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Methods of Interpreting the Constitution: Estonia's Way in an Increasingly Integrated Europe

1. Introduction ^{*1}

In Estonia, the post-communist establishment of a liberal democratic regime has been accompanied by the gradual emergence of new constitutional developments. Of course, it is not clear yet what precise model of constitutionalism the final form of these settlements should represent.^{*2} In § 3 of the Estonian Constitution, adopted in a referendum on 28 June 1992, the principle of legality is declared and compliance with the rule of law is accepted and guaranteed. Furthermore, the Constitution instated a system of judicial review^{*3} especially by a Supreme Court (see §§ 15, 149, 152 of the Estonian Constitution). Its Constitutional Review Chamber^{*4} has supervised the application of the Constitution for ten years now. It is therefore an appropriate moment to reflect on the methods for interpreting the Constitution.

This essay is born of an attempt to find out what methods of interpretation are still in use^{*5} and what trends could arise in the future. In relation to the two main legal reference points concerning Estonian constitutional law, the influence of continental and common law must be taken into consideration.

Last, but by no means least, it addresses the question of how Estonian jurisprudence will react to the forthcoming European integration, which is influencing developments in Estonian constitutional law and will certainly do so after accession to the EU on 1 May 2004.

¹ The author wants to thank Peeter Roosma (Adviser to the Estonian Supreme Court Constitutional Review Chamber) for constructive comments and Peeter Pällin (Judge, Master student at Faculty of Law, Tartu University) for his useful assistance with Estonian texts.

² J. M. Ostrow. *Comparing Post-Soviet Legislatures. A Theory of Institutional Design and Political Conflict*. Ohio, 2000, pp. 195 ff.

³ See in general R. Maruste, H. Schneider. *Constitutional review of legislation in Estonia – its principal scheme, practice and evaluation. Constitution as a legal base for system and functions of organs of the state*. Tallinn, 1996, pp. 84–104; R. Maruste, H. Schneider. *Constitutional Review in Estonia – its Principal Scheme. Practice and Evaluation*. – R. Müllerson, M. Fitzmaurice, M. Andenas (eds.). *Constitutional Reform and International Law in Central and Eastern Europe*. The Hague, 1998, pp. 91–104; R. R. Ludwikowski. *Constitution-making in the Region of Former Soviet Dominance*. Durham, 1996, pp. 210–227.

⁴ T. Marauhn. *Supreme Court or separate Constitutional Court: the Case of Estonia*. – *European Public Law*, 1999, vol. 5, No. 2, pp. 301–314.

The essay is focused on the methods of interpretation and employs the methods of comparative constitutional law, which have not yet been fully refined. Jaakko Husa⁶ states that confusion is more evident than a clear approach: “The question of the appropriate method of comparison [...] seems rather unsolved, as does the more general question of the methods of all legal sciences”. Friedrich Venter⁷ comes to the same conclusion: “A consideration of the status of comparative law, and more particularly of comparative activity in the field of constitutional law, soon shows a lack of consistency of method”. But to take the view of Martti Koskenniemi⁸, it is not a catastrophe. For purposes of this essay, it is enough to note clearly that comparative law is not descriptive only. It also deals with the similarities and differences of legal systems. Last but not least, applied comparative law searches for answers to the question of further developments.

From the starting point of a systematic description of the compatible traditional ways of interpreting the constitution according to the Romano-Germanic and common law traditions, the essay attempts to analyse the Estonian methods of interpretation. Beginning with the jurisdiction of the Estonian Supreme Court and continuing with scientific analysis and underlining of the specific influence of the forthcoming European integration, an attempt is made to categorise the Estonian approach. The Conclusions sum up the results and implications of the examination.

2. Different traditional ways of interpreting the constitution

Traditionally, legal scientists differentiate between different so-called law families. The best benefits can be attained by confining oneself to closely linked legal systems, maybe even within one ‘family’ (a ‘micro’ perspective). The choice of which material to compare may be called the selection of *tertium comparationis*. This is the conceptual apparatus, the context in which the comparison can take place. Focused “on the similarities, researchers attempted to identify a set of ideas or practices common to all developed legal orders. The differences among the systems have been examined chiefly in terms of proper taxonomic classification, an approach that analyses the differences among a small number of legal families rather than the particularities of the numerous individual legal systems themselves”, in the words of Richard Hyland.⁹ According to René David, three principal groups of law may be distinguished¹⁰: the Romano-Germanic family, the socialist legal systems, and common law. The criteria involve the compatibility of educated lawyers and philosophical, political, and economic principles.

Although Estonia is, because of its history, categorised as being in the Romano-Germanic family of legal systems¹¹, there could be — with the exception of a few remaining elements of socialist legal tradition — some legal transplants¹², especially from the Anglo-American legal system (common law). Therefore, their contribution necessitates first showing some basic outlines of the Anglo-American way of interpreting the constitution. Then, the Romano-Germanic approach is addressed.

To explain the relevance of this question, it lies in the fact that judges who are educated in the case-law system are more willing and obliged by the doctrine of *res judicata*¹³ to solve a legal problem by paying attention to precedent-setting decisions of the court, while judges from the Romano-Germanic tradition see this as a secondary approach. The second question should be whether the court is allowed to correct the legislative, representing the will of the sovereign. While judges in the case-law system see barriers here, other courts seize the chance to correct legislation.

⁵ Therefore this essay is in a line with the analysis of P. Roosma. *Methods of Constitutional Interpretation in the System of Checks and Balances: Development and Practice of Constitutional Review in Estonia*. Master of Laws Thesis. Central European University, Budapest, 1997.

⁶ J. Husa. *Nordic Reflections on Constitutional Law*. Frankfurt am Main, 2002, p. 33.

⁷ F. Venter. *Teaching comparative Constitutional Law*. IACL Rotterdam, July 1999, p. 5, <http://www.eur.nl/frg/iac/papers/venter.html>.

⁸ M. Koskenniemi. Letter to the editors of the Symposium on method. – *The American Journal of International Law*, 1999, 93, pp. 351–361.

⁹ R. Hyland. *Comparative law*. – D. Patterson (ed.). *A companion to philosophy of law and legal theory*. Oxford paperback, 1999, p. 185.

¹⁰ R. David, J. E. C. Brierley. *Major legal systems in the world today: an introduction to the comparative study of law*. 1985.

¹¹ See for the details R. Narits, K. Merusk. *Estonia – International Encyclopedia of Laws. Constitutional Law*. The Hague, 1998, pp. 17–42.

¹² See for the term D. Nelken. *Legal Transplants and Beyond: of Discipline and Metaphors*. – A. Harding, E. Örücü (eds.). *Comparative Law in the 21st Century*. London, 2002, p. 27.

¹³ See for the details P. Hay. *Law of the United States*. Munich, 2002, Chapter I No. 21.

2.1. Common law approach of interpreting the constitution

Firstly, this essay sets forth a primary, preliminary thesis. Given that most of the justices of the Estonian Supreme Court use English and not German^{*14} as a working language^{*15}, it seems to be possible that this has an extensive influence on their practice of jurisprudence.

