



Having re-established independence, Estonia is celebrating the 15th anniversary of the national constitution. The conference about to begin is one of the weightiest on the list of anniversary events and certainly the most law-oriented in its content.

The Constitution of Estonia, which was passed by referendum on 28 June 1992, is the fourth fundamental document of our statehood, which will soon celebrate its 90th jubilee, while it is the first Constitution that has laid the basis for protection of human rights and the development of democracy and the rule of law. I dare say that our Constitution is a modern set of legal values and principles that has a clear regulatory impact on regulations and is therefore different from those many constitutions that constitute sets of eloquent declarations or political programme documents.

The Constitution is alive and working. The Constitution is respected. While certain indications of nihilism are apparent in the public discussion of the implementation of some other legal acts, then non-compliance with the requirements of the Constitution has not been accepted by the public. Rather, abidance by the Constitution and constitutional thought are used as arguments to criticise misconduct, meaning that the Constitution has a position of authority in public thought.

Fifteen years of validity have proved that all of our disputes of public affairs and society can be settled on the basis of the provisions of the Constitution. As a universal legal act, the Constitution has not allowed any serious constitutional crises to occur in Estonia, although the press has sometimes made ominous predictions.

The Constitution represents a national agreement made 15 years ago to strengthen and develop our state in unflinching faith and unwavering will. This agreement is timeless, for the state and the law, being in constant change, cannot rely in their development only on a national agreement or national interest. Indispensably, this small nation had to choose the cultural area to which to belong, who to resemble, and whom to contrast against. The Constitution reflects this choice. The Constitution functions as the fundamental act of the legal order. A modern legal system has been built up relying on the Constitution, which is based on European legal values and principles and harmonises with the European legal area.

When speaking about the importance and strengths of the Constitution, we cannot overlook the constant discussion concerning whether Estonia needs a new constitution. Let us admit that the 15-year-old Constitution has passed the test of time. The Constitution is nowhere near flawless as a legal act, but what constitution is? The Constitution is, in the first place, a compromise between the political forces active at the time of its adoption, or, if you will, a public agreement made at the time of the greatest awakening of the nation, and only in the second place is it a legislative act. It is worth mentioning that those amendments that have been made to the Constitution over the past 15 years have not changed the nature, spirit, or idea of the Constitution. In its current form, the Constitution may be said to have guided the development of Estonia's statehood for the longest time when compared to our earlier constitutions, and it has in this time proved that an unchanged constitution is a serious constitutional value.

The Constitution Amendment Act, which was passed by referendum on 13 September 2003 for accession to the European Union, did not change the grammatical structure of the provisions or the underlying fundamental values of the Constitution. The amendment act changed the entire legal attitude to the Constitution itself.

The Constitution with its idea and spirit has provided underpinning for the dynamic development of our society and yet been detailed enough to ensure the protection of everybody's fundamental rights and freedoms. The Constitution has served Estonia well; celebration of its 15th anniversary with a high-level conference is a worthwhile endeavour.

The subject of the conference was not chosen by accident. ‘Political Questions in Constitutional Review: What is the Dividing Line between Interference with Policy-Making and Routine Constitutional Review?’ is a topical subject in rapidly developing legal orders, where the limits of the activities of judicial power and legislature need to be discussed to find a solution and in which the traditional principle of separation of powers needs to be developed further. It should be noted here that the Conference of European Constitutional Courts, of which the Estonian Supreme Court is a member, chose ‘Legislative Omission of the Constitutional Jurisprudence’ as the subject of its 2008 congress. These topics essentially spring from the development of constitutionalism as a branch of legal thinking and are more specifically confined to issues pertaining to the division of roles between parliaments and constitutional courts.

Allow me to put forth some general, introductory ideas related to the subject of the conference. Firstly, judicial constitutional review is such a new phenomenon in the Estonian legal order that 15 years ago a conference on this subject would have been unthinkable. As compared to today, when every seat in the conference hall is sold out, so to say, just a few years ago a conference on constitutionalism would have failed because of lack of participants. While I am glad of the great number of participants here, I want to apologise on behalf of the organisers to all those who were simply not able to attend today’s conference because of the lack of space. Increasing interest in constitutional issues creates a favourable environment for the development of legal thought and provokes optimism for organising events on this subject for an even wider audience.

I cannot but mention the peculiarity of judicial constitutional review in Estonia, in which all courts — in total, 245 judges — may choose not to apply any law or other legal act when solving a case if the law or legal act is contrary to the Constitution. Time has shown that this diffuse system of constitutional review, in which the legislative activities of 101 Parliament members are checked by 245 judges in the course of legislative control, reveals no unresolvable conflicts inherent in the Constitution. If the press has published claims about possible interference of the courts with politics, these topics are especially related to the abstract legislative control activities of the Supreme Court, in which the President of the Republic of Estonia when having chosen not to proclaim a passed law or the Chancellor of Justice has been a party to the proceedings. The question of interference with politics has arisen when the Supreme Court has resolved matters close to politicians, whether related to elections or political parties. This discussion has thus arisen from the subject discussed in court, not the court’s activities. It makes a big difference whether we speak about a case or the court’s activities. Each case may have its political aspects and political consequences if one is looking for them, but solving a broadly publicised or politically sensitive case is not interference with politics. The court always makes a legal, not a political decision — regardless of the case.

It is remarkable that when it comes to disputes on ‘political’ subjects the obsolete notion persists that the passing of laws and development of the legal system is only a matter of parliamentary agreement between political forces and courts are wished to be seen only in the capacity of organs applying legal provisions. The conflicting forces in such disputes are differing understandings of the balance of law and politics, on the one hand, and an obsolete legal-positivistic approach and the modern constitutionalist approach to defining the role of the parliament and courts as the developers of the legal system, on the other.

It should be admitted that the activities of the Supreme Court in its capacity as the constitutional court are broader than traditional administration of justice. The contact point for the legislature’s and court’s activities is constitutional review with its clear legal policy dimension that dims the lines between traditional parliamentary policy and administration of justice. It is time to agree that developing the legal system is essentially a chain of legal policy decisions wherein the constitutional court actually has a duty to have its say.

As the Constitution assigns the right of judicial constitutional review to every court, and hence every judge via specific legislative control, there is no reason to speak about administration of justice outside politics, whether domestically or internationally. Without trying to define the heavily loaded and, in the public discourse, deeply devalued concept of politics, I must say that courts are not involved in daily policy or party policy decisions. However, courts have their weighty say in legal policy decisions via each and every judgment, while judgments made in the course of constitutional review are unarguably aimed at developing the legal system and should be regarded as an integral part of legal policy.

Domestically, non-application or repeal of a provision of law means going against the political will of the legislature and should be understood as a constitutional legal policy decision made by the court. In international relations, each judgement is understood as made by the Estonian state and thus has **only** a political dimension in that international context.

Courts implement the policy of the Republic of Estonia as defined by its laws, which is why pushing the concept of policy or politics out of the courts’ realm is rhetorical self-deception. The word should not be feared or avoided. It need only be specified which policy is outside the court’s scope and what the court’s political activities are.

The Constitution gave the Supreme Court the right to repeal laws, accompanied by the rights of ‘negative legislative drafting’. Estonian constitutional adjudication has so far followed the principle that the court

does not prescribe how the legislature should regulate a subject. Rather, the court may say that the existing regulation or its absence is contrary to the Constitution. The legislature can always take a new legal policy decision that is in line with the Constitution.

In constitutional review, the court does not express its own will as the parliament does under the nation's mandate; rather, it reminds the legislature how the nation as the highest power decided on the disputed issue when it adopted the Constitution. How actively the court reminds the legislature of the Constitution is a question of judicial activism, which will surely be the subject of interesting analysis in the speeches to be made at this conference.

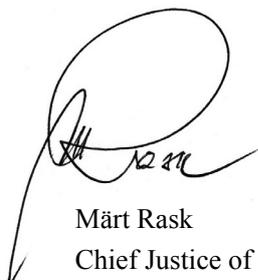
This somewhat simplified line of thought explains the nature of constitutional review on the axis of balance between legislative and judicial powers. However, the deeper reasons for courts still being considered part of the authority of the state, which should not have anything to do with parliamentary policy and which should apply provisions without argument and without critical assessment, are probably hidden deep in the public awareness.

The common understanding of adjudication is based on the legal positivistic way of thinking, according to which the court only applies provisions, regardless of which values the provisions are based on or which political regime they serve, without considering the compliance of the provisions with the Constitution or legal values. The understanding that authority equals law does not die easily.

One may agree that, as the role of values in legal thinking increases, law as a set of provisions is being transformed into law as a set of values and principles. In the system of written law we still read and study the provisions, and the legal way of thinking, if not provision-centred, is still very closely related to provisions. Apparently, the same applies to the study of law. Owing to the Constitution, all Estonian lawyers have had to undergo extensive complementary training in a short time, because the legal order has changed 100% when compared to what was taught 15 years ago. Studying is looking for truth. When we learn that our earlier knowledge is no longer applicable, this is new and better knowledge than sticking to the old. I do not doubt that we all expect that new and better knowledge from this conference, and that certain understandings that have restricted our thought will release their hold on us.

This conference, like many other events dedicated to the anniversary of the Constitution, has been organised owing to the co-operation among the Ministry of Justice, Office of the Chancellor of Justice, National Audit Office, and Supreme Court. The many participating delegations from other countries and international organisations add an international dimension to the conference. We are glad to welcome representatives of the Venice Commission, European Court of Justice, and European Court of Human Rights. We welcome the participants from the Constitutional Court of Bulgaria, State Council of the Netherlands, Constitutional Court of Lithuania, Constitutional Court of Latvia, Constitutional Court of Macedonia, Constitutional Court of Montenegro, Supreme Court of Norway, Constitutional Tribunal of Poland, Portuguese Constitutional Court, Constitutional Court of Romania, Federal Constitutional Court of Germany, Constitutional Court of Slovakia, Constitutional Court of Slovenia, Supreme Administrative Court of Finland, Court of Appeal of England and Wales, and Constitutional Court of the Czech Republic. Warm greetings to the researchers from Leiden University, the European University Institute in Florence, the University of Macerata, Heinrich Heine University of Düsseldorf, the University of Turku, the University of Helsinki, the University of Leeds, and the Central European University in Hungary who are participating in our conference.

Preparing for this conference without the support and the guest speakers from the Venice Commission would have been impossible. The organisers offer sincere thanks to all of you for responding to our invitation, and special thanks to Mr. Gianni Buquicchio of the Venice Commission, who found time to participate in our conference despite his busy schedule. We hope that the conference provides a good basis for intensifying genuine co-operation between the Supreme Court and the Venice Commission.



Märt Rask

Chief Justice of the Supreme Court of Estonia



It is with great pleasure that I am here today, to represent the Venice Commission of the Council of Europe, in this beautiful city of Tallinn and to open this conference on the occasion of the 15th anniversary of the adoption of the Constitution of Estonia. Your constitution has served you well in these 15 years, proving a firm basis for accession to the European Union. The Venice Commission is glad for having been of assistance in identifying in its opinion various issues related to this accession. In another opinion the Commission confirmed that the establishment of a constitutional review chamber is a perfectly valid model of constitutional control.

In order to celebrate this anniversary you chose a timely topic, as several constitutional courts have been criticised recently for being too ‘activist’. A number of them have been under serious pressure with respect to decisions they have rendered. We have seen cases in the past where, for instance, state powers have ‘punished’ constitutional courts for delivering unwelcome decisions, by not appointing new judges, thereby trying to ‘starve out’ the court by pushing the number of remaining judges below that constituting a quorum. The Venice Commission has assisted courts in such situations through direct support and by giving opinions pointing out solutions for avoiding such problems in the future.

As you well know, constitutional courts are often unfairly accused of ‘judicial activism’, a term frequently used in a negative sense to describe the tendency of judges to follow a particular, sometimes political or personal, agenda. Constitutional courts repeatedly face such accusations and the oft-asked question of whether constitutional review by a constitutional court is really law or whether it should be considered politics.

It is true that, over time, constitutional courts have been entrusted with more and more tasks that go far beyond the role of the negative legislator — a role attributed to them by Kelsen, the inventor of ‘specialised constitutional courts’. The negative legislator’s tasks were envisioned as merely to set aside enacted laws that were not in line with the constitution.

However, the line between interpretation of the constitution and judicial activism is difficult to draw. This is where the accusations of judges meddling tend to come in. Politicians often expect courts, when interpreting the nation’s constitution, to exercise judicial restraint — in other words, to refrain from striking down laws unless they are clearly not in line with the constitution. One technique is the interpretation of laws as in conformity with the constitution, which is sometimes less of an encroachment than striking them down.

But, sometimes, constitutional courts or equivalent bodies such as the Estonian Supreme Court cannot avoid filling in legal gaps through interpretation. This happens in cases where provisions might otherwise not be applicable or would not be applied in a constitutional manner (legal gaps are going to be the subject of the meeting of the Conference of European Constitutional Courts in Vilnius, Lithuania, in June 2008).

The constitutional court’s role in this respect is legitimised directly by the constitution. Its active role in fulfilling its mandate is crucial. This should not be confused with judicial activism, which would involve the court making its own legislative judgments. Such action by the constitutional court would be a radical departure from its role as the guarantor of the constitution.

Constitutional courts have been introduced in many countries as a mechanism of constitutional review, and as such they adjudicate cases that challenge the constitutionality of laws and the actions of the executive. In this context, they are sometimes faced with questions to which the constitution does not give clear-cut answers or, in some cases, offers no answers at all. This often occurs in new areas, not covered by the constitution, due to the fact that these areas did not exist at the time

of the constitution's adoption. An example can be found in the field of bioethics or areas where, over time, the perceptions and attitudes of society have changed — for instance, the attitude towards unions between same-sex partners.

It may also happen that the constitution is ambiguous on certain issues because its drafters agreed on a compromise formula that pleased all sides but left certain issues open. In such cases, it is up to the constitutional court to provide an answer. By providing one, it will have to develop the constitution without being a constituent power, which, of course, requires democratic legitimacy.

Taking into account the historical context and basing itself on the wording, the constitutional court develops the inherent values contained in the constitution through the systematic or teleological approach. In this way, the constitutional court ensures that the constitution remains a living, dynamic instrument that shapes the life of society, and vice versa, and not a static text that would be quickly outdated.

I believe that constitutional courts and equivalent bodies not only provide for the stability of the constitution and respect for the rule of law but have, beyond this classical approach, a distinctive role to play in furthering and strengthening the democratic process, in which the constitution serves as a main pillar.

The Venice Commission promotes the basic principles of the Council of Europe: democracy, the protection of human rights, and the rule of law. While each country is different and follows a different path at a different speed, these common goals apply to all of them. In pursuing these common goals, we can rely on a source that is an accumulated wealth of legal reasoning: the case-law and jurisprudence of constitutional courts and equivalent bodies. Their active role is therefore most dear to the Venice Commission.

I wish your country further success, building on the strength of your constitution as a cornerstone of democracy, the protection of human rights, and the rule of law.



Gianni Buquicchio

Secretary General of the Venice Commission

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Rait Maruste

PhD, Judge of the European Court of Human Rights

The Role of the Constitutional Court in Democratic Society

The constitutional court is a central but not the only instrument of democracy and constitutionalism. There cannot be a constitutional court without a constitution. Therefore, the role of the constitutional court should be viewed in a wider perspective embracing the general issues of democracy, constitution, and constitutionalism.

There is reason to believe that, relying on our earlier experience of statehood and having lived according to our constitution and practising democracy for the past 15 years, while being in close co-operation with democratic states in Europe and elsewhere in the world, we have learned something. We have passed the beginner course in constitutional democracy.

This allows me to limit the ‘general part’, as lawyers would say, and address some issues of Estonian constitutionalism that concern us today. My article broadly consists of two parts: the first considers the role of the constitution and constitutional court in democratic society, and the second part (the ‘implementation’ part) briefly assesses Estonia’s current situation of constitutional law and asks how we should proceed.

1. On constitutional democracy and constitutions

Ralf Dahrendorf¹ has written that constitutional democracy is built in three stages:

1. The drafting and establishment of a new constitution laying down the basic values of statehood, fundamental rights, the main paradigms of the rule of law, independent administration of justice, and separation of powers. This is ‘the hour of the lawyers’, as he put it.
2. The creation of a market economy, including amongst other things anti-monopolism, economic rivalry, and free competition with the development of a certain social protection network.
3. Establishment of civil society — the building of substantial sources of power outside the state and, more often than not, against the state. This is a network of autonomous institutions and organisations that have not one centre but hundreds or even thousands of them and that a monopolistic state or party authority cannot liquidate or eliminate.

¹ R. Dahrendorf. *Reflections on the Revolution in Europe*. 1990, p. 86 ff.

Dahrendorf speculated, perhaps somewhat optimistically, that the first stage might last six months, the second six years, and the third 60 years (or three generations). Estonia has been through the first two stages and entered the third. Therefore, the building of constitutional democracy in Estonia has not nearly finished yet.

Constitutions are drafted at and after times of upheaval. They usually bear the stamp of past fears. They are generally created on the basis of a recent bad experience and in order to avoid recurrence of that experience. The drafters of the 1787 United States Constitution were almost paranoid in their endeavour to avoid monarchy and populist democracy. The fear of Nazism and the negative experience of the failure of the Weimar Republic led the way to the drafting of a modern German constitution. In 1958, de Gaulle was desperate to avoid a paralysis of the parliament of the Fourth French Republic. These are but a few examples. Similarly, East-European countries, including Estonia, wrote their constitutions on the basis of, and trying to avoid, earlier bad experience. We can say in retrospect that this was the right course of action, as we have been able to avoid falling back so far.

Judicial review of power has a history of about 250 years. Already at the time of the French Revolution, or, to be more exact, in 1748, Montesquieu, being a judge, called for a strict separation of powers, while reducing the role of the court to that of the mouth of the law — *bouche de la loi* — subordinated to authority, a judge being a state official, and centralising the core of power in the hands of the legislature. Napoleon successfully spread the doctrine throughout the continent. On the other side of the Atlantic, in the United States, things turned out quite different — Chief Justice John Marshall introduced judicial review of legislation and of executive acts. This came about in a situation where the US Constitution itself did not *expressis verbis* provide for such competence. These two different trends were consolidated in Europe over a long process of development, mainly via German-language legal culture, into judicial constitutional review as we know it today. Without delving into the details of the history of law, we can see that today's democracy, whose most integral component is judicial constitutional review, is a result of 200 years of development. We were not part of that development for most of that time.

We all know the simple definition of democracy as the power of the majority. However, it would be a great mistake to see things in so simplified a manner. Today's democracy is much, much more than merely the power of the majority. Mistake majority for democracy and it is only a question of time and circumstances before one sees the evolution of authoritarianism, even dictatorship. Reducing democracy to merely the power of the majority is Jacobinism, which, as we know, was abandoned a long way back in history.

