



Raul Narits

*Professor of Comparative Jurisprudence,  
University of Tartu*

# Space and Time as Central Issues of Society's Perception of Law.

## Integral Link Between Law and Time and Space

A tendency towards monistic thought is always noticeable in scientific thinking. Every discipline endeavours certain unity, expressed by an attempt to explain the phenomena in its area of research through a basic principle or principles. Representatives of many other disciplines always wonder why legal science deals with national law only. And national law is often treated as merely a collection of legal provisions. Even supranational legal provisions (such as European law) are often explained in the context of a national legal order. We may see that legal provisions and legal principles, and legal provisions and values are treated separately in legal literature. At the same time, the monistic tendency is not unfamiliar to legal science. It is evident in the reception of Roman law and its meaning in the formation of the Continental European legal paradigm. "Europeanisation of legal science" has been a recent subject of discussion.<sup>1</sup> On the other hand, the applicability of law (objective law) is always limited by space and time, and this largely differentiates legal science from other social sciences and particularly from natural sciences.

Those who have had the consistency to seek legal literature for answers to the question of space and time<sup>2</sup>, have certainly noticed that such a posing of the question invariably leads to the close connection between law and a certain territory. Otherwise said, it is a certain stable hermeneutic conditionality of law and the state, the relations of which can be studied systematically.<sup>3</sup> On the other hand is the fact that science has,

---

<sup>1</sup> Die Europäisierung der Rechtswissenschaft, 2002.

<sup>2</sup> Special works that seek answers to the issues of time and space as the main categories related to law are not published very often. One of the latest and most interesting ones was the compilation published for the 600th anniversary of Würzburg: Raum und Recht. Festschrift 600 Jahre Juristenfakultät. H. Dreier (ed.). Berlin, 2002, which discusses the following main subjects: historic dimensions, European legal area, global legal area, border crossings, space as a category of national legal order. Reading this compilation, but also the jubilee collection by M. Lend: Das Recht im Raum und Zeit. A. Ruch (ed.). Zürich, 1998, inspired the author to write an article about the developments of Estonian legal order in the latest period not from the aspect of changes in areas of law, but through a prism of time and space, set around the axis of the birth story of the Republic of Estonia.

<sup>3</sup> There is hardly anybody today who doubts that when law or the provisions recognised as law are spoken of, the recognition has been achieved through the state's legislative activities and it originates in the "constitutional order". H. Hoffmann. Einführung in die Rechts- und Staatsphilosophie. 2000, p. 5 ff., 53 ff., 69 ff.; K. Seelmann. Rechtsphilosophie. 2<sup>nd</sup> ed. 2001, p. 102 ff.

rather independently, delimited certain spaces in law that allow themselves to be identified with certain conditionality via political borders.<sup>\*4</sup> One of the merits of the historical school in the perception of law, as demonstrated by studies in the 20<sup>th</sup> century, was the perception of not only the spirit of a specific nation, but the attempt to understand law supranationally, at least within Europe. Comparison of law still contains not only a comparison of the respective institutions and regulations, but always an element of systematic comparison as well.<sup>\*5</sup> In this connection, we have the opportunity to handle and see law not just as the product of the legislative activities of the state, but an expression of culture that extends beyond nations and groups of nations. "Regions of law", which are distinguishable in space, are usually spoken about in this context. It is certain that in the "universal historical" context, observations about law must be able to describe law as an originally social phenomenon. This aspect is related to the dimension of time. Naturally, the spatial dimension of law has to be taken into account as well.<sup>\*6</sup>