What is it that has led common law to solve interpretative problems? As David M. Beatty^{*16} says after an analysis of the role of religious liberty in the decisions of the German *Bundesverfassungsgericht* (Federal Constitutional Court — FCC) and the U.S. Supreme Court, the American question is one of how judges have exercised their powers of review. Beatty^{*17} underlines ‘the process of review as an exercise in semantics in which judges are asked to elaborate and extend the meaning of the constitution’. The self-consciousness of the judges influences the choices they make. Kent Greenawalt^{*18} describes this relation as follows: ‘In their actual decisions, judges will often implicitly side with one theory against another, but at least for many problems of theory, judges need not try to resolve them self-consciously’.

Or, in the famous words of Chief Justice Hughes on the constitution of the United States^{*19}, “The constitution is what the judge say it is!”.

The U.S. Supreme Court in the Nixon decision of 1974^{*20} described the phenomenon of the responsibility of the judiciary as ultimate interpreter.^{*21}

As Jaakko Husa^{*22} remarks critically from a Scandinavian perspective, the American way seems to focus on judicial review as the most important requirement of constitutionalism. One of the consequences is the fundamental question of political legitimacy.^{*23} One of the reasons for the power of the judges should be that it is rather complicated to amend the U.S. Constitution (see article 5).^{*24} Therefore, judicial review has a long-standing special function in U.S. constitutional law.

That leads to the stressing of the *stare decisis* principle, better known as the principle of precedence^{*25}: prior decisions are the basis for the development of (new) legal rules and perhaps legal principles; the experience of judges therefore has immense importance in common law systems.^{*26} This restraint ‘by the holdings and principle of prior decisions’^{*27} binds judges to develop constitutional law as part of common law, too.

Furthermore, one must go on to ask which role ‘canons’ play in the modern interpretation of common law. It is clear in analysing the highly entrenched constitution of the U.S.^{*28} that there is a broad consensus that one should “interpret them closely in terms of the constitution of the written document” and that “such an interpretation also can undermine a meaningful appreciation of the broad underlying values that this source of all public law provides to its society”.^{*29}

¹⁴ W. Drechsler, T. Annus. Die Verfassungsentwicklung in Estland von 1992 bis 2001. – Jahrbuch des öffentlichen Rechts der Gegenwart, 2002, 50, p. 489.

¹⁵ See by the way the homepage of the Supreme Court (<http://www.nc.ee/>), which is available in an English and a Russian version, but not in German.

¹⁶ D. M. Beatty. The Forms and Limits of Constitutional Interpretation. – American Journal of Comparative Law, 2001, 49, p. 79.

¹⁷ *Ibid.*, p. 82.

¹⁸ K. Greenawalt. Constitutional and Statutory Interpretation. – J. Coleman, S. Shapiro (eds.). Jurisprudence and Philosophy of Law. Oxford, 2002, p. 270.

¹⁹ See for the citation D. M. Beatty (Note 16), p. 87.

²⁰ U.S. Supreme Court, *United States v. Nixon*, No. 73–1766, 418 U.S. 683; 94 S. Ct. 3090; 1974 U.S. LEXIS 93; 41 L. Ed. 2d 1039 (July 24th 1974).

²¹ D. S. Reed (Popular Constitutionalism – Towards a Theory of State Constitutional Meanings, Rutgers Law Journal, 1999, 30 1999, p. 874) sees a consensus, “that state judges are the final interpreters of state constitutions.”

²² J. Husa (Note 6), pp. 54–55.

²³ K. Greenawalt (Note 18), pp. 292–295.

²⁴ This is underlined by K. Greenawalt (Note 18), pp. 290–291.

²⁵ See the detailed description by J. T. McHugh. Comparative Constitutional Traditions. New York, 2002, p. 16; P. Hay (Note 13), Chapter I No. 20.

²⁶ See the detailed discussion regarding Richard Rortys pragmatism at D. Litowitz. Postmodern Philosophy & Law. Lawrence, Kansas, 1997, pp. 145–149.

²⁷ K. Greenawalt (Note 18), p. 309.

²⁸ On the contrary, in Great Britain there is no written constitution.

²⁹ J. T. McHugh (Note 25), p. 34; W. B. Fisch. Constitutional Law. – D. S. Clark, T. Ansay (eds.). Introduction to the Law of the United States. pp. 63–64.

Beside the textual approach and the way of using ethical arguments in official interpretation of the constitution^{*30}, other modes of interpretation, with respect to history, structure, prudence, and doctrines, are accepted — particularly by the academic commentaries — although to a different extent.^{*31} Other keywords related to the methods of constitutional interpretation are ‘original intent’^{*32} and ‘dynamic interpretation’^{*33}, ‘neutral principles’^{*34}, and ‘balancing’^{*35}.

Canons, or, more precisely, ‘modalities’, are to be seen, to use the terminology of Jack M. Balkin and Sanford Levinson^{*36} in the context of discussion of common law as a result of constituting materials. These are the process of reproduction, related to the tools of understanding, mainly taught in law school. This includes ‘those cases and materials (historical examples, legislative history, speeches by legislators and presidents, *etc.*) that are regularly taught and read’. As a result of the general court-centredness of legal thinking, the constitutional canon is predominated by the thinking of the U.S. Supreme Court.^{*37}

2.2. Romano-Germanic method of interpretation

In the context of the legal history of Estonian jurisprudence, it would not be surprising if the Estonian Supreme Court were to use Romano-Germanic and in particular German methods to interpret the Estonian Constitution. Another consideration might be that the Estonian Constitution of 1992^{*38} is named as a *Põhiseadus* (Basic Law). The German term *Grundgesetz* has the same meaning.

But first one must make clear what the German method of interpreting statutes is and which special approaches are used in this country to interpret the constitution.

The choice of method for interpretation of the constitution thus has a tremendous impact, and which methods are to be used for the interpretation of the constitution is among the most disputed areas of public law.

In addition to legal teaching in Germany, which largely concerns the conventional^{*39} ‘canon of methods’, the decisions of the FCC^{*40} follow Roman legal tradition by installing a *pandectist* system^{*41} of civil law. This involves a concept of canon different from that in common law. Employing grammatical, systematic, historical, and teleological interpretation, the FCC tries to interpret the constitution like normal statutory law.^{*42} The FCC still follows the approach traditionally used in legal education, according to which the objective will of the legislative body is decisive and is grammatically, systematically, teleologically, and historically dependent. That this traditional approach is evidenced in reluctance to set up methodological rules as standards poses one problem in particular: that yardsticks are missing when it comes to the question of rank precedence among the single aspects. The FCC committed itself only insofar as it addressed the possible senses of the notion of the word forming the boundary for an interpretation in conformance with the constitution.^{*43}

³⁰ For the construing of the text see P. Bobbitt. *Constitutional Law and Interpretation*. – D. Patterson (ed.). *A companion to Philosophy of Law and Legal Theory*. Oxford, 1996 (Reprint 2000), pp. 130–131 and 135–137.

