

The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law



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Abstract The report informs that due to historical ties to the German legal culture, the most influential model for reconstruction of the Estonian legal order after the restoration of independence was German law, including when drafting the 1992 Constitution. However, with regard to EU law, a different approach was chosen: a

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blanket clause in a self-standing constitutional act that suspends the Constitution, in order to give full supremacy to EU law. The Supreme Court and its Constitutional Review Chamber have adopted an unconditionally EU-friendly approach. However, the report documents the widespread concerns that have emerged amongst Estonian lawyers with regard to setting aside the Constitution, as well as the practical difficulties in constitutional adjudication by the Supreme Court. The tensions peaked in the process of ratification of the ESM Treaty, which was approved by 11 judges against 8, with the latter submitting strongly worded dissenting opinions expressing concerns about the impact of the very large financial liabilities on the rule-of-law-based, democratic and social state. Concerns by lawyers were also raised with regard to the European Arrest Warrant system, which led to review proceedings initiated by the Chancellor of Justice based on defence rights. The report also explores the excess sugar stocks cases concerning the principles of legitimate expectations and non-retroactivity, and issues regarding publication of laws in the context of EU law. The report finds that broadly speaking, any strains on constitutional values have been justified, given the benefits of EU integration. It nevertheless recommends introducing a German *Solange*-style limitation clause into the Constitution.

Keywords The Estonian Constitution · Constitutional amendments regarding EU integration · The Estonian Supreme Court and the Constitutional Review Chamber Fundamental rights and the *Rechtsstaat* approach to the rule of law Influences of the German constitutional tradition · Constitutional review statistics and grounds · ESM Treaty · European Arrest Warrant and defence rights *Balbiino* · *Excess Sugar Stocks* cases and publication of laws · The principles of legal certainty, legitimate expectations and non-retroactivity · Justiciability of social rights · Data Retention Directive · Unconditional supremacy of EU law Referendum · Parliamentary reservation of law

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1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 At the top of the Estonian norm hierarchy stands the *Põhiseadus*¹ (Constitution), which was adopted by a referendum on 28 June 1992 and came into force on the following day, as prescribed by § 1(1) of the *Eesti Vabariigi põhiseaduse rakendamise seadus*² (The Constitution of the Republic of Estonia Implementation Act, hereinafter CREIA). The Estonian Constitution is a typical example of a constitution adopted after the fall of an authoritarian regime – it is fully binding and enforceable in courts. The Estonian constitutional order is determined by five fundamental principles of the Constitution: human dignity,³ democracy,⁴ the rule of law,⁵ the social state⁶ and the Estonian identity^{7,8}. The Estonian legal order is part of the continental legal culture with a strict hierarchy of norms, the principle of reservation of law provided by § 3(1) of the Constitution that requires a specific enactment of a statute for every specific exercise of state power, and the fundamental division of the legal order into public and private law. Historically bound to the German legal culture, old ties awoke from hibernation after the restoration of independence in 1991. The most influential model for reconstruction of vast parts of the Estonian legal order was again German law. In first order this applies to the central parts of private law, but also to criminal law and general administrative law.

1.1.2 The rationale of the Constitution is best defined in its preamble, according to which the Constitution is created to protect the peace and defend the people against aggression from outside, to form a pledge to present and future generations for their social progress and welfare, and to guarantee the preservation of the Estonian

¹ *Riigi Teataja* [State Gazette] (RT) RT 1992, 26, 349; RT I, 27.04.2011, 2. Estonian legislation in Estonian and English is available at: <https://www.riigiteataja.ee/en/>. Some revisions have been made to the translations by the editors of this volume.

² RT 1992, 26, 350.

³ E.g. Judgment of the Constitutional Review Chamber of the Supreme Court (CRCSCj) 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49. Selected decisions of the Constitutional Review Chamber and the Administrative Law Chamber are available in English at <http://www.riigikohus.ee/?id=823> and <http://www.riigikohus.ee/?id=719>. Some revisions have been made to the translations by the editors of this volume.

⁴ E.g. Judgment of the Supreme Court *en banc* (SCebj) 01.07.2010, 3-4-1-33-09, paras. 52 and 67.

⁵ E.g. Order of the Constitutional Review Chamber of the Supreme Court (CRCSCo) 07.11.2014, 3-4-1-32-14, para. 28.

⁶ E.g. CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49.

⁷ CRCSCj 04.11.1998, 3-4-1-7-98, para. III.

⁸ On the debate about fundamental principles of the Constitution, see Drechsler and Annus 2002, p. 473 et seq.; Ernits 2012, p. 126 et seq.; Maruste 2007, p. 8 et seq.; Maruste 2000, p. 311 et seq.; Laffranque 2007, p. 528 et seq.; Narits 2009, p. 56 et seq. For a compilation of the sources in Estonian and presentation of the debate, see Ernits 2011, p. 5 fn. 9, p. 6 et seq. and p. 23 et seq.

people, the Estonian language and the Estonian culture through the ages. The Constitution is organised as follows. It opens with an introductory chapter of seven sections (§), which includes a rather strict sovereignty clause in § 1. This chapter is followed by a detailed catalogue of constitutional rights with 48 sections (see Sect. 2.1.1). The Constitution also contains fundamental principles in § 10: human dignity, democracy, social state and the rule of law. The rule of law principle has complex elements, which are relatively frequent grounds of adjudication (see Sect. 2.1.3). The organisation of the state is regulated in Chapters III–XIII: The People, The *Riigikogu* (Parliament), The President of the Republic, The Government of the Republic, Legislation, Finance and the State Budget, Foreign Relations and International Treaties, National Defence, The State Audit Office, The Chancellor of Justice and The Courts. The Supreme Court (SC) is the highest court and also has powers of constitutional review.

1.2 *The Amendment of the Constitution in Relation to the European Union*

1.2.1–1.2.2 On 1 May 2004, Estonia, together with nine other European countries, joined the European Union. Before accession, the Constitution was amended by the *Eesti Vabariigi põhiseaduse täiendamise seadus* (The Constitution of the Republic of Estonia Amendment Act, hereinafter CREAA),⁹ which provides as follows:

In a referendum held on 14 September 2003 pursuant to section 162 of the Constitution of the Republic of Estonia, the people of Estonia adopted the following Act to amend the Constitution:

§ 1. Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected.

§ 2. When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia shall be applied taking into account the rights and obligations arising from the Accession Treaty.

§ 3. This Act may only be amended in a referendum.

§ 4. This Act shall enter into force three months after the date of its promulgation.

As noted in the preamble of the Act, the CREAA was adopted by a referendum. It entered into force on 6 January 2004. The draft CREAA was submitted to the *Riigikogu* on 16 May 2002. The draft presented had one important difference compared with the final version of the CREAA: § 1 of the initial version laconically provided that ‘Estonia may accede to the European Union’.¹⁰ As a result of

⁹ RT I 2003, 64, 429; RT I 2007, 43, 313.

¹⁰ Draft Act No. 1067 SE (16 May 2002). Draft Acts are available in Estonian at <http://www.riigikogu.ee/?s=&checked=eelnoud>.

parliamentary debates and criticism from legal scholars (see Sect. 1.2.3), § 1 of the draft CREA was amended on the recommendation of the then Chancellor of Justice Allar Jõks, to provide as follows: ‘Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected’.¹¹ On 18 December 2002, the *Riigikogu* adopted a resolution¹² on holding a referendum on accession to the EU and on amending the Constitution by the CREA, by a vote of 88 for and 1 against out of 101. The referendum was held on 14 September 2003 and is to date the only referendum that has been held under the Constitution of 1992. The turnout was 64% of all citizens eligible to vote, and 67% of all voters gave their consent to the amendment.

1.2.3 The aims of the amendment and idea behind the amendment On 28 November 1995, Estonia applied for membership of the EU. Becoming a member of the EU was one of the most important aims of the post-Soviet independence period for many reasons. First and foremost, a new isolation and seclusion from western societies which are based on the principle of individual freedom – as had occurred in the 1940s – was feared. Moreover, Estonia wished to guarantee that the principles of democracy, the rule of law and human rights that had once again been enforced would remain the fundamental principles of its legal order, regardless of possible geopolitical challenges that could lie ahead in the future. Bearing those aims in mind, the *Riigikogu* together with the Government began with preparations for joining the EU soon after the restoration of independence in 1991.

Conceptual background to the choice of wording and key factors influencing the decision on the scope and content of the amendment In 1991, the *Põhiseaduse Assamblee* (Constitutional Assembly, hereinafter Assembly) gathered with the task of drafting a new Constitution for Estonia. The members of the Assembly were aware of the wish of the population of Estonia to become a member of the EU in the future; however, at the time this aim was still so far out of reach that the assembly scarcely touched upon the issue. However, one foreign legal expert, Peter Germer, did point out that ‘the draft contains no provision concerning the transferral of power to supranational organizations like the European Community’, and that even though it may not happen in the near future, some day Estonian may join the European Community and might need a special provision to that effect, as in most other countries.¹³

In March 1995 the Constitutional Committee of the *Riigikogu* proposed that the Government prepare a legal expert analysis on the Constitution; this resulted in a landmark report of 1998 by the Legal Expertise Committee, which aimed to analyse, *inter alia*, whether the Constitution contained any conflicts of norms or

¹¹ List of amendment proposals to the CREA Draft Act No. 1067 SE II (12 December 2002).

¹² RT I 2002, 107, 637.

¹³ Peep 1997, p. 331; Laffranque 2003, p. 181.

legal gaps and whether the Constitution – also in the light of possible accession to the EU – required amendment.¹⁴

The present report will now explore the amendment proposals and debates in greater detail, as several issues have resurfaced in result of more recent cases, and have prompted calls to change the EU provisions in the Estonian Constitution. In the above-mentioned 1998 Report, the Expert Committee concluded that in order to become a Member State of the EU, the Constitution had to be amended. The committee first proposed the addition of § 1(3) to the Constitution, according to which Estonia may accede to the European Union by a referendum and on the conditions laid down in a new § 123¹. Secondly, the committee proposed the addition of § 123¹ to the Constitution, with the following wording:

Estonia may, based on the principles of reciprocity and equality, delegate state powers stemming from the Constitution to the institutions of the European Union for the purposes of joint realisation by the Member States of the European Union to the extent necessary to implement the agreements underlying the union and on the condition that this does not contradict the fundamental principles as established in the preamble of the Constitution.

The Government shall inform the *Riigikogu* as early and comprehensively as possible in matters concerning the European Union and shall take the positions of the *Riigikogu* into account upon participating in the European Union legislative process. Upon membership, a more detailed procedure shall be provided by law.¹⁵

The report also contemplated on the question of what the EU ‘is’. The Expert Committee took the view that the Constitution would theoretically allow Estonia to accede to the EU if it were a confederation, however it also affirmed that the EU is an international organisation *sui generis*.¹⁶

Sixteen foreign legal experts also participated in the drafting of the expert report. Amongst some of the views, Professor Robert Alexy elaborated in his expert opinion on the fundamental rights catalogue of the Estonian Constitution that § 1 hinders accession to the EU and should be amended by the addition of a third paragraph in the following wording: ‘The independence and sovereignty of Estonia do not exclude membership in the European Union’.¹⁷ From the report of McKenna & Co it can be concluded that in order to ensure conformity between Estonia’s legal order and the principle of primacy of EU law, amending the Constitution would be inevitable.¹⁸ Several amendments were proposed, for example to complement § 1 (2) with permission to transfer a part of sovereignty to an international organisation

¹⁴ The resulting report is entitled *Võimalik liitumine Euroopa Liiduga ja selle õiguslik tähendus Eesti riigiõiguse seisukohalt* (Possible accession to the European Union and its legal meaning from the perspective of Estonian constitutional law), Final Report of the Legal Expertise Committee for the Constitution of the Republic of Estonia (1998), (available in Estonian) <http://www.just.ee/et/eeesti-vabariigi-pohiseaduse-juriidilise-ekspertiisi-komisjoni-lopparuanne>, hereinafter referred to as ‘The 1998 Report of the Legal Expertise Committee’. See also Varul 2000.

¹⁵ The 1998 Report of the Legal Expertise Committee, supra n. 14 (translation by the authors).

¹⁶ Ibid.

¹⁷ Alexy 2001, p. 93.

¹⁸ McKenna & Co 1996, p. 17 and para. 3.1.

in accordance with § 3 of the Constitution, and to amend § 3 such that it would also allow for the exercise of governmental authority pursuant to EU law.¹⁹ Professor Guy Carcassonne proposed the addition of a separate chapter on the EU in the Constitution.²⁰ This Chapter would have consisted of three paragraphs allowing Estonia to become a member of the EU, every new treaty would have had to be submitted to the SC before ratification by Parliament, and the Government would have been required to introduce a specific procedure for informing Parliament.

In Estonian domestic discussions that followed the conclusions and proposals of the Expert Committee, Anneli Albi suggested an alternative wording for the constitutional amendment. Albi suggested that the two provisions proposed in the report, § 1(3) and § 123¹, be merged and that the amendment be added as a separate paragraph to § 1 of the Constitution.²¹ A further contribution to the discussion on whether/how to amend the Constitution was made by Julia Laffranque, who in an article in 2001 listed possible ways to amend the Constitution for the purpose of EU membership; the list also summarised proposals presented by other legal experts, *inter alia* the possibility of introducing a third supplementing act to the Constitution.²²

In 2002, a working group comprised of experts and members of the political factions in the *Riigikogu* was formed.²³ It should also be stressed that during the time the working group held its sessions, a public opinion survey showed that more than half (51%) of the citizens who had the right to vote were against joining the EU, and only 37% supported accession.²⁴ The solution later found by the working group was presumably to some extent influenced by this survey.²⁵

In January 2002, the Minister of Justice at the time, Märt Rask, asserted that the legal scholars had not reached a conclusion on whether and, if so, how exactly and to what extent the Constitution should be amended. Subsequently, Rask published the preferred form for the amendment – a laconic supplementing act to the Constitution – and its possible content.²⁶ The reasoning behind this choice was the desire not to amend the base text of the Constitution, since the Constitution itself was considered a ‘sacred’ text, and the Minister of Justice did not want the

¹⁹ Ibid., pp. 18–19.

²⁰ Carcassonne 1998, p. 10.

²¹ Albi 2000, p. 164.

²² Laffranque 2001, p. 215 et seq.

²³ According to Mart Nutt, the following experts played a central role in the drafting process of the future CREA, submitted to the *Riigikogu* on 16 May 2002: Kalle Merusk, Jüri Põld, Ülle Madise, Julia Laffranque and Märt Rask, see minutes of the IX Riigikogu, VII session (11 June 2002), (available in Estonian) <http://stenogrammid.riigikogu.ee/et/200206111000#PKP-2000008924>.

²⁴ For the period January 2000 to March 2001, see Mattson, T. (2001, March 28). *Üle poole kodanikest on euroliidu vastu* (More than half of all citizens oppose the EU). Postimees. <http://www.postimees.ee/1858647/ule-poole-kodanikest-on-euroliidu-vastu>. See also Albi 2005, p. 89.

²⁵ Albi 2005, p. 89.

²⁶ Rask, M. (2002, January 15). *Kas muuta põhiseadust või mitte?* (To amend the Constitution or not?) Postimees. <http://arvamus.postimees.ee/1914493/kas-muuta-pohiseadust-voi-mitte>.

Constitution to become a pile of amendments and insertions, losing its clarity and simplicity.²⁷

The critique and advice of legal scholars A wave of criticism from legal scholars followed. Rait Maruste, at the time Judge of the European Court of Human Rights (ECtHR), conceded that the Minister of Justice's proposal was one possible solution – and definitely a politically convenient one; however, he expressed doubt whether the Third Act (as the supplementing act came to be widely known) could maintain the clarity and simplicity of the Constitution.²⁸ He insisted that the Constitution had to reflect the actual mechanisms of exercising power. The Third Act with its few sentences would not be able to do so. According to Maruste:

It is as clear as day that upon joining the EU the actual ways in which power is exercised change, and change significantly. They change, in my opinion, to such an extent that this cannot be overcome through simple interpretation, by establishing a general rule or, in the worst case, by tacitly looking past any incompatibilities. It would be a rape of the Constitution and constitutional nihilism.²⁹

The criticisms by Maruste were followed by the Chancellor of Justice, Allar Jõks,³⁰ who also pointed out several shortcomings of the Third Act solution. For example, Jõks stated that without establishing clear rules on changes brought upon by the EU, it would be impossible to foresee problems that might arise from the Third Act.³¹ Furthermore, by raising EU law above the Constitution, Estonia would give up too much and, moreover, the Constitution does not permit entry into an international treaty that is not in accordance with the Constitution. Jõks proposed following the German example by adding a clause which would bind membership in the EU with adherence to the fundamental principles of the Constitution. Among further scholars, Lauri Mälksoo, now Professor of International Law at the University of Tartu, argued that amending the Constitution with a separate addendum which, in addition, modifies the contents of the Constitution itself, would

²⁷ Ibid.

²⁸ Maruste, R. (2002, January 29). *Põhiseadust tuleks siiski muuta* (The Constitution should nevertheless be amended). Postimees. <http://arvamus.postimees.ee/1917325/pohiseadust-tuleks-siiski-muuta>.

²⁹ Ibid., (translation by the authors).

³⁰ The monocratic institution of the Chancellor of Justice is unique, with a tripartite division of its functions. The first is to exercise supervision over the constitutionality and legality of the proceedings of the legislative and executive powers. To perform this function, the Chancellor of Justice has the right to speak before the *Riigikogu* (the Estonian Parliament) and during the sessions of the Government, to lodge a complaint against any state organ, to submit a direction to the *Riigikogu* to initiate an Act and also to appeal to the SC, if this request is not fulfilled. The second function is the ombudsman function, which includes the right to receive individual complaints, and to analyse and make suggestions to improve administrative governance. Thirdly, the Chancellor of Justice has the right to decide whether to bring a question of removal of immunity before Parliament.

³¹ Jõks, A. (2002, April 16). *Põhiseadus muutuste künnisel* (The Constitution on the brink of change). Postimees. <http://arvamus.postimees.ee/1933583/pohiseadus-muutuste-kunnisel>.

be harmful for the clarity of the Constitution.³² In addition, Mälksoo stated that the ‘neutral’ route of the CREEA was being used in an attempt to avoid some essential questions on the extent to which the rights and obligations arising from the Accession Treaty will change the Constitution. The irony of this ‘legal masquerade’ was that the Estonian Constitution provided one of the strictest sovereignty clauses in Europe.³³ Mälksoo insisted that the core of the Constitution should be respected, and the Third Act should not become a Trojan horse which would allow the fundamental principles of the Constitution to be turned upside down; he proposed the addition of reference to the fundamental principles of Estonian statehood and of the Constitution in the text of the CREEA.

