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# Courts as Political Institutions

## 1. Introduction

The main issues discussed at the scientific conference dedicated to the 15<sup>th</sup> anniversary of the Constitution of Estonia were the questions of what the role of the constitutional court should be in the society and to what extent the decisions of the parliament may be subject to judicial review. Scholars, and especially legal scholars, usually also attempt to answer the normative question of how the constitutional court should act — in other words, what restrictions may the court impose on the parliament when relying on the constitution. Two opinions compete with each other. On one side are those who support a modest court.\*<sup>1</sup> They emphasise that the more the parliament's behaviour is restricted by the court, the more the court interferes with the activities of an institution elected by the people and, thereby, with the functioning of democracy. On the other hand, the advocates of a stronger role of the court find that in a democratic society the court has a critical role to play — to ensure compliance with the constitution and, in particular, continuing respect for human rights and democratic processes. Often, a discussion of the importance of the judiciary's independence accompanies this viewpoint.

This article has a slightly different emphasis: I am trying to find answers to the empirical question of what kinds of restrictions are and can be established in reality by constitutional courts on the parliament and other institutions of public authority. My approach is not normative but, rather, empirical, with an attempt to explain why courts act in one way or another. My objective is to theorise about the position of the constitutional court in a political system and, to some extent, speculate as to the correctness of such theories, using the Supreme Court of Estonia as an example. My analysis is not based on jurisprudence but, instead, on political science — more specifically a rather small part of the political science literature, as I am relying on the work of researchers who regard courts as an empirical object of study.\*<sup>2</sup>

For an empirical researcher, the court as one of the decision-makers in matters of social importance is not a remarkably different object of study from the parliament, the executive, or other political institutions. Such research is devoted to politics of judicial review\*<sup>3</sup>, examining the question of what influences a constitutional

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<sup>1</sup> In this article, I use the terms 'court', 'constitutional court', and 'constitutional review court' interchangeably for the sake of conciseness. The Estonian Supreme Court is thus a 'constitutional court' within the meaning of this article although it is not a separate constitutional court.

<sup>2</sup> Of course, there are political scientists who address normative issues related to constitutional review; however, their methods and approaches are not substantially different from those of the legal theorists who address similar issues.

<sup>3</sup> One of the most comprehensive review articles of political science research on the US Supreme Court addressed to legally trained audience uses the concept of politics of judicial review in the title. See B. Friedman. *The Politics of Judicial Review*. – *Texas Law Review* 2005 (84) 2, pp. 257–337. Unfortunately, the majority of political science theories on the behaviour of courts are somewhat one-sided, relying only on the example of the US Supreme Court.

court in making one kind of judgment as opposed to another, as well as how the constitutional court influences the society.<sup>\*4</sup> In this article, I am thus attempting to provide an overview of studies in the field of politics of judicial review.<sup>\*5</sup>

## 2. What explains a judgment?

Let me begin with factors restricting the freedom of a constitutional court. While I have noted that courts do not stand out remarkably in comparison with other political institutions, this does not, however, mean that there is nothing specific to the behaviour of a court. Even the most radical political scientists attribute at least some weight to laws, including the constitution, as a factor restricting the activities of courts, although many think the weight accorded to these is quite minor.

At the same time, there are probably no political scientists who would consider the judgments of a court to be completely in the 'legal' realm — i.e., completely explicable by the nation's constitution or other provisions of law.<sup>\*6</sup> Several factors explain why a complete binding to the constitution is cast aside without further consideration, and these reasons have already been pointed out repeatedly. First is the theoretical reason based on the level of generalisation of terms used in the constitution. Irrespective of which methodology is used for interpreting the constitution, there is inevitably a certain freedom of choice in adjudication when a court operates with such constitutional-law concepts as the right to good administration, legal certainty, or legal clarity. For example, what are, in a democratic society, the important matters that must be regulated by parliamentary laws and what constitutes technical detail that may be regulated by the executive under authority received from the legislature?<sup>\*7</sup>

The argument that judgments made on the basis of at least international human rights provisions, including the case law of the European Court of Human Rights (ECHR), are predetermined by provisions of law is rather weak. In such cases, the ECHR should also be a tribunal whose judgments are predetermined by provisions of law. More probably, the strong influence of the ECHR case law in increasingly varied areas of life implies that the ECHR has, over time, 'discovered' new rights while relying on essentially the same provisions of law.<sup>\*8</sup>

Reference to well-known legal principles is not of much help either, as the application of these principles in specific situations differs remarkably from country to country. For instance, the quite strict restrictions adopted by the Estonian Supreme Court in its case law concerning the delegation of legislative power to the executive<sup>\*9</sup> are indeed similar to the corresponding German principles but substantially different from those recognised in France, England, or the United States.<sup>\*10</sup>

The lack of reality in the image of constitutional courts as bound to proceeding from the law is also implied by empirical experience, in addition to the theoretical argument. For example, let us take the question of why some courts are more active than others.<sup>\*11</sup> How can one explain the fact that, on the basis of similar constitutional provisions, one constitutional court (e.g., in Hungary or the Republic of South Africa) declares the death penalty to be unconstitutional while another court (e.g., the Estonian Supreme Court) does not do

<sup>4</sup> Social scientific investigations into the behaviour of institutions and persons stem, as a general rule, from the question of the interests and objectives of these institutions and persons. This important issue is not addressed in this article, but political scientists have discussed the factors behind the behaviour of judges. See L. Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton University Press 2006; L. Baum, *What Judges Want: Goals and Judicial Behavior*. — *Political Research Quarterly* 2004 (47) 3, pp. 749–768.

