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Karlsruhe v. Lisbon

An Overture to a Constitutional Dialogue from an Estonian Perspective

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Abstract

The article uses the 2009 decision of the German Constitutional Court on the Lisbon Treaty as a basis for an analysis of the relationship between EU law and Member State law, especially Member State constitutions. The authors argue that an uncritical openness of Member States to supremacy of EU law and the interpretations made of it by the European Court of Justice is not necessary but rather an analytical attitude towards the development of EU with active legal argumentation to protect the rule of law – a deliberative supranationalism. A constitutional dialogue between Member States and the EU is the best protection and promoter of rule of law. The constitutional discussions in Estonia are used as an illustration of the balancing of national constitutional principles and supremacy or EU law.

Keywords: constitutional dialogue, Karlsruhe decision, supranationalism.

A. Deliberative Supranationalism

The relationship between European Union (EU) law and Member State law is the central and most problematic issue of the EU integration process.[1] In this article, this issue is presented primarily against the background of the Estonian situation, as an example of the discussion of the issue in a recent EU Member State. The discussion, however, is of general interest and not just relevant for Estonia. Estonian openness to EU law principles and norms has been indeed at issue,[2] but mainly from an apologetic point of view. At the time of Estonian accession to the EU, when the Constitution of the Republic of Estonia Amendment Act was

1 F. C. Mayer, *Supremacy – Lost? Comment on Roman Kwiecień. – The Unity of the European Constitution*, Berlin, Heidelberg, New York: Springer, at 87, (2006).

2 *See* C. Ginter, *Application of Principles of European Law in the Supreme Court of Estonia,* Dissertationes Iuridicae Universitatis Tartuensis 21, Tartu University Press (2008).

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brought into force by a referendum, some practical discussions about the relationship between EU law and the Constitution were held.[3]

At the same time – EU law is a rapidly developing legal system. The most important legal text updating EU law, the Lisbon Treaty,[4] provides for its legitimacy and brings along many changes in the relationship between EU and its members. Because of its epoch-creating nature, this Treaty has become an object of populist as well as analytical discussions, which undoubtedly will continue in the future. From the various levels of the Treaty, which are in some respects discordant, it can be seen that it will have an as of yet indeterminable impact on the future of the EU. The annulment of it would prove to be rather complicated. The legal views on the Treaty are often affected by political ambitions. However, until now there have been relatively few analyses concerning the content of its text in relation to EU's development and its accommodation with the rule of law. This may be due to the fact that the Constitutional Treaty, created to reform EU, had to be replaced because of negative referendum results reflected in many countries; its amended text has been even more of a compromise. Consequently, until now, it is mainly the political question if and how an agreement can be reached to ensure EU's continuous progress that has deserved attention.

The final obstacle to the Lisbon Treaty's enactment was removed in November 2009, when the Treaty was signed by the last head of state of a Member State, the Czech Republic's President, Vaclauv Klaus. The Treaty took effect on 1 December 2009, after being delayed for political reasons and waiting for the Czech Constitutional Court's decision about the Treaty. In several Member States, the Lisbon Treaty´s constitutionality has been the subject of judicial review. The most substantial analysis, as well as the one which has received the most attention, probably derives from the German Constitutional Court. The decisions of this court historically have been of decisive importance in interpreting EU law. The German Constitutional Court, situated in Karlsruhe, is doubtlessly authoritative and is considered to be, in form and in content, the model for constitutional courts in Europe.

Traditionally, it has been possible, in principle, to distinguish between three standpoints about the supremacy of EU law. That is formulated by:

a. the European Court of Justice (ECJ), whereto Member State courts directly refer (Belgium *Cour de Cassation*: Le Ski 1971[5]);

3 RT I 2003, 64, 429. *See also* Ginter (note 2) and J. Laffranque, 'Ratification of the European Constitution in Estonia: A New Constitution for Estonia', *in* A. Albi, J. Ziller (eds.), *The European Constitution and National Constitutions. Ratification and Beyond,* The Hague: Kluwer Law International, at 88, (2007); the same author: Independent and democratic rule of law. In Supreme Court's practice Estonia in EU membership context. – Juridica, at 483 *et seq,* (2009/8). See also T. Kerikmäe. *Europe's Zeitgeist and Estonian choices in giving sense to constitutionality*, Tartu University Press, (December 2009).

4 The Lisbon Treaty, that amended the EU Treaty and the EC Treaty. Concluded in Lisbon on 13 December 2007. ELT C 306, 17 December 2007. The name "Lisbon Treaty", has replaced the earlier, sometimes used name "Reform Treaty".