## 1. New socio-political situation in Estonia and Constitution of 1992

In the 1990s, Estonia went through major changes in state affairs and social affairs as a whole. The collapse of communism was a process that concerned the entire Eastern Europe. The new reality brought about both changes and losses, things that were qualitatively new and those that were seemingly new. There was no area of social affairs that the events of this period did not touch upon. After Estonia regained independence, the most important document for the Estonian state, the Constitution, was passed in 1992.<sup>\*7</sup> In fact, the new socio-political situation in Estonia started to form already in the mid-1980s. The act that declared the historic blue, black and white colour combination as Estonian national colours and the cornflower and the chimney swallow as the national symbols may be regarded as the first constitutional act of the period.<sup>\*8</sup> The Supreme Council's declaration of the sovereignty of the Estonian Soviet Socialist Republic on 16 November 1988 was also a highly important act. In 1989, giving a legal opinion on the Molotov-Ribbentrop Pact became a central issue. The Supreme Council's resolution of 12 November 1989 "On the historic and legal assessment of the events of 1940 in Estonia" qualified what happened in Estonia in 1940 as aggression, military occupation, and annexation of the Republic of Estonia by the Soviet Union. Estonia defined itself as a state which endeavours the restoration of independence and termination of occupation. The Supreme Council's resolution on Estonia's status, dated 30 March 1990, affirmed that although Estonia was in the status of an occupied state, its legal consistency continued *de jure*. There were other legal programme documents. When the referendum on independence was held on 3 March 1991, it was attended by 82.86% of the population with voting rights, and 77.83% of them answered the question "Do you wish that the independence and sovereignty of the Republic of Estonia be restored?" in the affirmative. It was thus natural that when the referendum for passing the Constitution was held in 1992, it was attended by 446,708 persons of the 669,080 who were entered in the lists of the voting population, and 407,867 voted for and 36,147 voted against the Constitution and the Constitution Implementation Act.

<sup>4</sup> *E.g. droit écrit and droit coutumier* in France; general and Saxon law areas in the Holy Roman Empire; codified law and common law areas in Europe.

<sup>5</sup> K. Zweigert, K. Kötz. *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*. 3<sup>rd</sup> ed. 1996, p. 31 *ff.*

<sup>6</sup> The first Baltic Sea Area Legal Historians Day was held on 8–12 March 2000; it did not yield anything new in terms of methodology, but made a contribution to the perception of the legal history of a relatively uniform space, not a certain political unit. – J. Eckert, K. A. Modée (ed.). *Geschichte und Perspektiven des Rechts im Ostseeraum*, 2002 (Rechtshistorische Reihe, Vol. 251). Consideration of political units as space is in the foreground in terms of jurisdiction. The principle of territoriality is generally accepted in domestic as well as international law. See R. B. Lillich, U. S. Naval. *War College International Law Studies: Readings in International Law*. – Newport, 1980, vol. 62, p. 639.

<sup>7</sup> The Constitutional Assembly was set up to draft the Constitution. The Assembly was formed of representatives of the Estonian Congress and the Supreme Council on parity bases. By the end of its activities, the Constitutional Assembly prepared an address to the Estonian nation. The address stated that the Constitutional Assembly had completed its work and the draft Constitution of the Republic of Estonia and the Constitution Implementation Act were ready. The draft Constitution that was submitted to referendum is based on the former Constitutions of the Republic of Estonia and is their natural successor. The referendum for passing the Constitution was held on 28 June 1992. The official text of the Constitution was published in *Riigi Teataja* (the State Gazette) 1992, 26, 349 (in Estonian). The English text of the Constitution is available in the publication of the Estonian Legal Language Centre: *Legal Acts of Estonia*. 1996, 1; also: *Estonia. Text of Constitution*. – R. Narits, K. Merusk (eds.). *Constitutional Law*. – Kluwer Law International, Suppl. 23, April 1997. H. J. Uibopuu has translated the text of the Constitution into German and it has been published by Brunner (ed.). *VSO, Estland*, 1.1. a; also *Die Verfassung der Republik Estland*. – *Verfassungen Mittel- und Osteuropas*. Berlin, 1999, pp. 1–40.

<sup>8</sup> It was a constitutional and not a pre-constitutional act. The fact is that despite the occupation, the Estonian state existed *de jure* and its Constitution passed in 1937 was still in force, with the government-in-exile acting under it. – *Eesti Vabariigi põhiseadus. Kommenteeritud väljanne* (Constitution of the Republic of Estonia. Commented Edition). Tallinn, 2002, p. 23 (in Estonian).

