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Building a Just Society: the Role of the Constitutional Judge

Idea of Justice in the Contemporary Value Jurisprudence and the Process of Argumentation

Introduction

The role of values has been growing in legal thinking and works of legal theorists — during the past century we have passed from the conception of "law as rules" to an understanding of "law as values and principles".[*1] On the one hand, values form a basis of norm creation; on the other hand, they constitute a tool for the judge in making right and just decisions in individual cases. Judges should use the flexibility of law to maximise the possibility of reaching a just decision in a concrete case.

Written norms form an important part of the legal order, yet they are not self-sufficient. As set forth below, there are ambiguities, gaps and controversies in the *ius scriptum*, which cannot be overcome only in the context of written norms. Taking this as the overall context, I will argue that the latter can be viewed as stones in the construction of the legal system, the foundation of which consists of values and principles that have emerged from the broader social context and provide for the coherence of the legal system.

On the background of value pluralism characteristic to modern democracies, this analysis will concentrate on justice, one of the most fundamental values in the legal system. In order to ease the achievement of the aim of this article — providing an insight into the ways in which values are taken into account in judicial decisions — I will concentrate on the role of the idea of justice. Taking some cases as examples, I will view the importance of the idea of justice in decision-making by judges. For reasons of legitimacy, it is important that the reasons for the decisions would be reflected in the motivations.

Firstly, the role of the idea of justice will be considered in the process of argumentation in general, whereas the second part of the article will view making 'value decisions' by the constitutional courts.

[1] M. L. F. Esteban. The Rule of Law in the European Constitution. The Hague, 1999, p. 38.

Drawing parallels from the case law of French and German constitutional courts and the European Court of Justice, the analysis will concentrate on the new possibilities and challenges for the decision-makers posed by the value-centred approach for the Constitutional Review Chamber of the Estonian Supreme Court.

1. The idea of justice and value jurisprudence

1.1. Meaning of the idea of justice

Social justice, justice as fairness, material justice, procedural justice, intergenerational equity, just punishment and justice as part of the rule of law — these are a few examples of different aspects of the idea of justice. The dynamic progress in modern societies has brought up new perspectives, *e.g*. correlation between justice and fundamental rights.

The issues of material or substantive justice have not directly been on the programme of the Continental European legal thinkers in the (post)modern era, who have concentrated mainly on the procedural aspect: how to establish the meaning of justice in a concrete society, time and space and, more specifically, in a particular case. On the other hand, some Anglo-American philosophers, like J. Rawls and R. Nozick, have created theories that are at the core of the discussions on justice, elaborating also on its content.[*2]

1.2. Different forms and criteria of justice

Though there may be no universal definition or understanding of justice, certain **common features** are present in all theories of justice. The core problem that most of the theories address is the criteria for the allocation of goods in the society. This is referred to as *ius distributiva* or **distributive justice**. Among different principles of the latter, the following are of a greater impact in modern societies:

- to everyone according to their work (liberal individualist approach); and
- to everyone according to their needs (social democratic approach of a social state).[*3]

In each society, equilibrium between these aspects has to be found according to the needs, values and possibilities of the society. In the Estonian context, adherence to the value of social justice has been put forth in § 10 of the Constitution.[*4] However, the success of the transition and fast progress of the past decade, belongs to the liberalist approach taken by the government, aiming at building up the economy.

Equalising justice or *ius commutativa* would demand that all be equal, and is realised *e.g*. through the constitutional clause according to which everyone is equal before the law.[*5] The action taken to bring about just distribution in individual circumstances is referred to as **corrective justice**.

Among the widely acceptable **criteria of justice**, principles of fairness, equality and proportionality can be brought out. I. Tammelo, the most well-known Estonian legal philosopher, has defined justice as "a positive ethical social value, according to which everyone should be given what is "his or hers in a normatively bilateral situation". He has also brought out the Golden Rule from the Bible, the categorical imperative of Kant and principles of impartial court process as repeated criteria of justice.[*6]

Many different theories, admitting the relative subjectivity of the idea of justice, stress that rational thinking is the tool, which can help us in the search for justice and just decision-making. Reason can make us "impartial spectators"[*7] who define the existing prevalent value hierarchy in the society and reach a just decision.

