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Constitution of the Republic of Estonia in the Light of Accession to the European Union

1. Importance of the problem and the need for discussion

Next year the Constitution of the newly independent Estonia will become 10 years old. Noteworthy is the fact that the Constitution has not been amended at all during the first decade. This refers either to the successful quality and stability of Estonia's most important in-force legal document or to an over-sophisticated procedure of amendment of the Constitution and inability to achieve the political consensus for adoption of necessary amendments.

Estonia has substantially developed during the ten-year period. The government's priorities in foreign policy have also become more specific, and Estonia's joining the European Union has become one of them. The latter climaxed in 1995 in the presentation of application for accession to the European Union and the entering into force of the Association Agreement in 1998.^{*2} By the present moment more than half of the chapters of accession negotiations have been temporarily closed.^{*3} An inevitable question arises of how a Constitution passed ten years ago can hold out against such fast development in foreign policy, which is, though, also closely intertwined with domestic policy, and what would the best approach be in order to achieve a balance between political objectives, the will of people and juridically correct legitimation that would satisfy both politicians and lawyers and what is most important — also the Estonian people.

¹ This article expresses purely personal positions.

² On 28 November 1995, the Prime Minister of the Republic of Estonia presented an official application to the Commission of the European Union on Estonia's wish to join the European Union. The Association Agreement between European Communities and their member states and the Republic of Estonia or the Europe Agreement was signed on 12 June 1995 and it entered into force on 1 February 1998 (Riigi Teataja (The State Gazette) II 1995, 22–27, 120).

³ For an overview of Estonia's accession negotiations with the European Union see the homepage of the Ministry of Foreign Affairs of Estonia. Available at: [http://www.mfa.ee/euro/english/_Accession negotiations](http://www.mfa.ee/euro/english/_Accession%20negotiations) (2.04.2001).

Lack of knowledge may sometimes lead to development of false opinions, the results of which will be difficult to cure later. Thus we have reached a deplorable situation where there should be enough general information for everybody on Estonia's pursuit into the European Union and the nature of the European Union, but important legal and constitutional issues have mainly been left to experts of the field or those enthusiastic eurosceptics looking for cons against joining the European Union.^{*4} Politicians have the utmost caution in their attitudes towards the topic. Nevertheless the Constitution touches us all, *i.e.* the whole of the Estonian people into whom the supreme state power has been vested pursuant to the Constitution.^{*5} It is the people who will most probably make the final decision upon joining the European Union and amendment of the most important chapters of the Constitution, if necessary.

When the Committee of Expert Legal Review of the Constitution of the Republic of Estonia^{*6}, formed during the reign of the preceding government, after the presentation of its report in 1998 invited lawyers and politicians to discussion, the reaction to it remained modest.^{*7} Concerning seminars on the Constitution of the Republic of Estonia and the European Union, only two of them are worth mentioning: the *Riigikogu's* (Estonian parliament) event on amendment of the Constitution in a more general sense that took place in Haapsalu in December 1999, and the round table on EU law organised a year later by the Ministry of Justice "On the need for amendment of the Constitution of the Republic of Estonia in relation with Estonia's accession to the European Union" with the participation of German and French experts, which was followed by a broader discussion in the National Library with the assistance of the European Union Information Secretariat.

It may be concluded from the above that the relation between the Constitution of the Republic of Estonia and the European Union and issues related to possible amendment of the Constitution are important problems that need comprehensive juridical as well as political analysis and a broader discussion relying on it.^{*8}

The author of this article is going to clarify the present situation for the purposes of better orientation in sophisticated constitutional issues that accompany joining the European Union, and give one possible vision of legally appropriate constructions in respect of these problems, presenting therewith exclusively personal opinions. First it will be considered whether the ongoing process of integration of Estonia into the European Union, *i.e.* the process preceding joining the European Union, is legitimate. Then it will be discussed how it is possible to interpret the valid Constitution dynamically, following the principle of equability of the Constitution at the same time. Thereafter it will be analysed whether the 1992 Constitution of the Republic of Estonia enables Estonia to become a member of the European Union and explained in what way the Constitution should be amended, if it turns out to be necessary, and how to carry it through. At the same time experience of the member states of the EU will be presented for comparison, although intentions of other candidate states on the issue will not be given closer analysis due to limited space and relatively incomplete data available. In the end the joining of Estonia with the European Union will be observed in a broader context than amendment of the Constitution, considering the possible referendum preceding the accession to the European Union.

⁴ See *e.g.* Euroopa Liit, skeptiku vaatenurk (The European Union: the Sceptic's Viewpoint). K. Kulbok (Ed.). Tallinn: Ühendus Eurodesintegratsioon, 2001, p. 15 (in Estonian).

⁵ The Republic of Estonia Constitution, section 1.

⁶ In May 1996, under the leadership of the former Minister of Justice Paul Varul, an Expert Legal Review Committee of the Constitution of the Republic of Estonia was formed, the task of which was to prepare for amendment of the Constitution. The Committee consisted of nine members: in addition to the Minister of Justice, justices of the Supreme Court, the Legal Chancellor, solicitors, legal counsellors and professors. The Committee was assisted by workgroups. The account of the Expert Review Committee is available in the homepage of the Ministry of Justice. Available at: http://www.just.ee/_Õigusloome (2.04.2001).

⁷ The only article published in *Juridica* as a response: A. Albi. Euroliit ja kaasaegne suveräänsus. Üks võimalikke vastukajasad põhiseaduse ekspertiisikomisjoni üleskutsele aruteluks (The European Union and contemporary sovereignty. One possible response to the invitation to discussion of the Expert Review Committee of the Constitution). – *Juridica*, 2000, No. 3, pp. 160–171 (in Estonian).

⁸ The author is hereby glad to point out that unlike politicians, the former Chairman of the Supreme Court, the present Estonian Justice at the European Court of Human Rights R. Maruste has expressed a specific position while emphasising in his presentation at the international conference "Protection of human rights in Estonia and in Europe" that took place on 6 April 2001 in the National Library the need for discussion on the issue of amendment of the Constitution and supporting the proposals for amendment made by the Expert Legal Review Committee of the Constitution.

2. Legitimacy of the process of integration of Estonia into the European Union (*i.e.* the process preceding accession to the European Union)

The issue of possible amendment of the Constitution has often been associated with the process preceding Estonia's joining the European Union and the legitimacy of the latter has been called into question.⁹ Here we have to proceed from the following:

- political expression will by the government of the Republic of Estonia and the Association or the Europe Agreement ratified by the *Riigikogu* as representatives of the people,
- the Europe Agreement as the legal basis of relations between the European Union and Estonia,
- legal validity of Estonia's objective to join the European Union,
- compliance of the Europe Agreement with the Constitution,
- other legal acts,
- as well as legally not binding documents that constitute basis for Estonia's preparation for accession to the European Union.

