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ESTONIA’S SOVEREIGNTY IN PERSPECTIVE OF EU ACCESSION

Rethinking traditional constitutional concepts

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Introduction

The present bachelor thesis discusses in comparative perspective the constitutional implications of Estonia’s expected European Union membership, concentrating in particular to the problems concerning sovereignty. At present day, there is but one legal analysis by the Estonian lawyers on this actual topic, the Constitution’s Legal Expert Commission’s Report on the proposed constitutional amendments necessitated by the EU accession, proceeding strongly from sovereign nation-state paradigm, similarly to the other Member States Constitutional Courts’ positions. The present paper purports to submit an alternative view to the issue, proceeding from the European law and the general purposes of the European integration.

The paper makes three central claims. Firstly, the paper contests the interpretations of the Estonian Expert Commission’s as well as the Constitutional Courts of the present Member States, according to which the constitutions allow membership only in the European Union, the legal nature of which would be confederation, and prohibit participation in a federation, since this would end independent statehood. The analysis of the EU elements shows that the EU has already developed much further from a confederation, disposing several federalist features (extensive powers, uncertainty of secession right, monetary union, citizenship, etc). Instead of declaring the further federalist integration impossible, the change of fulfilling state’s functions in the result of internationalization processes should provide basis for rethinking 19th century statehood concepts, whereby the concepts of ‘open statehood’ and ‘supranational organization sui generis’ would enable to overcome the state-federation dilemma and preserve independent statehood, although in modified terms. In this light, the Expert Commission’s constitutional amendment proposals will be discussed.

Secondly, the paper purports to provoke rethinking the Constitutional Courts’ and the Expert Commission’s conviction of nation being the only source of legitimacy and thereby also of exercise of popular sovereignty. If possibility of divisible identity, national and European, the latter being based on common European cultural and political values, would be acknowledged, there is no obstacles to overcome the EU democracy deficit by empowering the European Parliament with competences of a normal representative body so as to exercise popular sovereignty partly in the European level. It will then be argued that instead of impossibility of the European Parliament’s legitimacy, it is rather the Member States’ aspiration to withhold their internal sovereignty by retaining the power to the Council and the national parliaments, while the
paper suggests that exercise of national sovereignty on the expense of popular sovereignty is not justified. Again, Estonian Expert Commission's views will be discussed in this light.

Thirdly, considering that the exercise of sovereignty finds its expression by the norm-creating activity and sovereignty is therefore, in essence, largely identical to the sovereign legal order, the paper suggests that the Member States’ as well as the Estonian Expert Commission’s attitude on the supremacy of Constitution and retained ultimate right of constitutional review, which they derive from state sovereignty, is contrary to European law as well as constitutional law provisions on the delegation of sovereign competences. The paper suggests though, that as ultimate safeguard for sovereignty, Estonia along with the other Member States may exercise indirect control as ultima ratio jointly in an intergovernmental conference, if the Community institutions’ excess of powers, conferred by the Treaties, has not been properly resolved by the ECJ.

The paper is in line with these claims divided into three chapters. Chapter 1, divided into three subchapters, discusses national sovereignty in the light of EU membership. The first subchapter purports to show through its twelve subdivisions, analyzing different elements of the EU (existence of ‘Constitutional Charter’, uncertainty of secession right, citizenship, etc) the rather federalist reality of the EU instead of confederation as alleged by the Constitutional Courts and the Estonian Expert Commission; the second thereafter provides in two subdivisions the alternatives to traditional constitutional concepts. The third subchapter in its two divisions outlines the positions and constitutional amendment proposals of the Estonian Expert Commission and discusses those in the light of changed constitutional concepts. Chapter 2, through its five subchapters, focuses on the EU membership implications to popular sovereignty. After outlining the notion of popular sovereignty and legitimacy as well as the problem of EU democracy deficit obscuring the exercise of popular sovereignty respectively in two first subchapters, the third subchapter will discuss the possibility of dual legitimacy so as to exercise popular sovereignty partly by the European Parliament. Concluding that dual legitimacy is conceivable, the fourth subchapter then argues that not empowering the EP on the expense of national sovereignty is unjustified. The last subparagraph discusses the Estonian Expert Commission’s proposals in this light. Chapter 3 discusses the impact of supranational legal order on sovereignty: reception (3.1.), sources, direct applicability and supremacy (3.2.), supremacy towards constitution (3.3) and ultimate constitutional review (3.4).

The paper is based on recent articles on the issues as well as to Member States’ Constitutional Courts’ jurisprudence.
1. NATIONAL SOVEREIGNTY AND EUROPEAN UNION

Similarly to the referenda and Constitutional Courts’ proceedings concerning the establishment of the European Union by the Maastricht Treaty in the present Member States, the Estonian Constitution’s Legal Expert Commission’s analysis on the constitutional implications of the expected EU accession has raised as the central issue the transfer of sovereignty. And similarly to the Member States Constitutional Courts’ positions, the Estonian Commission sets distinct limits to the European integration, establishing that the Constitution allows membership only in the European Union forming a confederation of states (see 1.1.12), so as to retain the sovereign statehood.

This chapter purports to show that core elements of the European Union (directly applicable supreme legal order, constitutional charter, extensive powers, citizenship, etc) show that the EU has already developed much further than a traditional confederation, and possesses distinct federalist features. The Courts’ and the Commission’s formal-juridical conclusion on confederation does not correspond thus to the material situation, and the dated constitutional concepts from which these bodies proceed, interpreting that the EU’s further substantive development towards federalism is not allowed by the constitutions, unjustifiably forecloses future integration necessary for effective fulfillment of social contract tasks.

At this point, so as not to end the future integration, the paper suggests, along with the evolving state theory, to replace the traditional 19th century concept of sovereign statehood, proceeding from absolute state-federation dilemma, by the alternative state models, which regard the EU as a supranational organization sui generis where the states fulfill on functionalist basis the tasks no longer effectively met by nation states, while the sovereign statehood would be retained, although in modified terms. In this light thereafter the Estonian Expert Commission constitutional amendment proposals will be discussed.
1.1 Legal nature of European Union exceeding concept of confederation

1.1.1 Sovereignty, statehood, confederation, federation

In order to illustrate the material incompatibility of the EU legal nature with the confederation, challenging the position of the Constitutional Courts and the Expert Commission, the traditional constitutional theory definitions will be outlined, in the light of which then specific elements of the EU discussed.

For the purposes of the present paper, the national sovereignty and popular sovereignty are regarded separately, the latter relating to the legitimacy of power exercise and dealt in more detail in Chapter 2. National sovereignty divides into internal (“[…][legal capacity of states to pass and implement laws within a certain territory[…]]”) and external or international sovereignty (“[…][refers to the idea that states are not subject to the authority of outside political entities such as other nation-states or a supranational state]”)\(^1\), in Estonian constitutional theory designated respectively as sõltumatus (sovereignty) and iseseisvus (independence)\(^2\). Sovereignty is inseparable from statehood, the external criteria of the latter being established in the Montevideo Convention as government, population, territory and capability for external relations\(^3\).

Sovereignty of the states forms the major feature of confederations, the other features of the latter, according to various constitutional law encyclopedias\(^4\), being the following:

- confederation is formed under international treaty and depends on international law;
- it does not possess legal personality;
- it is created for limited purposes, while the Member States retain essential powers competences;

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• tendency not to be long-lasting, as a rule they develop into federations or split apart.

In case of federation, on the contrary, sovereignty is held by the federation and not by the constituent states. The other features of a federation are generally determined as follows:

• federation is formed under constitutional document, specifying the exclusive and concurrent competences between the central authority and constituent states;
• although the constituent state may formally retain the status of state, it is not recognized as subject of international law, legal personality belongs to federation, who it is entitled to conclude treaties and bears responsibility;
• the member states possess legislative autonomy depending on the competence share, and representation in the parliament’s second chamber;
• presence of other factors like rules on the share of financial resources, existence of centralized political parties, cultural coherence, sentiments of solidarity, so as to enable the proper functioning of the federal institutional system;
• non-centralization, system of checks and balances, democracy and observance of human rights are fundamental principles of federalism.

1.1.2 Treaties as ‘Constitutional Charter’

As the definitions reveal, the form of constituent document provides one of major bases for the distinction between federalism and confederalism. The Estonian Expert Commission is on the position that the EU is based on international treaties, whereby it forms a confederation. However, although the European Constitution as such does not yet exist indeed (there are drafts though), the ECJ has described the Treaties as a ‘Constitutional Charter of the Communities’.

The existence of the constitutional character of the Treaties is strongly confirmed by the academia. Thus, O. Due explains that the Treaties possess for the Communities a similar role as the

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6 Võimalik liitumine Euroopa Liiduga, supra, lk 15.
constitutions for the Member States: the Treaties determine the tasks and general principles to be followed by the Community institutions and the Member States, define the institutions and their powers and their system of control and balance, relations between the Communities themselves as well as between them and the Member States, relations with the third states and international organizations, Community legal acts and their effect in the Member States, and authorize the Community institutions for legislative activity, going thus much further from ordinary international treaties and “[…]perform, in fact, the same functions as the Constitution of a federal State”. The Treaties, being concluded as international agreements, have “[…]progressively constitutionalized and evolved into a comprehensive Constitution.” J. Temple Lang goes even so far as to deem Ireland to possess two constitutions, the national and European. It is further often emphasized that the fact of absence of the written constitution in the EU does not preclude its existence since as shows the example of the United Kingdom, the constitution need not to be contained in a single written document.

Consequently, the European Union possesses a ‘constitution in the form of the Treaties’, unifying thus the elements of federation as well as confederation, leaving open its precise legal status or rather referring, as suggested above, to the futility of categorizing the Union in traditional constitutional state/non-state terms. Furthermore, the author suggests that it is but one of the following elements leading to the same conclusion, pointing to the need to reconceptualize the constitutional approach to the EU and to sovereign state.

1.1.3 Institutions as central authority

The federalist structure presumes the existence of central authority, acting within the competences determined in the constituent document. The central authority in the EU is composed of the institutions enumerated in Articles 4 and 4a of the Treaty: European Parliament, Council, Commission, Court of Justice, Court of Auditors, Economic and Social Commission, Commission of Regions and European Central Bank. Acting within the powers conferred by the Treaties, the

9 Due, supra, p 4. See similar position also Van Gerven, supra, p 81-82.
10 Obradovic, supra, p 2 (references omitted).
11 Temple Lang, J. The Widening Scope of Constitutional Law. – Community Adjudication…, supra, p 229.
12 Eg Van Gerven, supra, p 82.
Institutions possess wide legislative, executive, judicial and budgetary powers, unknown by traditional international organizations.

Further, differently from confederation where the organization acts through its member states, in the EU the central authority has direct relations to individuals through the Union citizenship and directly applicable Community law provisions as well as by recourse to the ECJ.  

1.1.4 Supreme and directly applicable legal order

The Union goes much further from the traditional international associations of states also and particularly in regard of the Community legal order, which comprises supremacy in regard of Member States law and direct applicability in the national legal orders, own legal sources, legal personality, legal capacity and capacity of representation on the international plane. The individuals of the Member States have direct legal standing in the ECJ, while in case of confederations, as a rule, the states are the legal subjects.

Although the legal order concerns only the integration under the First Pillar, it is however rather broad so as to exceed the limited purposes usually adhered by the confederations, as will be discussed in the following subchapter.

1.1.5 Division of powers between Member States and EU

This paragraph purports to show the federational nature of the range of transfer of powers to the EU, since the confederations limit their activity to achievement of specific restricted goals, preserving the essential powers of state entity. Thus, the claimants alleged in the Maastricht case in German Federal Constitutional Court (FCC) that Germany has lost its sovereignty in result of the transfer of responsibilities significant for a State entity, further deteriorated by Art F para 3 of the TEU which would grant to the European Union an exclusive competence for jurisdictional conflicts whereby it could assume any further responsibilities it may require (Kompetenz-

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14 See more Lenaerts, supra, p 773-775.
Kompetenz)\(^{18}\). In the Danish Supreme Court (DSC), similar harm to sovereignty was seen on grounds of the EU’s consistently extended powers resulting the Council activity under implied powers doctrine under Article 235 as well as the ECJ law-making activities.\(^{19}\)

Both claims were rejected. The FCC’s argument against the federal nature of the EU, resulting extensive transfer of competences, is that the EU disposes powers predominantly in the economic field under the so-called First Pillar, while the cooperation under the Second and Third Pillar, ie the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) as fundamental spheres of state sovereignty falls under the inter-governmental cooperation, where the decision-making process requires unanimity.\(^{20}\)

The Kompetenz-Kompetenz was negated on the basis that Art F para 3 does not confer any residual powers on the Union, is a principle of a program instead of an enabling provision and, eventually, is to be read in conjunction with Art B last paragraph, which makes the activities of the Union subject to the conditions and timetable of the Treaty and requires adherence to the subsidiarity principle.\(^{21}\)

Instead, the EC abides to the principle of limited individual powers, formed under following provisions: (a)Articles 3b para 1 and 189 para 1 of the EC Treaty oblige the Community institutions to act and issue legislation only within the limits of the powers conferred upon it by the Treaty\(^{22}\), (b) the new Art 3a of the EC Treaty limits the Community activities in its future economic and monetary policy to that provided in the Treaty with respective timetable;\(^{23}\) (c) it is further also confirmed by the principles of subsidiarity (Art 3b para 2 EC) and proportionality (Art 3b para 3)\(^{24}\).

As to Article 235, the DSC refers to the ECJ Opinion 2/94\(^{25}\), according to which the activities under 235 are limited with the purposes of the Community and remain therefore sufficiently concrete.\(^{26}\)

Similarly, according to the DSC, the extension of the Community powers by the ECJ, who uses teleological interpretation beside grammatical, remains within the exercise of concrete delegations, since the ECJ proceeds from the achievement of the Community objectives.\(^{27}\) The FCC further emphasizes the presumption of the Member States’ competences and exceptional nature of the EU

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\(^{20}\) See FCC Maastricht Decision, supra, p 424.

\(^{21}\) See the FCC discussion on Kompetenz-Kompetenz in Maastricht Decision, supra, p 428-432.