5 *Cour de Cassation* Belgium, available in English: *Common Market Law Review* (*CMLR*) 1972/2, at 330.

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b. a Member State (France *Cour de Cassation*: Vabre 1975[6]) or
c. a Member State, but with certain reservations (Germany: *Solange I 1974* and *II 1987*[7]).

But the German Constitutional Court's 2009 decision about the Lisbon Treaty's compatibility with the German constitution[8] has prompted new perspectives – not so much about the future of the Treaty itself, but precisely from the viewpoint of the EU's internal operating mechanisms on several levels. According to the concepts outlined above, the Karlsruhe Court's decision could be compared to the attitude formulated by a Member State. The German Constitutional Court asserted that the Lisbon Treaty is not, in principle, contrary to the state's constitution. Nevertheless, the ratification process was halted until the German parliament adopted a law that substantiated its role in determining EU's integration process and the application of EU norms. Thus, there has been a reversion to a highly normative approach and a withdrawal from generalizations that would deny the supremacy of EU law. Although the German Constitutional Court addressed the Lisbon Treaty only with regard to German constitutional and general law,[9] this decision has importance also outside of Germany.[10] The decision may be seen as a sign of a new relationship between the EU and its Member States, which is characterized by what can be called deliberative supranationalism.

The supremacy of EU law over constitutional acts of Member States has always been controversial because the latter function as the legal gateways through which the State allows EU law to connect with its legal order. A radical viewpoint would exclude the presupposition of constitutional loyalty and see supremacy as a conflict rule which brings along with it an "obligation to disapply" an EU norm if possible.[11] This theory, seemingly heretical at first glance, is not, however, a denial of supremacy. Rather it is a conception according to which the Member State's legislator should interpret EU normative acts carefully as far as both the normative technique and the interest of the State are concerned. The hierarchy of legal systems does not automatically mean hierarchy of norms in the implementation process, and a Member State should consider the application of

6 *Cour de Cassation* France, available in English *CMLR* 1975/2, at 336.
7 *Bundesverfassungsgericht*, available in English *CMLR* 1974/2, at 540 and *CMLR* 1987/3, at 225.
8 The Decision of the German Constitutional Court on the Lisbon Treaty, available in internet: <www.spiegel.de/international/germany/0,1518,634506,00.html> last accessed 22 November 2009.
9 The Court found problems with the Treaty's in conjunction with the role of the German Legislature's separate chambers of parliament.
10 The decision by the Karlsruhe court has been subject to many academic articles. *The European Constitutional Law Review* 5/2009 contained a number of such articles. These include A. Hinarejos, 'The Lisbon Treaty versus Standing Still: A View from the Third Pillar', pp. 99-116; J.H. Reestman, 'The Lissabon-Urteil: The Franco-German Constitutional Divide', pp. 374-390; R. Bieber, 'The Lissabon-Urteil: An Association of Sovereign States', pp. 391-406 and T. Locke, 'Why the European Union is not a State: Some critical remarks', pp. 407-420.
11 S. Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union', *in* C. Barnard (ed.), *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate*, Oxford University Press (2007), at p. 55.

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EU law not so much from a political viewpoint as from the viewpoint of the rule of law.

Contemporary theory about connecting legal systems of varying levels has moved to deliberative supranationalism. In general, deliberative supranationalism seems to be a modified version of Habermas theory of "deliberative democracy" by which democracy is seen essentially as a process of institutionalized public deliberation on matters of common concern.[12] It follows, that real constitutions are never static or complete but are constantly open to *critique* and review. What a constitution is must be sought in the living and evolving "*aquis*" of the constitutional rules and principles of a particular community.[13]

It does not mean an uncritical openness of Member States to ECJ's interpretations, but rather an analytical attitude towards the development of EU attitude. This cannot be considered mere protectionism; it is an implementation of an active legal argumentation method to protect the rule of law.

B. The *Karlsruhe* Decision

One of the most important comprehensive analyses of the Lisbon Treaty is the 147-page German Constitutional Court's decision of 30 June 2009, which, because of its allegedly ambivalent nature, has already been interpreted in several ways (as has the Lisbon Treaty itself). The German Constitutional Court has traditionally tried to act as an essential institution in evaluating the EU integration process and ensuring legal certainty. The *Karlsruhe* decision has received vivid response from adherents of the Treaty as well as its opponents, and it is considered an essential element in the implementation process of the Lisbon Treaty.