<sup>5</sup> A comprehensive handbook giving an overview of connections between political science and law will be published in 2008 by Oxford University Press: K. E. Whittington, R. D. Kelemen, G. A. Caldeira. *The Oxford Handbook of Law and Politics*. Oxford University Press, forthcoming.

<sup>6</sup> What is the difference between a legal and a political decision, and whether such differentiation is possible at all, are, of course, ancient questions. I do not even attempt to find a precise definition of a legal question, as this is not of great importance for my review — namely, I will discuss only such sources of influence that probably only very few would consider to be of a legal nature.

<sup>7</sup> See judgment 3-4-1-10-02 of the Constitutional Review Chamber of the Estonian Supreme Court, p. 24: "The legislature must decide all matters that are important from the angle of fundamental rights on its own and may not delegate the carrying out thereof to the executive."

<sup>8</sup> On the relationship between politics and law in the development of the ECHR, see, e.g., M. R. Madsen. *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*. — *Law and Social Inquiry* 2007 (32) 1, pp. 137–159.

<sup>9</sup> T. Annus. *Riigiõigus (Constitutional Law)*. Tallinn: Juura 2006, pp. 80–89 (in Estonian).

<sup>10</sup> A review of the practices of different countries is offered by, e.g., the following compilation: P. Craig, A. Tomkins (eds.). *The Executive and Public Law: Power and Accountability in Comparative Perspective*. Oxford University Press 2006.

<sup>11</sup> The question of what should be understood as activity or activism of courts is not of particular importance to me. For me it is sufficient to recognise that, whatever the definition, some courts are more active than others. On the matter of judicial activism, see B. Aaviksoo. *Kohtulik aktivism põhiseaduslikkuse järelevalve funktsioonina. Kui aktivistlik on Eesti põhiseaduskohus? (Judicial Activism as a Function of Constitutional Review. How Activist is the Estonian Constitutional Court?)*. — *Juridica* 2005/5, pp. 295–307 (in Estonian).

the same?)\*<sup>12</sup> Or that one constitutional court concludes that, pursuant to the constitution, persons detained in custodial institutions must be given voting rights but another does not?)\*<sup>13</sup> Or one might posit even a simpler question: why do different judges, in the same time and space, reach different conclusions in applying similar provisions of law?)\*<sup>14</sup> It would be easy to state that one judge or court is right while the another is just mistaken. However, then an answer would be required to the question of why one judge was mistaken — i.e., why the law was not applied correctly by the constitutional court or judge concerned. This simply cannot be explained with reference to law only.

Therefore, there are probably no political scientists who would seriously suggest that judgments of constitutional courts can be unambiguously explained by the law — the constitution — or that such judgments are born strictly of application of the constitution. This is probably one of the most substantial differences between legal professionals and social scientists: at least some law professionals and, in particular, the constitutional courts themselves try to leave the public with the impression that the judgments of constitutional courts repealing laws represent the only correct legal solution derived from the constitution, as if no adjudications are made on any other basis than the constitution.\*<sup>15</sup> However, this cannot be said about all legal professionals. For example, former Justice of the German Federal Constitutional Court Dieter Grimm has written: “Today, probably no one would argue against the fact that the behaviour of judges and the judgments are not and cannot be completely explained by provisions of law.”)\*<sup>16</sup> It is probably impossible to find a political scientist who would try to uphold the myth of law-based decision-making for the public. The ardour of debunking the myth has given rise to the articulation of rather radical-sounding ideas. For example, Martin Shapiro, one of the most recognised political scientists studying politics of judicial review, wrote, in 1994, an essay entitled ‘Judges As Liars’, where he argues that courts, particularly constitutional courts, are inevitably creating new law and that judges lie when they deny it.\*<sup>17</sup> Nonetheless, he sees this not as an evil but, rather, as an inevitable phenomenon: judges invariably try, and will always try, to convince us that their judgments are based on law.

Since the idea that a judge’s behaviour may be influenced by nothing apart from the law is nipped in the bud by the political scientist, such a scientist is not fettered in studying other possible sources of influence. These potential additional sources can be broadly classified into four categories: first, the judge’s own convictions; second, influences inside the court; third, influences from other institutions; and, fourth, influence from the public.

## 2.1. Ideology and convictions of judges

Probably the most painful reactions among jurists are occasioned by political scientists claiming that the behaviour of judges can be explained — if not the best, then at least very well — by their political convictions and ideologies.\*<sup>18</sup> For those scholars, a judge makes a judgment for or against the law, relying on the same criterion as a member of the parliament: whether this is a law that constitutes the best solution for the society according to the judge’s convictions. This approach is quite similar to that of the school of the legal realists in jurisprudence: for them, the statement of grounds actually consists of the legal reasons that the judge has sought later to justify the judgment, which has been made for other reasons. Empirical studies in this field focus, above all, on the US Supreme Court, which is a particularly good object of study on account of the numerous dissenting opinions and the great public attention accompanying the nomination of Justices. Through reference to pre-nomination opinions published with regard to the ideology of a nominee, it has been found that such opinions can explain a large majority of the Justice’s votes in resolving specific cases. In other words, Justice A makes a conservative decision because of being and having been conservative by

<sup>12</sup> Judgment 3-1-1-97-96 of the Estonian Supreme Court *en banc*. A review of judgments of different courts of the world with regard to the death penalty is offered by P. G. Carozza. ‘My Friend Is a Stranger’: The Death Penalty and the Global *Ius Commune* of Human Rights. – Texas Law Review 2003 (81), pp. 1031–1089.