In the summer of 2002, six scholars – Anneli Albi, Michael Gallagher, Indrek Koolmeister, Rait Maruste, Lauri Mälksoo and Peeter Roosma – published a joint statement concerning the Third Act.³⁴ The statement stressed that the Third Act would not describe the actual way power is exercised, and that accession to the EU must be regulated in accordance with constitutional law. By choosing the supplementing act solution, the text of the Constitution would cease to be as clear and easily applicable as it was before the Third Act. Moreover, the Constitution itself does not foresee the possibility to change the Constitution by means of a separate act: Chapter XV of the Constitution only permits amendment of the Constitution by amending its text. The six scholars concluded that the draft CREEA was not in accordance with the principle of a democratic state based on the rule of law, and that the Act might lay a foundation for a risky precedent in future. As an alternative, the scholars proposed that the text of the Constitution be amended by adding Chapter IX¹ on the European Union. The proposed chapter would have included Article § 123¹ (‘Estonia may delegate state powers stemming from the Constitution to the European Union according to the conditions laid down in the Treaties of the European Union and to the extent that this does not harm the fundamental principles of Estonian statehood’), and provisions regarding the participation of the *Riigikogu*, application of EU law in cases of conflict, equal treatment of EU citizens, and a revision regarding the Bank of Estonia with a view to participation in the Monetary Union.

In April 2002, the Minister of Justice recognised that many legal scholars wanted to change the Constitution in detail, so that exactly what would change after joining the EU would be clear.³⁵ The Minister proposed that the changes should be explained and clarified in the explanatory memorandum to the draft CREEA; however the draft itself, he maintained, should remain ‘short, simple and clear’.³⁶

³² Mälksoo, L. (2002, May 13). *Kuidas muuta põhiseadust?* (How should the Constitution be amended?) Postimees. <http://arvamus.postimees.ee/1938787/kuidas-muuta-pohiseadust>.

³³ Ibid.

³⁴ Albi et al. 2002, pp. 352–353.

³⁵ Rask, M. (2002, April 19). *Ühinemise otsustab rahvas* (Accession will be decided by the people). Postimees. <http://arvamus.postimees.ee/1936071/uhinemise-otsustab-rahvas>.

³⁶ Ibid. (translation by the authors).

A more comprehensive justification for the Third Act was presented in an academic article by the working group.³⁷

Amendment procedure and obstacles The procedure for amending the Constitution is set out in Chapter XV of the Constitution.³⁸ Notably, § 162 provides that Chapter I (General Provisions) and Chapter XV (Amendment of the Constitution) may only be amended by referendum. Since the CREEA would in principle have changed the first chapter of the Constitution (particularly § 1 and § 3), the amendment could only be adopted by a referendum.

1.2.4 With regard to EU-related amendment proposals, two different periods can be distinguished: the first period up to the decision by the *Riigikogu* to hold a referendum on the CREEA, and the second period starting from this decision and continuing to this day.

The question of further amendment of the Constitution was in particular revived by the discussions on the Treaty Establishing a Constitution for Europe, which ultimately never came into force. During the debates on the CREEA, it had been stressed on several occasions (including in the above-mentioned justification article by the working group that initiated the Third Act) that the next time the EU Member States amended the fundamental treaties of the EU, Estonia would need to amend the CREEA accordingly, and therefore a new referendum would have to be held.³⁹

In the context of the European Constitutional Treaty, some legal experts proposed a total revision of the Constitution. Märt Rask, who meanwhile in 2004 had been appointed Chief Justice of the SC, asserted that it would be very difficult for the Constitutional Review Chamber of the SC (CRCSC) to interpret the Constitution, considering that both the European Constitutional Treaty and the Estonian Constitution were applicable.⁴⁰

The subsequent developments in the *Riigikogu*, however, took a completely different direction. In December 2004, a working group to analyse the European Constitutional Treaty was formed with the task of, *inter alia*, analysing whether the Constitution and the CREEA allowed for ratification of the European Constitutional Treaty in the *Riigikogu* without amending the Constitution.⁴¹

³⁷ Laffranque et al. 2002, pp. 563–568. Cf. Ginter and Narits 2013, p. 60.

³⁸ The right to initiate amendments rests with one-fifth of the members of the *Riigikogu* and with the President (§ 161(1) of the Constitution).

³⁹ E.g. in Laffranque et al. 2002, p. 567.

⁴⁰ Piirsalu, J. (2004, 21 September): *Märt Rask: põhiseadus vajab lähiajal kindlasti revideerimist* (Märt Rask: The Constitution must definitely be revised in the near future). Eesti Päevaleht. <http://epl.delfi.ee/news/eesti/mart-rask-pohiseadus-vajab-lahiajal-kindlasti-revideerimist?id=50993275>.

⁴¹ See *Riigikogu* press release of 14 December 2004 and *Riigikogu* press release of 4 February 2005.

In March 2005, Chancellor of Justice Allar Jõks warned in a press article that in the interests of at least the formal constitutionality of the changes brought about by the European Constitutional Treaty, the reference to the Accession Treaty in § 2 CREEA should be replaced with ‘Treaty Establishing a Constitution for Europe’.⁴² For this minimum change, a new referendum should be held, since according to § 3 CREEA, the Act can only be amended by referendum. In the beginning of 2005, Uno Lõhmus, Judge of the European Court of Justice, referred *inter alia* to the standpoints of the legal experts who had drafted the CREEA⁴³ and stated that a new EU Treaty would have to be adopted by a referendum, since the CREEA only applies to the Accession Treaty explicitly named in the CREEA.⁴⁴

However, the report of the working group of the *Riigikogu* published subsequently concluded that the European Constitutional Treaty should be treated as a normal international treaty and therefore requires no referendum. The report stated:

The Treaty Establishing a Constitution for Europe ... is by its nature in a wider sense a constitutional act, which in the meaning of the Constitution must be considered as an international treaty.⁴⁵

The conclusions were not reached unanimously.⁴⁶ Insofar as the European Constitutional Treaty never came into force, the report did not have any significant impact on the decisions relating to amendment of the Constitution in 2005. However, some years later, the Lisbon Treaty was approached in a similar way as the European Constitutional Treaty: no amendments were introduced in either the Constitution or the CREEA.

In September 2010 the issue of amending the Constitution was once again brought to the forefront. Rait Maruste proposed a revision of the Constitution in the light of the changes that had taken place during the previous years.⁴⁷

⁴² Jõks, A. (2005, March 7). *Põhiseaduse leping ja põhiseadus õiguslikke küsimusi* (Legal Questions regarding the Constitutional Treaty and the Constitution). Postimees. <http://www.postimees.ee/1460167/allar-joks-pohiseaduse-leping-ja-pohiseadus-oiguslikke-kusimusi>.

⁴³ Laffranque et al. 2002, p. 566.

⁴⁴ Lõhmus 2005, p. 78.

⁴⁵ *Euroopa põhiseaduse lepingu riigiõigusliku analüüsi töörühma seisukohad lepingu ratifitseerimise küsimuses* (Report of the working group on the European Constitutional Treaty) 2005, para. II 1. (translation by the authors). http://www.riigikogu.ee/v/failide_arhiiv/Riigikogu/eps1_20051211_ee.pdf.

⁴⁶ Ibid.

⁴⁷ Although Maruste’s proposal was no different from his earlier statements, his proposal caused a passionate debate (possibly also because he had embarked on a political career). See Maruste, R. (2010, September 17). *(Päris) vaba Eesti põhiseadus* (The (truly) free Estonian Constitution). Postimees. <http://pluss.postimees.ee/314169/rait-maruste-paris-vaba-estni-pohiseadus>.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The delegation of powers to the EU is regulated in § 2 CREEA (for the text, see Sect. 1.2.1). There are no clear limits to the transfer or delegation of powers to the EU. The brief wording of the CREEA has left several major questions open, e.g. the effect of EU law, for interpretation by the judiciary.

The SC ruled on this issue in 2012. Although in this case concerning the constitutionality of the Treaty Establishing the European Stability Mechanism (ESM Treaty) the SC held that the ESM Treaty is not part of EU law, it included an *obiter dictum* on the potential limits to transfer of competences to the EU.⁴⁸ The Court referred to the CREEA and stated that in the view of the Court, ‘the CREEA is not an authorisation to legitimise the integration process of the European Union or to delegate the competence of Estonia to the European Union to an unlimited extent’.⁴⁹ It can be derived from the reasoning of the SC that any further amendment which leads to deeper integration of the EU and any additional delegation of competences, would need additional approval by referendum. According to the SC:

If it becomes evident that a new founding treaty of the European Union or amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it will be necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably to amend the Constitution once again.⁵⁰

1.3.2 The SC has not given much attention in its case law to the concept of sovereignty. The SC has addressed this concept directly only in the case concerning the constitutionality of the ESM Treaty in 2012:⁵¹

[T]he Constitution does not require, despite the strict wording of the sovereignty clause, observation of absolute sovereignty. ... [M]embership of the EU and in international organisations has become a natural part of sovereignty in this day and age.⁵²

In the reasoning that followed, the SC treated sovereignty as a principle that can be weighed against other principles. In fact, Estonian doctrine has never known a prevailing theory of absolute sovereignty. Instead, already in 1936 the leading professor of international law, Ants Piip, observed that the contemporary concept of sovereignty had changed significantly; it was only understood as a leeway within

⁴⁸ SCebj 12.07.2012, 3-4-1-6-12, paras. 217–233.

⁴⁹ *Ibid.*, para. 223.

⁵⁰ *Ibid.*, para. 223. See also Sect. 2.7. for a discussion regarding potential limits arising out of principles such as the budgetary autonomy of Parliament.

⁵¹ SCebj 12.07.2012, 3-4-1-6-12.

⁵² *Ibid.*, paras. 128 and 130. See on this judgment: Ginter 2013, p. 335 et seq.

the limits deriving from international law. Sovereignty, according to Piip, was at that time already used in this sense in interstate relations.⁵³ In contemporary writings, sovereignty was no longer considered an absolute concept.⁵⁴ On the other hand, the SC also stated in the ESM case: ‘The core essence of sovereignty is the right of discretion in all matters, irrespective of external influences’.⁵⁵ This can be considered as an expression of the classic concept of sovereignty.

In Estonian constitutional doctrine, the classic Kelsenian distinction between internal and external sovereignty is deep-rooted.⁵⁶ The former refers to the state’s power competences; the latter bears the connotation of independent statehood in the international arena.⁵⁷ Kelsen’s disciple Artur-Tõeleid Kliimann introduced this distinction to Estonian doctrine, re-naming internal sovereignty as independence (*sõltumatus*) and external sovereignty as self-determination (*iseseisvus*).⁵⁸ However, according to the Government’s translation of the Constitution (and as used in the work of e.g. Albi⁵⁹), ‘*iseseisvus*’ equals independence and ‘*sõltumatus*’ equals sovereignty. In this way the translators have put sovereignty on an equal footing with independence and the similarity of this distinction with the Kelsenian approach is no longer recognisable.

These two concepts can be found again in the wording of § 1(1) of the Constitution, and e.g. the Legal Expertise Committee for the Constitution of the Republic of Estonia adopted this dualistic definition of sovereignty in its expert report.⁶⁰ However, the significance of the two elements is not entirely clear. The author suggests that internal sovereignty ought to be considered as identical with democracy because it refers to the unimpeded exercise, by the people, of the highest inner-state decision-making competence that lies in a democratic state. The SC proclaimed in 2012: ‘The sovereignty of the people gives rise to the sovereignty of the state and thereby all state institutions obtain their legitimation from the people.’⁶¹ External sovereignty, on the other hand, concerns rather the commitment of the state in international relations and means simply the right of the state to govern itself.

Thus, the concept of sovereignty remains classic but the approach to the concept has been influenced by modern legal theory – the SC considers sovereignty to be open to restrictions and weighing. Therefore, not every infringement of sovereignty necessarily constitutes a violation, and an infringement may be justified by

⁵³ Piip 2007, p. 415 et seq. Cf. Kalmo and Luts-Sootak 2010, p. 14.

⁵⁴ See also two Estonian edited volumes: Kalmo, Luts-Sootak 2010; Loone et al. 2004.

⁵⁵ SCebj 12.07.2012, 3-4-1-6-12, para. 127.

⁵⁶ Kelsen 1925, p. 110.

⁵⁷ Ibid.

⁵⁸ Kliimann 1935, p. 49 et seq.

⁵⁹ Albi 2005, pp. 25, 30 et seq., 126.

⁶⁰ The 1998 Report of the Legal Expertise Committee, supra n. 14.

⁶¹ SCebj 12.07.2012, 3-4-1-6-12, para. 127.

weightier reasons, e.g. by the financial stability of the euro area, including of Estonia, like in the case concerning the ESM Treaty.

1.3.3 Whilst there is no clear articulation of any limits on EU law, the fundamental principles of the Constitution have been articulated in the case law of the SC and are listed in Sect. 1.1.1. The current interpretation of the Constitution implies that potential limits could indeed be surpassed by referendum. It could be argued that the fundamental values of the Constitution, such as the right to national self-determination, preservation of the Estonian nation and culture, etc., are inalienable and therefore cannot be forsaken.

1.3.4 The Constitution does not directly proclaim the supremacy of the Estonian Constitution, although § 3(1) provides that state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Currently, the Constitution is interpreted in a Europe-friendly manner, and Estonia, with a liberal approach to the economy and law, has shown a remarkable willingness to adapt to EU principles, led by its SC, with the suspension of Constitutional provisions in the event of a conflict with EU law.⁶² According to the SC:

Proceeding from of § 2 of the Constitution of the Republic of Estonia Amendment Act ..., pursuant to which when Estonia has acceded to the European Union, the Constitution of the Republic of Estonia shall be applied taking into account the rights and obligations arising from the Accession Treaty, the result of the adoption of this Act is that only that part of the Constitution which is in conformity with European Union law or which regulates the relationships not regulated by European Union law can be applied. The effect of those provisions of the Constitution that are not compatible with European Union law and are thus inapplicable, is suspended.⁶³

On 11 May 2006 the SC, this time performing constitutional review, adopted an opinion regarding the interpretation of the Constitution (the *Transition to the Euro* case).⁶⁴ According to the opinion:

In the substantive sense this [i.e. § 2 CREAA] amounted to a material amendment of the entirety of the Constitution to the extent that it is not compatible with European Union law. ... only that part of the constitution is applicable, which is in conformity with European Union law or which regulates relationships that are not regulated by the European Union law. The effect of those provisions of the constitution that are not compatible with the European Union law and are thus inapplicable, is suspended.⁶⁵

The decisions of the SC have been criticised in the dissenting opinions of two justices. Primarily the existence of limitations to this interpretation as well as to the binding nature of the opinion on further practice have been questioned. In a dissenting opinion, Justice Kõve expressly stated that when analysing the implications

⁶² Ginter 2008. The process of accepting the supremacy and direct effect of EU law in Estonia has been analysed in detail in Ginter 2007, pp. 337–345.

⁶³ CRCSCo 26.06.2008, 3-4-1-5-08, para. 30.

⁶⁴ CRCSC Opinion 11.05.2006, 3-4-1-3-06.

⁶⁵ Ibid., para. 16.

of § 2 CREEA, the Court should have also clarified the meaning of § 1 as well as the meaning of Chapter I of the Constitution in its entirety.⁶⁶ Dissenting Justice Kergandberg equally pointed to the need for an analysis of the nature and impact of § 1 CREEA.⁶⁷

In the absence of a decision by the SC, it is currently not clear whether § 1 CREEA should be seen as what it says grammatically – a limitation to Estonia's membership in the EU – or as an interpretative tool, to the benefit of the fundamental principles of the Estonian Constitution in the case of a conflict with EU law. The grammatical text of the CREEA seems to favour the first interpretation. On the other hand, the practice of the supreme courts of 'old' Member States, including but not limited to the famous *Solange* saga,⁶⁸ would rather support the second alternative. Indeed the court may even find that both solutions can be applied simultaneously.

1.4 Democratic Control

1.4.1 There are no specific rules in the Constitution concerning the participation of the Estonian Parliament in the EU decision-making processes. In 2004 the *Riigikogu* Rules of Procedure Act (RRPA)⁶⁹ was amended and a new standing committee, the European Union Affairs Committee (EUAC), was introduced.⁷⁰ The EUAC is unique since it is comprised of members who at the same time are members of other committees of the *Riigikogu*. The EUAC has the right to compose, in the name of the entire *Riigikogu*, opinions concerning draft EU acts. This position of the *Riigikogu* is in general binding for the Government. However, the Government has also been left a certain amount of discretion in negotiations: the Government is allowed to deviate from this position, but only on exceptional grounds.⁷¹ One exceptional ground would be for example a change of situation during the discussions at the EU level. If the Government does not follow the official position of the *Riigikogu*, it is bound to appear before the EUAC or the Foreign Affairs Committee to provide an explanation.

1.4.2 On the EU accession and constitutional amendment referendum of 2003, see Sect. 1.2.

⁶⁶ Dissenting Opinion of Justice Kõve to CRCSC Opinion 11.05.2006, 3-4-1-3-06, para. 2.

⁶⁷ Dissenting Opinion of Justice Kergandberg to CRCSC Opinion 11.05.2006, 3-4-1-3-06.

⁶⁸ *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 37, 271 (*Solange* I); BVerfGE 73, 339 (*Solange* II).

⁶⁹ RT I 2003, 24, 148; RT I, 05.11.2014, 5.

⁷⁰ See also Kundla in Möttus et al. 2012, Introduction to Chapter § 18¹, comm. 5.

⁷¹ *Ibid.*, § 152⁴, comm. 5.

1.5 *The Reasons for, and the Role of, EU Amendments*

1.5.1–1.5.2 On the reasons behind the amendments and the factors that influenced the content of the amendments, see Sects. 1.2.2–1.2.3 and 1.5.3.

1.5.3 The CREEA, introduced by a referendum in 2003, unfortunately entails more problems than it solves. As pointed out above, it was heavily criticised already in the course of the *travaux préparatoires*. The application of the CREEA has shown that some of that criticism was justified. The following proposal is therefore another attempt to point out the key issues regarding the CREEA and to offer a suitable solution to these problems.

Delegation of powers clause Sovereignty and the partial delegation of powers are the key aspects of all international cooperation clauses. The Constitution in § 1(2) establishes a particularly strong sovereignty clause: ‘The independence and sovereignty of Estonia are timeless and inalienable.’ It is one of the strongest accentuations of sovereignty in Europe⁷² and perhaps even the world. It should also be stressed that the fear of a rollback to a Soviet Union-type organisation was the main consideration behind the wording of § 1(2).⁷³

Amending the Constitution by a separate act has been sharply criticised, as seen in Sects. 1.2.3–1.2.4. Even if it is not explicitly prohibited by the Constitution, this practice does not constitute a welcome way to amend a legal document of central importance. Amending the text of the Constitution should be preferred in order to preserve legal clarity and to avoid unnecessary interpretation issues. What is more, both of the relevant sections, § 1 and § 2 CREEA, introduced problems that could have easily been avoided by simply amending the text of the Constitution.

It is not only the EU that restricts sovereign statehood in the globalised world, but also the Council of Europe, NATO, the UN, etc. In 2012 the question of international organisations other than the EU reached the SC in a case regarding the ESM Treaty. The delegation of powers to the ESM was found to be outside of the regulative effect of the CREEA.⁷⁴ The SC *en banc* identified an infringement of the principle of sovereignty but found by an extremely narrow majority of ten votes to nine that this was proportionate and justified by substantial considerations.⁷⁵ This tactic of reasoning has been sharply criticised, particularly by Justice Luik in his dissenting opinion. Justice Luik clearly held that ‘due to the existence of the prohibition on partial waiver of sovereignty, the Constitution does not permit ratification of the Treaty’,⁷⁶ with reference to § 1(2) of the Constitution.