The decision discussed the compliance of the Lisbon Treaty with the German Constitution. The Court found that there were no fundamental problems regarding joining the Lisbon Treaty but made reference to the responsibility of the German parliament, in preparing the ratification process and in explaining the role of *Bundestag* in EU's integration as a whole. The decision is inspiring for Estonia. That country's attitude towards this subject has become more attentive, raising the Estonian profile in the integration process,[14] as has occurred in other Member States where the readiness for the Lisbon Treaty by national organs has been a topic for discussion.

The German Constitution's (*Grundgesetz* or *GG*) Article 23 sets out clear standards for participating in the EU, including a protection clause.[15] Article 23, Sec-

12 A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, The Hague, London, New York: Kluwer Law International 2002, pp. 39-50.

13 *Id.* 53

14 European Union Affairs Committee's abstract on hearingsd on the subject "The representation of Estonia in the European Union", <www.riigikogu.ee/index.php?id=54130&parent_id=52540>, last accessed 22 November 2009. See also T. Kerikmäe, *Eesti Parlamendi roll pärast liitumist Euroopa Liiduga*, Riigikogu Toimetised (2001/IV).

15 K. Müller. *The Judgment of German Constitutional Court on the Treaty of Lisbon – Current Concerns*, no 14, (13.10.2009) Zürich, at 1. <www.currentconcerns.ch/index.php?id=826>, last accessed 22 November 2009.

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tion 1, *GG* provides that Germany is obliged to integrate in a developing European Union if it is committed to democracy, social and federal principles, and the rule of law. The *Karlsruhe* decision did not merely analyze if a conflict would arise between the Constitution and the Lisbon Treaty after ratification of the latter in Germany; the Court also tried to find a legal mechanism that would guarantee functional sovereignty.

The decision shows that EU membership should not be taken as an absolute. In accordance with Article 20 *GG*, the Court determined that the German state system must be a democratic, federal, welfare state founded on the Constitution anded on separation of powers. The state must also retain the right to resistance. The decision does not analyze EU's political reality,nor does it answer *expressis verbis* the question of whether the Article 23 criteria are fulfilled by EU.

It was important to the Court that the transfer of certain sovereignty to the EU has not weakened the state parliament's (*Bundestag*'s) authority and that even a certain democratic deficit at the EU level does not constitute an infringement of *GG's* democracy principle.[16]

Of course the *Karlsruhe* decision cannot be considered representative of the interests of all Member States. But important conclusions can be made from it, which are suitable for other Member States, such as Estonia. The main conclusion deriving from the Decision – Germany's participation in European integration – should be observed

a. through the provisions of the Constitution that regulate usage of international law and having in mind the contemporary nature of sovereignty, and by
b. distinguishing the principle of openness to European law (*Europarechtsfreundlichkeit*) from the principle recognized in German law of openness to international law (*Volkerrechtsfreundlichkeit*).[17]

At the center of the Court's analysis stands the European Parliament. The central argument of *Karlsruhe* is that if EU decides to move towards an analogue of state structure (*Staatsanalog*), then its political power should be legitimized through the democratic functioning of constituency.[18] Thus, the Court was extremely critical about the *sui generis* nature of EU law, which tries to justify EU's insubordination to constitutional law standards, and views EU as a political organization, an association of sovereign states. In the Court's opinion, the objective of the Lisbon Treaty is not the creation of a federal state, but the amendment of the already existing treaties. In the Court's opinion, the creation of a European federal state

16 J. Ziller, *Solange III, or the Bundesverfassungsgericht's 'Europefriendlyness'.On the decision of the German Federal Constitutional Court over the ratification of the Treaty of Lisbon.* – Rivista Italiana di Diritto Pubblico Comunitario 973–995, (2009/5) (english translation <http://papers.ssrn.com/sol3/papers.cfm>, last accessed 22 November 2009.

17 See F. Schorkopf, *The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon*, pp. 1220–1238, <www.germanlawjournal.com/article.php?id=1156>, last accessed 22 November 2009.

18 *Id.*, at p. 1225

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with the participation of Germany would be possible only by adopting a new German Constitution, which would presuppose a direct choice by the German constituency, and presumably constituencies of other states, regarding this. The task of constitutional courts is thus to safeguard the legal framework regarding the function of EU powers. National parliaments, as the representatives of the people,[19] have a responsibility to express the nation's will so that decisions at the EU level are formulated democratically. The Court criticized the European Parliament, even though the Lisbon Treaty increases the European Parliament's role and competence. This criticism could be justified retrospectively, but the Court's statements regarding the future may hinder the development of a balanced power structure at the EU level.