<sup>13</sup> Cf. ECHR Judgment of 30 March 2004 in *Hirst v. UK*, No. 74025/01.

<sup>14</sup> Differences in opinions among judges are not very extraordinary even in countries where the judges are not allowed to express dissenting opinions. For a general discussion see J. Laffranque. *Dissenting Opinion and Judicial Independence*. – *Juridica International* 2003 (9), pp. 162–172.

<sup>15</sup> Cf. judgment 3-3-1-65-03 of the Administrative Law Chamber of the Estonian Supreme Court, p. 14: (“[T]he courts must not engage in making socio-political decisions in the place of the legislature”); judgment 3-4-1-20-04 of the Constitutional Review Chamber of the Estonian Supreme Court, p. 14 (“The Chamber does not analyse the expediency of political decisions adopted by the legislature — it can check only the compliance of a law with the Constitution”); judgment 3-4-1-2-01 of the Constitutional Review Chamber of the Estonian Supreme Court (“The Supreme Court as the court of constitutional review is not required to assess the political will manifested in a law or its expediency but, rather, the compliance of legislation with the provisions and spirit of the Constitution”).

<sup>16</sup> D. Grimm. *Constitutional Adjudication and Democracy*. – M. Andenas, D. Fairgrieve (eds.). *Judicial Review in International Perspective*. The Hague: Kluwer Law International 2000, p. 113.

<sup>17</sup> M. Shapiro. *Judges As Liars*. – *Harvard Journal of Law and Public Policy* 1994 (17), pp. 155–156.

<sup>18</sup> J. Segal, H. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge University Press 2002.

conviction.<sup>\*19</sup> Comparatively recently, studies have started to consider courts of other states, with the results corroborating the earlier findings that the convictions and beliefs of a judge have at least some connection with the judge's decisions.<sup>\*20</sup>

Thus, in answering questions like 'What is needed in a democratic society?' or 'Will a restriction of an individual's rights outweigh the public interest for the sake of which these rights are restricted?'<sup>\*21</sup> a judge will inevitably apply his or her own convictions concerning what constitutes a good, just, and appropriate balance between the interests of an individual and those of the society — i.e., criteria that depend not only on the law or the constitution but also on the personal convictions of the judge. The situation can hardly be much different in Estonia.

## 2.2. Politics inside the court

Another source of influence on judicial activities arises from the fact that constitutional courts are collegial bodies and that, therefore, it would be naive to expect a court to act as a 'single tight fist'. This can be compared with a parliament: in order to find out why the Riigikogu passed a certain act, one's first reaction would probably be to check which political parties were behind the adoption of the decision in the Riigikogu and to determine the path of the draft before adoption. The same applies to courts: before the judgment enters into force, there has probably been quite a lot of internal activity within the court, although, under the principle of in-chambers confidentiality, this will be — and is probably also preferred by the court to be — concealed from the public. However, luckily for the political scientists, at least some judges have talked about intra-court politics and even left written evidence, as in the case of several US Supreme Court Justices, who have later made public their notes taken while in office.<sup>\*22</sup> And by reference to that material it becomes absolutely evident that, inside the chambers, persuasion, search for compromises, strategic adoption of positions, and other similar activities take place, reminding us of what we normally think of politics instead of subsumption under the law.<sup>\*23</sup> Again, the situation can hardly be different in Estonia.

## 2.3. Influence of other political institutions on courts

According to §146 of the Constitution, the courts are independent in their activities. Therefore, an assessment of influence exerted by other political institutions should be unambiguous: they should not influence the judgments of courts.<sup>\*24</sup> A court should be able to pass its judgments independently.

For a political scientist, this approach, although classical, is incomplete. Firstly, one must keep in mind that the judgments of a court may not be self-enforcing, and that the court is not in the position to enforce its decisions on its own — co-operation from other public authorities will be needed. Secondly, it must be taken into account that a court can never act in total isolation from the political system; there are points of contact, e.g., in the preparation of the budget or the nomination of judges. The legislature and the executive will — even if this is not 'right' in normative terms — always have options for punishing a disobedient constitutional court.<sup>\*25</sup> If nothing else helps, the parliament can amend the constitution in order to overturn a constitutional court judgment.

<sup>19</sup> *Ibid.*, p. 86 ("Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.")

<sup>20</sup> See L. Hausegger, S. Haynie. Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division. – *Law & Society Review* 2003 (37) 3, pp. 635–657; M. Wetstein, C. Ostberg. Search and Seizure Cases in the Supreme Court of Canada: Extending an American Model of Judicial Decision Making across Countries. – *Social Science Quarterly* 1999 (80) 4, pp. 757–774; C. Ostberg, M. Weinstein, C. Ducat. Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991–1995. – *Political Research Quarterly* 2002 (55) 1, pp. 235–256. Although there are no similar studies of the German Federal Constitutional Court, observers often classify the Justices as 'red' or 'black' according to whether the Justice is a Social Democrat or Christian Democrat. A. Rinken. The Federal Constitutional Court and the German Political System. – *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court*. R. Rogowski, T. Gawron (eds.). Berghahn Books 2002, p. 72.