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[2] The theory of justice of John Rawls places people behind a "veil of ignorance" for deciding the organisation of society is also a good example of procedural justice. The model proposed by Rawls also takes into account the interests of the disadvantaged members of the society. Opposed to his tentatively socialist theory is R. Nozick, committed to the individualist libertarian approach.

[3] Ch. Perelman has also brought out the distribution principles of "to everyone according to their inner assets", "to everyone according to their position in the society" and "to everyone according to what is legally his due". Ch. Perelman. Justice, Law and Argument. Concerning Justice. Holland, 1980, p. 2.

[4] Section 10 of the Estonian Constitution (published in Riigi Teataja (The State Gazette) 1992, 26, 349 (in Estonian)): "The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law."

[5] Expressed in § 12 in the Estonian Constitution: "Everyone is equal before the law. No one shall be discriminated against on the basis of /…/ sex, /…/ or on other grounds."

[6] P. Jõgi. Õiglus ja eetika. Ilmar Tammelo (Justice and Ethic. Ilmar Tammelo). Tallinn: Õigusteabe AS Juura, 1997, p. 160 (in Estonian).

[7] *Ibid.*, p. 162.

Most authors of theories of justice also agree that the result should 'render to everyone what is theirs', reflecting the principle of *cuique suum*.

1.3. Pluralism of values

The pluralism of modern democracies is reflected also in the constitutions that contain several, potentially conflicting, values. Taking a simple example from the Estonian Constitution: in order to guarantee equality of treatment, the state must restrain liberty of action of possible discriminators. Balancing between different values and principles is an integral part of the work of the judge in the process of argumentation, which is especially reflected in the case of constitutional interpretation. In order to enhance the legitimacy of decision-making, their reasoning should contain convincing arguments addressing "law as integrity"[*8] — embracing both written law as well as the underlying values and principles.

1.3.1. Justice and legal certainty

Besides the lack of universal understanding of justice, it is the pluralism of values that also contributes to the moderate use of the idea of justice. The law is at the same time *ars boni et aequi* and *ars stabilis et securi*.[*9] Ch. Perelman claims that it is finding the equilibrium between these demands, which guides judges in decision-making.[*10] As both justice and legal security are fundamental values, neither can be entirely sacrificed. This has taken German legal theorist B. Rüthers to suggest that the idea of justice in itself demands offering minimal legal security as a formal additional element.[*11]

In each concrete case a thorough value-weighing process should be carried out in order to reach a result that responds to the actual societal needs and values. The weighing rule is relevant in conflicting relations between justice and legal certainty as well as freedom and justice (especially egalitarian justice). The search for balance of these notions has to guide the decision-maker through the process of application of legal norms to a concrete factual setting, in order to reach a value judgement. I. Tammelo has called the process of achieving harmony between values "paraduction"[*12] that is to be reached in rational decision-making.

The result of the described process should be motivated with arguments from values, including arguments from justice and its criteria, in order to convince the auditorium that the decisions comply to and reflect the value order of the present society.

There are voices claiming that as long as there is no clear formulation of justice, it can only hold the position of a so-called additional value, as otherwise it would endanger the stability of the legal order which is one of the conditions for maintaining social order.[*13] From another point of view, without justice as one of the fundamental values we cannot speak of value jurisprudence. One of the tasks of legal reasoning is still to interpret the rules in the light of the just weighing of values.[*14]

1.3.2. Justice and equality

There is a special relation between justice and equality. Dworkin has said that for us equal treatment of people is the most fundamental principle of political morality.[*15] So far we have referred to it as a feature of justice, because justice can be expressed through equality, at least through equal distribution of goods between equals.[*16] On the other hand, equal distribution does not always contribute to justice, and a situation of inequality is not always inherently unjust. It is the unjust inequalities that should be brought to a minimum. This applies to discrimination in many cases — there are norms for prohibition of discrimination on grounds of sex, race, political dispositions, social status, *etc*. in constitutions of modern democratic states.