Inherent in the decision is the Court's criticism of EU's tendency to use political demands as a basis for legal norms, rather than founding norms on the existing competence set out in the treaties (ECJ's broad freedom of interpretation is a good example here). The democratic deficit has not disappeared from EU law, and the genesis of EU law based on the principle *creatio ex nihilo* must be replaced with grounds proceeding from the rule of law. In this context, it must be admitted that the legal system of EU is not ideal.

One of the main theses of the German Constitutional Court's decision is that EU cannot grant itself additional legislative competence without conferral from Member States. The Court refers, for example, to criminal jurisdiction, which EU has already indirectly tried to incorporate in acts against the environment by establishing a requirement that makes environmental offense a criminal offense in Member States. The *Karlsruhe* Court thus, once again, raised the question of the limits of EU competence.

The Court determined the rights of a Member State through the self-determination doctrine, according to which a state's legislature has the authority to make extensive decisions about that state's social policies, economy, culture, military policy, and legal system. The *Karlsruhe* Court tried to delimit EU's competencies indicating, for example, that cooperation among penal law, education policy, and defense policy can proceed solely on the basis of voluntary cross-border cooperation, and not be subject to supranational powers. Consequently, it is logical that the *Karlsruhe* Court criticized the German legislature, whose imput on the development of EU must become stronger, especially in the decision-making procedure.[20]

The *Karlsruhe* Court was of the opinion that, in case of deepening integration, EU Member States must remain masters of the treaties and the main decision

19 According to the Court, a united European nation does not exist. Here it is interesting to direct attention to the critics of Habermas about a too narrow notion of demos, that has been expressed in relation to the question if EU has demos, which could be the basis of democracy. *E.g.* J. Habermas, 'Warum braucht Europa eine Verfassung? – Zeit der Übergang', 2001 (104) 29 and its commentary J.P. McCormick, *Habermas, Supranationality and the European Constitution*, *European Constitutional Law Review*, 2006/2, pp. 407-408. (At the same time, demos cannot be created with laws). J. Greenwood, 'Organized Civil Society and Democratic Legitimacy in the European Union', *British Journal of Political Science* 2007/37, at p. 334.

20 This is the case for both the *Bundestag* and the *Bundesrat*.

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makers of EU's primary law. From this, the Court drew the conclusion that the Member State's parliamentarians must strengthen their monitoring capacity amending the Act, which stipulates the parliament's competence. Here, the Court observed not only the relationship between EU and its Member States, but also the situation in the Member States' internal legal systems. According to the constitutions of each Member State, the power is divided and balanced between authorities. Academics have long discussed the situation where, on the EU level, the executive power (government) has greater competence than what is customary in parliamentary democracies at the expense of the legislative power (parliament). Member States have, in different ways and at different levels, dealt with this issue, but generally, this problem has often receded into the background in the context of relations between EU and its Member States. The discussions that have occurred, however, have compared competencies at different levels (i.e. Member State and EU) instead of looking at the effect on relations between organs of power in the Member States. The *Karlsruhe* Court emphasized the need for maximum usage of the *Bundestag*'s terms that reference the principles applicable in the democratic theory of rule of law.

The *Karlsruhe* Court found that, in terms of developing integration, a domestic legislature must also observe very attentively the expansion of EU's jurisdiction from the viewpoint of its Member States' interests. And for that, a legal foundation that would ensure the possibility of such monitoring is necessary, to avoid an increase of authority by EU that is intractable by Member States. Such increasing of authority has taken place mainly through the ECJ's interpretations.[21] Consequently, one of the main reasons for the delay in enacting the Lisbon Treaty was not the content of legal norms themselves but rather how and by whom they will be interpreted, especially having in mind the ECJ's supposed activism (i.e. its alleged extreme usage of judicial authority). At the same time, the *Karlsruhe* Court emphasized the important role of national constitutional courts in safeguarding rule of law.

The *Karlsruhe* Court did not confine itself merely to finding methods of increasing the Member States' control and influence but also highlighted the problems in the Lisbon Treaty that necessitate such control by Member States. The Court refered to the wording of the Lisbon Treaty, according to which the procedures of EU are based, as "representative democracy" – the European Parliament is, after all, made up of EU citizen representatives. But the Court then emphasized the opposite: At the present moment, the European Parliament because it not a representative body of European citizens is not elected by a single European nation in equal and uniform elections. The fear of a democratic deficit is evident. For example, a member of the European Parliament elected from Malta represents 67,000 Maltese residents; a Swedish member, 455,000; and a member chosen from Germany, 857,000 voters. Thus, the parliaments of Mem-

21 *See* ECJ 11 January 2000, C-285/98, Tanja Kreil, (in which the ECJ called upon Germany to amend its constitution, because the prohibition for women to fulfill certain military assignments following thereof was contrary to the EU principle of gender equality). *See* M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously', *European Constitutional Law Review*, 2009/5, pp. 8-9.