\(^{22}\) See the Court’s reasoning in FCC Maastricht Decision, supra, p 426-427.

\(^{23}\) FCC Maastricht Decision, supra, p 427.

\(^{24}\) FCC Maastricht Decision, supra, p 427.

\(^{25}\) ECJ Opinion 2/94 Communities Accession to ECHR, ECR 1996-I 1788, para 29, 30.

\(^{26}\) DSC Judgement of 6\(^{th}\) April 1998, supra, para 28.

\(^{27}\) DSC Judgement of 6\(^{th}\) April 1998, supra, para 9.4-9.5.
powers\textsuperscript{28}, the sufficiently foreseeable and concrete standardization of delegations to the EU as well as the dependence of amendments and supplements to the Treaties from the consent of the national parliaments.\textsuperscript{29}

Even if the EU lacks formally indeed any Kompetenz-Kompetenz (though the Author is on the position that materially it has exercised it to a certain extent by Art 235 and the ECJ judicial activity\textsuperscript{30}), the Union powers are rather broad, even under the First Pillar, so as to exceed the notion of confederation: the internal market, competition, common commercial policy towards the third countries, common agricultural policy and a common transport policy, economic and monetary union leading to the introduction of a single currency.\textsuperscript{31} Further, the EC Treaty grants powers to the Community in variety of fields such as social policy, education and vocational training, culture, public health, consumer protection, trans-European networks, industry, research and technological development, environment, and development of co-operation.\textsuperscript{32} The TEU extended the Council qualified majority voting as well as the European Parliament input under the First Pillar, while the powers are enlarged by the Treaty of Amsterdam\textsuperscript{33} (see Chapter 1.1.11). In result of this, even before the TEU, nearly 80\% of all regulations in the field of commercial law \textit{eg} in Germany have been established by means of Community law and almost 50\% of all German laws have been prompted by Community law, while the TEU and the Amsterdam Treaty would substantially expand those responsibilities of the EU institutions.\textsuperscript{34} Furthermore, although the FCC interprets Articles A to F of the TEU as it is not in future possible to create directly applicable European law in the fields of the Second and Third Pillar, Hailbronner draws attention to the fact these fields may likewise get fused with the European law by virtue of the Council disposing the majority decision.\textsuperscript{35} The Amsterdam Treaty further shows the understanding that the common exercise of powers also under the Second and Third pillar may be more effective than by each state individually, since the Treaty provides limited opportunity for qualified majority voting on Foreign and Security Policy issues, and moves part of issues from Home and Justice Affairs to the First Pillar.

\begin{itemize}
\item \textsuperscript{28} FCC \textit{Maastricht} Decision, \textit{supra}, p 427.
\item \textsuperscript{29} FCC \textit{Maastricht} Decision, \textit{supra}, p 417.
\item \textsuperscript{30} \textit{Eg} extending Community powers to environment, etc under Art 235, and establishing state liability doctrine, direct applicability, supremacy, by the ECJ.
\item \textsuperscript{31} Lenaerts, \textit{supra}, p 776-777.
\item \textsuperscript{32} Lenaerts, \textit{supra}, p 776-777.
\item \textsuperscript{33} Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct 2, 1997, OJ C 340/1 (1997).
\item \textsuperscript{34} This data was submitted by the Applicants in the \textit{Maastricht} decision, with reference to Assessment of the President of the Commission of the European Communities Mr Delors (speech in the European Parliament on 4 July 1988, Bulletin EC 1988 no 7/8 p 124), cited in FCC \textit{Maastricht} Decision, \textit{supra}, p 410.
\item \textsuperscript{35} Hailbronner, K. The European Union from the Perspective of the German Constitutional Court. – GYIL, Berlin: Duncker & Humblot, 1994, p 99.
\end{itemize}
The Treaties also provide for exclusive and concurrent competences. Thus, a sphere belongs to the exclusive competence of the Community when the Treaties oblige the Community to take action and the Community bears the sole responsibility for its realization, eg internal market, including the free movement of goods, persons, services and capital, common trade policy, competition, common agricultural policy, preservation of fish resources and transport policy. Concurrent competences mean that authorities of the Member States may interfere only to the extent and till the Community institutions have not exercised their competences in order to fulfill the objectives assigned on them in the Treaties. The non-economic questions and the Second and Third Pillar form the competences belonging exclusively to states.\textsuperscript{36}

It follows that even if the EU lacks Kompetenz-Kompetenz, the wide range of powers in any case exceed the traditional competences of a confederation, the integration having reached from the economic sphere to the fundamental spheres of state sovereignty like monetary policy, police and foreign policy,\textsuperscript{37} while the division of competences into exclusive and concurrent powers further refers to federalist system.

\textit{1.1.6 Uncertainty of secession right}

Likewise deserves contest the Member States and the Constitutional Courts’ position on confederalism based on sovereign state’s right of secession. Thus, according to the FCC’s contemplation of the \textit{travaux preparatoires} and systematic analysis of the TEU, the EU derives its authority from the Member States and Germany is ‘one of the Masters of the Treaties’ who, having established their adherence to the Union Treaty ‘for an unlimited period’\textsuperscript{38}, could however ultimately by pertinent act terminate the membership.\textsuperscript{39} Likewise, in writings on Denmark and Finland’s membership, the possibility for withdrawal is invoked by potential adoption of parliamentary act.\textsuperscript{40} Estonia’s Commission concludes on the existence of the secession right from


\textsuperscript{38} Art Q, TEU, \textit{supra}.

\textsuperscript{39} FCC \textit{Maastricht} Decision, \textit{supra}, 5, p 424-425.

the right of national self-determination as well as Constitution Art 1 requirement on the inalienability of sovereignty (delegation instead of transfer of competences).

These views may contradict international law, European law as well as be impossible regarding the practical political and economic considerations though. There are discussions that the European Union in may have evolved into an independent legal entity, being no longer totally subject to the individual Member States who could not simply withdraw at will. The impossibility of withdrawal is supported by Art 54 of the Vienna Convention on the Law of Treaties, which sets forth that if a treaty does not provide stipulations on denonnsiation or withdrawal (which is the case of the Treaties), these are not possible, except if this derives from the will of the parties or the nature of the treaty. The ‘will of parties’ is obviously orientated to further deeper integration, as show the integration history and preambles of the Treaties speaking of ‘an ever closer Union’, providing thus no basis for withdrawal. It has been suggested though that the ‘nature of the Treaty’ may give basis to secession, since the Treaties provide a constitutional basis for association with federalist elements instead of ordinary international organization and therefore the doctrine of sovereignty may indeed overweight the Vienna Convention regulation.

The attitude of the Courts and the Estonian Expert Commission may also violate European law since interpretation of the Treaties (eg Article Q – conclusion for unlimited period) is along with the general transfer of competences conferred to the ECJ (Art 164 EEC and Article L TEU). At least in states where state constitution provides in its EU provision the mutuality clause (France, Portugal as well as the Estonian Constitution if the Commission’s pertinent amendment proposal discussed in Chapter 1.3 will be adopted), the unilateral withdrawal would be contrary also to constitution and thus subordinated to constitutional amendment. Even if the secession would be legally possible, it

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41 Võimalik liitumine Euroopa Liiduga, supra, lk 16.
42 Võimalik liitumine Euroopa Liiduga, supra, lk 5.
45 Thus, common example is that France would not have accepted the system, if Germany could have withdrawn at will.
46 The Amsterdam Treaty (Art F 1) however provides a possibility of suspending the membership on certain circumstances, which, according to Petite, may have undermined its irreversibility. See discussion in Petite, M. The Treaty of Amsterdam, Harvard Law School. The Jean Monnet Chair Working Papers. 1998. Available: (24.03.99), Chapter I-1.
is considered excessively difficult if not impossible in the practice, considering the level of economic integration, the high level of interdependence as well as political circumstances.\textsuperscript{49}

Considering the above, the existence of secession right as part of expression of sovereignty in confederation is in the EU no longer unequivocal, referring thus to emerging federalism.

\textbf{1.1.7 EU citizenship}

The European Union citizenship, granting every person who holds the nationality of a Member State, rights to move and reside freely within the territory of the Member States, vote and stand as candidate at municipal elections and the EP elections within state of residence, subsidiary diplomatic and consular protection of any MS, rights to petition to the European Parliament and to apply to the Ombudsman appointed by the European Parliament and to the ECJ (Articles 8-8e TEU)\textsuperscript{50}, is another indication that the level of integration in the EU goes much further from the traditional framework of confederations.

However, the EU citizenship, as reveals the scope of the rights enumerated, does not form traditional concept of citizenship though. It is specified by the Amsterdam Treaty that the EU citizenship does not replace, but only complements Member State nationality. As to the legal nature of the EU citizenship, E. Perez Vera qualifies it rather as ‘a condition of a person’ entailing certain sporadic and incomplete rights\textsuperscript{51}. The rights are indeed more oriented to facilitating free movement of persons, while the status of EU citizens in the other Member States is stronger than of an alien but considerably weaker than of own nationals.\textsuperscript{52} The content of the EU citizenship may, however, be extended by the Council’s unanimous vote.

The FCC, likewise, does not find the citizenship to indicate federalism, since federalism would presume the presence of the European nation, which does not exist. According to the FCC, “[t]he Maastricht Treaty establishes an inter-governmental community for the creation of an ever closer

\begin{reftext}
\textsuperscript{49} MacCormick and Koopmans are on the position that the secession is rather doubtful considering the political circumstances, \textit{MacCormick, N.}, The Maastricht-Urteil: Sovereignty Now. – ELJ, 1995, p 265, \textit{Koopmans, supra}, p 86, the position is shared by \textit{Van Gerven, supra}, p 86.


\textsuperscript{51} \textit{Pérez Vera, supra}, p 392.

\end{reftext}
union among the peoples of Europe, in which peoples are organized on a State level (Art A of the Maastricht Treaty), rather than a State which is based upon the people of one State of Europe.” The Court’s position on the absence of the European people is often criticized, particularly since the Court uses it to justify grounding the EU decision-making legitimacy upon the national structures instead of the European Parliament. This problem will be discussed in Chapter 2.2, which will argue that at the very least, it is possible to speak of divisible identity with different level of intensity, the organic national-cultural identity belonging to the nation state, and the shared political and cultural values to European identity, providing thus basis for enhanced legitimacy via the European Parliament.

Thus, European nation as one of preconditions of federation may be to a certain extent present, while the citizenship, particularly right to passive and active participation in the EP and municipal elections as well as the right to move freely clearly exceeds concept of confederation.

1.1.8 Subsidiarity, autonomy and protection of national identities as federal principles

As previously defined, in case of confederation, the state transfers but minor specific competences and retains the essential state prerogatives. Meanwhile, the federation concentrates to central authority relatively broad powers, therefore principles like subsidiarity, autonomy and protection of national/regional identities are used in order to ensure constituent states’ own political integrity.

These principles are also introduced in the EU. Article 3b, establishing the subsidiarity principle, subjects the exercise of functions in the field of concurrent powers to the level of efficiency. The TEU Art F para 1 establishes the protection of national identities, which is further secured by the TEU Art 126(1) and 127(1), obliging the Community to respect the responsibility of the Member States for the conduct of teaching, organization of educational systems as well as their cultural and linguistic diversity when taking action in the fields of education, vocational training and youth. In addition, the Community is not entitled for harmonization in these fields (TEU 126(4), 127(4)), as well as in the field of culture (128(5)). Further, under Article 128(4) of the EC Treaty, the Community is obliged to take cultural aspects into account in its activities. Autonomy is expressed in combination of Art N of the TEU subjecting any amendments to the Treaties to the national

53 FCC Maastricht Decision, supra, p 423.
54 See more on subsidiarity Rideau, supra, p 411-439.
55 See discussion in Lenaerts, supra, p785. (references omitted?)
constitutional procedures, whereby the Member States have the power of veto for protecting their autonomy,\textsuperscript{57} as well as protecting the Member States legislative autonomy by principles of mutual recognition and harmonization\textsuperscript{58}. Autonomy of Community is present in exclusive competences such as common commercial policies towards third states.\textsuperscript{59}

While the subsidiarity principle has been therefore considered as an analogue of American and German federalism\textsuperscript{60}, the FCC, however, considered the principle of subsidiarity\textsuperscript{61}, complemented further by the principle of limited individual powers,\textsuperscript{62} protection of national identities\textsuperscript{63} and principle of proportionality\textsuperscript{64} to safeguard the Member States sovereignty and confederalism.

Thus, dual interpretation of the meaning of these features is conceivable, although on the basis of the Chapter 1.1.1 definitions, these characteristics resemble rather a federation. However, as will be discussed in Chapter 1.2.3, when to acknowledge the insufficiency of the statal terms thinking and adhere to the EU’s independent supranational nature, the subsidiarity principle will rather provide useful tool for determining the level, national or international, for fulfillment of state’s tasks on the functionalist basis.

\textbf{1.1.9 ‘Embryonic’ legal personality}

Although there is however wide consensus that the Union is missing one of central features of a federation, the legal personality, even this view is growingly challenged. According to the FCC’s interpretation, there is no distinct legal personality nor in terms of relationship with the Communities neither with the Member States\textsuperscript{65},\textsuperscript{66} the personality is instead held by the Communities (Art A TEU).
However, eg Rideau, being on the position that the lack of explicit personality statement in the TEU does not necessarily preclude it, speaks of ‘embryonic legal personality’; 67 considering that the Union is aspiring towards an independent identity in the international sphere, appearing as distinct entity from its Member States, being capable once upon a time to be recognized as such. He further explains that in the matters of defense policy, the TEU does not authorize conclusion of treaties by the EU, but meanwhile does not preclude it either. Furthermore, he sees strands for the EU legal personality in the new office in the Common Foreign and Security Policy, Secretary General of Council as High Representative, created by the Amsterdam Treaty 68. In Home and Justice Affairs, the EU activity has internal orientation, but may evolve also towards third states or international organizations. 69 Ross is one of authors alleging that EU possesses already legal personality.70

Thus, the legal personality as one of features of federation may be on its way to emerge, besides, one must not forget that the legal personality held by the Community, including the exclusive treaty conclusion rights etc, covers rather extensive areas.