The Europe Agreement¹⁰ ratified by the *Riigikogu* created a new, substantially broader framework for relations between Estonia and the European Union as compared to the previous Agreement on Free Trade. Association is the strongest bond that exists between the European Union and third states. The Europe Agreement is a legally binding document that regulates Estonia's relations with the European Union until Estonia becomes a member state of the European Union.

It follows from the Preamble of the Europe Agreement that Estonia's final objective is to become a member of the European Union, and association helps Estonia to achieve this end according to the opinions held by the parties. The former Legal Chancellor Eerik-Juhan Truuväli has said that the position expressed in the Preamble of the Europe Agreement is a political expression of will of the Government of the Republic of Estonia who signed the Agreement and of the *Riigikogu* who ratified it, which has no legal consequences for the achieving of such end. However, the importance of preambles should not be forgotten at interpretation of agreements.¹¹

Beside the Preamble, article 1 of the legally binding Europe Agreement provides:

“1. An association is hereby established between the Community and its Member States, of the one part, and Estonia, of the other part.

2. The objectives of this association are:

/.../ to provide an appropriate framework for the gradual integration of Estonia into the European Union. Estonia shall work towards fulfilling the necessary requirements in this respect.”

The Association Council founded on the grounds of the Europe Agreement is the highest political body according to the Agreement, which convenes on the level of ministers and is authorised to deal with whatever issues considered necessary by the parties to raise.¹² In accordance with article 111 of the Europe Agreement the Association Council has the power to take decisions for the purpose of attaining the objectives of the Association Agreement. The decisions taken are binding on the Europe Agreement parties which shall take the measures necessary to implement the decisions taken. The Association Council may also make appropriate recommendations.

But is the Europe Agreement itself in harmony with the Constitution? From the pro forma legal aspect the answer to this question may only be affirmative. The first paragraph of section 123 of the Estonian Constitution prohibits entering into international treaties which are in conflict with the Constitution. Accordingly, the concluded and entered into force Europe Agreement does comply with the Constitution. No one raised the question of possible conflict between the Europe Agreement and the Estonian Constitution before the coming into force of the former.

⁹ This applies both to the opinion of the Expert Legal Review Committee of the Constitution and A. Albi (Note 6), pp. 169–170.

¹⁰ See Note 1.

¹¹ See for more: J. Laffranque. Eesti assotsiatsioonileping Euroopa Liiduga. Juriidilised, eelkõige konstitutsioonilised aspektid (Estonian Association Agreement with the European Union. The legal, primarily constitutional aspects). – *Juridica*, 2000, No. 4, pp. 224–237 (in Estonian).

¹² Articles 3 and 109 of the Europe Agreement.

In accordance with clause 5 of subsection 4 (1) of the Constitutional Review Proceedings Act^{*13}, the Supreme Court may perform review only on foreign treaties that have not entered into force. The proposal may be made according to subsection 6 (1) of the same Act by the President of the Republic (does not proclaim the ratification act of the foreign treaty) and the Legal Chancellor (for checking the compliance of foreign treaties with the Constitution — as towards a signed foreign treaty or bill of ratification of a treaty). No review can be performed over an already entered into force act of ratification of a foreign treaty, because this would be in conflict with the first and second paragraphs of section 123 of the Constitution.^{*14}

Thus, as no constitutional institution doubted in compliance of the Europe Agreement with the Constitution before the entering into force of the foreign treaty, it follows that the Europe Agreement complies with the Constitution, and no constitutional review may be performed over the already entered into force foreign treaty. At entering into force of the Europe Agreement, the Agreement became a part of internal law, which is superior in case of its conflict with Estonian laws or other legal acts according to the second paragraph of section 123 of the Constitution.

According to article 27 of the Vienna Convention on the Law of Treaties^{*15}, which Estonia joined in 1991, a party of an international treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty. In accordance with article 46 of the same Convention, a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

However, in addition to the Europe Agreement, some other legal acts may be pointed out that serve as basis for preparation of Estonia's accession to the European Union, and from which the legal bases for responsibilities related to European integration of the three state powers and of institutions and the obligation to take into account the European law arise.

In respect of legislative power, this is best reflected in the adoption of the State Budget Act, pursuant to which the budget shall provide the financial means foreseen for European integration on the level of law.^{*16} The *Riigikogu*, in its second composition in a row, however, has decided on the grounds of the *Riigikogu* Rules of Procedure Act to form a European Affairs Committee as a special committee of the *Riigikogu*, whose tasks include assisting at attaining of the objectives of association between Estonia and the European Union on a parliamentary level, co-operation with the Government of the Republic on a regularly basis for the attaining of the association purposes, holding of contacts with the European Parliament and representing the *Riigikogu* as a delegation to the Parliamentary Committee created in accordance with article 115 of the Europe Agreement, holding of contacts with other institutions of the European Union, and giving recommendations to members of the Government for their work in the institutions of the European Union and the Association Council.^{*17}

Obligations of the executive power are directly reflected in the Government of the Republic Act^{*18}, pursuant to section 49 of which a minister, as head of a corresponding ministry, shall monitor the purposeful use of funds, aid and grants allocated by the European Union. Pursuant to section 59 of the same Act, the area of government of the Ministry of Justice shall include, among other things, the ensurance of the harmonisation of Estonian legislation to European Community law, and pursuant to section 84, a county governor shall ensure the purposeful use of funds, aid and grants allocated by the European Union.

General organisation of European integration has been fixed by the Government of the Republic Order No. 79-k of 30 January 1996 "Application of primary measures necessary for integration of the Republic of Estonia into the European Union".^{*19}

¹³ Põhiseaduslikkuse järelevalve kohtumenetluse seadus (Constitutional Review Proceedings Act) – Riigi Teataja (The State Gazette) I 1993, 25, 435 (in Estonian).

¹⁴ On the possible actual situation where the ratified by the Riigikogu and entered into force international treaty and the Estonian Constitution are in conflict, and possible solution of such a situation, see J. Põld. Põhiseaduslikkuse järelevalve menetluse algatamine halduskohtus (Initiation of Procedure of Constitutional Review by an Administrative Court). – Kohtuniku käsiraamat. Tartu: Sihtasutus Eesti Õiguskeskus, 1998, p. 11 (in Estonian).

¹⁵ Riigi Teataja (The State Gazette) II 1993, 13–14, 16.

¹⁶ Seadus 2001. aasta riigieelarve (2001 State Budget Act) – Riigi Teataja (The State Gazette) I 2001, 4, 11 (in Estonian).

¹⁷ Riigi Teataja (The State Gazette) I 1999, 47, 536 (in Estonian).

¹⁸ Vabariigi Valitsuse seadus (Government of the Republic Act) – Riigi Teataja (The State Gazette) I 1995, 94, 1628 (in Estonian).