Equality can be invoked in different ways, *e.g*. in terms of welfare, resources or possibilities. Looking at people around us we can see that we have not been created according to the same formulas. Only as possess-

[8] The notion of "law as integrity" has been used in the works of R. Dworkin, *e.g*. in Taking Rights Seriously. London, 1981.

[9] *Ars boni et aequi* (Latin): art of the good and the just; *ars stabilis et securi* (Latin): art of stability and security.

[10] Ch. Perelman. La motivation des décisions de justice. Bruxelles, 1978, p. 422.

[11] B. Rüthers. Rechtstheorie. München, 1999, p 221.

[12] P. Jõgi (Note 6), p 162.

[13] H. Page. L' Équité en face de droit. Bruxelles, 1931, p. 158.

[14] A. Aarnio, A. Peczenik. Suum cuique tribuere. – Ratio Juris, 1995, Vol. 8, No. 2, p. 171.

[15] R. Dworkin (Note 8), pp. 179–183.

[16] H. Page (Note 13), p. 167.

ing the right to human dignity, on the basic level of human beings, are we all equal. Thus absolute equality would not necessarily enhance justice; equality in the relative sense should be attained with the help of conceptions of justice that prevail in the given social context.

2. Values in the process of argumentation

2.1. Interpretation and reasoning in 'hard cases'

The notion of 'hard' cases is usually invoked when it concerns a gap in the law, antinomies of *sensu largo* (conflict between potentially applicable norms) or *strictu sensu* (contradiction between different applicable norms), or difficulties in determining the meaning of a legal norm (ambiguity, vagueness, generality, polysemy *etc*).[*17] The case can even be called 'harder', if the best solution, just and morally acceptable, seems not to fit into the legal framework or contradicts some existing norms. This would be a case of ideological antinomy.

As a result of these shortcomings that to some extent are present in any legal order, it is often not possible to limit the task of deciding a concrete case to following the deductive-logical process of subsumption when applying legal norms. The argument from justice has a special role especially in these 'hard cases', when in addition to the literal interpretation and subsumption of the norms, the teleological and systematic arguments and broader legal principles have to be taken into account.

Teleological interpretation, addressing the aims and purposes of norms, is the most relevant from the point of view of using arguments from values. In the preamble of the Estonian Constitution, justice has been recognised as one of the fundamental values and aims of the legal order: Estonia is a state "founded on liberty, justice and law."[*18] Taking into account the contemporary understanding of justice of the society should be an integral part of making legal value judgements.

The judicial decision is justified when it is logically deduced from correctly selected premisses and if the rules of reasoning with such premisses are accepted as correct.[*19] If in 'easy' cases the analytical deductive reasoning is sufficient via syllogistic justification, then in 'hard cases' one has to turn to broader rules of reasoning and interpretation. In decision-making, the simple facts, motives as well as the norms have to be evaluated in the light of values. Although this has to be kept in mind in all cases, especially in 'hard case' circumstances the role of axiology is paramount.

It has to be highlighted that in the period of transition and rapid reforms that Estonia is now passing, the broader concept of interpretation of legal norms becomes especially necessary, as the legislation cannot always keep up with the pace of real changes. In a new democracy like Estonia there are also unfortunately more gaps in the laws that cannot also be filled with analogy and need an alternative approach. The judges have to make decisions also in these circumstances, and one guarantee of a value judgement in this setting would be teleological interpretation that takes into account the objectives of legal acts and the legal system as a whole of which the idea of justice forms an immanent part.

2.2. Judicial discretion

As we saw above, achievement of the equilibrium of values in decision-making resembles balancing on a tight rope. In an ideal situation, resolving upon which values belong to the foundation of a particular society and determining their content should be the result of a discourse comprising the whole society. In reality, this burden is often left to judges to be exercising in the course of decision-making in individual cases, especially in 'hard cases'.