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ber States must also play the role of representative democracy at the EU level. The Court emphasized that EU must still be considered an association of sovereign states, where the democracy is exercised mainly at the Member State level.

The Court explained that since EU violates the prohibition of discrimination based on nationality, which is one of the principles of EU law, it cannot be considered a state-like organization but merely an association of states. Thus, no union of sovereign citizens of the EU exists, because of the absence of any representative organ of EU citizens – the European Parliament is still only a representative organ of the Member States. Because of the democratic deficit of EU's representative institutions, the *Bundestag*, as the representative organ of the German Member State, must have the main authority in the determination of the development of the EU. The Court called into question the principle of equal treatment of Member States in the implementation of EU law, and it declared that every country must retain its possibility to shape the economical, cultural, and social living conditions in its jurisdiction.

C. Member States' Rule of Law and European Union Law

The need for legal protection mechanisms at the Member State level can be analyzed according to the following rule of law impediments within the EU legal system to the rule of law.

a. Several EU norms overlap, creating problems with the hierarchy of norms. Also, the European Commission and the ECJ have been frequently accused by Member States of non-objective identification of breaches of law. The interests of and interpretation by EU institutions are protected rather than the interests of Member States and EU citizens. This is especially true in cases where an EU norm is not formulated clearly enough.[22]
b. EU law has not always been available in Member States´ languages. Because of this the ECJ has found[23] that "if the norms are not published in the member state's language, then it cannot be required that the state or its subordinates implement them".
c. In some cases, there has been an occurrence of retroactive (*ex post facto*) legal impact. For example, the Council's 15 June 2001 Directive 2001/44/EC, which amended Directive 76/308/EEC.[24]
d. EU institutions have admitted and academic analysis has proven that EU norms are not always set out unequivocally.[25]

22 T. Kerikmäe, *Euroopa Liit ja õigus*, Tallinn: Õiguskirjastus 2000, at pp. 10-11, 91, 118.
23 C-161/06, *Skoma-Lux sro v. Celní ředitelství Olomouc*.
24 J. Raitio, *The Principle of Legal Certainty in EC Law*, Dordrecht: Kluwer Academic Publishers 2003.
25 See M.A. Waterbury, 'Uncertain Norms, Unintended Consequences: The Effects of European Union Integration on Kin-state Politics in Eastern Europe', *Ethnopolitics* (7) 2008, 2&3, at pp. 217–238.

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Even though EU law has developed fast and has been generally accepted, the principle of supremacy should not prevail over the rule of law. "Each legal system must refrain from internal discrepancies and considering the quantity of cases containing analysis of EU law and planned reforms, the existing problems cannot be overlooked."[26]

The aforementioned implicit increasing of authority through ECJ also concerns the rule of law. The criticism of the *Karlsruhe* Court towards the Luxembourg Court is, from a viewpoint of legal policy, a protest of a Member State against the ECJ's activism. The ECJ has, in the opinion of the *Karlsruhe* Court, taken too much part in the creation of legal provisions and in the management of legal policy. If a court is too active in legislative activity, the principle of separation of powers, and with it rule of law, may be jeopardized. Even though the allegation that the ECJ has exceeded its powers is commonly made, it is not universally accepted. Some experts refer to cases where the ECJ has demonstrated restraint; they say that the activism is in line with the role the treaties give the Court.[27] And yet, in dealing with certain subjects, it is apparent that the ECJ favours interpretations that give to the court, and indirectly to EU law, as broad of an authority as possible.[28] The ECJ found that even though the treaties gave the Court no direct competence of analyzing certain legal acts, it should have such a right. Based on the finding that there *should* be such competence it was found that it *does* exist.[29]

This argument makes it difficult for a national legislature to observe that EU only exercises the competence given to it in conformity with that Member State's constitution. Since the *Karlruhe* decision had to preceed from the language of the Treaty, as has every other Treaty evaluation, implicit increase of competence and the monopolization of interpretation by the ECJ often worry the Member States. Some indicators show that, in recent years, the ECJ has been cognizant that Member States and their constitutional courts may find that the ECJ's excessive activism jeopardizes the EU legal system, and that the Court acknowledges that this may mean a step back in EU's development. Only the future will show if the *Karlsruhe* decision will bring about a change in ECJ strategy.