The constitution is the law of power. Power today means politics, both internal and external. Therefore, constitutional law together with its implementation and supervision (i.e., judicial review) is essentially and inevitably the most political law and legal activity of all. There is no reason to purport or convince anyone of the opposite — the whole question is about limits and methods. To define the latter, one has to be well familiar with oneself, the pertinent law and its doctrine, and the relevant experience of other countries.

In the discussion of the French Constitution in 1791, Saint-Just said that people have one serious enemy — their own government. Without a constitution, democracy as the law of the majority can easily become tyranny. A constitution, and especially constitutionalism, must keep democracy from running amok. It is not the legal act or its text that is decisive, even if it is the fundamental law, but the constitutionalism arising from it — the set of principles, methods, institutions, practices, and norms that functions to limit power. Without a deep culture of constitutionalism, formal democracy may become superficial and corrupt. With a constitution, a nation ties itself and its government to Odysseus' mast in order not to be distracted by the calls and temptations of the sirens.

It is worth remembering that a constitutional state is not the same as constitutional democracy. Any form of government and the constituents (electorate) behind it may establish a constitution. An example of this is totalitarian communism with its formally progressive constitution, or any other autocratic regime. Such a system, even if it applies the provisions of the constitution and follows the letter of the constitution with the support of the state apparatus and courts, is only a rule-of-law state (*rechtsstaat*).² It is a dictatorship of law but not constitutional democracy or a democratic state governed by the rule of law.

Power can be limited only by another power that is at least equal to the first. It took Occidental culture hundreds of years and much suffering to understand that the best guarantee of internal balance and stable development is division of power and mutual control under a law approved by the nation — i.e., a constitution. The fact that we have had 60 years of peace and prosperity in Europe, which has been fighting throughout history, is extraordinary and certainly owes itself to, amongst other things, the deep rooting of constitutionalism in Europe after World War II. This factor does not stand out or meet the eye in the press, which covers persons and action, but it is inarguably present. In this context it is appropriate to refer to the preventive effect of functioning constitutionalism and a strong constitutional court as pointed out by Helmut Steinberger — with

² See J. Habermas. *Law as a Medium and as an Institution. – Dilemmas of Law in the Welfare State.* 1988.

their reputation, possibilities, and competence they in themselves have a limiting effect on any attempts to act in a manner contrary to the constitution and to restrict rights and freedoms.^{*3}

Democracy is a difficult form of government even in favourable circumstances. It is all the more difficult in a situation where society's economic environment is relatively weak; civil society is only at the initial stage of development; and there are persons, circles, and other actors within and affecting the society who find their status, privileges, and opportunities threatened by the new and wish for a return to the old system or either shun the new or have not adapted to it.^{*4}

A true and functioning constitutional democracy is based first of all on thinking, values, good will and practice, faith and experience. These are categories that take much longer and greater effort to evolve than economic wealth or formal lawfulness. It is perhaps appropriate at this point to cite the opinion of famous American judge Learned Hand: "I often wonder whether we do not rest our hopes too much on constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."^{*5} We can agree with this metaphorical generalisation if we know that law can still be helpful in restoring one's liberty and independence, as our experience has shown.

It can be very difficult to introduce judicial constitutional review and establish a relevant court in an empty place, as this implies the sudden redistribution of power, and for the thus-far sovereign centres of power — the parliament and executive power — it means giving up some of the power and approval authority to a new centre of power or overseer. Suddenly a group of lawyers and judges appear and tell them what they can and cannot do. This is not an easy thing to swallow. And, as the constitution is the law of power, tensions and accusations of interference in politics arise immediately. For the court this means years of hard work of self-establishment. This applies to all East-European countries, including Estonia, where it perhaps still applies.^{*6}

Where the constitutional court has all the attributes and competencies befitting a constitutional court, it faces politics wherever it looks — in the way judges are selected and appointed, their mandate, and especially the competence of the court. If its competence covers not only the traditional and well-known task of constitutional review of legislation (another product of political activity) but also constitutional review of political parties, settlement of election disputes, and authorisation of impeachment of persons in power, then it does faces politics at every step. However, this does not mean that the decisions of the constitutional court are automatically political. A political decision and a legal decision are two different things where a constitutional court is concerned, and they must not be confused.

A political decision, as opposed to a court decision, does not require legal argumentation, explanation, and justification. Clever politics provide a socio-political explanation but need not do even that. Political decisions are not correct or incorrect in the objective sense as much as they are justified under a certain system of values.

On the other hand, the first and only objective parameter of the (constitutional) court is the legal act — the constitution — and through that also international law, generally accepted legal principles, and the related legal doctrine as presented via special methodology — legal logic and argumentation.

Therefore, the court shapes its decisions according to the values, generally accepted (legal) principles, and arguments contained in the letter and meaning of the constitution, by applying the logic and methodology of legal argumentation. This may, but need not necessarily, be true for political decisions. To keep society together and coherent, to make it follow common and stable rules, or, put other way, to keep them tied to the mast, as it were, a 'reader of the holy word' is inevitably needed. Even if somebody does not like it or if the court does not always perform brilliantly, this is the logic and inevitability of the game. The mission of the constitutional court is not to prevent democracy but to consolidate democracy, to keep it together.

As constitutions have been created throughout history as a result of upheaval, today's constitutional courts are the product of upheavals and shocks. They have been set up for putting down totalitarianism and for (re-) establishing and upholding democracy, as constitutional provisions and values have been grossly violated. The violations have often been committed by or with the help of power itself — the legislature and executive power. Constitutional jurisdiction was thus created with the aim of ensuring democratic constitutional stability and of avoiding the erosion and suppression of democratic values via sheer stupidity or scheming or the application of Jacobinic methods.

It should not be concluded from this discussion that a constitution and constitutional court are needed only by those in power in order to settle matters of their mutual relations and activities. This is certainly one of their functions, but constitutional law is essentially everyone's law, the nation's law for keeping power and the life

³ H. Steinberger. Decisions of the Constitutional Court and Their Effects. – The Role of the Constitutional Court in the Consolidation of the Rule of Law. CoE proceedings. Bucharest 1994, p. 72.

⁴ H. Schwartz. The Struggle for Constitutional Justice in Post-Communist Europe. 2000, p. 3.

⁵ L. Hand. The Spirit of Liberty. – The Spirit of Liberty. Knopff 1952, p. 190.

⁶ In this context, see the above-mentioned writing by Professor H. Schwarz.

of society within an agreed framework. This is how constitutional law acts unless it is illusionary or formal; it is a real and effective law that anyone can use and rely on.

2. On the Estonian Constitution and judicial constitutional review

I stated above that constitutions are usually a reflection of times of upheaval and old fears. The problem is that law (including the constitution) does and must look into the future. It must take account of the past, be effective in the present, and be projected into the future. Therefore, we have to ask ourselves whether we are still in the old situation, whether those fears are still justified or we have put the past behind us for good, whether the constitution is adequate and effective in the present situation, and whether it is sufficiently modern and forward-looking.

The content of the constitution, its doctrine, and its interpretation directly depend on the cultural, social, and political environment in which the constitution lives and applies. We can see a vivid expression of this if we compare the opinions and decisions of present-day European constitutional review bodies, especially constitutional courts. In the interpretation and in providing content for the various paradigms of democracy, rights and freedoms, and mechanisms of power, these decisions and their reasoning show increasing proximity. They are carried by similar philosophies and legal thinking. Estonia has clearly followed the same direction. This is proof of the development of a common European legal area. The situation was quite different 15 years ago. It had to be — we were not in the new cultural area yet. It may therefore be noted that an important shift of mentality has taken place, while the legal source material, the text of the constitution, has remained the same.

In his speech of 8 December 2001, President of the Republic of Estonia Lennart Meri said: “Over 10–12 years [...] I have followed the position of the Constitution in our society, the implementation of our constitutional institutions, and I have perceived something that has started to bother me. We have a good constitution, part of which comes from Germany — the constitution the Allies dictated to West-Germany on the basis of their experience; another part comes from Estonia, yet others from a third and fourth country. In this sense, it somewhat reminds me of our contradictory legislation.” Meri went on to supply examples to raise the question of whether our political and constitutional law *status quo* matches our new circumstances and the needs arising therefrom.*⁷

Understanding of the main constitutional parameters in Europe has thus developed and become harmonised, while the text of our constitution has largely remained the same. This makes us ask whether we have not reached a new state that requires a new constitutional text. Or will we continue by simply interpreting the text in a new way? It is clear that even the most Europe-oriented drafters of the Constitution could not even have dreamt of such close integration with Europe as we have already achieved.

I am asking which is better: to stretch or even ignore the text, or to draft a new and adequate one? My short answer is that we are not in the same situation but in a new one, one that requires a constitutional text adapted to this new situation.

Many influential constitutionalists and politicians respecting constitutionalism have said that a constitution is either a set of binding provisions or nothing. What does this mean in the context of our constitution? We have amended the Constitution several times when we have found that it did not work in its old form; another amendment action is under way. So, the sanctity and immunity of the text of the Constitution is history anyway and can no longer serve as a plausible argument.

Our constitution contains provisions that are overlooked due to the circumstances*⁸, and there are things that the Constitution does not address but, in view of the new situation, should. Other provisions simply need new legislative drafting. The shortcomings of the Constitution and amendment proposals have been under discussion for some time at various levels, from academic writers to the government’s committee of experts for the Constitution to the President of the Republic. However, as this is not the topic of this paper, I shall only reiterate that it would be reasonable to draft a new text of the Constitution, one that is organised and corresponds to the circumstances.

In addition to addressing the legal element, this would give us a great opportunity in broader terms to reflect upon, ponder, and analyse the situation of our statehood, and its functioning and development. Secondly, it would be reasonable to secure ourselves with a well-functioning constitution in good times, so as to be prepared for bad times.

⁷ L. Meri. Poliitiline testament (Political Will). Tartu 2007, pp. 48–49 (in Estonian).

⁸ An example can be taken from this extract from the opinion of the Supreme Court of 11 May 2006: “At that, only that part of the Constitution is applicable which is in conformity with European Union law or which regulates the relationships that are not regulated by European Union law. The effect of those provisions of the Constitution that are not compatible with European Union law and thus inapplicable is suspended.”

In this context, there is another fairly relevant but hidden element that extends to the use of the constitution as a whole as well as to judicial constitutional review — the longer a system continues with its errors and shortcomings, the more internalised and rigid it becomes, and the harder it will be to change or develop something, however strongly the situation may demand it.

What should we think of the judicial constitutional review system in Estonia?

The short answer would be that it has fulfilled its historical mission but that it also requires renewal. The Estonian system, wherein judicial constitutional review is an additional function of general courts, is a unique mixture of the American model and the Continental/Kelsenian model, which is aimed at formal constitutional review of legislation. In addition, the whole solution was justified in the context of its time by the limited means of a small state. The result is not exactly purebred, but it worked and still works. We are still small, but our means are less limited and, we can hope, much more experienced and wiser.

The system turned out to be quite difficult and unfamiliar for general and career judges, as they had no doctrinal or methodological preparation for constitutional adjudication. They were therefore very laconic and largely limited to what they knew — that is, the application of formal lawfulness and legal dogmatics. The doctrine and casuistry of international and comparative law were applied little. Especially disturbing, in my opinion, is the grounding of judicial protection of rights and freedoms only, or largely, in the paradigm of formal lawfulness. Basing the protection of rights and freedoms on formal lawfulness means having regard for the arguments of one side only, state authority, as law is nothing other than an instrument of power. These problems have decreased over time, but they have not disappeared, and I believe that the existing system does not allow for their disappearance.

Still, to avoid being negative, I have to compliment the great role of the first period (till now) in the building of the constitutional legal system and development of the hierarchy of provisions and the tradition of lawfulness.

On the fifth anniversary of the first constitutional review decision of the Supreme Court, the Supreme Court held an international seminar entitled *Constitutional Courts: Problems and Development Plans*, on 4–5 June 1998.⁹ I must note that, to my disappointment, I have nothing important to add to those assessments, proposals, and recommendations made nine years ago. The normative basis of judicial constitutional review has made progress; there is a new law that is quite good in the context of the current system, but most of the principal and systemic issues have remained the same. It is possible that the acuteness of the problems has been alleviated somewhat by relatively well-performing and innovative administrative courts, and the ombudsman's function recently added to the Chancellor of Justice's duties.

Without going into the details, I see three main problems in current Estonian judicial constitutional review:

1. the main problem: the lack of a system for individual constitutional complaints;
2. the lack of a possibility for minorities, especially the parliament's minority, to address the constitutional court;
3. the lack of a separate constitutional court with the competence to conduct constitutional review of the judgements of ordinary courts.

As there is almost no debate in the Estonian parliament over important political and socio-strategic issues, so is there no judicial debate between Estonian inhabitants and groups of people, on the one hand, with the state authority, on the other, on the constitutional level. However, it is important how everybody in Estonia perceives constitutional protection and his or her right to rely on the Constitution and argue with the power. It may be asked whether the lack of a direct channel — i.e., a system for individual complaints — is not one of the reasons for the people of Estonia being alienated from power and why participatory democracy is weak. A well-organised system of individual complaints would also remarkably reduce the need for and possibilities for addressing Strasbourg, which would also alleviate the Strasbourg system's burden of addressing poorly justified complaints. Strasbourg's experience shows very clearly that relatively few complaints are received from countries that have a well-organised constitutional court system for dealing with individual complaints (e.g., Germany, Spain, and Hungary). Why? Because the problems are solved at home.

The weak point of our democracy is the straightforward, often simplified and bumptious power of the majority and the lack of meaningful debate and mutual consideration surrounding application of the general principles of law and the values of the Constitution and international law. Giving the parliament, and not only the minorities in the parliament, the right to refer to the constitutional court would bring those subjects and arguments to public discussion while intensifying and developing our constitutional thinking and democratic behaviour. I would like to repeat the well-known saying about judicial power being the least dangerous power. We should not be afraid in the least of constitutional discussion and constitutional judicial disputes, because this is the way in which democratic statehood functions. It improves the coherence of the state, promotes mutual

⁹ See *Konstitutsioonikohtud: probleemid ja arengukavad*. Rahvusvahelise seminari ettekanded (*Constitutional Courts: Problems and Development Plans*. Reports of the International Seminar). Tartu: Riigikohus 1999 (in Estonian).

dialogue, and develops constitutional argumentation and political culture. We may thus make progress in the development of civil society.

The third proposal related to the establishment of a separate constitutional court makes sense after the first two proposals are realised. If they become fact and we develop our judicial constitutional review system into what the countries with the most to offer in this field have, it is inevitable that we will establish a separate constitutional court by separating the constitutional review chamber from the Supreme Court. There are three basic reasons this should be done:

1. the total workload will increase substantially;
2. the methodology and dogmatics of constitutional adjudication are specific, especially when it comes to individual complaints, and require special preparation. Judicial constitutional review would become an independent legal activity as opposed to a branch of the Supreme Court's activity, which it is now;
3. the practice of well-organised constitutional courts, as well as that of Strasbourg and, in part, Luxembourg, shows very clearly that courts as well, including the supreme courts of states, can violate constitutions, international law, and rights and freedoms. A separate constitutional court with the associated expertise, competence, and reputation would reduce the chances of such violations.

However, I should stop discussing my vision at this point, because, if we really want to do something, we must admit that we are back at the beginning and that we would need to amend the Constitution in order to establish a separate constitutional court. Which is what was to be demonstrated.



Allar Jõks

Chancellor of Justice of the Republic of Estonia

The Chancellor of Justice's Role in Protecting the Constitution and Balancing the Legislature's Activity: Is the Chancellor of Justice Only a Prosecutor of the Supreme Court?

Five years ago, on the 10th anniversary of the Constitution, I gave a speech titled 'The Chancellor of Justice and/or Ombudsman'.¹ It focused on the pros and cons of merging the functions of the Chancellor of Justice and the Ombudsman. Now, nobody has any doubt any longer that it was the correct decision to join these two functions. Separation of the two functions would necessitate amendment of the Constitution and renouncement of at least one international treaty.

It is therefore symbolic that the present discussion, which is dedicated to the 15th anniversary of the Constitution, focuses on another important aspect of the activities of the Chancellor of Justice — constitutional review. The fact that the Chancellor of Justice speaks about his own constitutional role and the line between legitimate protection of the Constitution and illegitimate interference with politics might, of course, remind you of the well-known fairy tale about the goat becoming the gardener. The Chancellor of Justice has been admonished enough by politicians for not remaining true to his business and for having passed up a great opportunity to be silent.

Below I would like to share the ideas I have had in my six and half years of this practice that relate to the role of the Chancellor of Justice as a constitutional review institution and about how I understand the balance of law and politics in this institution.

Firstly, it would be appropriate to briefly introduce the institution of the Chancellor of Justice and engage in a **short excursus to history** to see how the authors of our constitution saw the Chancellor of Justice's institution.

¹ Available at <http://www.oiguskantsler.ee/index.php?konedID=32&show=koned&menuID=22> (in Estonian).

The Constitution of the Republic of Estonia^{*2} lays down the following functions of the Chancellor of Justice (formerly translated as 'Legal Chancellor'):

- 1) the Chancellor of Justice as the reviewer of compliance with the Constitution and laws^{*3};
- 2) the Chancellor of Justice as the Ombudsman^{*4}; and
- 3) the Chancellor of Justice as a higher criminal prosecutor.^{*5}

1. About the constitutional review function of the Chancellor of Justice in general

The constitutional review activities of the Chancellor of Justice may be conditionally divided into *ex ante* and *ex post* control.

For *ex ante* control, the second sentence of § 141 of the Constitution allows the Chancellor of Justice to participate in sessions of the Riigikogu and of the Government of the Republic with the right to speak. The right to speak at a session of the Government of the Republic allows the Chancellor of Justice to draw attention to the most apparent shortcomings in draft legislation and to obtain the information he needs for his work. The Chancellor of Justice may participate with the right to speak in plenary assembly and committee sessions of the Riigikogu.

Unfortunately, it is often mistakenly thought that if the Chancellor of Justice has participated in a session of the Government of the Republic or of the Riigikogu, this guarantees that the law or regulation adopted complies with the Constitution and any further contestation is precluded. In the course of legislative proceedings, attention can be drawn to only the most obvious errors, as conflicts with the Constitution are usually revealed only upon implementation of the law. This is why it is erroneous to think that the Chancellor of Justice should review every legal act adopted in the country or even that the Chancellor of Justice not having contested the act within reasonable time after its adoption indicates that the act is in line with the Constitution and the laws of the land.