The discretion of judges to decide on the meaning of justice in a concrete case can raise fears of too wide judicial activism in those who prefer judicial restraint to the letter of law. An often-arising question is whether we are not putting the judges into the shoes of a democratically elected legislator? Taking into account that laws are abstract in nature, their application and concretion has to take place in concrete cases. It would not be possible to put every individual 'hard' case to the Parliament — the application of laws remains in the competence of courts, and the legislator can object or repeal these decisions via stronger regulation of the issues in question.

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[17] J. Bengoetxea. The Legal Reasoning of the European Court of Justice. Oxford, 1993, p. 218.

[18] Preamble of the Constitution of the Republic of Estonia. – Riigi Teataja (The State Gazette) 1992, 26, 349 (in Estonian).

[19] J. Bengoetxea (Note 17), pp. 168–169.

A good example of the interdependence of the supreme court and the legislator is the recent *Perruche* case of the French Supreme Court.[*20] Nicolas Perruche was born with a serious handicap, which his mother was not able to foresee due to medical faults, being thus deprived of the possibility of terminating the pregnancy. The court recognised the right of the parents and the child to damages for this prejudice. The decision arouse a large-scale debate in the society, in which it was also claimed that this decision could be interpreted as declaring birth of a handicapped child itself as a prejudice and grounds for indemnification. The Parliament, in immediate reaction, adopted a law, stipulating clearly that the fact of birth of a handicapped child could not be seen as a prejudice in itself.

This could also be regarded as an example of judicial activism, which the legislator found necessary to restrain. Apart from the possible reactions of the parliament, the legitimacy of decision-making by judges is controlled in two different ways: on the one hand, there is their own morality and consciousness, and on the other hand, the external control that takes place through their obligation to motivate the decisions. This reasoning can in its turn give rise to further and wider deliberations within the society, which is common practice in many European countries and also in the European Union, which brings reflections of the living spirit of the society in certain time and space into the process of decision-making.

One of the difficulties arising in 'hard cases' is the seeming plurality of right decisions — the existence of several answers to the question, when only taken from a different perspective. In this case it ought to be decided, which perspective is the most important in this case. For example, there could be a choice between the 'common good' and an individual right.

R. Dworkin has argued against the 'no right answer' thesis in his Taking Rights Seriously. He contends that there are cases where controversial outcomes in favour of either party are equally possible and equally right, meaning that the judge cannot decide.[*21] He defends the existence of right answers in 'hard cases', meaning that it is not a hopeless aim to let the judges seek this answer. I would like to join in his optimism that there must be an argument that is the soundest, when balanced with others.

The decision has to be based upon the weighing of these different options, taking into account not only the questions of law, in the strict sense, but also issues of philosophy and ethics. In case of a gap or other shortcomings in the legislation, the process of decision-making should be conducted in light of the Constitution. In order to provide for the legitimacy of the decision, the motivation should convince the audience that the result is consistent with the spirit of the Constitution that is the spine of the legal order.

3. Value decisions in practice

3.1. The German *Bundesverfassungsgericht*

Valuable contemplation on the idea of justice can be found from the decisions of the German *Bundesverfassungsgericht*, where the question of justice is brought up in several contexts, from the matters of just compensation to broader issues concerning justice and welfare state. For example, the idea of material justice is underlined as one of the fundamental elements of the rule of law (*Rechtsstaat*) that has to be protected as such.[*22] The *Bundesverfassungsgericht* has stated that the rule of law is one of the elementary principles of the German Constitution and it embraces not only legal security (*Rechtssicherheit*), but also the concept of material or substantive justice.[*23]

According to the *Bundesverfassungsgericht*, the lawgiver cannot give unequal treatment to cases that are the same in the essential elements. It is up to the legislator to decide which elements are to be deemed important enough to give grounds for differentiation. But the length of slack afforded the lawgiver is fully taken up where the unequal treatment is no longer in accordance with the demands for the existence of an objective reason for differential treatment.