<sup>21</sup> See, e.g., P. Roosma. Protection of Fundamental Rights and Freedoms in Estonian Constitutional Jurisprudence. – *Juridica International* 1999 (4), p. 35.

<sup>22</sup> The papers of Justice Blackmun were made available to all on the Internet in October 2007. L. Epstein, J. A. Segal, H. J. Spaeth. The Digital Archive of the Papers of Justice Harry A. Blackmun (2007). Available at <http://epstein.law.northwestern.edu/research/BlackmunArchive.html>.

<sup>23</sup> N. Maveety. Concurrence and the Study of Judicial Behavior in American Political Science. – *Juridica International* 2003 (8), pp. 173–185; F. Maltzman, J. F. Spriggs, P. J. Wahlbeck. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press 2000.

<sup>24</sup> Examples include H. Schneider. Kohus lahusvõimude süsteemis (The Court in the System of Separated Powers). – *Juridica* 1999/9, pp. 414–424 (in Estonian).

<sup>25</sup> An interesting study of Japanese lower court judges observes that those judges who have been more 'government-friendly' in addressing sensitive political questions have done better in their careers. J. M. Ramseyer, E. B. Rasmusen. Why Are Japanese Judges So Conservative in Politically Charged Cases? – *American Political Science Review* 2001 (95) 2, pp. 331–344.

If the court wants its judgments enforced in reality and without excessive delay and wishes to act with continuing efficiency, it is sometimes compelled to retreat from the 'iron principles' and consider issues of political feasibility.<sup>\*26</sup> There are hardly any reasons for a court to pick a fight with other public authorities. Of course, courts do not simply do what politicians tell them in fear of retaliation, since politicians do not always want to retaliate. Attacking the constitutional court would be neither pleasant nor useful for politicians when the court enjoys considerable public support. Therefore, to at least a certain extent, the court can repeal decisions of other political institutions. However, the theory of a court restrained by other political institutions gives rise to somewhat more clear hypotheses, which can be tested empirically. For example: the more united the legislature and the executive are, the more modesty is probably required from the constitutional court, while in the case of fragmented political power the constitutional court can increase its role more confidently, since fragmented political power is not so readily able to respond to the behaviour of courts.<sup>\*27</sup>

The theory of judicial dependence, which seems to directly contradict the dogma of judicial independence, has met with at least some empirical support in numerous studies in political science — although claims that courts are nevertheless independent are at least as numerous.<sup>\*28</sup> The fluctuation of courts' activity in connection with the strength of the authorities has been demonstrated most clearly in transitional societies, particularly in view of the fact that the courts have had to face direct sanctions in reality. The Russian Supreme Court was able to show remarkable activity during the time of general political disarray but only until the moment when the court was practically disbanded by President Yeltsin. The reassembled court was immediately much more modest.<sup>\*29</sup> It has been found on the basis of the behaviour of the Argentine Supreme Court that when the political institutions were weak the court made bolder judgments than those of the time when the political institutions were strong.<sup>\*30</sup>

At the same time, empirical studies have also shown that even if a conflict arises between a constitutional court and politicians, it will not last long. One of the reasons for this is that, given time, politicians can replace the judges. However, this does not provide a full explanation, especially in the case of lifetime appointment of judges, as in Estonia. The opinions of courts and politicians often concur also because judges withdraw from their initially radical-seeming positions. For example, the US Supreme Court, one of the most independent and strongest courts, backed away quite quickly from attacking Franklin D. Roosevelt's socio-political decisions after the political authorities threatened to additionally nominate new Justices 'of more proper disposition'.<sup>\*31</sup>

Another interesting example can be found by considering Estonia<sup>\*32</sup>, with regard to a case of privatisation of residential space that had belonged to co-operative organisations. The Supreme Court dealt with that matter thrice and finally withdrew from its position — which had initially seemed to be quite strong — that the state should either not have forced these organisations to privatise the apartments at all, or that the compensation should have been equivalent to full market value of the apartments.<sup>\*33</sup>

<sup>26</sup> See L. Epstein, J. Knight. *The Choices Justices Make*. Washington: CQ Press 1998.

<sup>27</sup> See, e.g., J. Ferejohn, F. Rosenbluth, C. Shipan. *Comparative Judicial Politics*. — C. Boix, S. C. Stokes (eds.). *The Oxford Handbook of Comparative Politics*. 2007, p. 272; T. Ginsburg. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York: Cambridge University Press 2003; M. Santoni, F. Zucchini. Does Policy Stability Increase the Constitutional Court's Independence? The Case of Italy during the First Republic (1956–1992). — *Public Choice* 2004 (120) 3–4, pp. 439–461; M. Iaryczower, P. Spiller, M. Tommasi. Judicial Independence in Unstable Environments, Argentina 1935–1998. — *American Journal of Political Science* 2002 (46) 2, pp. 699–716; E. Herron, K. Randazzo. The Relationship between Independence and Judicial Review in Post-Communist Courts. — *Journal of Politics* 2003 (65) 2, pp. 422–438.