Ex post control by the Chancellor of Justice may be divided into two parts: 1) proposing to the body which passed the act to bring it into conformity with the Constitution and 2) initiating of constitutional review proceedings in the Supreme Court. Everyone has the right of recourse to the Chancellor of Justice to review the conformity of an act of parliament or a regulation (according to the Constitution "law creating acts") with the Constitution or the law.^{*6} The Chancellor of Justice may also check the compliance of these acts on his own initiative. If the Chancellor of Justice finds that an act passed by the legislative or executive powers or by a local government is in conflict with the Constitution or a law, he shall propose to the body that passed the act to bring it into conformity with the Constitution or the law within 20 days.^{*7} From 1993 to 30 June 2007, the Chancellor of Justice made 386 proposals for bringing such law creating acts into conformity with the Constitution. If the act is not brought into conformity with the Constitution or the law in 20 days, the Chancellor of Justice shall propose to the Supreme Court declaration of it as invalid.^{*8}

At this point, it is appropriate to have a glance at history and see how the Constitutional Assembly developed the institution of the Chancellor of Justice when drafting the Constitution of the Republic of Estonia.

It was not so much the issue of the Chancellor of Justice's constitutional review function that raised disputes at the Constitutional Assembly as the issue of whether the Chancellor of Justice could also have the function of an ombudsman. In the shorthand notes of the Constitutional Assembly, the Chancellor of Justice has been described as the supervisor of development of the legislation and the legal system^{*9} and as the controller

² Eesti Vabariigi põhiseadus. – RT I 2003, 29, 174; 2007, 33, 210 (in Estonian). Available in English at <http://www.president.ee/en/estonia/constitution.php?gid=81917>.

³ The first sentence of § 139 of the Constitution: "The Legal Chancellor shall be, in his or her activities, an independent official who shall review the legislation of the legislative and executive powers and of local governments for conformity with the Constitution and the laws."

⁴ The second sentence of § 139 of the Constitution: "The Legal Chancellor shall analyse proposals made to him or her concerning the amendment of laws, the passage of new laws, and the activities of state agencies, and, if necessary, shall present a report to the Riigikogu."

⁵ The third sentence of § 139 of the Constitution: "The Legal Chancellor shall, in the cases prescribed by §§ 76, 85, 101, 138, 153 of the Constitution, make a proposal to the Riigikogu that criminal charges be brought against a member of the Riigikogu, the President of the Republic, a member of the Government of the Republic, the Auditor General, the Chief Justice of the Supreme Court, or a justice of the Supreme Court."

⁶ Section 15 of the Chancellor of Justice Act (Õiguskantsleri seadus. – RT I 1999, 29, 406; 2007, 11, 52 (in Estonian)). In English available at <http://www.legaltext.ee/text/en/X30041K6.htm>.

⁷ The first sentence of § 142 of the Constitution.

⁸ The second sentence of § 142 of the Constitution.

⁹ L. Hänni. Põhiseadus ja Põhiseaduse Assamblee: koguteos (Constitution and Constitutional Assembly: Digest). Tallinn: Juura 1997, p. 765 (in Estonian).

of compliance with the Constitution and the quality of legal documents.^{*10} Importance was attached to the Chancellor of Justice's own initiative and compliance with the principles of democracy. Jüri Adams said at the Constitutional Assembly when introducing the institution of the Chancellor of Justice: "We have considered it necessary to introduce an institution that has a direct duty to raise issues of the compliance of the government's decisions with the Constitution on his own initiative regardless of whether or not a group of citizens draws attention to such issues" and that protecting society from the state "will be one of the most important tasks in the coming years".^{*11}

Based on the above, **the role of the Chancellor of Justice may be described through the following key concepts: supervision of the development of the legal system, assessment of the quality of legal documents, and intervention on his own initiative to protect democratic society.**

In view of the above, it is odd that in recent years a question has been raised as to whether the Chancellor of Justice may, in his constitutional review capacity, contest only the acts or also the omissions or insufficient acts of the legislative body.

According to § 139 of the Constitution, the Chancellor of Justice shall review the law creating acts of the legislative and executive powers and of local governments for conformity with the Constitution and the body of law. As the Constitution provides both limitations (prohibitions) and positive obligations for the legislature in its legislative drafting activities, both the acts and the omissions of the legislature should be effectively controlled in the course of constitutional review. If a law lacks something it should contain according to the Constitution, it is certainly not in line with the Constitution. Therefore, under the first sentence of § 139 of the Constitution, it is subject to review by the Chancellor of Justice. Otherwise it would be the legislature that decides on the scope of abstract constitutional review of norms (abstract norm control). In such cases, the Riigikogu would be able to use legislative drafting techniques to avoid the Chancellor of Justice's review of the compliance of legislative acts with the Constitution. The interpretation according to which the Chancellor of Justice has no powers to contest failure to issue law creative acts, or, put another way, omissions or insufficient acts of the legislative body, differs in my opinion from the views of the Supreme Court so far and from the consistent practice applied in construing the Chancellor of Justice's powers since 1994. When one considers the Chancellor of Justice's powers, the Chancellor of Justice Act and the Constitutional Review Proceedings Act^{*12} should be interpreted in the light of and in line with the Constitution and not the other way round. In this connection, any discussions over which provisions of the Constitutional Review Proceedings Act give rise to the Chancellor of Justice's right to contest the omissions of the legislature lose their meaning.

2. Chancellor of Justice as the constitutional prosecutor at the Supreme Court

If we ask **whether the Chancellor of Justice is only a constitutional prosecutor at the Supreme Court**, we have posed a tricky question. What could I have against being called the constitutional prosecutor at the Supreme Court in the context of the constitutional review function of the institution of the Chancellor of Justice? If anything, this sounds really dignified and respectful. The tricky word is '**only**'. I will give an example from a somewhat different context. If we look at, e.g., the European Court of Justice, also the Advocates-General are '**only**' Advocates-General, in the sense that they are not at the core of decision-making as judges. At the same time, everyone who has studied EU law knows that Advocates-General play a fairly central role in the outcome of cases. Yes, in the Estonian constitutional system, the Chancellor of Justice cannot give a final binding answer to the question of compliance with the Constitution. However, does the fact that constitutional review is the Supreme Court's monopoly justify the word '**only**' following 'the Chancellor of Justice'?

What do statistics show? From 1993 to 30 June 2007, the Supreme Court settled 187 cases in constitutional review proceedings; in 75 cases legislation has been declared invalid or contrary to the Constitution. In other words, the Supreme Court has directly shaped the Estonian constitutional landscape in 75 cases.

In the same time, the Chancellor of Justice made 386 proposals to the issuers of various legal acts for bringing these acts into compliance with the Constitution. In 365 of these, the legislation has been corrected without objections, in 19 cases this was done with help from the Supreme Court, and in two cases the Chancellor of Justice's requests to repeal legislation in the Supreme Court were held to be unjustified. Can we find from these emotionless figures the answer to the question of whether the Chancellor of Justice is a prosecutor in

¹⁰ J. Rätsep. Põhiseadus ja Põhiseaduse Assamblee: koguteos (Constitution and Constitutional Assembly: Digest). Tallinn: Juura 1997, p. 309 (in Estonian).

¹¹ *Ibid.*, p. 138.

¹² Põhiseaduslikkuse järelevalve kohtumenetluse seadus. – RT I 2002, 29, 174; 2007, 44, 316 (in Estonian). In English available at <http://www.legaltext.ee/text/en/XX00014.htm>.

the constitutional court, a pre-trial conductor of constitutional review, or the first instance of the constitutional review court?

What do the shorthand notes of the Constitutional Assembly tell us? According to § 104 (1) of the draft Constitution submitted by the Jüri Adams working group^{*13}, the Chancellor of Justice was to be appointed for life by the head of state from among candidates recommended by the Riigikogu and approved by the Supreme Court. This may have referred to a wish to tie the Chancellor of Justice to the Supreme Court. Later discussion led to the Chancellor of Justice not being institutionally tied to the Supreme Court.^{*14}

Perhaps it would be more accurate to speak of the office of the Chancellor of Justice as the anteroom of the Supreme Court. Or, to be more exact: in constitutional review matters, the Chancellor of Justice functions in the manner of the anteroom of the Constitutional Review Chamber of the Supreme Court. However, this is an untraditional anteroom: unexpected guests in the form of constitutional disputes may surprise the members of the household. I do not have in mind only the institution of politically flavoured constitutional disputes judged by the Chancellor of Justice. As we know, the Chancellor of Justice may submit opinions to the Supreme Court on all constitutional disputes. I believe the role of the Chancellor of Justice does not merely lie in issuing opinions about the settlement of specific disputes. I have considered it important to develop constitutional thought via my opinions and thereby develop protection of the fundamental principles of the Constitution. For that purpose, I have on several occasions offered opinions to and raised issues in the Supreme Court that were not inevitably related to the case but were relevant to the further interpretation of the Constitution or the procedural provisions. Sometimes the Supreme Court has taken the bait, if I may say so, and in other cases it has disregarded it.

Our opinions have repeatedly drawn the attention of the court to the fact that the Supreme Court should change its practice from that previously displayed, which we thought was erroneous.^{*15}

It makes me sad that the Supreme Court does not take a view on the opinion of the Chancellor of Justice as a party to the proceeding. Justice of the Supreme Court (and Head of the Constitutional Assembly) Tõnu Anton has mentioned in his dissenting opinion on the Traffic Act case: "It arises from the first sentence of § 139 of the Constitution that constitutional review is the most important function of the Chancellor of Justice. Disregard for the arguments presented in the Chancellor of Justice's opinion is in line neither with the powers of that constitutional institution nor with the requirement of the harmonised activity of the state nor with the principles of constitutional review proceedings."^{*16}

Insofar as the Chancellor of Justice's duty is to draw attention to gaps and shortcomings in the protection of the fundamental constitutional principles, this is an opportune moment to point out certain problems in constitutional review.

2.1. Estonian Constitution and the EU law

Accession to the EU has significantly weakened our Constitution and hence constitutional review. There is no domestic procedure for assessing the compliance of primary European Union law (basic agreements) with the underlying principles of the Constitution of the Republic of Estonia. However, every citizen of the Republic of Estonia must be able to ask whether or not the basic agreements concluded by the European Union are in line with the fundamental principles of the Estonian Constitution.

One should agree with the dissenting opinions of Supreme Court Justices Erik Kergandberg^{*17} and Villu Kõve^{*18} to the position of the Supreme Court on the interpretation of § 111 of the Constitution of the Republic of Estonia. According to the dissenting opinion, the Supreme Court overestimated the supremacy of European Union law and did not provide a position on the implications for the Estonian constitutional order of the condition contained in § 1 of the Constitution Amendment Act^{*19} that Estonia belong to the European Union in accordance with the fundamental principles of the Constitution.

How and in which procedure can it be ensured that EU legislation and the domestic provisions reproducing EU legal provisions do not restrict the rights and freedoms enshrined in the Constitution?

¹³ Põhiseadus ja Põhiseaduse Assamblee: koguteos (Constitution and Constitutional Assembly: Digest). Tallinn: Juura 1997, p. 1179 (in Estonian).

¹⁴ *Ibid.*, p. 390.

¹⁵ CRCSCd 10.12.2004, 3-4-1-24-04. Available in English at <http://www.nc.ee/?id=395> (5.11.2007).

¹⁶ CRCSCd 10.12.2004, 3-4-1-24-04e. Available at <http://www.nc.ee/?id=11&tekst=222477327> (5.11.2007) (in Estonian).

¹⁷ CRCSC 11.5.2006, 3-4-1-3-06-e2. Available in English at <http://www.nc.ee/?id=663> (5.11.2007).

¹⁸ CRCSC 11.5.2006, 3-4-1-3-06-e1. Available in English at <http://www.nc.ee/?id=663> (5.11.2007).

¹⁹ Põhiseaduse täiendamise seadus. – RT I 2003, 64, 429 (in Estonian). In English available at <http://www.legaltext.ee/text/en/X70050.htm>.

We have read in the press^{*20} that a person who was suspected on the basis of little and unverified information was detained in Estonia upon a request from Italy and in the course of a major operation and was surrendered to Italy with the court's permission.

Arrest and surrender to another country are serious impingements on the right to freedom. The impingement on fundamental rights also largely arises from the fundamental principle of the relevant EU framework decision.^{*21} Namely, an arrest warrant is based on the principle of mutual trust between EU Member States, and the Member State receiving a request has no opportunity to assess the facts of the matter. Therefore, judicial control of a foreign arrest warrant is limited in Estonia to the legal bases for the warrant and not its proof. According to the idea and wording of the framework decision, the prosecuting authority and the court have no obligation to check the alibi of the person concerned by the arrest warrant.

The intention of the framework decision is to ensure effective surrender, not to protect fundamental rights. Neither the framework decision nor its domestic procedure in the Code of Criminal Procedure^{*22} expressly provides for the protection of persons in terms of contestation of the suspicion underlying the arrest warrant and submission of vindicating evidence. A justified question can therefore be raised about a conflict with Article 6 (on fair trial) of the European Convention of Human Rights and the fifth paragraph of § 24 (on right of appeal) of the Estonian Constitution. Although these objections can be made in the Member State conducting criminal proceedings, this requires arrest and surrender to a foreign country, where deprivation of liberty continues. Limited judicial remedies might not provide for the same degree of protection of rights as under the domestic procedure.

The above-mentioned problems in interpreting EU law in conjunction with the Constitution give me reason to go back in time by five years and repeat the criticism that was put forth concerning the Constitution Amendment Act or the so-called third act: **the third act is easy to proceed with but not to implement.**^{*23}

2.2. Effective judicial remedies

How can we ensure effective judicial protection? The Chancellor of Justice was addressed by an entrepreneur whose complaint about the water price and sewerage price established by the city council's decision was not accepted by the administrative court, which advised the entrepreneur to address the Chancellor of Justice for instituting of constitutional review.^{*24} In consideration of the limited scope of the article, I will leave aside criticism of the court's behaviour. I see the main problem as lying in the fact that the court considered addressing the Chancellor of Justice to be the person's sole legal remedy. The court did not analyse the person's opportunities for defending his rights in the court. According to the first paragraph of § 15 of the Constitution, everyone whose rights and freedoms are violated has the right of recourse to the courts and, while the case is before the court, to petition for any relevant law, other legal act, or procedure to be declared unconstitutional. The Supreme Court *en banc* has also stressed that, by virtue of § 15 of the Constitution, the Supreme Court may dismiss a person's complaint only if the person has another effective means of exercising his constitutional right to judicial protection arising from the same section, and unless the legislature has established an effective and gapless mechanism for the protection of fundamental rights, courts must provide for the protection of fundamental rights under § 14 of the Constitution. Therefore, if a law directly affects fundamental rights, § 14 of the Constitution obliges courts to analyse whether they are entitled not to give leave to the complaint.

Addressing the Chancellor of Justice is not a judicial remedy but, rather, a last resort after all judicial remedies have been exhausted. Therefore, an analysis should have shown in this case what other judicial remedies were available to the person, and if no effective remedy was available, proceedings should have been instituted in the matter similarly to those initiated in respect of the applications by Sergei Brusilov^{*25}, AS Giga^{*26}, and Tiit Veeber.^{*27}

The right arising from the first paragraph of § 15 of the Constitution should certainly be secured on a more general basis than by a court judgment made on a specific matter. The competence of the administrative court

²⁰ See, e.g., Politsei tabas suuroperatsiooni käigus 21 Itaalia juveeliärisid röövinud isikut (Police Caught 21 Robbers of Italian Jewellery Shops in a Major Operation). – Eesti Päevaleht online, 21 February 2007. Available at <http://www.epl.ee/artikkel/375255> (5.11.2007) (in Estonian).

²¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Available at <http://europa.eu/scadplus/leg/en/lvb/l33167.htm>.

²² Kriminaalmenetluse seadustik. – RT I 2003, 27, 166; 2007, 44, 316 (in Estonian). In English available at <http://www.legaltext.ee/text/en/X60027K5.htm>.

²³ A. Jõks. Põhiseadus muutuste künnisel (Constitution at the Doorstep of Changes). – Postimees, 17 April 2002. Available at <http://vana.www.postimees.ee/index.html?op=luagu&rubriik=6&id=54950&number=479> (5.11.2007) (in Estonian).

²⁴ Letter of Advocates Raidla and Partners of 2.01.2007 to the Chancellor of Justice. Chancellor of Justice Proceedings No. 6-4/070199.

²⁵ CRCSCd 17.3.2003, 3-1-3-10-02. Available in English at <http://www.nc.ee/?id=419> (5.11.2007).

²⁶ SCEbd 10.1.2004, 3-3-2-1-04. Available in English at <http://www.nc.ee/?id=411> (5.11.2007).

²⁷ CRCSCd 6.1.2004, 3-1-3-13-03. Available in English at <http://www.nc.ee/?id=410> (5.11.2007).

should apparently be changed by allowing the administrative court to check the legitimacy of regulations that directly influence the rights and obligations of a person, or individual complaints should be allowed in constitutional review proceedings where the legislature has not provided for another effective procedure that would ensure the fundamental right to judicial remedies. Otherwise, a person should, figuratively speaking, let himself be hanged first, in order to challenge in constitutional review proceedings the proportionality of the rope. Personally, it seems extremely odd to me to assess the pricing of sewerage services in constitutional review proceedings. This would be the same as assessing the effect of the Constitution Pilsner on the increase in awareness of the Constitution by way of abstract norm control.^{*28}

2.3. Court administration

I will not discuss here whether Estonia needs a separate constitutional court. I would only like to draw attention to that fact that, according to the trends in the development of Estonian court administration and the development principles of the judicial system as approved by the plenum of all Estonian judges^{*29}, the judicial system will be run on a self-management principle, realised via the activities of the plenum of judges, the Council for Administration of Courts, and the Chief Justice of the Supreme Court. This means that the monopoly over administration of justice, administration of courts, and constitutional review will be joined in a system topped by the Supreme Court.

While agreeing with the need to ensure the separation of powers, we should not forget the balance of powers. Will a system where the administration of justice, administration of courts, and constitutional review are thus consolidated ensure the balance of powers? Let us imagine a disagreement between the Supreme Court and the Riigikogu concerning the funding of the judicial system or the appointment/salaries/pensions/attestation of judges. Who will settle the dispute?

A serious and emotionless discussion is needed. I have to agree with the observation that Minister of Justice Rein Lang made on the plenum of judges: "In the course of editing the court administration development strategy, the editors have edited the balance of powers remarkably to their own benefit."^{*30}

2.4. Law and politics

How can we distinguish between law and politics? I would like to ask, putting it heretically, whether there is much difference at all. If the Chancellor of Justice speaks, on the basis of the Constitution, about — to take one example — the need to regulate the funding of political parties in a more transparent manner, or if the Supreme Court says to the Riigikogu that the parliament's inability to resolve the restitution-for-property issues of Baltic-German migrants is gaining an anti-constitutional dimension, then where does law end and politics begin?