The principle of equality is often referred to in the motivations of the *Bundesverfassungsgericht*, though it is rarely invoked separately. In spite of the purpose of "treating the like cases alike and different cases in proper accordance with their nature, referring to the idea of justice"[*24], as people looking through different

[20] Decision of the French Supreme Court (Cour de Cassation) of 17th of November 2000, confirmed in similar cases of 13th of July 2001 and 28th of November 2001.

[21] R. Dworkin (Note 18), pp. 280–281.

[22] BVerfGE, 102, 254 (2000), referring also to BVerfGE 21, 378 (1967); BVerfGE 33, 367 (1972); BVerfGE 52, 131 (1979).

[23] BVerfGE, 20, 323 (1966).

[24] L. Favoreu. Les Cours Constitutionnelles. Paris: Presses Universitaires de France, 1986, p. 67.

prisms see the likeliness of cases in different colours, it is feared that giving too wide discretion to the judges would enable them to take up the role of the legislators. The profound motivations of decisions, distinctive when compared to the French, European or Estonian counterparts of the *Bundesverfassungsgericht* contribute to legitimacy, by rendering the decision-making more transparent.

The demand of social justice (*Gebot sozialer Gerechtigkeit*) is referred to in several cases as an important aspect of the principle of social state, which has evolved significantly due to the jurisprudence of the Court. Also the demand for justice in concrete cases (*Einzelfallgerechtigkeit*) has been mentioned, and the terms like value justice and system justice also appear in the motivations. If in general we can speak of the art of argumentation rather than the science of argumentation, the sixteen-member German Constitutional Court has succeeded in developing the art into a science.

In conclusion, the decisions of the German *Bundesverfassungsgericht* contain several arguments of justice in several forms, as well as the principle of equality and arguments concerning other fundamental rights. The well-articulated decisions are academic in character and provide valuable analysis on the meaning of the idea of justice.

3.2. The French *Conseil Constitutionnel*

The central role in establishing the meaning of texts in the French Constitution is exercised by the *Conseil Constitutionnel* (the *Conseil*). The body that comprises nine members also serves as an instrument that assures including new perspectives in the legal discussion in France. Since the eighties (from the nomination of D. Mayer to the post of president of the *Conseil*, and after him R. Badinter — the presidents have had a strong impact on the jurisprudence), emphasis has been laid on human rights protection.[*25] Another analyst of the decision-making of the *Conseil* has pointed out that there are two finalities or aims that guide the *Conseil* in its practice of interpretation: just balance of public powers and protection of human rights, the latter being the main source of inspiration of constitutional interpretation.[*26]

The French method of argumentation is rather minimalist compared to the example of the German Constitutional Court, which shows a clear touch of academic reflection. A councillor of the French *Cour de Cassation* has interpreted the obligation to motivate decisions as a duty to motivate in fact and in law. This means that the judge has to indicate clearly and completely the path of reflection and the intellectual stages of decision-making, or in other words, the legal reasoning.[*27] Still, he points out the extreme shortness of the motivation, though with respect to the decisions of the Supreme Court (*Cour de Cassation*): "only eight lines dedicated to announcing the legal rule and its application in the respective case."[*28] The same applies equally to the practice to other jurisdictions in France, including the *Conseil*.

Still, although the literal and systematic traditions of interpretation generally prevail in the practice of the *Conseil*, there is also a place for teleological interpretation that takes into account the aims of a legal norm and, more broadly, the aims of the social order as a whole.[*29] The latter is still least dominating, as instead of taking into account what is implicit in the social order, the *Conseil Constitutionnel* regards what is implicit in the Constitution. In several decisions the *Conseil* has referred to "the spirit of the Constitution", *e.g.* in 1962, when it refused to examine the constitutionality of laws adopted by referendum.[*30]

As to the principle of equality, it has been invoked in different forms: concerning equality before the law and justice, in elections, in access to posts in public service *etc*.[*31] The argument from equality is usually based on section 2 of the Constitution or the Declaration of 1789, or without any mentioning of its legal source.

