



Raul Narits

Professor of Comparative Jurisprudence

Comprehension of the Constitution

(from the Communitarian Point of View)

Legal theory has always been aimed at attaining adequate cognition of law. Figuratively speaking, this means the creation of the organic integer image of law. Thus, bearing in mind the legal order, the theory of law should also conduce to cognise the constitution as a certain independent whole. Furthermore, "comprehension of the national legal order must always be based on the idea of oneness or coherence of the legal order as a whole and its supreme law — the constitution".¹ Bearing in mind the achievements of cognition in legal theory, it can be said that it has provided the applier of law with a wide-range complex of cognitive means. However, with regard to the use of cognitive means elaborated by the theory of law, two basic principles should be pointed out: firstly, the principle of ensuring consistency and, secondly, the contextual principle. The constitution must be interpreted in such a way (using cognitive means at that) that no conflicts with other constitutional provisions would occur (consistency) and that one could have a clear idea of a constitutional provision as to its place in the text of the constitution (contextuality).²

The understanding of the constitution is connected with another very important problem concerning court decisions made on the basis of constitutional law or in other words, interpretation of the constitution by constitutional courts³ and acceptance of these decisions. And although not much is written on the problem of accepting the decisions of constitutional court review in legal literature, the problem as such exists. "Here we also have to deal with the question," writes J. Limbach, the Chief Justice of the Federal Constitutional Court of Germany, "how to improve the real power of integration and validity of law."⁴ In every respect it is natural to acknowledge that namely

the decisions of constitutional courts as compared to those of other court instances must be the highest in the hierarchy of value decisions. But the question is not only in the hierarchy of decisions. Instead it is *vice versa*, as first and foremost the decisions of constitutional courts must be supposedly acceptable. It is naturally debatable whether and to what extent the law (i.e. the constitution) and judicial decisions altogether need public or informal recognition (acceptance).⁵ But still objectified forms of comprehension of the constitution, especially the decisions of constitutional courts, as to their acceptance are of importance to the society organised as a state. The best decision from the lawyers' point of view and for lawyers need not be the best for other members (for many or even the majority) of the society. The opening report of the 61st German-wide Lawyers' Day was dedicated to the activities of the German Constitutional Court (*Bundesverfassungsgericht*, hereafter BVerG). The report, *inter alia*, dealt with a 1995 decision of the BVerG by which it was forbidden to hang up crucifixes in the classrooms of German schools. The reason for this prohibition lies in the fact that children of parents with different creed attend school and this, if we bear in mind the freedom of religion, may be distressing for them. And at the same time, senior students may already have a certain theological conception of the world of their own. There are no signs of cooling down of the discussion over the afore-mentioned decision by the German public and this reveals that many as to their level of legal conscience and of conscience as a whole do not approve the decision. It is admitted that although the BVerG has followed the letter of the law it has not been able to understand the actual purport of the law. The Constitutional

Court got into conflict with the legal conscience of the silent majority, thus, with these circles of population whose obedience to the law and loyalty to the state and constitution were generally self-evident.⁶ And although the only determiner of the quality of constitutional review decisions is not and cannot be general acceptability thereof, the fact as such cannot be just ignored. This article does not mainly analyse the interpreter and interpretation of the constitution in connection with the entire open society. It is quite clear that the cognition of the constitution in an open society is an open process in which alternative possibilities become manifest. Specialist literature refers to citizens, social groups, state bodies and the public as interpreters of the constitution in an open society.⁷ Anyway, this should be clear: the text of the constitution in itself is not sufficient for its cognition and the circle of interpreters of the constitution in an open society is broad.⁸ One more aspect should be stressed. Namely, comprehension of the constitution and actual operation of constitutional courts are directly connected with the problems of the protection of a person. This connection is most directly revealed between the cognition and authentic interpretation of Chapter II of the Constitution of the Republic of Estonia.⁹ Chapter II of the valid Constitution of the Republic of Estonia differentiates fundamental rights, freedoms and duties. But many other constitutional provisions that are not incorporated in Chapter II also contain fundamental rights and freedoms (§ 57, § 60(1) and others). In connection with that we can say that the whole Constitution deals with the problem of the protection of a person. Without referring hereby to the communitarian approach, it is absolutely clear that contemporary societies are organised as states and beyond that organisation — the state — it is difficult, if even impossible, to imagine a person.