1.1.10 Emerging enforcement measures; democracy and human rights as federalist characteristics

Although the Community disposes no traditional central enforcement measures, and needs therefore the Member Sates to secure the enforcement of its tasks, strands of central enforcement mechanisms are present in the state liability for non-transposition or incomplete transposition of directives, the as established by the ECJ in Francovich 71, etc. Further, the Amsterdar Treaty (Art F 1) provides a possibility to suspend Member State’s membership and voting rights in case of serious violation of human rights and fundamental freedoms.

The federal nature may be further inferred by elements like the pursuance of harmonious development of the Union as a whole (broad regional policy, structural funds) as well as the general organization of the EU “[…]in a democratic way […]respectful of fundamental rights and the rule

67 Rideau, supra, p 229-232.
68 Rideau, supra, p 232.
69 Rideau, supra, p 231.
of law”\textsuperscript{72}, as expressed in Articles F of the TEU and further reiterated by the Amsterdam Treaty. The democracy exercised through the EP who disposes means of binding say in the Community decision-making process as well as protection of human rights have indeed traditionally not been present in confederations.

\subsection{1.1.11 Further expansion of EU competences by Amsterdam Treaty}

The EU powers have recently been extended by the Amsterdam Treaty, which entered into force on 1 May 1999.\textsuperscript{73} The Treaty places massive powers concerning free movement of persons, internal and external frontiers, visas, asylum, immigration and judicial cooperation in civil matters from the Third Pillar to the First Pillar, accompanied by the use of directives and regulations instead of conventions, and the ECJ jurisdiction. These matters, except visas, are subject to unanimous voting though. The Schengen is incorporated into the Treaty. The Treaty strengthens human rights protection by providing explicitly for the ECJ jurisdiction, and provides for suspension of participation of MS in case of their gross violation. Further, the Council may take measures to combat discrimination, and to promote equality between women and men. The police, justice cooperation and criminal law matters are strengthened, although remain under the Third Pillar. The ECJ may by MS declaration of acceptance have jurisdiction on certain third pillar areas.\textsuperscript{74}

The Treaty strengthens the Common Foreign and Security Policy. Art J.12(2) prescribes the qualified majority voting when adopting actions or positions implementing common strategies decided by the European Council, the same applies to decisions implementing its own joint actions or common positions. The common strategies themselves, however, need unanimity. ‘Constructive abstention’ possibility is however provided for the Member States (Art J 13), they may opt out from certain policies in case of important national policy reasons, but may not obstruct. A new form of legal act, the framework decision is introduced. The Treaty creates a new office in the CSFP, Secretary General of Council as High Representative, in which Rideau, as discussed, sees strands for the EU legal personality. The EU may avail itself to the WEU for peace-keeping operations under security and defense policy.\textsuperscript{75}

\textsuperscript{72} See more on this position Lenaerts, supra, p 787.
\textsuperscript{73} See for detailed overviews Degryse, supra, p 44-53, and Petite, supra.
\textsuperscript{74} See more in Degryse, supra, p 46-47; Petite, supra, Chapter I-2.
\textsuperscript{75} See more in Degryse, supra, p 47; Petite, supra, Chapter III-1.
The institutional and functioning reforms entail the increase of the Council majority vote so as to enable the Community enlargement. Amsterdam Treaty provides considerable contribution to democratization, extending remarkably the fields of co-decision and virtually abolishing cooperation procedure. The Treaty also introduces strengthened cooperation on the basis of principle of flexibility, according to which the Member States who want may undertake a closer cooperation under certain conditions. The Treaty introduces employment policy and social policy.

These changes show that the Treaty provides for further federalist development in transferring substantive competences (particularly in foreign policy and free movement issues) as well as strengthening formal federalist structures (eg EP co-decision procedure).

1.1.12 Conclusion – EU inbetween confederation and federation

The FCC, the DSC as well as the Estonian Expert Commission interpreted the EU to form but a confederation of states where the Member States retain their sovereignty. This may be true formal-juridically, but question-begging considering the material and present political circumstances. At the very least, every discussed element shows development towards federalist structure of the EU, or intermediate status between confederation and federation.

The outcome of the interpretations of the above bodies could not, however, reach this result since the traditional constitutional thinking in statal terms would have resulted in declaring the EU integration unconstitutional. According to the DSC, it is assumed in the Constitution that “[…]no
transfer of powers can take place to such an extent that Denmark can no longer be considered an independent state [emphasis added].” Proceeding from considerations of political nature, the Court found that no transfer of sovereignty has happened to the extent to violate this assumption. Likewise, the FCC emphasizes that “[...]Germany is [...]maintaining its status as a sovereign State in its own right as well as the status of sovereign equality with other States in the sense of Art 2, sub-para 1 of the UN Charter of 26 June, 1945”.

The French Constitutional Council (CC) has likewise established that the integration must not harm ‘essential conditions of national sovereignty’, these being the state’s institutional structure, independence of the nation, territorial integrity and fundamental rights and liberties of nationals.

While the FCC and the DSC emphasize the excessive transfer of internal sovereignty to render the EU a federation, the Estonian Commission stresses more the external sovereignty aspect, ie that Estonia may not lose its independence by becoming a part to a federal state. The crucial point for the EU to become a federation is, according to the Commission, the potential adoption of the EU constitution.

It is doubtful however, whether the absolute dilemma between sovereign state and federation, from which the Courts as well as the Estonian Commission have proceeded, is justified in the general process of internationalization and particularly in the context of European integration. As the author will suggest in following subchapter, it would be more meaningful to drop this dual option in case of the EU, and characterize it in alternative terms, as a supranational organization ‘sui generis’, which is the position of the ECJ, or as ‘integrative federalism’, as does Lenaerts. The author also suggests along with Hobe to rethink the concept of state and the way of fulfillment of its original tasks, introducing eg ‘open statehood’ concept where the state continues to exist, although in modified form.. Rethinking traditional constitutional concepts may become inevitable if the

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82 FCC Maastricht Decision, supra, p 425.
83 These criteria are, according to Jacques, contained in the CC Décision du 22 mai 1985, see Jacques, J.-P. Commentaire de la décision du Conseil constitutionnel n 92-308 DC du 9 avril 1992. Traité sur l’Union européenne 1992 – RTDE, 1992, n 2, p 256. In the CC Maastricht decision of 9 april, the single currency and qualified majority voting as to visas were found to violate these conditions (see Favoreu, L. Le controle de constitutionnalité du traité de Maastricht et le developpement du “droit constitutionnel international”. – RGDIP, 1993, n 1, p 45), while common foreign and security policy, providing for possibility of qualified majority voting in cases of implementation, were implicitly approved (Jacque, 1992, supra, p 265). In France, the decisions are made as a priori control before accession to treaties, and in case of incompatibility, the Constitution is amended. In Maastricht II of 2 september 1992, n 92-312, the senators asked the CC how far can the constitutional amendments affecting essential conditions of exercise of sovereignty go, and what is the treshold from where the transfer of competences to the European construction changes the nature of State. CC did not answer on procedural grounds, finding that the question does not fall under Article 54 (Favoreu, supra, p 49).
social contract tasks, security and welfare, require for their effective fulfillment the further transfer of substantial powers and advancement of formal federalist structures in the EU.

1.2 Preserving sovereign statehood by evolving constitutional concepts – ‘open statehood’ and ‘supranational organization sui generis’

1.2.1 Alternatives to state-federation dichotomy

The Courts formula of the European Union as a confederation of allied States is based on a concept of sovereign statehood derived from public international law, while several authors question the appropriateness of the exclusive thinking in statal terms and doubt in the traditional models of a federal state to “[…]provide adequate political structures for a united Europe”.

An alternative approach is that used by the ECJ, the ‘supranational organization sui generis’, defined by R. Schuman as follows:

“Supranationality is placed in the middle between, on the one hand, international individualism respecting the integrity of national sovereignty and knowing only of such limitations of sovereignty that are of an occasional, contractual and revocable nature and, on the other hand, the federalism of states that are subordinated to a superstate endowed with territorial sovereignty. […]As opposed to confederationist concepts it has the advantage of clarity.”

Also, the concept of wider ‘integrative federalism’, proposed by K. Lenaerts may appear more useful in qualifying the European developments, particularly in the light of the EU elements discussed in previous subchapters. The integrative federalism “[…]refers to the constitutional order that governs the creation of a new core of sovereignty by previously independent component entities[…]”, with purpose to divide competences between nation states and central authority on the basis of efficiency, while the member states retain their autonomy and part of their sovereignty.

84 Hailbronner, supra, p 97.
86 Hailbronner, supra, p 112.
88 Lenaerts, supra, p 749 (references omitted).
89 Lenaerts, supra, p 748, (references omitted).
90 Lenaerts, supra, p 749, (references omitted).
1.2.2 Preserving statehood and independence by ‘open statehood’ concept

Beside rethinking the traditional state-federation dilemma, also reconsidering the traditional notion of sovereign statehood would allow to overcome the Constitutional Courts’ concern for loss of sovereign statehood by transfer of substantive competences, as well as the Estonian Expert Commission’s concern on losing independence by becoming part of a federal state.

The Courts as well as the Estonian Commission adhere tensely to the traditional public international law concept of sovereignty and statehood dating back to the era of creation of nation-states in the end of 19th and beginning of 20th century, the concept being embodied in the constitutional structures.91 This concept of sovereign statehood per se are attributed by the Courts an almost sanctified meaning, forgetting to analyze the possible transformation of values behind it. The state’s purpose was and is, according to the social contract theory, the provision of security, welfare and framework for nation’s solidarity. In the 20th century, however, fundamental processes of internationalization have occurred, inevitably transforming the means to achieve these goals. The common examples of the internationalization are economic interdependence and financial flows, globalized production patterns and accompanying trade, labor, consumer and tax consequences, transboundary environmental problems, protection of human rights, communication and media, sustainable development, demographic explosion, global warming, transfers of technology, depletion of the ozone layer, nuclear proliferation, worldwide migratory movements, etc.92 Let us give but few examples: when in the end of last and beginning of this century the autarchy was mainly considered the way to achieve economic prosperity, today, in the result of internationalization of economic and financial relations and economic interdependence, the international cooperation is mandatory for fulfilling the state’s task to ensure the well-being of individuals. The same has happened in the field of internationalization of criminality. As S. Hobe puts it, “[…]most of the tasks, aims and purposes of the State, like eg security, safety, defense and welfare are characterized by a specific international element; one can even go so far as to describe the openness of the State to international cooperation as a central aim of statehood”93.

Therefore, considering the internationalization developments, the means to achieve the above functions of the state, security, welfare, etc, have inevitably undergone a transformation and

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91 For critics of the German Maastricht decision as “… an out-dated expression of a nineteenth century concept of sovereignty” see references in Hailbronner, supra, p 96.
92 See on these and other internationalization developments eg Trachtman, supra, p 462; Hobe, 1997, supra, p 134ff; Carillo-Saledo, supra, p 51; Evers, supra, p 32; Tangney, supra, p 400.
necessitate states’ common efforts and international cooperation. It is widely acknowledged that the European Communities, by tying closely Germany and France, has achieved the maintenance of peace and security, and by the customs union, abolition of barriers, economic and monetary union, increased the economic prosperity. Therefore also the decision-making power in itself cannot be regarded as ultimate value as did the Courts and the Estonian Commission, but must be seen in the context of transformation of the means for fulfilling the state’s tasks, whereby part of the decision-making power requires to be exercised outside the state. Sovereignty, though particularly important for Eastern-European states who have exercised own decision-making power very short period after the Soviet occupation, proves therefore outdated for facing in reality the objectives of social contract. In an analogous context, speaking about the relationship of state and nation, I. Weiler says that it is “[…]most egregious when the State comes to be seen not as instrumental for individuals and society to realize their potentials but as an end in itself”95. Trachtman further deplores the resistance of states to confer power on transnational level based predominantly on the state governments bureaucratic tendency to “[…]arrogate and retain power, preventing power from being delegated to transnational institutions when it would otherwise be appropriate to do so” and challenges the state to be a “[…]focal point for loyalty that may relate less to the ability of the state to express human aspirations than to chauvinism.”96 He concludes that “[e]ach state government is mandated, politically if not legally, to optimize each value it addresses for its citizens alone. Cooperation among state governments would enhance aggregate welfare in many, although presumably not all, areas of governance.”97

The absoluteness and preeminence of sovereign state in the international law system has been questioned by most of authorities discussing the future of statehood, referring to the above phenomena of internationalization98. The more so, the context of European integration requires its

93 Hobe, 1997, supra, p 150.
94 See eg Trachtman, supra, p 464ff. For a different view, however, see Preuss, supra, p 279, according to whom it is the nation-state who is still the basic political organization able to provide security, freedom and welfare.
95 Weiler, supra, p 248.
96 Trachtman, supra, p 462.
97 Trachtman, supra, p 463.
98 Trachtman, supra, p 459 is on the position that state may endure but its “[…]primacy must be reevaluated and curtailed in accordance with a humanist social contractarian process. The state-centered model has constrained our ability to respond to changing social needs.” According to him, the Westphalian system can no longer effectively tackle with peace, human rights and sustainable development (p 46). Sur suggests that the internationalization puts under question the internal and international role of state, in legal as well as political plane, whereby the state becomes insufficient in norm production as well as in providing services, and is on its way to become an intermediate archaic instance relinquished by history, see Sur, S. L’Etat entre l’éclatement et la mondalisation. RBDI, 1997, n 1, Bruxelles, p 5-6. Hobe suggests a concept of ‘open statehood’, Hobe, 1997, supra, p 147ff. Tagney speaks about ‘new internationalism’, expressing in the loss of distinction between domestic and international, Tagney, supra, p 400. Rethinking of international law system attributing preeminence to the traditional sovereign states is also supported by
reconceptualization. Thus, eg Hobe discusses the fundamental change of statehood\textsuperscript{99} dating back to Jellinek’s state concept based on three Montevideo Convention criteria, population, territory and government. In the EU, the introduction of the Union citizenship obscures the first criterion\textsuperscript{100}, while the free movement and abolition of internal borders (particularly Art 227 EEC), as well as the EU’s exercise of jurisdiction on the Member States territory challenges the territory notion\textsuperscript{101}. The extensive decision-making power concentrated to the EU institutions (particularly broadened by the ECJ activity and implied powers doctrine) enroaches upon the exercise of government.\textsuperscript{102} In addition, the individual is growingly emancipating from state’s jurisdiction, considering in the EU context the direct appeal to the ECJ and petition rights to the European Ombudsman and to the European Parliament.\textsuperscript{103}

However, regardless of the growing irrelevance of original state criteria, Hobe argues for the preservation of statehood also in the end of 20\textsuperscript{th} and beginning of 21\textsuperscript{st} century\textsuperscript{104}, albeit in somewhat modified form, as ‘open statehood’\textsuperscript{105}. Thus, representing functionalist ideas, he suggests as fourth and most important criterion for the statehood the capability to exercise, on the basis of efficiency, some of state’s tasks in the international/supranational level\textsuperscript{106}. In this regard, the principle of subsidiarity should become the decisive criterion for future organization of states’ functions, whereby state would assign the performance of tasks, depending on their quantitative and qualitative dimension and the level of resolution efficiency (eg Hobe finds the economic, environmental, asylum, foreign and security policy questions to be more effective to tackle by international cooperation), to the international level.\textsuperscript{107} Similar position is shared by C. Carillo-Saledo, supra, p 51. See on the theme also Evers, supra, and Schreuer, C. The Waning of the Sovereign State: Towards a New Paradigm for International Law? – EJIL, 1993, n 4, p 447-471. \textsuperscript{99} See for analysis on the change of the statehood concept in Hobe, 1994, supra, p 128-134.