In conclusion, a judge of the *Conseil* has far-reaching powers in interpreting the French Constitution. Although it is rather short-spoken and laconic in motivating its decisions, it still proves to be engaged in what could sometimes be called "creative interpretation", not just mechanical application of law.

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[25] See further: D. Rousseau. Sur le Conseil Constitutionnel: La doctrine Badinter et la démocratie. Paris: Descartes & Cie, 1997, p. 194.

[26] Y. Aguila. Le Conseil Constitutionnel et la Philosophie du Droit. France: Louis-Jean, 1994, p. 73.

[27] J. Ancel. Rédaction de décision en France. – Revue internationale de droit comparé, 1998, No. 3, p. 848.

[28] *Ibid*., p. 848.

[29] Y. Aguila (Note 26), p. 63–72.

[30] Case No. 62-20, 6 November 1962. – Journal GD, No. 14, p. 27.

[31] Cases No. 75-56 DC, 23 July 1975, p. 22; No. 86-208 DC, 1 July 1986. – GD No. 42, p. 78; No. 82-153 DC, 14 January 1983, p. 35; No. 80-125 DC, 19 December 1980, p. 51.

3.3. The European Court of Justice

In argumentation in the jurisprudence of the Court of Justice of the European Communities (below referred to as the ECJ or the Court) there are aspects which differ from practice of the national courts. The understanding of these particularities is of a special importance for the legal thinking in Estonia, keenly pursuing the road map of negotiations for accession to the European Union. There are also interesting features in practice of ECJ that the Estonian judges could consider learning from.

The ECJ uses most frequently dynamic teleo-systemic modes of interpretation, combining systemic and functional as well as teleological or consequentialist criteria. The Court itself has stated that in establishing the meaning of a legal text, "one has to go back to its spirit, general scheme and wording".*[32] General goals of the Community should also be mentioned as key directives in the Court's practice of interpretation and motivation.

As to the finalities that the ECJ takes account of in its interpretation, it has stated that the Community is a *Rechtsgemeinschaft**[33], and this notion is used by the Court as an inspiring idea and motivating argument in several of its decisions. The principle of *rechtsgemeinschaft* means interpretation in accordance with law, the written norms as well as their spirit that contain also the values as objectives of the legal order. Heterogeneity of the value systems in the different societies joined into the Community account for difficulties for the Court in determining the content and meaning of values. But the ECJ has taken itself rather broad liberties in filling out the blanks in the Communities' peculiar legal system.

The ECJ has referred to justice in many of its decisions, bringing out arguments from natural justice, fairness and equity.*[34] As an example, in the *Walt Wilhelm**[35] case that concerned applying competition protection measures to the same case by different Member States, the court based the justification of its decision upon natural justice, although the relevant party had referred to the *non bis in idem* principle. In several cases the ECJ has directly referred to the objective of fairness as an underlying value of the legal norm in question and the basis for interpretation.*[36]

The principle of proportionality, as one criteria of justice, also holds an important place in the jurisprudence of the ECJ. The latter has combined it with the principle of fairness.*[37] The principle of equality has also been developed mainly by the Court. In times, when there were only fragmentary references to the prohibition of discrimination in the Community law, the Court that derived a general prohibition of discrimination from these provisions.*[38] The ECJ has applied this principle in the fields of discrimination on the basis of religion and nationality, as well as gender.

Case Defrenne II*[39], a landmark case in the Court's equal treatment jurisprudence, sets forth the principle of equal pay for equal work that is closely connected to one possible formulation of distributive justice — whose contributions are equal, are entitled to equal benefits. The case *Commission v. UK**[40] also concerns equal remuneration. Here the court has grounded its motivation on the general structure and objectives of the equal pay directive, finding that leaving classification of jobs to be established by the employers would violate the principle of equal pay for equal work.