<sup>28</sup> On the US Supreme Court, see J. Segal. Separation-of-Powers Games in the Positive Theory of Congress and Courts. — *American Political Science Review* 1997 (91), pp. 28–44.

<sup>29</sup> L. Epstein, O. Shvetsova, J. Knight. The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government. — *Law & Society Review* 2001 (35) 1, pp. 117–164.

<sup>30</sup> G. Helmke. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. New York: Cambridge University Press 2005.

<sup>31</sup> For a recent political-science analysis of this incident, see: J. L. Carson, B. A. Kleinerman. A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan. — *Public Choice* 2002 (113) 3–4, pp. 301–324.

<sup>32</sup> One of the few political-science studies on the 'extra-legal' factors influencing the Estonian Supreme Court is about the role of the Chancellor of Justice in the practice of constitutional review. See N. Maveety, V. Pettai. Government Lawyers and Non-Judicial Constitutional Review in Estonia. — *Europe-Asia Studies* 2005 (57) 1, pp. 93–115.

<sup>33</sup> See judgment III-4/1-1/95 of the Constitutional Review Chamber of the Estonian Supreme Court (the decision that privatisation of property that belonged to the legal successors of co-operatives is not in the public interest); judgment 3-4-1-2-96 of the Constitutional Review Chamber of the Estonian Supreme Court (the decision that privatisation may be permitted but compensation amounting to the market price of the property is required); judgment 3-2-1-59-04 of the Estonian Supreme Court *en banc* (the decision that the compensation may remain below the market price).

## 2.4. Influence exerted on courts by the public and interest groups

Public opinion, and active interest groups who among other things help the judges to become aware of the public opinion are further important factors that may explain the behaviour of a constitutional court. One of the reasons for the importance of interest groups in constitutional review is that, as a general (although not absolute) rule, the court may discuss only matters that have been referred to it. The more active the interest groups, the more reasonably one can expect violations of persons' rights to be brought before the constitutional court, initially through the first instance and then through the more resource-demanding instances of appeal and cassation.<sup>\*34</sup> The statement made by de Tocqueville almost two centuries ago about American society that political issues will sooner or later be brought to the courts and become judicial issues<sup>\*35</sup> applies quite precisely to most of the present-day societies in which constitutional review exists. Interest groups also have another kind of influence — they can provide the court with information that would otherwise be unavailable to the court, thereby influencing the essence of judgments.

As regards public opinion, judges themselves have sometimes quite publicly admitted that, although courts do not usually (if ever) make specific judgments on the basis of the public's opinion, they still keep an eye on it and the legitimacy of the court is important for them. This is corroborated by numerous studies relying on complex statistical methods: generally, the positions of courts do not diverge from general public opinion for long.<sup>\*36</sup> Quite certainly public opinion is also a concern for the Estonian Supreme Court. For example, a week before the conference dedicated to the 15<sup>th</sup> anniversary of the Constitution, the main news item on the Supreme Court's Web site was about the great public trust in the court.

## 3. Reasons for initiation of constitutional review

If the courts are not completely bound to the law and if the behaviour of the court, in turn, needs to be restricted by extra-legal factors, then why do politicians agree to constitutional review at all?

It is absolutely evident that, over the last couple of decades, constitutional review has gained ground all over the world.<sup>\*37</sup> Before World War II, constitutional review was a topic associated primarily with the United States, and even after the war, constitutional review had spread to relatively few other countries. By now, the European countries where constitutional review is not recognised have become a minority, although such countries do exist.<sup>\*38</sup> Presently, constitutional review in at least some form is recognised also in such countries as Finland and Sweden, where no laws were left unapplied by the courts until the beginning of this millennium.<sup>\*39</sup> The highest courts of these countries have now struck down legislation.<sup>\*40</sup> Nowadays, strong and active courts are

<sup>34</sup> The increase in the activity of interest groups using means of law is considered to be one reason why courts have become more active politically. C. Epp. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. University of Chicago Press 1998.

<sup>35</sup> M. A. Graber. *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*. – *Constitutional Commentary* 2004 (21), p. 21.

<sup>36</sup> The respective hypothesis was formulated by R. Dahl in the 1950s in his famous article: R. Dahl. *Decision-Making in a Democracy: The Supreme Court As a National Policy-Maker*. – *Journal of Public Law* 1957 (6), pp. 279–295 (see especially pp. 279, 285). Of the empirical studies based on the example of the US Supreme Court, see, e.g., W. Mishler, R. S. Sheehan. *The Supreme Court As a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*. – *American Political Science Review* 1993 (87), pp. 87–101; G. Caldeira, J. Gibson. *The Etiology of Public Support for the Supreme Court*. – *American Journal of Political Science* 1992 (36), pp. 635–664; R. Durr et al. *Ideological Divergence and Public Support for the Supreme Court*. – *American Journal of Political Science* 2000 (44), pp. 768–776.

<sup>37</sup> N. Tate, T. Vallinder (eds.). *The Global Expansion of Judicial Power*. New York University Press 1995.

<sup>38</sup> For discussion of the increase in the importance of constitutional review in major European countries, see A. Stone Sweet. *Governing with Judges: Constitutional Politics in Europe*. Oxford University Press 2000. The fact that constitutional review has not been adopted in absolutely all countries often tends to be forgotten. Moreover, it is often also forgotten that many countries do not have a separate constitutional court. For example, as regards the neighbours of Estonia, such courts exist in Latvia and Russia but do not exist in Finland and Sweden (nor are there constitutional courts in the other Nordic countries).