¹⁹ Vabariigi Valitsuse 30.01.1996 korraldus nr. 79-k "Eesti Vabariigi Euroopa Liitu integreerumiseks vajalike esmaste abinõude rakendamine" (Government of the Republic Order No. 79-k of 30 January 1996 "Application of primary measures necessary for integration of the Republic of Estonia into the European Union") – Riigi Teataja (The State Gazette) I 1996, 8, 170 (in Estonian).

The Statutes of ministries follow from the Government of the Republic Act. Thus, for instance, the scope of competency of the Ministry of Justice includes, in accordance with the Statute of the Ministry^{*20}, the development of primary foundations of legal policy and methods of harmonisation at harmonisation of Estonian law to the European Union law.

Harmonisation of the Estonian law to the European Union law is also reflected in the Technical Rules for Drafts of Legislative Acts^{*21}, pursuant to subsection 16 (3) of which, if a Directive of Regulation of the European Union has been considered at preparation of a draft of legislative act, the number of Directive or Regulation and a publication note shall be presented as a technical remark in the European Communities Official Journal.

In the form of Supreme Court judgements, the judicial power has also accepted the need to take the European law into account.^{*22}

As legally not binding documents that help to conduct and interpret the European integration process of Estonia, Estonia's application for becoming a member state of the European Union, action plans of the Government of the Republic for Estonia's integration into the European Union (beginning from the year 1996)^{*23}, the position of the European Commission on Estonia's application for accession to the European Union (July 1997), and the Commission's annual accounts^{*24}, accession negotiations^{*25} — screening sheets on the basis of which the Ministry of Foreign Affairs gives information to the Government of the Republic, accession partnership^{*26}, the White Paper^{*27}, documents of the European Commission, of other EU institutions and member states are worth mentioning.

Besides, the people have elected the *Riigikogu* at free and democratic elections, supporting those representatives who ratified the Europe Agreement and parties who are for accession to the European Union.

Thus, although it may be stated that the process of European integration is not sufficiently legitimate^{*28}, this subjective statement cannot be measured with objective juridical criteria, as the process of preparation for accession to the European Union is legitimate at least pro forma, as derived from prior legal and political foundations and conclusions made on the grounds of them, and the relevant activity of our state power is thus also justified.^{*29} Although transition periods are discussed at accession negotiations, no sovereignty is yet directly waived; this will finally become true only through an accession agreement and the entering into force of the latter. The critique concerning the civil-servants-focused nature of the accession negotiations may sometimes be justified, but indeed foreign communication in any country inevitably belongs mainly to the field of activity of the government and the head of state.^{*30} Domination of executive power may be avoided through giving a permanent overview of the course of accession negotiations to the *Riigikogu*, although unfortunately the European Affairs Committee of the *Riigikogu* has no legislative power^{*31}, and this is why the

²⁰ Justiitsministeeriumi põhimäärus (Statute of the Ministry of Justice) – Riigi Teataja (The State Gazette) I 1997, 1, 7 (in Estonian).

²¹ Õigustloovate aktide eelnõude normitehnika eeskiri (Technical Rules for Drafts of Legislative Acts) – Riigi Teataja (The State Gazette) I 1999, 73, 695 (in Estonian).

²² See e.g. Order No. 3-3-1-97 of 24 March 1997 of the Administrative Law Chamber of the Supreme Court. – Riigikohtu lahendid 1997. Tallinn: Juura Õigusteabe AS, 1997, pp. 41–48.

²³ See the homepage of the Office of European Integration: <http://www.eib.ee> (2.04.2001).

²⁴ The European Commission's regular report on Estonia's progress at accession to the European Union, 8 November 2000. See the homepage of the European Commission at: <http://www.europa.eu.int/comm/enlargement/> (2.04.2001).

²⁵ Order No. 56-k of the Government of the Republic (Riigi Teataja (The State Gazette) I 1998, 13, 172) (in Estonian), serves as foundation for accession negotiations.

²⁶ See Regulation 622/98 of the Council of the EU, OJ L 85, 20 March 1998, p. 1, on this matter.

²⁷ Valge raamat. Assotsieerunud Kesk- ja Ida-Euroopa riikide ettevalmistamine integreerumiseks Euroopa Liidu siseturgu (The White Paper. Preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the European Union). Tallinn: Eesti Õigustõlke Keskus, 1996 (in Estonian).

²⁸ See A. Albi. Europe Agreement and European Integration in Estonia — Constitutional Aspects. – The Process of Estonia's Integration into the Western Economic System — International Legal Issues. P. Cramér (Ed.). Göteborg: Centre for European Research, Göteborg University, 2001, pp. 47–120. Opinions of the same author were also expressed at the presentation of the publication on 30 March 2001 in the Faculty of Law of the University of Tartu.

²⁹ Unlike the opinion of the Eurosceptics who find that Estonian civil servants are engaged in anti-state activity, see Note 4, pp. 12–13.

³⁰ Pursuant to clause 1) of section 87 of the Constitution of the Republic of Estonia, the Government of the Republic executes the foreign policy of the state and pursuant to clause 7 manages relations with other states; pursuant to clause 1) of section 78 of the Constitution, the President of the Republic of Estonia represents the Republic in international relations.

³¹ See Note 16 above on the *Riigikogu*'s resolution on formation of the European Affairs Committee where the tasks of the Committee are presented.

knowledge and interventions of the *Riigikogu* in spheres related to European law remain marginal. In this respect the *Riigikogu* should itself demonstrate initiative and interest, and not behave in a manner hindering the implementation of or ignoring the obligations arising from the Association Agreement ratified by the same *Riigikogu*.³² Legal acts of the European Union have been actually indeed taken into account in Estonian legislation so far, but only the Estonian *Riigikogu* and other Estonian state authorities pass laws and other legal acts directly applicable to the inhabitants of Estonia. Legal acts given in Brussels will apply on us directly only after accession.

In my opinion, two moments should be differentiated in this respect: accession to the European Union and preparation for accession. Accession is a desired, but not obligatory consequence of the ongoing process of European integration — *i.e.* preparation for accession must not yet mean accession. Therefore the integration process also does not need a separate constitutional authorisation. On the accession itself, a public discussion would be necessary, amendment of the Constitution, if necessary, and through this, clarification of the will of the people that will decide upon accession. Therefore it is unreasonable to spend more energy on doubting the legitimacy of an already ongoing process, and it should be attempted to guarantee the legitimacy that has remained weaker in the European integration process so far via timely ensuring of approval or non-approval of accession to the European Union by the people.

3. Nature of the European Union and different interpretation of the concept of Estonian independence

The treaties constituting the foundation of the European Union — the Treaty of Foundation of European Coal and Steel Community, the Treaty of Foundation of European Atomic Energy Community, the Treaty Establishing the European Community and the Treaty on European Union³³ — are all international treaties in their essence. At the same time, the European Union has become an integration organisation that is creating supranational law in the first pillar of the European Union (in the three above associations), forming therewith a specific European legal order *sui generis* that is different from an internal legal order for its different set of purpose and perspective. The states waive a certain portion of their sovereignty to the European Union, and this is why European law is superior to internal law in a sphere within the scope of competence of the European Union and directly applicable on certain conditions.³⁴ This is how it works, for instance, at passing a decision with a qualified majority. Generally no conflict should occur between a constitution of a member state and European law. If this still becomes evident, European law should be applied according to the position of the European Court of Justice.³⁵ European law should actually be seen not as standing on a higher level of hierarchy, but as a parallel autonomous legal order bound with internal law via a provision of constitution of a member state allowing for membership of the given state in the European Union. The issue varies from one member state to another.