Indeed, this was perhaps the most problematic point in the reasoning of the SC. Section 1 CREEA does not permit the delegation of powers to any international

⁷² Albi 2002, p. 42; cf. the table in Albi 2005, p. 26 et seq. and its summarised background p. 30.

⁷³ Cf. Peep 1997, p. 68.

⁷⁴ SCebj 12.07.2012, 3-4-1-6-12, para. 110.

⁷⁵ SCebj 12.07.2012, 3-4-1-6-12, paras. 176–203 and 207–210.

⁷⁶ Dissenting Opinion of Justice Luik to SCebj 12.07.2012, 3-4-1-6-12, para. 14.

organisation other than the EU and, in the light of this conclusion, the restriction of sovereignty for any other purpose is in fact questionable in the light of § 1(2) of the Constitution. Taking the aforementioned aspects into consideration, it would seem appropriate to amend the sovereignty clause with an exception that would also allow the delegation of powers to other international organisations, instead of restricting its application solely to the EU. Simultaneously, the minimum requirements for such organisations should be established to exclude the legality of any potential attempt to incorporate Estonia into any organisation that does not respect human rights, democracy or the rule of law.⁷⁷ A good example of such a clause is Art. 3a of the Constitution of Slovenia (see the Slovenian report in this Volume).

European Union clause In addition to a more detailed delegation of powers clause, (a) revised provision(s) concerning the functioning and aims of the EU should be introduced. The author of this section recommends the introduction of a set of conditions for the EU in the Constitution. The freedom that was regained in 1991 is based on respect for human dignity, democracy, the rule of law, a social state and the national identity of Estonia. These fundamental principles should be respected both nationally and within the EU. The guarantee of equally effective protection of fundamental rights on the EU level should also be mentioned. These criteria are necessary to stress the objectives of the EU for Estonian political decision-makers and to guarantee an effective constitutional review of future amendments to the EU treaties. An example of such a clause is Art. 23(1)1 of the German *Grundgesetz* (see the German report in this Volume). In the Estonian Constitution, the systematic position for this type of article could be in the preamble or in Chapter I or IX of the Constitution; the preferable position, however, would be a new § 120(1) of the Constitution.

Qualified majority clause There are three possible procedures for delegating powers to the international level. The first and probably most democratic procedure would be the holding of a referendum for any delegation of powers. The second possibility would be to follow the regular legislative procedure in Parliament, i.e. powers could be delegated by a simple majority. The third alternative, in a sense the golden mean, would be to introduce a legislative procedure which requires a qualified parliamentary majority.

Compared to other possibilities, referendums are usually financially more onerous, more time-consuming and often politically unpredictable. Furthermore, powers are delegated through international treaties and, according to § 106(1) of the Constitution, no ratification of any international treaty shall be submitted to a referendum. However, a mere simple majority would not correspond to the importance of the decision. Therefore, in order to stress the importance of a delegation of powers, a qualified majority of two-thirds of all the members of the

⁷⁷ The best solution would be to add a new section § 1(3) to § 1. Such clause would determine legally that Estonia will remain part of the free world, and Soviet-type organisations would thus be precluded.

Riigikogu, which is presently foreseen in four instances in the Constitution, would seem appropriate. A comparable rule can also be found in Art. 3a of the Slovenian Constitution.

Exercise of power clause According to § 3(1), of the Constitution, state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. According to § 2 CREEA, when Estonia has acceded to the EU, the Constitution shall be applied taking into account the rights and obligations arising from the Accession Treaty. As the SC asserted in its opinion of 11 May 2006,⁷⁸ § 2 CREEA led to a suspension of a large part of the Constitution and to a redefinition of § 3(1) of the Constitution. This has been described as one of the most significant (legal) changes caused by accession to the EU.⁷⁹ The SC has even relinquished its competence to perform constitutional review if EU law collides with the Constitution, with reference to the competence provision: ‘§ 152(2) of the Constitution, as well as the Constitutional Review Court Procedure Act passed for the implementation thereof, must not be applied to the extent that these enable to declare invalid, due to unconstitutionality, a provision relating to EU law of any Act or other legislation, which is in conformity with the EU law on the basis of which it was enacted’.⁸⁰

The main argument in support of the view of the SC is that the SC does not have competence to exercise judicial review over national legislation transposing EU law into national law.⁸¹ This restrictive interpretation of the SC’s competence has been sharply criticised with overwhelming arguments.⁸² Since the Constitution gives the SC universal competence to review all laws that might contradict the Constitution, there can be no doubt that the SC is competent to review all laws that are applied in Estonia. If the SC thereby comes to the conclusion that the object of the review is national legislation transposing EU law, it should take the primacy of EU law into consideration in deciding the case. Otherwise, by suspending some of the norms of the Constitution, the SC would decide on the validity of the norms on which its own competence for constitutional review is based. Pursuant to the Constitution, however, this would be *ultra vires*.⁸³

⁷⁸ See Sect. 1.3.4, CRCSC Opinion 11.05.2006, 3-4-1-3-06, para. 16. Cf. CRCSCj 26.06.2008, 3-4-1-5-08, para. 30.

⁷⁹ Madise et al. in Madise et al. 2012, Introduction to the CREEA.

⁸⁰ CRCCo 26.06.2008, 3-4-1-5-08, para. 30.

⁸¹ Kalmo 2008, p. 583 et seq.; Laffranque 2007b, p. 535 et seq.; Laffranque 2009, p. 498. Cf. the discussion in Ernits 2011, p. 49 et seq.

⁸² Lõhmus 2011, p. 24 et seq.; Mäliksoo 2010, p. 147 et seq.; Ernits 2011, p. 37 et seq. and 61 et seq.; Ernits 2012, p. 137 et seq. (See also Sect. 2.9)

⁸³ Ernits 2011, p. 49 et seq.; cf. Lõhmus 2011, p. 25. In 2015, the SC revised partially its earlier far-reaching position, cf. SCEbj 15.12.2015, 3-2-1-71-14, para. 81, 83: ‘The fact that any provisions are compatible with European Union law cannot lead to the conclusion that the same provisions are also compatible with the Estonian Constitution or that declaring a provision unconstitutional and repealing it would constitute a breach of European Union law. The connection of a legal act with EU law, or an opinion of any other institution on the compatibility of

It is well established that after accession to the EU, state powers can be exercised not only on the basis of parliamentary laws but also on the basis of directly applicable EU law. However, instead of declaring a conflict between the Constitution and EU law, suspending the Constitution⁸⁴ and relinquishing competence for constitutional review, it would be advisable to re-interpret the relevant provisions of the Constitution (and thus still apply them) in conformity with EU law, and thus to apply EU law on the basis of the Constitution to the extent possible. As long as there is no violation of the fundamental constitutional principles, it would be the legitimate way to achieve both: conformity with the EU Treaties and preservation of the Constitution, including the constitutional review competence of the SC.⁸⁵ This concept is not new in the context of other EU Member States.⁸⁶ It would, however, be an innovation in the Estonian context.

Since § 2 CREEA serves as the basis for the current interpretation of the SC, it would be recommendable to abandon the present text of § 2 CREEA and to choose a solution that better fits the system of the Constitution. Instead of integrating § 2 CREEA into the text of the Constitution, § 3 of the Constitution should be amended with a new para. 2, whereas the existing para. 2 would become the new para. 3. A good example of such a clause is Art. 8(4) of the Constitution of Portugal (see the Portugal report in this Volume). This would help to avoid the erosion of the Constitution and at the same time systematically guarantee that EU law is applied in accordance with the Constitution.

Parliamentary participation and information clause The 1998 legal expert report on the Constitution proposed *inter alia* a further clause introducing the obligation of the Government to inform the *Riigikogu* as early as possible and comprehensively of matters relating to the EU. Although a similar procedure is foreseen in § 152¹ RRPA, no such guarantee is provided by the Constitution. As this question concerns the checks and balances on state powers, it is a constitutional matter. According to the present regulation, the Government is not obliged to involve the *Riigikogu* in matters concerning the EU and Parliament is not able to effectively demand information and compliance with the parliamentary opinion by the Government. It would therefore be necessary to include such provisions in a

domestic legislation with EU law cannot in itself preclude review of the constitutionality of the legal act within the meaning of § 152 of the Constitution. [...] Within the boundaries set by EU law, including state aid guidelines, the national legislator is bound by the requirements arising from the Estonian Constitution, and the national courts by the duty under § 152 of the Constitution to check the constitutionality of the measure(s) chosen for achieving the aim. By no means does EU law prohibit member states from ensuring domestic fundamental rights to the extent that the exercise of the rights does not endanger the supremacy, uniformity and effectiveness of EU law.’ However, it still remains unclear how far would the SC go in recognising the primacy of the EU law over the Constitution.

⁸⁴ CRCSC Opinion 11.05.2006, 3-4-1-3-06, para. 16; CRCSCo 26.06.2008, 3-4-1-5-08, para. 30.

⁸⁵ Cf. Ernits 2011, p. 61 et seq.

⁸⁶ Cf. Ehrlicke 1995, p. 598 et seq.; Nettesheim 1994, p. 261 et seq.; Heukels 1999, p. 313 et seq.

future reform package (e.g. in Chapter VI of the Constitution). Comparable rules can also be found in Art. 23(2) and Art. 45 of the German *Grundgesetz*.

Further issues The list of the aforementioned problems is not exhaustive. There are further questions, for example whether there should be a parliamentary committee authorised to exercise the rights of the Parliament in matters concerning the EU, whether § 111 and/or § 112 of the Constitution should be amended with a euro clause and/or European Central Bank clause, and whether the Constitution needs to contain an equal rights clause for European citizens. There are, moreover, other issues that should be analysed in depth, e.g. the often-cited § 58 of the Constitution that allows for the restriction of the right to vote of imprisoned Estonian citizens only.

Furthermore, there has been a call for a general renovation of the Constitution of 1992.⁸⁷ The need for a general renovation is questionable, since there is no constitutional crisis in Estonia and the Constitution of 1992 has proven, beyond the CREEA, to be well-functioning and, in a historical perspective, the most successful Constitution for Estonia ever.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 *The Position of Constitutional Rights and the Rule of Law in the Constitution*

2.1.1 Constitutional rights are provided in Chapter II of the Constitution. Five general rights can be identified: a general right to liberty in § 19(1), general right to equality in § 12(1), general right to state protection in § 13(1), general right to organisation and procedure in § 14⁸⁸ and a general social right in § 28(2).⁸⁹ The chapter on constitutional rights is otherwise rather comprehensive and detailed.⁹⁰ Constitutional rights and fundamental principles like the rule of law are enforceable in courts. They are procedurally guaranteed by the general right to address a court in the case of an alleged violation of a right, provided for in § 15(1).

⁸⁷ Maruste's written report for *Eesti Õigusteadlaste Päevad* (Congress of Estonian lawyers) 2004, cited in Maruste, supra n. 47.

⁸⁸ 'The guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments.'

⁸⁹ This division was first introduced by Robert Alexy in the first systematic monograph concerning fundamental rights in the Estonian Constitution: Alexy 2001, pp. 51 et seq., 56 et seq., 68 et seq., 73 et seq., 76 et seq.

⁹⁰ It contains classic rights and liberties such as the right to privacy in § 26, freedom to choose an occupation in § 29(1), right to property in § 32, inviolability of the home in § 33, right to free movement in § 34, freedom of religion in § 40, secrecy of correspondence in § 43, freedom of expression in § 45, freedom of assembly in § 47, etc., as well as special social rights such as the right to education in § 37.

However, the enforceability of constitutional rights has not been fully developed. It remains disputable in Estonian constitutional law theory whether there is a right to an individual constitutional complaint to the SC on the grounds of the Constitution or whether all courts have the obligation to enforce constitutional rights with no room for a direct complaint to the SC. It can be noted that the Constitutional Review Court Procedure Act (CRCPA)⁹¹ does not foresee an individual constitutional complaint.

2.1.2 Section 11 of the Constitution states: ‘Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted’. The aforementioned § 3(1) and § 11 define the general minimum requirements for every restriction: every infringement of a constitutional right requires a legal basis and must be proportional. However, these provisions cannot be considered as sufficient authorisations to restrict a particular constitutional right. If the legislator wants to restrict a particular constitutional right, it must consider the statutory reservation of the particular constitutional right. For example, the second sentence of § 26 of the Constitution states: ‘State agencies, local governments and their officials shall not interfere with the private or family life of any person, except in the cases and pursuant to procedure provided by law to protect health, morals, public order, or the rights and freedoms of others, to combat a criminal offence or to apprehend a criminal offender’. This is an example of a clause that states a qualified statutory reservation. Beyond this, there are constitutional rights with a simple statutory reservation (e.g. § 29(1), second sentence: ‘Conditions and procedure for the exercise of this right may be provided by law’) and rights without any statutory reservation (e.g. § 38(1)). A simple statutory reservation does not add anything substantial to the general minimum requirements, whereas the SC has specified that only other fundamental rights or constitutional values can provide a legitimate justification for an infringement of a fundamental right established without reservations.⁹² In every case the state has a duty to justify all infringements of rights and liberties.⁹³

2.1.3 The rule of law can be considered as one of the fundamental principles of the Constitution anchored in § 10 and determining the rules and principles for the exercise of state power.⁹⁴ The rule of law is the most complex principle in the Constitution, containing further sub-principles such as the separation of powers and due checks and balances, the supremacy of law, the reservation of law and certainty of law, non-retroactivity, legitimate expectations, the principle of proportionality, access to courts, judicial review and judicial independence.

⁹¹ *Põhiseaduslikkuse järelevalve kohtumenetluse seadus*. – RT I 2002, 29, 174; RT I, 23.12.2013, 57.

⁹² SCebo 28.04.2004, 3-3-1-69-03, para. 28; SCeoj 03.07.2012, 3-3-1-44-11, para. 72.

⁹³ Cf. Ernits in Madise et al. 2012, Introduction to Chapter 2 of the Constitution, comm. 8 et seq.

⁹⁴ Cf. CRCSCj 19.03.2009, 3-4-1-17-08, para. 26.

In the Estonian legal commentary, five key elements of the rule of law principle have been identified:⁹⁵ (1) restriction of state power by constitutional rights and the principle of proportionality; (2) separation of powers and due checks and balances; (3) legal certainty; (4) legality; and (5) access to courts and judicial review.

Legal certainty is one of the five central postulates of the rule of law principle and is intended to create order and stability in society.⁹⁶ The SC has stated:

The principle of legal certainty is based on § 10 of the Constitution In the most general sense this principle should create certainty in regard to the current legal situation. Legal certainty means clarity in regard to the content of valid norms (principle of legal clarity) as well as certainty that the established norms shall remain in force (principle of legitimate expectations).⁹⁷

Legal clarity Legal clarity has a double nature in the Constitution. First, it is a fundamental right guaranteed by § 13(2), according to which ‘the law shall protect everyone from the arbitrary exercise of state authority’.⁹⁸ Already in its early case law, the SC proclaimed that ‘insufficient regulation upon establishing restrictions on fundamental rights and freedoms fails to protect everyone from the arbitrary treatment of state power’.⁹⁹ The classic meaning was given to subjective legal clarity by the SC *en banc* in 2002:

Legal norms must be sufficiently clear and comprehensible, so that an individual can foresee the conduct of public power with a certain probability and can regulate his or her conduct. A citizen must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable.¹⁰⁰

Secondly, according to the SC, legal clarity also derives as an objective principle directly from the rule of law set out in § 10.¹⁰¹

Legitimate expectations Legitimate expectations include three subcategories: *nulla poena sine lege*, non-retroactivity and legitimate expectation in a narrower sense.¹⁰² First, the *nulla poena sine lege* rule in § 23(1), and (2), can be identified as *lex specialis* to the general principle of legitimate expectations and is explored in detail in Sect. 2.3.2.

⁹⁵ Ernits in Madise et al. 2012, p. 93, § 10 of the Constitution, comm. 3.4. et seq.

⁹⁶ CRCSCj 30.09.1994, III-4/1-5/94; 23.03.1998, 3-4-1-2-98, para. IX.

⁹⁷ CRCSCj 02.12.2004, 3-4-1-20-04, para. 12; 15.12.2005, 3-4-1-16-05, para. 20; 20.03.2006, 3-4-1-33-05, para. 21; 31.01.2007, 3-4-1-14-06, para. 23.

⁹⁸ SCebj 28.10.2002, 3-4-1-5-02, para. 31; CRCSCj 20.03.2006, 3-4-1-33-05, para. 21; Judgment of the Criminal Law Chamber of the SC (CLCSCj) 28.02.2002, 3-1-1-117-01, para. 12.

⁹⁹ CRCSCj 12.01.1994, III-4/1-1/94. See also Alexy 2001, p. 36.

¹⁰⁰ SCebj 28.10.2002, 3-4-1-5-02, para. 31.

¹⁰¹ SCebj 10.12.2003, 3-3-1-47-03, para. 30; CRCSCj 31.01.2007, 3-4-1-14-06, para. 22.

¹⁰² Ernits in Madise et al. 2012, § 10, comm. 3.4.3.2.

The second element is non-retroactivity which derives from the constitutional interpretation of the SC. The SC proclaimed already in its early case law in 1994: ‘One of the general principles of law is that as a rule, laws must not have retroactive effect.’¹⁰³ Later the SC, referring to its earlier case law, specified that the legislator is entitled to issue legislation with retroactive effect in areas other than criminal law, but it must thereby take into account the will of the people expressed in the Constitution, bear in mind the general interests of the state, and consider the actual situation as well as the principle of legality.¹⁰⁴ The administrative law chamber of the SC has stated even more precisely that the legislator may give retroactive force to a law if there is a well-founded need, it does not cause disproportionate harm to legitimate expectations and the law is not surprising for the person concerned.¹⁰⁵ Recently, the SC has restricted its point of view: ‘It is generally inadmissible to increase obligations with a genuine legal instrument of retroactive force, which means that no legal consequences may be established on actions already performed in the past.’¹⁰⁶

The third element of legitimate expectations is legitimate expectation in a narrower sense, concerning ‘non-genuine retroactive force’, which arises ‘if it concerns an activity that has started, but has not yet ended by the time of the adoption of a legal instrument, to be more exact, if it establishes prospectively legal consequences for an activity that has started in the past’.¹⁰⁷ The most important definition was provided in 2004:

Pursuant to the principle of legitimate expectations everyone must have the possibility to arrange his or her life in reasonable expectation that the rights given to and obligations imposed on him or her by the legal order shall remain stable and shall not change dramatically in a direction unfavourable for him or her.¹⁰⁸

Thus, according to the principle of legitimate expectation in a narrower sense,

[e]veryone has a right to conduct his or her activities in the reasonable expectation that applicable Acts will remain in force. Everyone must be able to enjoy the rights and freedoms granted to him or her by law at least within the period established by the law. Modifications to the law must not be perfidious towards the subjects of the law.¹⁰⁹

If something is promised by law, the legitimate expectation is that the promise shall be applied to those who have started to exercise their rights.¹¹⁰ However,

[t]he principle of legitimate expectations does not mean that the restriction of persons’ rights or withdrawal of benefits is impermissible. The principle of legitimate expectations

¹⁰³ CRCSCj 30.09.1994, III-4/1-5/94.