On the other hand, it can be assumed that the ECJ will show evidence of a new kind of activism, concentrated on the protection of constitutional rights. Even though such activism may be progressive in several ways from the rule of law viewpoint, "judicial colonialism" may still accompany it. In the case of courts, lead by the ECJ, obtaining greater possibilities to direct legal practice by the use of constitutional rights, not only would the position of Member States be endan-

26 D. Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection', *Boston College International and Comparative Law Review* (31) 1, (2008).

27 K. Nyman-Metcalf & I. Papageorgiou *Regional Integration and Courts of Justice,* Antwerp: Intersentia 2003. *See also* A. Albors Llorens, 'The European Court of Justice, More Than a Teleological Court', *The Cambridge Yearbook of European Legal Studies* (2) (1999). A. Dashwood & A. Ward (ed.). Oxford & Portland: Hart Publishing 2000, at pp. 373-398.

28 See ECJ 294/83, *Parti ecologiste "Les Verts"*, EKL 1339, (1986).

29 Nyman-Metcalf & Papageorgiou (2003).

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gered but also the balance between EU institutions.[30] Such imbalance can also violate the rule of law principle.

D. Constitutional Dialogue

Contemporary EU constitutional legal theory[31] endeavours towards supranational and national level dialogue. 'Comparative legality, an efficient application of reciprocity, must balance between both levels of legal systems, including the ECJ, who should be directed, in its work, of values deriving from the legal systems of the member states.'[32] But how does such a constitutional dialogue find expression in practice? Using a test application of EU law devised by Kordela,[33] it is possible to establish the meaning of deliberativism. Before the application of each EU legal norm, a Member State should test that norm with the following postulates:

a. Substantial Postulate: the general justification of the norm according to human rights and according to the principle of legitimate expectations;
b. Formal Postulate: a norm cannot be contrary to certain principles, such as proportionality, legal certainty, non-retroactivity, equal treatment, subsidiarity;
c. Procedural Postulate: a norm must be adopted within limits of competence and recognized by the addressees and the introducers of the norm.

Only after successful passage of this test can the supremacy and directly applicable nature of an EU norm be assumed. The test can be considered a dialogue in which both arguments are taken into account – the ones deriving from interstate and the ones from the supranational legal system.

The attitude of EU Member States varies regarding the extent to which their citizens or public authorities have the opportunity to take part in the constitutional dialogue. The Czech Republic is an interesting example. The so called "Euroamendment" of the Czech Constitution created a possibility for the parliament's chambers to take international treaties that the government intends to conclude to the Constitutional Court. Through such action, a treaty's pre-control of the conclusion is achieved, similar to the control achieved at the EU level. The Czech Constitutional Court has evaluated the Lisbon Treaty according to this possibility several times and found that the Treaty is not contrary to the Czech Con-

30 Cartabia (2009), 6, at pp. 17–18.

31 The theoretical structure of the work (except the analysis of the German constitutional court's dec.) partially overlaps with T. Kerikmäe's research, *Estonia in the European Legal System: Constitutional Dialogue as a Device for Protection of the Rule of Law*, Tallinna Ülikooli Kirjastus, (December 2009).

32 K. Lenaerts, 'Interlocking Legal Orders in the EU and Comparative Law', *International and Comparative Law Quarterly* 905, 2003.

33 M. Kordela, *Principles of Law as a Theoretical Category – Remarks on the Background of the General Principles of Community Law. – The Emerging Constitutional Law of the European Union. German and Polish Perspectives*, A. Bodnar, M. Kowalski, K. Raible, F. Schorkopf (ed.). Berlin, Heidelberg, New York: Springer 2003, at pp. 581–582.

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stitution. Even though the rights and freedoms contained in a Member State's constitution must be the main yardsticks of analysis, the Court must consider that constitution as a whole.[34]

Prerequisite to the dialogue between EU law and Member States' law is that the legal systems differ from each other, meaning the law of the Member States is simply not in the field of EU law application.[35] Even though the Lisbon Treaty contains constitutional elements, the name "constitution" was abolished after the first unsuccessful referendum. Thus, it is yet too early to talk about a real European constitution. This is shown clearly by the *Karlsruhe* Court's argumentation, which substantiates the right of a Member State to participate in EU law development.

E. Estonian Standpoints

Using Estonia as an example against which to evaluate deliberative supranationalism, we will now analyze whether this concept could be used. When answering this question, the relationship among the Constitution of the Republic of Estonia Amendment Act (CAA), the Constitution of the Republic of Estonia, and EU law should be observed.