Let us now turn to a possible¹⁰, achievement of cognition of the constitution — to communitarianism. Since the 1980s, foremost in the United States,¹¹ and more recently also in continental European legal culture,¹² communitarianism has become a rather frequently discussed theory of society and state¹³ among jurists. (Communitarianism is a social theory that revived some decades ago in the United States to counterbalance prevailing individualism. Communitarianism reproaches individualism that the latter treats a person and personality one-sidedly and reduces everything to the level of a person and personality. It should be added that although communitarianism is connected with ethics, it expresses the counter direction to the Rawlsian moral theory.) As we have to deal with a comparatively novel sphere of interest in jurisprudence we do not find much on the treatment of communitarianism as a constitutional theory of the constitution in specialist literature. At the same time it is clear that just in recent decades an important convergence of continental-European legal thinking and that of common law has taken place. It seems

that cognition of such "integrated" legal thinking is in itself of great help for the interpretation of the constitution, especially in the relatively young national legal order of Estonia. Whereat it has to be considered that denotation "young" does not mean "embryonic". It rather refers to a short period during which we have been able and managed to, firstly, shape and, secondly, cognise (interpret) the legal order.¹⁴ Estonia remembers well the discussion on "the letter of law" and "the spirit of law" arisen in 1997. The essence of the discussion was, and still is, that the values on which the law relies must be seen behind or above the text of the law. With regard to the constitution when in many cases, we have to deal with so-called norms-principles the cognition thereof without the use of cognitive methods elaborated by the theory of law is absolutely impossible. Namely communitarianism can be one of the possible approaches here.

In addition to the relative novelty of communitarianism, its emphasis on homogeneity, on certain equability including minor groups of the society as well as the state itself is imposing. Nowadays, rather, the opposite trends the accents of which cause ever-growing individualisation of persons, including their alienation from society, expose problems.

What is characteristic of communitarianism as a systematic understanding (cognition) of society? First of all it has to be stressed that communitarianism must not be reduced to a single (homogeneous) understanding because the pertinent theory is miscellaneous (polymorphous) or integrant.

Firstly, one should find an answer to the question what it is that unites people and their associations. Why are people together? Different answers are possible depending on what we understand under coinciding interests (identities). For example, we can speak of Christian value ethos, European identity or even world solidarity. By this analysis we emphasise the idea of unity.¹⁵ The opposite of unity is difference. For example, with regard to human rights, the questions of race, religion and nationality are irrelevant. But if we consider, for example, citizenship as a criterion of unity then one should see the difference between the people of the state and so-called non-people. Certain differentiations can be actually drawn with regard to every criterion of unity. But in the case of communitarianism it is important to contribute to certain unity in the society: belonging to the society, possibility to be socialised, the society as a certain unitary membership, etc. Clearly distinctive is a communitarian position that the freedom of unitary forms of existence rather than the freedom from society is in the foreground.¹⁶ Communitarianism pays attention to the fact that the development of personality needs not only freedom for something (so-called negative freedom), the freedom must also "have a certain content"¹⁷ By way of and with the help of communitarianism it is pos-

sible to explain the forms of human coexistence as well as structures of social coexistence. Communitarianism acts as a mediator between an isolated individual and centralised state power.¹⁸ The quality of organisation of the society in the form of the state must be such that it would enable to realise one of the person's basic needs — a need to socialisation. As it has been expressed in specialist literature, the state may even use coercion in order to guarantee this need.¹⁹ This means the possibility to use coercion. As a rule, the pertinent processes still take place with the help of permits, co-ordination, etc. But naturally the legal order must comprise the pertinent norms. For example, in Germany, thanks to the operation of the constitutional court a communitarian understanding of a person in the society has been formulated in the following way: "An understanding of a person contained in the Constitution is not that of an isolated sovereign individual, on the contrary, the constitution has eliminated the tension between an individual and society by the involvement of a person in the society and by his or her connection with the society without testing these values."²⁰

Forms of Communitarianism

The following three forms of communitarianism can be distinguished:

- substantial or conservative communitarianism;
- liberal communitarianism; and
- egalitarian or universalistic communitarianism.²¹

It should be mentioned at once that all these forms of communitarianism are democratic by their nature and directed against any political totalitarian state. For an individual the aforementioned forms of communitarianism offer both freedom to make decisions of his or her own and, what is even more important in the pertinent context, the possibility for the protection of fundamental rights and freedoms. It has been pointed out in literature that in this case we do not have to deal with a mere doctrine of liberalism as the stress is not on the "freedom from something" but on "freedom of something"²².

Prior to the analysis of relations between the forms of communitarianism and the constitution, the main forms of communitarianism as to their nature should be characterised.