## 2. New era and related questions

Despite the aforementioned formal acts and events, answers should be sought in the legal context to those questions or circles of questions that such a time and space places in the foreground. It is no exaggeration to say that these were revolutionary times and three circles of questions have always been in the foreground in terms of revolution law: sources of law, interpretation of law, and gaps in law. Revolutionary periods have shown and are showing that finding law, perceiving it, creating it, and understanding it do not boil down to simple subsuming. Social shocks show that any legitimatisation issues are the closest related to and affected by, in the broad sense, the culture (traditions) of that society. Literature stresses that this is why it is particularly important to know that culture, traditions, and historical social experience provide relatively fixed frames for discussions with a legal focus<sup>9</sup>, as well as legal decisions. However, opportunities for discussion are not very broad in revolutionary times, as the parties that are fighting are the old and the new, *summa summarum*. When viewing the 1990s in Estonia, it should be said that the aforementioned constitutional acts did not only imply assessment of the actual facts of history, but served as a curious protective shield to the freedoms and greater decisive power attained in the struggle for independence.<sup>10</sup> The existence of this peculiar protective shield does not (and did not then) solve the question of on which premises and within which limits a discourse in law and on law is possible at all. In view of time and space as the attributes of law, we may speak about the legitimacy of law when it is based on the historical, including cultural, legitimacy of law. Developments in legal science are only a fragmentation of the concept of legitimation. Systematic observations from other areas of knowledge, such as sociology, political science, theory of systems, etc., can naturally be helpful in such activities. However, I find it particularly important to stress that practice plays the primary role in the balance between theory and practice in legal science.<sup>11</sup>

Such an understanding has long-term and very serious consequences and effects. If we were to believe that upon revolutionary changes in the time dimension and no changes in the spatial dimension, the state as such would remain the same, there would be no reason to speak about a change in rights and obligations in the meaning of the rights and obligations that were in force so far and will remain in force. It is simply a fact that a new era always brings about something new. But if we proceed from the premise that in a new socio-political situation, state power is not, at least not formally, related to the formerly applicable law, an entirely new picture is constructed. We can also speak about a third option which also applies to the Estonian example. The third approach is based on the fact that Estonia has not always been an independent state. Or rather, the period of independence was fairly short for Estonia in relative terms of time scale.<sup>12</sup> Estonian independence was born on 24 February 1918, when the Governors Council published the "Manifest for all peoples of Estonia". The manifest declared Estonia to be an independent democratic republic and set out the general principles on which basis the state was to govern in the future. The democratic republic was seen in its historical and demographic boundaries — these were the parts of Estonia within the state border. The first independence period lasted until 1940. But it is this historic fact that indicated that at least historically, there is a link between the Republic of Estonia declared in 1918 and the Republic of Estonia that regained independence in 1991. The situation forces us to think about the important facet of legitimation with the help of legal provisions. We are speaking about the social and legal validity of law as a collection of provisions. The problem is that the legal validity of a provision does not necessarily guarantee the provision's force in the social sense. Or *vice versa*: the legitimacy of legal provisions cannot be automatically derived from their social validity. Thus, the social validity of provisions and their legitimacy have always represented two different qualities.<sup>13</sup>

<sup>9</sup> T. Würtenberger. Zur Legitimität des Grundgesetzes in historischer Perspektive. – Legitimation des Grundgesetzes aus Sicht von Rechtsphilosophie und Gesellschaftstheorie. 1<sup>st</sup> ed. 1996, pp. 21–22.

<sup>10</sup> A. Rüütel. Mõned tagasivaated põhiseaduse tulekule (Retrospect of the Coming of the Constitution). – Põhiseaduse tulek. Kogumik. Tallinn, 2002, p. 10 (in Estonian).

<sup>11</sup> W. Krawietz. Aus Differenzierung von Praxis und Theorie in juristischer systemtheoretischer Perspektive. – Rechtstheorie, 2001, No. 32, p. 346.

<sup>12</sup> Estonia's history has plenty of proof that Estonia was a legally autonomous unit long before declaration of national independence in 1918, meaning that Estonian society was ready for the creation of a new quality of an organisational form, the state, even at the end of the ancient times already.

<sup>13</sup> Special literature draws attention to the fact that in a certain historical context, a situation forms in a certain time and space where some perceive and accept the *restitutio* principle, while others resist it. – H. Herrfardt. Revolution und Rechtswissenschaft. Untersuchungen über die juristische Erfassbarkeit von Revolutionsvorgängen und ihre Bedeutung für die Allgemeine Rechtslehre. Aachen, 1970, p. 92.