On 25 January 2006 the Parliament passed a resolution to obtain the Supreme Court's opinion about the conformity of Section 111 Estonian Constitution with the CAA. In its opinion, the Supreme Court's constitutional review chamber expressed[36] a rigid attitude towards the application of EU law. Such an attitude contrasts with the dynamic approach of adjusting to deliberative supranationalism. The standpoints of other state representatives, expressed in the opinion, are also relevant. These standpoints signify a situation where different institutions view the relationship between Estonia and EU differently. The chancellor of law thinks it is possible to interpret a new meaning, one in conformity with EU law, from the provisions of the Estonian Constitution. The minister of justice believes that a new meaning may be interpreted in conformity with EU law, depending on the constitutional provision; otherwise it is inapplicable because EU law must be preferred. According to this view, only a grammatical or formal conflict is possible if a national provision is not in conformity with EU law.

The Supreme Court demonstrated a dogmatic attitude in its opinion, according to which the content and validity of the Estonian Constitution is determined merely by EU law. Thus, the legal status of the Constitution as an independent normative act remains unclear.

The Supreme Court found:

> The Constitution of the Estonian Republic must be read in conjunction with the Constitution of the Estonian Republic Amendment Act, applying only

34 P. Brisza, 'The Czech Republic, The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008', *European Constitutional Law Review* 2009/5, at p.143 *et seq*.

35 Cartabia (2009), at pp. 6-8.

36 RKPJKa 11 May 2006, 3-4-1-3-06. – RT III 2006, 19, 176.

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> this part from the Constitution that the Amendment Act of the Constitution does not change. [...] According to the Amendment Act of the Constitution § 2 the Constitution applies, taking account of the rights and obligations arising from the Accession Treaty. As a result of adopting the draft of the Amendment Act of the Constitution, EU law became one of the interpretation and application basis. [...] Practically, it means a substantial and recurring amendment of the Constitution in the parts where it contradicts EU law. To find out what parts of the Constitution are applicable, it must be interpreted in conjunction with EU law, which became binding for Estonia through the Accession Treaty. Only the parts of the Constitution that are in conformity with EU law or regulate relations that EU law do not regulate are applicable. The effect of the provisions, that are not in conformity with EU law and therefore inapplicable, stops. In other words, it means that in cases of contradiction of Estonian legal provisions, including the Constitution, with the EU law in the spheres of EU sole competency or divided competency, the EU law applies.

Thus, the Supreme Court ignored the opportunity to consider the dynamism of mutual relations between legal systems situated at two separate levels, and it provided for unconditional subordination of the Estonian Constitution to EU law. A passive standpoint like this endorses a unilateral communication that favors only EU. At the same time, two dissenting opinions were submitted that supported a more dynamic and non-dogmatic approach. Supreme Court Judge Villu Kõve contended that the legal bindingness of the Court's opinion is doubtful to the extent that the mechanism of constitutional review is provided by the Constitution itself. Judge Kõve found that the first paragraph of the CAA, which refers to the fundamental principles of the Constitution as one of the prerequisites of accession to EU, also should have been evaluated in analyzing the purpose of the Act. His opinion includes criticism about the inappropriate usage of the protective clause and summarily concludes that the Chamber has overrated the principle that EU law prevails over the Estonian legal order. To the extent that the Constitution is completely transformed with the CAA, it only remains valid in spheres that are not regulated by EU law. Judge Kõve agreed that the CAA prevails over the Constitution but disagrees with the methods on which the Supreme Court based its opinion. This dissenting opinion, accordingly, condemns unconditional constitutional loyalty.

The second dissenting opinion, given by the Supreme Court Judge Erik Kergandberg, focused on the aforementioned protective clause and agrees with how it was addressed in the first dissenting opinion. In Judge Kergandberg's expression, the Supreme Court's opinion does not include an explanation of why it is not considered necessary to cover section 1 of CAA in the analysis of constitutional review (i.e. the compliance of EU law to the fundamental principles of the Constitution).

Judge Rait Maruste has tried to clarify the fundamental principles of Estonian Constitution: "[T]he Constitution of the Estonian Republic contains nine

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principles',[37] including democracy, parliamentary republicanism, unitary statehood, social statehood and human dignity and the prevalence of human rights. The principles of legality and democratic rule of law are undoubtedly centred among these constitutional principles. All the named principles are supported by several academic and judicial opinions. It be assumed that the basis of Estonian legal culture derives from legal science and legal practice, which, through consistent application would lead to the development of a certain constitutional doctrine. But the Supreme Court has, in its aforementioned decision, abstained from an EU-directional doctrinarian approach, apparently considering the constitutional loyalty principle as prevailing over the fundamental principles of the Constitution itself.