³² For example, a technical remark on the EU legal act taken account of at drafting the act is sometimes left out from a law passed by the *Riigikogu*. The requirement of a technical remark is set though by the Technical Rules of the Government with the purpose to gain better information about how much and in what manner Estonia has harmonised its law with the European law. See for more on this matter: J. Laffranque. Influence of European Community Law on Estonian Law and, in particular, Law-making. – *Juridica International. Law Review*. University of Tartu, IV, 1999, pp. 86–92.

³³ The foundation treaty of the ECSC was signed on 18 April 1951 in Paris; entered into force on 25 July 1952; valid for 50 years; will become invalid on 23 July 2002. There is no Estonian translation of the foundation agreement of ECSC. The EURATOM and treaty establishing EEC (later renamed as the European Community) was signed on 25 March 1957 in Rome (the so-called Roman treaties) and entered into force on 1 January 1958. See the treaty establishing EURATOM in Estonian in the homepage of Eesti Õigustölke Keskus at: <http://www.legaltext.ee>. The EU treaty was signed on 7 February 1992 in Maastricht; entered into force on 1 November 1993; now in the redaction of the Amsterdam Treaty (2 October 1997; entered into force on 1 May 1999). See the EC foundation treaty and the EU treaty in the book: *Amsterdami leping. Konsolideeritud lepingud* (Amsterdam Treaty. Consolidated Treaties). Tallinn: Eesti Õigustölke Keskus, 1998 (in Estonian).

³⁴ The European Court of Justice in its verdict in the *Van Gend en Loos* case has stated the following: “The European Economic Community will form a new legal order within international law in the interests of which nation states have restrained their sovereign rights, although in few spheres of life, and the subjects of which do not include only its member states, but also their citizens. Regardless of legal acts of the member states, the law of the Community not only binds individuals, but is also meant to grant them rights that will become a part of their legal heritage.” Legal case 26/62 *Van Gend en Loos*, ECR 1963, 1. On the superiority of Community law see also case 6/64 *Costa v. ENEL*, ECR 1964, 1251.

³⁵ European Court of Justice, case 11/70, *Internationale Handelsgesellschaft*, ECR 1970, 1125.

Pursuant to section 1 of the Constitution of the Republic of Estonia, Estonia is an independent and sovereign democratic republic wherein the supreme power of state is vested in the people. In accordance with the second sentence of the same section, the independence and sovereignty of Estonia are timeless and inalienable. In the first place, the principle of sovereignty of people emphasises the people as the carrier and source of state power, and its role.^{*36} The Committee of Expert Legal Review of the Constitution finds that the concepts **independence** and **sovereignty** are often identified as one and the same in international legal practice, which gives reason to assume that section 1 of the Estonian Constitution has the same meaning as the norms of constitutions of other countries ensuring the existence of the state and its sovereign status in international communication expressed often via the use of the term sovereignty.^{*37}

The Expert Review Committee still relies to a great extent on the meanings prescribed to the terms independence and sovereignty by the Estonian law scholar Artur-Tõeleid Kliimann before World War II, while coming to the conclusion that although the European Union does not threaten Estonia's independence, it does have an impact on the sovereignty of the state.

The PhD student of the European University-Institute Anneli Albi recommends reviewing the interpretations made by the Expert Review Committee. While the Expert Review Committee proceeds at interpretation of the Constitution in addition to obsolete definitions of the concepts independence and sovereignty mainly from the historical method of interpretation, according to which it was important at the time of adoption of the Constitution in the context of becoming newly independent that the Republic of Estonia ensure its independence as related to Russia, then according to Albi's position, the present priorities of Estonia are voluntary accession to Western organisations founded on co-operation in the spheres of economy and security, and this is why the Constitution should also be interpreted as required by the new era.^{*38}

Reality, however, is never black-and-white; and thus the static, verbatim interpretation of the text of the Constitution or, on the other hand, an extremely liberal treatment of it must also not be approached from just one unique perspective. The text of the Constitution is undoubtedly the starting point for its interpretation, but besides this the Constitution also sets limits to interpretation itself. Theoretically the interpretation of a constitution is as natural as interpretation of any other law^{*39}, but this of course depends on the person interpreting the constitution and the validity of such an interpretation. Undoubtedly, any applier of the Constitution inevitably interprets the Constitution, but the interpretations by the Constitutional Review Chamber of the Supreme Court, if it performs constitutional review over a law or a lower legal act, possess special value.^{*40}

The Supreme Court in its creation of legal principles and interpretation of law in practice relies among other things on generally accepted principles of international law, including principles characteristic of the European Union.^{*41} Besides the Court prescribes an interpretation value to the Preamble of the Constitution also.^{*42} The latter has been considered in the context of the European Union by the Committee of Expert Review of the Constitution, which holds the justifiable position that the Preamble of the Constitution does not hinder the development of statehood and needs no amendment.^{*43} Indeed, there is no need for supplementation of the aspect of the European Union into the

³⁶ K. Merusk, R. Narits. Eesti konstitutsiooniõigusest (On Estonian Constitutional Law). Tallinn: Juura Õigusteabe AS, 1998, lk. 22 (in Estonian).

³⁷ See the Expert Review Committee account (Note 6), p. 2.

³⁸ A. Albi (Note 7), p. 165.

³⁹ See R. Narits. Tõlgendamisest Kontinentaal-Euroopa õiguskultuuris. – Euroopa Nõukogu. Riigikohus. Seminari konstitutsioonikohtute organisatsioon ja tegevus ettekanded (On Interpretation in the Legal Culture of Continental Europe. – European Council. The Supreme Court. Presentations at the seminar "Organisation and activity of constitutional courts"). Tartu: Atlex, 1995, p. 46.

⁴⁰ See the Constitutional Review Proceedings Act (Note 13), pursuant to section 2 of which the court of constitutional review shall be the Supreme Court.

⁴¹ See e.g. Resolution No. 4-1-5-94 of 30 September 1994 of the Constitutional Review Chamber of the Supreme Court (Riigi Teataja (The State Gazette) I 1994, 66, 1159) (in Estonian); the Regulation No. 3-3-1-97 of 24 March 1997 of the Administrative Law Chamber of the Supreme Court (Note 22) that refers to the 1994 resolution in which the Court has said that the general principles of law developed by the institutions of the European Council and the European Union derived from general principles of law of the member states with highly developed legal culture should be taken account of at development of general principles of Estonian law. The Chairman of the Supreme Court Uno Lõhmus has stated at the international seminar "Protection of human rights in Europe and in Estonia" held in the Tallinn National Library on 5 April 2001 that the Supreme Court interprets international law generally in such a way as to ensure the compliance of internal law with international law. At the same time there is no significant experience of interpretation of the Constitution, there are few research works on the issue and comments on the Constitution.