\textsuperscript{100} See Hobe, 1994, supra, p 130-132, 142. This position is also true in more general international plane, see eg Sur, supra, p 6, according to whom the internal homogeneity of state is challenged by regionalism, minorities’ problems, immigration, etc.

\textsuperscript{101} See Hobe, 1994, supra, p 130-132, 142. Similar position on the international plane is shared by Preuss, supra, p 279, and Sur, supra, p 6, speaking of blurring of the territory as traditional part of state concept.

\textsuperscript{102} Hobe, 1994, supra, p 130-132, 143.

\textsuperscript{103} Hobe, 1997, supra, p 146. The international protection of human rights makes the same argument true also on international plane.

\textsuperscript{104} Hobe deems the FCC to have fundamental misunderstanding when holding that the Europeanization of the national policies must inevitably entail the disappearance of the national State, Hobe, 1994, supra, p 128-129.

\textsuperscript{105} Hobe, 1997, supra, p 147ff, Hobe, 1994, p 127ff; the same term is used by Meessen and Zuleeg to describe the German Constitution Art 23 doctrine as breaking the traditional concept of nation-state, see Meessen, supra, p 524-525 and Zuleeg, M. The European Constitution under Constitutional Constraints: The German Scenario. ELR, 1997, Vol 22, p 22.

\textsuperscript{106} See Hobe, 1994, supra, p 128. On functional attitude to tasks share and subsidiarity see also Hobe, 1997, supra, p 148, 153. Trachtman, supra note, p 4698ff considers likewise the subsidiarity principle to reconcile the state and transnational society on functionalist basis.

\textsuperscript{107} Hobe, 1994, supra, p 128.
Schreuer, according to whom it is not important whether the state is replaced at one point with the European state: *there is no danger to the statehood long time to come, but instead the functionalist growing division and swift in level of fulfillment of the tasks.*  

C. Lenz objects also the speculations on the mystic point at which the EU would become a federation: according to him, the Member States continue to exist as countries even if written constitutions were replaced by the EU constitution: “*[t]heir legal structure is only one part of their identity. People, traditions, language and customs – all exist regardless of whether a written constitution is in place or not*.”

The supranational organization or integrative federalism would provide alternative to state-federation dilemma, while the ‘open statehood’ concept allows to retain independent statehood, although in modified terms, so as to fulfill on supranational level the tasks no longer effectively met by nation-states. These novel concepts could serve as guidelines for rethinking traditional constitutional theory, since, as stated above, the Constitutional Courts’ concern for constitutional prohibition for EU’s development into a federation in result of extensive delegation of powers, as well as the Estonian Expert Commission’s concern for losing independence in case of federation (see below), would endanger to foreclose future substantive integration of the EU merely for the sake of out-dated constitutional concepts.

1.3 Estonia – Expert Commission constitutional amendment proposals

The Estonian Expert Commission shows in its reasoning even more conservativity than the German Constitutional Court and the Danish Supreme Court, showing the utmost commitment to the 19th century thinking in state-non-state paradigm and takes every opportunity to provide strongly nation-state-centered interpretations. By declaring the Constitution not to allow the EU to develop further from confederation so as not to lose Estonia’s independence, the Commission fails to acknowledge the EU rather federalist reality (see Chapters 1.1.1-1.1.12) and in any case precludes further substantive EU integration.

After outlining the Commission’s positions, the author suggests to rethink this traditional constitutional theory – to use the above discussed alternative concepts such as supranational organization, through which an ‘open state’ fulfills at functionalist basis the tasks no longer

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effectively met by nation-states, allowing to overcome the state-federation dilemma and maintaining the independence and statehood.

1.3.1 Expert Commission’s explanation and amendment proposals

According to the Commission, the present formulation of the Constitution, proceeding from the ultimate historic value of state sovereignty, does not provide for cooperation in an organization of such an integration level as the EU and needs to be amended. This conclusion is predominantly based on Art 1 of the Constitution, which reads: “Estonia is an independent and sovereign democratic republic, wherein the supreme power of state is vested in the people. The independence and sovereignty of Estonia are timeless and inalienable”\textsuperscript{110}, as well as to the fact that differently from the other MS constitutions, there are no enabling provisions on delegation of sovereign powers to international organizations.

As the Article reveals, also in difference with the other European constitutions, the Estonian Constitution draws distinction between two notions, independence and sovereignty. The Commission explains the meaning of these terms by referring to Estonian legal authority A.-T. Kliimann, according to whom the independence means the prohibition to become part of a federal state, while sovereignty implies the non-subordination of the law-giving authority to foreign power.\textsuperscript{111} According to this definition, the Commission submits that the EU accession would not harm the national independence since the EU forms a confederation instead of a federation. The accession would affect however the sovereignty, since the law-making power in broad fields would be accorded to the Union bodies, whereby the will of these and other Member States would be binding upon Estonia even in case Estonia has voted against a decision.\textsuperscript{112} Since this would be incompatible with the Article, the Commission deems mandatory pertinent constitutional amendments.

Before submitting the potential amendment provisions, the Commission underlines repeatedly the ultimate value of sovereignty and statehood dating back to the political and historic context of world order during the birth of the state\textsuperscript{113} and emphasizes the non-federational nature of the EU

\textsuperscript{111} See Võimalik liitumine Euroopa Liiduga, supra, lk 3-5. This distinction seems to correspond to external and internal sovereignty, discussed in Chapter 1.1.1
\textsuperscript{112} Võimalik liitumine Euroopa Liiduga, supra, lk 4, 11.
\textsuperscript{113} See Võimalik liitumine Euroopa Liiduga, supra, lk 6.
whereby the relations between the Member States and the EU are determined under national constitutions instead of federal constitution\textsuperscript{114}.

Article 1 is submitted to be amended by adding 3. sub-paragraph: “Estonia may, on the basis of referendum, participate in the European Union, which is an association of states created by its Member States on the basis of the Treaties.”\textsuperscript{115} Further, the Chapter IX ‘Foreign Relations and Treaties’ is proposed to be amended by adding Article 123.1 to be formulated as follows: “Estonia may, under the principles of reciprocity and equality, delegate to the European Union bodies the power competences deriving from the Constitution, in order to exercise them jointly with the European Union Member States, to the extent necessary for the implementation of the Treaties the Union is based upon and on the condition that this does not violate the basic principles and functions of Estonian statehood, manifested in the Preamble of the Constitution.”\textsuperscript{116} The Commission has under consideration also a reference directly to the Amsterdam Treaty, which would make unnecessary the referendum clause in the submitted Article 3.1.

These amendment proposals, according to the Commission, enable them to be interpreted as exceptions from the leading principles of the Constitution so as not to cover international organizations in general, but exclusively the EU, the nature of which must furthermore conform to the criteria established in the amendment provision (\textit{ie} to remain ‘association of states’, which in the Commission’s explanation means confederation).\textsuperscript{117} The exceptional nature of the provisions is further sought to be underlined by the fact that the consequences of the EU accession are not reflected in the other paragraphs of the Constitution, \textit{eg} Art 59 assigning the legislative power to the \textit{Riigikogu}.\textsuperscript{118} From legal technique perspective, the concentration of the EU provisions to Chapter IX ‘Foreign Relations and Treaties’ should, according to the Commission, furthermore demonstrate the EU-relations to be international law acts not harming the independent statehood.\textsuperscript{119} The Commission explains that this legal technique measure is designed to avoid overt contradiction with Article 1 two first subparagraphs: the membership allows to limit Estonia’s sovereignty, but meanwhile retains the independence of the State.\textsuperscript{120}

\textsuperscript{114} See \textit{eg} Võimalik liitumine Euroopa Liiduga, \textit{supra}, lk 6.
\textsuperscript{115} Võimalik liitumine Euroopa Liiduga, \textit{supra}, lk 14, [Author’s translation].
\textsuperscript{116} Võimalik liitumine Euroopa Liiduga, \textit{supra}, lk 16, [Author’s translation].
\textsuperscript{117} Võimalik liitumine Euroopa Liiduga, \textit{supra}, lk 13.
\textsuperscript{118} Võimalik liitumine Euroopa Liiduga, \textit{supra}, lk 13.
\textsuperscript{119} Võimalik liitumine Euroopa Liiduga, \textit{supra}, lk 14.
\textsuperscript{120} Võimalik liitumine Euroopa Liiduga, \textit{supra}, lk 15.
As the amendment provision as well as the accompanying analysis in the Report shows, the Commission draws difference between the delegation and transfer of sovereignty, stressing that ‘delegation’ implies the development of the EU on the basis of national constitutions allowing the delegation of competences to the EU bodies. Delegation, according to the Commission, differently from transfer, allows the sovereign state to withdraw the competences, using international legal mechanisms: the state similarly to an individual could not bind itself eternally. The Commission proceeds in the right to secess from the inalienable right of national self-determination\footnote{Võimalik liitumine Euroopa Liiduga, supra, lk 16.} (see critique in chapter 1.1.6).

\subsection*{1.3.2 Alternative suggestions in the light of evolving constitutional concepts}

The Commission’s interpretation and amendment proposals, as repeatedly stated, proceed from the ultimate value of sovereign statehood in its traditional form, declaring that the EU forms but a confederation and that the Constitution prohibits Estonia’s participation in the EU in case it develops into a federation, since this would end independent statehood.

One may ask if the pouvoir constituant’s will was indeed sovereign statehood as an end, or rather as a mean to achieve the values which the state is to provide – welfare, security, framework for national solidarity. The Preamble of the Constitution sets forth as one of the purposes of the Constitution to “[…]protect internal and external peace[…]” and to be “[…]a pledge to present and future generations for their social progress and welfare[…]”\footnote{Preamble, Constitution of the Republic of Estonia, supra.}. Considering that the processes of internationalization have resulted in the state being able to perform these tasks only through international organization, the will of pouvoir constituant should be interpreted in this light. It is undisputable that the security, particularly ‘external peace’ of the Estonian state requires the military guarantees of the NATO as well as soft security provided by the EU, while the ‘social progress and welfare’ presumes the participation in the EU economic and social integration. Therefore, the Preamble may provide basis for changing the interpretation of the Kliimann-time context independence notion by an ‘open statehood’-type interpretation more favorable to integration.

Furthermore, as the analysis of the EU elements (constitutional charter, directly applicable supreme legal order, uncertainty of secession right, citizenship, etc, see Chapter 1.1.1-1.1.12) shows, its legal
nature is already now far more than a confederation, resembling to a large extent a federation, which moreover questions the appropriateness of the thinking in Kliimann’s independent state categories submitted four decades ago. If the fulfillment of the social contract tasks will require the adoption of the European Constitution and enhancement of other federalist features, which will obviously take place sooner or later, the Kliimann/Commission approach would foreclose Estonia’s participation in this organization, merely for the sake of the preservance of the out-dated notion of State. It is doubtable whether this is indeed the will of the informed reasonable pouvoir constituant. The requirement of inalienability and timelessness of the independence can, on the contrary, be reconciled by interpreting these concepts in the light of the above Preamble provision so as adhering to modified sovereign state concepts, where the State continues to exist in form of ‘open statehood’, participating in the supranational organization ‘sui generis’ so as to fulfill on different levels its original tasks, overcoming by both concepts the state-federation dilemma. The Kliimann/Commission’s approach furthermore provides but a formal-juridical independence, while the material political conditions strongly challenge it.

Alternatively, if the interpretation of independence and statehood, allowing for open statehood concept, is not acceptable, the author suggests, in order to overcome the problem of the harm to independence and sovereignty, to amend Art 1 so as to enable the delegation of powers to international sphere for fulfilling the state’s purposes. Furthermore, this amendment would also be appropriate if the former interpretation could be accepted though, on two reasons. Firstly, this would formalize the present situation, where Estonia is a member of numerous international organizations, which inevitably enroach to some extent to the sovereign decision-making. Secondly, the legal technique requirements call for concentrating the EU stipulations to one norm so as to consolidate provisions covering the same subject (the provisions concerning parliamentary participation are also proposed to be placed to Art 123.1 second sentence), as well as to avoid redundancies, while the proposed amendment to Art 1.3, speaking of ‘participation’ in the EU, overlaps in essence with the ‘delegation of competence’ to the EU bodies proposed to the Art 123.1

The expression ‘an association of states created by its Member States on the basis of the Treaties’ may be dropped, considering that it is based on the above discussed out-dated notion of state and confederation, as reveals the Commission’s explanation, does not correspond to the rather federalist reality of the EU, and would, by foreclosing Estonia’s participation in further integration, hinder rather than assist the security and welfare tasks set by the Preamble of the Constitution. The expression ‘on the condition that this does not violate the basic principles and functions of Estonian
statehood manifested in the Preamble of the Constitution’, proposed to the Art 123.1, refers, in the Commission’s explanation, again to the Kliimann concept of independence and statehood and its relevance should, on the basis of the previous discussions, be seriously reconsidered. This part of the provision should instead be replaced by the statement of the purposes of the European integration, the ‘economic and social cohesion’ as declares eg the Portugal Constitution\textsuperscript{123}, so as to bring the EU closer to individuals, instead of drawing in the Constitution implicit parallels between the two Unions.