³¹ *Ibid.*, pp. 131 *ff.*

³² See P. Brest. *The misconceived Quest for the Original Understanding*. – *B.U.L.Rev.* 1980, 60, pp. 204–209, 214–224, 231–234, printed in: J. H. Garvey, T. A. Aleinikoff (eds.). *Modern Constitutional Theory*. 2nd ed. St. Paul., 1991, pp. 28–40; W. B. Fisch (Note 29), p. 63; see for the details of “originalism” R. N. Graham. *A Unified Theory of Statutory Interpretation*. – *Statute Law Review*, 2002, 23, pp. 92–104 and K. Greenawalt (Note 18), pp. 300–308.

³³ For an overview about the dynamic approach see R. N. Graham (Note 32), pp. 104–115.

³⁴ See H. Bork. *Neutral Principles and some First Amendment Problems*. – *Ind. Law Journal*, 1971, 47, pp. 1–11, printed in: J. H. Garvey, T. A. Aleinikoff (Note 32), pp. 40–47; H. Wechsler. *Toward neutral principles of constitutional law*. – *Harvard Law Review*, 1959, 73, pp. 9, 11–20, 31–35, printed in: J. H. Garvey, T. A. Aleinikoff (Note 32), pp. 84–92; M. V. Tushnet. *Following the Rules laid down: A Critique of Interpretivism and neutral Principles*. – *Harvard Law Review*, 1983, 96, pp. 781, 805–824; printed in: J. H. Garvey, T. A. Aleinikoff (Note 32), pp. 92–102; K. Greenawalt (note 18), p. 299.

³⁵ T. A. Aleinikoff. *Constitutional Law in the Age of Balancing*. – *Yale L.J.*, 1987, 96, pp. 943, 945–946, 972–992, printed in: J. H. Garvey, T. A. Aleinikoff (Note 32), pp. 102–111.

³⁶ J. M. Balkin, S. Levinson. *Canons of Constitutional Law*. – *Harvard Law Review* 1998, 111, pp. 1001.

³⁷ *Ibid.*, p. 1002.

³⁸ It is to be mentioned that the 1920 adopted Estonian Constitution was named in this way.

³⁹ H.-J. Koch. *Die Begründung von Grundrechtsinterpretationen*. – *EuGRZ*, 1984, p. 347 calls it “old hermeneutics”.

⁴⁰ See *e.g.* BVerfGE 51, pp. 97 *ff.*

⁴¹ See *e.g.* J. T. McHugh (Note 25), p. 19.

⁴² See for the details A. Katz. *Staatsrecht*. 14th ed. Heidelberg, 1999, § 5 No. 110–117.

⁴³ See several decisions of the FCC, *e.g.* BVerfGE 25, p. 305; 38, p. 49; see R. Zippelius. *Recht und Gerechtigkeit in der offenen Gesellschaft*. 2nd ed. 1996, pp. 428–429.

Besides the traditional 'canons', other approaches to interpretation have been developed by legal scholars, but not definitely adopted by the FCC.

- First, one must mention the so-called topic (*Topik*^{*44}). It is characterised by placing the problem and its solution in the foreground. Simply said, the approach sets the primary problem purchase to the place of the primary standard text purchase. Herein also lies the main criticism of the approach. Following such an approach would remove the obligation to the rule of law, by explaining the constitution (thus the standard text) as only one item among many.
- Under the terms of the new hermeneutic (*Neue Hermeneutik*^{*45}), a third view is set forth, one that sees the existing understanding on the part of the legal decision-maker as the determinant of the result of the decision on interpretation of the constitution. From this results the circularity of understanding that is said to characterise this approach (*i.e.*, the danger of a hermeneutic circle^{*46}). Taken as a whole, subjective conceptions of value are relevant or even inevitable for interpretation based even partially on constitution standards. Quite quickly a diametric balance of facts and legal provision is attained, one which is significant to the view described. Hermeneutics plays a key role in interpreting the constitution in Germany.^{*47}
- Friedrich Müller^{*48} developed the so-called after-positivistic structure theory (*Nachpositivistische Strukturtheorie*) of legal rules. With its assistance, he hopes to attain the inclusion of the social reality in the interpretation. With this view, a certain range of facts is to be included as a cutout from the social reality that informs the considerations made in the interpretation of the written constitution.^{*49} Mueller demands that one deal with the special fact contents of legal rules as a component of the interpretation.^{*50} That is, according to Mueller, necessary if one is to interpret and concretise these rules of positive (constitutional) right. This connection to the text of the legal norm is then positivistic no longer: the permissible legal argumentation does not presuppose that it must be derivable from the wording.^{*51}
- Analytical legal teachings must also be mentioned; these resist offering a generally binding solution in opposition to the beginning steps introduced so far. This opinion (*Analytische Begründungslehre*^{*52}) is developed with a view to regarding the results of analytical philosophy after the fashion of Hans-Joachim Koch.^{*53} Aimed at solutions to such problems that are among the subjects of methods used in legal teachings, the essence is that legal semantics are to play a large role with respect to discussion of legal method.^{*54} The focus of the analytic legal theory should be the law in its linguistic sense, 'how it comes in legal sets to the expression' (Hans-Joachim Koch^{*55}). The linguistic style of the law plays an important role.^{*56} It implies turning off primarily to the positivist right.
- Last but not least, there can now be seen the first attempts to adopt the postmodern methodical approach to German constitutional law. Karl-Heinz Ladeur^{*57} has attempted to place basic rights in a postmodern perspective, underlining, *e.g.*, the 'diminishing value of the distinction of the public and private spheres'^{*58} and the meaning of the 'society of organization'^{*59}; the federal struc-

⁴⁴ See the description *e.g.* at C. Starck. Die Verfassungsauslegung. – W. Isensee, P. Kirchhof (eds.). Handbuch des Staatsrechts. Heidelberg, 1992, § 164 No. 24.

⁴⁵ See K. Hesse. Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland. 20th ed. Heidelberg, 1995, No. 56, and the overview at H.-J. Koch (Note 40), pp. 345 and 349.

⁴⁶ See G. Radbruch. Grundzüge der Rechtsphilosophie. – A. Kaufmann (ed.). Collection. Vol. 2. 1987 *et sequi*, pp. 58–59; A. Kaufmann. Problemgeschichte der Rechtsphilosophie. – A. Kaufmann, W. Hassemer (eds.). Einführung in Rechtsphilosophie und Rechtstheorie. 6th ed. 1994, pp. 114–115, 160–161; see W. Hassemer. Tatbestand und Typus. Saarbrücken, 1968, p. 102.

⁴⁷ U. Karpen. Teaching Constitutional Law. Paper submitted to the IACL Fifth World Congress, 12–16 July 1999 in Rotterdam, p. 1, <http://www.eur.nö/frg/iacl/papers/karpen.html>, pp. 4–5; see further A. Katz (Note 42), No. 118: "hermeneutic as starting point".