### 3. Formation of legal policy communication

The Estonian example offers a lesson about how the 1992 Constitution of the Republic of Estonia came into being. At first glance, it is not difficult to differentiate between what is important and what is not. The new is always the new. However, the situation is more complicated when we notice that the birth of constitutions is very often related to certain revolutionary events as opposed to ordinary social life, even crises and shocks. In this new situation, when the implementer of law who has been implementing law already before such a social breakpoint, receives an "order" from the new power to solve the legal problem in a different way than he has done before, the implementer of law faces the inevitable question of what legitimacy to use as the basis for entry into the legal decision process.<sup>14</sup> The Estonian socio-legal reality served as good grounds for characterising the entire Constitution of 1992 as a carrier of legal continuity.<sup>15</sup>

In this context, the events that occurred in Estonia may be characterised as the historic process of supranational formation of law.<sup>16</sup> If we bring the supranational formation of law down to two conditions only — economic<sup>17</sup> and socio-ethical — these conditions may prove insufficient when taking regional peculiarities into account. References are made to the political activity of those in power.<sup>18</sup> In his aforementioned work on the creation of the Constitution, the member of the Constitutional Assembly J. Adams states with reference to his memorandum to the management of the Estonian Committee<sup>19</sup>, "There will probably be no great objections when I say that on the road to making independence reality, we need a transitional Constitution or otherwise said, an interim government procedure. On the one hand, the latest [1938 — R.N.] Constitution of the Republic of Estonia cannot be enforced again in full [...]. On the other hand, we cannot use the Soviet Estonian Constitution [1968 — R.N.] [...]. Legal philosophers particularly have discussed that there is always 'something else' behind a law. These are the principles and values on which the law was built — quite often they cannot be clearly formulated, or if they can, it is wiser not to attempt to word them as legal provisions."<sup>20</sup> Adams illustrates his idea with § 4 of the Constitution of the Republic of Estonia, which sets out the principle of separation and balance of powers, "The sentence that suits well into any constitutional law textbook and is a trivial truth of today's democratic structure of the state has caused many problems as a part of the text of the Constitution, as it has become a weapon in the mutual fight of state agencies for prestige and power and a larger share in the state budget."<sup>21</sup> Adams recalls J. Kross, an expert in the Constitutional Assembly, "I have an especially good memory of Jaan Kross who participated as an expert; the writer's sense of language was combined with the conceptual clarity and terminological precision of his pre-war [World War 2 — R.N.] lawyer's education, topped by the impartiality and calmness that sprouted from a lack of personal interests."<sup>22</sup> The role of experts was especially powerful in drafting the constitutional bases of the Republic of Estonia, since these were the people who were thought to become the teach-

<sup>14</sup> For example, § 2 of the Constitution of the Republic of Estonia Implementation Act provides that legislation currently in force in the Republic of Estonia shall be valid after the entry into force of the Constitution in so far as it is not in conflict with the Constitution or the Constitution Implementation Act and until it is either repealed or brought into complete conformity with the Constitution. The aim of such a provision was probably to ensure the functioning of society and the state upon entry into force of the new Constitution. It is also evident that the legal situation that was valid before the occupation was not restored. It should be kept in mind that the legislation applicable at the time of entry into force of the Constitution which was not in conflict with the Constitution and its Implementation Act remained in force; the legislation that was in conflict with these was repealed if its conflicting nature was obvious. The competent authority to settle disputable issues was the Supreme Court according to the procedure for constitutional review.

<sup>15</sup> The President of the Republic of Estonia, who was a member of the Constitutional Assembly, has characterised legal continuity in the context of the Constitution as follows: "This principle was a guiding companion that organised thought in restoring independence, drafting the legislation that preceded the passing of the Constitution, and in the drafts submitted to the Constitutional Assembly. Legal continuity does not merely imply the handling of two separated legal systems as a single whole [meaning the legal systems in different times and spaces: the one applicable in 1918–1940 and the one created since 1991 — R.N.], but also the lawful development of the current legal order. This is why it is important to stress that the Constitutional Assembly did not have to start drafting the Constitution from an empty spot [...]. Legal continuity also requires theoretical consistency. This conclusion is particularly relevant in the period when we start to provide legal content to the state organisation model as a future member state of the European Union." — A. Rüütel (Note 10), p. 9.

<sup>16</sup> The opinion has been stated in special literature that supranational formation of law can be described on two grounds: economically justified formation of law, and socio-ethically justified formation of law. — D. Willoweit. *Historische Prozesse staatenübergreifender Rechtsbildung*. — H. Dreier (ed.). *Raum und Recht*. Berlin, 2002, pp. 8–18.

<sup>17</sup> H. Dreier. *Wirtschaftsraum – Grossraum – Lebensraum. Facetten eines belasteten Begriffs*. — H. Dreier (Note 16), pp. 47–84.

<sup>18</sup> D. Willoweit (Note 16), p. 19.

<sup>19</sup> The Constitutional Assembly consisted of members of the Supreme Council and the Estonian Committee.