⁴² See e.g. Resolution No. 3-4-1-7-98 of 4 November 1998 of the Constitutional Review Chamber of the Supreme Court – Riigi Teataja (The State Gazette) I 1998, 98/99, 1618 (in Estonian).

⁴³ See the Expert Review Committee's account (Note 6) on the Preamble of the Constitution.

Preamble, as the European Union as a supranational organisation is not an end in itself, but will be a natural part of both Estonia's foreign and domestic policy in case of accession becoming a reality.

There is no doubt that the world has become and is becoming more and more global. International co-operation is often observable and interpretable as part of sovereignty, but drawing a frontier between an integration organisation and the coming to an end of sovereignty of a country is relatively sophisticated.^{*44} Of course, the bringing of the Constitution into compliance with the changed reality must be acquiesced. There is no sense in relying on an obsolescent text or an illusory vision of sovereign nation states when the rest of Europe talks of a global era, bidding the nation states farewell, the death of nation states and even an end to democracy, sacrificing the former principles in the name of a new universal collective identity.^{*45} Just as the rights concerning primary rights and freedoms must be interpreted in a broader manner (e.g. the prohibition of reproductive cloning of humans may be derived relying on the principle of human dignity), it is also possible to give a broader interpretation to section 1 of the Constitution in the same way.^{*46} However, this kind of approach may be applied only within the limits to the extent of which the people, to whom the supreme power of the state is vested and as the possessor of the constitutional power itself, sees the change of meaning of sovereignty in contemporary Europe. If for example the Republics of Finland and France may be regarded as sovereign states from the point of view of Estonian people, regardless of their belonging to the European Union, then there cannot be talk of complete alienation of sovereignty in case of Estonia's accession to the European Union either, but rather of a change of meaning of the concept of *sovereignty*, of delegation of a certain portion of sovereignty. The interpretation of the Constitution must satisfy the requirements of actual social reality, which implies going beyond the text of the Constitution and seeing values above or behind the text.^{*47} Sovereignty as a term of state law is not a purely legal concept, but presumes a political approach.

Thus a more dynamic interpretation of the Constitution should be supported. At the same time, it cannot be decided whether it is enough for ensuring the legitimacy of accession to the European Union to update the interpretation, before it has been checked whether a direct conflict may be found in the provisions of the effective Constitution as to principles arising from the essence of the European Union or not. Indeed in accordance with the equability principle of the Constitution, the Constitution ought to be interpreted in such a manner that would not conflict with other norms of the Constitution.

In order to do this, the current nature of the European Union itself should be analysed more deeply and an answer to the question of whether the 1992 Constitution enables Estonia to join the European Union should be found. Namely, without allowing for a possibility for a broader interpretation of the concepts of independence and sovereignty, representatives of the Constitutional Expert Review Committee have found that the treatment of the European Union presented in the report completed in 1998 does not correspond to reality any more — meanwhile the European Union has changed, as they say, putting into question referring to it as a confederation.^{*48} According to the opinion of the Constitutional Expert Review Committee the Constitution ought to give permission for accession to such a European Union that constitutes in itself a union of states, and not a federation or a unitary state. Still it cannot be alleged at the current moment that the European Union already constitutes in itself a federation.^{*49}

⁴⁴ M. Vunder. Eesti Vabariigi põhiseadus ja Euroopa Liit. Uurimustöö. 1996 (The Constitution of the Republic of Estonia and the European Union. A Research Account. 1996). In the Ministry of Justice in the form of a manuscript, p. 5 (in Estonian).

⁴⁵ See E. Denninger. Vom Ende nationalstaatlicher Souveränität in Europa. – Juristenzeitung, 2000, pp. 1121–1126, particularly p. 1122.

⁴⁶ Välisministeeriumis 2000 valminud analüüs Eesti õiguse vastavusest EL põhiõiguste hartale (An analysis completed by the Ministry of Foreign Affairs in 2000 on the compliance of Estonian law with the Charter of Fundamental Rights of the EU). In the Ministry of Foreign Affairs in the form of a manuscript, analysis of article 3 of the Charter, p. 11 (in Estonian).

⁴⁷ K. Merusk, R. Narits (Note 36), pp. 50–51.

⁴⁸ Lauri Madise at the 4 December 2000 round table of the Ministry of Justice on the EU law “On the need for amendment of the Constitution of the Republic of Estonia in relation with Estonia's accession to the European Union”.

⁴⁹ See J. Laffranque. Kas ühinev Euroopa vajab ühtset konstitutsiooni? (Does the integrating Europe need a common constitution?). – Juridica, 2000, No. 7, pp. 471–481 (in Estonian).

4. Possible ways for amendment of the Estonian 1992 Constitution

4.1. The need and essence of amendment of the Constitution

Through applying a broader and more dynamic interpretation, it may be stated of course that the effective Constitution of the Republic of Estonia allows for Estonia's accession to the European Union. At the same time, as it has been said already, in this case we would have to do with violent interpretation of the Constitution ignoring cumulative effect of the norms of the Constitution. Namely, doubts have emerged in case of some sections of the Estonian Constitution whether these norms may be interpreted in such a way that no conflict would occur with the supranationality of the European Union. Sections 1, 3, 29, 31, 48, 59 and 111 of the Constitution of the Republic of Estonia may be pointed out as examples.*⁵⁰ If it cannot be alleged with absolute certainty that there is no conflict whatsoever between these sections and the legal nature of the European Union, amendment of the Constitution may turn out to be inevitable. This is actually not a problem that relates exclusively to the European Union. Although a part of the European Union is unique in its nature — supranationality — similar issues may also emerge at accession to any other international organisation or institution (e.g. accession to the Statutes of the International Criminal Court*⁵¹). If such doubts about possible conflict between the Estonian Constitution and international or European law arise, it logically should be proceeded from the first paragraph of section 123 of the Constitution, which prohibits entering into international treaties that are in conflict with the Constitution of the Estonian Republic. The wording does not specify whether the signing or ratification of such treaties, *i.e.* undertaking commitments by one state initially as towards other countries or also as towards the given state itself, has been meant under entering. As has been mentioned above, the Supreme Court, pursuant to the Constitutional Review Proceedings Act, performs review over foreign treaties which have not yet put into force. If a doubt about conflict is justified and finds certification by the Supreme Court, there are three options for further development: not to enter into a foreign treaty at all creating such organisation, institution or law; to enter only in such case if it is possible at negotiations between the parties to arrive at a compromise under which it is possible to avoid conflict with the Constitution; or as the third option — to amend the Constitution before accession to the treaty. In the case of the European Union, application of the first or the third option will be most probable. In case of ascertained conflict, the possibility to take an easier route vanishes — to leave the Constitution intact and to proceed, for instance, from section 120 of the Constitution, pursuant to which the procedure for relations with other states and with international organisations shall be provided by special law (International Communication Act).