⁴⁸ F. Müller. Juristische Methodik. 7th ed. (ed. by R. Christensen), Berlin, 1997.

⁴⁹ *Ibid.*, p. 109 (222.345).

⁵⁰ *Ibid.*, p. 110.

⁵¹ *Ibid.*, p. 104.

⁵² See *e.g.* P. Mazurek. Analytische Rechtstheorie. – Kaufmann, Hassemer (eds.). Einführung in Rechtsphilosophie und Rechtstheorie. 6th ed. 1994, p. 331.

⁵³ H.-J. Koch. Vorbemerkung: Juristische Methodenlehre und analytische Philosophie. – H.-J. Koch (ed.). Methodenlehre. Kronberg, 1976, pp. 4–5.

⁵⁴ *Ibid.*, p. 5 and Kunz. Die analytische Rechtstheorie. 1977.

⁵⁵ H.-J. Koch (Note 53), p. 17.

⁵⁶ *Ibid.*, p. 18.

⁵⁷ K.-H. Ladeur. Post-Modern Constitutional Theory. The Modern Law Review, 1997, 60, pp. 617–629.

⁵⁸ *Ibid.*, p. 620 *ff.*

⁵⁹ *Ibid.*, pp. 623–624.

ture of the Federal Republic of Germany, and for the first time a structural principle of the state, is another target for this new approach^{*60}, partly using the approach of Jacques Derrida to deconstruction^{*61} for interpreting constitutions.

So far, the approaches of the legal scholars have been addressed. But what about those of the FCC, not taking these methods into consideration? With regard to the specific problems of a constitution as a legal and political framework, the FCC has worked out seven specific principles for interpretation of a 'Basic Law'.

- To take a first example, the FCC has to develop a way to combine two competing state goals, principles and basic rights. The FCC asks for 'practical concordance' to solve the conflict between two applicable constitutional provisions regarding the 'unit of the constitution'.^{*62}
- A second example is the FCC's 'consumption of conformity'. Instead of declaring a provision for nullification and voiding, the Court prefers 'in interpretation that meaning [...] by which a particular state measure, be it a statute, be it a court's decision, would be constitutional'.^{*63} This interpretation in a constitutional manner is applicable under the condition that the provision be open to different interpretations, which lead in part to an unconstitutional result but also in part to a constitutional result.^{*64} The FCC can, indeed, combine the result of a 'still' constitutional provision with the appeal to the legislator to amend this statute.^{*65}
- To take a third example, the FCC has developed the concept of integrative effect and the normative power of the constitution.^{*66} This involves, *e.g.*, the task of optimisation, especially to guarantee basic rights.^{*67} If different interpretations exist that are constitutional, the FCC will choose the alternative that leads to the greatest efficiency.

Pure interpretation of the constitution in a country in which this framework has applied for over fifty years may not commit the mistake of understanding the conditions for practical further development of the state in a longer term than is reasonable. It must keep instead a functional development in mind, one that corresponds to existing constitutional standards as far as possible, for these will lead again to new interpretations. The 'living constitution'^{*68} is therefore, as Dieter Suhr^{*69} correctly pointed out, a constitutionalised process.

Accepting constitutional change^{*70} amid ongoing concretising work should involve so-called teleological and, still more, so-called systematic interpretation. Thus, teleologically oriented interpretation gives the option of considering new legal developments also. Accordingly, the FCC^{*71} always rejected an isolated view of an individual constitution standard and in its stead demanded that each standard be regarded in a sense connected to the remaining regulations.

The crucial point is the internal unit of the constitution.^{*72} From this point, constitutional principles and basic decisions can be developed; the single constitutional provision is subordinated to them.^{*73} The constitution is, and the FCC^{*74} too, a 'unificatory order of the political and social life of the national community'. Overall, this represents existing approaches of the court^{*75}, which — being confronted with several results after application of the above-mentioned methods of interpretation — is to take the alternative that yields the strongest legal efficiency for the provision.

⁶⁰ See for the principle of federalism J. Sanden. Die Weiterentwicklung der föderalen Strukturen in der Bundesrepublik Deutschland, Ein postmoderner Ansatz einer Bundesstaatsreform (forthcoming).

⁶¹ See the description *e.g.* of B. Belay. Justice: The Law of the Law. – J. Brannigan, R. Robbins, J. Wolfreys (eds.). Applying: To Derrida. Houndmills, 1996, pp. 124–135.

⁶² BVerfGE 30, 1 (19); 34, 269 (287); A. Katz (Note 42), No. 121 *ff.*; C. Starck (Note 44), § 164 No. 19.

⁶³ BVerfGE 2, 266 (282); U. Karpen (Note 47), p. 4; A. Katz (Note 42), No. 124.

⁶⁴ See 1983 BVerfGE 64, 229 (242).

⁶⁵ See *e.g.* 1975 BVerfGE 39, 169; S. Michalowski, L. Woods. German Constitutional Law. Aldershot, 1999, p. 44.

⁶⁶ See *e.g.* H. Maurer. Staatsrecht. Munich, 1999, § 1 No. 60 *ff.*; C. Starck (Note 44), § 164 No. 1–3, 27–29.

⁶⁷ A. Katz (Note 42), No. 122.

⁶⁸ BVerfGE 342 (351).

⁶⁹ D. Suhr. Freiheit durch Geselligkeit. – EuGRZ, 1984, p. 531.

⁷⁰ For the term see *e.g.* A. Katz (Note 42), No. 107.

⁷¹ BVerfGE 19, p. 206 (209); 30, p. 1 (19); 33, p. 23 (29); 39, p. 334 (368); 55, p. 274 (300).

⁷² BVerfGE 1, p. 32; 1, p. 227; 15, p. 194; 19, pp. 206 *ff.*

⁷³ W. Geiger (Missverständnisse um den Föderalismus. Berlin, 1962, p. 2), who underlines structural principles to guarantee the inner unit of the state; F. Klein, B. Schmidt-Bleibtreu, Kommentar zum Grundgesetzes, 9th ed., Neuwied 1999. Introduction, No. 53 with further cit.

⁷⁴ BVerfGE 19, p. 220.

⁷⁵ BVerfGE 6, p. 72; 39, p. 38.