<sup>20</sup> J. Adams. *Eelnõu sünd ja saatus (Birth and Fate of Legislative Proposal)*. — Põhiseaduse tulek. *Kogumik* (Note 10), pp. 131, 143 (in Estonian).

<sup>21</sup> *Ibid.*, p. 143.

<sup>22</sup> *Ibid.*, p. 149.

ers of the idea and aim of the Constitution.<sup>23</sup> Adams describes the situation as “a major communication problem”.<sup>24</sup> History has shown that all pre-modern societies have been characterised from the legal policy aspect by their limited ability and readiness to adopt something that is foreign (not bad) and new in legal thinking. K. Stern makes an interesting observation in this respect. When analysing the human and fundamental rights situation in the East–West dimension, he writes: “It could be said: fundamental rights are in force only in the framework of the socialist order, but socialist lawfulness is not within the framework of fundamental rights. This is no problem for the state and for those in power. In the end, fundamental rights cannot be protected in court.”<sup>25</sup> In the final decades of the 20th century, Estonia had a historic chance to essentially participate in open legal policy communication. Since 1989, almost every day, week, and month meant changes and dynamics in Europe. Two hundred years after the French Revolution, a large part of Europe stood at a constitutional turning point. Major changes took place in the socio-political systems of Poland, Hungary, Czechoslovakia, Yugoslavia, the Baltic States, Bulgaria, Romania; the German Democratic Republic moved under the constitution of the German Federal Republic as if sliding under an umbrella, and received a constitution that contains a model of a state based on the rule of law. The monopoly of absolute truth and doctrines of pure theory as guidelines for political behaviour were discarded. They were replaced by the concept of a democratic state based on the rule of law, which places human and fundamental rights in the foreground. But free legal policy communication was not born without labour. For example, the member of the Constitutional Assembly V. Andrejev answers the question of what the Russian-speaking representatives felt when they worked in the Assembly, “Frankly speaking, we, the Russian-speaking representatives, had rather conflicting feelings at the time. On the one hand, we acknowledged that we were drafting the constitution for our OWN state and tried to do our best. On the other hand, we were often unsuccessful, because “Russians” were not readily heard at the time.”<sup>26</sup> L. Hänni, head of the working group for the wording of the constitution in the Assembly writes, “Sometimes, especially in the early years when the new Constitution was in force and the neonate was still strange and sometimes even fended off, you could read these words here and there: what do you expect of this constitution of stokers and astronomers. I believe that the people who wrote these words meant the former dissident Jüri Adams, who was the main author of the draft on which the work of the Constitutional Assembly was based, and also me, having made a living as an astronomer earlier [...]. Society slowly started to realise that the new Constitution was not merely an abstract legal model of future Estonia, but a crowbar for demolishing the power relations that still originated from the Soviet period.”<sup>27</sup> K. Kama as a member of the Constitutional Assembly opines, “The best results were achieved when debates were carried out to the end and the approaches that took a balanced account of the opinions of both politicians and lawyers were incorporated into the text of the Constitution. The lawyers would not let politicians play games with daily policy issues, while politicians did not let lawyers wander off onto the paths of overly theoretical, crystal clear law, which would have alienated from the needs of real life.”<sup>28</sup> The work of the Constitutional Assembly has been assessed perhaps most critically from the political communication viewpoint by its member A. Sirendi, “When starting to work in the Assembly, I believed in good faith that all its members tried to make their best efforts for unity and solidarity and for reaching *consensus omnium*. After some sessions, it became clear that a majority did not wish that, and the spirit of winning and political pressure were what determined the results of debates.”<sup>29</sup> Yet another observation was, “The Constitutional Assembly united the power of Estonian constitutional thought via its members and their satellites, including the experts amongst others. It is very regrettable that no minutes were taken of the sessions of the wording committee [...]. Minutes of the full Assem-