¹⁰⁴ CRCSCj 20.10.2009, 3-4-1-14-09, para. 50.

¹⁰⁵ ALCSCj 17.03.2003, 3-3-1-11-03, para. 33.

¹⁰⁶ CRCSCj 16.12.2013, 3-4-1-27-13, para. 61.

¹⁰⁷ Ibid.

¹⁰⁸ CRCSCj 02.12.2004, 3-4-1-20-04, para. 13; 31.01.2012, 3-4-1-24-11, para. 49.

¹⁰⁹ E.g. CRCSCj 30.09.1994, III-4/1-5/94; 31.01.2012, 3-4-1-24-11, para. 49 et seq.

¹¹⁰ CRCSCj 17.03.1999, 3-4-1-2-99, para. II.

does not require fossilisation of the valid regulatory framework – the legislator is entitled to re-arrange legal relationships according to changed circumstances and, by doing so, inevitably deteriorate the situation of some members of society. The legislator is competent to decide which reforms to undertake and which groups of society to favour with these reforms.¹¹¹

Prohibition of secret laws The rule that only published laws can be valid or the prohibition of secret law plays a central role in the Estonian Constitution – § 3(2), second sentence states explicitly: ‘Only published laws have obligatory force’. This norm can be considered as a reaction to the tendency of the Soviet occupation regime to apply secret laws from time to time. In particular, the deportations of March 1949 during which more than 20,000 persons were expatriated and transported to Siberia were based on secret Soviet regulations.¹¹² Furthermore, since § 3 of the Constitution is located in Chapter I, it not only belongs formally to the core elements of the rule of law principle, but it can also be amended only by a referendum. Beyond this, the *vacatio legis* principle can be considered as part of the principle of prohibition of secret law: ‘The requirement arising from the *vacatio legis* principle is that, prior to the entry into force of amendments, persons concerned must have sufficient time to examine the new legislation and take it into account in their activities.’¹¹³

Legality The rule that the imposition of obligations, administrative charges or penalties and criminal punishments is only permissible on the basis of a parliamentary statute derives from § 3(1) of the Constitution, according to which: ‘State authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith’. Several sub-principles derive from this norm; the two most important in the present context shall be presented briefly.

According to the principle of parliamentary reservation, the legislator is obliged to regulate essential questions in law itself: ‘What the legislator is ... obliged to do under the Constitution cannot be delegated to the executive, not even temporarily and on the condition of judicial review’.¹¹⁴ This defines the separation of powers principle, or, more specifically the division of powers between the legislator and the Government as the issuer of regulations: ‘The reservation of law principle delimits the competence of the legislative and executive powers’.¹¹⁵ Robert Alexy has called this aspect the democratic dimension of the principle of legislative reservation.¹¹⁶ The SC has stated that in regard to issues concerning fundamental rights, all

¹¹¹ E.g. CRCSCj 02.12.2004, 3-4-1-20-04, para. 14; cf. CRCSCj 31.01.2012, 3-4-1-24-11, para. 49.

¹¹² See Jäätma 2006, p. 31.

¹¹³ CRCSCj 16.12.2013, 3-4-1-27-13, para. 51.

¹¹⁴ CRCSCj 12.01.1994, III-4/1-1/94. See also: CRCSCj 26.11.2007, 3-4-1-18-07, para. 36; 20.10.2009, 3-4-1-14-09, para. 32.

¹¹⁵ CRCSCj 26.11.2007, 3-4-1-18-07, para. 36; 20.10.2009, 3-4-1-14-09, para. 32.

¹¹⁶ Alexy 2001, p. 36.

decisions that are essential from the point of view of the exercise of fundamental rights must be taken by the legislator.¹¹⁷

According to the principle of legal basis, every infringement of any constitutional right needs a legal basis. According to the SC, '[p]ursuant to this principle an authorisation by the legislator is required for the restriction of fundamental rights by a body ranking lower than the legislator'.¹¹⁸ Public authority is only entitled to act if there is a legal basis or enabling act permitting it to do so. The law must determine the conditions for and extent of every infringement.

Access to courts and the right to judicial review Access to courts and the right to judicial review result from § 15(1) of the Constitution: 'Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional'. This guarantee – a constitutional right in itself – is broad and strong and must be regarded as a core element of the rule of law.¹¹⁹ It enables the rule of law to be rendered fully justiciable through a constitutional right, i.e. if there is an infringement of any constitutional right which constitutes a violation of any of the sub-principles of the rule of law, the constitutional right is also violated. The SC has also stressed the close tie between Art. 6(1) of the European Convention on Human Rights (ECHR) and § 15(1) of the Constitution: 'The violation of Art. 6(1) of the Convention, found by the European Court of Human Rights, also constitutes a violation of § 15 of the Constitution'.¹²⁰

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

In Estonia, the balancing of fundamental rights with economic free movement rights has not raised substantial constitutional issues or discussion. There have, however, been some cases where such a discussion would have been merited.

In 2009, the media covered the case of Aivo Piirsoo,¹²¹ a truck-driver from a small Estonian village who had been detained in Germany on the accusation of smuggling cigarettes. He had been released due to his innocence. Approximately nine years later, he discovered that his Estonian bank account had a negative

¹¹⁷ SCebj 03.12.2007, 3-3-1-41-06, para. 21; 02.06.2008, 3-4-1-19-07, para. 25; cf. CRCSCj 24.12.2002, 3-4-1-10-02, para. 24.

¹¹⁸ CRCSCj 13.06.2005, 3-4-1-5-05, para. 9; 20.10.2009, 3-4-1-14-09, para. 34.

¹¹⁹ Cf. CRCSCo 05.02.2008, 3-4-1-1-08, para. 3.

¹²⁰ SCebj 06.01.2004, 3-3-2-1-04, para. 27.

¹²¹ Henno, E. (2009, November 4). *Saksamaa nõuab eestlaselt miljoneid kroone* (Germany is demanding millions of kroons from an Estonian). Postimees. <http://www.postimees.ee/183910/saksamaa-nouab-eestlaselt-miljoneid-kroone>.

balance of 6.7 million Estonian kroons (approx. 430,000 EUR). The Estonian Tax and Customs Board had frozen the bank account upon the request of the German authorities due to a claim for tax and interest on the illegal cigarettes. With interest, the total claim amounted to more than 10 million Estonian kroons (i.e. approx. 640,000 EUR). The case made apparent the fact that there is no judicial involvement in administrative cooperation, i.e. authorities can cause a significant change in a person's financial standing without prior judicial review in the Member State of residence of the person. It became apparent that in cases of such cooperation, there is no effective remedy for an ordinary citizen (in this particular case with a monthly salary of ca. 700 EUR) without sufficient funds for a cross-border legal battle. It is at minimum debatable whether this is in line with the requirements of Art. 47 of the Charter of Fundamental Rights of the European Union (the Charter) and the equivalent provisions of the Estonian Constitution.

A similar series of events unrolled when a truck driver, Neeme Laurits, was jailed in Finland for nine months, accused of organising international drug-trade.¹²² He was picked up by the Estonian police from his home in Estonia and delivered to the Finnish authorities pursuant to a court order issued by an Estonian judge to execute a European Arrest Warrant (EAW). The accusations related to events in February of the same year. However, Mr. Laurits had not in fact travelled to Finland within the five years before his detention. The main evidence against him in Finland appeared to be the fact that three traffickers arrested in Finland all had his mobile phone number in their phones. Hence, he was treated as the mastermind of the criminal scheme. The actual explanation was that Mr. Laurits had worked in Estonia conducting vehicle roadworthiness tests years ago – and thus they had his number as that of an ordinary service provider. He was later released and acquitted by a Finnish appeals court.

There has been no extensive discussion about the above cases in the Estonian academia. A prominent attorney, Kaido Pihlakas, sharply criticised the system of European arrest warrants in an article published in the media, referring to the fact that Estonia is too eager to trust foreign authorities when executing their requests.¹²³ He proposed that the relevant procedure be expanded to include the right of a person to be heard before being extradited and that a simpler procedure for obtaining compensation for having been detained should be established. A Member of Parliament and former judge of the ECtHR opined that there is a strong need for local judicial supervision and stated that '[d]omestic control must be

¹²² Randlaid, S. (2012, February 1) *Narkoparuniks tembeldatud eestlane pisteti 9 kuuks Soome vanglasse* (Estonian labelled as drug baron and thrown into Finnish jail for 9 months). Estonian National Broadcasting. <http://uudised.err.ee/v/eesti/242d45bc-0425-415a-b986-4163decf25dc>.

¹²³ Loonet, T. (2012, February 29). *Advokaat: Eesti täidab Euroopa vahistamismäärusi liiga püüdlilikult* (Attorney: Estonia executes European Arrest Warrants too eagerly). <http://www.postimees.ee/756124/advokaat-est-i-taidab-euroopa-vahistamismaarusi-liiga-puudlikult>.

substantive and not only formal'.¹²⁴ The fact that this is not the case with the European arrest warrant is obvious.

Indeed, there seems to be a strong imbalance between the effectiveness of the extradition process and the mechanisms available for obtaining compensation. At a minimum, individuals should be able to initiate compensation mechanisms with their domestic authorities. Thus, the requesting Member State would still obtain full and efficient cooperation from other Member States during the extradition process and at the same time take into account that those very same authorities would later be entitled to order compensation measures equally effectively. This would most likely reduce the moral conflict involved, as the risk of actually having to pay compensation would most likely increase significantly.

The third example of a shift in the protection of fundamental rights concerns the excess stocks cases, which will be discussed in Sect. 2.6.

2.3 *Constitutional rights, the European Arrest Warrant and EU Criminal Law*

2.3.1 The Presumption of Innocence

2.3.1.1 The first two paragraphs of § 22 of the Constitution stipulate as follows:

No one may be deemed guilty of a criminal offence before he or she has been convicted in a court and before the conviction has become final.

No one is required to prove his or her innocence in criminal proceedings.

The principle of the presumption of innocence is closely related to the right to liberty and security guaranteed by § 20 of the Constitution ('No one may be deprived of his or her liberty except in the cases and pursuant to a procedure provided by law') and to the grounds for lawful deprivation of liberty listed in § 20.

There has been no significant constitutional debate covering the presumption of innocence in the context of surrender procedures. Instead, more general questions concerning the right to defence during surrender proceedings – in the situation where the courts do not examine evidence for or against the suspicion of a criminal offence set out in a European arrest warrant – have been raised both in the media and in professional discussions in recent years (mainly from 2012 onwards, after media coverage of the Laurits case, see Sect. 2.2). However, the legal commentary has found that e.g. in the case of a valid alibi, the surrender of a person should be refused on grounds of conflict with the general principles of Estonian law, whereby

¹²⁴ Krjukov, A. (2012, February 5). *Maruste: kodanike väljaandmisel peab olema tugev siseriiklik kontroll* (Maruste: Strong domestic control is needed when extraditing citizens). Estonian National Broadcasting. <http://uudised.err.ee/v/eesti/4cd69e51-2204-498c-8d0b-b4aa1377166e>.

suspicion of guilt is a precondition for surrender.¹²⁵ Until 1 January 2015, it was not possible to refuse a request for surrender due to the general grounds for refusal in international cooperation in criminal matters (*inter alia* conflict with the general principles of Estonian law) specified in § 436(1) CCP, except if there was reason to believe that the request had been issued for the purpose of bringing charges against or punishing a person on account of his or her race, nationality or religious or political beliefs, or if the situation of the person may have deteriorated for any such reasons. Due to the restrictions on the right to appeal an EAW, the SC has not had enough opportunities to rule upon matters regarding surrender. The constitutional aspects of surrender proceedings have not been successfully raised before the courts as of yet. However, the evaluations given by SC to the regulation of extraditions under international treaties could, by analogy, be in some aspects relevant.

Domestic criminal procedure requires that in order to take a person into custody, a reasonable suspicion and legal (constitutional) ground for deprivation of liberty has to be present. The same applies when an EAW is issued by Estonia. In the context of extradition under international treaties, the SC has, in response to the defence's argument that extradition to and the conduct of criminal proceedings in the USA would infringe the fundamental rights of the defendant, acknowledged the limitation of fundamental rights. The SC concluded that the fundamental rights of a person in domestic proceedings were guaranteed since the defence had, during the court proceedings, a possibility to effectuate the right to protection of fundamental rights¹²⁶ and, in addition, there was an option to contest the extradition decision (either adopted by the Government or the Ministry of Justice) in an administrative court.¹²⁷

The legal situation of the protection of fundamental rights in the framework of surrender between EU Member States differs from that in domestic criminal proceedings by virtue of the essence of surrender. In EAW proceedings, the right to appeal is restricted, as a ruling made by a county court can be contested only in the circuit court, whose judgment is final (§ 504(4) CCP). In order to ensure the uniform application of law, the SC has only explained that restrictions of basic rights may occur prior to the issue of an EAW as well as during execution of the EAW in the requesting state, but not through issue itself. Therefore, disputes concerning the existence of a legal ground for deprivation of liberty in Estonia do not include the right to contest an EAW by the requested person in Estonia. If there was no legal ground for detention, the person is entitled to claim compensation.¹²⁸

Interpreting the evaluation of the SC by analogy, it can be concluded that the constitutional ground for arrest for surrender is § 20(1)6) of the Constitution. The SC has found that arrest for extradition is different from taking a person into custody in domestic criminal proceedings, because in extradition proceedings the

¹²⁵ Plekksepp in Kergandberg and Pikamäe 2012, § 492, comm. 7.1.

¹²⁶ The legal admissibility of the extradition of a person shall be verified by a court in extradition proceedings pursuant to international treaties.

¹²⁷ CRCSCo 29.05.2013, 3-4-1-10-13, para. 11.

¹²⁸ CLCSCo 19.09.2011, 3-1-1-93-11, paras. 17 and 18.

decision to deprive the person of liberty has already been made by a court of the requesting state. The principle of mutual recognition in international co-operation in criminal procedure means that the executing state is not allowed to question such a decision. In addition, the grounds for deprivation of liberty may to some extent vary from state to state.¹²⁹ The same limitation upon the courts therefore applies accordingly in the case of surrender.

From a wider perspective of a right of defence, in April 2012 the Estonian Bar Association submitted a proposal to the Legal Affairs Committee of the Estonian Parliament to amend the regulation of surrender in the CCP, by way of a brief summary, as follows: (1) refusal to surrender a person on the ground of a conflict with the EU Charter should be provided for; (2) the list of the rights of a person arrested for surrender should be stipulated, including the right to be heard immediately by a judge; (3) the requirements for formalising voluntarily consent to surrender should be defined; (4) there is a need for more specific regulation in cases where a party requests that additional information be sought from a requesting state. The committee forwarded the proposal to the Minister of Justice. As the Minister of Justice did not support the amendments,¹³⁰ in November 2012 the Estonian Bar Association asked the Chancellor of Justice to verify the conformity of the surrender regulation with the Constitution. The Chancellor of Justice initiated the respective proceedings in April 2013.

Although the legal analysis of the Chancellor of Justice is still pending, he expressed his preliminary opinion in the request for information sent to the Minister of Justice.¹³¹ He found that in addition to the legal interpretations, how the regulation governing surrender procedures is applied in practice, in other words, what kind of problems have been raised in protecting the fundamental rights of the persons affected and how these problems have been handled, must inevitably be explored. The Chancellor of Justice also established that there is no such overview on the Ministry of Justice website or in the explanatory memorandum to the latest

¹²⁹ CLCSCo 19.12.2013, 3-1-1-101-13. In this case the defence lawyer claimed that the CCP is unconstitutional to the extent that it does not provide for alternatives (bail, electronic surveillance) to custody in extradition proceedings, as are provided for in domestic criminal proceedings. According to the SC decision, there is no unlawful unequal treatment because of the different legal situation: in extradition proceedings the decision to take a person into custody has already been made by the requesting state, whereas in domestic proceedings it is decided by the domestic court. Furthermore, the legislator has not expanded the domestic regulation of imposing bail or electronic surveillance instead of taking a person into custody to the regulation of international co-operation in criminal procedure.

¹³⁰ Minister of Justice letter No. 8-2/8349 (23 October 2012), <http://adr.rik.ee/jm/>.

¹³¹ Chancellor of Justice letter No. 6-1/130507/1301793 (16 April 2013), <http://adr.rik.ee/okk/>. The opinion of the Chancellor of Justice is based on the same document. Both co-authors of Sect. 2.3 were involved in preparing this preliminary opinion. After this report was written, the new Chancellor of Justice, Ülle Madise, took office in March 2015. She issued a final opinion in which she found in an abstract review of constitutionality that the provisions of the Code of Criminal Procedure relating to the EAW are not in conflict with the Constitution. See Chancellor of Justice Letter No. 6-1/130507/1601468 (7 April 2016), <http://adr.rik.ee/okk/dokument/4680282>.

draft law dealing with international co-operation in criminal matters.¹³² Some individual cases have been discussed in the media as well as in legal commentary.¹³³

In short, the Chancellor of Justice focused his analysis on two main topics: (1) can the person affected and his/her counsel effectively exercise the right of defence in surrender proceedings, considering the short time limits foreseen by the CCP; this includes the question of how the clause enabling a court to obtain additional information from a requesting state is applied in practice; (2) how the state reacts or should react if subsequently it becomes evident that the person surrendered has been acquitted or released on other grounds (the issue of compensation for damage).

The Estonian legal literature has pointed out that the exercise of some procedural rights in surrender proceedings is problematic, e.g. the right to notify a person close to the detainee of his/her detention.¹³⁴ Additionally, the question of the conformity of the CCP with Art. 12 of the EAW Framework Decision (FD)¹³⁵ has been raised, as § 503(4) of the CCP (mandatory detention until factual surrender) excludes the use of alternatives to detention in surrender proceedings.¹³⁶ Another issue that has raised concerns is the conformity of § 492(3) of the CCP (Estonia will surrender its citizens who reside permanently in Estonia for the period criminal proceedings are conducted, provided that the punishment imposed in the requesting state will be executed in Estonia), with the prohibition of discrimination.¹³⁷

From the perspective of the right of defence, it is important to keep in mind the readiness and willingness of defence lawyers to request, if needed, clarification of foreign law from the requesting state or a preliminary ruling from the Court of Justice (CJEU). The Chancellor of Justice has also addressed the Estonian Bar Association and raised the question of the need for training for defence lawyers. Additionally, the Chancellor of Justice has requested examples of problematic practices of surrender.¹³⁸ In its reply, the Bar Association advised that in the course of its supervision, it has discovered no misgivings on the part of advocates regarding surrender proceedings.

2.3.1.2 Estonian law guarantees the right to be heard in court before surrender to all persons, irrespective of consent to surrender (§ 502(4)3 CCP). An analysis of Estonian court practice has confirmed this.¹³⁹

¹³² Draft Act No. 578 SE, adopted 12 June 2014.

¹³³ E.g. Albi 2015.