Now, the focus must remain on whether interpretation of the constitution should consider, and if so to what extent, not only the legal interpretation principles mentioned but also political and economic evaluations. This is partly answered in the negative.^{*76} Such a limited perspective favours formal-legal constructions of a legal-positivist nature without purchase on the political and economic reality. Therefore, it is necessary to grant the purely constitutional interpretation space also to different interpretation approaches. This applies to the provinces of both politico-scientific research and aspects of political economics. It is only thus that phenomena can be sought out and be legally explained according to the categories employed in constitutional law. Such an approach does not lead however to the adaptation of such an extended notion of the constitution as represented in the policy and/or social science^{*77} as would place the entire political order or structure over the supply of the legal framework. The correct approach must consist of recognising with Hermann Heller constitutional change in connection with changing social norms and allowing this to influence the interpretation.^{*78}

On the basis of the relatively open notion of the constitution represented here, the interpretation of the provisions of the constitution too must take place relatively openly. This is because the interpretation and its methodology must be derived from constitutional theory. Who positively elevates legal rule in rank over everything else is he who quickly loses hold of the social reality as a condition for the law, including constitutional law. Also, what is nationally normative must be aligned to what is accepted and usual of the state. The integration of such legal maxims into rules concerning interpretation met with its approval also in the jurisdiction of the FCC.^{*79} The remarks made there, which concern civil law, apply without restriction to constitutional law, too.^{*80} If it depends for the interpretation of the constitution in part on social normality also, legal interests alone cannot be the evaluation horizon for constitutionality. Therefore, it is clear that the province of the constitution must be broad in its interpretation — as described above — for purposes other than legal ones as well.

To summarise the German approach, in the words of David M. Beatty^{*81}, it “looks to the courts to judge whether the justifications state authorities offer for the laws they enact meet basic texts of legitimacy that are immanent in all constitutional texts”.

Looking at the different ways of treating religious clauses in the constitution, Beatty^{*82} states: “Not only does the text of the constitution figure less prominently in the judgments of the German Court, its method of interpretation is quite different as well. More emphasis is put on the words and structure of the document and especially on the purposes and values they express. Rather looking to history and case law to give meaning to the text, the German Court proceeds in a more purposeful and logical way.” In its words, the meaning of religious liberty follows from putting “human dignity ... [forth as] ... the highest value and [recognising] ... the free self-determination of the individual ... as an important community value”.

2.3. Incompatibility of the two approaches?

On the basis of this differentiation, the next step could be the thesis that there is an incompatibility and therefore an urgent need to decide as to which side the Estonian Supreme Court sees as its place.

But a closer look shows that, on one hand, the two methods are different but that, on the other, the thesis of incompatibility would be an error. In spite of this, I agree with Ulrich Karpen^{*83}, who shows some nascent convergence in interpretation of constitutional law in the two law families. On the basis of a ‘reciprocal

⁷⁶ W. Geiger (Note 73), p. 3; see the critics by H. Heller. *Staatslehre*. – H. Heller. *Gesammelte Schriften*. M. Drath, O. Stammer, G. Niemeyer, F. Borinski (eds.). Vol. 3. 1971, p. 294 (first published 1934).

⁷⁷ See e.g. H. Kilper, R. Lhotta. *Föderalismus in der Bundesrepublik Deutschland*. Opladen, 1996, p. 26; H. Boldt. *Einführung in die Verfassungsgeschichte*. Düsseldorf, 1984, pp. 18, 20 ff.

⁷⁸ H. Heller (Note 76, p. 282) calls it a “product, a “kind of activity“. See for this way I. Maus. *Hermann Heller und die Staatsrechtslehre der Bundesrepublik*. – Müller, Staff (ed.). *Der soziale Rechtsstaat. Gedächtnisschrift für Hermann Heller 1891–1933*. Baden-Baden, 1984, 113 p. (134); see for the Heller-interpretation in general: C. Müller, I. Staff. *Hermann Heller und die Auseinandersetzung um die Interpretation des Grundgesetzes*. – W. Brugger (ed.). *Legitimation des Grundgesetzes*. Baden-Baden, 1996, pp. 133 ff.

⁷⁹ BVerfGE 34, p. 269 (288, 287): “[...] the rule constantly stands in the context of social conditions and the social-political opinions, which it is to affect; sometimes their contents can and must change themselves”; “the law is not identical to the whole of the written legal provisions [...] The task of the jurisdiction can require it [...] to realize value conceptions, which are expressed in the constitutional legal order immanently, but in the texts of the written laws not or only imperfectly [...] in decisions”.

⁸⁰ Same opinion in I. Maus (Note 78), p. 134.

⁸¹ *Ibid.*, p. 82.

⁸² *Ibid.*, p. 89.

⁸³ U. Karpen (Note 47), p. 1.

influence^{*84}, there are no real cleavages between the two approaches of common law and German Continental law. As Karpen^{*85} says, putting the focus on constitutional law, 'It is true that German legal interpretation nowadays can't be understood without being familiar with the case law method. This is prevalently true for constitutional law'. Looking at the more than 100 volumes comprising the official collection of decisions of the FCC, this thesis seems to be correct. To give further evidence to this thesis, it must be stated with James T. McHugh^{*86} that several countries in the world indeed have 'mixed' systems involving both common and civil law institutions.

But the influence of the common law approach to German constitutional law is not a one-sided phenomenon: British public law is increasingly influenced by continental principles^{*87}, too. In the U.S., parties in a procedure have the right to invoke foreign law, but it is handled still as a 'fact' and not introduced as law *ex officio*.^{*88} Finally, the statement of Esin Örücü^{*89} seems to be true that there is a 'blurring of the demarcation lines between the generally accepted classification of legal families'.

Further evidence for this thesis can be found by taking a deeper look at the similarities of some **modalities** for interpretation of constitutional law in common law on the one hand and different **canons** of Romano-Germanic law on the other. Historical interpretation is comparable with the manner of bringing history into the interpretation. Emphasising the structural context of the constitutional provision means quite the same thing as systemic interpretation. Finally, the ethical view and the teleological interpretation are based on the same main idea. To summarise, the details of the described approaches are in fact different, but they can lead to similar or even the same results.

Although it was shown that there is no real need for a sharp distinction between the approaches to constitutional interpretation developed by the various families of law, it will be interesting to see which Estonia as a transition country follows. Therefore, the focus of the following section is on Estonia.

3. The Estonian approach

3.1. Analysis of the jurisdiction of the Estonian Supreme Court

According to the constitution, the Supreme Court Constitutional Review Chamber of checks if legislation is in conflict with the provisions and (!) the spirit of the constitution (see the second paragraph of § 152 of the constitution).^{*90}

The following review of the decisions made by the Supreme Court Constitutional Review Chamber contains only a few hints as to methods of interpretation used by the judges.

In 1994, the Estonian Supreme Court^{*91} underlined for the first time some basic principles for interpreting the constitution (here article 63, para 1). Furthermore, Chief Justice of the Supreme Court of the Republic of Estonia (December 1992–August 1998) Rait Maruste expressed in a 1996 essay^{*92} his view of the methods for interpretation of the Estonian Constitution. The summary^{*93} in the English language reads as follows:

“The interpretation of the constitution requires, in addition to usual methods and techniques of interpretation, a specific approach. The purpose of the constitution should be the point of departure in its interpretation. The second important issue is that the constitution should be interpreted in good faith. In the interpretation of the constitution, the function of a constitutional court is not to assess the political will in legislation but only the conformity of legislation with the constitution. The principle of separation of

⁸⁴ E. Örücü. *Unde Venit. Quo Tendit Comparative Law?* – A. Harding, E. Örücü (eds.). *Comparative Law in the 21st Century*. London, 2002, pp. 6–7.