<sup>23</sup> A number of foreign experts helped to draft the Constitution alongside Estonian experts. The Constitutional Assembly set up seven working groups, each of which could invite up to three foreign experts to participate in their work. There were 11 foreign experts: C. Bernholdt, legal adviser for human rights and constitutional law to the Austrian Chancellor; G. Carcassonne, professor of the University of Paris; P. Garmer, professor of constitutional law at Aarhus University; E. Harremoes, Director of Legal Affairs of the Council of Europe; R. Herzog, presiding judge of the German Constitutional Court; T. MacPherson, Dean of the Faculty of Law of the University of York; H. Ragnemalm, *ombudsman* of the Swedish Parliament, professor; M. Russell, senior assistant for legal affairs to the Government of Ireland; M. Shugart, assistant professor, University of California; A. Suviranta, presiding judge of the Higher Administrative of Court of Finland, and Zierlein. However, the member of the Constitutional Assembly R. Taagepera notes, “They were all introduced as legal experts to the Assembly; there were few political scientists. The Assembly seemed to believe that excellent legal counsel was available from abroad, but that Estonia had the necessary political wisdom itself. It is more likely that, as political science was not permitted in the Soviet Union, the members of the Assembly had not realised that political science is separate from legal knowledge. R. Taagepera. *Eesti Põhiseaduse Assamblee 1991–1992* (Estonian Constitutional Assembly 1991–1992). – Põhiseaduse tulek. Kogumik (Note 10), p. 96 (in Estonian); English text: R. Taagepera. *Estonian’s Constitutional Assembly, 1991–1992*. – *Journal of Baltic Studies*, Fall 1994, vol. XXV, No. 3, pp. 211–231.

<sup>24</sup> J. Adams (Note 20).

<sup>25</sup> K. Stern. *Menschen- und Grundrechte in West und Ost – Idee, Rechtsgrundlagen und Durchsetzung*. – International Conference on Comparative Constitutional Law. Tokyo, 1990, p. 26.

<sup>26</sup> V. Andrejev. *Intervjuu Inge Rumessenile* (Interview to Inge Rumessen). – Põhiseaduse tulek. Kogumik (Note 10), p. 154 (in Estonian).

<sup>27</sup> L. Hänni. *Põhiseaduse sünd redaktsioonitoimkonnast nähtuna* (Birth of Constitution: Viewpoint of Redaction Team). – Põhiseaduse tulek. Kogumik (Note 10), pp. 160, 161–162 (in Estonian).

<sup>28</sup> K. Kama. *Intervjuu Inge Rumessenile* (Interview to Inge Rumessen). – Põhiseaduse tulek. Kogumik (Note 10), p. 177 (in Estonian).

<sup>29</sup> Põhiseaduse tulek. Kogumik (Note 10), p. 206 (in Estonian).

bly do not give a fraction of the information of what the discussion was all about, and of the views of our society's elite on the state and society in the first years of freedom. For today's youth you have already studied law in Europe's best universities, including Tartu, many of the opinions voiced at the time can seem unintelligible, tragicomic or simply funny, but this was out of life and spirit in 1991–1992. We cannot hide from our history.<sup>30</sup>

## 4. Continuity of Constitution of the Republic of Estonia in the new Europe

The Estonian Constitution has remained almost unchanged for 11 years.<sup>31</sup> During the same 11 years, many developments have taken place in Estonia and elsewhere in the world. One of the key themes is the European Union. The author of this article believes that regardless of the social and political reality that has formed and is forming, the consistency and continuity of the Constitution is important for us. We are not speaking about the unchangeable nature of the Constitution. A referendum on accession to the European Union will be held in Estonia on 14 September 2003.<sup>32</sup> It is quite clear that the current Constitution was drafted in view of European law in the broad meaning. The European Union did not yet exist at the time when the Constitutional Assembly was working. The European Union does not pose requirements for the candidate states as to whether and how they should set out membership in their constitutions. The Estonian parliament chose to hold a referendum on the draft "Constitution of the Republic of Estonia Addition Act".<sup>33</sup> All four sections of the draft will be printed on the ballot and they constitute the question on which the referendum will be held.

Section 1 "Estonia may be a member of the European Union, based on the fundamental principles of the Constitution of the Republic of Estonia."

Section 2 "Upon Estonia's membership in the European Union, the Constitution of the Republic of Estonia shall be applied, having regard to the rights and obligations arising from the accession agreement."

Section 3 "This Act may be amended only by referendum."

Section 4 "This Act enters into force three months after its proclamation."