To begin the discussion here, I will try to set forth in general terms the reasons for the Chancellor of Justice's activities having been considered unbecomingly political:

- 1) Taking the initiative. Most politically sensitive topics have been raised at the office of the Chancellor of Justice on the latter's own initiative. It has been opined that the Chancellor of Justice 'picks up' popular subjects.^{*31}
- 2) Emphasising the state's positive duties, including those arising from the principle of the social state. An example is the proposal to the Riigikogu to reorganise the system of assisting the poor, so as to ensure human dignity for those who cannot cope.^{*32}
- 3) Raising general issues of democracy — following the principle of proportional elections in the Riigikogu Election Act, allowing election coalitions to participate in local elections, improving the efficiency of checks of political party funding, addressing the right of members of the Riigikogu to belong to the supervisory board of state companies, and upholding the impossibility of simultaneously holding office in the Riigikogu and in a local government council.

²⁸ See, e.g., R. Lang: õlu paneb rahva põhiseadusest huvituma (Beer Makes People Interested in the Constitution). – Postimees online, 9 August 2007. Available at <http://www.postimees.ee/090807/esileht/siseuudised/276285.php> (5.11.2007) (in Estonian).

²⁹ Kohtusüsteemi arengu põhimõtted (Development Principles for the Judicial System). Decision of the Plenum of the Judges of 9 February 2007. Available at <http://www.riigikohus.ee/?id=749> (5.11.2007) (in Estonian).

³⁰ R. Lang. Õigus- ja kohtusüsteemi areng (Development of the Legal and Judicial Systems). Speech of the Minister of Justice to the Plenum of the Judges on 9 February 2007 in Pärnu. Available at <http://www.riigikohus.ee/?id=750> (5.11.2007) (in Estonian).

³¹ Oravapartei vahetaks Jõksi välja (The Squirrel Party Would Replace Jõks). – Eesti Päevaleht, 28 August 2007. Available at <http://www.epl.ee/artikkel/397648> (5.11.2007) (in Estonian).

³² Presentation No. 1 of the Chancellor of Justice of 3.02.2004 to the Riigikogu concerning compliance of the subsistence level established in § 6 (6) of the 2004 State Budget Act with §§ 10 and 28 (2) of the Constitution.

- 4) Being outspoken. It seems that the means and ways in which the Chancellor of Justice performs his duties have disturbed the political elite even more than the specific subjects. I am referring to the fact that, to make his words heard and to shape public opinion, the Chancellor of Justice has used similar means of addressing the public to those applied by political forces to win the sympathy of the electorate.^{*33}

The Constitution provides the general framework and defines the playground for politics. Generally, this playground is broadly defined — politics can do everything that remains in the framework established by the Constitution. The Constitution's own framework is legal and political at the same time.

The main difference that makes it possible to distinguish between law and politics lies in the language used by these two areas. Even if they speak about the same things, such as the regulation of political party funding, they do so in completely different ways. We may say that, although the Supreme Court and the Chancellor of Justice are, in the existential sense, inevitably also political institutions, the constitutionally defined policy of these institutions lies in their use of highly formalised legal language and argumentation as opposed to political language and argumentation. The French sociologist Pierre Bourdieu has offered interesting and convincing legal sociological insight into this topic in his writing published in 1980 titled 'The Force of Law'.^{*34}

What is the main difference between political and legal languages? It lies mainly in the much more regulated and limited nature of the legal language and mentality. The language of the Chancellor of Justice and the Supreme Court is limited to interpretation of the Constitution and has to proceed from this interpretation as its set task. The language of politics is almost unlimited.

Secondly, a politician in a democratic pluralistic society inevitably expresses the interests of a certain group, however legitimate. A politician in a democracy has the task of creating as wide as possible a basis for the interests of such interest group. A politician is and indeed has to be partial, even if trying to impress as supra-national. At the same time, an institution trusted with the task of interpreting the Constitution must retain an impartial attitude in any case. Interpretation of the Constitution should not hit the ball to the same goal, or it ceases to go beyond political parties and take as many arguments and interests into account as legitimate.

At this point, we cannot overlook the issue of the activeness and initiative of the Chancellor of Justice.

2.5. Activism of the Chancellor of Justice

How active may the court and the Chancellor of Justice be? In the USA, for example, the problem of judicial activism is essentially similar as a topic of legal and political dispute. Many conservatives believe that judicial activism is a deplorable phenomenon, while most liberals believe that important public or minority interests can be established and protected via judicial activism. The main objection of conservatives to judicial activism in the USA arises from the theory of democracy: in a democratic society, as many legal policy decisions as possible should boil down to the will of the people and hence be made by delegates of the people. Parliament members are directly elected by the nation, while judges (and, in Estonia, the Chancellor of Justice) have only a secondary, derived democratic legitimisation.

If the requirement arising from the theory of democracy that legal policy decisions directly boil down to the nation's will is the strongest argument against judicial activism, what could be pointed out in favour of the judicial activism model?

The first important aspect is the constitutional protection of minorities against the will of the majority.^{*35} The parliament's power cannot be absolute. Somebody has to exercise some control to prevent the parliament's majority from abusing its position as such to the detriment of the minority. The legislature's majority may err in its attempts to follow the provisions and guarantees of the Constitution. The Constitution gives certain guarantees to everyone, including minorities, and overriding these is not allowed, even when done in reliance on the will of the people (i.e., the majority). **In developing various policies, it is impermissible to ask how much human dignity costs or what the price of democracy is.** The smaller the circle of people in which the power of the majority is concentrated, the more dangerous it is to a constitutional state. This is why democracy has its built-in system of checks and balances — to provide some control in case the majority

³³ Editor's note: On 12.12.2002, the plenary meeting of the Estonian Newspaper Association voted Chancellor of Justice Allar Jõks the most press-friendly public figure. Jõks won the title by a great majority. This was explained by the fact that Jõks with his open attitude had made a great contribution to raising public awareness of the institution of the Chancellor of Justice. In the discussion before the voting, it was mentioned that Jõks had thoroughly explained the reasons for complicated legal disputes to the public via the press. See also the Estonian Newspaper Association. News, 12.12.2002: Aasta pressisõbraks valiti Allar Jõks (Allar Jõks Was Voted This Year's Friend of the Press). Available at http://www.eall.ee/uudised/2002/19_12_2_sub.html (5.11.2007) (in Estonian).

³⁴ In the *Hastings Law Journal* 1987 (38) 5, pp. 814–853.

³⁵ As a marginal note, it should be stated that the parliament's majority has also asked the Chancellor of Justice for protection against the parliament's minority.

loses its sense of reality. The criterion for such external control is the idea and wording of the Constitution, not political will as such.

If everything were all right with our democracy and constitutional culture, the Supreme Court and the Chancellor of Justice could safely be more conservative and keep a 'lower profile'. As long as the democratic system works faultlessly, lawyers have no need, as a rule, to poke at it. However, there is too much dealing, corporatism, and fantasising about the omnipotence of political agreement in our political system — partly due to the culture's youth, which I mentioned above. The youth of our democracy is vividly characterised by, for example, the democracy index published in *The Economist*³⁶ last year, in which Estonia ranked among flawed democracies.

Our democracy continues to need a system of checks and balances — constitutional review institutions that would stand somewhat aside from the Big Game and be ready and able to show a red light when necessary.

The fundamental principles of the Constitution must shape policy and not *vice versa*. Attempts to restrict constitutional democracy never emerge overnight. As Professor Marju Luts-Sootak pertinently stressed in her speech before the Forum of Judges: "Totalitarianism seldom arrives with a single act; usually it approaches step by step, often quietly sneaking into the essential administration of justice."³⁷ The Supreme Court as the highest court and the Chancellor of Justice have the duty of interpreting the Constitution and laws and of developing judicial practice in a way that ensures the best possible protection of fundamental rights and freedoms and the underlying principles of the Constitution. The role of these institutions is to protect and not to sacrifice these constitutional values.

³⁶ Economist Intelligence Unit Democracy Index 2006. Available at http://www.economist.com/media/pdf/DEMOCRACY_TABLE_2007_v3.pdf (10.11.2007).

³⁷ M. Luts-Sootak. Kohtuliku õigusloome väljad ja piirid (Fields and Limits of Judge-made Law). Presentation at the Forum of Judges in Tartu, 7 June 2007. Available at <http://www.riigikohus.ee/?id=802> (4.11.2007) (in Estonian).



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Courts as Political Institutions

1. Introduction

The main issues discussed at the scientific conference dedicated to the 15th 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.^{*1} 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.^{*2}

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^{*3}, examining the question of what influences a constitutional

¹ 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.

² 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.

³ 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.^{*4} In this article, I am thus attempting to provide an overview of studies in the field of politics of judicial review.^{*5}

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.^{*6} 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?^{*7}

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.^{*8}

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^{*9} are indeed similar to the corresponding German principles but substantially different from those recognised in France, England, or the United States.^{*10}

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.^{*11} 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

⁴ 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.

⁵ 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.

⁶ 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.

⁷ 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."

⁸ 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.

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

¹⁰ 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.

¹¹ 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?)*¹² 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?)*¹³ 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?)*¹⁴ 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.*¹⁵ 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.”)*¹⁶ 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.*¹⁷ 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.*¹⁸ 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

¹² 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.

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

¹⁴ 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.

¹⁵ 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”).

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

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

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

conviction.^{*19} 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.^{*20}

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?'^{*21} 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.^{*22} 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.^{*23} 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.^{*24} 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.^{*25} If nothing else helps, the parliament can amend the constitution in order to overturn a constitutional court judgment.

¹⁹ *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.")

²⁰ 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.

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

²² 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>.

²³ 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.

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

²⁵ 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.^{*26} 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.^{*27}

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.^{*28} 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.^{*29} 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.^{*30}

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'.^{*31}

Another interesting example can be found by considering Estonia^{*32}, 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.^{*33}

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

²⁷ 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.

²⁸ 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.

²⁹ 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.

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

³¹ 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.

³² 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.

³³ 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.^{*34} 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^{*35} 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.^{*36} Quite certainly public opinion is also a concern for the Estonian Supreme Court. For example, a week before the conference dedicated to the 15th 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.^{*37} 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.^{*38} 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.^{*39} The highest courts of these countries have now struck down legislation.^{*40} Nowadays, strong and active courts are

³⁴ 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.

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

³⁶ 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 Countermajoritarian 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.

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

³⁸ 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).

³⁹ 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.

⁴⁰ 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.^{*41}

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?^{*42} 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*”^{*43} and the ‘insurance theory’.^{*44} It has also been claimed that courts sometimes help to secure the power of politicians, particularly when the judges are not very independent.^{*45}

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.^{*46} 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.^{*47}

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.

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.

⁴¹ 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).

⁴² 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.

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

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

⁴⁵ 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.

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

⁴⁷ 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.^{*48} Similar conclusions have been reached by studying well-known judgments of the courts of New Zealand, Israel, Canada, and the Republic of South Africa.^{*49} For instance, the Israeli Supreme Court judgment prohibiting discrimination against Arabs in distribution of housing hardly produced any results in real life.^{*50}

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’^{*51} or ‘legalisation of politics’,^{*52} ‘juristocracy’,^{*53} ‘courtocracy’,^{*54} and even ‘the court as secular papacy’^{*55} 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.^{*56} 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.^{*57} Similarly, many political scientists regard constitutional courts as veto players who can obstruct the realisation of social changes.^{*58} Again, a number of studies have shown that a multitude of veto players can impede the implementation of extensive reforms.^{*59} 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.^{*60} 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.

^{*48} G. Rosenberg. *The Hollow Hope: Can Courts Bring About Social Change?* University of Chicago Press 1991.

^{*49} R. Hirschl (Note 43), p. 211.

^{*50} *Ibid.*, pp. 206–207.

^{*51} 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.

^{*52} M. Volcansek (ed.). *Law above Nations: Supranational Courts and the Legalization of Politics*. University Press of Florida 1997.

^{*53} R. Hirschl (Note 43); L. Goldstein. *From Democracy to Juristocracy*. – *Law & Society Review* 2004 (38), pp. 611–629.

^{*54} 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).

^{*55} 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.

^{*56} A. Lijphart. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. London & New Haven, CT: Yale University Press 1999, p. 216.

^{*57} 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.

^{*58} G. Tsebelis. *Veto Players: How Political Institutions Work*. Princeton University Press 2002, p. 222.

^{*59} 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.

^{*60} 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.⁶¹ 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.⁶² The ongoing dispute concerning the participation of electoral alliances in local elections can be pointed out as just one example.⁶³ 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.

⁶¹ 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.

⁶² 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).

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



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The Concept and Practice of Judicial Activism in the Experience of Some Western Constitutional Democracies

1. Judicial activism and judicial restraint in interpretation

In current legal language, the terms ‘judicial activism’ and ‘judicial restraint’ designate opposite approaches taken by judges to the text they are expected to interpret whenever the meaning of the words of which it is composed, or the intent of its authors, is not deemed sufficient for resolving the case. The more a judge feels himself free, in such circumstances, to give the text further meanings, the more he is considered ‘activist’. Conversely, the more a judge prevents himself from giving the text those meanings, the more he is deemed to be following a ‘restraint-based’ approach.

While focusing on the meaning of the text, these definitions connect the terms ‘activism’ and ‘restraint’ strictly to the task of interpretation. Larger definitions associate such terms with further activities of judges. Whether judges should strictly apply the rules of standing, whether judges should not consider a case until the applicant has exhausted other remedies, and whether judges should avoid deciding ‘political questions’ are among the questions that sometimes are deemed necessary for distinguishing judicial restraint from judicial activism.¹ These definitions, although no less correct than that focused on interpretation of the text as such, are not appropriate for application in a straightforward comparative account of the experiences of constitutional justice, requiring enquiry into judicial activities that diverge greatly in individual legal orders. By contrast, as will be further demonstrated, interpretation of the text not only corresponds to the most important criterion for designating a judge’s attitude as activist or not but is also particularly helpful in such a comparative account.

¹ J. Daley. Defining Judicial Restraint. – T. Campbell, J. Goldsworthy (eds.). *Judicial Power, Democracy and Legal Positivism*. Ashgate 2000, p. 280 ff.

2. The specific features of constitutional interpretation

It has been noticed that “Individual words acquire real meaning only when they are viewed and interpreted within context. Myriad factors may combine to constitute that context: the other words within the sentence; the other sentences within the paragraph; the purpose of the text as a whole; the identity of the author and the expectations which we have of him; the identity of the reader; the social, cultural or political perspective from which he approaches the text, and so on. Thus it is naive to suppose that any text may have a fixed and settled meaning. Any given meaning which is ascribed to a text is, at least in large measure, a product of the external factors which influence its interpretation; the inherent meaning of the words which combine to form the text merely demarcate the parameters within which a range of specific meanings can be ascribed to that text.”²

This argument becomes crucial with respect to constitutional interpretation. The fact that constitutional rights provisions tend to be comparatively indeterminate, including general invocations of liberty, equality, due process, freedom of speech, and the like, leaves them more open to judicial interpretation than most statutes, administrative regulations, or ordinances. Moreover, since constitutional provisions generally occupy the highest position in the hierarchy of norms within a domestic legal system, decisions of courts in the position of final arbiter of constitutional claims can be overruled only by a constitutional amendment or by their own subsequent decision. Finally, constitutional rights claims often raise issues that are highly controversial politically.³ These features appear particularly clear in the case of the Constitution of Estonia, whose § 152 second paragraph states that “The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution.”. While specifying that laws might infringe the Constitution whenever conflicting with its ‘spirit’ not less than with its ‘provisions’, the Estonian Constitution presupposes the literal rule’s insufficiency for a correct approach to constitutional interpretation. The ‘spirit’ of the Constitution is, in fact, unlikely to be encapsulated in single words, and even in the whole text of the Constitution. It can, rather, be apprehended through adaptation of the text to the diverse circumstances imposed with the passage of time. Rather than requiring a predetermined meaning, the ‘spirit’ of the Constitution admits shifts of meaning. This is precisely the kind of challenge that constitutional interpretation is expected to meet. It is also a challenge that contemporary constitutional texts are suited for, due to their relatively indeterminate language. It is that language which gives a constitution the capacity to survive those changes that may bring about reform of the ordinary legislation.

On the other hand, constitutional rights claims raise politically controversial issues to the extent that constitutions mirror pluralistic societies and at the same time posit the premises for their own free development. As Michelman has put it, “The legal form of plurality is indeterminacy — the susceptibility of the received body of normative material to a plurality of interpretative distillations, pointing toward differing resolutions of pending cases and, through them, toward differing normative futures.”⁴

The fact that the literal rule and recourse to the intent of the Framers are frequently insufficient in guiding constitutional interpretation does not mean that courts may set aside those criteria whenever they wish. On the contrary, courts rely on other criteria only after having demonstrated that the language plainly emerging from the text or from the intentions of its authors is insufficient for resolving the case. This is not merely a recommendation. It also depicts a current judicial practice. Although ‘activism’ is sometimes seen as failure to apply a rule at hand in accordance with its meaning, or applying a rule that has no warrant in the existing legal materials⁵, it has been convincingly replied that “understood in these terms, an account of ‘activism’ is unlikely to be of much assistance. Few judges will knowingly fail to apply a rule in accordance with its meaning, or rely on a rule which has no legal warrant as they see it”.⁶

These features appear sufficiently consolidated both in the American and in the European system of constitutional justice. If this is so, contrasting judges who apply their own moral values with judges following the plain meaning of the words in the law, as many commentators do, appears to be a ‘false dichotomy’.⁷ The activism/restraint dichotomy presupposes instead that the language that judges, and constitutional courts in particular, have to contend with is often indeterminate. And the dichotomy exists in the attitude toward that language. The activist approach tends more easily than the restraint-based approach to rely on criteria, first and foremost the teleological, that are not directly grounded in the text. The above-mentioned dichotomy is therefore a matter of degree, being apprehended in quantitative rather than in qualitative terms.

² M. Elliott. *The Constitutional Foundations of Judicial Review*. Oxford & Portland: Hart Publishing 2001, pp. 107–108.

³ M. Kumm. *Constitutional Rights As Principles: On the Structure and Domain of Constitutional Justice*. A Review Essay on ‘A Theory of Constitutional Rights’, by Robert Alexy. *International Journal of Constitutional Law* 2004 (2) 3, p. 574.

⁴ F. Michelman. *Law’s Republic*. – *The Yale Law Journal* 1988 (97), p. 1528.

⁵ T. Campbell. *Democratic Aspects of Ethical Positivism*. – T. Campbell, J. Goldsworthy (Note 1), p. 14.

⁶ A. Glass. *The Vice of Judicial Activism*. – T. Campbell, J. Goldsworthy (Note 1), p. 361.

⁷ W. Sinnott-Armstrong. *A Patchwork Quilt Theory of Constitutional Interpretation*. – T. Campbell, J. Goldsworthy (Note 1), p. 316.

3. Activism and restraint in light of the ‘counter-majoritarian difficulty’: The American model of constitutional justice

Once definition is provided in such terms, it remains to be seen why judges **should** adopt an activist or instead a restraint-based approach.