Many member states of the European Union have amended their constitutions in order to specify more precisely their relations with the European Union and avoid any conflicts in the future.

In case of Estonia, this can logically take place before accession. After succession this would merely mean following a formality, which does not exclude renewal/amendment of the Constitution in the future, while being member of the EU, if this should become necessary due to a change of level of integration of the European Union.

The Constitution may be amended as follows:

- Using specifically the concept of the European Union or talking about international law in general. The latter is excluded by the peculiarity of the European Union and its legal order as well as the danger that otherwise we could delegate a portion of our sovereignty also to some other organisation or union in the future, without specifying its name and essence in particular.
- Amending specifically all the sections that may cause any conflicts. This would unnecessarily make the situation complicated and also psychologically hard to accept for the people, without making use of the opportunity to interpret the Constitution proceeding from cumulative effect of its provisions.*⁵²

⁵⁰ The list is definitely not exhaustive.

⁵¹ Pursuant to the Roman Statute (see art. 25) adopted on 17 July 1998 at the UN diplomatic conference of the International Criminal Court, the International Criminal Court has jurisdiction over natural persons. Available at: <http://untreaty.un.org/ENGLISH/notpubl/notpubl.asp> (2.04.2001).

⁵² For instance A. Albi recommends (Note 7, p. 164) the changing of the concept of statehood with the assumption that the first sentence of section 1 of the Constitution will be amended. As the author herself also points out, this, however, would be difficult to implement in practice.

- Confining oneself only to a laconic wording that enables Estonia's accession to the European Union. Such amendment will not be sufficient, considering the peculiarity of the European Union and the need for specification on a constitutional level of the roles of Estonian state institutions at dealing with European Union issues.
- Applying very specific methods — establishing superiority of European law by the Constitution. This is a proposal of some foreign experts, which anyway is too extreme an approach and unreasonably encumbering for the Constitution.
- Confining oneself only to single provisions dealing with the European Union and excluding therewith any conflicts through cumulative effect of different provisions of the Constitution (highly welcome), and amending both section 1 and section 123 of the Constitution.^{*53}
- Amending only section 1 of the Constitution.^{*54}
- Amending only section 123 of the Constitution.
- Bringing a new chapter covering the European Union into the Constitution.^{*55}
- There also has been put forward such a position according to which a so-called third constitutional act covering the European Union should be adopted through a referendum. Such an option has been derived from the fact that at present the Estonian Constitution consists of two acts — the Constitution and the Implementation of the Constitution Act. The latter may be treated as a constitutional act because some of its provisions are not implementation provisions in their character, but will always remain valid.^{*56} This option would surely need further consideration, but at a first glance, if amendment of the Constitution turns out to be necessary, doing this through amendment of the Constitution itself still seems psychologically more acceptable, as this would correspond better to the principle of legal clarity and would definitely grant stronger legitimacy also in the eyes of the people than adoption of a constitutional act supplementing the Constitution.

The Irish Constitution provides an extremely laconic option for constitutional amendment, according to which Ireland shall join the European Union in accordance with its Accession Agreement. Such construction has also been used by France at its accession to the International Criminal Court.^{*57} On the other hand, another extreme is reflected in radical proposals for amendment presented by some foreign experts to provide, for instance, the superiority of European law in the Estonian Constitution, and to take the European law explicitly away from under norm review of internal courts.^{*58} I personally find that this kind of amendment of the Constitution would be an exaggeration; the member states accept the principle of superiority of European law tacitly, as an unwritten principle.

The Committee of Expert Legal Review of the Constitution of the Republic of Estonia prefers to confine itself only to single provisions dealing with the European Union, excluding conflicts through cumulative effect in different provisions of the Constitution and taking the so-called European article 23 of the German Constitution as the example. According to the Committee's position, it would be necessary to bring a third paragraph into section 1 of the Constitution, pursuant to which Estonia may join the European Union on the grounds of a referendum on the conditions prescribed by section 123' of the Constitution. It has been proposed to supplement Chapter IX of the Constitution "Foreign Relations and International Treaties" with section 123' of the following wording:

"Estonia may delegate authorities of state power arising from the Constitution to bodies of the European Union on the principle of reciprocity and equality for their joint implementation by the member states of the European Union to the extent necessary for application of treaties serving as the foundation of the Union, and on the condition that this does not contradict the foundational principles and tasks of Estonian statehood provided by the Preamble of the Constitution.

⁵³ Position of the Expert Legal Review Committee of the Constitution.

⁵⁴ Position of A. Albi.

⁵⁵ The author of this article proposes the two latter options.

⁵⁶ Position of Ü. Madis at the 4 December 2000 round table of the Ministry of Justice on the EU law "On the need for amendment of the Constitution of the Republic of Estonia in relation with Estonia's accession to the European Union".

⁵⁷ See the Irish Constitution of 1 July 1937 and its amendments to article 29 on foreign relations dating back to the years 1972, 1992 and 1998. Available at: <http://www.irlgov.ie/taoiseach/publication/constitution/english/contents.htm> (2.04.2001), and article 53-2 of the French Constitution. Available at: <http://www.conseil-constitutionnel.fr/textes/const.rtf> (2.04.2001).

⁵⁸ McKenna & Co. Commission of the European Communities Directorate-General for External Economic Relations, Operational Service PHARE Proposals Paper Brussels and London to the Ministry of Justice and the Ministry of Economics of the Republic of Estonia. Approximation of Legislation: Constitutional Amendments, September 1996.

The Government of the Republic shall inform the *Riigikogu* as early and extensively as possible about issues concerning the European Union and take account of positions of the *Riigikogu* at participation in preparation of legislation of the European Union. A more specific order shall be established by law upon membership of the Republic of Estonia.”

Albi proposes to bind proposals which overlap in their essence for amendment into a new third paragraph of section 1 and holds the position that references found in constitutions of the member states to guaranteeing democracy and human rights, subsidiarity, *etc.* within the European Union should also be considered in order to eliminate the parallel dominating the consciousness of the people between the European Union and the Soviet Union.⁵⁹

In my opinion, the main problem of this topic does not lie in the first section of the Constitution and the impossibility of alienation of sovereignty. The amendment/rewording of this section may be necessary in relation to cultural and historical traditions, the importance of the concept and essence of sovereignty for the Estonian people. This matters a lot from the political aspect in the first place, while preserving at the same time a balance in the Constitution between the first chapter and consequent sections.