According to **conservative communitarianism** an individual is tightly connected with the society (a conservative connection). All individuals have been and are connected with the society by a certain period of time that contains the previous course of development of society. For reasonable existence an individual simply needs the forms of human life descended to him or her. Only in such a way the development of the society and that of an individual is possible. "To a great degree the person's freedom consists of the freedom of something, i.e. freedom of life fulfilled with the descended forms of life".²³ This situation does not preclude in any way the freedom of choice including even

so-called decisions made against culture. Nevertheless, conservative communitarianism does not overestimate individual self-determination. Namely, not everything that the forms of human life have descended is worth of choice. But one has to be attentive to everything that has lasted for a long time.²⁴ Therefore this form of communitarianism prefers traditions, conventionality and morals. In the case of a society organised in the form of the state one should begin with the fact that the state and law can function only as long as there is such harmony of conditions that guarantees the loyalty of citizens to the state (an essential aspect) and at the same time allows both distance and difference in comparison with other states (an external aspect).²⁵ If there are really homogeneous conditions in the society that conservative communitarianism in every respect values then there exists homogeneity or at least contractual relationship between classes, religions, languages, races and forms of human life. Nevertheless, the real world is different. For example, the existence of various cultures continuously causes cultural conflicts.²⁶ It should be added that conservative communitarianism does not know exactly what to do in such situations. Distinctions could be made on the "friend-enemy" principle. It seems that thinking in the "friend-enemy" dimension has its place also in Estonia. Reasons for that can be found in the 50-year period under Soviet power. But conservative communitarianism does not draw radical conclusions even in such a situation. For the achievement of homogeneity the idea of integration rather than that of assimilation must be used and developed. At the same time it is an objective fact that various cultures are represented in Estonia. On the basis of the principles of conservative communitarianism we have to head at least for contractual forms of life. The state and its "tool" — law — must be able to be abstracted from such criteria as race, religion and others and offer various associations a full-value place in the society. The state as a frame society cannot propagate only one lifestyle. But a drawback of the conservative societal model is that the state organises these homogeneous associations and groups necessary for the society on the bases of a so-called close horizon.

The essence of **universalistic communitarianism** is that people are autonomous individuals who make decisions of their own. The right as well as the duty to make decisions is simultaneously vested in them. This conception has its logic because, be that as it may, with the descended forms of human life, finally an individual is the one who must improve and develop his or her mind diverging in this or that way from the "descended" society.²⁷

Thus, a full-value life is achieved by making free choices that cover all forms of associations. Thereby the internal relations of associations are also taken into consideration. While conservative communitarianism values first of all morals then universalistic communitarianism is critical of the morals "descended" to us. Conventional

morality claims to universality but at the same time the prerequisite of loyalty is the person's freedom to purpose.²⁸ This means foremost that life, needs and interests of every separate person are equally valuable. Therefore, the aforementioned "close horizon" of ethics (care for close persons, care for similar persons) as well as the "distant horizon" of ethics (care for everyone) and the forms of mediation thereof (for example, European solidarity) would rather be surmised. The aforesaid horizons may be reformed into ethnocentrism, intolerance of not "our folks". "Solidarity requires, above of all, ... permanent overcoming of preliminary decisions shaped by only egocentric primitive ethnocentrism."²⁹ J. Rawls has proposed a solution to face the described conception or rather a deficiency. He interprets law as fairness, wherein fairness is a political and not metaphysical conception. Naturally it is a moral conception but it cannot be derived from a kind of universal morality. The conception eventually and intuitively tries to grasp and interpret what is legitimised by the democratic constitution in state institutions and public traditions.³⁰ In the United States this caused polemics as moral reflection in this case would mean that we ourselves do not know who we as personalities actually are when we make moral decisions or when we decide on the ways and scope of solidarity. True, the described understanding of a person has its positive side. Namely, there must always be a so-called fair balance in the society. Thus, it is not possible that, for example, the predominance of only a certain majority (those who are in power) is realised. Nevertheless, the theory of a person as the centre of society is not realised easily. It is true that the more abstractly we define the person by his or her morals the more attractive the theory seems. Let us imagine ourselves sitting in a comfortable armchair in front of a colour TV-set watching other people's troubles. In fact, we find ourselves in a virtual world that is quite far away from the one in which we actually bear responsibility. Treatments of law contrasting with internal conventional morals should serve as a mirror image of critical (universal) morality that safeguards equality of any lifestyle in the society where bigger associations as well as minorities have comprehensive equality-rights and protection-rights. "Only with the radical setting free of individual biographies and particularities the universalism guarantees equal attention to everyone and solidarity with everything that is embodied in humanity."³¹

The presented standpoints of universalistic communitarianism speak manifestly in support of a common "world-state". But it seems that actual political organisation developed by nation states does not coincide with the above treatment. In Estonia much is spoken namely about a nation state and the fact that Estonia is indeed a small country (with a population of 1.5 million of whom 1 million are Estonians) apparently amplifies these trends even more. But communitarianism introduced in the United

States and primarily its egalitarian substantiation demand understanding of worldwide social-public responsibility.