According to Posner, three approaches may lie behind doctrines of restraint: deference, reticence, and prudence. The deferential approach consists in avoiding contrasts with the decisions of other branches of government, the reticent approach is founded on the assumption that judges should not be making policy decisions, and the prudential approach is suggested on the grounds that judges should avoid making decisions that may well impair their capacity to make other decisions.⁸

The first two approaches appear directly related to the issue of the legitimacy of judicial decisions in a democratic system. The third one as well is related to that issue, albeit only indirectly, prudence being suggested in order to avoid decisions that would incur political reprisals interfering with the judiciary’s ability to make other decisions.⁹ The approaches suggested by Posner for justifying restraint appear therefore as diverse expressions of the legitimacy issue.

In the American literature, the most important accounting of that issue is in the work of Alexander Bickel. “The root difficulty”, wrote Bickel, “is that judicial review is a counter-majoritarian force in our system”, since “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it”.¹⁰ At the same time, however, Bickel was convinced that the court’s task consisted in rendering principled decisions. Judicial review, he stressed, “brings principle to bear on the operations of government. By ‘principle’ is meant general propositions [...] organizing ideas of universal validity in the given universe of a culture and a place, ideas that are often grounded in ethical and moral presuppositions. Principle, ethics, morality — these are evocative, not definitional terms; they are attempts to locate meaning, not to enclose it.”¹¹

Bickel was also aware that “the Supreme Court touches and should touch many aspects of American public life”, but he was also convinced that “it would be intolerable for the Court finally to govern all that it touches, for that would turn us into a Platonic kingdom contrary to the morality of self-government”.¹² His solution to the ‘counter-majoritarian difficulty’ didn’t consist, therefore, in recommending to the court an exclusive reliance on the text, or on the intent of the Framers, since this would not correspond with the task of issuing principled decisions that he found typical of judicial review. He instead invited the court to exert, and further enhance, ‘passive virtues’, which he described as refraining from deciding cases, through a number of well-known jurisdictional techniques and like devices, whenever issues of principle are not at stake. This suggestion corresponds to the conviction that, while legislation is both ‘empirical’ and ‘evanescent’, “Principle is intended to endure, and its formulation casts large shadows into the future”.¹³ Bickel here joined Marshall in considering the Constitution to be, as the latter put it in *McCulloch v. Maryland* in 1819, “intended to endure for ages to come, and to meet the various crises of human affairs.”

Bickel’s reconstruction of the counter-majoritarian difficulty appears almost unique in the American literature in that it represents the accumulation of a profound understanding of the specific features of constitutional interpretation, as demonstrated by his defence of the Supreme Court’s choices in the School Segregation Cases¹⁴, with a clear perception both of the substantive power already acquired by the Supreme Court *vis-à-vis* democratically elected institutions and of the dangers of the ‘Platonic kingdom’ that an unfettered constitutional jurisprudence might create.

In the decades that were to follow, the American debate has lost this contextual attention, being polarised on account of the dichotomy between partisans of the originalist approach¹⁵, whose fear of judicial activism leads them to forget the features specific to constitutional interpretation, and defenders of judicial activism — particularly in the Warren Court’s version — whose view is that law is an interpretative enterprise guided by

⁸ R. A. Posner. *The Federal Courts*. Cambridge, MA: Harvard University Press 1996, p. 314 ff.

⁹ J. P. Roche. *Judicial Self-Restraint*. – *American Political Science Review* 1955 (49), pp. 771–772.

¹⁰ A. Bickel. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. 2nd ed. Yale University Press 1962, p. 17.

¹¹ *Ibid.*, p. 199.

¹² *Ibid.*, pp. 199–200.

¹³ *Ibid.*, p. 131.

¹⁴ *Ibid.*, p. 244 ff.

¹⁵ See, e.g., A. Scalia. *Originalism: The Lesser Evil*. – *Cincinnati Law Review* 1989 (57), p. 849; R. Bork. *The Tempting of America*. New York: Macmillan 1990.

a vision of the integrity of the political society to which the law belongs^{*16}, thus denying the very premise of the counter-majoritarian difficulty. Nor has the Supreme Court followed Bickel's suggestion of relying on the 'passive virtues' to cope with that difficulty.^{*17}

4. The constitutional courts of European democracies and the issue of their legitimacy

Notwithstanding its relative lack of impact on the subsequent American experience, Bickel's reconstruction remains a useful basis for examination of the issue of the legitimacy of constitutional courts in a democratic system, which lies at the core of the activism/restraint dichotomy. Bickel was careful in giving balanced attention to the two factors that render constitutional review of legislation a delicate task — namely, the fact that the Constitution applies morally controversial concepts in many instances and the fact that the legislative text under review derives a special dignity from its source — a popularly elected parliament.^{*18}

Posed in these terms, the legitimacy issue affects the European not less than the American model of constitutional justice. As is well known, the former is distinguished from the latter in that European constitutional courts are uniquely empowered to set aside legislation that runs counter to the relevant national constitution, while all American courts have the authority to adjudicate on constitutional issues in the course of deciding legal cases and controversies. The choice for courts specialising in constitutional issues was a result, in Europe, of both cultural and institutional elements. The high value given to the principle of legal certainty in countries adhering to the civil law tradition was likely to be ensured only by a special court in charge of constitutional review of legislation. On the other hand, in assignment of a special court to that task, specific rules could be adopted with respect to the selection and tenure of the judges concerned, thus minimising the democratic objection, inasmuch as the legislation that constitutional courts are empowered to strike down is the product of a democratic legislature. Relevant here is that European constitutional judges are frequently elected by the parliament, while ordinary judges are selected through more bureaucratic procedures. Moreover, constitutional judges' tenure is greatly limited, while ordinary judges usually retain their judicial role until the age of retirement.^{*19}

These structural features, which have characterised the European model since the approval of democratic constitutions after the demise of totalitarian regimes, were anticipated in the 1920s by Hans Kelsen, who for this reason is considered the father of the European model of constitutional justice. Kelsen not only envisioned its main structural features but added that, given those features, and particularly the fact that the effect of a constitutional court's holding that a statute is unconstitutional consists in the formal expunction of that statute from the legal system, the court acts as a "negative legislature", thus distinguished from Parliament with its positive introduction of statutes into the legal system.^{*20} The Kelsenian court was not a judge, or a political institution as Parliament was. Because of its specific power of reviewing the legislation, it wasn't a judge, and it was not a political institution because the exercise of that specific power had no positive effect on the legal system.

These structural features appear very different from, if not opposite in nature to, those affecting the American model. However, when one compares the two models, even in terms of the legitimacy issue, experience needs to be taken into account. To what extent, then, does the European experience of constitutional justice correspond to the Kelsenian model?

Constitutional interpretation lies at the core of this question. Kelsen's definition of the constitutional court as negative legislative actor presupposes that constitutions are centred on distribution of powers amongst diverse institutions, particularly on the devolution of legislative power to Parliament, and eventually on a list of rights framed in sufficiently determinate language. Constitutions of the 20th century, by contrast, are value-ridden documents, founded on principles framed in relatively indeterminate language. This indeterminacy paved the way for interpretation processes far more complex than those imagined by Kelsen. The court's main task would lie in giving appropriate meaning to constitutional principles, rather than in merely ascertaining the compat-

¹⁶ R. Dworkin. *Law's Empire*. Cambridge, MA: Harvard University Press 1986, chapters 6 and 7.

¹⁷ I have attempted to demonstrate this in C. Pinelli. *La legittimazione della Corte Suprema*, at the annual conference of the Associazione Italiana dei Costituzionalisti, 'La circolazione dei modelli e delle tecniche del giudizio di costituzionalità in Europa'. Rome, 26–27 October 2006.

¹⁸ V. Ferreres Comella. *The European Model of Constitutional Review of Legislation*. – *International Journal of Constitutional Law* 2004 (2) 3, p. 475.

¹⁹ For discussion of this, see V. Ferreres Comella (Note 18), p. 468.

²⁰ H. Kelsen. *La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)*. – *Revue de droit public et de la science politique*. 1928.

ibility of statutes with the text of the state's constitution. Accordingly, the end of constitutional justice would consist in preserving the sense of those principles, rather than in pursuing the value of legal certainty *per se*.

These circumstances have affected the whole model of European constitutional justice, including the role of ordinary judges. The choice of a specialised and centralised court, as we have seen, resulted from the fear that, given the absence of a doctrine of precedent in the civil law tradition, ordinary judges would endanger the value of legal certainty. But the evolution of constitutional justice has changed these assumptions remarkably. Ordinary judges not only have abandoned that deference which had characterised their attitude toward democratically elected institutions since the French Revolution but, especially in those countries where constitutional review of legislation is made dependent on their own impulse, have become more and more involved in the constitutional interpretation process. On the other hand, the value of legal certainty has lost its crucial significance *vis-à-vis* the quest for preserving the sense of constitutional principles. Even on this basis, then, the European experience appears far closer to the American than at the moment of its foundation^{*21}, although the power to set aside unconstitutional statutes remains with constitutional courts, and structural features such as the appointment criteria and tenure of constitutional judges still reflect the Kelsenian model.

5. The activism/restraint dichotomy and the institutional dialogue

To the extent that the American and the European system of constitutional justice reveal increasing similarities in terms of their functioning, they are likely to be compared also in relation to the issue of the legitimacy of constitutional courts.

As has been noted in a general survey of constitutional justice in Western democracies, “constitutional review proves to have become the irreplaceable counterweight to the supremacy of the majority principle”^{*22}. However, that counterweight is not without problems, since, as we have already seen, constitutional review of legislation requires criteria of interpretation that give constitutional courts broad discretionary powers, in spite of the fact that, unlike parliaments, those courts are not democratically elected. Hence the fact is derived that the Bickelian counter-majoritarian difficulty, and the restraint/activism dilemma, affects the European system of constitutional justice to at least as great an extent as the US one.

The difference between the two systems rests instead on the fact that the issue of the legitimacy of the constitutional court has emerged, and still does so, on different sorts of occasions. The long tradition of US Supreme Court jurisprudence is frequently separated into eras corresponding to larger movements along the restraint/activism divide. The *Lochner* era, the period following the New Deal, the Warren Court, and — somewhat more controversially — the recent decades are depicted as representing different overall attitudes of the Supreme Court toward the legislator. And the difference among such attitudes depends essentially on whether the rulings tend to defer to the legislator or to declare void its statutes.

When we turn to the European courts' experience, it is very difficult to find something similar. From time to time, constitutional review is reproached as impermissibly interfering in the legislative process — e.g., in Germany in the 1970s and in France in 1986 — but these tensions appear insufficient to bring about distinct periods of constitutional jurisprudence at diverse points along the restraint/activism divide.

In the European experience, that divide emerges instead in the context of establishment of positive criteria for legislation. Constitutional courts — the German, the Italian, and the Spanish, particularly — have abandoned the Kelsenian model also with respect to the definition of the court as a negative legislature.^{*23} The establishment by the court of positive criteria for legislation poses clearly the question of the court's legitimacy, corresponding to the European version of that question: the more a court dictates positive prescriptions to the legislator, the more it applies an activist attitude, which might run counter to the democratic principle.

Positive decisions of constitutional courts have met scholarly criticism, to the extent that they anticipate the substantive content of future regulations. In that case, the court might further the tendency of the legislator to remove from himself the burden of decision. At the same time, the adoption by the court of overly detailed prescriptions for the legislative process might undermine the actualisation of the constitution through law, which in all democratic countries remains initially with legislative institutions, characterised not only by a

²¹ This is generally recognised by constitutionalists. See, e.g., A. von Brunneck, *Constitutional Review and Legislation in Western Democracies*. — C. Landfried (ed.), *Constitutional Review and Legislation: An International Comparison*. Baden Baden: Nomos Verlagsgesellschaft 1988, p. 223 ff; F. Fernandez Segado, *La justicia constitucional ante el siglo XXI: la progresiva convergencia de los sistemas americano y europeo-kelseniano*. — F. Fernandez Segado (ed.), *The Spanish Constitution in the European Constitutional Context*. Madrid: Dykinson 2003, p. 867 ff; M. Verdussen, *Les douze juges. La légitimité de la Cour constitutionnelle*. Brussels: Labor 2004, p. 49 ff.

²² A. von Brunneck (Note 21), p. 250.

²³ F. Fernandez Segado (Note 21), p. 879 ff.

direct democratic legitimacy but also by greater participation of the general public than that affecting the constitutional review process.^{*24}

These recommendations are far from revealing some nostalgia for the Kelsenian model. Rather, they reflect the assumption that in democratic countries constitutional courts are expected not to insulate themselves from other institutions and from the general public but to ensure the openness of the democratic process.^{*25} This very assumption affords perhaps the best criterion for doing away with the Bickelian counter-majoritarian difficulty. An activist approach, particularly one pursued through positive decisions, should be deemed correct until it begins to impede further political debate and participation of the public in addressing the issue at hand.

6. A recent criticism of the European model and the legitimacy issue

A different view has been afforded recently with respect to the evolution and the perspectives of the European model. Centralisation of review of legislation, while presupposing that the laws ordinary judges must apply do not leave room for judicial lawmaking, appears in this view inconsistent with the pragmatic needs of modern societies, where legislation has ceased to be specific and categorical. Given these conditions, the centralised model has been undermined through interpretation of statutes by ordinary judges: before referring a question to the constitutional court, judges are expected to look for an interpretation of the statute that preserves its constitutional validity. Therefore, a division of labour has emerged within the centralised system between ordinary judges, who must interpret statutes in harmony with the constitution, and the constitutional court, the sole court authorised to set aside a statute.^{*26}

Such division of labour, so the argument goes, should be reconsidered. The fundamental distinction should not be between interpreting and setting aside statutes under the constitution. The critical question should instead be that of whether the constitutional court has determined the meaning of the relevant clauses of the constitution in view of which the statute under consideration is to be examined. If the constitutional court has had such occasion, the case should be deemed relatively 'easy' in light of the constitutional court's precedents. According to that hypothesis, ordinary courts would be authorised to set aside statutes. Only when 'hard cases' arise would those courts refer a question to the constitutional court, thus ensuring that the system, unlike the American one, remains centralised.^{*27}

When looking beyond the difficulty of evaluating whether a case is 'easy' or 'hard', we see also that this proposal is clearly at odds with the structural features of the European model as provided for by the constitutions of those European states that have introduced centralised constitutional review of legislation, entrusting constitutional courts with the exclusive power to set aside unconstitutional statutes. The proposal amounts therefore to an infringement of explicit constitutional provisions. Such provisions could be modified only through explicit constitutional amendment. But how can the legislator distinguish 'hard' from 'easy' cases? In fact, the author does not suggest that his proposal necessitates constitutional revision. He suggests instead that the review should take place through judicial means. That judges would thus infringe on crucial constitutional provisions such as those concerning the monopoly of constitutional courts in setting aside unconstitutional statutes appears to the author a quite irrelevant matter. However, according to the general premises of European constitutional law, this concern is far from irrelevant. To the extent that they are provided for in constitutional texts, the structural features of constitutional justice are not likely to be at the discretion of judges.

Moreover, reconstruction of the relationship between ordinary judges and constitutional courts fails to consider the crucial role of constitutional interpretation. The fundamental distinction in the organisation of the centralised model of constitutional justice, we are told, consists in the division of labour between ordinary judges, who interpret the statute in harmony with the constitution, and the constitutional court, authorised to set aside unconstitutional statutes. The thesis clearly refers to the separate tasks of ordinary judges and the constitutional court with respect to legislation — that is, the object of constitutional review — but it neglects to take account of those tasks where the constitution itself is concerned: the parameter of constitutional review. So far, the thesis appears at least inaccurate. It is precisely on grounds of constitutional interpretation, as we have seen, that ordinary judges and constitutional courts are committed to a permanent dialogue that not only does not contrast with but, in fact, presupposes their distinctive roles in judicial review of legislation. To the extent

²⁴ P. Haberle. *Die offene Gesellschaft der Verfassungsinterpreten*. – *Juristenzeitung* 1975, p. 297.

²⁵ A. von Brunneck (Note 21), p. 250; F. Michelman (Note 4), p. 1529 ff; M. Verdussen (Note 21), p. 81 ff, and, first and foremost, J. Hely. *Democracy and Distrust: A Theory of Judicial Review*. Harvard University Press, 1980.

²⁶ V. Ferreres Comella (Note 21), p. 472.

²⁷ *Ibid.*, p. 476.

that they have permitted such dialogue, these roles, corresponding to the structural features of constitutional justice as provided for via constitutional texts, need to be preserved rather than overruled.

Finally, and most importantly, the author suggests the need for what Comella terms “an important shift in the theoretical discussion regarding the problem of the legitimacy of constitutional review of legislation”, on the premise that “the literature on constitutional interpretation in some European countries has been too obsessed with the problem of how to distinguish between a genuine interpretation of a statute and the undue manipulation of its content”.²⁸ Such literature, Comella tells us, neglects more important issues: “Does democracy require that the majoritarian branches decide? May a system of judicial review be established? What sort of system? How should judges be appointed? Are there ways to understand the relationship between the courts and the legislature that make the arrangement more democratic than others? And then the difficult question: What are the standards that should guide the judge when she tries to ascribe concrete meaning to the broad and morally loaded clauses of the constitution? It is a pity that this debate is neglected in favor of a discussion about what should happen with a statute once it is found to be in tension with the constitution.”²⁹

The above questions, however, are not likely to be dealt with at the same level. For example, the question of whether a system of judicial review may be established, and of how judges should be appointed, does find an answer in the constitutional text. It is at the level of that answer that the question needs to be interpreted. Other questions, including that of the legitimacy issue, instead remain necessarily open to diverse approaches. At any rate, as the quotations offered in the preceding paragraphs suffice to demonstrate, it is simply disingenuous to assert that such questions are neglected in the literature on European constitutional justice.

Comella adds that “Kelsen has often been inaccurately used to buttress this incorrect understanding of the problem of legitimacy”, since he never intended the formula of the constitutional court as negative legislature to express the standard for measuring the legitimacy of the constitutional court itself. Kelsen insisted, according to Comella’s argument, that constitutional review should take place only with respect to rather specific clauses of the constitution, on the presumption that the final authority to interpret the more abstract clauses that protect, e.g., ‘justice’, ‘liberty’, or ‘equality’ should rest with the parliament. Thus, Comella believes it therefore to be a mistake “to use Kelsen to justify the idea that the problem of legitimacy arises when the constitutional court, instead of simply declaring a statute unconstitutional, partially readjusts it in order to save its validity, acting, as it were, as a ‘positive legislature’”.³⁰

Here Comella fails to consider the relationship between the framing of the constitutional text and the role of the court *vis-à-vis* the legislature that clearly arises from Kelsen’s writings. His conviction that the interpretation of general or abstract clauses of the constitution should rest with the parliament is in fact the clearest demonstration of his fear that, in the opposite case, the court would risk becoming a positive legislature. The more generally framed the clauses of the constitution are, the more their interpretation by the court might leave room for political appreciation that he thought alien to the model of the court as negative legislature. In the European constitutions of his time, as mentioned above, general clauses were rather rare, and this served to encourage Kelsen to suggest omitting them from the scope of the court’s actions. The European constitutions of today, by contrast, are framed in the language of principles — namely, of general clauses. Without this characterisation, our constitutions simply lose their significance. This shift has brought about the problem of the legitimacy of constitutional courts as positive legislatures. And this is also why relying on Kelsen with the aim of ascertaining the distance of the experience of European constitutional justice from the original model is far from being an ill-founded approach.