¹³⁴ Plekksepp in Kergandberg and Pikamäe 2012, § 502, comm. 3.4.

¹³⁵ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

¹³⁶ See CLCSCo 19.12.2013, 3-1-1-101-13. By analogy, the alternatives to detention are excluded also in surrender proceedings, although once in the practice of the county courts, bail was imposed instead of detention (Order of the Harju County Court 12.09.2008, 1-08-4553).

¹³⁷ Plekksepp in Kergandberg and Pikamäe 2012, § 504, comm. 4.1. and § 492, comm. 3.2.

¹³⁸ Chancellor of Justice letter No. 6-1/130507/1301794 (16 April 2013), <http://adr.rik.ee/okk/>.

¹³⁹ The summary of court practice (2004–2012) is based on the MA thesis by Marje Allikmets 2013.

Estonian courts have on several occasions been faced with claims on the part of the defence that the person has an alibi, that the person was not aware of the allegations or that the respective circumstances set out in the EAW were superficial. In contesting an EAW, requested persons and their counsel have sought to prove the existence of an alleged alibi, although they have often been unsuccessful for different reasons. In court practice from 2002–2012, there were at least two cases where the court, in order to refute reasonable suspicion, decided to request additional information from the requesting state.¹⁴⁰ In general, an analysis of court practice indicates that overall, no preliminary review of evidence takes place and, as a rule, Estonian courts follow the principles of mutual recognition and mutual trust strictly.

In connection with the right to be heard, it is worth mentioning that the Estonian Bar Association has proposed that a person's right to be heard by a judge immediately after his/her arrest should be included in the CCP. However, in a reply to the Chancellor of Justice, the Minister of Justice held that such amendment would have no added value.¹⁴¹ A requested person has the opportunity to express his/her opinion on three occasions: upon arrest, at the court hearing in which detention before surrender is decided and at the court hearing in which surrender is decided. According to the Minister of Justice, additional questioning would not in any way support the possibility of the Estonian court to evaluate the decision of the requesting state to issue an EAW in respect of a particular person objectively, if the evidence reviewed by the requesting state is unknown to the Estonian court. The Minister of Justice also referred to cases where a person has claimed his/her innocence and has managed independently to obtain essential supportive evidence within 24 hours, in result of which the EAW has been withdrawn.¹⁴² However, the Minister of Justice also noted that a refusal to surrender a person to a Member State does not entail the obligation of the requesting state to withdraw the EAW and to remove the notice of a wanted person in the Schengen Information System (SIS). According to the Minister of Justice, it has happened that after an Estonian court has refused surrender, the person has been arrested based on an SIS notice in some other Member State and has nevertheless been surrendered.

The Chancellor of Justice is of the opinion that a person's right of defence can be seen as a right to get explanations from his or her defence lawyer with regard to

¹⁴⁰ Harju County Court Order 22.12.2011, 1-11-13412 and Tallinn City Court Order 21.11.2005, L-15/05.

¹⁴¹ Minister of Justice letter No. 10-2/13-4291 (4 June 2013), <http://adr.rik.ee/jm/>. Here and subsequently, the opinion of the Minister of Justice is based on same document if not shown otherwise.

¹⁴² (2007, April 26) Itaalia nõudis Eestist välja süütu mehe (Italy demanded extradition from Estonia of innocent man). Eesti Ekspress. <http://ekspress.delfi.ee/news/paevauudised/itaalia-noudis-eestist-valja-suutu-mehe.d?id=69107847>; see also Plekksepp in Kergandberg and Pikamäe 2012, § 490, comm. 1.2.

surrender proceedings and the related documents, as well as the use of defence tactics such as presenting evidence in order to preclude or restrict surrender. Considerable weight should be attributed to the right to consent or refuse to consent to surrender. According to § 499(3) CCP, consent, once given, cannot be withdrawn. The Chancellor of Justice has therefore proposed that the Minister of Justice consider elaborating the requirements for how consent is obtained and formalised. Statistical data show that the majority of surrendered persons consent to surrender.¹⁴³ However, it is notable that Neeme Laurits, who was surrendered to Finland and acquitted after 9 months of detention and whose case was extensively discussed in the Estonian media, is among those who have consented to surrender. According to Laurits, he had agreed to surrender because the police told him that if he did, even if the request was groundless, then at least he could be back from Finland in a couple of days. If he did not agree, he would be thrown in jail for several months in Tallinn and then would be surrendered to Finland anyway.

At the same time no data exists on the number of cases in which consent has been given but the initial suspicion has turned out to be unsubstantiated or the criminal proceedings have been terminated for some other reason. The Chancellor of Justice has emphasised that even if it can be assumed that protection of the fundamental rights of the requested person will be endangered only in exceptional cases, it is the obligation of the state to guarantee a fair trial to everyone. Therefore, in his opinion, the factual application of the regulation of surrender proceedings has to be explored.

The Chancellor of Justice also recalled that the time limits in surrender proceedings are tight and, because of this, it is of practical importance to evaluate whether the exercise of the right of defence is at all effectively possible within these time limits. The true aim of the right to be heard and its impact on the decision taken in surrender proceedings is also relevant.

If a surrender decision cannot be made within the prescribed term, the time period for making the surrender decision shall be extended by thirty days (§ 502(7) CCP). A court may set a term for the submission of additional information (§ 502 (5) CCP) by the requesting state, although it may extend the length of detention. The right of a court to acquire additional information and the right of the parties to request it from the court are relevant first and foremost in cases of incomplete or ambiguous EAWs, e.g. if there are doubts concerning the identity of the person requested or the facts relating to or classification of the criminal offence (i.e. check of double criminality, if allowed).¹⁴⁴ The SC has acknowledged the need for additional information where there is uncertainty whether the limitation period for the criminal offence has expired or it is unclear whether the person requested has absconded from criminal proceedings.¹⁴⁵

¹⁴³ According to the summary of court practice 2004–2012, consent was given to 226 (74.3%) of the total of 304 surrender requests.

¹⁴⁴ Plekksepp in Kergandberg and Pikamäe 2012, § 502, comm. 5.

¹⁴⁵ CLCSCo 18.03.2009, 3-1-1-9-09, para. 8.3.

In the above-mentioned preliminary opinion, the Chancellor of Justice noted that in the case of reasonable doubt, a request for additional information may be of critical importance. Surrender of a person may be refused if additional information has not been submitted by the deadline determined by the court. Additional information may, and as previously mentioned has, in (rare) individual cases resulted in the withdrawal of an EAW.

In practice, defence lawyers seek to convince the court of the need to request additional information, especially when the substance of the charge is incomplete or unclear. In reply to one such request, a county court explained that in surrender proceedings there is no room for disputes in respect of the substance of the charge.¹⁴⁶ In most cases such request will not be satisfied. Based on the court practice, it is possible to conclude that in deciding on a request for additional information, the court will primarily rely on the opinion of the prosecutor.¹⁴⁷

In the preliminary opinion, the Chancellor of Justice categorised the potential problems in exercising the right of defence in surrender proceedings as follows: (1) defective regulation (e.g. insufficient time limits); (2) officials violating their duties (e.g. not allowing examination of respective documents; not explaining a person's rights to them); (3) incompetent defence lawyers; (4) concurrence of these reasons. In domestic court proceedings there is the additional factor of the understanding of judges of the role and competence of courts in surrender proceedings.

Overall, an analysis of court practice reveals that, as a rule, Estonian courts do not carry out preliminary judicial review in order to evaluate the factual basis of an EAW, although the right to be heard is guaranteed to all requested persons. On several occasions, the courts have *expressis verbis* found that the court hearing the EAW case does not have any competence to deal with the substance of the charge, and is allowed only to check whether circumstances exist which preclude or restrict the surrender of the person. Therefore, the majority of court rulings deciding on surrender are laconic in their formulation. The same applies to decisions on detention for the purposes of surrender. In the latter case, the courts usually write in their decisions that the court has no reason to doubt the information sent by the requesting state and, in order to ensure the execution of the EAW, the person has to be detained. Courts have sometimes additionally explained that it is reasonable to assume that upon issuing an EAW, the requesting state has ascertained the relevant facts on which the charge is based and that this is sufficient for arrest as a precondition for surrender.¹⁴⁸

In legal commentary, however, it has been remarked that the examination of an EAW is not always formalistic and, in the case of reasonable doubt, certain substantial requirements have to be followed to control the validity of relevant information.¹⁴⁹ The SC has, in the context of the expiry of the limitation period of the

¹⁴⁶ Harju County Court Order 21.03.2012, 1-12-2617.

¹⁴⁷ E.g. Harju County Court Order 29.05.2012, 1-12-73 and 03.01.2011, 1-10-16977.

¹⁴⁸ E.g. Harju County Court Order 03.12.2012, 1-12-11375.

¹⁴⁹ Plekksepp in Kergandberg and Pikamäe 2012, § 492, comm. 7.1.

offence, noted the following: if an EAW does not contain information that the person requested has absconded from the criminal proceedings, the court must hold that this has not happened. If the court still has doubts concerning the circumstances on which an EAW is based (including expiration of the limitation period), the court has to acquire additional information from the requesting state.¹⁵⁰

2.3.2 *Nullum crimen, nulla poena sine lege*

This principle is stipulated in § 23(1) and (2), first sentence of the Constitution:

No one may be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed.

No one may be sentenced to a penalty that is more severe than the one that was applicable at the time the offence was committed.

The principle of legality in criminal matters derives from this provision, in conjunction with § 13(2) of the Constitution, which provides that everyone is entitled to protection by the state and of the law.

As far as it is known to the Experts, in practice no problems with the application of the *nulla poena sine lege* rule have arisen. Estonia has on one occasion refused the surrender of a person to Sweden due to the fact that the act committed (infringement of the Swedish law regulating the collection of debts) was not punishable in Estonia and it was not an offence in the list of 32 offences in the EAW FD.¹⁵¹ In legal literature, there has been no additional discussion on this subject. The legal commentary only refers to the decision of 18 July 2005 of the German Constitutional Court and to the CJEU *Advocaten voor de Wereld* decision.¹⁵²

In the view of the Experts, there is a justified concern regarding the legal regulation of surrender, as the 32 crimes stipulated in the EAW FD include offences that are not harmonised in EU law. In addition, this may cause problems relating to the proportionality of the offence on which an EAW is based. The SC has stated in *obiter dictum* that in the case of an offence other than one stipulated in the EAW FD, the court may not solely rely on the qualification of the act stated in the EAW by the requesting state, and must therefore verify whether the facts of the case correspond to the necessary elements of an offence stipulated in Estonian law.¹⁵³

¹⁵⁰ CLCS Co 18.03.2009, 3-1-1-9-09, para. 8.3.

¹⁵¹ Harju County Court Order 21.11.2007, 1-07-14422.

¹⁵² Plekksepp in Kergandberg and Pikamäe 2012, § 491, comm. 2.2.

¹⁵³ CLCS Co 18.03.2009, 3-1-1-9-09, para. 8.2.

2.3.3 Fair Trial and *In Absentia* Judgments

Everyone's right to attend all hearings held by a court in his/her case is stipulated in § 24(2) of the Constitution. The CCP provides some grounds for a court hearing without the participation of the accused. As an exception, a criminal matter may be heard in the absence of the accused if his/her whereabouts in Estonia cannot be established, there is sufficient reason to believe that he/she is outside the territory of Estonia and is absconding from the court proceedings, reasonable efforts have been made to find him/her and the court hearing is possible without the accused (§ 269(2) CCP). If an *in absentia* hearing is not possible due to the facts of the case, there may be grounds for issuing an EAW.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 Estonia does not provide any practical assistance to surrendered citizens or permanent residents. In the view of the Chancellor of Justice,¹⁵⁴ it would be important to explore the practical aspects of implementing EAWs and, if necessary, to learn from any mistakes.

In response to the Chancellor of Justice, the Minister of Justice has stated that the rare, negative cases covered by the media have not been caused by any miscarriage of justice by Estonian law enforcement authorities, but by a reappraisal of the evidence in the requesting state.

In response to the question whether the state should be obliged to give necessary contact information to persons surrendered, the Minister of Justice responded that Estonia does not have information about the authorities a person could turn to in order to get more information about one's rights in another Member State.

The Minister of Justice replied to the Chancellor of Justice that the state does not have any information concerning the criminal proceedings of surrendered persons in other Member States. Thus, there is no plan to analyse 'the fate' of surrendered persons. Likewise, Estonia does not give information to other states about criminal proceedings in which Estonia has issued an EAW. According to the Minister of Justice, there have only been a few cases in one Member State where, figuratively speaking, the person surrendered has come to the Estonian embassy on the following day asking for help in returning to Estonia.

In practice, individuals themselves and their defence lawyers have sometimes claimed that they do not have any information about the proceedings in another Member State and that Estonia should protect and help its citizens in surrender

¹⁵⁴ Preliminary opinion of the Chancellor of Justice, Chancellor of Justice letter No. 6-1/130507/1301793 (16 April 2013), <http://adr.rik.ee/okk/>.

proceedings.¹⁵⁵ Estonia, however, does not have any public or non-governmental organisations that provide assistance to surrendered persons.

Unquestionably, several problems arise when participating in criminal proceedings in another Member State, e.g. starting with the need for translation. Questions regarding the guarantee of fundamental procedural rights equally to citizens and permanent residents do not arise only in the case of surrender, but also in all other cases involving foreigners. Freedom of movement within the EU has raised the number of alien suspects and accused persons. Ideally, the state should provide additional help for its citizens and permanent residents in proceedings in other Member States, even though under recent EU directives defence rights in the requesting state are now more clearly regulated.

2.3.4.2 According to information from the Minister of Justice, 8,508 criminal convictions entered into force in 2013, 94 (1.1%) persons were partially acquitted and 73 (0.86%) were fully acquitted (this data may include cases where the prosecutor withdrew the charges or the proceedings were terminated on grounds other than acquittal). In 2012, the percentage of partially or fully acquitted persons was 1.62% (156 of 9,638).¹⁵⁶

Between 2011–2013 only one of all the persons surrendered to Estonia was partially acquitted. According to the official data,¹⁵⁷ during these years 67, 61 and 88 EAWs, respectively, were issued in Estonia. At the time of the compilation of this data, during those years, 31, 39 and 45 persons, respectively, were surrendered to Estonia (including surrenders on the basis of EAWs issued in earlier years). Therefore, the percentage of surrendered persons who have been acquitted cannot be reliably compared to the percentage of individuals who have been acquitted in domestic criminal proceedings.

There is no information on how many of the individuals surrendered from Estonia have subsequently been found innocent.

The legal literature has pointed out a problem which arises from a so-called negative conflict of competency, i.e. a situation where none of the Member States involved foresee any rules for compensation for violations that occur in surrender proceedings.¹⁵⁸ One of the reasons may be the absence of such rules in the EAW FD.

With regard to compensation for damage, the Chancellor of Justice has made a proposal to analyse whether the Minister of Justice could help surrendered

¹⁵⁵ Harju County Court Order 27.03.2012, 1-12-2397.

¹⁵⁶ Urvo Klopets (adviser in the Criminal Policy Department of the Ministry of Justice) in response (e-mails of 13 and 17 June 2014) to the enquiry of Saale Laos (6 June 2014). For statistical data see also 'Kuritegevus Eestis 2012' (Crime in Estonia in 2012), p. 29. http://www.kriminaalpoliitika.ee/sites/krimpoliitika/files/elfinder/dokumendid/17._kuritegevus_eestis_2012_0.pdf.

¹⁵⁷ Webpage of the Ministry of Justice, statistics on international legal aid. <http://www.just.ee/et/eesmargid-tegevused/rahvusvaheline-oiguskoostoo/rahvusvahelise-oigusabi-statistika>.

¹⁵⁸ Plekksepp in Kergandberg and Pikamäe 2012, § 490, comm. 6.2.2.

individuals by publishing overviews of the rules on state liability and pertinent court practice in the Member States that submit the most EAWs to Estonia.

The Minister of Justice is of the opinion that Estonia could compensate for damage only in cases where Estonia is the requesting state. The SC has stated that the state's obligation to pay fair compensation even in the case of a lawful restriction in an extraordinary manner of some fundamental right (obligation to endure the performance of criminal procedural acts in respect of a person, as criminal proceedings serve the public interest) arises from the Constitution.¹⁵⁹ In the opinion of the Chancellor of Justice, the same principle applies to international co-operation in criminal procedure, including surrender. The Compensation for Damage Caused in Offence Proceedings Act (entered into force 1 May 2015) includes rules on compensation for damage caused by measures applied in the course of international co-operation in criminal proceedings.¹⁶⁰

Publication in the media of the Neeme Laurits case in Finland brought about public debate and calls for a more thorough control of EAWs by the domestic courts, including from politicians (e.g. statement of the head of the Constitutional Committee of the *Riigikogu*).¹⁶¹

In another case, a person surrendered to Italy who had been accused because he had been a passenger in the same bus as the actual criminals, was released three months later.¹⁶² There has also been at least one negative case concerning identity theft, in which a person was surrendered to France, although the accused claimed that his passport had been stolen; he was released soon after the surrender.¹⁶³ In this case, it was problematic that the court had not requested any necessary supplementary information.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 The above-mentioned *Piirsoo* case (see Sect. 2.2)¹⁶⁴ is remarkable, but unfortunately there is no public information as to whether the topic has been discussed any further in Parliament or at the Governmental level.

¹⁵⁹ E.g. SCebj 31.03.2011, 3-3-1-69-09, paras. 60 and 64.

¹⁶⁰ RT I, 20.11.2014, 1, Compensation for Damage Caused in Offence Proceedings Act § 2(4), see also explanatory memorandum to Draft Act No. 635 SE, paras. 12 and 13.

¹⁶¹ See supra n. 124.

¹⁶² Filippov, J. (2008, December 18). Itaalia vaikib Eesti juveeliröövlitest (Italy silent on Estonian jewel thieves). <http://ekspress.delfi.ee/news/paevauudised/itaalia-vaikib-est-juveeliroovlitest.d?id=27684285>; see also supra n. 142.

¹⁶³ Plekksepp in Kergandberg and Pikamäe 2012, § 492, comm. 4, with reference to Harju County Court Order 06.06.2008, 1-08-6004.

¹⁶⁴ Also reflected in the paper by Albi 2015, p. 176.

2.3.5.2 There has been no extensive debate on the move to mutual recognition in criminal matters. However, related issues have arisen in the context of specific cases. In legal commentary, Plekksepp has criticised the shift to mutual recognition in criminal matters, stating that unlike the free movement of goods, penal law is a societal and cultural construction, based on agreements and values recognised in the particular Member State.¹⁶⁵

2.3.5.3 From a critical point of view it could be concluded that it is largely unclear what the role of the courts is in safeguarding individual rights in surrender proceedings, what level of protection is guaranteed by the Constitution and what, in addition to the formal prerequisites for surrender, the courts can assess. There is no relevant CJEU case law as of yet and it is not clear how the Charter can and will be applied in practice.

In short, Estonia tends to satisfy all EAWs. Court practice indicates that courts in Estonia operate exactly pursuant to the regulation in the CCP (and therefore pursuant to the EAW FD) and, as a rule, they have not established any new grounds for refusal to execute an EAW.