Art 1 should thus be replaced by general international cooperation clause, adding expression ‘for purposes of peace and welfare of the nation’, so as also to minimize the potential connotations entailed by the Soviet Union among the population. This provision would cover also the EU integration, which could then be further specified by Art 123.1, in the wording submitted by the Commission, with substituting the expression ‘and on the condition that this does not violate the basic principles and functions of Estonian statehood manifested in the Preamble of the Constitution’ with expression ‘with purpose to achieve economic and social cohesion’.

\textsuperscript{123} “Portugal may, on under the conditions of reciprocity, respect of principle of subsidiarity and with purpose of the realization of economic and social cohesion, enter into agreements for common exercise of powers necessary for the construction of the European Union.” Constitutional Law No 1/92 25 Nov, cited in Moura Ramos, R.M., Portugal. - L’intégration du droit international …, supra, p 482 (Author’s translation).
2. POPULAR SOVEREIGNTY AND EUROPEAN UNION

Having challenged in Chapter 1 the traditional concept of national sovereignty and statehood, the present Chapter purports to provoke rethinking the Estonian Expert Commission’s and the Constitutional Courts’ conviction of nation being the only source of legitimacy and thereby also of exercise of popular sovereignty. If possibility of divisible legitimacy based on divisible identity, national and European, the latter being based on shared European cultural and political values, would be acknowledged, there is no obstacles to overcome the EU democracy deficit by empowering the European Parliament with competences of normal representative bodies (Chapter 2.3.), exercising thus popular sovereignty in dual levels. It will then be argued that instead of impossibility of the European Parliament’s legitimacy, which is the position of the Expert Commission and the Constitutional Courts, it is rather the Member States’ aspiration to retain their internal sovereignty by retaining the power to the Council and formal power to the national parliaments instead of empowering the European Parliament; Chapter 2.4 suggests therefore that exercise of national sovereignty on the expense of popular sovereignty is not justified. In this light, the Estonian Expert Commission’s positions will be discussed.

2.1 Popular sovereignty and legitimacy

While the Expert Commission and the Constitutional Courts are on the position that the nation can be the only source of legitimacy of power and exercise of popular sovereignty, this sub-chapter outlines the concepts and interrelationship of popular sovereignty and legitimacy in order to show that the elements of legitimacy allow, in fact, the exercise of popular sovereignty in the supranational level alongside with that in the national plane.

Popular sovereignty implies the principle that the government must be authorized by the people, ultimate authority belongs to people.\textsuperscript{124} This principle is expressed explicitly in many constitutions, including the Estonian Constitution. The concept of popular sovereignty leaves however open in what form the popular sovereignty must be exercised\textsuperscript{125}, therefore the principle of legitimacy serves as concretization.

\textsuperscript{125} Merkl, supra, p 980.
Legitimacy authorizes governments to act on behalf of a certain body of citizens\textsuperscript{126}, but it is also connected to being based on law, reason and values\textsuperscript{127}. Concept of legitimacy means the “[...]validation of rules and rule-making[...][]”, comprising, from one hand the legal entitlement, and on the other, the acceptance of the rules by citizens, their sense of obligation to an order based on moral obligation and consent.\textsuperscript{128} Legitimacy involves also authorities’ commitment to “[...]values that are part of the particular national identity, \textit{ie of the general political culture of the people} [emphasis added]”\textsuperscript{129} Obradovic describes the interrelationship of popular sovereignty and legitimacy as follows: “[...]legitimacy is a concept founded on the premises of the doctrine of popular sovereignty, that the people may be the only legitimate source of power since they represent ultimate authority.”\textsuperscript{130}

The following subchapters will demonstrate that, differently from the Estonian Expert Commission and the Constitutional Courts’ position, there exist \textbf{European values and common political culture}, which would provide basis for European identity and European Parliament legitimacy and form thereby basis for exercise of popular sovereignty partly through the European Union.

\subsection*{2.2 EU democracy deficit problem obscuring popular sovereignty}

The FCC as well as the Estonian Expert Commission base the legitimacy of the EU decision-making process to the national parliaments and seek to retain internal sovereignty by keeping the decision-making process in the EU predominantly to the Council. Both grounds have constrained the empowerment of the European Parliament, resulting in the democracy deficit problem, which in turn weakens considerably the popular sovereignty, people’s participation in the exercise of power.

The substance of the EU democracy deficit problem, called the Achilles’ heel of the EU\textsuperscript{131}, is the following. The principal decision-making power belongs to the Council of Ministers, consisting of the Government representatives of the Member States. Further, large fields of implementing legislation are delegated to the Commission, the executive body. The European Parliament, differently from traditional national parliaments, disposes but secondary powers, although its

\begin{flushleft}
\textsuperscript{126} Saward, \textit{supra}, p 536. \\
\textsuperscript{127} Colas, D. \textit{Légittimité}. – Dictionnaire constitutionnel, \textit{supra}, p 565. \\
\textsuperscript{128} Obradovic, D. Policy Legitimacy and the European Union. – JCMS, 1996, Vol 34, p 194, references omitted. \\
\textsuperscript{129} Obradovic, \textit{supra}, p 195. \\
\textsuperscript{130} Obradovic, \textit{supra}, p 195. \\
\end{flushleft}
importance has been gradually enlarged. Its input takes place by consultation, codecision and cooperation procedures depending on the Treaty field, veto-right on budget, nomination of the Commission and parliamentary debates, altogether though giving the EP electorate a marginal role in the decision-making process. Meanwhile, as stated above, already before the TEU, nearly 80% of legislation in commercial law field and 50% of a Member States’ overall legislation have been prompted by Community law. Democracy deficit further derives from the fact that the national governments are not only the decision makers (legislative power) but also principal implementors (executive power). Thus, the institutional triangle is out of balance, since extensive legislative competences conferred on the Union are conferred to the Council and not to the EP. In result of this, the link between the individual and his/her vote in the political process has became obscured and the democratic control on decision-making weakened.

The violation of democracy principle was likewise one of the central issues brought by the applicants in both the FCC and DSC cases. In Maastricht, the applicants claimed that the transfer of competences fundamental to state entity violates “[…]the German peoples’ right of representation by their elective representatives,” while in Denmark, the extensive delegation of sovereignty was alleged to be inconsistent with the democratic form of government. In other words, the political right to vote has lost its fundamental democratic content and remained of mainly formal nature, the elections having lost their substantial function. The Courts, however, do not share this view, arguing for sufficiency of ‘minimum legitimacy’, the substance of which as well as its critique is discussed in the following subchapter.

2.3 European identity as legitimate basis for exercising popular sovereignty on EU level

This subchapter contests the Constitutional Courts and the Estonian Expert Committee attitude to the status quo concerning the democracy deficit as inevitable, as well as their satisfaction with formal legitimacy based on national democratic processes, suggesting along with Weiler, that there is a sense of shared cultural and political values in Europe, on which the European legitimacy and exercise of popular sovereignty through fully empowered European Parliament can be based.

131 Evers, supra, p 41.
132 See more on democracy deficit problem eg Degryse, supra, p 230-231.
133 Wegen, Kuner, supra, p 390.
According to the FCC and the DSC, on supranational level the democracy can not be organized on the same way as on national level, the minimum legitimacy being sufficient for the former. The FCC holds that the minimum legitimacy requirement is met by the national democratic process, whereby the democratically appointed national governments are responsible for their EU politics vis-à-vis national parliaments. The parliaments’ further participation in the EU decision-making process is secured by their consent in ratifying the Treaties and their amendments as well as in determining with sufficient clarity and specificity the concrete powers delegated to the EU, while retaining themselves powers of substantial importance. Excessive functions and powers of the EU would weaken the democracy considerably and would no longer legitimize the sovereign powers of the Union. The parliaments have also right to be informed of the Governments’ activities in the EU and to cooperation with them. Finally, the FCC attributes a supporting role also to the European Parliament. The FCC reasons the preeminence of national chain of legitimation, instead of raising the powers of the EP, by the absence of European nation and European political process, which renders impossible legitimate representation by European representative body. Even more conservative view on these questions is held by the Estonian Expert Commission, outlined and discussed in Chapter 2.5.

The question arises whether the ‘minimum legitimacy’, which in actual circumstances means material democracy deficit, is inevitable, ie whether normal democratic process exercised by fully-powered European parliament is indeed foreclosed by the alleged absence of European nation.

An excellent critique of the FCC’s No Demos approach is submitted by J. Weiler. Discussing the legitimation problems outlined in the previous Chapter, Weiler strongly challenges the FCC’s position on the sufficiency of democratization taking place predominantly at national level, considering moreover the vast array of powers already transferred to the Union as well as the illusoriness of national parliamentary control given the “[...]volume, complexity and timing of the Community decisional process[...]” and the ample use of qualified majority voting. The Court’s
reasoning provides formal legitimacy only (also and particularly in regard of sufficiency of successive parliamentary approvals to the Treaties), maintaining and furthermore by No Demos thesis securing for future power transfers the growing material democratic deficiency,\textsuperscript{143} showing in Weiler’s view the ostrich syndrome by sticking one’s head in the sand instead of solving the problem\textsuperscript{144}. Instead of taking advantage to rethink the issues in the Community context, the FCC sticks to “[…]old ideas of an ethno-culturally homogeneous \textit{Volk} and the unholy Trinity of \textit{Volk-Staat-Staatangehöriger} as the exclusive basis for democratic authority and legitimate rule-making”.\textsuperscript{145} According to Weiler, European demos must not be understood exclusively in “organic cultural homogeneous terms”\textsuperscript{146}, regarded as identic with \textit{Volk}\textsuperscript{147}. Instead, a different model should be used for Europe: demos as \textbf{membership}, expressing in \textbf{commitment to shared values transcending nationalistic ethno-cultural differences}.\textsuperscript{148}

Analogous concept may be distinguished in D. Obradovic analysis, although she considers these elements to be insufficient in order to form the myth of European identity so as to provide basis for legitimacy.\textsuperscript{149} These transcending ideas providing basis for European identity, may, in Obradovic discussion, be expressed in determinants like the principles of representative democracy, rule of law, social justice and respect for human rights\textsuperscript{150} as well as in common market, based on a customs union, established Community institutions’ common policies, and machinery of co-operation\textsuperscript{151}. Further, Greek-humanist, Roman-legal and Christian-spiritual values, tradition of Renaissance and Enlightenment, resulting in secular ideals of rationalism and humanitarianism, civic and political democratic culture, welfare society and political stability, romanticism and classicism and modern science and the technological breakthroughs of the industrial revolution may provide basis for common European identity.\textsuperscript{152}

While Obradovic concludes with cautious idea of possibility of divisible identities, \textit{ie} national and European, Weiler strongly adheres to the idea of multiple identities with “different level of

\textsuperscript{143} Weiler, supra, p 236, 238.
\textsuperscript{144} Weiler, supra, p 236.
\textsuperscript{145} Weiler, supra, p 223. Similarly, Van Gerven, supra, p 82, 84 criticizes the FCC’s approach a la “…no constitution without state, and no state without state people” as incompatible with the examples of contemporary modern multicultural states.
\textsuperscript{146} Weiler, supra, p 240, see also p 251.
\textsuperscript{147} Weiler, supra, p 252.
\textsuperscript{148} Weiler, supra, p 252.
\textsuperscript{149} Obradovic, 1996, supra, p 196
\textsuperscript{150} Copenhagen Declaration on the European Identity (Copenhagen Summit Conference (1973) Bulletin of the European Communities, No 12, p 6-122, at 118-119, cited in Obradovic, 1996, supra, p 210-211.
\textsuperscript{151} Obradovic, 1996, supra, p 211.
\textsuperscript{152} See discussion in Obradovic, 1996, supra, p 212-214 (references omitted).
the organic national-cultural identity belonging to the nation state, and the shared transcending political and cultural values to European identity. According to Weiler, the No Demos thesis “[…]misreads the European anthropological map. That, in fact, there is a European sense of social cohesion, shared identity and collective self which, in turn, results in (and deserves) loyalty and which bestows thus potential authority and democratic legitimacy on European institutions.”

There is “[…]European people on the terms stipulated by the No Demos thesis and […] the only problem of democracy in the Community relates to the deficient process, such as the weakness of the European Parliament, but not the deep structural absence of a demos.” Furthermore, the cases of Switzerland and Belgium show that the absence of common European language can not form a *conditio sine qua non* for the existence of demos. Weiler sees no danger for double citizenship, national and European, to compromise national authentic culture, since the national identities are not so weak.

Thus, the terms used by the BDG as basis for stating the absence of the European identity, which in turn precludes the solving of material democracy deficit problem so as to enhance the legitimation by the European Parliament, may, in fact, provide sufficient basis for European identity beside the national ethno-cultural identity. This, in turn, provides basis for exercise of popular sovereignty *via* the European Parliament, so as to strengthen parallel chain of legitimation, adding to the national democratic process also the legitimacy by the European structures. As states the Encyclopedia of Democracy, the traditional theory of democracy may indeed have to be reconceptualized so as to correspond with the political realities of the 21st century, where the appropriate groups to form basis for democracy may be locality, region, world and nation-state all together, “[…]based on the idea of overlapping jurisdictions, powers, and responsibilities”.

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154 Weiler, *supra*, p 239.
155 Weiler, *supra*, p 239.
156 Weiler, *supra*, p 255.
157 Saward, *supra*, p 537.
2.4 National sovereignty as unjustified basis for not empowering European Parliament

Beside the *No Demos* attitude, another reason behind the marginal powers of European Parliament and thereby of the democracy deficit problem has traditionally been the Member States’ concern of giving up their internal sovereignty. In other words, the European Parliament working on the model of the national parliaments would signify the last and decisive step for the creation of the European federal state. It would also remove the decision-making from the Council as an intergovernmental body, to the European Parliament, which as a supranational body represents European interests, enroaching thus further upon the Member States’ sovereignty. Thus, the enhancement of democracy would inversely diminish the Member States’ sovereignty.