²⁸ *Ibid.*, p. 485.

²⁹ *Ibid.*, pp. 486–487.

³⁰ *Ibid.*, p. 487.



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Judicial Activism in the Practice of the German Federal Constitutional Court: Is the GFCC an Activist Court?

The question of whether the Federal Constitutional Court is an activist court cannot simply be answered 'yes' or 'no'. In Germany, lawyers have a standard answer to questions that cannot be answered with a mere 'yes' or 'no'. That answer is: 'It depends.' This is also the first way in which I would like to reply to the key question I will address here. Of course, however, I will as the discussion progresses try to answer it in a differentiated manner and to substantiate my answer by making reference to some selected examples from the Federal Constitutional Court's case law. In this context, one must differentiate matters according to the reasons for the Federal Constitutional Court's scope for formative action, which means that one must differentiate among the following aspects:

1. the Federal Constitutional Court's competencies;
2. the content of the Federal Constitutional Court's decisions; and
3. the effect of the Federal Constitutional Court's decisions.

1. The Federal Constitutional Court's competencies

A constitutional court's possibilities of taking an active part in the shaping of policy are determined above all by the competencies that have been designated for it. In Germany, these competencies are set out in the Basic Law (*Grundgesetz*)¹, in the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*)², and in other laws. What is inherent to all of the provisions concerning competencies is that they restrict the Federal Constitutional Court's tasks to examining the following, **with the Basic Law as its sole standard of review**: firstly, the compatibility of an act of state with the Basic Law (the compatibility of a law, for instance, can be examined by means of a constitutional complaint, or through proceedings for the abstract or concrete review of statutes, and the compatibility of a court ruling can be examined by lodging a constitutional complaint);

¹ Basic Law (*Grundgesetz*) from 23 May 1994 (BGBl. (Federal Law Gazette), p. 1); in the version of the amendment from 28 August 2006 (BGBl. I, p. 2034 ff).

² Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*, or BVerfGG) in the version from 11 August 1993 (BGBl. I, p. 1473), last amendment from 5 September 2006 (BGBl. I, p. 2098).

secondly, the scope of rights and obligations of supreme federal organs or other parties (in so-called *Organstreit* proceedings); and, thirdly, the scope of rights and obligations in the case of disputes about the rights and obligations of the federation and the *Länder* (states).³ It is true that the Federal Constitutional Court is a constitutional organ; it is, however, not a political organ but a court of justice, bound by the strict standard of the Basic Law in its decision-making.

Another restriction of the ‘political activities’ of the Federal Constitutional Court is due to the fact that the Federal Constitutional Court has no right of initiative whatsoever; thus, it has no possibilities of becoming active without the initiative of another constitutional organ, or of organs of the federation or of the *Länder*, without either a submission by a court or an application by a citizen. The Basic Law and the Federal Constitutional Court Act confer on the Federal Constitutional Court only the competence to decide in cases where the Basic Law, the Constitutional Court Act (which is founded on the Basic Law), and other laws provide the right to make applications for constitutional organs, for sections of such organs, for organs of the federation or of the *Länder*, or for citizens and also contain provisions concerning the courts’ right to make referrals to the Federal Constitutional Court. In no event can the Federal Constitutional Court become active of its own accord. In this meaning — that is, in the meaning of the question of whether the Federal Constitutional Court can take the initiative where a political question is at issue — the answer to the question as posed is a simple ‘no’.

For the sake of completeness, I would, however, like to mention that the Federal Constitutional Court, or, to be more precise, the Plenum, consisting of all 16 judges (both chambers) sitting together, does have a right of initiative, which can at most exert an indirect political effect: Its right of initiative consists in the possibility for the Plenum to initiate, pursuant to § 105 of the Federal Constitutional Court Act, the retirement or dismissal of a Federal Constitutional Court judge by authorising the Federal President accordingly. Such a procedure has not yet taken place in the 56 years of the Federal Constitutional Court’s existence. Moreover, the right of initiative of the Federal Constitutional Court Plenum is restricted to cases in which a Federal Constitutional Court judge is to be removed because of permanent unfitness for service or where a Federal Constitutional Court judge has been sentenced in a final and unappealable judgment because of a dishonourable act or to more than six months’ imprisonment, or where he has committed a breach of duty that is so gross that his remaining in office is ruled out. Thus, the right of initiative has no politically motivated starting point. All in all, this right of initiative is completely apolitical as regards its motive, and it is virtually insignificant; as noted at the outset, I have mentioned it only for the sake of completeness.

This description of the Federal Constitutional Court’s limited scope of political action is not intended to negate or to disguise the fact that many proceedings, especially those in which the Federal Constitutional Court acts as a court judging state matters and thus rules on disputes between constitutional organs or other organs of the federation or of the *Länder*, are caused by a political issue and a political dispute. This was the case, for instance, in the *Organstreit* proceedings on the question of the constitutionality of the German Armed Forces’ missions abroad and on the question of their requiring the consent of the German *Bundestag*⁴; this was also the case in the *Organstreit* proceedings that were initiated by some members of the *Bundestag* against the amendment of § 44a (1) of the Act on the Legal Status of Members of the German *Bundestag* (*Abgeordnetengesetz*), pursuant to which holding a seat in the Parliament is the focus of the professional activities of a member of the German *Bundestag*, and against the obligation thus imposed for the members of the *Bundestag* to disclose their additional income.⁵ The ruling in the *Organstreit* proceedings undertaken by some members of the *Bundestag* concerning the question of whether the dissolution of the German *Bundestag* on 21 July 2005 by the Federal President had been compatible with the Basic Law was also based on a political issue.⁶ Time and again, issues that have been subject to intensive discussion before in the political sphere, or that will be intensively discussed afterwards, have to be finally settled by the Federal Constitutional Court also by means of constitutional complaint proceedings or of proceedings for the review of statutes.⁷ Examples of this are cases of proceedings for the abstract review of a statute, and I could cite many cases in this connection — for instance, in recent case law, the proceedings for the review of a statute that had been initiated by the opposition at the time concerning the question of the constitutionality of the 2004 Budget Act and of the procedure of its adoption.⁸ Another example can be found in the proceedings addressing the question of the constitutionality of the Civil Partnerships Act (*Lebenspartnerschaftsgesetz*), and especially of its compatibility with § 6 (1) of the Basic Law, which places marriage and family under the special protection of the state.⁹ The Lifetime Partnerships Act has recognised same-sex partnerships in important respects and has in some respects accorded these partnerships a status that previously had been reserved for marriage.

³ E. Benda, E. Klein. *Verfassungsprozessrecht*. 2nd ed. 2001, marginal number 26.

⁴ *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 90, pp. 286–394.

⁵ Decision, dated 4 July 2007 — 2 BvE 1/06; 2 BvE 3/06; 2 BvE 9/06 — thus far published only on the Web site <http://www.bundesverfassungsgericht.de/>.

⁶ BVerfGE 114, pp. 121–195.

⁷ E. Benda, E. Klein (Note 3), marginal number 9.

⁸ Decision, dated 9 July 2007 — 2 BvF 1/04 — thus far published only on the Web site <http://www.bundesverfassungsgericht.de/>.

⁹ BVerfGE, 105, pp. 313–365. English version available at <http://www.bundesverfassungsgericht.de/>.

Another prominent example of the Federal Constitutional Court's competence to take an active part, with far-reaching consequences, in the shaping of policy is its competence, which is set out in § 21 (2) of the Basic Law, to rule on the unconstitutionality of a political party. Through its decision to ban a political party or to deny a motion to this effect, the Federal Constitutional Court seriously intervenes in the course of politics. This statement, must, however, be put into perspective by describing the facts: in the 56 years of the Federal Constitutional Court's existence, only eight party-ban proceedings have been brought before it, and five judgments have been passed in party-ban proceedings.*¹⁰

What must be mentioned in this context is the Federal Constitutional Court's competence to declare laws that have been adopted by the *Bundestag* and by the parliaments of the *Länder*, or individual provisions of such laws, unconstitutional or even void. Legislation is the political decision per se. Its result, the law, marks the end of a process of policy-shaping, perhaps even of the most important such process. The fact that the Federal Constitutional Court can declare laws, in whole or in part, unconstitutional and even void and that the Federal Constitutional Court's decisions have the force of law, and that they are even published in the Federal Law Gazette in the manner of a law*¹¹, makes it unmistakably evident that the Federal Constitutional Court, by means of its competence and in the shape of its decisions, is also active in the political sphere in this respect, even if its activity is restricted, as I have already described, by the framework for its review, which is the Basic Law.

Through every decision in which the Federal Constitutional Court declares a law unconstitutional, it also exerts a political effect. A quite recent example of this is the Federal Constitutional Court's decision on the Aviation Security Act (*Luftsicherheitsgesetz*), which declared § 14 (3) of the Aviation Security Act unconstitutional and void.*¹² This provision authorised the Federal Minister of Defence, in the event that an aircraft with citizens on board is hijacked by terrorists above German territory and the aircraft is recognisably intended to be used as a weapon to kill more people, to have the armed forces shoot down the aircraft. In its judgment, the Federal Constitutional Court found the following: Not only does the Basic Law not provide authorisation to employ the Federal Armed Forces (*Bundeswehr*) in such a situation but, above all, it is a violation of § 1 (1) of the Basic Law, and thus a violation of human dignity, to decide about human lives in the manner provided for by § 14 (3) of the Aviation Security Act in favour of other human lives. This decision has met with criticism in the political arena, and the Federal Constitutional Court's judgment has given rise to a discussion in the federal government and in the parliamentary sphere about how the political concern of protecting citizens who are not in the aircraft but who are threatened all the same can nevertheless be addressed in such a situation.

Sometimes, the federal legislature refrains from active policy-shaping in a specific area because proceedings in this area are pending before the Federal Constitutional Court and the legislature wishes to wait for the Federal Constitutional Court to issue its decision. Such was the situation underlying the Federal Constitutional Court's decision on the unconstitutionality of inheritance tax and gift tax on real property. By its order of 22 May 2002, the Federal Finance Court had submitted to the Federal Constitutional Court the question of whether, as far as inheritance tax and gift tax are concerned, the fact that different methods of value ascertainment (i.e., valuation methods) are applied, especially as regards real property in contrast to capital assets and operating assets, is compatible with the principle of equality under § 3 (1) (the value of real property is sometimes ascertained according to the capitalised value, not according to current market value, as is the case with other assets). The federal government and the *Bundestag* had been provided with the Federal Finance Court's submission. The political bodies were aware of the misgivings that existed on account of constitutional law. In spite of the fact that the proceedings were pending before the Federal Constitutional Court for several years, and despite the broad political debate about an inheritance tax and gift tax reform, the Federal Finance Court's misgivings were not taken up by the legislature in a change of the assessment of inheritance tax and gift tax for real and immovable property; instead, the legislature deliberately waited for the outcome of the proceedings before the Federal Constitutional Court. At the end of last year, the Federal Constitutional Court found the relevant provisions unconstitutional due to their violation of the principle of equality.*¹³ Now a similar situation and a similar debate have arisen in a slightly different area. Constitution-oriented complaints have been lodged with the Federal Constitutional Court against the Act Concerning the Protection of the Constitution (*Verfassungsschutzgesetz*) of the *Land* North-Rhine/Westphalia. Said act provides authorisation, under specified conditions, to perform online searches of citizens' computers. Also the federal government is considering introduction of similar authorisation as a bill in the Parliament. In view of the pending proceedings, however, the federal government is now considering waiting for the Federal Constitutional Court's decision.*¹⁴ This shows the esteem and respect that the Federal Constitutional Court

¹⁰ BVerfGE 2, pp. 1–79; BVerfGE 5, pp. 85–393; BVerfGE 91, pp. 276–294; BVerfGE 107, pp. 339–305.

¹¹ Subsection 31 (2) of the Federal Constitutional Court Act.

¹² BVerfGE 115, pp. 118–166.

¹³ The decision has not yet been published in BVerfGE, but it has been published in *Neue Juristische Wochenschau* (NJW) 2007, p. 573 ff and on the Web site <http://www.bundesverfassungsgericht.de/>.

¹⁴ *Wir sollten auf Karlsruhe warten. – Die Tageszeitung*, 29.06.2007; *Abwarten, wie Karlsruhe entscheidet. – Stuttgarter Zeitung*, 14.07.2007.

enjoys, although one could interpret the federal government's conduct as being the political sphere reducing the room it has in which to manoeuvre.

It must be emphasised, however, that, as regards declaration of the unconstitutionality, or even nullity, of statutes, the Federal Constitutional Court has acted with great restraint (and still does). Through 31 December 2006, the Federal Constitutional Court handed down more than 160,000 decisions. According to the Federal Constitutional Court's statistics, laws or ordinances were declared entirely or partly unconstitutional in only 423 cases; in many of these, only individual provisions were declared entirely or partly unconstitutional. Nullity was declared in very few cases: As regards laws and ordinances of the *Länder*, the number is even lower: In the 56 years of the Federal Constitutional Court's existence, 165 such laws or individual provisions thereof have been declared unconstitutional.

To sum up, the following can be said concerning the question of 'activism' from the point of view of the Federal Constitutional Court's competencies: the Federal Constitutional Court's possibilities of taking an active part in the shaping of policy are limited by its standard of review being the Basic Law, and by the fact that the Federal Constitutional Court has no right of initiative. The Federal Constitutional Court's competencies themselves empower the court to take an active part in the shaping of policy. This stems from the Federal Constitutional Court's competence as a court for state matters, which confers on it jurisdiction in proceedings between constitutional organs and other organs of the federation and of the *Länder*. As a general rule, there is a political dispute at the root of such proceedings. Also the court's competence to declare laws unconstitutional or even void always results in a decision being taken in the political sphere. Through these competencies, the Basic Law and the Federal Constitutional Court perform, historically speaking, the task conferred on them after the Second World War and after the National Socialist regime of injustice: The Federal Constitutional Court is intended to guarantee that the political decision-makers in Germany will never again step onto the wrong track in a similar manner as between 1933 and 1945.

2. The content of the Federal Constitutional Court's decisions

The decisive standard for answering the question of whether the Federal Constitutional Court is an activist court is the interpretation of the provisions of the Constitution that confer competencies on the Federal Constitutional Court, and the interpretation of the Code of Procedure (specifically, of the Federal Constitutional Court Act), which casts the competence provisions in concrete terms. It has rightly been pointed out in this respect that the Federal Constitutional Court is, on the one hand, the addressee of these provisions whilst being, on the other, their interpreter with ultimate jurisdiction.^{*15} Such interpretation, however, is what is performed in the court's decisions, and thus the Federal Constitutional Court's room for manoeuvring is decisively influenced also by the court's understanding of itself. In the legal literature, the court's decisions and its understanding of itself are discussed under a broad variety of headings. They range from reproaching the court for acting as a 'substitute legislature'^{*16} to a warning that the court's acting with judicial self-restraint may be tantamount to denial of justice. According to some opinions expressed in the literature, self-restraint is "self-authorisation, or even unwarranted assumption of competencies, if not even usurpation of competencies, and, apart from this, denial of justice".^{*17} This overstatement must be seen against the background that German law does not provide the Federal Constitutional Court with the possibility of not settling a dispute on grounds of its political nature. In German constitutional law and law of constitutional procedure, the political question doctrine, which applies in United States law, does not exist.^{*18} The political question doctrine makes it possible for the United States Supreme Court not to become active in a matter in which the extralegal factors — that is, the political ones — are of such relevance that it would not be possible to issue a decision on the basis of the legal standards alone.

In some of its decisions (perhaps in too few of them?), the Federal Constitutional Court deals with the question of judicial self-restraint and thus with its own role in the political system; in doing so, it partially discloses the understanding that it has of itself. This has been done, in a fundamental and detailed manner, in the judgment on the Basic Treaty with the German Democratic Republic. In its judgment, the Federal Constitutional Court established the following: "[T]he principle developed in general by the Federal Constitutional Court with regard to the responsibility of the other constitutional bodies in the free democratic state under the rule of law set up by the Basic Law applies to constitutional review of a Treaty too: that among several possible

¹⁵ H. Bethge. – T. Maunz, B. Schmidt-Bleibtreu, F. Klein, H. Bethge. Bundesverfassungsgerichtsgesetz. Kommentar, § 31, marginal number 18.

¹⁶ H.-P. Schneider. 'Gesetzes vertretende Notverordnungen' of the Federal Constitutional Court. – NJW 1994, p. 2591.

¹⁷ See H. Bethge (Note 15), § 31, marginal number 15.

¹⁸ See E. Benda, E. Klein (Note 3), marginal number 43.

interpretations, the one to choose is that through which the Treaty can stand up to the Basic Law. [...] Among the interpretive principles important particularly in connection with the constitutional review of treaties is also that in interpreting constitutional provisions relating to the Federal Republic's relationships with other states, their demarcatory character, that is the room for manoeuvre they allow in policy-making, ought not to be left out of account. In this demarcation the Basic Law sets legal limits to every political power, in the area of foreign policy too; this is the essence of the rule of law constituted by the Basic Law."¹⁹ These statements, which relate to the decision and to the constitutional issue of the proceedings at hand, are followed by another two essential sentences, which express the Federal Constitutional Court's understanding of itself as regards its role within the "structure of the state under the rule of law" that has been described by it before but also concerning its understanding of judicial self-restraint²⁰: "The implementation of this constitutional order is incumbent ultimately on the Federal Constitutional Court. The principle of judicial self-restraint that the Federal Constitutional Court imposes upon itself does not mean a curtailment or weakening of its powers as just set out, but refraining from 'playing politics', that is, intervening in the area of free policy-making set up and demarcated by the constitution."