As of 31 December 2012, courts in Estonia have refused to execute 8 (i.e. 2.6% of all) EAWs. Only in one notable case did a court refuse surrender on the grounds of a general provision of international co-operation, as the accused had a valid alibi.¹⁶⁶ However, it has to be said that in many other similar cases, courts have satisfied the request to surrender. On three occasions, Estonia has refused surrender on the grounds that the double criminality requirement was not fulfilled.¹⁶⁷ On one occasion, the EAW was considered to be an international rogatory letter.¹⁶⁸ A requesting state has twice annulled an EAW after Estonia asked for additional information,¹⁶⁹ and Estonia has once refused surrender due to expiry of the limitation period.¹⁷⁰

¹⁶⁵ Plekksepp in Kergandberg and Pikamäe 2012, § 490, comm. 1.2.

¹⁶⁶ Harju County Court Order 29.03.2007, 1-07-3718; see also Plekksepp in Kergandberg and Pikamäe 2012.

¹⁶⁷ Tartu County Court Order 24.04.2012, 1-12-3543 (causing damage to a person's health did not constitute a criminal offence under Estonian law, as the health disorder caused persisted less than four weeks); Harju County Court Order 25.09.2008, 1-08-12380 (theft of a CD-player is a misdemeanour under Estonian law because of the low value of the object) and 21.11.2007, 1-07-14422 (infringement of the Swedish law regulating collection of debts).

¹⁶⁸ Harju County Court Order 31.03.2008, 1-08-4051.

¹⁶⁹ Harju County Court Order 22.12.2011, 1-11-13412 and Tallinn City Court Order 21.11.2005, L-15/05.

¹⁷⁰ Tallinn Circuit Court Order 17.11.2008, 1-08-13649.

2.3.5.4 The question of proportionality arises in the context of deprivation of liberty (detention for surrender), as this constitutes an intensive restriction of a fundamental right. To date, the European handbook on how to issue a European arrest warrant,¹⁷¹ which also introduces a proportionality test, is just an advisory guideline.

The Minister of Justice has explained that even though the CCP does not provide any requirement of a proportionality test, various guidelines and trainings have emphasised that authorities conducting proceedings should consider proportionality. The Minister of Justice has confirmed that Estonia has not submitted any EAWs that have been in conformity with the EAW FD but not proportionate.

In the Experts' view, application of the EAW FD needs to be assessed and problems that arise should be resolved through amendments to the EAW FD (if application of the EAW FD on the national level is problematic). If the competence of the local courts is to be reinstated, the problems this aims to resolve (e.g. re-establishment of the requirement of double criminality, pre-evaluation of evidence, etc.) must first be identified. It is therefore difficult to support a general proposal to widen the jurisdiction of the courts of the executing state to expand preliminary judicial review. It is clear that the amount and quality of evidence may vary depending on the stage of the pre-trial procedure, and the prerequisites for suspicion of guilt (e.g. for arrest) may differ among the Member States. As a starting point, it may be reasonable to reassess the time-limits for proceedings and to focus on requesting additional information without having false modesty about distrusting the judicial authorities of another Member State.

2.4 The EU Data Retention Directive

2.4.1 The implementation of the Data Retention Directive 2006/24/EC¹⁷² (DRD) has not raised any serious constitutional concerns in Estonia. The Directive was implemented in national law by amendment of the Electronic Communications Act (ECA) in 2007.¹⁷³ According to § 111¹ ECA, communication data is generally retained for one year. Requests submitted and information given to specific authorities is retained for two years. In the interest of public order and national security, the Government can extend these terms of retention.

¹⁷¹ Council of the European Union, 17195/1/10 REV 1 (17 December 2010).

¹⁷² Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

¹⁷³ Draft Act No. 62 SE (28 May 2002).

By the amendment of 2012,¹⁷⁴ the legal classification of requests submitted by law enforcement agencies to communication services providers was downgraded from ‘measures of surveillance activities’ to ‘general investigative activities’. This means that certain special legal requirements for surveillance activities, *inter alia*, the agencies’ obligation to notify the person subjected to surveillance measures after their completion, no longer apply to the requests concerned. Additionally, through this amendment, the right of request was no longer restricted to criminal proceedings exclusively, and was extended to misdemeanour proceedings. This right, which had been exclusive to the specific prosecution authorities, was extended to other authorities entitled to process administrative offences (e.g. the Environmental Inspectorate, the Financial Supervisory Authority and the tax and customs authorities). Aware of the European Commission’s critical approach to the vague term ‘serious crime’ used in the Directive, the legislator defended the amendment by declaring that the right to define the term ‘serious crime’ lies with the national legislator.¹⁷⁵

The explanatory memorandum to the amending act did not consider questions concerning the compatibility or proportionality of the measures envisaged, rather the motivation for their adoption was based particularly on the necessity to reassess the needs of internal security after the terror attacks in Madrid and London in 2004–2005.¹⁷⁶

According to the Estonian legislator¹⁷⁷ and the prevailing legal opinion,¹⁷⁸ the statutory duties provided for in the DRD did not interfere with the right to secrecy of correspondence guaranteed in § 43 of the Estonian Constitution,¹⁷⁹ as the retention obligation refers only to connection data but not to its content. Although the retention of connection data does encroach on the right to the inviolability of private life guaranteed in § 26 of the Constitution, the latter is seen as less entitled to protection than the right to secrecy of correspondence.¹⁸⁰ The general diagnosis is that these topics are not in the awareness of the Estonian public at large.¹⁸¹ At the same time, the practical realisation of an e-state – including e-governance, e-healthcare and e-voting, to name only a few areas – has long become reality in Estonia.

¹⁷⁴ Draft Act No. 175 SE (6 February 2012).

¹⁷⁵ Explanatory memorandum to Draft Act No. 175, supra n. 174, p. 6.

¹⁷⁶ See explanatory memorandum to Draft Act No. 62, supra n. 173, pp. 11 and 13.

¹⁷⁷ *Ibid.*, p. 12.

¹⁷⁸ Kask et al in Madise et al. 2012, § 43, comm. 6.

¹⁷⁹ ‘Everyone has the right to confidentiality of messages sent or received by him or her by post, telegraph, telephone or other commonly used means. Derogations from this right may be made in the cases and pursuant to a procedure provided by law if they are authorised by a court and if they are necessary to prevent a criminal offence, or to ascertain the truth in criminal proceedings.’

¹⁸⁰ See explanatory memorandum to Draft Act No. 62, supra n. 173, p. 12.

¹⁸¹ See also Tigasson’s critical remarks on the lack of public awareness concerning the topics of eavesdropping and surveillance in Estonia. Tigasson, K.-R. (2013, October 30). *Klaasist maailm* (Glass world). Eesti Päevaleht. <http://epl.delfi.ee/news/arvamus/kulli-riin-tigasson-klaasist-maailm.d?id=66999970>.

Concerning the disclosure of personal information, the Estonian SC has without further consideration approved the Estonian lawmaker's general decision to disclose the identity of the defendant in court decisions (the latter are generally made public via the Internet).¹⁸² It has also approved the right of creditors to publicly disclose their debtors, arguing that this constitutes an appropriate instrument to protect the legitimate interests of the former.¹⁸³ These judgments exemplify the Court's disposition to accept restrictions to the right to privacy and/or the secrecy of correspondence where it finds the given grounds justifiable.

In a recent ruling of February 2015, the Criminal Law Chamber of the SC also delivered its opinion on the invalidation of the DRD and its legal impact on national law.¹⁸⁴ In its decision, the Chamber acknowledged that the invalidation of the DRD does not automatically lead to the unconstitutionality of the respective national law, and upheld the constitutionality of the Estonian rules on data retention discussed above as in force prior to the amendments of 2012. According to the Chamber's majority view, the classification of insurance fraud as a 'serious crime' was up to the legislator, while the proportionality of the measure was ensured in particular by the requirements applicable to surveillance activities.¹⁸⁵ Two out of the six justices of the Chamber presented a dissenting opinion. Among other issues, they challenged the adequacy of the procedural guarantees under the measures, and questioned the Chamber's view concerning the proportionality of the general one-year data retention period.¹⁸⁶

There is another aspect that has in the past made data retention an unlikely topic for particular concern in Estonia. This is the issue of national security. Due to its historical experience and geo-political position, since the restoration of independence in 1991, Estonia has regarded NATO and therewith the U.S. as the strongest guarantors of its sovereignty and security interests.¹⁸⁷ For this reason, Estonia unequivocally supported – rhetorically and militarily – the U.S. invasion of Iraq, notwithstanding the strong opposition of e.g. Germany and France.¹⁸⁸ This may help explain Estonia's willingness to prioritise security matters over aspects of personal freedom.

Based on the above, it seems rather unlikely that the SC would have considered declaring measures on data retention – even if they were not part of the EU legal order – unconstitutional prior to the CJEU's decision to annul the DRD.

¹⁸² See, e.g., CLCSCo 10.09.2007, 3-1-1-35-07.

¹⁸³ E.g. Judgment of the Civil Chamber of the Supreme Court (CiCSCj) 21.12.2010, 3-2-1-67-10, para. 22.

¹⁸⁴ CLCSCj 23.02.2015, 3-1-1-51-14.

¹⁸⁵ *Ibid.*

¹⁸⁶ CLCSCj 23.02.2015, 3-1-1-51-14, dissenting opinion of Justices Kergandberg and Laos para. 5 et seq. Furthermore, the judges underlined that if the Criminal Chamber had doubts concerning the conformity of the regulations with the Constitution, it would by law be obliged to refer the decision on the constitutionality of the legal norms to the SC *en banc* (*ibid.*, paras. 1 and 3).

¹⁸⁷ See also: Sprüds 2012, p. 60 et seq.; Kaldas 2006, pp. 97 and 107 et seq.

¹⁸⁸ *Ibid.*

The author's view is corroborated by the Estonian answers to the Questionnaire on the Area of Freedom, Security and Justice and the Information Society for the FIDE Congress in Tallinn 2012.¹⁸⁹ Concerning the question of the impact of the Data Retention Directive on the legal order of the Member State, Estonia's answers focus on the Directive's vital role in the fight against terrorism and serious crime and reiterate the importance of every Member State to implement the Directive as soon as possible.¹⁹⁰ Equally, the invalidation of the DRD by the CJEU did not attract any special interest at societal level in Estonia. However, the Ministry of Justice in cooperation with the Ministry of Economic Affairs and Communications decided in spring 2014 to conduct a legal analysis on the rules in question. Additionally, the Estonian Chancellor of Justice has asked the Ministries of Justice, of the Interior and of Economic Affairs and Communications for their opinion on the constitutionality of the national regulation in force. The Government's official conclusions are still pending at the time of writing in May 2015.

2.5 *Unpublished or Secret Legislation*

2.5.1 In the context of EU law, the issue of unpublished or secret measures has arisen in case law on the applicability of measures adopted immediately before EU accession.

In 2006, the SC was confronted with the question of whether EU legislation, which had not been published in Estonian, was binding on individuals. In two decisions of the Administrative Law Chamber of the SC of 10 May 2006, the applicants argued that they were not to be blamed for incorrectly declaring their goods to the customs authorities. The case related to customs declarations filed immediately after the accession of Estonia to the EU. According to the applicants, they did not knowingly submit false data to the customs authorities as 'they did not and could not have known it, as the EU rules were hard to access and the relevant Estonian regulations were passed, so to speak, at the last minute'. The SC stated that ignorance of the law does not release the declarant from the duty to submit correct data to the authorities. The court also decided that since the applicant acted as a professional customs broker, it was irrelevant whether the EU acts had been published in Estonian.¹⁹¹

Curiously enough, this decision relies on a number of cases from the CJEU regarding substantive rules. Yet the decision makes no reference to the obligation of the court of last instance to refer matters of EU law for a preliminary ruling (Art. 267 TFEU). Almost exactly at the same time, namely on 24 March 2006, a Czech court, faced with a similar dilemma of EU legislation having to be published in the

¹⁸⁹ Antonova et al. 2012, p. 319 et seq.

¹⁹⁰ Ibid., p. 325 et seq.

¹⁹¹ ALCSCj 10.05.2006, 3-3-1-65-05 and 3-3-1-66-05.

official language of the Member State, referred a question to the CJEU, which led to the famous *Skoma-Lux* decision.¹⁹²

Consequently, the SC had to revisit its earlier position. As an example of creative judicial writing, the Court placed the responsibility on the CJEU, stating that '[a]t the time of the processing of the current administrative matter, the CJEU has in its more recent practice expressed a clear position regarding the central importance to the rights of individuals of the requirement to publish EU legal acts in the language of the Member States, which is why in solving of the current case it is not appropriate to take into account the positions of the chamber expressed in the 10 May 2006 decisions'.¹⁹³

In the *Pimix* case, the CJEU, responding to a request from the Estonian SC, confirmed that 'the relevant provisions of Regulations Nos 1789/2003 and 1972/2003 could not be enforced against individuals in Estonia with effect from 1 May 2004, since they had not been properly published in Estonian in the Official Journal of the European Union or reproduced in Estonian national law'.¹⁹⁴

The Constitution foresees that laws have to be published and that only published legislation can have mandatory force; this is also a key part of the rule of law. According to Estonian legal doctrine, publication of laws is a necessary precondition for their legal existence as such.¹⁹⁵ Accordingly, the prevailing opinion is that unpublished legislation cannot be binding and valid laws cannot be declared secret. The Estonian rule is stricter, and the law is considered non-existent instead of merely 'not enforceable'.

Another question relates to secret regulations of a minister (or of the Government). Such regulations mainly concern national security, e.g. regulations concerning the methods used by that authority to secretly gather information, but also e.g. the requirements for encrypted materials and processing and protection thereof. Section § 3(2) of the Constitution, which states that only published laws may have binding force, does not explicitly mention 'regulations'. Non-publication of some regulations is *expressis verbis* allowed by § 4(2) of the *Riigi Teataja seadus* (the Estonian State Gazette Act)¹⁹⁶ and is based on the understanding that 'law' in the sense of § 3(2) of the Constitution must be interpreted to mean only Acts of Parliament. In these cases, the State Gazette publishes only the title, date and number of the regulation together with its unclassified provisions. However, this interpretation of § 3(2) is not mandatory: the SC has not yet answered the question whether the word 'law' in the meaning of § 3(2) of the Constitution only refers to Acts of the Parliament or also to regulations of the Government or a minister. Although Acts of Parliament are the only 'laws' in the formal sense, 'law' in the substantive sense includes all acts that are addressed to an undetermined number of addressees. Thus, in the substantive sense, regulations are also

¹⁹² Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, para. 37.

¹⁹³ ALCSCj, 13.10.2008, 3-3-1-36-08, para. 21.

¹⁹⁴ Case C-146/11 *Pimix* [2012] ECLI:EU:C:2012:450, para. 42.

¹⁹⁵ Merusk et al in Madise et al. 2012, § 3, comm. 4.

¹⁹⁶ *Riigi Teataja seadus*. – RT I 2010, 19, 101.

'laws'.¹⁹⁷ Furthermore, there are good reasons to treat regulations as laws in the sense of § 3(2) of the Constitution. First, there is neither a theoretical nor a practical need to enact secret regulations because everything that must remain secret may also be adopted by an administrative act that will be classified according to the State Secrets and Classified Information of Foreign States Act.¹⁹⁸ Secondly, it is questionable whether a universal legal norm can be valid at all without prior publication, since an unpublished act cannot be followed by the public and cannot therefore be socially effective.¹⁹⁹ Thus, there is no consensus among Estonian scholars whether § 3(2) excludes secret regulations of the Government or a minister or not.

A practical example of unpublished documents having a character similar to unpublished legislation is the question of references to national or international standards, such as e.g. CEN and CENELEC as well as ISO and IEC. For instance in construction related disputes, the standards form a part of the rules relevant to solving disputes. As the standards are not available without charge, they may be considered similar to unpublished legislation *de facto*. So far the Estonian courts have not addressed this issue and the standards have been accepted as relevant in litigation. For example in civil litigation, a county court has referred to standard EN 976-2 regarding underground tanks of glass-reinforced plastics when dismissing a buyer's damage claim that relied on a lack of installation instructions in the documents handed over with a purchased underground tank.²⁰⁰

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

The Estonian SC has taken a relatively liberal approach towards accepting EU law as interpreted by the CJEU.²⁰¹ There have been very few cases in the SC in which the argument of EU law being contrary to national constitutional law has arisen.

Such cases have primarily concerned the taxation of excess stocks (of e.g. sugar) that took place at the time of the accession of Estonia to the EU in 2004.²⁰² There

¹⁹⁷ Cf. Merusk 1995, p. 13.

¹⁹⁸ *Riigisaladuse ja salastatud välisteabe seadus*. - RT I 2007, 16, 77.

¹⁹⁹ The concept of legal validity, according to Gustav Radbruch, includes three elements: a legal, a social and a legal philosophical element, see Radbruch 1914, p. 158 et seq. The publication of a universal act can be considered as a precondition for social effectiveness. If it is lacking, the validity of the act is questionable.

²⁰⁰ Harju County Court Judgment 16.03.2011, 2-06-11240, para. 7; upheld on appeal by the Tallinn Circuit Court 20.03.2012.

²⁰¹ For an analysis of the practice of the SC, see Ginter 2008.

²⁰² For a detailed discussion, see Albi 2009, pp. 46–69 and Albi 2010, pp. 791–829. Albi's analysis suggests that the standard of protection of e.g. legitimate expectations and property rights by the CJEU in these cases was significantly lower than in the established Estonian case law.

were many issues with constitutional implications in the matter, however only two will be mentioned here: the issue of legal certainty and the right to property. Undertakings were requested to make payments for excess stocks of certain products as of 1 May 2004. Up until the last minute, it was not clear which products would be subject to the tax and how it would be determined what stock would be considered normal and what would be considered to be in excess of that normal. The relevant regulations were, however, not adopted by the European Commission in due time. EU Regulation 1972/2003 entered into force only on 1 May 2004, and the draft was amended immediately before its enactment – i.e. on 10 April 2004 and 20 April 2004. In Estonia, the Surplus Stocks Act, implementing the EU regulations, was published on 27 April 2004 and took effect on 1 May 2004. This gave the relevant undertakings nowhere near enough time to adjust their behaviour or dispose of excess stocks.

The most famous case where property rights were invoked is the 5 October 2006²⁰³ decision of the SC (the excess stocks case). The applicant challenged the administrative prescriptions ordering it to pay a fee on its excess stock of sugar at the time of the accession of Estonia to the EU. The applicant (unsuccessfully) argued, *inter alia*, that the challenged administrative acts as well as the legislative provisions which formed the legal basis for those acts breached provisions of the Estonian Constitution protecting the rights of enterprise and property. The applicant also requested that the relevant regulations of the European Commission be set aside because they breached the Estonian Constitution.

In the light of the SC's stringent rule of law case law outlined in Sect. 2.1.3, it is very doubtful that in a wholly internal situation such a significant financial impact, imposed over such a short period of time, would have been acceptable under national constitutional rules.²⁰⁴

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 In Estonia, the ESM Treaty was subject to a constitutional challenge by the Estonian Chancellor of Justice. In his legal challenge to the Estonian SC, the Chancellor of Justice pointed out that the unprecedented magnitude of the financial commitment could potentially seriously limit the very ability of the state to ensure the functioning of state institutions, including the judicial system, and the protection

²⁰³ ALCSCj 05.10.2006, 3-3-1-33-06, <http://www.juradmin.eu/docs/EE01/EE01000007.pdf>.