As discussed in the previous Chapter, the Constitutional Courts object any further transfer of substantial competences to the EU, tracing the principal source of legitimacy back to the delegation by the democratically elected national parliaments. Considering this, the FCC’s appeal to extend principles of democracy in step with the EU’s integration and to retain a living democracy in the Member States\(^\text{158}\) sounds somewhat contradictory. “[…]I[t has been argued that the Union is brought into a very difficult situation if on the one side the democratic deficit is deplored while on the other side the way to further attribution of competences to the Union is blocked”\(^\text{159}\). Likewise, Hobe draws attention to the contradicting nature of the FCC’s general argumentation with its appeal to enhance the EP’s powers, since “[…]more of the competences than before will be transferred to the European Parliament and not completed by the Council and will therefore no longer be more or less subject to the sovereign discretion of the national State”\(^\text{160}\). I.Ward has eloquently discussed how the aspiration to preserve nation-state is the actual reason behind the withhold of the powers of the European bodies.\(^\text{161}\)

Somewhat different attitude is held by the French *Conseil Constitutionnel*. The direct elections of the EP nor the other Member States’ nationals’ active and passive right to participate the EP elections’ in France was found to violate the ‘State’s institutional structure’ which, according to the CC’s jurisprudence, forms ‘essential condition of the national sovereignty’, since the EP does not belong

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\(^{158}\) FCC *Maastricht* Decision, *supra*, p 444

\(^{159}\) Hailbronner, *supra*, p 108 (references omitted).

\(^{160}\) Hobe, 1994, *supra*, p 123.

to the institutional structure of France but to an independent legal order. The CC’s attitude comes close, however, to the FCC’s since, according to the CC, the empowering of the EP to the extent that it would have general competence would endanger the exercise of national sovereignty.

The author considers the priority of the national sovereignty on the expense of the popular sovereignty not to be justified. Regardless of the Constitutional Courts’ excellent formal-juridical argumentation on the retained sovereignty, in substance, it is evident that much of the traditional state functions are exercised by the EU institutions. This has happened since the traditional end-of-19th-century state is no longer able to fulfill the tasks the interdependent and internationalized life expects. Therefore, to sacrifice continuously the individual’s proper democratic participation for the dated concept of state sovereignty can not be supported.

2.5 Estonian Expert Commission’s proposals in light of potential EU level legitimacy

The Estonian Expert Commission takes even more conservative view on the forms of exercising popular sovereignty, stating that only the Estonian nation can be the legitimate source of power exercised in Estonia, negating, differently from the Constitutional Courts, any legitimizing role of the EP, and basing the legitimacy exclusively to national democratic process and referendum. As discussed in above subchapters, this view results in formal legitimacy and material democratic deficiency, and furthermore it precludes resolving the problem via basing part of the exercise of popular sovereignty to the European level.

The Commission proceeds from the Constitution Art 1, which sets forth that Estonia is a democratic republic where the highest authority is vested in people. It reaches the interpretation that this clause does not allow any intergovernmental or other governmental organ authorized by a foreign nation to possess higher power than the Estonian Riigikogu, since the former would then exercise higher power not only in the intergovernmental level but also in Estonia, which is prohibited by the Constitution. Further, according to the Commission, the ‘highest state authority’ is identical to the sovereign, whereby the Estonian people as the source of sovereignty would not then be bound in legal sense. Moreover, under the right of national self-determination, it is the Estonian nation to

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162 CC decision n 76-71 of 29-30 December 1976 and CC decision n 92-308 DC of 9 April 1992 (Maastricht I), RJC p 497, cited and discussed in in Dubois, supra, p 221.
163 Same decision, cited in Dubois, supra note, p 221.
164 Võimalik liitumine Euroopa Liiduga, supra, lk 5.
165 Võimalik liitumine Euroopa Liiduga, supra, lk 5.
whom belongs the *pouvoir constituant* so as to adopt the constitution as the act of the highest legal force determining the legal arrangement of the functioning of the state; the Estonian nation is the only source of the legitimacy and therefore “[…]the European Parliament as representative body of nation can not possess higher legitimacy than the Estonian legislator”\(^{166}\). The Commission further states that “[…]in the European Union, there is no parliament elected by people exercising the legislative power as the highest state authority body”.\(^{167}\)

In order to overcome the incompatibility of the accession with the requirement of popular sovereignty, the Commission suggests two devices: (a) *Riigikogu’s* maximum involvement to the EU decision-making process by right to information, and (b) referendum. As to referendum, since presently Art 106 prohibits referendums on treaties, the referendum clause on the EU would be embodied in the proposed Art 1.3 (see Chapter 1.1.3) so as to legitimize the delegation of powers under the European integration not covered by Art 106 which addresses the traditional international treaties.\(^{168}\) The referendum clause, according to the Commission, is required so as to secure the control of the people, as the source of the highest power, over the *Riigikogu’s* delegation of powers to supranational bodies.\(^{169}\) Further, this provision subjects any future expansion of the EU powers at the expense of those of national bodies to the prior referendum.\(^{170}\) As to the second device, in order to secure the *Riigikogu’s* participation in the EU decision-making process, the IX Chapter ‘Foreign Relations and Treaties’ is proposed to be amended by adding Article 123.1, the second sentence of which would read as follows: “The Government of the Republic informs the *Riigikogu* the earliest and widest possible on the issues concerning the European Union and considers in its contribution for the European Union legislation the positions of the *Riigikogu*. The precise procedure will be regulated by law in case of Estonian Republic’s membership.”\(^{171}\) The Commission suggests to retain unmodified Art 59 on the legislative power belonging to the *Riigikogu*, since this Article could be read in accordance with the amendments formulated in such a way as to enable to interpret them as exceptions from the leading principles of the Constitution.\(^{172}\)

Both the devices suggested by the Commission remain fundamentally insufficient for securing popular sovereignty. As discussed above, the national parliaments’ participation in the EU decision-

\(^{166}\) Võimalik liitumine Euroopa Liiduga, *supra*, lk 15 [Author’s translation].

\(^{167}\) Võimalik liitumine Euroopa Liiduga, *supra*, lk 8 [Author’s translation].

\(^{168}\) Võimalik liitumine Euroopa Liiduga, *supra*, lk 15.

\(^{169}\) Võimalik liitumine Euroopa Liiduga, *supra*, lk 15.

\(^{170}\) Võimalik liitumine Euroopa Liiduga, *supra*, lk 15.

\(^{171}\) Võimalik liitumine Euroopa Liiduga, *supra*, lk 15.

making power by right to be informed remains largely illusory, considering the complexity of the EU decision-making process, the vast range of powers concentrated to the EU and extensive majority voting procedure. As to the referendum, it legitimates first of all the transfer of powers as such and remains furthermore but a single act of legitimation.

In order to alleviate the serious impairment of the EU democracy deficit to the exercise of popular sovereignty, is necessary to consider whether part of the legitimacy could indeed not be based to the European level, on the basis of divisible identity, national and European. Since legitimacy is also to a large extent connected to cultural and historic values as well as shared political culture, and since Estonians have always declared their belongingness and commitment to the European cultural and political values, there should be no obstacles therefore to accept legitimacy based partially on the European identity. Further, in the light of the above described phenomena of internationalization, and also considering that the form of legitimacy is not foredetermined and may be based on different overlapping groups,\footnote{Saward, supra, p 537.} it may be more appropriate to interpret that Article 1 does not establish the institutional structure of democracy, but the principle of people as the sovereign, therefore the democracy can be exercised, beside the national parliament, also by other bodies (in this case, the European Parliament) by means of delegation.\footnote{The original idea belongs to Meessen, supra. p 519, speaking of German Constitution’s pertinent provision (Art 79).} Regardless of the critique of the previous subchapters, even the German Constitutional Court attributed to the European Parliament some legitimacy, although of supportive nature, beside that of the national structures. The Commission’s position on the Estonian nation as the exclusive source of legitimacy as well as its position that development to a federation is not allowed by the Constitution, further endangers to result in obstructing the democratization of the EU, since there is no adequate alternatives to overcome the democracy deficit problem than to empower the European Parliament.

As to Art 59, the amendments allow indeed to give to the Article a wide interpretation so as to include the delegated competences,\footnote{Supra, p 519, supra, p 519, speaking of German Constitution’s pertinent provision (Art 79).} however, if to acknowledge the possibility of multi-level legitimacy based on divisible identity, national and European, there should be no obstacles to add to the provision a clause ‘[…]and European bodies within the delegated competences’. This would formalize the material situation as well as contribute to the general awareness, capable in turn to enhance legitimacy, which is growingly necessitated by the expanding material democracy deficit entailed by the broadening of the EU competences.
3. SOVEREIGNTY AND SUPRANATIONAL LEGAL ORDER

Since the exercise of sovereignty finds its expression by the norm-creating activity and sovereignty is therefore, in essence, largely identical to the sovereign legal order,\footnote{See eg Colas, supra, p 412-413.} this chapter will discuss how the Community supranational legal order with its own sources, supremacy and direct applicability, have been adapted in the other Member States as well as takes a view on the Estonian Expert Commission proposals.

The emphasis, however, will be given to the Member States’ as well as the Estonian Expert Commission’s attitude on the supremacy of their constitutions and retained ultimate right of constitutional review, which they derive from state sovereignty, whereas the paper will argue that these positions are contrary to European law as well as to the provisions of the constitution, delegating sovereign competences. The paper suggests though, that as ultimate safeguard for sovereignty, the Member States may exercise indirect control as ultima ratio jointly in an intergovernmental conference, if the Community institutions’ excess of powers, conferred by the Treaties, has not been properly resolved by the ECJ.

3.1. Reception of supranational legal order

As it is well established since Van Gend en Loos and Costa v ENEL, the Community law forms an independent sui generis legal order with its own sources, direct applicability and supremacy.

As a rule, the national legal orders of the Member States acknowledge the difference pointed out by the ECJ between the traditional international law or international cooperation and the European Union, referring to the level of integration, sovereignty transfer, supremacy and direct applicability. Germany, France, Portugal have introduced independent constitutional provisions on the EU, the other states like Greece, Luxembourg, Italy, Netherlands, Belgium, Spain, not possessing the separate clause, adopt the Community legal order by the delegation of powers to international organizations. As discussed in Chapter 1.3.1, the different approach towards the international law and European integration is also adhered to by the Estonian Expert Commission, proposing special

amendment in this regard, adopting the *acquis communautaire* by delegation of ‘power competences deriving from the Constitution’.

As a rule, the further national incorporation activity and publication in the Member States’ official publications are not allowed in case of Community law, the publication takes place in the Official Journal in pertinent language or by notification (Article 191 EC). In the Estonian Constitution, Art 3 sets forth that ‘only published laws have obligatory force’. However, this article does not establish the only source of publication as the *Riigi Teataja*, but prescribes specification by law. Therefore, the problem may be resolved without amendment by giving the interpretation that the amendment on delegation of powers covers also the mechanisms for publication contained in the Rome Treaty. This is also the interpretation accepted in other Member States. However, following the example of Spain, it is advisable, on practical reasons, to publish an Estonian version of the OJ on the *acquis communautaire*, presenting by the specific domains the acts in force in the EU before the accession.

### 3.2. Novel structure of legal sources, direct applicability and supremacy

The EU membership modifies significantly the range of legal sources and their hierarchy. Beside the Treaties disposing the nature of ‘Constitutional Charter’ (see discussion in Chapter 1), the secondary law issued by the Community institutions (Article 189 enumerates these as regulations, directives, decisions and recommendations) as well as the general principles of law and the authoritative interpretations issued by the ECJ case-law become the sources of law in the domestic legal system.

Regulations are to be directly applied as such, without implementing legislation, although they may need additional domestic implementing acts so as to create, for example, pertinent administrative organization. Directives are to be incorporated by domestic legislation so as to achieve the

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178 However, Italy practices the publication in an analogue of the Official Gazette so as to ensure its accessibility equally to Italian legislation, but this does not influence the legal force of the EU acts. *Treves, T., Frigessi di Rattalma, M.*, Italie. – L’intégration du droit international…, supra, p 375, 397
179 *Eg in Spain, see Bermejo Garcia, R., Bou Franch, V., Valdes Diaz, C.*, etc, Espagne, L’intégration du droit international… , supra, p 225-226.
180 See *Bermejo Garcia, Bou Franch, Valdes Diaz*, supra, p 226.
prescribed result. These acts must have the same domestic rank as the national provisions of the same domain, need parliamentary involvement, and must ensure the rights to individuals with sufficient level precision. The status of general principles of law and the ECJ’s legal precedents will bring a major change to the Estonian legal system, since presently they are but a secondary source of law, while in the Community law they have a higher rank in regard of the derived law; they are capable of invalidating incompatible Community or national measures and are directly applicable in the courts.

Direct applicability and supremacy, Community constitutional principles introduced by the ECJ, are well established in the Member States jurisprudence. The former requires the Treaties, regulations and other directly applicable provisions to be applied as Community law as such and not by transformation or reception into domestic law, while the provisions can be relied on by individuals vis-à-vis national courts and authorities, the latter attributes Community norms priority in case of conflict with national provisions. In the Member States, however, both the principles are predominantly grounded on the authorization of their own legal order, either on competences transfer clause of constitution (eg Netherlands, France) or Accession Acts in case of later members (eg Denmark, Finland), rather than to specific nature of the European law (Portugal, Spain).