Supreme Court Judge Julia Laffranque justifies the Supreme Court's decision, noting that the Court finally explained the meaning of the CAA. The Court notes that the Constitution of the Estonian Republic must be read in conjunction with the CAA, applying only those provisions of the Constitution that are not amended with the CAA.[38] This assertion stresses upholding under traditional supremacy, which the fundamental principles of the Estonian Constitution must be interpreted according to EU law. Ginter adds: "accordingly, it may be concluded that the approach of the Supreme Court was pro-European and there were no signs of a defensive approach towards EU law."[39] From the standpoints previously introduced it follows that supremacy must be taken as a dogma and a dialogue and is therefore not necessary in an EU with several levels.

In the opinion of the current authors, the task of the Supreme Court is not to contest the supremacy of EU law but rather to deliberatively analyze the compatibility of the Estonian Constitution with the developing EU law by proceeding from the rule of law principles. The opinion hitherto has not explained the position and scope of the CAA's implementation nor the Constitution in any way. Also the expectation in our legal society that a constitutional doctrine related to EU law would arise has not come true. Values, interests, and operational efficiency are essential, but visions and political will are important as well. Too often, reforms are promoted by words but hindered by corporative conservatism.[40] Through the medium of constitutional dialogue, Estonia could take a more active part in the development of EU and, by proceeding from the protection of the rule of law, mitigate the political influence of other Member States in determining EU matters without the involvement of all Member States. The Estonian situation is not unique but instead illustrates the more cautious attitude that especially many of the more recent Member States take, as opposed to that of Germany.

37 R. Maruste, *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* Juura 2004, at p. 93 *et seq.*

38 Laffranque (2007), at p. 88.

39 *Id.*, at p. 24.

40 P. Cox., 'Speech at opening session – Europe's Challenges in a Globalised World. Visions of leading policy makers & academics', Global Jean Monnet Conference, ECSA World conference, Brussels, Education and Culture DG, Office for Official Publications of the European Communities (23 and 24 November 2006).

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F. Towards EU Rule of Law

From the debates over the Lisbon Treaty, it appears that it is too early to talk about a European constitution; the EU legal system needs a more pragmatic mechanism to organize relations between different levels. A more realistic position uses the concept of deliberative supranationalism, according to which one should proceed from a common constitutionalism that represents the Member States as well as EU. The latter would be expressed in an dialogue between (legal) cultures and in a legal analytical forum, where the principle of association is constantly debated.[41] Apart from political pressures, deliberative supranationalism has an essential role in the contemporary approach. 'The transnational position of EU is viewed as a universal source of authority, in the functioning of which the member states are ectogenous from each other, and develop their dialogues independently.' [42] A discrepancy can be found here: On the one hand, EU is a phenomenon, where values from different legal cultures and the norms that reflect them mix. On the other hand, it can be established that, in practice, the most influential Member States do not change their style and technique of legal argumentation so dramatically, as do States that later accede to an existing system. Thus, the deliberative supranationalism in the given context means that the influence of EU must be autonomous and independent from its individual members.

The EU as such is not contrary to the principles of rule of law nor to the sovereignty of states because the Member States can decide to limit their sovereignty or express it together with other states.[43] An essential element in assuring EU rule of law is the method that ensures a functional EU legal system and the protection of fundamental values, whether by the system itself or by the Member States and in accordance with their legal systems. A dialogue, especially one over primary rights, supports EU legal development as well as that of the Member States as it enriches the discussion about the essence and interpretation of laws.[44]

As an ideal, the EU legal system must be based on rule of law, not on the opinions of interest groups, and each Member State must have an opportunity to have an equal say in its development. To what extent the opinion of a Member State is taken into consideration depends primarily on the vigor of the legal argumentation that develops in the course of a constitutional dialogue. The authors can only agree with professor Schorkopf,[45] states that "the *Karlsruhe* decision should be seen above all, as a challenge to practics as well as to scientists, to initiate a multinational discussion on a topic about explaining the relations between EU and a member state". This is not a call for protectionism – the Member States

41 J. Shaw, 'Relating Constitutionalism and Flexibility in the European Union', *in* G. de Búrca & J. Scott (ed.), *Constitutional Change in the EU. From Uniformity to Flexibility*, Oxford, Portland Oregon: Hart Publishing 2001, at pp. 347-351.

42 J.C.N. Raadschelders, *Handbook of Administrative History*, New Brunswick and London: Transaction Publishers 2000, at p. 217.

43 Brisza (2009), at pp. 149-150.

44 Cartabia (2009).

45 Schorkopf (2009), at p. 1239.

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rather are challenged to give up political opposition and instead find a suitable method to introduce rule of law through using legal argumentation.