In conclusion, the ECJ utilizes a combination of teleological and systematic criteria of interpretation, taking into account the general objectives of the Community as well as the coherence and need for further development of its legal system. The argument of justice has been essential to several of its decisions, in close connection to principles of equality and proportionality. The ECJ has taken itself a rather wide margin of discretion, being inspired in its argumentation of the general purposes and values of the Communities' legal system.

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[32] For example, case 6/72 *Continental Can v. Commission* (1973) ECR 215 at 243.

[33] Case 294/83 *Les Verts v. European Parliament* (1986) ECR 1339.

[34] M. L. F. Esteban (Note 1), pp. 162–163.

[35] Case 14/68 *Walt Wilhelm and others v. Bundeskartellamt*, [1969] ECR I concerned competition law. The court found it unjust if authorities of different member states would independently conduct procedures for controlling actions to guarantee competition, as it could result in subsequent sanctions for the same violation.

[36] Case 61/98 *De Haan Beheer BV v. Inspecteur der Invoerrechten en Accijnzen te Rotterdam*, [1999] ECR I-5003, interpretation of section 905 of the regulation no. 2454/93 of the EC; also case 86/97 *Reiner Woltmann v. Hauptzollamt Potsdam*, [1999] ECR I-1041, interpretation of section 239 of the Customs Code of the EC.

[37] Case 297/98 *SCA Holding Ltd v. Commission of the EC*, [2000] ECR 0000.

[38] Cases 1/72 *Frilli v. Belgium*, [1972] ECR 457; 168/82 *ECSC v. Ferriere Sant'Anna*, [1983] ECR 1681.

[39] Case 43/75 *Defrenne v. Sabena*, [1976] ECR 455.

[40] Case 61/81 *Commission v. UK*, [1982] ECR 260.

3.4. The Constitutional Review Chamber of the Estonian Supreme Court

In Estonia there is no separate constitutional court. The Constitutional Review Chamber of the Supreme Court (CRC), composed of five judges, functions as the highest authority in norm interpretation.

3.4.1. Examples of references to justice in argumentation of the Constitutional Review Chamber

In the following paragraphs, some models of argumentation relating to the idea of justice in the practice of the Estonian Supreme Court will be outlined.

Firstly, in a decision from September 1994, the applicability of general principles of law has been based upon the statement in the preamble of the Estonian Constitution, which sets forth that "freedom, justice and law are the underlying values of our state order".*[41] This statement has been of a fundamental importance for the development of the Estonian legal culture, being referred to in many subsequent decisions.

The requirement of justice has also been referred to in connection to the principle of equal treatment. For example, this has been invoked in relation to returning of the unlawfully alienated property*[42] and equal treatment of the foreigners in comparison with the Estonian citizens.*[43]

Secondly, there are decisions on just compensation that could be viewed as applications of corrective justice, which aim at establishing justice in the concrete circumstances. In a case from 8 November 1996, the CRC noted that "it is not possible to evaluate in the course of general legal norm control whether the compensation would be just in a concrete case". At the same time, the judges have not specified according to which criteria it would be possible to evaluate in individual cases whether the compensation does comply with the requirements from justice.

Thirdly, the requirement of social justice has been brought out as an underlying objective of the property law reform.*[44] The Legal Chancellor had submitted a petition, seeking to declare "Supplementary budget for 1999" partially null and void. The case dealt with implementation of requirements from the Housing Act. In the opinion of the Supreme Court *en banc*, it was put forth that "Section 2 of the Principles of Ownership Reform Act stipulates the purpose of ownership reform to be, *inter alia*, to undo the injustices caused by violation of the right to ownership /…/. The provision pursuant to which return of property to or compensation of former owners or their legal successors for property in the course of ownership reform shall not prejudice the interests protected by law of other persons or cause new injustices, is to guarantee balancing of different interests and social justice."

3.4.2. More emphasis on teleological argumentation

The importance of teleological arguments in general, including arguments from justice, ought to be extended in the practice of the Supreme Court. As cited above, the preamble of the Estonian Constitution sets justice as one of the notions that our state is founded upon. Also provisions of the Constitution as well as different legal acts have set the different components or criteria of justice, *e.g*. equality or proportionality as under-lying aims of legal regulation. Still, none of these acts says when or how the idea of justice should be used in practice.