²⁰⁴ In Case C-146/11 *Pimix*, n. 194, the CJEU decided that the regulations could not be enforced against individuals due to the fact that they had not been published in Estonian. No consideration regarding the temporal scope of application was expressed in the decision.

of the rights and social welfare benefits envisaged under the Constitution.²⁰⁵ The case has been analysed in detail in other publications.²⁰⁶

According to the treaty framework, after the ‘temporary correction period’, the contribution of Estonia, if the maximum capital calls allowed under the ESM Treaty were to be made, would amount to 1.79 billion EUR.²⁰⁷ In 2013, the GDP at current prices of Estonia was 18.4 billion EUR.²⁰⁸ Accordingly, the maximum contribution would amount to approximately 9.7% of the GDP. Estonia’s commitment to the European Financial Stability Facility (EFSF) is close to 2 billion EUR.

The issue of whether those amounts would be added together or absorbed was of central focus during the parliamentary debate, where the reporting Member of Parliament (MP) was unable to provide a consistent response.²⁰⁹ The debate is best illustrated by the following question of MP Igor Gräzin:

You have heard that they are not summed. I have heard that they are. You have heard one thing, I have heard another. Hasn’t the thought crossed your mind that if we are talking about billions, it would be wise to check if they are or are not summed?

The fact that the contribution of Estonia is very large was also one of the central arguments of the national constitutional challenge, where the constitutionality of the ‘emergency voting’ mechanism set out in Art. 4(4) of the ESM Treaty was questioned.

It was argued that the emergency voting provisions render this mechanism contrary to the principle of parliamentary democracy, the principle of parliamentary prerogatives, parliamentary control over public finances and the principle of a democratic state subject to the rule of law. More generally, the delegation of responsibility over public finances from Parliament to the executive branch would, according to the petition, break the chain of legitimation and political responsibility; it would greatly impact the budgetary powers of Parliament and its ability to use funds to guarantee the rights and liberties of the people.

The constitutional challenge also focused on the issue of ‘incalculable risks’ and the Parliament no longer being able to exercise overall budgetary responsibility. In the German ESM case, the German Constitutional Court noted the ambiguities in the Treaty’s wording about whether a maximum limit exists, and thus requested Parliament to address this issue in the ratification process. In Estonia, the SC was confident in deciding that the amount set in the Treaty ‘is the maximum limit of the obligations of Estonia, which cannot be changed without its consent and without

²⁰⁵ SCebj 12.07.2012, 3-4-1-6-12 on the ESM Treaty.

²⁰⁶ Ginter 2013, pp. 335–354; Ginter and Narits 2013, pp. 55–76.

²⁰⁷ See Art. 42 of the ESM Treaty.

²⁰⁸ Press release by Statistics Estonia ‘Economic growth slowed down in 2013’ (11 March 2014), <http://www.stat.ee/72427>.

²⁰⁹ Minutes of the XII Riigikogu (30 August 2012), (available in Estonian) <http://stenogramm.ee/et/20120830/>.

amending the Treaty’.²¹⁰ However, Justice Kõve, one of the dissenting justices, argued along the same lines as the *Bundesverfassungsgericht*, stating that

I deem it necessary to note that I am not convinced that the opinions of the SC *en banc* on the interpretation of the Treaty are correct. Namely, I am not convinced that the maximum limit of the possible obligations of Estonia according to the Treaty does not in any case exceed 1.302 billion euros and that obligations larger than that may arise for Estonia only through amendment of the [Treaty].²¹¹

This is evidence of the fact that the existence or absence of an upper limit was discussed in the deliberation room.

The same issue was addressed in the parliamentary debate. When the head of the parliamentary Finance Committee was asked whether the maximum amount of the contribution could be increased under the emergency procedure, the chairperson responded that ‘[t]his is the information I have at the moment and what I will base my decisions on in today’s voting. Should you have different information be sure to let me ... know. ... I suppose it is so’.²¹² In a press conference, the Prime Minister of Estonia was quoted as saying ‘[f]irst the ESM must be ratified and then we can discuss the details’.²¹³

The fact that under Arts. 8(4) and 9(3) of the ESM Treaty the capital calls have to be met ‘irrevocably and unconditionally’, within seven days, was not analysed from the point of view of the Constitution. In a dissenting opinion, six justices proclaimed that ‘[t]his is the most important case in the history of [Estonian] constitutional review’.²¹⁴ In the same dissenting opinion, the six justices pinpointed the very same issue, writing that ‘[w]e find that in addition to Art. 4(4) of the Treaty referred to by the Chancellor of Justice, also the irreversible and unconditional nature of the financial obligations to be assumed by the Treaty ... and the limited nature of judicial review of the operations of the ESM ..., as referred to by Anneli Albi ..., should have been addressed as related provisions’. In the opinion of the dissenting judges, this condition also should have been taken into account when analysing the seriousness of the interference with the Constitution. According to the dissenting judges, as the obligations are irrevocable and unconditional, ‘[c]onsequently, the *Riigikogu* cannot, without breaching the Treaty, alleviate the effect of

²¹⁰ SCebj 12.07.2012, 3-4-1-6-12, para. 144.

²¹¹ Dissenting Opinion of Justice Kõve to SCebj 12.07.2012, 3-4-1-6-12. Estonian law does not recognise the term ‘concurring opinion’ which is why, although justice Kõve supported the final decision, the opinion is titled ‘dissenting’.

²¹² Quoted text by MP Sven Sester, see minutes of the XII Riigikogu, VIII session (18 December 2014), (available in Estonian) <http://stenogrammid.riigikogu.ee/et/201412181000>. The final comment by MP Sester was edited out of the revised version of the official transcript.

²¹³ Quote by Andrus Ansip as provided by Kuusik, I. (2012, August 14). *Ansip: kõigepealt tuleb ESM ratifitseerida, siis räägime detailidest* (Ansip: First the ESM must be ratified, then we can discuss the details). Postimees. <http://majandus24.postimees.ee/939704/ansip-koigepealt-tuleb-esm-ratifitseerida-siis-raagime-detailidest>.

²¹⁴ Dissenting Opinion of SC Justices Jõks, Järvesaar, Kergandberg, Kivi, Kull and Laarmaa to SCebj 12.07.2012, 3-4-1-6-12.

possible negative consequences for Estonia arising from the application of Art. 4(4) of the Treaty'. Dissenting Justice Luik added along the same lines:

Now it is time to ask: what is/will be left of the *Riigikogu*'s financial sovereignty besides a merely formal competence to decide on the ratification of the Treaty in question and on the post-ratification obligation to establish a legal environment necessary for the fulfilment of the financial obligation assumed irrevocably and unconditionally, and to reserve 1,153,200 million euros to ensure the satisfaction of a claim filed at any given time? Perplexed, I place three question marks here.

The narrow majority of the SC concluded that Art. 4(4) of the ESM Treaty does not breach the Constitution of Estonia. The Court confirmed that the ESM Treaty affected the financial competences of Parliament, including those of future parliaments and thereby also the financial sovereignty of the state. The Court recognised that budgetary powers are one of the core competences of Parliament. The essence of this competence is the right and duty of Parliament to decide on the revenue and expenditure of the state. It added that, 'the state must use public assets in a manner which enables the performance of the duty ... to guarantee the protection of fundamental rights and freedoms'.²¹⁵ The Court decided that the interference with the parliamentary powers was justified.

The Court expressly excluded the possibility that the seriousness of the interference could be derived from the fact that it constitutes a vast financial obligation.²¹⁶

Differently from the German *Bundesverfassungsgericht*, which relied on the fact that the *Bundestag* remains in control of decision-making, the Estonian court accepted the reduction of the powers of Parliament in order to provide financial stability. The SC decided that 'the economic and financial sustainability of the euro area is contained in the constitutional values of Estonia as of the time Estonia become a euro area Member State'.²¹⁷ According to the Court,

[e]conomic stability and success ensure the planned receipt of state budget revenue. Incurring necessary expenditure ensures constitutional values. The obligation to guarantee fundamental rights arises from § 14 of the Constitution. Extensive and consistent guarantee of fundamental rights is extremely complicated, if not impossible, without a stable economic environment.²¹⁸

The Estonian decision was very much focused on the close connection between fundamental rights and having the necessary finances available to secure their existence.

While the ESM Treaty is not considered as EU law,²¹⁹ in an *obiter dictum* the Court considered it necessary to point out potential constitutional limitations for further EU integration (see Sect. 1.3).

²¹⁵ SCebj 12.07.2012, 3-4-1-6-12, para. 139.

²¹⁶ *Ibid.*, para. 190.

²¹⁷ *Ibid.*, para. 163.

²¹⁸ *Ibid.*, para. 166.

²¹⁹ As was confirmed later by the CJEU in Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756.

2.7.2 There has been no substantial discussion about the constitutionality of other proposed measures, such as Eurobonds and the Banking Union, from the point of view of the potential of exposing the country's citizens and residents to unlimited liability for bank failures in other European countries.

2.7.3 Not applicable; Estonia has not been subject to a bailout programme.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 We have no information of any cases where the applicants would have challenged the validity of secondary EU law via the preliminary ruling procedure. It is possible that such arguments have arisen within the context of national proceedings, but there have been no references for a preliminary ruling that pose such questions.²²⁰ However, the possibility to invoke EU regulations against individuals was addressed in the so-called 'sugar saga' vis-à-vis rules regulating the imposition of financial duties on excess stocks at the time of EU accession (see Sect. 2.6).

2.8.2 It is the impression of the Experts that there seems to be a discrepancy between the strict application of the principle of proportionality to the legislation of the Member States when compared to the methodology applied when reviewing the legality of secondary EU law. In the context of the free movement of goods, for example, it is not uncommon for the CJEU to point to an abundance of more lenient alternatives available to the legislator as sufficient grounds to declare national measures illegal. In judicial review of secondary EU law, however, such an approach is rarely to be seen, and the Court focuses more narrowly on issues such as the existence of a proper legal basis for the measure. Accordingly, the author would suggest that a stricter standard of judicial review of EU measures could be argued for. For example, the CJEU could in fact exercise a stricter review of concepts such as subsidiarity. Although subsidiarity is a core concept of EU law that is prominently displayed in the first chapters of any respectable EU law textbook, one has to look carefully to find any cases where it has been considered by the CJEU in the context of review of EU legislation. As a rare example, in *Vodafone*, referring back to *Imperial Tobacco*,²²¹ the CJEU analysed the conformity of an instrument of secondary EU law with the principle of subsidiarity, confirming that the measure's objective could best be achieved at EU level.²²²

The rarity of such review has in fact led to statements such as echoed by the spokesperson of the European Commission, stating that '[t]he issue here is that

²²⁰ A full list of references from Estonia can be found on the page *Eesti kohtute eelotsusetaotlused* (available in Estonian) <http://www.riigikohus.ee/?id=872>.

²²¹ Case C-491/01 *Imperial Tobacco* [2012] ECR I-11453.

²²² Case C-58/08 *Vodafone* [2010] ECR I- 04999, paras. 72–79.

subsidiarity is a political concept rather than a judicial one. Every proposal we make, we believe, respects subsidiarity'.²²³ This may be interpreted as a sign of confidence that subsidiarity is something for the Commission to assess without fear of judicial review.

2.8.3 In Estonia, the SC is rather open towards review of constitutionality/legality of legislation, regulatory acts of the executive branch and administrative action. Judgments of the CRCSC establishing the unconstitutionality of national laws and regulations are quite regular.²²⁴ By way of recent examples, in June 2014 the SC declared legislative measures regarding pensions for judges to be unconstitutional.²²⁵ In January 2014, the court declared unconstitutional a law establishing differentiated state fees depending on whether an applicant used digital means to address the court.²²⁶ In many cases, the annulment of a law has been based on fundamental principles of law, such as legitimate expectations, equal treatment and proportionality.

2.8.4–2.8.5 In its 25 April 2006 ruling (in the case related to the effects of the Polish challenge to the excess stock rules), the SC recognised the exclusive competence of the European Court to decide on the invalidity of secondary Community law, as was established in *Foto-Frost*, and the obligation of a domestic court to make a reference, where doubts as to such validity arise.²²⁷

The SC has accepted that in the case of a contradiction between Estonian and EU law, the Estonian law should be disapplied without initiating constitutional review proceedings.²²⁸ It is not clear what the approach of the SC would be should a contradiction with the fundamental principles of Estonian constitutional law arise. The Court has so far not adopted a position similar to that in the German Constitutional Court's *Solange II* judgment²²⁹ or the ECtHR's *Bosphorus* judgment²³⁰ that would assume that the EU standard of protection of rights is equivalent

²²³ Quoted in Mahony, H. (2012, May 29). National parliaments show 'yellow card' to EU law on strikes. EU Observer. <http://euobserver.com/social/116405>.

²²⁴ In the period 1993–2004 the CRCSC declared an act or a provision unconstitutional in 75.5% cases (68 out of 90 cases), see Aaviksoo 2005, pp. 295–307. According to another source, in the period 2010–2013, the SC declared a norm or absence of a norm unconstitutional on 72 occasions. See information provided by the SC in 2014, (available in Estonian) http://www.riigikohus.ee/vfs/1712/Lisa%20_PS%20jarelevalve%20lahendite%20aitmine.pdf. In 2014, the SC heard 48 constitutional review cases and in 23 cases declared the relevant provisions unconstitutional, see: Teeveer et al. 2014, (available in Estonian) <http://www.riigikohus.ee/vfs/1885/Kohtute%20aastaraamat%202014.pdf>.

²²⁵ SCebj 26.06.2013, 3-4-1-1-14.

²²⁶ SCebj 21.01.2014, 3-4-1-17-13.

²²⁷ ALCSCo 25.04.2006, 3-3-1-74-05, para. 21; Case C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR I-04199.

²²⁸ ALCSCo 07.05.2008, 3-3-1-85-07, para. 38.

²²⁹ *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 37, 271 (*Solange I*); BVerfGE 73, 339 (*Solange II*).

²³⁰ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

to the ECtHR or national standard, unless the applicant proves a significant fall of standards.

2.8.6 In Estonia, the issue of reverse discrimination has not been reflected in case law.

2.9 Other Constitutional Rights and Principles

In Estonia, discussions regarding constitutional rights and the rule of law in relation to EU law, beyond the issues explored in the preceding sections, are overall rather scarce.

One example would be the issue of imposing duties on traders for excess stocks accumulated up until the time of accession of Estonia to the EU. The Estonian SC has a long line of case law confirming the principle that taxes can only be imposed by a law enacted by Parliament. A constitutional issue could have arisen vis-à-vis the question of whether regulations such as Commission Regulation (EC) No. 1972/2003 of 10 November 2003 on transitional measures relating to accession of new Member States could in fact impose financial obligations on individuals. The question is further complicated considering that the regulations could not traditionally produce effects in states that were not yet in the EU (e.g. the day before accession). However, the issue remained undecided in the context of the 2004 enlargement, as the possibility to apply the regulations against individuals was excluded by the CJEU on other grounds, namely that they had not been published in the Official Journal in Estonian.

The issue of whether the suspension of large parts of the Constitution by the SC²³¹ was a good solution²³² or not²³³ has been the subject of a passionate debate. Supporters of the SC's approach argue that it would be pointless and useless for the constitutional court of any Member State to have constitutional review competence with regard to EU law. They warn that a deviation from the primacy of EU law in a particular case could lead to a withdrawal from the EU by the Member State in question or even to a collapse of the EU.²³⁴ Critics argue that the material amendment of the entirety of the Constitution that was claimed by the SC lacks a mainstay in the text of the Constitution as well as the relevant will of the people to abandon sovereignty. On the contrary, a clear intention not to abandon sovereignty can be identified in the explanatory memorandum to the CREEA.²³⁵ Furthermore, such an interpretation is an imperative neither from the point of view of the

²³¹ See Sect. 1.3.4.

²³² Laffranque 2009, p. 483 et seq.; Kalmo 2008, p. 583 et seq.

²³³ Mälksoo 2010, p. 132 et seq.; Lõhmus 2011, p. 15 et seq.; Ernits 2011, p. 35 et seq.; Ernits 2012, p. 137 et seq.

²³⁴ Cf. the discussion in Ernits 2011, p. 46 et seq.

²³⁵ Explanatory Memorandum to the CREEA.

Constitution nor because of the primacy of EU law. There are weighty reasons supporting the thesis that the SC did not act on the basis of the competence conferred on it by the Constitution. Neither the Constitution nor any other act confers on the SC competence to rule on the validity of constitutional provisions.²³⁶ On the contrary, the Constitution provides the legal basis for the existence of the SC itself, and gives it the task and the competence to act as the Constitutional Court. If the SC does not perform this function, it endangers not only its own existence but also the continuity of the entire Constitution.²³⁷ This situation has been referred to as the ‘erosion of the Constitution’ by Uno Lõhmus.²³⁸

2.10 Common Constitutional Traditions

2.10.1 The SC relied on the central importance of the practice of the EU in determining the principles of law long before Estonia’s accession to the EU. Already in September 1994, the SC declared that general principles of law developed by European institutions are incorporated into the fundamental principles of Estonian law.²³⁹ According to the SC,

[i]n developing the general principles of Estonian law, in addition to the Constitution, the general principles of law developed by the institutions of the Council of Europe and the European Union must also be considered. These principles have their origin in the general principles of law of the highly developed legal systems of the Member States.²⁴⁰

A contradiction with those principles would constitute a violation of the Constitution.²⁴¹ A norm contrary to the Constitution will be declared null and void by the SC. Such semi-automatic extension of the vast catalogue of general principles of law represents a strong willingness to develop the Estonian legal system in harmony with the European legal system. It may be seen as a demonstration of the general openness and trust of the SC towards European institutions.

As arguments of interpretation, general principles of law provided an impetus for the SC to develop the following principles in the 1990s: legality, non-retroactivity, legitimate expectations and legal certainty more broadly, and the principle of equality.²⁴² In a certain sense the general principles of law served as a catalyst for a constitutional leap from a post-communist transformation society to a modern democratic rule-of-law-based state of Western European character.

²³⁶ Lõhmus 2011, p. 18.

²³⁷ Ernits 2011, pp. 44, 62 and 69 et seq.

²³⁸ Lõhmus 2011, p. 24.

²³⁹ CRCSCj 30.09.1994, III-4/A-5/94; 17.02.2003, 3-4-1-1-03.

²⁴⁰ CRCSCj 30.09.1994, III-4/A-5/94.

²⁴¹ Cf. Ernits 2011, p. 11 et seq.

²⁴² ALCSCo 24.03.1997, 3-3-1-5-97, para. 4.

Accordingly, we consider it likely that ‘common constitutional traditions’ may indeed exist among the Member States of the EU as well as within the EU itself. It is of course difficult to come up with a list that could claim universal legitimacy.