⁸⁵ U. Karpen (Note 47), p. 5.

⁸⁶ J. T. McHugh (Note 25), p. 20.

⁸⁷ See the details at R. Thomas. *Continental Principles in English Public Law*. – A. Harding, E. Örücü (Note 84), pp. 121 *ff.*

⁸⁸ See P. Hay (Note 13), chapter 3 No. 199.

⁸⁹ E. Örücü (Note 84), p. 7.

⁹⁰ Decision of the Constitutional Review Chamber of the Supreme Court of 5 March 2001 (3-4-1-2-01), concerning the Aliens Act; see the comment of R. Narits. *The Republic of Estonia Constitution on the Concept and Value of Law*. – *Juridica International*, 2002, No. 7, p. 14.

⁹¹ Decision of the Supreme Court Constitutional Review Chamber of 2 November 1994, III-4/A-6/94, Review of the petition of the Legal Chancellor seeking to declare Article 7 (1) of the Law on the *Riigikogu* Procedure to be null and void.

⁹² R. Maruste. *Põhiseaduse tõlgendamise meetodid (Methods for Interpretation of the Constitution)*. – *Juridica*, 1996, No. 2, pp. 75–81 (in Estonian).

⁹³ See http://www.juridica.ee/juridica_en.php?document=en/articles/1996/2/23338.SUM.php.

powers and an interest to ensure basic rights and freedoms are essential. The constitution should be interpreted as a whole since its purpose is to establish an integral order of social and political life of people. Other laws should be reviewed for their conformity with the constitution. In analysing the constitution, the generally recognised rules of international law and international agreements binding on Estonia should be taken as a basis. Apart from formal methods and techniques of interpretation, there are unwritten practices and principles adopted by constitutional courts in their everyday work.”

In its decision of 17 March 2000 (3-4-1-1-2000), the Estonian Supreme Court (*en banc*)⁹⁴, Review of the Petition of the Legal Chancellor Seeking to Declare the ‘Supplementary Budget for 1999’ Act Partially Null and Void, the Court uses the systematic approach as well as the grammar-oriented approach for interpretation of the constitution (emphasis given by the author).

“3. It proceeds from the **systematic interpretation of the constitution** [emphasis added — J.S.] that under legislation of general application we should understand a general act or a normative act as a legal act containing legal rules — universally obligatory rules of conduct, the fulfilment of which is guaranteed by the possibility of state coercion. In Estonian legal theory, the prevailing viewpoint is that legislation of general application means a general act (normative act). [...]

6. The next question is: does the Legal Chancellor dispute a law, a provision thereof, or a legal rule?

Grammatical interpretation of the text of the constitution [emphasis added — J.S.] could produce the impression that the Legal Chancellor disputes legislation or a provision thereof. [...] The expression ‘disputes legislation’ is on the same level with the phrases ‘observes a law’ or ‘violates a law’, or a provision thereof, that are found in laws and in common usage. [...]

The systematic approach is used also in the decision⁹⁵

“Article 156 of the constitution has to be interpreted so that its scope of application is not confined to ensuring the formal equality established within the framework of electoral law. The Chamber is of the opinion that Article 156 does not exist in isolation from all other provisions and principles of the constitution. Upon interpreting Article 156 one must also proceed from the nature of local government and the principles of democracy.”

It can be seen more under a teleological and less under a systematic approach that in 2000, as seen in the dissenting vote of a judge⁹⁶, can be found a hint on securing the function of the Supreme Court:

“It is very welcome that the Supreme Court gives a wider interpretation to § 4 (3) of the CRCPA, which regulates the extent of review of petitions, because this is the only way for the Supreme Court to efficiently fulfil the function of a guardian of the constitution.”

In 2002, the Estonian Supreme Court⁹⁷ mentioned the rule of interpretation that there should remain a reasonable scope of application (emphasis given by the author):

“In the case of such an interpretation, there would be no right of deduction regardless of how small a portion of the total amount was paid in cash. **Such an interpretation is manifestly unreasonable** [emphasis added — J.S.]”

To sum up, the first remarks of the Estonian Supreme Court make clear that the main methodological basis for its decisions is (continental) Romano-Germanic, and not common law.⁹⁸

But, additionally, this is the same as in Germany, as mentioned above. The 1993-initiated jurisdiction of the Supreme Court is receiving more and more importance for forthcoming decisions. It was in a way wise that Chief Justice Rait Maruste had in 1994, one year after the first decisions of the Supreme Court, already emphasised in an essay⁹⁹ the so-called ‘leading case’ and its relevance as a source for legal cognition. The English summary¹⁰⁰ of the essay reads as follows:

“The expression ‘legal judicial decision’ in Estonian and the regulation provided by procedural laws refer to the necessity and possibility of the leading case in the Estonian legal system. The experience and development trends of the world jurisprudence also direct us to it. Therefore, it would be quite natural to

⁹⁴ See <http://www.nc.ee/english/>.

⁹⁵ Decision of the Supreme Court Constitutional Review Chamber, 15 July 2002, 3-4-1-7-02, Petition of the Legal Chancellor to declare subsections 31 (1), 32 (1) and clause 33 (2) 1) of Local Government Council Election Act partly invalid, para 19.

⁹⁶ Decision of the Supreme Court Constitutional Review Chamber, 5 October 2000, 3-4-1-8-00, Review of the petition of Tallinn Circuit Court to review the constitutionality of subsection 1 (3) of section 18 of Competition Act. Dissenting vote of justice U. Lõhmus, part II.

⁹⁷ Decision of the Supreme Court Constitutional Review Chamber, 6 March 2002, 3-4-1-1-02, Petition of Tallinn Circuit Court to declare the second sentence of subsection 18 (8) of Value Added Tax Act invalid.

⁹⁸ See beside the clear statement of R. Narits (Note 90), p. 10, regarding the constitutional principle in § 3 of the Estonian Constitution.

⁹⁹ R. Maruste. Kohtupretsedendist (On the Leading Case). – *Juridica*, 1994, No. 5, pp. 116–117 (in Estonian).

¹⁰⁰ http://www.juridica.ee/juridica_en.php?document=en/articles/1994/5/28766.SUM.php.

make the essence of the leading case clear to ourselves, include the fact that a [earlier] motivated judicial decision is also a source of justice explicitly into law and begin immediately to create a data base of motivated judicial decisions, publish judicial decisions and refer to them in the motivation of decisions.”

This stresses the importance of the jurisdiction in the light of common law traditions. As the German law illustrates, this is not a clash between the two legal approaches.