The question itself is: "Are you in favour of accession to the European Union and passing of the Constitution of the Republic of Estonia Addition Act?" But why should the Estonian Constitution be amended? It is because the decision on the amendment was based on the provisions of § 3 of the Constitution: "The state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith." The Estonian Constitution does not mention the legislative acts of the EU, such as the directives. And as § 3 belongs to Chapter 1, "General Provisions", then according to the Constitution itself (§ 162) an addition that substantively concerns § 3 must be decided by referendum.<sup>34</sup> From the legal theoretical aspect, Estonia is again in a situation where it must consider supranational legislative conditions. The steps to be taken in the process of accession to the EU, including amendment of the Constitution, do not pose a danger to the choice for independent statehood made on 28 June 1992, nor to the values contained in the Constitution. It seems that legal policy communication must be much more intensive in the objective formation process of Europe. We cannot imagine the present day without its geographical or spatial dimension. Indeed, in the Middle Ages, legal thought was as limited as was knowledge of the adjacent or more distant geographical spaces. At least in Europe, legal policy discourse covered a large part of the continent already in the 19th century; in the 20<sup>th</sup> century, a powerful step was made for communication that covers the whole world.<sup>35</sup> Legal historians have made an interesting observation: during the period when independent statehood is

<sup>30</sup> R. Lang. Mõned mõtted seoses põhiseadusega (Some Thoughts about Constitution). – Põhiseaduse tulek. Kogumik (Note 10), p. 220 (in Estonian).

<sup>31</sup> Except for amendment of the Constitution concerning the election of local government councils for a term of four years, which will enter into force on 17 October 2005 – Riigi Teataja (the State Gazette) I 2003, 29, 174 (in Estonian).

<sup>32</sup> On 18 December 2002, the *Riigikogu* passed the resolution "Holding of referendum on accession to the European Union and adding to the Constitution of the Republic of Estonia". – Riigi Teataja (the State Gazette) I 2002, 107, 637 (in Estonian).

<sup>33</sup> On the "third act" theory, read J. Laffranque, Ü. Madise, K. Merusk, J. Põld, M. Rask. Põhiseaduse täiendamise seaduse eelnõust (On Draft Constitution Supplementation Act). – *Juridica*, 2002, No. 8, p. 563 ff. (in Estonian).

<sup>34</sup> A problem may arise if the Constitution Addition Act is supported by the referendum, but the *Riigikogu* does not ratify the agreement with the EU. Section I of the Addition Act only states that Estonia may be a member of the European Union. If the *Riigikogu* finds that the signed agreement is not favourable for Estonia, etc., it might not ratify it. In such a case, the agreement would have to be amended so as to make its ratification by the *Riigikogu* possible.

<sup>35</sup> On this, see W. Fikentscher (ed.). *Begegnung und Konflikt – eine kulturantropologische Bestandsaufnahme*. – Bayer, Ak. d. Wiss., Phil.-hist. Kl., Abh. N.F. Heft (Edition) 120, 2001.

established, it does not greatly resist the public perception of compliance with law or law as such. On the contrary, authority accepts that law is something that every generation adopts from the previous one and develops further.<sup>36</sup> All major political parties in Estonia support accession to the European Union. This is support to broad-based legal communication; this is support to the idea that Estonia must be able to open up not only inwards, but also outwards.<sup>37</sup> When we speak of a state's willingness and ability to open outwards, we are speaking of the process of accession to the European Union. Besides, we are speaking of an increasing share of international law and a continuing legalisation of human rights.<sup>38</sup> Transition to the European Union can be structured as entry into the EU structures, efficient economy, formation and development of a European identity. The opening process certainly has its legal dimension. If the referendum succeeds, passing of the additions to the Constitution will be an example of this. And this is not all. The importance of practice in making legal theoretical conclusions and generalisations was already referred to. The thesis can be illustrated by an example of the use of European law by the Supreme Court of Estonia already. Namely, the Supreme Court of the Republic of Estonia uses the legislation of the European Council, and to some extent, the EU law itself, as a means (argument) of interpretation of Estonian law. Judicial practice of the Supreme Court clearly indicates that the general principles of EU law have been adopted among the generally accepted principles in Estonian law.<sup>39</sup> This practice leads to at least one important conclusion. Perception of and consideration for "globalisation of law"<sup>40</sup> as an objective process is apparent within the national legal order. Individual states are the primary subjects of integration of global law. International organisations are striving for legal integration simultaneously with individual states. It seems that Estonia has sensed the challenges that time and space have posed in the understanding of law.