If conservative communitarianism contributes to "close horizon" where the organisation of state is based on mutually close associations then it ignores the fact that the state is something bigger than a family or even a clan. The principle suitable for the organisation of state must be far more abstract. And here universalistic communitarianism counterbalances on its part conservative communitarianism but at the same time it overdoes it. Namely, in connection with egalitarian communitarianism there is a tendency to keep away from anything on the basis of which it is possible to distinguish people from groups, groups from cultures and so on. In such a way universalistic communitarianism renders a "distant horizon" far too much significance: rights and duties are distributed in the world as such. The fact that namely the state is an important mediator between "close horizon" and "distant horizon", involving both the human environment and political decision-makers, is overlooked.³²

Liberal communitarianism³³ tries to avoid the metaphysical nature of conservative and egalitarian communitarianism. It is a fact that an individual is socialised. Socialisation in itself is neither a linear nor a one-level process. On the contrary, socialisation has taken place and is taking place through various antagonisms and is multi-level. Figuratively speaking, a person needs various socialisations. Different societal structures involve individuals in different forms of life in social, supranational, public and other spheres. This leads to the empirical truth that liberal communitarianism differently from other norms of communitarianism does not *a priori* recognise the primacy of the "close horizon" and "distant horizon". For liberal communitarianism any form of socialisation has the potential to enable a full-value life. It seems that the abovementioned standpoint reveals more adequately the reality. Social life consists of many common forms involving the elements of "close horizon" (including the initial element thereof — the family) as well as these of "distant horizon". There are very many forms of social life (the results of socialisation) between the two horizons anyone of which has its purport, scope and structure. It is important to notice that the level of personal responsibility is just higher in a closer circle (belonging to the "close horizon"). For example, people are usually ready to give, risk and answer more for their countrymen than for aliens. Liberal communitarianism judges this situation positively: if a person gets to know responsibility first in a closer circle (to which naturally conventional morality is added), then the last stage of responsibility, in the sense of the reflection of morality, means overcoming of conventional morality and so-called subsidence of morality of the mankind. The latter crystallises primarily into human rights. It has been observed in specialist literature that for liberal communitarianism this

last stage is a morally necessary one that, true, entails some "expenses" for law. This concerns aid programmes, realisation of asylum and others. But the abovementioned step for overcoming conventional morals is possible only if the preceding steps have been passed. Everything must start with the "close horizon" and logically achieve the "distant horizon". This evolutionary view is not sufficiently followed by egalitarian communitarianism that, for example, calls for urgent and global aid programmes.³⁴

Liberal communitarianism shapes an image of a person that is based on morals and that applies to political and legal spheres as well. Therefore, a (political) decision put into the legal form has often a substantial meaning because it finds its place in the text of the constitution. It seems that communitarianism tries to explain constitutional provisions taking into account the relations thereof and at the same time also justifying them.

On the Communitarian Constitutional Theory in the Light of Liberal Communitarianism

Contemporary constitutions enable the formation of various associations. The task of politics, thereat, is just to find the corresponding forms of organisation. A form of organisation itself must have its place between the "close horizon" and "distant horizon". Hereby one must see to it that in the course of such concretisation no so-called negative norms would be established in nation states,³⁵ but naturally the specification is connected with internal collective identity of people and nations. Everything goes normally if the positive experience is taken over from history.³⁶ Liberal communitarianism alleges that a nation state must be able to open both inwards and outwards. Outward openness is nowadays connected with (bearing in mind continental-Europe) three tendencies: moving to the European Union, enhancement of the role of international law and continuous legitimisation of human rights³⁷. Moving to the European Union can be characterised as an entrance into the European Union structures, effective management and formation and the shaping of a European identity. In the case of the latter it is not absolutely clear when and to what extent the European identity overcomes regional and national identities. There is even no clarity in what should be the final goal of converging Europe. At least one important conclusion can be drawn from it: nowadays the democratic nature of national legal orders is transparent, but in the case of the European Union it is often very difficult to decide who is responsible for what. Outward openness has found its way to the supreme law, the constitution of national legal orders through the pertinent regulations (norms-principles). Thus, the Constitution of the Republic of Estonia provides that generally recognised principles and norms of international law are an inseparable part of the Estonian legal system (§ 3(1) of the Constitution). As primarily these norms legitimise everything humane (moral) then they especially go with the