As an example of the practical difficulties, one can take the different positions adopted by the German *Bundesverfassungsgericht*²⁴³ and the Estonian SC in their respective ESM cases. In the German case, the Court focused on the importance of the fact that Parliament remains the central decision-maker over the budget and that it retains a veto over the decisions of the ESM with Germany’s shares. In the Estonian case, the court accepted the need to limit the budgetary autonomy of Parliament for the greater good of having the ESM functional.²⁴⁴ However, it is our hypothesis that the fundamental principles, even budgetary autonomy, should essentially have a very similar substance throughout the 28 Member States of the EU. There may be differences in the value attributed to each and every one of the principles depending on local geographical, ethnic, religious, cultural or other reasons. For example, the value attributed to the protection of small languages such as Estonian or Gaelic may well be different due to the need to take into account the very real risk of these languages diminishing.

From the Estonian perspective, we would indeed argue that many principles could be regarded as a part of the ‘common constitutional traditions’, such as the principle of the democratic legitimation of policy-makers, *nulla poena sine lege*, the right to be heard, access to courts, judicial independence, etc. We believe that the Estonian constitutional interpretation would support the interpretation of the German Constitutional Court in the Data Retention Case, and would conclude that it is part of the constitutional identity that the citizens’ enjoyment of freedom may not be totally recorded.

2.10.2 It would certainly facilitate identification of the common constitutional traditions if the courts highlighted the long-standing constitutional rights or safeguards for the rule of law in the national constitutions, along with comparative case law on the established standards in different Member States (as suggested separately by Torres Perez and Albi, cited in the Questionnaire).

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

We appreciate the controversy surrounding the approach adopted by the court in the *Melloni* case and the wording of Art. 53 of the Charter.²⁴⁵

²⁴³ BVerfGE 131, 152, 194 ff.

²⁴⁴ For the relevant discussion, see Ginter 2013, pp. 335–354.

²⁴⁵ Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, paras. 59 and 63.

In the case of Estonia, we do not foresee any substantial controversy concerning the standard of protection of fundamental rights at the national and EU level.²⁴⁶ The reason for this can be found in the very pro-European approach to interpretation of national constitutional principles by the SC and in the existence of social rights in the Constitution. Already in September 1994, only a year after its establishment, the SC declared that general principles of law developed by the Council of Europe and EU institutions are incorporated into the fundamental principles of Estonian law. A contradiction with those principles would constitute a violation of the Constitution. Such semi-automatic extension of the vast catalogue of general principles of law represents a strong willingness to develop the Estonian legal system in harmony with the European legal system. The pro-European approach of the SC is further evidenced by its willingness to refer to European sources even in cases where the substance of the case is not directly based on European law. For example, the ambiguous legal status of the Charter did not prevent the SC from referring to the Charter several times even before Estonia's accession to the EU.

On 17 February 2003, the SC referred to the Charter as one of the most recent international documents on fundamental rights evidencing the existence of the general principle of good administration.²⁴⁷ Other pre-accession references to the Charter include the principle that if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable,²⁴⁸ and that the EU recognises the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.²⁴⁹ Since EU membership, references to the Charter have included the right to bequeath property (Art. 17).²⁵⁰ On 28 March 2006,²⁵¹ the SC referred to Art. 1 of the Charter when confirming that human dignity is inviolable, the basis for all of the fundamental rights of the individual and the goal of protecting fundamental rights and freedoms.²⁵²

A clear parallel between the practice of the SC and that of the CJEU in establishing pan-European fundamental rights can thus be seen. Accordingly, we do not predict that the Charter or practice of the CJEU would lead to a lowering of the existing constitutional guarantees vis-à-vis fundamental rights. However, for discussion on some areas where the standards under the Estonian Constitution may be higher, see Sect. 2.1.3 (the judicial protection of the rule of law, especially legitimate expectations); Sects. 2.5–2.6 (excess stocks cases in the context of the publication of laws, legitimate expectations and property rights), and Sect. 2.2 (judicial protection in the *Piirsoo* and *Laurits* cases).

²⁴⁶ Ginter 2008.

²⁴⁷ CRCSCj 17.02.2003, 3-4-1-1-03, para. 15.

²⁴⁸ SCebj 17.03.2003, 3-1-3-10-02.

²⁴⁹ CRCSCj 21.01.2004, 3-4-1-7-03, para. 20.

²⁵⁰ SCebj 22.02.2005, 3-2-1-73-04.

²⁵¹ ALCSCj 28.03.2006, 3-3-1-14-06, para. 11.

²⁵² Case C-377/98 *Netherlands v. Parliament and Council* [2001] ECR I-07079.

2.12 *Democratic Debate on Constitutional Rights and Values*

2.12.1 The adoption of the European Arrest Warrant was not surrounded with substantial scholarly debates; the debate primarily emerged in 2012 after some problematic cases were highlighted in the media. The explanatory memorandum to the implementing law briefly dealt with the constitutional conflict concerning the prohibition of extradition of Estonian citizens. According to the document, as accession to the EU was approved by a referendum in 2003 and the EAW system was foreseen in the existing *acquis*, the Constitution must be interpreted taking into account this obligation of Estonia arising from EU law.²⁵³ Thus, the conclusion that the adoption of the EAW Framework Decision was marked by ‘the lack of public engagement in the area of defence rights and the almost total absence of political debate on the subject’ (see the Questionnaire) is fully applicable also to Estonia. The same applies to the adoption of the EU Data Retention Directive.

There have been no cases where important constitutional issues have arisen and have been referred to the SC at the stage of implementing EU law. The case relating to the implementation of the ESM Treaty is excluded here, as the treaty was considered to be non-EU law.

2.12.2–2.12.3 Considering the long line of case law of the CJEU referring to the system of protection of fundamental rights on the EU level being related to the common constitutional traditions of the Member States, if important constitutional issues have been identified by a number of constitutional courts, it would be appropriate for the application of the questioned measure to be suspended and a review of the measure initiated on the EU level.

The authors have differing opinions in regard to the recommendation to recognise, as a defence on the part of the Member State in an infringement procedure, that unconstitutionality has been identified in accordance with the domestic system of control of constitutionality. On the one hand, there are some cases where the need for more effective protection of fundamental rights, also in the face of EU law, is hard to deny.²⁵⁴ In such cases the Estonian system of control of constitutionality would be in a position to grant the necessary protection properly and responsibly. Furthermore, as long as the Member States remain the only genuine bearers of sovereign power in the EU, the supremacy of the fundamental principles of their constitutions and the sovereignty of their interpretation by national constitutional courts are also hard to deny.²⁵⁵ If an infringement procedure were initiated in a case like *Piirsoo* or *Laurits* because of a refusal to deliver the person to another Member State on the grounds that the delivery would violate at least one of the fundamental

²⁵³ Explanatory memorandum to the amendment of the Code of Criminal Procedure (RT I 2004, 54, 387).

²⁵⁴ Cf. e.g. the *Piirsoo* and *Laurits* cases in Sect. 2.2.

²⁵⁵ Cf. Ernits 2011, p. 60 et seq.

principles of the Constitution (e.g. the rule of law), it would seem to be a good solution to allow the state to defend itself with the argument that unconstitutionality has been identified in accordance with the domestic system of control of constitutionality. On the other hand, we see the danger of undermining the uniform application of EU law that could at one point lead to a fragmentation of the EU along national lines. From this point of view, a procedure whereby the validity of the EU measure is checked by the CJEU with reference to a potential breach of common constitutional principles would be preferable.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1–2.13.2 It is extremely difficult to provide an accurate conclusion regarding whether or not there has been an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law. In our opinion the balance would inevitably have to take into account the significant positive impacts of EU law in the fields of free movement, non-discrimination, gender equality and other areas noted in the Introduction to Part 2 in the Questionnaire. It is perhaps appropriate to refer to the English idiomatic proverb, 'you can't have your cake and eat it'. Accordingly, we have to consider the concept of trade-offs.

For instance, the internal market freedoms regarding free movement of persons or goods provide a considerable benefit to the persons exercising those freedoms. In exchange, the risk of cross-border crime inevitably increases. Accordingly, as a trade-off, a measure is needed which in the case of cross-border crime appears e.g. in the form of the European Arrest Warrant. Thus if one were to examine the concept of the arrest warrant in a vacuum, one could establish a significant reduction in the protection of constitutional rights by the national court. However, considering it in context with a person's increased mobility, one could conclude that the reduction is proportional to the increased opportunities for the person and the increased impact of his or her activities in the jurisdictions of other Member States.

It is likely that in some areas a reduction in the level of protection of constitutional rights has taken place. At times, this has been inevitable given the objectives of European integration, and at times this may have resulted from a lack of wider awareness and debate given issues such as the complexity of multilevel governance.

In the light of e.g. the decision of the CJEU in the EU Data Retention case, we are of the opinion that the CJEU is in principle equipped to deal with issues relating to the guarantee of a higher level of protection of fundamental rights. We do not consider that EU accession to the ECHR would significantly increase the level of protection of fundamental rights within the EU, as it is common knowledge that the ECtHR is overburdened with cases and has difficulty providing decisions in due time as it is.

2.13.3 An increased dialogue between the national constitutional courts and the CJEU in cases dealing with fundamental rights could provide a potential improvement. If the CJEU, when faced with the need to decide on a matter of interpretation of fundamental rights, were able to engage the national constitutional courts by asking for an opinion on the matter, the legitimacy of the interpretations provided might be increased.

3 Constitutional Issues in Global Governance

3.1 *Constitutional Rules on International Organisations and the Ratification of Treaties*

3.1.1 There is no explicit provision in the Estonian Constitution nor does the Constitution regulate the general transfer of powers to international organisations. Indirectly, however, § 123(1) of the Constitution states that Estonia may not enter into international treaties which are in conflict with the Constitution. If laws or other legislation of Estonia are in conflict with an international treaty ratified by the *Riigikogu*, the provisions of the international treaty shall apply (§ 123(2)). If, however, an international treaty is not in accordance with the Constitution, § 65, clause 4, of the Constitution gives the *Riigikogu* the right to denounce the treaty. It follows that the limit to the delegation of powers is the Constitution itself – no international treaty may be in conflict with constitutional norms.

The procedures concerning international treaties are regulated in detail in the *Välissuhtlemisseadus*²⁵⁶ (Foreign Relations Act (FRA)). According to § 6(1)2 FRA, the *Riigikogu* has the competence to ratify treaties by passing Acts concerning accession, approval, acceptance, ratification or other Acts, and to denounce ratified treaties by passing Acts concerning the denunciation of, withdrawal from or termination of the agreement or other Acts. The Ministry of Foreign Affairs (MFA) has the right to initiate the conclusion of a treaty. The MFA shall review the materials specified in § 14 submitted thereto for compliance with legislation (§ 15 (1) FRA). If the materials of a treaty contain deficiencies, the MFA shall set a reasonable term for the elimination of deficiencies (§ 15(2) FRA). A treaty prepared for conclusion has to be approved by the Government (§ 16 FRA). According to § 121 of the Constitution, ratification by the *Riigikogu* is required if (1) state borders are altered by the treaty; (2) the implementation of the treaty requires the passage, amendment or repeal of Acts of the Republic of Estonia; (3) the Republic of Estonia joins an international organisation or union according to the treaty; (4) the Republic of Estonia assumes military obligations by the treaty; (5) by the treaty, the Republic of Estonia assumes proprietary obligations in relations in public law for the performance of which no funds have been designated in the state budget, or which

²⁵⁶ RT I 2006, 32, 248; RT I, 21.06.2014, 10.

exceed the limits for proprietary obligations established by the state budget within which the Government of the Republic is authorised to conclude the treaty; (6) ratification is prescribed in the treaty.

The instrument of agreement of a treaty ratified by the *Riigikogu* shall be signed by the President of the Republic. The instrument of agreement of a treaty concluded by the Government of the Republic shall be signed by the Prime Minister or the Minister of Foreign Affairs (§ 21 FRA).

3.1.2 Not applicable.

3.1.3 No amendments concerning international law and global governance have been made or debated on the parliamentary or Governmental level.

3.1.4 See Sect. 1.5.3.

3.2 *The Position of International Law in National Law*

3.2.1 The Constitution contains a special section (§ 123) with two paragraphs addressing the applicability of treaties and their relationship in domestic law. The first paragraph provides that '[t]he Republic of Estonia shall not enter into international treaties which are in conflict with the Constitution'. This provision is usually understood to mean that in the domestic hierarchy of legal sources, the Constitution takes the highest position. In practice, it requires the authorities to analyse the constitutionality of a treaty in the course of its preparation and conclusion. The Constitution does not explain what happens if there is a collision between the Constitution and a treaty in force. Such collisions are overcome, to the extent possible, by interpretation. As the Constitution cannot release Estonia from its international obligations, the courts should adopt an international law friendly approach in this regard. The Constitution does not provide for the judicial review of treaties; however the CRCPA authorises the SC to verify the conformity of international agreements with the Constitution.

Within the Constitution, § 123(2) provides: 'If laws or other legislation of Estonia are in conflict with international treaties ratified by the *Riigikogu*, the provisions of the international treaty shall apply'. The status of treaties depends on whether they have been approved by Parliament or some other state organ. In the former case, the Constitution confirms that the treaties are directly applicable domestically, provided that they are able to regulate domestic relations and are detailed enough for that purpose. Parliament does not rewrite treaties into domestic legislative acts, which means that treaties remain connected to their international 'background' (e.g. text, interpretation, practice), which consequently affects their application. If a domestic legislative act is in conflict with a treaty, it is not unconstitutional and does not become null and void. Instead, the treaty is applied as a practical solution. When it comes to treaties approved by other state organs (e.g. agreements between ministries), such treaty may be directly applicable, although its

position in the domestic hierarchy of legal sources depends on the state organ which concluded the treaty.

3.2.2 Estonia is often considered monistic, as the Constitution and the practice of the different state organs are international law friendly. The supporters of the monistic approach point to the fact that treaties are not rewritten into domestic legislative acts, meaning that their original texts are applied, i.e. international law is applied domestically. However, as was explained above, this logic applies fully only to treaties which have been approved by Parliament. The monistic view is also supported by § 3(1) of the Constitution, which provides that '[g]enerally recognised principles and rules of international law are an inseparable part of the Estonian legal system'. Regardless of the actual wording, this section refers to customary international law and general principles of law. It should be noted that the Constitution does not similarly provide that treaties form an inseparable part of the Estonian legal system.

3.3 *Democratic Control*

3.3.1 Estonian law entrusts the primary responsibility for initial international negotiations to the Government, first and foremost to the Ministry of Foreign Affairs. According to § 9(3) FRA, the MFA initiates the conclusion of treaties, participates in negotiations concerning treaties, prepares or approves and submits to the Government draft treaties or the texts of treaties adopted, and organises the preparation, signing and exchange or submission to the depositary of the instruments of agreement.

The competency of the *Riigikogu* and its Foreign Affairs Committee (FAC) primarily relates to the procedure of ratification. However, the FAC regularly discusses foreign policy, discusses the report from the Government on the foreign policy of the state and presents its report at a plenary sitting of the *Riigikogu*, and also discusses the bases of security policy and the principles of development co-operation and humanitarian aid presented by the Government.

The detailed procedure is regulated in the RRPA. Section 115 RRPA provides that drafts concerning international treaties undergo two readings in the *Riigikogu*, if the leading committee does not propose otherwise.

Subsequent involvement in scrutinising an international organisation beyond the initial ratification of a related treaty has not been regulated in detail. The MFA is, however, obliged to regularly inform the President, the President of the *Riigikogu*, the Prime Minister and the FAC of the implementation of foreign policy. Also, once a year the MFA prepares a report of the Government on foreign policy.

3.3.2 The ratification and denunciation of international treaties may not be subjected to a referendum as stems from § 106(1) of the Constitution. Thus, the referendum on amending the Constitution and accession to the EU was in this respect constitutionally debatable.

3.4 *Judicial Review*

The competence of the SC to review treaties and measures adopted under international law derives from § 2 clause 2 and § 4(1) CRCPA. Further, the Chancellor of Justice may submit a request to the SC to declare an international agreement which has been signed or a provision thereof to be in conflict with the Constitution.²⁵⁷ The SC further may, on the basis of a reasoned request of a participant in the proceedings or on its own initiative, suspend, with good reason, the enforcement of a contested legislative act or a provision thereof or the enforcement of an international agreement until the entry into force of the judgment of the SC.

In the adjudication of cases, the SC may declare an international agreement which has entered into force or has not yet entered into force or a provision thereof to be in conflict with the Constitution (§ 15(1) No. 3 CRCPA). Further, § 15(3) CRCPA adds that if an international agreement or a provision thereof is declared to be in conflict with the Constitution, the body which entered into the agreement is required to withdraw from it, if possible, or commence denunciation of the international agreement or amendment thereof in a manner which would ensure its conformity with the Constitution; an international agreement which is in conflict with the Constitution shall not be applied domestically.

3.5 *The Social Welfare Dimension of the Constitution*

3.5.1 The social state dimension is mentioned in § 10, whereas the general social right is embedded in § 28(2) of the Constitution.²⁵⁸ According to the SC, the social state is a fundamental, core principle of the Constitution.²⁵⁹ The SC stated in 2004:

The concepts of a social state based on social justice and the protection of social rights contain an idea of state assistance and care to all those who are not capable of coping independently and sufficiently. The human dignity of those persons would be degraded if they were deprived of the assistance they need for satisfaction of their primary needs.²⁶⁰

²⁵⁷ The SC *en banc* held that § 6(1)4) CRCPA gives the Chancellor of Justice the right to challenge a signed international agreement or a provision thereof both before the ratification of the international agreement, i.e. by way of preliminary review, and after ratification, i.e. by way of *ex-post* review. The SC held that the competence arising from § 6(1)4) CRCPA is in accordance with the Constitution, see SCEbj, 12.07.2012, 3-4-1-6-12.

²⁵⁸ ‘An Estonian citizen has the right to state assistance in the case of ... need.’ According to § 28 (2), citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law.

²⁵⁹ CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49.

²⁶⁰ CRCSCj 21.01.2004, 3-4-1-7-03, para. 14.

The SC has declared a number of laws unconstitutional on the ground of social rights, and has stressed that ‘the right to receive state assistance in the case of need is a subjective right, in the case of violation of which a person is entitled to go to court, and the courts have an obligation to review the constitutionality of an Act granting a social right’.²⁶¹ However, the SC has stressed several times: ‘[u]pon ensuring social rights, the legislator has an extensive right of discretion and the courts must not make social policy-related decisions in lieu of the legislator. The exact extent of social fundamental rights also depends on the state’s economic situation’.²⁶²

The potential impact of the policies of global institutions on the social state has not been a matter of discussion in Estonia.

However, the concern of the dissenting judges that the financial commitments undertaken under the ESM Treaty may undermine the social state are outlined in Sect. 2.7.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

There are many further theoretical constitutional issues arising in the context of constitutional rights and values in global governance, e.g. the transfer of a part of sovereign powers to the International Criminal Court. However, due to the space restriction, they shall not be addressed here.

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²⁶¹ CRCSCj 21.01.2004, 3-4-1-7-03, para. 16; reiterated in CRCSCj 05.05.2014, 3-4-1-67-13, para. 31.

²⁶² E.g. SCebj 07.06.2011, 3-4-1-12-10, para. 58.

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