An example of judicial self-restraint is the judgment of 9 July 2007²¹ on the constitutionality of the 2004 Budget Act, which has already been mentioned. Here, the majority of the Second Senate (one of the two bodies of the court in question) has refrained from interpreting the relevant sections (115 and 109) of the Basic Law in a more restrictive manner; in such an interpretation, it would have deviated from the case law existing to date. The Senate explicitly set forth the following: "Even today, fundamental revisions of the concept of regulation set out in the second sentence of § 115 (1) and § 109 (2) of the Basic Law are reserved to the constitution-amending legislature"²², although, some sentences later, it maintained: "It is true that, at present, the need for revision of the applicable constitutional provisions can hardly be doubted any longer."²³ It went on to say: "The conclusion, which at first sight seems evident, that here the intensity of the constitutional court's review — which obviously has not been sufficiently effective in the past — must be increased leads one astray. To replace the legislature's assessment of whether there is a disturbance of the overall economic equilibrium with the constitutional court's assessment of the existence of such a disturbance, and of the appropriate budgetary reaction to this, does not increase the prospects for adequate decisions that correspond to the objectives of the constitutional rules governing public finances in the best possible manner. What is necessary instead is to develop mechanisms that ensure the necessary compensation for given debt margins over several budget years. The selection and the institutionalisation of rules that achieve this and that in doing so counteract, in an appropriate manner, the incentive to shift the burden of compensation to subsequent legislatures is a complex task, for the solution of which the applicable constitutional law does not provide any sufficiently specific directives. This task is reserved to, and mandated for, the constitution-amending legislature."²⁴ Two dissenting opinions have been added to the decision. One of them begins with the following words: "The Senate interprets the relevant provision of the Basic Law on the Federation's debt limitation in such a way that it cannot exert an effect. This corresponds neither to the wording and the purpose of the provision nor to the structure of the Basic Law."²⁵ The other dissenting opinion starts as follows: "The Senate majority does not show any effort to set limits to the policy of excessive state borrowing by applying the provisions of § 109 (2) and the second sentence of § 115 (1) of the Basic Law in a more restrictive manner, which would be indicated."²⁶ It is a question of interpretation whether from the constitutional or from the political point of view the decision of the Senate majority is to be criticised in accordance with the dissenting opinions.

Particularly in decisions about applications for temporary injunctions in *Organstreit* proceedings, the Federal Constitutional Court specifies whether a temporary injunction would encroach on another constitutional organ's room to manoeuvre.²⁷ The same applies to applications for temporary injunctions in proceedings for the abstract review of a statute²⁸ or in constitutional complaint proceedings that challenge laws.²⁹ In one of these proceedings for the review of a statute, the Federal Constitutional Court has laid down the following: "[...] because the issuance of a temporary injunction is always a considerable encroachment on the legislature's room to manoeuvre. Invoking the Federal Constitutional Court's jurisdiction may not become a means

¹⁹ BVerfGE 36, pp. 1–37 (especially 14). The English version is published in *Decisions of the Bundesverfassungsgericht*. Nomos Verlag 2005 (3), pp. 1–25.

²⁰ *Ibid.*

²¹ See Note 8.

²² See Note 8, marginal number 132 on the Web site.

²³ See Note 8, marginal number 133 on the Web site.

²⁴ See Note 8, marginal number 135 on the Web site.

²⁵ See Note 8, marginal number 161 on the Web site.

²⁶ See Note 8 marginal number 204 on the Web site.

²⁷ For example, BVerfGE 99, pp. 57–69 (especially p. 69); BVerfGE 105, pp. 51–62 (especially p. 61); BVerfGE 106, pp. 253–265 (especially p. 254).

²⁸ See BVerfGE 104, p. 27.

²⁹ J. Berkemann, – D. Umbach, T. Clemens, F.-W. Dollinger. *Bundesverfassungsgerichtsgesetz*. 2nd ed. 2005, § 32, marginal number 162.

by which parties to the proceedings that have been unsuccessful in the legislative process can delay the law's entry into force."³⁰

Sometimes, external critics of the court, but also internal ones, are of the opinion that in individual decisions the Federal Constitutional Court does not observe the restraint that it has imposed on itself. Especially after the so-called abortion decisions³¹, the Federal Constitutional Court was criticised for acting as a 'substitute legislature'.³² The decisions were based on the question of whether the 'time-phase' solution (that is, the exemption from punishment for pregnancy terminations performed until the twelfth week) that had been newly provided in the Criminal Code (*Strafgesetzbuch*) was compatible with the Basic Law. The Federal Constitutional Court declared the provision unconstitutional because the legislature was under an obligation to make a pregnancy termination subject to punishment if no special reasons for an abortion existed. Because the relevant provision was declared void by the decision, the Federal Constitutional Court laid down in its decision a transitional arrangement with validity until the enactment of an amended provision.³³ It has already been mentioned that the decision as such and the transitional arrangement have been criticised, in the legal literature but also within the court itself, in the dissenting opinion.³⁴

The dissenting opinion says: "The authority of the Federal Constitutional Court to annul decisions of the parliamentary legislator demands restraint in its use in order to avoid a dislocation of power among the constitutional organs. The command of judicial self-restraint, which has been termed the 'life-giving elixir' of the judicial function of the Federal Constitutional Court, applies when a case does not involve warding off encroachments by governmental authority but rather involves the court issuing directives for the positive development of the social order to the popularly elected legislature by way of constitutional review. In this instance, the Federal Constitutional Court may not succumb to the temptation to assume the functions of the organ to be controlled if, in the long run, the status of constitutional jurisdiction is not to be endangered."³⁵ The dissenting opinion goes on to state that, through the decision of the Senate majority, "the first time in the adjudication of a constitutional issue, an objective value decision is to serve the purpose of postulating a **duty** of the legislature **to issue penal norms**, therefore [postulating] the strongest imaginable interference with the citizen's sphere of freedom".³⁶ Further on, the dissenting opinion substantiates that the Senate majority has exceeded the limits of judicial self-restraint in this decision. In the legal literature, the very far-reaching wording of the two 'abortion decisions' referred to above, especially the transitional arrangement, are justified as follows: "After the Federal Constitutional Court had declared the nullity of § 218 of the Criminal Code that was applicable at that time, it was in a difficult situation because it obviously also had constitutional misgivings concerning the previous solution, the continued applicability of which until the enactment of a new act of legislation would therefore hardly have been a consideration, and that this had been the reason the wording had been chosen."³⁷

The Federal Constitutional Court has created 'transitional arrangements' in other decisions but without their having resulted in similarly critical discussions in the legal literature. In its decisions concerning the ability to testify of persons who are unable to write and speak, for instance, the Federal Constitutional Court has declared the unconstitutionality of the strict requirements as to form for drawing up a will that were applicable at the time because these requirements deprived a person who is unable to write and speak but who is mentally and physically able to draw up a will of the possibility to do so. As the legislature had latitude for determining under which conditions a person who is unable to write and speak may create a will, the relevant provisions, however, were declared unconstitutional but not void. The Federal Constitutional Court ordered at the same time that, until the enactment of an amended provision, persons who are unable to write and speak could in future make testamentary dispositions (wills, contracts of inheritance, etc.) with the help of a notary. In this respect, the Federal Constitutional Court in this decision as well specified a transitional arrangement applicable until the legislature could resolve the matter via acts of its own.³⁸ One possible reason that this decision and others that contain transitional arrangements have not met with criticism that was as harsh as the criticism after the abortion decisions may be that the abortion decisions were highly politically charged also as regards the question on which they were based.

As the examples that I have just cited show, the question of whether the Federal Constitutional Court has exceeded the limits of jurisprudence and has stepped onto the path of politics in a specific case is asked, as a

³⁰ BVerfGE 104, p. 27.

³¹ BVerfGE 39, pp. 1–95; BVerfGE 88, pp. 203–366. English version available at <http://www.bundesverfassungsgericht.de/>.

³² H.-P. Schneider writes about 'Gesetzes vertretenden Notverordnungen' of the Constitutional Court (NJW 1994, p. 2591). See also E. Benda, E. Klein (Note 3), marginal number 1358.

³³ BVerfGE 39, pp. 2–3.

³⁴ BVerfGE 39, p. 68 ff (namely, p. 69 ff).

³⁵ BVerfGE 39, pp. 69–70.

³⁶ BVerfGE 39, p. 73.

³⁷ E. Benda, E. Klein (Note 3), marginal number 1357.

³⁸ BVerfGE 99, p. 359.

general rule, not only externally but also internally — that is, by individual members of the court. Thus, dissenting opinions have been written on almost all of the decisions I mentioned at the beginning of this report as those brought before the Federal Constitutional Court after major political debate — for instance, on the decisions concerning the Civil Partnerships Act³⁹, on the dissolution of the *Bundestag*⁴⁰, and on the constitutionality of the 2004 Budget Act.⁴¹ Each of these three decisions had two dissenting opinions. As has been explained above, the dissenting opinions often directly or indirectly mention a lack of judicial self-restraint on the part of the Senate majority, or the Senate majority's exceeding the limits of judicial self-restraint. One dissenting opinion, for instance, says: "The Senate replies to questions that are not raised in the case with constitutional principles that are not contained in the Basic Law."⁴²

Another peculiarity of the Basic Law — namely, that the two Senates are composed of eight judges each and that therefore an equality of votes in the shape of a four-to-four decision is possible — sometimes reveals the political explosiveness of a constitutional issue to be decided by the Federal Constitutional Court. An example of this is formed by the *Organstreit* proceedings that have already been mentioned that were brought by members of the *Bundestag* against an amendment of § 44a (1) of the Act on the Legal Status of Members of the German *Bundestag* and against the obligation to reveal their additional income. In its judgment of 4 July 2007⁴³, the Second Senate decided these proceedings with a result of four votes to four. According to the third sentence of § 15 (4) of the Federal Constitutional Court Act, in such a case the Basic Law cannot be declared to have been violated. In this four-to-four decision the court found, on the one hand, that the amendment of the act and also the disclosure of additional income are constitutional. On the other hand, the decision also presents the points of view of the four other members of the court — even if they were unsuccessful as regards the result — according to which the 'provisions concerning the centre of professional activities' and the provisions concerning the disclosure of additional income are incompatible with the German Constitution. Whilst there is an increase in the number of dissenting opinions, four-to-four decisions are extremely rare; in the Federal Constitutional Court's history, there have been only 24 of them.

Finally, the example of a case in which the Federal Constitutional Court has practised judicial self-restraint and was ultimately sanctioned for doing so should not go unmentioned.

Between 1993 and 2000, several proceedings had been brought before the Federal Constitutional Court that dealt with the question of the preconditions under which the Family Courts can, or must, assign joint custody to parents after divorce even if one parent objects. The constitutional complaints challenged several sections of the Civil Code (*Bürgerliches Gesetzbuch*). The Federal Ministry of Justice had been informed of individual constitutional complaints in 1994. In its opinion, the ministry had pointed out that, according to the federal government's plans, a reform of family law was intended to take place in the 13th legislative term, which lasted from 10 November 1994 to 26 October 1998. This legal reform was intended to include amendment of the provisions on joint custody. Ultimately, the Act on the Reform of Parent and Child Law entered into force only on 1 July 1998 — four years later. In view of the opinion set forth by the federal government, the Federal Constitutional Court had postponed its decisions in order to give the legislature the opportunity of autonomously shaping the reform. The constitutional complaints were decided only after the enactment of the Act on the Reform of Parent and Child Law, in which the possibility of joint custody was extended. A consequence of such judicial self-restraint, which was also political in its effect, on the part of the Federal Constitutional Court was that proceedings were brought before the European Court of Human Rights. As a result, the Federal Republic of Germany was sentenced to pay compensation for the excessive protraction of proceedings before the Federal Constitutional Court.⁴⁴ In its decision, the European Court of Human Rights found that it is not appropriate if the Federal Constitutional Court lets almost four years elapse with a view to the legislature's expected activity concerning the matter.

Finally, what should not go unmentioned is the description of an area in which the Federal Constitutional Court is acknowledged to have 'quasi-political' latitude of decision. This concerns decisions in which a statute is merely declared unconstitutional, not void. Especially where an infringement of the principle of equality under § 3 of the Basic Law is established, the legislature, as a general rule, is granted room to manoeuvre as regards the shape that it wants to give to a statute that is in conformity with the principle of equality. In these cases, the Federal Constitutional Court frequently also decides how long the situation that has been declared unconstitutional may continue, by setting a time limit for the legislature. In the case related to inheritance and gift tax, which has already been cited⁴⁵, the Federal Constitutional Court has given the legislature a time

³⁹ BVerfGE 105, pp. 357–359 and 359–365. English version on the Web site of the Constitutional Court, <http://www.bundesverfassungsgericht.de/>.

⁴⁰ BVerfGE 114, pp. 170–182 and 182–195.

⁴¹ See Note 8.

⁴² BVerfGE 112, p. 44. English version on the Web site of the Constitutional Court, <http://www.bundesverfassungsgericht.de/> and in Decision of the Bundesverfassungsgericht, volume 3, pp. 183–217.

⁴³ See Note 8.

⁴⁴ Case of Wimmer v. Germany, application No. 60534/00.

⁴⁵ See Note 12.

limit for an amended provision. The deadline is 31 December 2008, approximately a year and a half from the date of service. But there have been shorter time limits specified as well — for instance, in the case in which § 1685 of the Civil Code was declared unconstitutional, and in which the legislature was given less than one year to enact an amended statute (the decision was served on 28 April 2003, and the legislature was given a deadline of 30 April 2004).^{*46} Another interesting case in this respect is the order of the First Senate of 24 May 2000, according to which the principle of equality requires that remuneration in the shape of a one-off payment be taken into account in the calculation of short-term wage replacement benefits that are financed from contributions, such as unemployment benefits and sickness benefits, if the one-off payment is subject to social insurance contributions. Already in its order of 11 January 1995, the Federal Constitutional Court had established that this violation of the principle of equality existed, but it had accepted the continued applicability of the statute until its amendment without setting a time limit.^{*47} The statute was not amended, and therefore the same issue had to be decided in the decision of 24 May 2000 due to the referral of a social court. In this case, the time limit that the Federal Constitutional Court set from the date of service, which was 20 June 2000, was only a little over a year, with a deadline of 30 June 2001; the Federal Constitutional Court added that in the event of no amended statute having been enacted by that date, the provision that violated the principle of equality should no longer be allowed to serve as a basis for subjecting one-off payments to social security contributions.^{*48} It is evident that, because the legislature had not become active after the first decision, the Federal Constitutional Court now wanted to bring about a decision on the part of the legislature not only by allowing only a very short period of time for action but also by announcing a legal consequence, in the form of the non-applicability of the statute.

In the case of the unconstitutionality of *Land* laws that regulated the placement in preventive detention of highly dangerous offenders with a high risk of recidivism after their having served their prison sentences, the Federal Constitutional Court imposed a time limit of only about seven months for the enactment of a law that was in conformity with the nation's constitution.^{*49}

3. The effect of the Federal Constitutional Court's decisions

Examples of political effects of the Federal Constitutional Court's decisions have already been cited, in the context of the Federal Constitutional Court's competencies. To the extent that the Federal Constitutional Court's competencies include the correction or even the reversal of political decisions by reason of their unconstitutionality, the Federal Constitutional Court's decisions always have a political effect. This becomes particularly clear as regards the Federal Constitutional Court's competence to declare a statute void. The same, however, applies to *Organstreit* proceedings, in which decisions of the majority of an organ can be corrected by the Federal Constitutional Court upon application by minorities. In this respect, the competence and the effect cannot be separated from each other.

Only in the past few months, a decision of the Federal Constitutional Court coincidentally, due to the point in time at which it was passed, exerted a very particular political effect. For several years, proceedings for the review of a specific statute had been pending before the Federal Constitutional Court in which the referring court submitted the question of whether it was compatible with the principle of equality that the provisions concerning the child-care maintenance paid to mothers (and sometimes, in specific cases, also to fathers) and the case law based on such provisions differentiated between legitimate and illegitimate children. The Civil Code provides that child-care maintenance paid to the custodial parent of an illegitimate child shall be restricted to three years whereas the provisions and the relevant case law provide that child-care maintenance for legitimate children shall be paid for a longer time. The Federal Constitutional Court declared the different provisions concerning child-care maintenance unconstitutional because child-care maintenance serves to maintain the child and here no distinction may be admitted between legitimate and illegitimate children.^{*50} The decision was served on 23 May 2007. The parliamentary debate in the *Bundestag* on the reform of maintenance law had been scheduled for the very week in which the decision in the end was issued. Because the constitutional requirements made clear in this decision had not been taken into account in the bill, the bill was withdrawn from the agenda the day before its scheduled entry into law in a vote of the *Bundestag*.^{*51} Due to

⁴⁶ BVerfGE 108, pp. 82–122. English version on the Web site of the Constitutional Court, <http://www.bundesverfassungsgericht.de/>.

⁴⁷ BVerfGE 92, pp. 53–74.

⁴⁸ BVerfGE 102, pp. 145–146.

⁴⁹ BVerfGE 109, p. 191.

⁵⁰ NJW 2007, pp. 1735–1737.

⁵¹ *Unterhaltsrecht gestoppt*. – *Süddeutsche Zeitung*, 25.05.2007; *Unterhaltsreform gestoppt*. – *Stuttgarter Zeitung*, 25.05.2007; *Koalition verschiebt neues Unterhaltsrecht*. – *Bild Zeitung*, 25.05.2007; *Reform des Unterhaltsrechts verschoben*. – *Frankfurter Allgemeine Zeitung*, 25.05.2007.

the fact that the ruling coincidentally was handed down and served at the same time as the deliberations of the *Bundestag*, the decision had great influence on them. Also in this context, it must, however, be pointed out that the *Bundestag* and the federal government had known of the misgivings that were expressed in the suspension of proceedings and submission order of the Hamm Higher Regional Court (*Oberlandesgericht*) of 15 August 2004 for quite some time.

4. Conclusions

The conclusion of this discussion may be stated as follows. The Federal Constitutional Court's competencies empower the court to take an active part in the shaping of policy. Many proceedings are caused by political disputes. Consequently, many decisions exert political effects. The Federal Constitutional Court imposes upon itself judicial self-restraint. In some opinions of external and internal critics (the latter expressed in dissenting votes and the associated dissenting opinions), the Federal Constitutional Court does not pay enough attention to the restrictions it has imposed on itself. On the other hand, other criticism has claimed that self-restraint is, in fact, expressed by the court as self-authorisation, or unwarranted assumption of competencies, if not even usurpation of competencies. If a court decision is to be criticised, the result depends in most cases on the constitutional and political point of view. The most important issue is to have in Germany a public debate, review in the relevant media, and the opportunity to nurture the court's internal discussion of the question of whether or not the Federal Constitutional Court is or should be an activist court.



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Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?

When constitutional courts and political questions are mentioned in the same sentence in post-Communist Central and Eastern Europe, several rather discomfoting scenarios come to mind even when only news items of the past year or so are scanned.