ideas of liberal communitarianism. Along with constitutions, international treaties and agreements play an important role in the process of outward opening of the state. Without any further deeper analysis it can be alleged that a constitutional state must resort to international treaties in so far as they guarantee the protection of human rights. The Republic of Estonia has moved here in parallel with the idea of liberal communitarianism acceding to or concluding corresponding treaties and agreements. It should be added that "generally recognised norms" in the meaning of § 3 of the Estonian Constitution stand for international customary law, the current universal international customary law. Norms of international customary law are the norms that most of the states recognise as obligatory. The notion "generally recognised principles of international law" could be interpreted as general principles stemming from national legal systems and recognised by civilised nations.

But along with European law and international law there is another important way of openness (both inwards and outwards) for the state: this is the situation where most of the fundamental rights cannot be connected only with the people (citizens) of the state. At the same time there is nothing surprising in the fact that, on the one hand, conservative and liberal communitarianism and, on the other hand, universalistic communitarianism value the category "patriotism" differently. We try to illustrate this with the help of citizenship as a legal and constitutional category that as a natural element belongs to a nation state.³⁸ As is known, under the influence of the French Revolution the "nation" became the source of state sovereignty. Every nation must henceforth have the right to use law as a means of its self-determination. A democratic volitional association replaces an ethnic association. The nation of a state finds its identity not in the ethnic-cultural association but in actual activities of its citizens who actively use their rights in various forms (participation democracy, representative democracy, direct democracy).³⁹ Anyway, for a long time legal language has interpreted the notion "*kodakondsus*" (added — R. N.), "*Staatsbürgerschaft*", "*citoyenneté*" or "citizenship" only in the meaning of nationality and just more recently the notion has been extended to denote the status of a citizen of the state written by the citizens' rights⁴⁰. Thus, the institution of citizenship regulates the rights and duties of persons as members of the people of the state, wherein the people of the state is also recognised by international law. At the same time two different cognitive levels of citizenship stand in opposition. A liberal tradition of natural law based on Lock's ideas crystallises in individualism while a so-called republican tradition of political law based on Aristotle's ideas crystallises in the communitarian-ethic understanding of the citizen's role. As to the first tradition, citizenship is connected with the membership of an organisation on the basis of which the rights and duties are derived from. With regard to the

republican tradition, we have to deal with such a model of belonging where an ethical-cultural association determines itself. Thus, in one case persons are, figuratively speaking, externals to the state and make their contribution by participating in the elections, paying taxes, etc. But in the other case citizens are connected with a political association as individuals in general, or to be more precise, citizens are integrated into a political association and they can achieve their personal as well as social identities together by forming, for example, political institutions. Pursuant to the liberal position a citizen does not essentially differ from a private person. With regard to the republican position citizenship gains its proper meaning only in the course of collective self-determination practice. Ch. Taylor describes the two aforementioned citizenship conceptions in the following way: "One (model) focuses mainly on individual rights and equal treatment, as well as on a government performance which takes account of citizen's preferences. This is what has to be secured. Citizen capacity consists mainly in the power to retrieve these rights and ensure equal treatment, as well as to influence the effective decision-makers... These institutions have an entirely instrumental significance... No value is put on participation in rule for its own sake... The other model, by contrast, defines participation in self-rule as of the essence of freedom, as part of what must be secured. This is ... an essential component of citizen capacity... Full participation in self-rule is seen as being able, at least part of the time, to have some part in the forming of a ruling consensus, with which one can identify along with others. To rule and be ruled in turn means that at least some of the time the governors can be "us" and not always "them"."⁴¹

In specialist literature it has been observed that the following standpoint clearly stems from the distinction of the two conceptions: "political autonomy is an object in itself because no one alone ... but only together can realise (accomplish) the inter-subjectively divided practice. Citizens' legal status constitutes itself through the recognition of egalitarian relations".⁴² Consequently, it stems from the republican model of citizenship that the value of freedom of constitutionally secured institutions is only as high as the population's customary political freedoms to use them. The role of a citizen institutionalised by law must always exist in the context of free political culture. Namely, because of that, communitarians worry that the citizens would identify the "patriotic" with their form of life. Constitutional principles are adopted and rooted in the public practice only in the context of history, history of nationalities, and history of citizens. The reality of multicultural societies clearly reveals that political culture, which should contain the "roots" of constitutionality, must protect not merely the ethnic, linguistic and cultural descent of citizens. Liberal political culture forms constitutional patriotism as a common denominator for different

coexisting forms of life and multicultural societies. Consequently, democratic citizenship must not be rigidly stuck to national identity of only one nationality but it surely insists on socialisation of all citizens into common political culture.