Amendment of the Constitution turns out to be much more important when proceeding from the fact that the Constitution of the Republic of Estonia absolutely lacks a generally formulated provision that would allow for implementation of state competencies on an international level by international organisations, and thus also to delegate implementation of certain sovereign authorities of state power to the European Union. Obviously, there has not been an urgent need for this so far. The relationship between the Government and the Parliament at formulating Estonian positions concerning the EU would also need constitutional regulation in such a way as this has been proposed by the Expert Legal Review Committee of the Constitution in the wording of the new second paragraph of section 123. Similar wording may also be found in article 23 of the German Constitution and in articles 88–4 of the French Constitution. This is just the way via which the people may be involved through the members of the *Riigikogu* in the decision-making process of the EU in addition to elections to the European Parliament.

Relying on the above, I hold the position that supplementation of the Constitution will be necessary. However, I deliberately use the term supplementation at this point, and not amendment. From the point of view of stability of the Constitution I cannot see any need for changing the provisions of the Constitution that could maybe cause conflict when Estonia belongs to the European Union. It should be attempted to adapt these provisions as much as possible to the circumstances of the European Union. Rather the existing Constitution should be supplemented in such a way that it could be interpreted as proceeding from the cumulative effect principle in a European-integration-friendly manner. The alteration must not be profound; on the contrary, the more insignificant supplementation legitimises accession to the European Union, the better from the viewpoint of stability of the Constitution and also the people’s attitude towards the European Union. Indeed, the politicians’ fear that amendment of the Constitution as such in relation with accession to the European Union would frighten the people and cause unfounded confrontation is justified to some extent.

I therefore think that the addition of section 123’ to the Constitution and interpretation of section 1 in the light of the former would probably be sufficient. In my opinion, duplicating of two sections should be avoided and issues concerning the European Union should be provided by one single section, but not by section 1 (as proposed by Albi) but by section 123’. Albi rightly emphasises that covering the European Union in Chapter IX of the Constitution that deals with foreign relations and foreign treaties is underlining the international character of the European Union, whereas the Union itself is not an international organisation any more in the classical sense of the term. I therefore feel that supplementation of an entirely separate chapter to the Constitution dealing with the European Union and European Community could be considered. This would avoid overestimating the importance of the European Union in the first chapter of the Constitution dealing with Estonian statehood and favour a vision of European integration as a means and not an end, but avoid also a too superficial attitude towards the European Union. In such a chapter, there also would be space for opening Estonia’s vision of the European Union and its compliance with the principle of democracy and other attitudes.

Success of the proposals presented in this article will depend to a great extent on how it would be best to carry out the supplementation of the Constitution in terms of procedure.

⁵⁹ A. Albi (Note 7), p. 164.

4.2. Procedure of supplementation of the Constitution and referendum on the issue of accession to the European Union

Amendment of the Constitution of the Republic of Estonia has been regulated by Chapter XV of the Constitution. Pursuant to it the right to initiate an amendment rests only with not less than one-fifth of the membership of the *Riigikogu* (21 members) and with the President of the Republic (section 161). Amendment of the Constitution cannot be initiated through a referendum. An act amending the Constitution may be passed only either via referendum or by two successive compositions of the *Riigikogu*, or as a matter of urgency, by the *Riigikogu* upon four-fifths majority of the vote (section 163). But even while an amendment may be adopted by the people, this would be possible only if the *Riigikogu* prior decides to subject the amendment to a referendum. Thus the making of a decision upon carrying through a referendum is a parliamentary monopoly.

Chapters I (General Provisions, where the proposal for amendment of the Constitutional Expert Review Committee concerning the third paragraph of section 1 should be included) and XV (Amendment of the Constitution) may be amended upon the initiative from the President or one-fifth of the membership of the *Riigikogu* only via referendum. Therefore a portion of amendments concerning the European Union proposed by the Expert Review Committee could enter into force in one way or another only after the affirmative result of a referendum.

However, a three-fifths majority of the membership of the *Riigikogu* will be required to subject a bill for amendment of the Constitution to a referendum. A bill to amend the Constitution shall be debated for three readings in the *Riigikogu*, in which the interval between the first and second readings shall be not less than three months, and the interval between the second and third readings shall be not less than one month. The manner in which the Constitution is to be amended shall be decided at the third reading (sections 163, 164). The referendum will take place three months after the *Riigikogu*'s decision to subject the amendment to a referendum at the earliest. Thus, in the fastest case, an amendment will take seven months from its presentation to the first reading.

Amendment of the Constitution by two successive memberships of the *Riigikogu* has been regulated by section 165 of the Constitution.

An amendment to the Constitution regarding the same issue shall not be initiated within one year after the rejection of a corresponding bill by a referendum or by the *Riigikogu* (section 168).

In terms of procedure, supplementations to the Constitution in relation with Estonia's accession to the European Union:

- may be included into the Constitution together with other amendments

or

- the supplementations concerning accession to the European Union may be separated from other amendments and included independently.

The finding of the right solution hereby depends to a great extent on what kind of positions dominate concerning the rest of proposals for amendment of the Expert Legal Review Committee of the Constitution. If consensus is achieved on such an issue as, for instance, direct election of the President, the supplementations related to the European Union may also be included together with this amendment. If, however, issues concerning internal policy do not find a unanimous approach amongst political parties, it will be desirable for avoiding the slowing down of the European integration process to separate the supplementations related to accession to the European Union from other amendments.

Given that there is no common position amongst political forces at the moment on the need for amendment of the Constitution and there is consensus only on the issue that a referendum should be carried out on the question of accession to the European Union⁶⁰, I would now consider issues related to conducting a referendum and the procedure of accession to the European Union more generally.

Pursuant to the valid Constitution, issues regarding the budget, taxation, financial obligations of the state, ratification and denunciation of international treaties, the declaration or termination of a state of emergency, or national defence shall not be submitted to a referendum (section 106). Thus there are mainly three circumstances at the present moment arguing against subjecting the issue of accession to the European Union to a referendum as quickly as possible:

⁶⁰ The Chair of the Constitutional Committee of the *Riigikogu* at the 4 December 2000 round table organised by the Ministry of Justice on the EU law "On the need for amendment of the Constitution of the Republic of Estonia in relation with Estonia's accession to the European Union".

- 1) at the moment there is no agreement on accession to the European Union, as Estonia is still holding accession negotiations,
- 2) even if there were an accession agreement, it would not be possible in accordance with section 106 of the Constitution of the Republic of Estonia to submit the issue of ratification of the international treaty — and this is what accession agreement actually is — to a referendum, and
- 3) at ensuring the legitimacy of the accession process, it should be aimed for as short as possible a time interval between the receiving of consent for accession from the people and the accession itself.⁶¹ Otherwise, if meanwhile the European Union itself for instance turns into a federation, the consent given by the people for accession to a union of states does not correspond to reality any more.

There is of course one option to amend section 106 of the Constitution in such a way that international treaties could be submitted to a referendum. However, the Expert Legal Review Committee of the Constitution has put forward a different, less risky option, according to which, instead of amending section 106 of the Constitution, the Constitution should first be amended by adding a third paragraph to section 1 of the Constitution as a result of a referendum, so that Estonia would be allowed to join the European Union only on the grounds of a referendum, and then, just before accession, to perform a referendum on the accession.