<sup>39</sup> On the modest role of courts in the Nordic countries, see S. Lind. *Seaduste põhiseaduslikkuse järelevalve Põhjamaades Soome näitel (Constitutional Review of Laws in the Nordic Countries on the Basis of the Example of Finland)*. – *Juridica* 2001/6, pp. 393–398 (in Estonian); J. Husa. *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*. – *American Journal of Comparative Law* 2000, pp. 345–382.

<sup>40</sup> As regards Finland, see the judgment of the Supreme Court of Finland of 25 March 2004 in Case 2004:26 (the state was required to compensate an enterprise for obstructing the use of property, although such compensation had not been provided for by law). In Sweden, a law that established a retrospective tax liability was left unapplied as unconstitutional. See X. Groussot. *Proportionality in Sweden: The Influence of European Law*. – *Nordic Journal of International Law* 2006 (75) 3–4, pp. 451–472. The Supreme Court did not hold the criminal conviction of Åke Green (a pastor who was convicted of making statements against homosexuals) unconstitutional but, rather, set aside the conviction by relying on the European Convention of Human Rights. See the Supreme Court judgment of 29 November 2005 in Case B 1050-05. Available

no longer a solely American phenomenon, especially after the universal introduction of constitutional review in the freshly democratised Central and Eastern European countries.<sup>\*41</sup>

Political scientists are keenly interested in why such developments have taken place — and jurists do not have a good answer to offer. Why should the parliament give up some of its power to the constitutional court?<sup>\*42</sup> One explanation could be that the creators of the constitutional system and the constitutional court thought that a constitutional court is in the best public interest and thus followed what was in the public interest. Political scientists, however, are not so idealistic, and recent studies have concentrated primarily on the creators' own interests. As regards countries going through a process of democratisation, reference has been made to, e.g., the intention of those still in power to ensure that a protector of their rights remains after new rulers have taken power. The politicians want to perpetuate the norms that are favourable to them. In this respect, the key concepts include a wish to ensure “the preservation of the hegemonic *status quo*”<sup>\*43</sup> and the ‘insurance theory’.<sup>\*44</sup> It has also been claimed that courts sometimes help to secure the power of politicians, particularly when the judges are not very independent.<sup>\*45</sup>

Moreover, it has been found that delegation of power to the constitutional court provides politicians with the convenient option to refrain from deciding controversial issues, when popular decisions are difficult to make. The Estonian Supreme Court faced such a situation when it had to decide how to resolve the matter of restitution of property to those who resettled in Germany before World War II.<sup>\*46</sup> The final decision to provide restitution of property was, of course, passed by the Riigikogu. The judgment of the Supreme Court left the Riigikogu free to decide the matter in one way or the other. Nonetheless, several politicians justified their decision on the basis of the Supreme Court judgment, which actually only specified that restitution must be provided unless the Riigikogu were to decide otherwise before the deadline set by the Supreme Court.<sup>\*47</sup>

In the Estonian context, the question of why the Supreme Court was entrusted with the constitutional review function is no longer of great interest. Still, the theories listed above would probably be applicable if the Riigikogu were to institute, in the place of the Supreme Court, a separate constitutional court with much more extensive powers. If this does not happen, then why does it not happen? A political scientist would probably state something akin to the following: such a constitutional court would perhaps be created if the parties in power have reason to fear that their power could be decreased by some new political power. Then the constitutional court would be a good means for securing their positions for the future.

## 4. The influence of the constitutional court on society

By studying what kinds of consequences can be brought about by the behaviour (including varying levels of activism) of courts, political scientists could most directly help to find answers to the question of what kind of role the courts should have in the society and what kind of relationships they should have with other institutions, including the parliament. Surprisingly, very few thorough empirical studies have explored the consequences of the activities of constitutional courts and, moreover, these studies take radically different positions. Therefore, it is rather difficult for me to offer answers to the question that is the most interesting one from the standpoint of this conference.

at [http://docs.google.com/View.aspx?docid=ahjqm32fn79x\\_ahjqjkcw4tc](http://docs.google.com/View.aspx?docid=ahjqm32fn79x_ahjqjkcw4tc).

Concerning the increased role of courts in Norway, where constitutional review has, however, existed for a long time already, see P. Selle, Ø. Østerud. The Eroding of Representative Democracy in Norway. – *Journal of European Public Policy* 2006 (13) 4, pp. 551–568.

<sup>41</sup> In parallel with the increase in the importance of constitutional review, the importance of law as such has also increased. For example, over the last couple of decades, the number of legal professionals per capita in European countries has grown by approximately 150 per cent. See D. R. Kelemen. Suing for Europe: Adversarial Legalism and European Governance. – *Comparative Political Studies* 2006 (39) 1, pp. 101–127 (see especially pp. 101, 112).

<sup>42</sup> Even when a constitution is approved by the majority of the people in a referendum, the text of the constitution must, as a general rule, have been approved by the parliament in order to be put to a referendum.

<sup>43</sup> R. Hirschl. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Harvard University Press 2004, pp. 32–49.

<sup>44</sup> T. Ginsburg. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York: Cambridge University Press 2003, p. 22.