The author of this article is of the opinion that, in converging Europe, various national influences must be considered while developing European statehood. And in perspective, "our own" cultural tradition must still be reflected in European constitutional culture. At the same time we can allege that democratic citizenship must not be legitimised on the basis of national identity of only one nationality ignoring the plurality of different forms of life — states are, in one way or another, multiethnic. Nevertheless, European citizenship requires that any citizen could participate in the socialisation process of common political culture.

It seems that the biggest advantage of communitarianism lies in the fact that it treats the development of political will as an ethical discourse in the course of which the best solution for citizens and their forms of life (considering traditions) will be found. Assimilation of political will with the ethical-political one is directly connected with legislation process. The issues dealt with in this article must be among the teleological goals of legal drafting. In other words, it is important to cognise what society organised into a state we like to live in, what traditions we want to go on with, and what our attitude towards minorities, refugees, marginal social associations and others is. All that is part of public policy, including legal policy. And as we have acknowledged, these issues are subjected to moral problems being at the same time closely connected with pragmatic issues and bearing in mind hereby that for communitarianism the discourse that is aimed at achieving collective self-realisation goals is the valid (rational) one. Quite naturally further analysis of the theme is connected with questions of justice in law but this is another subject because justice and ethics do not stem from one and the same source and, thus, the problems of justice are not directly derived from a certain association or its form of life.

Finally, the fact that both law and legal theories develop and change or to be more precise, that they both are connected with social changes must not be overlooked. Consequently not only legal systems but also the reflection thereof, the meta-level of law is in permanent evolution.⁴³

The aim of this article was not to criticise communitarianism but it seems that the social reality of the end of the 20th-century-Europe forces to do so in many aspects.

We have referred in our treatment to the fact that, for example, German legal practice while interpreting the constitution from communitarian positions has not always been able to guarantee the acceptance of pertinent legal decisions by people belonging to different forms of life.

Notes:

¹ R. Narits, K. Merusk. *Constitutional Law. Estonia*, The Hague, London, Boston: Kluwer, 1998, p. 186.

² Thus, it can be contextually alleged that the active right to vote (§ 57(1) of the present Constitution) is not, pursuant to the Constitution of the Republic of Estonia, a fundamental right because the corresponding provision is placed in Chapter III of the Constitution (entitled "The People") instead of Chapter II (entitled "Fundamental Rights, Freedoms and Duties"). But bearing in mind the consistency of the treatment of fundamental rights, this must be objected to. Namely, it is absolutely not possible to realise the idea of a democratic republic without providing for the right to vote.

³ Pursuant to § 149(3) of the Constitution of the Republic of Estonia, the Supreme Court is also the court of constitutional review. In accordance with section 9 of the Constitutional Review Court Procedure Act, the Constitutional Review Chamber or General Assembly of the Supreme Court operates as the Court of Constitutional Review. — For more details, q.v.: P. Roosma, "Constitutional Review under 1992 Constitution" (1998) III *Juridica International. Law Review University of Tartu* 35-43.

⁴ J. Limbach. *Die Akzeptanz verfassungsrechtlicher Entscheidungen*. — In: *Soziologie des Rechts: Festschrift für Erhard Blankenburg zum 60. Geburtstag*. Baden-Baden: Nomos Verlag-Ges., 1998, pp. 209.

⁵ For example, it has been opined in specialist literature that the recognition of a norm by the public or by the addressee of the norm does not form the foundation of validity of law in the modern legal system. It will be sufficient to act in a norm-conformable manner irrespective of the motives. W. Krawietz, *Anerkennung als Geltungsgrund des Rechts in den moderner Rechtssystemen*. Gerd Haney u.a. (Hrsg.). *Recht und Ideologie. Festschrift für Hermann Klenner*, Freiburg, Berlin, 1996, pp. 104, 139. W. Krawietz draws attention to the fact that "acceptance" of the word and concept is, thus, differently from their serious and elder sister — **recognition** —, first of all a legal-political conception that serves primarily, as proved by its use in diverse political, economic and social contexts, a critical explanation with regard to the law in force." — Krawietz, W. *Akzeptanz von Recht und Richterspruch? Geltungsgrundlagen normativen Kommunikation im Bereich des Rechts*. — In: *Rechtssprechungslehre*. W. Hoppe u.a. (Hrsg.) Carl Heymanns Verlag. Köln u.a., p. 459.