3.2. Academic commentary and training

In the first years after the promulgation of the Estonian constitution, there was, as is hardly surprising, no special attention paid to the need for interpreting the constitution. To the contrary, emphasis was given to the function of lawmaking in filling the gaps arising from a constitution not being able to cover all matters in full detail.^{*101}

Wolfgang Drechsler and Taavi Annus^{*102}, presenting a political science perspective, have described the strong influence of German jurisprudence on the Estonian interpretation of the constitution, especially in the area of human rights. Furthermore, the Estonian theory of legal methods takes German scientific essays more into consideration than others.^{*103}

Considering method of interpretation, Drechsler and Annus say in summary that judges are preferring the grammatical method more these days but ignoring the historical elements of interpretation.^{*104} Neither the systematic nor the teleological approaches are used, according to these authors, nor are the economic analysis of law or integration of sociological elements used in interpretation.

As far as the systematic approach is concerned, this thesis is from a legal point of view not valid: As shown above, the Constitution Review Chamber has quite clearly adopted in its decision of 17 March 2000 (3-4-1-1-2000) a systematic approach to interpretation. This is confirmed by Raul Narits^{*105}, who stated that the systematic approach ‘had been one of the most extensively used’.

Recognising that the usage of approaches is broader than this, Raul Narits, Heinrich Schneider, and Ülle Madise^{*106} declare in the commentary on the Estonian Constitution, published in 2002 and edited by the Estonian Ministry of Justice, the canons in their entirety as an appropriate methodological approach to interpreting the constitution from a jumping-off point of objective law. This work underscores the importance of the Romano-Germanic tradition^{*107}, referred to as the continental-European legal culture^{*108} and cites such influences as Friedrich C. von Savigny, probably the leading figure of the Historical School of legal scholarship and codification. This commentary, which addresses the challenge of developing the constitution^{*109}, describes the grammatical, the historical^{*110}, the teleological, and the systematic approach to interpretation of the law. The authors also accept taking social and economic aspects into consideration and, finally, give emphasis to the systematic approach to interpretation. This is done by way of underlining the relevance of conceptual thinking related to the idea of the law as a unit to find the answers to constitutional problems.^{*111}

But it is also the case that the thesis that the teleological interpretation of the Estonian Constitution is underestimated cannot be verified when one takes the most recent years of Estonian jurisdiction into account. As Raul Narits^{*112} has stressed the spirit of the constitution, so has Peeter Roosma^{*113} emphasised the

¹⁰¹ See K. Merusk. *Das Verhältnis von Parlament, Staatspräsident und Regierung in Estland*. – B. Meissner, D. Loeber, C. Hasselblatt (eds.). *Der Aufbau einer freiheitlich-demokratischen Ordnung in den baltischen Staaten*. Hamburg, 1995, p. 104.

¹⁰² W. Drechsler, T. Annus (Note 14), p. 489.

¹⁰³ See e.g. the encyclopedia of legal methodology at the Institute of Baltic Studies, Kasutatud kirjandus, <http://www.ibs.ee/ibs/juura/entsyklop/kasutkirj.html>, which is clearly dominated by recommendations in the German language. The same phenomenon is to be seen in R. Narits. *Õigussteaduse metodoloogia*. Tallinn, 1997 (in Estonian).

¹⁰⁴ W. Drechsler, T. Annus (Note 14).

¹⁰⁵ R. Narits. *About the Meaning of the Legal Aspect of Practical Semantics in Estonian Legal Order*. – *Juridica International*, 2000, No. 5, p. 10 (13), who remarks by the way that “the legal historical approach had been practically unexploited.”

¹⁰⁶ R. Narits, H. Schneider, Ü. Madise. – *Justiitsministeerium* (ed.). *Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne* (The Republic of Estonia Constitution. Commented Edition). Tallinn, 2002, *Sissejuhatus* (Introduction), p. 31 (in Estonian).

¹⁰⁷ See further R. Narits (Note 105), p. 10.

¹⁰⁸ In Estonian *mandriroopalik õiguskultuur*.

¹⁰⁹ See the signposting thoughts of Narits (Note 105), p. 10 (16).

¹¹⁰ R. Narits, H. Schneider, Ü. Maruste (Note 106), p. 34 warn not to overestimate historical interpretation, which could lead to violations.

¹¹¹ R. Narits, H. Schneider, Ü. Madise (Note 106), p. 31.

¹¹² R. Narits (Note 105), p. 10.

¹¹³ P. Roosma. *Constitutional Review under 1992 Constitution*. – *Juridica International*, 1998, No. 3, p. 36 concerning the second paragraph of § 107 of the Estonian Constitution.

need for an interpretation with a meaningful result and Marika Linntam^{*114} underlined the need for jurisprudence considering contemporary values. Also, it is accepted, that legal hermeneutics can play an important role in this.^{*115} That leads to the thesis that a strict positivism has definitely been overruled in Estonian legal discourse. Matter of scientific interest and practice is much more than the *ius scriptum*. Pluralism of values, emphasised by Marika Linntam, guarantees an open and free discussion of the further development of the constitution and its interpretation. And the low number of lawyers in comparison to other European countries cannot lend credence to a thesis that there are no discussions on constitutional problems.^{*116} To the contrary, in particular the older generation of constitutional lawyers, who gained their experiences during the Soviet era knows the enormous importance of a free discussion and of discourse^{*117} on the constitution and of methods for dealing with it.

Last but not least, the commentary of Narits, Schneider, and Madise names^{*118} some newly-added maxims (principles) of constitutional interpretation in Estonia, drawing particular attention to the 'integration principle', the 'functionality principle', and the 'principle of optimal application of constitution'. This provides evidence that the recent Continental development of specific methods for constitutional interpretation (*op. cit.*) is regarded actively in Estonia, too.

4. Upcoming trends for interpretation: European integration

The same commentary mentioned above introduces^{*119} — in the strict context of systematic interpretation and the coming of a common European legal culture — the vision for interpreting the Estonian Constitution with respect to European law. Citing the *Internationale Handelsgesellschaft* decision^{*120} of the European Court of Justice (ECJ), the authors emphasised the supremacy of European law over national (constitutional) law. And it is right that the (co-existing^{*121}) Estonian Constitution will be interpreted more and more in light of the recent development of a joint European constitutional law. And this despite the fact that Estonia is not yet a member of the European Community/Union.^{*122} This is not strict denial of the thesis of Esin Örüü^{*123} of a 'collective colonization by the EU' but is the result of an open-minded national state^{*124} and an ever-closer-integrating Europe. Last but not least, the draft of the new European constitution, now being discussed in the European Convention with contributing Estonian experts, will influence the constitutional debate in Estonia, too. This includes the debate on the methods for interpreting the national constitution.

This European approach, influencing the content and development of national jurisprudence, was first used — as far as I can tell — in 1997 on the principle of legality in a dissenting vote of Rait Maruste, who had previously worked for five years as a judge in ECHR at Strasbourg.^{*125} The increasing^{*126} influence of Euro-

¹¹⁴ M. Linntam. Building a Just Society: the Role of the Constitutional Judge. – *Juridica International*, 2002, No. 7, pp. 49–57.