According to the Estonian Legal Expert Commission, the introduction of the direct applicability of Community law to the provisions of the Constitution is under consideration, to serve the purposes of clarity so as to distinguish the EU from other international organizations, although the Commission remarks that the direct applicability would be already covered by the delegation of

\[183\] Harnhoff, F. Denmark. – L’intégration du droit international…, supra, p 172-173.
\[184\] They are relevant in the process of creation of legal norms as well as in interpretation and filling legal gaps. See eg Merusk, K. Koolmeister, I. Haldusõigus [Administrative Law], Tartu: Õigusteabe AS Juura, 1995, p 47.
\[186\] Case 26/62, supra, p 1; Case 6/64, supra, p 585.
\[188\] Abraham, R. L’ordre juridique communautaire: Un ordre constitutionnel? Le point de vue français, - Vers une nouvelle Constitution pour l’Union Européenne…, supra, p 54-56.
\[189\] Denmark Act on Accession to the European Communities (No 447 11. Oct. 1972) provides that the Community law is directly applicable in Denmark to the extent it is directly applicable in the other Member States, in accordance with the Community legal system, cited in Harnhoff, supra, p 168.
\[190\] In Finland, in blanco act incorporating the Accession Treaty declares the internal legal force of the EC Treaties, which also covers direct applicability. See Rosas, A. Finland’s Accession to the European Union: Constitutional Aspects. – EPL, 1995, n 2, p 167.
\[191\] Portugal and Spain base the principles on supranational nature of the Community law, see respectively Moura Ramos, supra, p 487, Bermejo Garcia, Bou Franch, Valdes Diaz, supra, p 226.
powers. The proposed formulation would read as follows: “In case of Estonian Republic’s participation in the European Union, the norm-creating acts of this Union will be applied”. This proposal can be welcomed since the constitutional provision would serve for general awareness among the citizens, lawyers and judges, of the rights provided by the EC law and contribute thus to its more efficient use and implementation. As the present experience with international treaties shows, the absence of clause on direct applicability of treaties in the Estonian Constitution has resulted in the situation where their direct applicability has remained purely an academic discussion and finds no practical outcome in judicial institutions. The Commission’s position on supremacy will be discussed in Chapter 3.4.1.

3.3 Supremacy and conflict with national constitution

While the supremacy of the EC law over ordinary national legislation is well established in the Member States legal orders, the rank of Community law, particularly its derived law in case of conflict with national constitution is strongly disputable, it has been addressed by Constitutional Courts as well as the ECJ and academia, the positions diverge largely.

European law position to the question is explicitly established in Internationale Handelsgesselschaft and Simmenthal:

“[T]he law stemming from the Treaty, an independent source of law, cannot because of its very nature be overriden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore, the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.”

Thus, according to Community law, the Community provisions should in any case permeat the national law, be it even a norm of constitution. However, the ECJ’s ruling is shared only by few Member States. Thus, in Belgium, although there has not arisen explicit constitutional dispute, several indirectly related cases show that the acceptance of the ECJ position on supremacy towards

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192 Voimalik liitumine Euroopa Liiduga, supra, lk 18.
193 Voimalik liitumine Euroopa Liiduga, supra, lk 18 [Author’s translation].
196 Case 11/70, supra, p 1134.
the Constitution as part of the reception of the EC legal order by the accession.\textsuperscript{197} As regards the Treaties, in practice, the ECJ’s view has also found reconciliation in France and Spain, who in theory attribute primacy to constitution, but avoid in reality the hierarchy problem by \textit{a priori} constitutional control and pertinent amendments to the constitution.\textsuperscript{198} Greece has not faced direct conflict, but has on several occasions had to tackle the situation where constitutional law and treaty covered the same issues, whereas solution under domestic norm gave a different interpretation; the \textit{Arios Pagos} resolved the situation by applying the European law as an instrument for interpretation of constitutional law.\textsuperscript{199}

Germany and Denmark, in their Constitutional Courts’ reasoning, give to the Constitutions priority in certain conditions, \textit{ie} when the Community institutions have exceeded their powers derived from the Treaties and Accession Acts. According to the FCC, the German Constitution Article 79(3), which allows no modification to fundamental constitutional principles, must prevail in any case. Similar attitude appears to be held by Irish courts, where the Constitution Art 29.4.3 attributes the supremacy to the EC norms ‘necessitated by membership’, while the norms not necessitated by membership may be subordinated to the Constitution (but still prevail over other forms of Irish law).\textsuperscript{200} In Portugal, the Constitutional Court not having ruled on this question as by 1996, the prevailing opinion however supports the Constitution’s primacy in regard of the Community secondary legislation, particularly in regard of fundamental constitutional principles like rule of law, human rights and democracy.\textsuperscript{201}

Whether the Member States’ approach is compatible with the European law and also with the constitutional delegation of sovereign competences, is discussed in the next chapter on ultimate constitutional review, since both the issues are interrelated and overlap largely.

\textsuperscript{197} See Bribosia, H. Applicabilité directe et primauté des traités internationaux et du droit communautaire. Réflexions générales sur le point de vue de l’ordre juridique belge. – RBDI, 1996, n 1, p 33-89.
\textsuperscript{198} Favoreu, \textit{supra}, p 62. In regard of Spain, the Spanish Constitutional Court held in Maastricht decision of 1 July 1992, that the integration clause does not allow amendment of constitution by treaty or by delegation, which in Burgorgue Larsen’s view implicitly gives supremacy to the Constitution, see Burgorgue Larsen, L. Chapitre V Espagne. Les Etats Membres…, \textit{supra}, p 140.
\textsuperscript{199} \textit{Eg} in regard of principle of equality, application of EC law so as to interpret constitutional norm invalidated the domestic law, while applying only constitutional norm had not given this result. See more Vardavakis, C. European Law in the Hellenic Judicial Practice. - European Ambitions…, \textit{supra}, p 46-50.
\textsuperscript{200} Gardner, \textit{supra}, p 9.
\textsuperscript{201} Moura Ramos, \textit{supra}, p 487.
3.4 Ultimate constitutional review - Constitutional Courts or ECJ?

The supremacy of EC law in relation to national constitutions is closely related to the question of whether the ultimate judicial review belongs to the national Constitutional Courts or to the ECJ. As Meessen sets the question, “[i]n the latter case, the Union-wide validity of European Union acts may be placed in jeopardy, and, in the former case, Member States may be considered to have abandoned a core element of their sovereignty.”202 This subchapter suggests that the Member States’ and Estonian Expert Commission’s position on right of direct control violates the European law as well as constitutional provisions on the delegation of sovereign competences, while indirect control is retained as ultimate safeguard for sovereignty, but should not be exercised separately by the Constitutional Courts, but as an ultima ratio by the Member States jointly in their intergovernmental conferences, if the Community institutions’ excess of powers, conferred by the Treaties, has not been resolved by the ECJ.

The Constitutional Courts’ attitude in regard of scope of review differs, the FCC and the DSC retain clearly the right of indirect review, ie whether the EU institutions exceed the powers granted in the Treaties, and the FCC also residual direct control (whether the EU institutions’ action compatible with the Constitution itself)203 in regard of human rights not in specific reasons protected by the ECJ. The Spanish and Italian Constitutional Courts retain, to a certain extent, direct control.

Thus, the FCC emphasizes the need for foreseeable and sufficiently clear definition of delegated powers by the legislator so as to allow constitutional control, ruling that

“[i]f, for example, European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German Act of Accession is based, any legal instrument arising from such activity would not be binding within German territory. […] Accordingly, the German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to exceed those bounds.”204

Similar is the ruling of the DSC:

202 Meessen, supra, p 511.
203 See for distinction of direct and indirect review in Meindl, T. Le controle de constitutionnalité des actes de droit communautaire dérivé en France. La possibilité d’une jurisprudence Solange II. – RDPSPFÉ, 1997, n 6, p 1668ff.
204 FCC Maastricht Decision, supra, p 422-423.
“...[T]he courts of law cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for the transfer of sovereignty made by the Act of Accession. Therefore, Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the transfer of sovereignty according to the Act of Accession. Similar interpretations apply with regard to community-law rules and legal principles which are based on the practice of the EC Court of Justice.”

The FCC further reserves itself right to exercise jurisdiction on derived Community law in ‘cooperative relationship’ with the ECJ, giving to the latter the general and itself a residual jurisdiction so as to guarantee those mandatory standards of basic rights, which for specific reasons could not be secured otherwise (e.g. specific German constitution’s right to broadcasting, freedom of religion, or rights which the ECJ cannot protect because of procedural reasons). This is in principle continuation of the tradition established in Solange I and II, the former declaring FCC’s right for review as long as the Community integration has not reached the level of human rights protection provided on the national level, the latter, being rendered some while later, after the ECJ started to safeguard human rights on the level provided in the ECHR and the Member States’ constitutional traditions, practically withdraw its review.

While recognizing the general competence transfer to the ECJ with pertinent preliminary ruling system, essentially similar attitude is nevertheless also adhered to by the Italian Constitutional Court and Spanish Constitutional Court, reserving themselves ultimate right to safeguard human rights observance by the EU (Italy also to fundamental constitutional principles), although the Italian Constitutional Court emphasizes that the conflict would be highly hypothetical. The Italian Constitutional Court relies in this regard on the separation of Community legal order and national legal order, in the latter the Court retains the right of review.

The French Constitutional Council, on the contrary, adheres to exclusive a priori control of direct constitutionality and declared the lack of jurisdiction to control the compatibility of international

206 FCC Maastricht Decision, supra, p 412. See also Hobe, 1994, supra, p 123.
208 Solange II, 73 BverfGE 378, cited in Tagney, supra, p 422.
obligations to the Treaties in Schengen decision\textsuperscript{211} as well as \textit{a posteriori} direct control of human rights, in Maastricht I decision, since these are secured by the ECJ.\textsuperscript{212}

The Constitutional Courts’ relative consensus on ultimate constitutional review right, although to differing extents, is \textbf{ incompatible with European law} as established in Simmenthal and Internationale Handelsgesellschaft, undermining the uniform application and full effectiveness of the Community law. This is also the position of Meessen, who finds that Article 164 allows no exceptions, since the Member States’ courts’ freedom to disagree with the ECJ positions would seriously undermine the authority of the Court of Justice, setting further in doubt also the Union-wide validity of Community legal acts.\textsuperscript{213} If Member States could invoke their national constitutional clause, it would also slow down and endanger the Union decision-making process.\textsuperscript{214}

It may further also violate the Member States \textbf{constitutional law} since the interpretation of Treaties belongs according to Articles 164 and 177 of the Treaty to the ECJ, forming thus part of the sovereign competences delegated to the EU. This view is supported by Hobe\textsuperscript{215}, Meessen, MacCormick, Lenaerts, Pizzolo\textsuperscript{216} and partly by Hailbronner. Meessen is strongly on the position the FCC’s \textit{obiter dictum} on review right is “[…]unwarranted under the German constitutional law[…]” delegations transfer.\textsuperscript{217} He further finds that the final transfer of control to the ECJ is not precluded by the Constitution, considering the ‘open statehood’ principle provided in the Preamble and new version of Article 23 of the German Constitution.\textsuperscript{218} Hailbronner, proceeding from the practical necessity to secure regular functioning of the Community by uniform application of Community law, suggests that the question whether a Community act is within the boundary of the Treaties, should generally be resolved by the ECJ in course of preliminary ruling proceedings due to the judicial structure being transferred to the Community, however, in case of fundamental conflicts the final review should still reserved to the FCC, since this is a necessary prerequisite of national sovereignty.\textsuperscript{219}

\textsuperscript{211} CC 25 July 1991 Accords de Schengen, cited in Favoreu, supra, p 54, 55-56.
\textsuperscript{212} CC n 92-308, Dc, 9 April 1992, Cons 17, cited in Meindl, supra, p 1683.
\textsuperscript{213} Meessen, supra, p 521-522, with reference to Case 6/64, supra, p 593-594.
\textsuperscript{214} Meindl, supra, p 1679.
\textsuperscript{215} See Hobe, 1994, supra, p 121.
\textsuperscript{217} Meessen, supra, p 514.
\textsuperscript{218} Meessen, supra, p 524-525.
\textsuperscript{219} Hailbronner, supra, p 110.
MacCormick approaches to the conflict question from legal systems’ pluralism view, considering the Member State and Community law to be distinct but interacting systems of law where the national Constitutional Court and the ECJ respectively give authoritative interpretations in own fields, the question of hierarchy thus not being relevant. If overlapping should occur though, MacCormick gives interpretation right to the ECJ following the delegation of competences. Lenaerts relies likewise on the delegation of competences, reaching furthermore a conclusion on the ECJ ‘umpiring the federal system’, adding that if the ECJ follows the interpretation rules of Art 31 of the Vienna Convention on the Law of Treaties, no problem of acceptance of the ECJ’s judicial last word on the extent of Community competences should arise.

Further, in the academia, it is the ECJ who is often called the ‘Constitutional Court’. The characteristics usually associated with a constitutional court find expression in the following: the Court has power to review the constitutionality of legislation (the Treaties being regarded by the Court as ‘constitutional charter’, see Chapter 1.1.2), distribution of powers between the Community organs as well as power to adjudicate the division of competences between the Community and its constituent Member States, references to preliminary rulings resemble references from ordinary courts to the Constitutional Court to determine the relationship of national and Community law.

The author of the paper is also on the position that at least control of direct constitutionality, ie whether the EU institutions act in accordance with national constitutional principles, is incompatible with the European law (Art 164, 177, Simmenthal) and furthermore contradicts the constitutional provisions on delegation of sovereign competences by the EU membership to the Community. The delegations cover also the protection of human rights, since additionally to their protection established in the ECJ’s jurisprudence, their protection is furthermore by the Maastricht and the Amsterdam Treaty formally brought under the competence of the Community and jurisdiction of the ECJ, on the level provided in the Member States’ constitutional traditions and the ECHR, this position is confirmed, as mentioned above, also by the Conseil Constitutionnel.

However, as to ultimate safeguard of sovereignty in case the Community institutions exceed their competences accorded by the Treaties, and the ECJ fails to establish this, the indirect control, ie the control whether the Community acts within the powers granted in the Treaties, may be exercised by

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220 MacCormick, supra, p 264-265.
221 Lenaerts, supra, p 797, (references omitted).
the Member States. However, this should not be decided one by one by the Constitutional Courts, so as not to hinder the functioning of the Community by the Member States separately, but by a political decision, adopted jointly by the Member States in an intergovernmental conference as an ultima ratio, if the violation is manifest and serious so as to arise concern of several Member States. This solution is also suggested by Van Gerven \(^{224}\).

And a final remark, as we saw from the alternative views to the FCC decision on democracy, the national Constitutional Courts tend not necessarily give optimum solutions to the constitutional issues, but simply protect traditional constitutional notions, disregarding their wider meaning and purposes and the general changed context.