## 5. About the legitimacy of current Estonian law

The above was a discussion of the time and space dimensions in the context of drafting the Constitution of the Republic of Estonia, where the commentaries on the birth of the Constitution were essentially a glimpse of the events that occurred 10 or 11 years ago and indicated that the constitutional order was not created without problems, but took account of the challenge posed by time and space. On the one hand, the drafters relied on the traditional approach, according to which, "The Constitution is a basic set of rules that determines the way public authority has to act. It has to express the form of treating the nation as a political community, how people are governed and who does it, and what the rights and duties of the governors are. The Constitution is nothing else but a determination of the procedure for attaining the common goals of society and using the advantages of political society". These words, uttered by E. de Vattel, who acted in Geneva in the year 1758, were cited by the acclaimed German constitutional researcher K. Stern in his presentation in Montreux in 2001.<sup>41</sup> All this still holds true today. However, legitimacy can no longer — like traditional law — be justified by merely relying on conventional concepts of compliance with law, justice, and morality. The conditions for the validity of legal provisions that have to be considered — and this is stressed not only by lawyers — include the formal applicability, efficiency, and acceptance of the

<sup>36</sup> D. Willoweit (Note 16), p. 21.

<sup>37</sup> R. Narits. Comprehension of the Constitution (from the Communitarian Point of View). – *Juridica International*, 1999, pp. 7–8.

<sup>38</sup> Constitutional legal science has paid attention to these aspects a relatively long time ago already. *Staatswissenschaft im Grundrisse*. Stuttgart-Bad Cannstatt, 1984, pp. 50–87.

<sup>39</sup> Already in 1994, *i.e.* in the third year of independence, the Supreme Court stated in a matter of constitutional review that democratic states base their legislative drafting and application of law, including administration of justice, on laws and historically formed general principles of law. The general principles shaped by agencies of the European Union have to be taken into account alongside the general principles of Estonian law [...]. The validity of the principles of a democratic and social state based on the rule of law means that the general principles of law recognised in the European legal area are valid in Estonia [...]. A law that is contrary to the general principles is also contrary to the Constitution. – *Riigikohtu lahendid 1993/1994*. Tallinn, 1995, p. 34 (in Estonian). A dissenting opinion of the presiding judge of the Supreme Court at the time, R. Maruste, contains a reference to the Europe Agreement and a statement that the principle of equal treatment is one of the general principles of European law. – Decision of the Constitutional Review Chamber of the Supreme Court, 27 May 1998, 3-4-1-4-98. – *Riigi Teataja* (the State Gazette) I 1998, 49, 752 (in Estonian). In a dissenting opinion, presiding judge of the Supreme Court U. Lõhmus refers to the resolution of the EU Council of 1993 concerning legislative drafting in the EU and the requirements for EU legislation, and the judicial practice of the European Court. See Decision of the Constitutional Review Chamber of the Supreme Court, 5 October 2000, 3-4-1-8-2000. – *Riigi Teataja* (the State Gazette) III 2002, 21, 232 (in Estonian). The Supreme Court has based its decisions even on the Charter of Fundamental Rights of the European Union, which is only a politically binding document. – Decision of the Supreme Court *en banc*, 17 March 2003, 3-1-3-10-02 (in Estonian).

<sup>40</sup> K. Kreuzer. *Entnationalisierung des Privatrechts*. – H. Dreier (Note 16), pp. 250–251.

<sup>41</sup> K. Stern. *Der Staat der Gegenwart – Aufgaben, Grenzen und Reformgedanken*. – *Im Dienste von Recht, Staat und Wissenschaft*. Köln, 2002, p. 742.

provisions by society.<sup>\*42</sup> Efficiency corresponds to J. Habermas's social validity, and acceptability corresponds to validity as such.<sup>\*43</sup> General principles of law are added to legal provisions. The formal side of general principles is less relevant than that of legal provisions. Principles affect the way provisions are created and implemented. The central basis of legal principles is their recognition in a certain time and space. From this aspect, legal principles are peculiar provisions or a part of the set of provisions that legal culture has adopted and that live on in the axiological basis that supports legal order. Validity of legal principles is certainly a part of the legitimacy of Estonian legal order besides the formal validity, efficiency, and public acceptance of legal provisions. Reality shows that Estonian legal order was and is being created supranationally since the country regained independence, and is related to international legal policy communication.

<sup>42</sup> J. Wróblewski. Verification and Justification in the Legal Sciences. – *Rechtstheorie*, 1978, Beiheft (Supplement) 1, pp. 195–217; A. Aarnio. The Rational as Reasonable. Dordrecht. 1987, pp. 33–40; K. Tuori. Legitimität des modernen Recht. – *Rechtstheorie*, 1989, vol. 20, p. 224 *ff.*

<sup>43</sup> J. Habermas. *Moralbewusstsein und Kommunikatives Handeln*. Frankfurt am Main, 1983, pp. 69–72.