¹¹⁵ R. Narits, H. Schneider, Ü. Madise (Note 106), p. 31 stated that the standpoint that legal hermeneutics can offer only value-neutral propositions, should be overcome.

¹¹⁶ See only the institution of *Juridica* and *Juridica International*, edited by the Faculty of Law of the Tartu University (available at http://www.juridica.ee/juridica_en.php?submit_year=1&selected_year=default and http://www.juridica.ee/international_en.php?submit_year=1&selected_year=default with controverse essays of practitioners and legal scholars on legal matters. The critics of W. Drechsler, T. Annus (Note 14), p. 474 footnote 6, 489) that there is only one single law journal oversees, that there is only one relevant law school in Estonia, which has only 1.4 million inhabitants. And by the way, the existence of *Juridica International* gives evidence to the thesis that there is no fear to join in international (pluralistic) discussion.

¹¹⁷ See mentioning the need of a discourse R. Narits, H. Schneider, Ü. Madise (Note 106), p. 30.

¹¹⁸ R. Narits, H. Schneider, Ü. Madise (Note 106), pp. 31–32.

¹¹⁹ *Ibid.*, p. 32.

¹²⁰ ECJ, C-14/81, *Alpha-Steel*, Collection 1982, p. 749 (764).

¹²¹ See J. Laffranque. Co-existence of the Estonian Constitution and European Law. – *Juridica International*, 2002, No 7, pp. 17 *ff.*

¹²² See for the details J. Laffranque (Note 121), p. 19; J. Laffranque. Constitution of the Republic of Estonia, in the light of the Accession to the EU. – *Juridica International*, 2001, No. 6, pp. 207–221.

¹²³ E. Örüü. *Unde Venit, Quo Tendit Comparative Law?* – A. Harding, E. Örüü (eds.). *Comparative Law in the 21st Century*. London, 2002, p. 1 (7).

¹²⁴ See R. Narits, H. Schneider, Ü. Madise (Note 106), p.32.

¹²⁵ See Decision of the Supreme Court Constitutional Review Chamber of 6 October 1997 (3-4-1-3-97), Review of the petition of the Valga County Court, dated 9 June 1997, to declare paragraph 3.19 of Part I of the Valga City Rules, approved by the regulation of Valga City Council, dated 10 January 1996, partially null andvoid, <http://www.nc.ee/english/const/97/4a9703i.html>.

¹²⁶ See A. Albi, R. Maruste. *Eesti Vabariigi põhiseadus Euroopa Liidu õiguskorras* (The Constitution of the Republic of Estonia in the Legal System of the European Union). – *Juridica*, 2003, No. 1, pp. 3–7 (in Estonian).

pean integration on constitutional interpretation in general is mainly based on the acceptance of European law's supremacy^{*127}. In this context, the principle of '*effet utile*' (see article 10 EC Treaty), which demands an interpretation of the law that is in conformity with the law of the Union, is of high relevance.^{*128} On this basis, it can be foreseen that the Estonian approach to interpreting the constitution will see further development in the near future, taking the aspects of European law more and more into consideration.

But what will happen with the interpretative methods of the ECJ, which stands in the centre of the development? The ECJ did not find a standard method of interpretation in the beginning. To the contrary, it had to develop its methods on its own.^{*129} The grammatical method as well as consideration of the historical will of the sovereign did not give the clarity needed to interpret the primary law of the EC. This is caused by the fact that there are regularly different versions of the treaty there is no single authentic text.^{*130} Besides, it is rather complicated to define 'the' will of the sovereign in such a complicated system as the EC. Therefore, it is not surprising that contextual interpretation, systematic thoughts on such matters as the framework of Community law, always played a special role in the decisions of the ECJ.^{*131} That means that the *teleos* of the treaties' provisions — *i.e.*, their object and purpose — was of high relevance, too^{*132}. There is, in the words of Jaap E. Doek^{*133}, 'more emphasis on the teleological approach to interpretation than on the literal and/or historical approach'. This is because the goal of an ever-closed community asks for a functioning primary law that guarantees more and more intensive integration. With regard to the different approaches of the legal systems of the member states, the ECJ developed in article 288 para. 2 of the EC Treaty a method of comparing constitutions.^{*134}

5. Conclusions and outlook

The Estonian way of interpreting the national constitution is based on Romano-Germanic traditions, and a close parallel to the German approach cannot be ignored. Both systems of jurisprudence accept the 'leading case' as a source of interpretation and therefore come closer to the common law system, by which they are reciprocally influenced. But the Estonian legal science is prepared to adopt the European principle of integration more readily than the German scholars have been. While the German Constitutional Court uses the 'approach of interpretation in conformity with the Community law (*gemeinschaftskonforme Auslegung*)'^{*135}, the Estonian legal educators seem to be more willing to accept a European influence on their constitution. This can be identified as a result of the 'normative power of the facts' — meaning the accession on 1 May 2004, *ante portas*.

¹²⁷ See for the details, using the German Judicial Acceptance as example K. Alter. *Establishing the Supremacy of European Law*. Oxford, 2001, pp. 64–123; M. Maduro. *We, The Court*. Oxford, 1998, p. 175.

¹²⁸ T. Kennedy. *Learning European Law*. London, 1998, pp. 267–269.

¹²⁹ One of the main starting points is the often cited *Van Gend en Loos* decision (Case 26/62 (1963) ECR 1 at. 12, where the judges paid attention to article 31 of the Vienna Convention on the Law of Treaties: "To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions".

¹³⁰ For the textual approach in international law see the articles 31 and 32 of the Vienna Convention: The subject of interpretation is the intention as expressed in the text, which "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty" (article 31), unless this "results in a meaning incompatible with the spirit, purpose, context or the clause or instrument in which the words are contained." (*South West Africa Cases*, ICJ Rep (1962), pp. 335–336).

¹³¹ T. Kennedy (Note 128), pp. 260–262.

¹³² *Ibid.*, pp. 263–267.

¹³³ J. E. Doek. *Legal education in a unifying Europe: Where are we going?* European Law Faculty Association (ELFA)-Conference, Amsterdam, 24–25 February 2000, p. 8, http://elfa.bham.ac.uk/ELFA/Newsletters/Newsletter2000_2.pdf.

¹³⁴ See R. Christensen, T. Kuhn. *Methodik des EuGH – Rechtsvergleichende Auslegung zum Nachweis von Gemeinschaftsgrundrechten, das Urteil „Jégo Quéré”*. Available at: <http://www.hemmer.de/repetitorium/systempdf/bonn/Europarecht01.pdf>, pp. 3 ff.

¹³⁵ See for the national level K. A. Bettermann, *Die verfassungskonforme Auslegung. Grenzen und Gefahren*. Heidelberg 1986; but see also Decision of the Supreme Court Constitutional Review Chamber, 22 February 2001, 3-4-1-4-01, Review of the petition of Tallinn Administrative Court to review the constitutionality of subsection 231 (6) of the Code of Administrative Offences, No. 17, see <http://www.nc.ee/english/>.