In some cases the court has used reference to the spirit of the Constitution in accordance with the second paragraph of § 152 of the Constitution*[45], that could open up more dynamic dimensions of constitutional interpretation.*[46] In a decision from December 2000, the CRC has stated that "The Supreme Court can and must evaluate the lawfulness of a norm, taking into account the coherence and conception of the Constitution as a whole".*[47] Respecting the coherence of the legal system requires an integrative approach that would take into account the aims of the Constitution and legal order. The preamble of the Constitution thus becomes an important part of the argumentation process, serving as the key for understanding the legal system.

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[41] The decision of the Constitutional Review Chamber of the Supreme Court, 30 September 1994 (III-4/A-5/94).

[42] The decision of the Constitutional Review Chamber of the Supreme Court, 30 September 1998 (3-4-1-6-1998); 8 November 1996 (3-4-1-2-96); and 12 April 1995 (III-4/A-1/95).

[43] The decision of the Constitutional Review Chamber of the Supreme Court, 27 May 1998 (3-4-1-4-98).

[44] The decision of the Estonian Supreme Court *en banc*, 17 March 2000 (3-4-1-1-2000).

[45] The second paragraph of 152 of the Estonian Constitution: "The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution."

[46] M. Suksi. On the Constitutional Features of Estonia. Åbo: Åbo Academis, 1999, p. 32.

[47] The decision of the Constitutional Review Chamber of the Supreme Court, 22 December 2000 (3-4-1-10-2000).

3.4.3. Need for greater consideration of values

The Chief Justice of the Supreme Court U. Lõhmus has pointed out that "importance of the use of general principles of law especially arises in time of great changes in the legal system, when the gaps and contradictions in norms are more extensive".*[48] Estonia has witnessed the building up of a new legal system and legal culture during the past decade. In spite of successful reforms, many questions are left unanswered. The discourse on values has been treated in a few academic works and articles, yet it has not been developed in court decisions. In several decisions, the importance of legal certainty has been stressed, yet arguments from justice have generally not been drawn. Comparing the practice of CRC to the decisions of the previously viewed constitutional courts, references to the idea of justice are not common and when the notion of justice is used, its meaning and content in the given context are not clarified.

In the same article U. Lõhmus also finds that "use of general principles of law could help solving the conflict between law and justice". The Supreme Court has created a link between the idea of justice and general principles of law, using this as the basis of deriving the validity of several fundamental rights in the Estonian legal system. On the other hand, solving the conflict between law and justice deserves to be treated directly and argumentation would benefit from using arguments from justice itself. There is a need for clarification of which content of justice is prevalent in Estonia in the minds of the Supreme Court judges and how does it guide them in decision-making.

Conclusions

In order to ensure the legitimacy of judicial decision-making, the power of discretion left to the judges has to be limited, especially by the obligation to motivate decisions. Judges are not only 'the mouth that repeats words of the laws', but their role and responsibility in the society reaches further: they have an important part in building up a just society. To attain this, they should take values, including the idea of justice, into account in concrete cases. This value-oriented method should be integrated into the legal reasoning, aiming to make the decision acceptable for the audience, comprising not only parties to the case, but also the legal community as well as the whole society.

Compared to the practice of the ECJ and German and French Constitutional Courts, the idea of justice has been less brought out in the Estonian practice of motivation. In spite of references in some decisions of the Constitutional Review Chamber of the Estonian Supreme Court, there are almost no indications as to the relevance of justice in the reasoning or its meaning for our judges. There is a need for a more intensive discourse on the content and criteria of justice, to which the contribution of the Constitutional Review Chamber would be essential in future.

[48] U. Lõhmus. Rahvusvahelise õiguse üldtunnustatud põhimõtted Eesti õigussüsteemi osana (Generally Recognised Principles of International Law as Part of the Estonian Legal System). – Juridica, 1999, No. 9, p. 426 (in Estonian).