### 3.4.1 Supremacy and constitutional review in Estonia’s perspective

The Estonian Expert Commission follows in its interpretations on supremacy and ultimate constitutional review largely the positions of the Constitutional Courts discussed above, and may therefore be subjected to the same critique on incompatibility with the European law as well as constitutional amendment on delegation of sovereign powers suggested to be undertaken by the Commission.

As to supremacy, the Expert Commission firmly rejects foreign experts’ proposal to introduce the supremacy clause to the Constitution, following the presumption that “[…]Estonia will never acknowledge the higher legal status of the European Union legal acts in regard of the Constitution and that in case of the accession to the European Union the Constitution as well as legislation will be harmonized with the European law”\(^{225}\).

This statement leaves somewhat open whether the position negates supremacy towards both the Constitution as well as ordinary law. However, since reference to full harmonization is made, the Commission obviously meant to reject EC law supremacy in both cases. The Commission’s presumption may be considered ungrounded since the experience of the other Member States shows abundant jurisprudence on the issue, which proves that full harmonization in reality is difficult, if not impossible to achieve. As regards negating EC law’s supremacy over ordinary national

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\(^{223}\) Tridimas, supra, p 206; Due, supra, p 4-9.  
\(^{224}\) Van Gerven, supra, p 86.  
\(^{225}\) Võimalik liitumine Euroopa Liiduga, supra, lk 11 [Author’s translation].
legislation, this violates explicitly the fundamental feature of the Community legal system, which is furthermore undisputably accepted by all the other Member States, although its express mentioning in Constitutions is rare and the interpretation of delegation of competences or supremacy of international law is used as basis.

As concerns opposing supremacy towards the Constitution, it likewise contradicts the EC law (Simmenthal, Internationale Handelsgesellschaft) as well as may violate the expected constitutional amendment on delegation of sovereign competences, and the future Accession Treaty (which presumably obliges the unconditional acceptance of the acquis communautaire), while on this position, as discussed in previous subchapters, the Commission finds support from the practice of the other Member States. It is necessary to observe though that the Commission’s reference to the other Member States’ Constitutional Courts’ position that the EC law does not possess higher legal force than the national constitutions226 is somewhat misleading since the Courts’ reserve the supremacy only to most fundamental provisions of the constitutions and to the Community institutions’ activity exceeding the delegation of competences. The Constitutional Courts, as discussed previously, treat the constitutional supremacy as exception, while the supremacy is regarded as a rule.

Furthermore, even if the Commission’s above somewhat ambivalent statement means only negating supremacy towards the Constitution and accepts supremacy towards ordinary law, but does merely not deem necessary to introduce pertinent constitutional provision, the avoidance of a supremacy provision on European law is hard to understand, considering that the Constitution explicitly recognizes the supremacy of international law and treaties (Art 123). It is of course possible to interpret the supremacy of EC law in the light of Articles 3 and 123 or by delegation of competences. However, the incorporation of supremacy clause in the Constitution would create general awareness among the individuals as well as judicial institutions, contributing thus to the more efficient implementation of the Community law, which in turn serves the general purposes of welfare and security.

In practice, as concerns the supremacy problem in regard of the Treaties, the Estonian Constitution provides chance to reconcile the problem by mandatory a priori control as is the practice of France and Spain, since the Constitution Art 123 prohibits conclusion of treaties incompatible with its

226 Võimalik liitumine Euroopa Liiduga, supra, lk 8.
provisions. Constitution would thus retain supremacy, while the preliminary control avoids in practice conflicts with the Treaties.

As to the ultimate review of derived law, according to the Commission, Estonia should retain right for its *a posteriori* control, in order to guarantee the secondary legislation’s conformity with the fundamental principles of the Estonian legal order as well as with the Constitution’s normative provisions, and also with the purposes contained in the Treaties, the latter control taking though place by recourse to the ECJ.\(^227\) The Commission further explains that the amendments of the Constitution aimed at conformity with the EU Treaties should not be accompanied by the screening in regard of the Constitution’s conformity with the derived law, since the delegation of competences must be clear and foreseeable so as to avoid norms of derived law conflicting with the Constitution, because in that case the Constitution would no longer meet the quality assumed by the ideas of national self-determination, democracy and nation-state.\(^228\)

Thus, the Commission retains right of direct control (*ie* whether the EC law is compatible with the Constitution), while granting indirect control to the ECJ (compatibility of EC derived law with the Treaties themselves). According to the pertinent discussion in regard of the other Constitutional Courts’ practice in the previous subchapter, the latter view of the Commission conforms to European law as well as to the expected constitutional amendment on delegation of sovereign competences. The former, however, *ie* the right of direct control of the derived law’s compatibility with the Constitution, violates both, the EC law as established in *Simmenthal* and *Internationale Handelsgesellschaft*, undermining the uniform applicability and full effectiveness of the Community law, as well as the expected constitutional amendment on delegation of sovereign competences to the EU, with corresponding right of the ECJ for review right in the EC law sphere. This position would also violate the Accession Treaty in which presumably the supremacy and full adoption of the *acquis* will be stipulated.

However, as suggested in the previous subchapter, Estonia would, along with the other Member States, retain indirect review as an ultimate safeguard against the excess of the Community institutions’ powers granted by the Treaties, as *ultima ratio* when the ECJ fails to secure the observance of the Treaties or acts itself not within the powers, by deciding upon the issue jointly with the other Member States in an intergovernmental conference. This solution provides a

\(^{228}\) Võimalik liitumine Euroopa Liiduga, *supra*, lk 10-11.
compromise between European law and the need for proper functioning of the Community, and the Member States ultimate sovereignty, if the excess of the powers of the Community institutions is of manifest and serious nature so as to arise the concern of several Member States.

The Commission further reasons its negative position on supremacy towards constitution by the legal thinking belonging to the paradigm of sovereignty, democracy and nation-statehood\textsuperscript{229}, while as discussed in Chapters 1 and 2, the concept of sovereignty is undergoing major changes in the 20\textsuperscript{th} century end of European integration and neither is the democratic legitimacy formed any longer exclusively on traditional national state model. Likewise, it is doubtful whether the right of national self-determination can be invoked by the Commission, since the voluntary delegation of sovereign competences may in itself form part of the national self-determination.

\textsuperscript{229} See Võimalik liitumine Euroopa Liiduga, supra, lk 8.
Conclusion

The present Bachelor thesis analyzed the constitutional implications of Estonia’s expected European Union membership, with particular interest on transfer of sovereignty. The paper purported to offer an alternative view, proceeding from the European law and general purposes of the European integration, to the Estonian Constitution’s Legal Expert Commission’s constitutional amendment proposals, which follow the line of the other Member States’ Constitutional Courts’ pertinent jurisprudence, both of which accentuate sovereign nation state paradigm.

The paper reached to three principal conclusions. Firstly, the Estonian Expert Commission’s as well as the MS Constitutional Courts interpretations, according to which the constitutions allow membership only in the European Union, the legal nature of which would be confederation, and prohibit participation in a federation, since this would end independent statehood, needs to be reconsidered in the context of European integration. The processes of internationalization have resulted in transformation of the means of fulfillment of state’s original tasks, requiring on functionalist basis their realization on the international level. Therefore, the traditional public international law notion of sovereign statehood, dating back to the end of 19th and beginning of 20th century, form which proceed the Estonian Expert Commission and German Constitutional Court, has become inappropriate for qualifying the European integration. The EU, not yet fully meeting elements of federation but being far more than a confederation (Treaties as ‘Constitutional Charter’, extensive powers, supreme directly applicable legal order, monetary union, uncertain secession right, EU citizenship, etc), should be liberated from traditional constitutional thinking in state-federation terms conceiving the state and sovereignty as values per se, and regarded rather as supranational organization sui generis fulfilling at functionalist basis the tasks no longer effectively met by nation states. The supranational organization approach, overcoming the state-federation dilemma, as well as the modern state concepts such as ‘open statehood’, would enable to retain independence and sovereign statehood, although in modified terms. The paper therefore suggests to reformulate the Estonian Expert Commission’s Constitutional amendment proposals, so as not to hinder the further European integration towards federalism, if this is necessary for pursuance of welfare and security, the principal purposes of the social contract.
The second conclusion goes further in suggesting to reconceptualize the traditional constitutional theory notions, submitting, differently from the Estonian Expert Commission and the German Constitutional Court, that the EU context allows for **exercise of popular sovereignty partly on the European level**. This is possible since legitimacy may be based on **divisible identity**, beside the national also to European, the latter deriving from the **common European cultural and political values**, and thereby no obstacles should arise to empower the European Parliament with powers of normal representative body. This is even imperative, considering that the national democratic structures (firstly, parliaments’ participation in the EU decision-making process by right of information, ratification of Treaties and governments’ responsibility towards parliaments, and secondly, referendums, legitimizing the transfer as such rather than decision-making), to which the Estonian Expert Commission and the Constitutional Courts base the legitimacy, fail in fact to resolve the democracy deficit problem where extensive decision-making competences have been concentrated to the EU level executive power. The paper also criticizes the Member States’ exercise of sovereignty on the expense of strengthening the European democratic structures. The paper suggests that differently from the Estonian Commission’s position, the Constitution allows the dual exercise of popular sovereignty, since it establishes the principle rather than concrete institution.

Finally, the third chapter, considering that the exercise of sovereignty finds its expression by the legal order, concludes that the Estonian Expert Commission’s as well as the Member States’ attitude on the **supremacy of constitution and retained ultimate right of constitutional review**, which they derive from state sovereignty, **is contrary to European law** *(Simmenthal, Internationale Handelsgesellschaft, Art 164, 177)* as well as to the **constitutional provision on the delegation of sovereign competences**, whereby the delegated spheres should belong to the final review of the ECJ. The paper suggests though, that as ultimate safeguard for sovereignty, the Member States may exercise indirect control as **ultima ratio** jointly by intergovernmental conference, if the Community institutions’ excess of powers, conferred by the Treaties, has not been properly resolved by the ECJ. This solution provides a compromise between, on the one hand, the European law and the need for proper functioning of the Community, and, on the other, the Member States ultimate sovereignty, if the excess of the powers of the Community institutions is of manifest and serious nature so as to arise the concern of several Member States.

All these somewhat heretic positions (considering the shortness of Estonia’s sovereign statehood) call for further research and academic discussion, since Estonia’s expected accession to the Union means for the dispute a practical outcome in the Constitution in the near future.
Eesti suveräänsus Euroopa Liiduga ühinemise perspektivis: riigiõiguslike kontseptsioonide ümberhindamine. Resümee


Antud vaatepunktist lähtudes analüüsitakse Põhiseaduskomisjoni ettepanekuid, leides, et üksnes rahvuslike protseduuride kaudu toimuv legitimeerimine (parlamendi osalus EL-i otsustusmehhanismis pelgalt infoõiguse ja Valitsuse aruandluskohtuse kaudu, ning referendum kui ühekordne akt õigustamaks kompetentside delegeerimist ja mitte eurootsustusmehhanismi kui sellist) on selgelt ebapiisav rahva demokraatliku osaluse tagamiseks, mistõttu on vajalik alternatiivsete legitimeerimismehhanismide tunnustamine. Eeldades kahehe identiteedi, rahvusliku kõrval Euroopa identiteedi olemasolu, millele võiks rajada tulevikus Euroopa Parlamenti muutmise täisvolitustega esinduskogus, ei saa Põhiseaduse artikkel 1 rahvasuveräänsuse jagatud teostamiseks, kunagi artikkel ei määra rahvasuveräänsuse teostamise konkreetset institutsiooni (st Riigikogu), vaid põhimõtte kui sellise.

Kolmandaks, lähtudes asjaolust, et suveräänsuse teostamine toimub kaude õiguskorra, vaadeldakse võrdlevas plaanis Ühenduse õiguse tähendust siseriiklikule õiguskorralle ning vaidlustatakse Põhiseaduskomisjoni ja liikmesriikide konstitutsioonikohtute seisukohta põhiseaduse ülemuslikkuse ning Ühenduse õiguse suhtes põhiseaduslikkuse järelevalve õiguse säilitmise suhtes, kuivõrd selline lähennemine on selgelt vastuuls Euroopa õigusega (Rooma lepingu art 164, 177 ja Õiguskohtu otsus kohtuasjades Simmenthal ja Internationale Handelsgesellschaft), samuti EL-iga ühinemisel põhiseadusesse viidava suveräänsete pädevuste delegeerimise sättega ning ei ole kooskõlas ka ühinemislepinguga, mis eeldatavasti muudab kohustuslikuks acquis tingimusteta
ülevõtu. Siiski pakutakse riikliku suveräänsuse ja Ühenduse õiguse normaalse funktsioneerimise huvides kompromissina välja lahendus, kus liikmesriikidele jääb *ultima ratio* võimalus ühiseks otsustusõiguseks valitsustevahelise konverentsi kaudu, kui Ühenduse institutsioonid on selgelt lepingutega delegeeritud pädevusi ületanud ning Õiguskohus ei ole mingil põhjusel adekvaatset lahendit taganud, ning rikkumine on piisavalt tõsine äratamaks mitme liikmesriigi tähelepanu.


Töö põhineb peamiselt liikmesriikide põhiseaduskohtute praktikale ning erialakirjanduse uuematele artiklitele. Esitatud mõneti ketserlikud seisukohad (arvestades Eesti suveräänse riikluse suhtelisest lühidust) võiks olla aluseks edasiastele põhjalikumale uurimisele ning arutelule, kuna antud küsimusteringi on lähtutelevikus EL-iga eeldatava ühinemise käigus ootamas praktiline väljund põhiseaduses.
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List of Normative acts

List of Legal practice

Danish Supreme Court


European Court of Justice

• Case 6/64 Costa v ENEL [1964] ECR 585.
• Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125 at 1134.
• Case 106/78 Simmenthal [1978] ECR 629

French Constitutional Council


German Constitutional Court

### List of Abbreviations

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<th>Abbreviation</th>
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<tr>
<td>AJIEL</td>
<td>Austrian Journal of International and European Law</td>
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<td>CC</td>
<td>French Constitutional Council</td>
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<td>Common Foreign and Security Policy</td>
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<td>Common Market Law Review</td>
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