From my point of view, such a construction is questionable from two aspects — first, in this case a possible conflict would emerge between section 106 and the third paragraph of section 1 of the Constitution, as pursuant to the first it will be impossible to submit an international treaty and therewith also an issue of accession to an international organisation to a referendum, but the third paragraph of section 1 would make a referendum possible or even obligatory in case of the European Union as an exception. Second, according to such a construction, two referendums should be conducted — first for amendment of the Constitution, and then for accession to the European Union. As it is known, however, organising a referendum requires very thorough preparation, timing, and also certain expenses, and therefore duplication of a referendum in its essence on one and the same issue should be avoided.

The Expert Review Committee's proposal could still be interpreted and modified in such a manner that the people would not vote on the issue of entering into a treaty of accession to the European Union, but adopt (or renounce the adoption) of an act of amendment of the Constitution which would make the entering into the accession treaty possible in case of an affirmative result. In such case the wording of the third paragraph of section 1 should be left out of the set of amendment proposals, and the people would vote on section 123', *i.e.* the referendum would decide whether to amend the Constitution in such a way that it would enable Estonia's accession to the European Union.

At this point I would dare to propose a third option: namely, to use section 105 of the Constitution granting the *Riigikogu* the right to submit a bill or other national issue to a referendum as the legal basis for a referendum. Joining the European Union could definitely be classified as a national issue. And only then, if the people have approved the accession to the European Union, to amend the Constitution of the Republic of Estonia accordingly (by adding section 123' or a separate chapter dealing with the European Union) in order to fix the accession legitimately also in the Constitution. However, amendment of Chapter IX of the Constitution or adding a new chapter coming after it does not automatically presume subjection of the amendment to the Constitution to a referendum. Through such a solution, neither automatic amendment of the Estonian Constitution in case of any future changes within the European Union nor conducting of a referendum under any circumstances on these matters would be definitely determined. If the European Union changes, it should be weighed separately depending on each particular case whether these changes are foundational enough as to presume a referendum and/or amendment of the Constitution.

A referendum on the issue of accession to the European Union should be, however, as it has been mentioned already, thoroughly prepared. It implies legal, political, as well as psychological prepa-

⁶¹ Contrary to A. Albi who holds the position that the referendum should take place as soon as possible in order to legitimise the ongoing process of European integration, I am of the opinion, as I have given my arguments for sufficient legitimisation of the process of European integration above, that now the main emphasis should be focused on thorough preparation for the referendum preceding the accession and its timing. Besides it is strange that Albi at the 30 March 2001 presentation of her collection "The Process of Estonia's Integration into the Western Economic System — International Legal Issues" at the Faculty of Law of the University of Tartu stuck to the position that we should be very cautious with our conducting of a referendum, if this would be carried through at all, while in her article (Note 6) she dared to doubt even about the legitimacy of the European integration. In this case, though, the accession to the European Union should be legitimised via a referendum even more.

rations and analyses. The timing of the referendum is also important. All the more that although the Constitution allows for organising a referendum and a Referendum Act has been adopted in Estonia^{*62}, no referendums have taken place after the adoption of the Constitution. At a round table of the Prime Minister and representatives of the parties represented in the *Riigikogu* on the topic of the EU that took place on 16 March 2001, the politicians achieved a principal agreement that a referendum for the joining of Estonia with the European Union should be organised before the conclusion of the accession agreement. Besides the conclusion was drawn that the right period for organising the referendum would be the time when Estonia has completed its accession negotiations and the accession conditions are precisely known. Estonia expects to complete its negotiations early in 2002. Local elections will take place in the fall of the same year. Still, according to preliminary data, the politicians are not willing to connect the organising of the referendum with the elections, but are planning to carry the referendum through entirely independently.^{*63}

Pursuant to the Constitution and the Referendum Act, the result of a referendum is mandatory for the state institutions.^{*64} But the relevant provisions of the Constitution and the Referendum Act are relatively difficult to comprehend and may be interpreted in multiple ways — all the more that there is no experience.^{*65}

If the people approve the accession, the position on the agreement of the Constitutional Review Chamber of the Supreme Court could theoretically also be asked upon the President's or Legal Chancellor's initiative before the entering into force of the accession agreement.^{*66}

In addition to Estonia, the European Parliament and all the member states should also approve the accession agreement according to their internal rules of procedure.

I personally do not share the opinion of the Expert Legal Review Committee of the Constitution stating that the Estonian courts (the Supreme Court in the first place) would be able in the future to perform review (constitutional review) over legal acts passed by the institutions of the European Union. Review over validity of legal acts of the institutions of the EU can be performed exclusively by the European Court of Justice. It is assumed that the secondary law of the EU, if this is in compliance with the primary law of the EU, to which Estonia as a member state has given its legal consent, is also in compliance with the constitution of a member state. The Estonian Supreme Court will be able, however, in the future to perform review over treaties amending those treaties constituting the foundation for the European Union before their ratification by Estonia, deciding upon the compliance of these treaties with the Constitution of the Republic of Estonia.

Conclusions

Finally the following conclusions may be drawn:

- (1) The process preceding accession is legitimate and it cannot be equalised with accession itself.
- (2) The Constitution can be interpreted in a dynamic manner. Still, it is not sufficient for Estonia's accession to the European Union. If we violate our own Constitution, we will make a substantial mistake that will cause mistrust amongst the people towards the Constitution and the constitutional order/institutions.
- (3) Supplementation, and not amendment, of the Constitution will be possible in multiple ways. Legally the wording of section 1 of the Constitution does not hinder Estonia from joining the European Union; culturally and politically the adding of an aspect of the European Union into this section could be considered. Nevertheless, the supplementation of the Constitution in its Chapter on foreign relations with a separate section dealing with

⁶² Rahvahääletuse seadus (Referendum Act) – Riigi Teataja (The State Gazette) I 1994, 41, 659 (in Estonian).

⁶³ See Baltic News Service. Erakonnad jõudsid euroreferendumi suhtes kokkuleppele (The parties attained an agreement upon a European referendum). – Eesti Päevaleht, 17 March 2001 (in Estonian).

⁶⁴ Section 105 of the Constitution of the Republic of Estonia; section 39 of the Referendum Act.

⁶⁵ See J. Frowein. Report on Possible Amendments to the Constitution of Estonia of 1992. SIGMA Panel Review of the Estonian Constitution. September 1997, p. 10.

⁶⁶ Subsection 6 (1) of the Constitutional Review Proceedings Act.

the European Union or even with a new chapter on the European Union will definitely be necessary.

- (4) Before the supplementation of the Constitution a referendum should be performed in order to clarify what exactly is the opinion of the people on accession to the European Union — both the organising of the referendum and the supplementation of the Constitution should be very thoroughly prepared for, both legally and psychologically.