<sup>45</sup> See, e.g., C. Thorson. Why Politicians Want Constitutional Courts: The Russian Case. – *Communist and Post-Communist Studies* 2004 (37), pp. 187–211; A. Trochev. Less Democracy, More Courts: A Puzzle of Judicial Review in Russia. – *Law & Society Review* 2004 (38) 3, p. 513.

<sup>46</sup> Judgments 3-4-1-5-02 and 3-3-1-63-05 of the Estonian Supreme Court *en banc*.

<sup>47</sup> See, e.g., the statement of U. Reinsalu in the session of the Riigikogu on 16 May 2006 at the first reading of the draft act providing for restitution of property, wherein he noted that “this draft is guided, in all aspects, by the spirit of the Supreme Court judgment”.

On the one hand, there have been studies concluding that courts are not able to induce any great changes in the society, even if they wanted to. This conclusion has been reached on the basis of data from several different countries. For example, a study has analysed probably the most famous judgments of the US Supreme Court — the legalisation of abortion and the prohibition of segregation in schools — and asked whether anything changed in reality after those decisions. The study reached the unambiguous conclusion that, in essence, the judgments indeed changed nothing. The number of abortions did not rise, and the segregation of schools continued for a long time. By contrast, real change was produced by a change of political climate throughout the country; however, this took place at a different time and altogether independently from the judgments.<sup>\*48</sup> Similar conclusions have been reached by studying well-known judgments of the courts of New Zealand, Israel, Canada, and the Republic of South Africa.<sup>\*49</sup> For instance, the Israeli Supreme Court judgment prohibiting discrimination against Arabs in distribution of housing hardly produced any results in real life.<sup>\*50</sup>

On the other hand, many political scientists claim that the behaviour of courts has changed the entire nature of politics in many countries — as a result of the activities of constitutional courts, political disputes in the parliament often become legal disputes between politicians. This development has been characterised, even in titles of books and articles, by means of such keywords as ‘judicialisation of politics’<sup>\*51</sup> or ‘legalisation of politics’,<sup>\*52</sup> ‘juristocracy’,<sup>\*53</sup> ‘courtocracy’,<sup>\*54</sup> and even ‘the court as secular papacy’<sup>\*55</sup> by reference to courts providing authoritative opinions in political and moral matters.

Between those two extremes — the non-existent and the considerable influence — are political scientists whose ambitions are more modest and who attempt to explain, primarily by using comparative statistical methods, the consequences of courts’ activity in certain fields. For instance, for Arend Lijphart, one of the most well-known comparative political scientists, a strong constitutional court is a sign of consensus democracy.<sup>\*56</sup> In contrast to majoritarian democracy, consensus democracy is characterised, *inter alia*, by search for compromises between different political institutions and by options for various interest groups to participate in decision-making in a variety of ways. Several researchers have demonstrated that a consensual decision-making process results in certain consequences — including a certain stability in policies but also in an increase in the size of the public sector.<sup>\*57</sup> Similarly, many political scientists regard constitutional courts as veto players who can obstruct the realisation of social changes.<sup>\*58</sup> Again, a number of studies have shown that a multitude of veto players can impede the implementation of extensive reforms.<sup>\*59</sup> This is so not only because of the threat of a constitutional court’s direct veto of an important decision. As an example, reference can be made to the judgments in which the Hungarian and Polish social reforms were declared unconstitutional by the constitutional courts.<sup>\*60</sup> The parliament’s modesty in adopting reform-related or other decisions can be just as significant cause of the lack of reforms: the parliament may itself abandon more radical reforms or draft laws with the knowledge that a more radical reform could be later blocked by the court — whether justifiably or not.

<sup>\*48</sup> G. Rosenberg. *The Hollow Hope: Can Courts Bring About Social Change?* University of Chicago Press 1991.

<sup>\*49</sup> R. Hirschl (Note 43), p. 211.

<sup>\*50</sup> *Ibid.*, pp. 206–207.

<sup>\*51</sup> R. Siedler, L. Schjolden, A. Ingell (eds.). *The Judicialization of Politics in Latin America*. Palgrave Macmillan 2005; M. Shapiro, A. Stone Sweet. *On Law, Politics, & Judicialization*. Oxford University Press 2002; R. Hirschl. *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*. – *Fordham Law Review* 2006 (75) 2, pp. 721–753; T. Moustafa. *Law Versus the State: The Judicialization of Politics in Egypt*. – *Law and Social Inquiry* 2003 (28) 4, pp. 883–930.

<sup>\*52</sup> M. Volcansek (ed.). *Law above Nations: Supranational Courts and the Legalization of Politics*. University Press of Florida 1997.

<sup>\*53</sup> R. Hirschl (Note 43); L. Goldstein. *From Democracy to Juristocracy*. – *Law & Society Review* 2004 (38), pp. 611–629.

<sup>\*54</sup> K. L. Scheppele. *Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe*. – *International Sociology* 2003 (18) 1, pp. 219, 238 (with reference to the activity of the Hungarian constitutional court in the early 1990s).

<sup>\*55</sup> R. Dworkin. *The Secular Papacy: Presentation*. – R. Badinter, S. Breyer (eds.). *Judges in Contemporary Democracy: An International Conversation*. New York University Press 2004, p. 67.

<sup>\*56</sup> A. Lijphart. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. London & New Haven, CT: Yale University Press 1999, p. 216.

