks enne Euroopa Liiduga liitumist ja sel ajal esines potentsiaal dünaamiliseks lähenemiseks EL-i suhtes; üleriikliku EL-i õiguse ühtselt mõistetava rakendamise teoreetilisi probleeme oli võimalik identifitseerida juba enne liitumist; Eesti põhiseaduse juriidiline staatus Euroopa Liidu

liikmelisuse tingimustes ei ole selgelt määratletud; Eesti põhiseadus ei ole kasutusel kui keskne ennetavaid meetmeid kasutav vahend siseriikliku ja üleriikliku õigussüsteemi vahendamisel, tagamaks õigusriigi põhimõtte toimimise; Eesti nüüdisaegne õigusharidus peab võimaldama teadmisi mitte pelgalt EL-i õiguse tehnilise rakendamise osas, vaid pigem asetades rõhuasetuse õiguslikule argumentatsiooniõpetusele, mis arvestab EL-i dünaamilist arengut ja õiguslikku pluralismi.

Töös ei süveneta konstitutsionaalse doktriini ega ka õigusriikluse määratlustesse, vaid püütakse eelkõige leida vahend õigusriikluse kaitseks EL-i liikmelisuse spetsiifilisi õiguslikke probleeme silmas pidades. Töö autor on teoreetilise analüüsi tulemusena loonud indikaatorite süsteemi, mis iseloomustab ideaaltüüpidena erinevaid lähenemisi Euroopa Liidu õiguse ülimuslikkuse suhtes ning uurib nende kaudu Eestis vastuvõetud õiguspoliitiliste otsuste kuuluvust. Indikaatorid puudutavad doktrinaalset suhtumist üleriiklusesse, EL-i õiguse rakendamisse, lähenemist siseõiguse ja üleriikliku õiguse vastuolude lahendamisse, põhiseaduse seisundisse EL-i liikmelisuse tingimustes ning õigusriikluse kaitsmise põhimõtteid. Töö eesmärk on tuvastada (arvesse võttes liitumiseelset, liitumisperioodi hõlmavat ja liitumisjärgset ajastut) Eesti põhiseadusdoktriini mittevastavust kahepoolsele avatud suhtele Euroopa Liiduga. Uurimuses analüüsitakse peamiselt kahte olulist otsustust – põhiseaduse täiendamise seadust ja seda tõlgendavat Riigikohtu otsust. Autor leiab, et põhiseadusliku dialoogi praktiseerimine EL-i liikmena looks parema pinnase Eestile kaalutlusvabaduse rakendamiseks õigusriigi põhimõtete alusel. Autor leiab ka, et Eesti põhiseaduse juriidiline seisund on EL-i liikmelisuse tingimustes muutunud ebamääraseks, doktriini põhiseaduse kasutamiseks keskse vahendina siseriikliku ja üleriikliku õigussüsteemi vahendamisel ei ole välja arendatud. Eesti poolt kasutatavad jäigad ja normitehnilised meetodid põhiseaduse positsioneerimiseks EL-i liikmelisuse tingimustes ei ole piisavad, et tagada õigusriikluse põhimõtte prevaleerumist. Töös esitatud hüpotees ja allhüpoteesid on leidnud tõestust.

Autor teeb töö järeldusi silmas pidades ka ettepanekuid. Kõigepealt soovitatakse arvesse võtta EL-i dünaamilist loomust, mitte suhtuda EL-i õiguse üleriiklikku iseloomu dogmaatiliselt, vaid testida EL-i õigust läbi põhiseaduse aluspõhimõtete. Need tõlgenduselemendid peavad läbi kaalutleva tõlgendusmeetodi arvesse võtma Euroopa konstitutsioonilisi väärtushinnanguid. Seega, Eesti peaks tulevikus liikuma nn kaalutlevalt üleriiklikust praktiseeriva liikmesriigi kategooriasse.

Pelgalt retoorilised vaatlused, normitehniline arusaam ning analüüsi sügavuse puudumine võib suurendada asümmeetriat liikmesriigi ja EL-i ühisinstitutsioonide tasandi vahel. Eesti ei pea käituma apologeetiliselt, vaid pigem kindlustama oma positsioone Euroopa Liidus, kasutades konstitutsioonilist dialoogi kui doktriinipõhist lähenemist. Suhted Euroopa Liiduga peavad olema konstruktiivsed, põhinema õiguskindlusel ja stabiilsusel, mis saab toimuda vaid läbi õigusriikluse ja konstitutsionalismi. Peame õppima kasutama innovaatilisi tõlgendusmeetodeid (*effet utile*) ja panustama EL-i õigusruumi arengusse. Eesti peab riiklikul tasandil astuma samme euroopalikuma õigushariduse suunas, et tagada Eestit esindavate spetsialistide kõrge tase, mis avaldub nende teadmistes nüüdisaegsete EL-i õigusruumi puudutavate teooriate ja rakendustehnikate osas. Töö valmimise ajal osales autor Riigikogu Euroopa asjade komisjoni istungil (04.05.2009), kus sai kinnitust, et seadusandja püüdleb sarnaste eesmärkide poole. Autor loodab, et käesolev uurimistöö ja selle edasiarendus annavad toeka panuse Eesti positsiooni parandamiseks Euroopa Liidus.

Töö analüütiliseks eesmärgiks oli kujundada struktureeritum raamistik õigusriikluse ja põhiseaduslikkuse käsitlemiseks EL-i õiguskeskkonnas. Autori loodud baas võimaldab teha võrdlevat analüüsi teiste liikmesriikide lõikes ning raamistik on saanud 2009. aasta juulis heakskiidu Luzerni ülikooli koordineeritud teadusprogrammi osaliste poolt ja saab ühe vahendina kasutatud vastavate teemade mitmeid riike võrdlevas uuringus.

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