⁶ R. Wassermann. *Prüfend Rechtspolitik// Die Welt*, 18. Sept. 1996. Critics of decisions of the BVerG of the mid 1990s have often referred to the lack of the acceptance of these decisions. Q.v. Limbach, J. *Ibid.* p. 214.

⁷ Q.v. P. Häberle. *Die offene Gesellschaft der Verfassungsinterpreten*. In: *Juristen Zeitung*, 1975, pp. 297, 298, 300, 301.

⁸ It should be added that in addition to its national aspect the problem has at least in Europe a considerably broader meaning. On the one hand, it is obvious that constitutions form the legal foundation of states. International treaties and agreements regulate inter-state relations. At least that has been the case for a long time. But if we bear in mind the European Union, such a division seems almost untenable. "Although no one considers it a state, much has been spoken about its constitution. Thereby, at any rate, quite different treatments meet." Q.v.R. Grimm. *Braucht Europa ein Verfassung?* München. Carl Friedrich von Siemens Stiftung, 1995, p. 11.

⁹ *Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Riigi Teataja toimetuse väljaanne (Publication of the Editorial Board of the Riigi Teataja)*. Tallinn, 1994.

¹⁰ For an overview on the interpretation theories of the constitution, q.v. E.-W. Böckenförde. *Die Methoden der Verfassungsinterpretation*. In: *Staat, Verfassung, Demokratie*. 2. Aufl. Fr. a. M., 1992, pp. 53, 58; R. Narits, K. Merusk. *Constitutional Law. Estonia*. Kluwer, The Hague, London, Boston, 1998, pp. 63-65.

¹¹ Q.v., for example: A. MacIntyre. *After Virtue. A Study in Moral Theory*. 1981; M. Walzer. *Spheres of Justice. A Defence of Pluralism and Equality*. 1983; B. Barber. *Strong Democracy. Participatory Politics for a New Age*. 1984; R. Bellah. et al. *Habits of the Heart. Individualism and Commitment in American Life*, 1985; A. Etzioni. *The Spirit of Community. Rights,*

Responsibilities and the Communitarian Agenda, 1993; S. Mulhall. Swift, A. *Liberals and Communitarians*, 1992 and others.

¹² Q.v., for example: *Kommunitarismus: Eine Debatte über die moralischen Grundlagen moderner Gesellschaft*. A. Honneth (Hrsg.) Fr. a. M., Campus Verlag GmbH, 1993; R. Forst. *Kontexte der Gerechtigkeit. Politische Philosophie jenseits von Liberalismus und Kommunitarismus*, 1994 and others.

¹³ Since 1990 a special journal dedicated to communitarianism is published — "The Responsive Community. Rights and Responsibilities".

¹⁴ Specialist literature reveals that authors have also been astonished at the fact that theoretical discussions on communitarianism have been "imported" from the United States. Q.v., for example: W. Brugger. *Kommunitarismus als Verfassungstheorie des Grundgesetzes*. — *Archiv des öffentlichen Rechts*. 123. Band, 1998, p. 339.

¹⁵ Q.v. W. Brugger. *Ibid.*, p. 340.

¹⁶ On these headwords of communitarianism, q.v.P. Selznick, P. *The Idea of a Communitarian Morality*. *California Law Review*, 1997, 75, p. 445 ff. A communitarian morality is not at its core philosophy of liberation. The control value is not freedom or independence but belonging.

¹⁷ *Staatswissenschaft im Grundrisse*. Stuttgart-Bad Cannstatt: Fr. Frommann Verlag, 1984, pp. 50-87.

¹⁸ Also in the modern theory of state in itself elements of communitarianism can be found. Conception of a contemporary state has made its way in the continental-European political thinking already from the beginning of the 17th century. This means that since Althusius we can speak of a pluralist new organisation of political and social process in which everyone shares the responsibility that the society in the form of a state guarantees to people through their "place" and "vote". Quests for alternative political and social organisations are denoted in theory as post-etatistic, post-sovereign or post-modern. — Q.v. S. Hall. *The State in Question*. — In: *Idea of the Modern State*. G. McLennan. (Eds.) Philadelphia: Open University Press, 1984, pp. 1-28; S. K. White. *Political Theory and Postmodernism*. Cambridge: Cambridge University Press, 1994; Th. O. Hüglin. *Das Westfälische System aus der Föderalismus – Perspektive des Althusius: Frühmoderne Konzepte für die spätmoderne soziale Welt*. — In: *Rechtstheorie*. 29. Band, Heft 2, Berlin: Duncker&Humblot, 1999, pp. 153-175.