<sup>\*57</sup> See, e.g., M. Tavits. *The Size of Government in Majoritarian and Consensus Democracies*. – *Comparative Political Studies* 2004 (37) 3, pp. 340–359; K. Armingeon. *The Effects of Negotiation Democracy: A Comparative Analysis*. – *European Journal of Political Research* 2002 (41) 1, pp. 81–105.

<sup>\*58</sup> G. Tsebelis. *Veto Players: How Political Institutions Work*. Princeton University Press 2002, p. 222.

<sup>\*59</sup> See, e.g., M. Taylor. *Veto and Voice in the Courts: Policy Implications of Institutional Design in the Brazilian Judiciary*. – *Comparative Politics* 2006 (38) 3, pp. 337–356; G. Tsebelis, E. Chang. *Veto Players and the Structure of Budgets in Advanced Industrialized Countries*. – *European Journal of Political Research* 2004 (43) 3, pp. 449–476. Tsebelis, one of the best-known authors of the veto player theory, finds that although constitutional courts theoretically are veto players they usually have no reason to use their veto in practice. See G. Tsebelis (Note 58), p. 227.

<sup>\*60</sup> B. Bugarcic. *Courts as Policy-Makers: Lessons from Transition*. – *Harvard International Law Journal* 2001 (42), pp. 247–288 (p. 263 concerning Poland, p. 265 on Hungary); A. Sajo. *How the Rule of Law Killed Hungarian Welfare Reform*. – *East European Constitutional Review* 1996, pp. 31–41.



Studies published so far by political scientists about the behaviour of Estonian courts (including the Supreme Court) have focused on the influence of courts, particularly on the influence of the courts on minority policies.<sup>61</sup> At the same time, it is difficult to say what political scientists would say, based on thorough research, what the influence of the Estonian Supreme Court has been on the society generally. At first glance it seems that the Supreme Court has not effected any important social changes on its own. At the same time, in the case of at least some political matters, the transformation of parliamentary discussions into more legal than political disputes, or the ‘judicialisation of politics’, can be noticed.<sup>62</sup> The ongoing dispute concerning the participation of electoral alliances in local elections can be pointed out as just one example.<sup>63</sup> However, the Supreme Court has undoubtedly prevented the implementation of quite a number of political decisions, acting as a veto player. Again, a good example can be found in the case of local electoral alliances, in which the Supreme Court has blocked the development of what probably amounts to an important change in the political system.

## 5. Conclusions

What can be learned from the above-described political-science studies and theories? Generally, political scientists avoid judgment on the question of what the role of the court should be in light of a specific constitution. At least according to their own statements, this is, first of all, a normative question belonging within the scope of constitutional law. At the same time, I find that there is something to learn from the political scientists.

First, I think that knowledge of political issues will help us to better understand judgments of the Supreme Court. Many judgments that seem vague, illogical, or contradictory from a purely legal point of view can be understood by also considering their political aspects. It is rather improbable that the judges are not aware of the relations inside the court and the court’s continual and close connections with other state authorities and the public. Additionally, the judges are probably aware also that their influence on social processes may be quite limited. For practising legal professionals this certainly offers a lesson: the court can be persuaded much more efficiently by taking account of those political matters.

Second, we can learn that, even if generally worded provisions seem to provide the courts with the option of making political discretionary judgments, the reality is not so tragic. We must remember that, although constitutional courts are political institutions, they are a special category of political institution. Even if the courts establish norms and even if they are influenced by extra-legal factors, they are still not parliaments and the judges are still not people’s deputies. In order to ensure their legitimacy, the courts inevitably have to justify their decisions with legal or legal-seeming argumentation because the courts indeed are connected with politics. In the end, this connection with politics might actually establish the greatest limits on the courts’ behaviour.

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<sup>61</sup> V. Pettai. *Ethnopolitics in Constitutional Courts: Estonia and Latvia Compared*. – *East European Constitutional Review* 2003, pp. 101–105; N. Maveety, A. Grosskopf. ‘Constrained’ Constitutional Courts as Conduits for Democratic Consolidation. – *Law & Society Review* 2004 (38) 3, pp. 463–488. Maveety and Grosskopf find that the Estonian Supreme Court has quite substantially influenced the behaviour of the Riigikogu in the area of minority rights. See, more generally, also V. Pettai. *Estonia’s Constitutional Review Mechanisms: A Guarantor of Democratic Consolidation?* – J. Zielonka, V. Pettai (eds.). *The Road to European Union. Volume 2: Estonia, Latvia, and Lithuania*. Manchester University Press 2003, p. 75; V. Pettai. *Democratic Norm Building and Constitutional Discourse Formation: Experience from the Constitutional Review Chamber of Estonia*. – M. Krygier, A. Czarnota, W. Sadurski (eds.). *Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses*. Budapest: CEU Press 2005, p. 91.

<sup>62</sup> Cf. R. Järvamägi. *Põhiseaduslikkuse järelevalve kohtu mõju seadusandjale (Influence of the Constitutional Review Court on the Legislature)*. – *Juridica* 2006/6, pp. 414–422 (in Estonian).

<sup>63</sup> See, e.g., U. Lõhmus. *Valimisliit ja valimisõigus (Electoral Alliances and Right to Vote)*. – *Juridica Special Issue* 2003, pp. 27–31 (in Estonian).