¹⁹ W. Kymlicka. *Community*. — In: R. Goodin, P.Pettit (Eds.). *A Companion to Contemporary political Philosophy*, 1993, pp. 366, 373.

²⁰ W. Brugger. *Ibid.*, p. 343.

²¹ For example, R. Forst distinguishes between substantial and democratic-republican communitarianism. Q.v. R. Forst. *Kontexte der Gerechtigkeit. Politische Philosophie jenseits von Liberalismus und Kommunitarismus*, Fr. a. M., Suhrkamp, 1994.

²² Q.v. W. Brugger. *Ibid.*, p. 344.

²³ W. Brugger. *Ibid.*, p. 345.

²⁴ F. A. Hayek. *v. Verfassung der Freiheit*. 3. Aufl. 1991, Tübingen: J. C. B. Mohr, p. 65 ff.

²⁵ On factors themselves in their classical form, q.v.: F. Tönnies. *Gemeinschaft und Gesellschaft. Grundbegriffe der Reinen Soziologie*. Neudruck der 8. Aufl. von 1935, Darmstadt, 1991, § 9.

²⁶ One of the last and extremely regrettable conflicts took place in Kosovo (a part of Yugoslavia) where public policy was aimed at ethnic purification of Albanians from one of the regions of the country. This entailed a military intervention by NATO in order to protect the established forms of life and individuals' rights irrespective of their nationality and creed.

²⁷ B. Baumann writes, referring to v. Hayek's social theory, that in an open society conditions of voluntary-contractual and open co-ordination processes of independent individuals hold a special place. Q.v. B. Baumann. *Offene Gesellschaft, Marktprozess und Staatsaufgaben*. Nomos Verlag. Baden-Baden, 1993, p. 71.

²⁸ R. Dworkin. *Taking Rights Seriously*. 1978, p. 180.

- ²⁹ E. Denninger. *Menschenrechte und Grundgesetz*. 1994, p. 46.
- ³⁰ J. Rawls. *Gerechtigkeit als Fairness: politisch und nicht metaphysisch*. — In: A. Honneth (Hrsg.) *Kommunitarismus: Grundlagen moderner Gesellschaften*: Campus Verlag. GmbH, Fr. a. M., 1994, pp. 36-68.
- ³¹ J. Habermas. *Vom pragmatischen, ethischen und moralischen Gebrauch der Vernunft*. - In: *Erläuterungen zur Diskursethik*. 1991, p. 100.
- ³² W. Brugger. *Ibid.*, p. 353.
- ³³ P. Selznick used the corresponding denotation for the first time. Q.v. P. Selznick. *Kommunitaristischer Liberalismus — Der Staat*. 1995, 34, p. 487 ff.
- ³⁴ W. Kersting. *Gerechtigkeit und demokratische Tugend*. 1997, Kap. 11-13.
- ³⁵ With regard to Nazi Germany q.v.: W. Brugger. *Ibid.*, p. 358.
- ³⁶ Q.v. also M. Walzer. *Lokale Kritik, globale Standards. Zwei Formen moralischer Auseinandersetzung*. 1996, p. 109.
- ³⁷ A. Bleckmann. *Europarecht*. 6. Aufl., 1997.
- ³⁸ For example, in Germany one can notice the thinking characteristic to communitarianism in connection with substantiation of fundamental rights. Q.v. P. Häberle. *Verfassung als öffentlicher Prozess*. Fr. a. M., 1978; A. Blankenagel. *Tradition und Verfassung*. Baden-Baden, 1987.
- ³⁹ But theoretically the conception of citizenship is considerably older and connected with Rousseau's notion of self-determination whereat the sovereignty of people was understood as the restriction of prince's sovereignty.
- ⁴⁰ J. Habermas. *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. 3. Aufl., Fr. a. M.: Suhrkamp, 1993, p. 638.
- ⁴¹ Ch. Taylor. *The Liberal-Communitarian Debate*. — In: N. Rosenblum. (Ed.), *Liberalism and the Moral Life*, Cambridge, Mass. 1989, 178 ff.
- ⁴² J. Habermas. *Ibid.*, p. 641.
- ⁴³ W. Krawietz. *Theoriesubstitution in der Jurisprudenz*. — In: *Das Naturrechtsdenken heute und morgen*. D. Mayer-Maly u.a. (Hrsg.) Berlin: Duncker&Humblot. 1983, p. 359.