One will find, for instance, that the Romanian Constitutional Court was deeply involved with the impeachment of the country's president in the spring of 2007.^{*1} After a scandal erupted around him in early January 2007, the Constitutional Court first reviewed an amendment to the referendum law that would have made it easier to impeach the President (20 February 2007); then it found that it was constitutional to set up a parliamentary investigation commission inquiring into the President's activities (21 March 2007). These decisions were followed by the court finding that, although the President's alleged acts were seriously problematic, they were not severe enough to merit impeachment (5 April 2007) — a point made while the impeachment procedure was still pending in Parliament. The Constitutional Court then sent an explanation of this decision to the parliament in a matter of days (17 April 2007). Once Parliament voted in favour of suspending President Bănescu, the Constitutional Court confirmed the interim president without further ado (20 April 2007). President Bănescu refused to resign^{*2}, and in a month voters refused to impeach him in a referendum.^{*3}

In Poland it did not take long for relations between the Constitutional Tribunal and the political branches to grow tense after a coalition government led by the Law and Justice Party (PiS) entered the political scene. In February 2006, the Constitutional Tribunal's chairman at the time, Marek Safjan^{*4}, published a commentary in *Gazeta Wyborcza* harshly criticising President Kaczynski's statements about the Constitutional Tribunal, calling the President's words "astonishing and disturbing to a great degree".^{*5}

¹ Romanian Constitution, Article 95: "(1) In case of having committed grave acts infringing upon constitutional provisions, the President of Romania may be suspended from office by the Chamber of Deputies and the Senate, in joint session, by a majority vote of Deputies and Senators, and after consultation with the Constitutional Court. The President may explain before Parliament with regard to imputations brought against him. (2) The proposal of suspension from office may be initiated by at least one third of the number of Deputies and Senators, and the President shall be immediately notified thereof. (3) If the proposal of suspension from office has been approved, a referendum shall be held within 30 days, in order to remove the President from office." The document is available in English at <http://www.cdep.ro/pls/dic/site.page?id=371&idl=2&par1=3>. It contributed to the scandal that President Bănescu's political opponents control the majority in Parliament. President Bănescu vowed to run for office again if impeached (AP report, 13 April 2007).

² Ousted Romanian President Defiant. 20 April 2007. Available at <http://news.bbc.co.uk/2/hi/europe/6577573.stm>.

³ Romania President Survives Vote. 20 May 2007. Available at <http://news.bbc.co.uk/2/hi/europe/6665919.stm>.

⁴ Professor Safjan's term on the Constitutional Court expired in 2006. He was appointed to the Constitutional Tribunal in 1997 and has served as its chairman since 1998.

⁵ M. Safjan. Nie wklajmy Trybunału w politykę PiS. – *Gazeta Wyborcza*, 7 February 2006. The full text of the article is available from the Web site of the Polish Constitutional Tribunal in Polish via <http://www.trybunal.gov.pl/Wiadom/Prezes/prezes.htm>. The article attracted consid-

The Polish Constitutional Tribunal most recently^{*6} clashed with the political branches in a high-profile case wherein it invalidated the newest lustration law in May 2007 — right before the contested lustration procedure was to have taken effect.^{*7} The bill was the Kaczynski government's pet project in its mission to clear the public sector of old Communists. In the decision, Chief Justice Jerzy Stepien issued a reminder that "a state based on the rule of law should not fulfill a craving for revenge instead of fulfilling justice".^{*8} A commentary in the Polish edition of *Newsweek* reminds the reader that, while in striking down the lustration decision the Constitutional Tribunal preserved its independence in the face of constant attacks from the ruling coalition, the decision was reached over a record number of dissenting opinions.^{*9} President Kaczynski reportedly indicated before the decision that "if the law was ruled unconstitutional, the government would make thousands of secret police files public. [...] After learning of the tribunal's ruling, Mr Kaczynski said: 'This isn't over'."^{*10}

In the meantime, the finally operational Constitutional Court of Ukraine is deeply involved in the political crisis centring on parliamentary dissolution.^{*11} In early April 2007, President Yuschenko ordered the dissolution of Parliament and called for early elections, in part because — as a result of defections — the Yanukovich-led parliamentary majority was dangerously close to acquiring sufficient support to override presidential vetoes.^{*12} The dissolution orders were challenged before the Constitutional Court, which — not for the first time — exposed the judges of a constitutional court to immense political pressure. The chairman of the Constitutional Court resigned, and five of its judges complained about unacceptable political pressure at a news conference.^{*13} Indeed, in less than two weeks, Prime Minister Yanukovich became so impatient as to say to the Polish media that if the Constitutional Court is unable to decide about the constitutionality of the dissolution order, it deserves to be disbanded.^{*14} In mid-May, the chief of the security services said in a television interview that the services were not imposing any pressure on the Constitutional Court but acknowledged that they were investigating corruption charges against a Constitutional Court judge.^{*15} Soon three judges were dismissed from the Constitutional Court and another four went on sick leave, a development that prompted the President's administration to conclude that the Constitutional Court did not exist anymore^{*16} and then to order a probe against the court with the prosecutors' office.^{*17} When the Constitutional Court's new chairman took office, he assured the polity in a lengthy newspaper interview that the Ukrainian Constitutional Court was not politicised.^{*18}

These are some of the harshest instances of constitutional courts getting involved in intense political scandals. As even such a short record indicates, fears of the political repression of constitutional courts in the post-Communist sphere are not completely unfounded. It remains a question, however, how much politics is too much before and around a constitutional court. The limitations of the present paper certainly do not allow for a comprehensive, systematic consideration of all the issues and relevant jurisprudence. I hope to highlight on the following pages at least some of the most disturbing problems and draw the reader's attention to concepts and considerations that may assist in addressing these issues.

erable attention and triggered discussion in the Polish press and 'blogs'. Excerpts from the article are available in English in BBC Monitoring International Reports, Lexis-Nexis account No. A220602094C-10084-GNW.

⁶ Previously the Constitutional Tribunal had a major clash with the government when it invalidated legislation intended to end the mandate of those local authorities that were late with their property (wealth) declarations (the law was an attempt by PiS to remove its political opponents from major local posts, like the office of Mayor of Warsaw). See decision K 31/06.

⁷ Decision K 2/07. An English language summary of the decision is available at http://www.trybunal.gov.pl/eng/summaries/documents/K_2_07_GB.pdf.

⁸ Quoted in English from: Poland's Anti-Communist Law 'Unconstitutional'. — The Daily Telegraph, 12 May 2007. Available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/05/12/wpoland12.xml>.

⁹ As reported in English in Polish News Bulletin, 17 May 2007.

¹⁰ Judge Curbs Polish Informers Law. — The Financial Times, 11 May 2007. Available at http://www.ft.com/cms/s/56ee999e-0004-11dc8-c98-000b5df10621_i_rssPage=7c485a38-2f7a-11da-8b51-00000e2511c8.html.

¹¹ Ukraine Constitution, Article 90.2: "The President of Ukraine may order the early termination of powers of the Verkhovna Rada of Ukraine where: (1) there is a failure to form within one month a coalition of parliamentary factions in the Verkhovna Rada of Ukraine as provided for in Article 83 of this Constitution; (2) there is a failure, within sixty days following the resignation of the Cabinet of Ministers of Ukraine, to appoint members of the Cabinet of Ministers of Ukraine; (3) the Verkhovna Rada of Ukraine fails, within thirty days of a single regular session, to commence its plenary meetings" (document available in English as part of the CODICES database).

¹² Under Article 94 of the Constitution, a presidential veto may be overridden by a two-thirds vote of the MPs.

¹³ BBC Monitoring International Reports, 10 April 2007. The circumstances of Constitutional Court Chairman Ivan Dombrowsky are unclear; it is known that the majority of Constitutional Justices voted against his resignation, and it is also suggested that his resignation was announced in public before he formally handed in his resignation letter.

¹⁴ Constitutional Court Should Be Disbanded If It Fails to Assess Constitutionality of Presidential Decree to Dissolve Parliament, Yanukovych Says. Interfax-Ukraine, 14 April 2007. Available at <http://www.interfax.com.ua/en/news/main-news/25693/?print>.

¹⁵ BBC Monitoring International Reports, 11 May 2007.

¹⁶ BBC Monitoring International Reports, 18 May 2007.

¹⁷ The President's televised address is available in English translation from BBC Monitoring International Reports, 23 May 2007.

¹⁸ BBC Worldwide Monitoring, 27 July 2007.

1. Constitutional courts entering the political scene: Fears and expectations

Constitutional review is a task or power surrounded by serious doubts, distrust, and reservations in many jurisdictions. Those best known for their deep-seated objections against government by judges are the French, with these long-held sentiments clearly informing the creation of the Constitutional Council in 1958. Indeed, it took more than a decade for that council to abandon at least in some respects the intellectual confines surrounding its jurisdiction in its famous decision on freedom of association. While in the United States the judicial review power of the Supreme Court as established by Chief Justice Marshall in *Marbury v. Madison* has slowly acquired its place in the constitutional edifice, its critiques never really ceased, and the current voices calling for ‘taking the constitution away from the courts’ (to borrow Mark Tushnet’s proposal) merit serious scholarly discussion.^{*19}

In the time of transition to democracy, the creation of post-Communist constitutional courts was in large part fuelled by a distrust of the judiciary and by the firmly held belief that courts and judges inherited from the Communist regime were (or would be) incapable of exercising the powers allocated to the constitutional courts.^{*20} In post-Communist Central and Eastern Europe, constitutional courts were established at the dawn of transition to democracy.^{*21} Following to some extent the German model, newly created constitutional courts were established outside the ordinary judicial hierarchy.^{*22} These new courts were then entrusted with broad powers, often but not always encompassing abstract and concrete judicial review, preliminary review of legislation, abstract constitutional interpretation, presidential impeachment, and powers related to the control of elections and referenda.^{*23}

The newly created constitutional courts were frequently staffed by eminent lawyers, who often were not required to have served in a judicial office before.^{*24} The new constitutional courts enjoyed a high level of institutional

¹⁹ M. Tushnet. *Taking the Constitution Away from the Courts*. Princeton, 2000.

²⁰ On this, see L. Garlicki. *Constitutional Courts Versus Supreme Courts*. – *International Journal of Constitutional Law* 2007 (44) 5, pp. 44–68 (see especially pp. 44–45). See also Z. Kühn. *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*. – *American Journal of Comparative Law* 2004 (52), pp. 531–567.

²¹ The Polish Constitutional Tribunal was established in 1985; thus, formally it predates the Round Table Talks.

²² As an exception, Estonia does not have a separate constitutional court but entrusts a special chamber of the Supreme Court with constitutional review functions.

²³ See, e.g., Czech Constitution, articles 65 (covering the power to try the President for high treason) and 87 (on jurisdiction) (as available at http://test.concourt.cz/angl_verze/constitution.html); the Estonian Constitution, articles 149 (para. 3) and 152 (para. 2) (as available in English at <http://www.president.ee/en/estonia/constitution.php?gid=81918>); the Hungarian Constitution, articles 26.4 (on preliminary review of legislation upon the president’s referral), 31.A-32 (impeachment), and 32.A.1 (as available via <http://www.mkab.hu/en/enpage5.htm>) and Act XXXII of 1989 on the Constitutional Court, Article 1 (as available at <http://www.mkab.hu/content/en/encont5b.htm>). For Latvia, see Latvian Constitution, Article 85 (available at <http://www.satv.tiesa.gov.lv/?lang=2&mid=8>) and Constitutional Court Act, Article 16 (as available at <http://www.satv.tiesa.gov.lv/?lang=2&mid=9>); for Lithuania, see Lithuanian Constitution, Article 102 (as available at http://www.lrkt.lt/Documents2_e.html); for Poland, see Polish Constitution, articles 79.1 (on constitutional complaint), 122.3 (on the President’s preliminary review request), 133.2 (addressing compatibility of international agreements), 186 (on requests from the National Judiciary Council regarding guarantees of judicial independence), and 188–189 (as available via <http://www.trybunal.gov.pl/eng/index.htm>) as well as the Constitutional Tribunal Act of 1 August 1997, articles 2 and 3 (as available via <http://www.trybunal.gov.pl/eng/index.htm>); for Romania, see Romanian Constitution, Article 144 (available at http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=5); and for Slovakia, see Slovak Constitution, articles 107 (on prosecution of the President for wilful violation of the Constitution or treason) and 125–129 (as available via http://www.concourt.sk/A/a_index.htm).

²⁴ While high professional standing, or at least experience as a lawyer, tends to be a standard qualification criterion set forth in national laws, constitutional court judges in post-Communist countries are rarely required to be of such background as would qualify them for judicial office. For details on the Czech Republic, where constitutional court members hold a 10-year renewable term, see the Czech Constitution (Note 23), articles 84.3 (“Any citizen who has a character beyond reproach, is eligible for election to the Senate, has a university legal education, and has been active in the legal profession for a minimum of ten years, may be appointed a Justice of the Constitutional Court”) and 19.2 (“Any citizen of the Czech Republic who has the right to vote and has attained the age of forty is eligible for election to the Senate”); for the situation in Hungary, where justices hold a nine-year renewable term, see the Act on the Constitutional Court (Note 23), Article 5.1 (“Hungarian citizens with a law degree who [have] reached the age of 45 years and have no criminal record may be elected as Members of the Constitutional Court”) as well as Article 5.2 (“Parliament elects Members of the Constitutional Court from among learned theoretical jurists (university Professors or Doctors of political science and jurisprudence) and lawyers with at least twenty years of professional experience. Such professional experience must be acquired in a position demanding a degree in political science and jurisprudence.”); for Latvia, where Constitutional Court judges have a 10-year, non-renewable term, see Constitutional Court Act (Note 23), Article 4.2 (“Any citizen of Latvia who has a university level legal education and at least ten years’ working experience in a legal profession or in a scientific or educational field in a judicial specialty in a research or higher educational establishment, may be confirmed a justice of the Constitutional Court. A person who may not be nominated for the office of a justice under Article 55 of the Law ‘On Judicial Power’, must not be appointed as a justice of the Constitutional Court.”); for Lithuania, where Constitutional Court members have a nine-year non-renewable term, see Lithuanian Constitution (Note 23), Article 103 (“Citizens of the Republic of Lithuania who have an impeccable reputation, who have higher education in law, and who have not less than a 10-year work record in the field of law or in a branch of science and education as a lawyer, may be appointed as justices of the Constitutional Court”); and for Poland, where Constitutional Court justices serve a nine-year fixed term, see the Constitutional Tribunal Act of 1 August 1997 (Note 23), Article 5.3 (“A judge of the Tribunal may be a person who possesses the necessary qualifications to hold the office of a judge of the Supreme

trust, and thus popular legitimacy in these fledgling democracies. While their current public opinion ratings might not be as high as they used to be, constitutional courts tend to be among the most trusted public institutions in the post-Communist zone, despite the problems exposed in this paper.

Post-Communist constitutional courts were expected to become the ultimate guarantors of the fundamentals of newly crafted democratic constitutions, guarding institutional arrangements (including separation of powers and the independence of the ordinary judiciary) and fundamental rights alike. Among their top achievements most constitutional courts by now may list their contribution to their countries' membership in the Council of Europe, membership in NATO, and their recent accession to the European Union — which had specified “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities” as a crucial prerequisite for membership.^{*25} These are undeniable success stories, in spite of occasional darker spots in the record.

Nonetheless, one cannot help but notice that some of their powers almost automatically drag constitutional courts into the dark den of daily politics. The Romanian as well as the Ukrainian case discussed above arose as a consequence of the exercise of such powers. This certainly does not mean that constitutional courts testing the constitutionality of impeachment or parliamentary dissolution automatically make themselves targets of political persecution. It is well known that the German Federal Constitutional Court had decided twice already on the constitutionality of the exercise of presidential powers to dissolve the Bundestag, and, while these not might be the least-criticised decisions of the court, they did not harm the court's legitimacy or reputation. To cite a reassuring example from the post-Communist region to this effect, it is worth remembering that the Lithuanian Constitutional Court was left unscratched when it ruled in 2004 that it was acceptable to prevent an impeached president from running for re-election.^{*26}

Even such a short account makes it clear, therefore, that it is not the inherently political nature of certain review powers that drags constitutional courts into being hassled by the political branches of government by unacceptable means such as forced dismissals or court-packing. While reduction of judicial terms of office and salary cuts are truly political decisions (since they are taken by the political branches out of political considerations), the present paper focuses on more subtle readings of what may amount to a political question before a constitutional court. As the following section sets out to demonstrate, constitutional systems differ in their definition of the type of decisions occasioning such political questions for consideration that are worth reflecting upon. After this discussion, the paper moves on to continue the analysis of post-Communist constitutional jurisprudence.

2. ‘Political questions’ and constitutional review: On and beyond Baker

In continental Europe, the belief that well-functioning courts should and do keep away from politics is a firm one. It may be credited to Hans Kelsen's insistence on ‘pure theory’, bad experiences with politically controlled courts, and numerous other factors. Therefore, it is an unpleasant task to talk about the political involvement of constitutional courts, or even the political consequences of constitutional court decisions (after all, constitutional court judges are expected to be blind to the political turmoil their decisions could spark).

Nonetheless, when ‘political questions’ and constitutional review are mentioned in the same sentence, one cannot help but think of the US Supreme Court's political question doctrine as expounded upon in the semi-

Court or the Chief Administrative Court”). The Web site of the Constitutional Tribunal includes the following comment: “The qualifications required to become a candidate for the office of a judge of the Supreme Court or the Chief Administrative Court are as follows: at least 10-years [sic] practice in the legal profession and a degree in legal studies with successful completion of the relevant examinations. Professors of law are, however, exempt from these requirements. In practice, the Tribunal has been dominated by professors of law: from 1985 to 2002, 28 judges have been professors of law, seven have been judges, three prosecutors, two barristers, and one [an] official” (at http://www.trybunal.gov.pl/eng/About_the_Tribunal/info.htm). For Romania, where Constitutional Court judges serve a nine-year non-renewable term, see Romanian Constitution, Article 143 (available at http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=5) (“Judges of the Constitutional Court must have graduated law, and have high professional competence and at least eighteen years of experience in juridical or academic activities”). For Slovakia, see the Slovak Constitution, under which Constitutional Court judges serve for a 12-year non-renewable term, Article 134.3 (available at <http://www-8.vlada.gov.sk/index.php?ID=1384>) (“A judge of the Constitutional Court must be a citizen of the Slovak Republic, eligible to be elected to the National Council of the Slovak Republic, not younger than forty years, and a law-school graduate with fifteen years of experience in the legal profession”). Estonia is an obvious exception, as the Supreme Court's constitutional review chamber is composed of regular Justices of the Supreme Court.

²⁵ See the so-called Copenhagen criteria in articles 6.1 and 49 of the Treaty on European Union as established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995.

²⁶ The decision is available in English at <http://www.lrkt.lt/dokumentai/2004/d040406.htm>.

nal decision *Baker v. Carr* (369 U.S. 186 (1962)).^{*27} In this case, Justice Brennan defined political questions in the following terms (at 217):

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.^{*28}

In *Baker* the US Supreme Court seemed to subscribe to the view that political questions of this kind are not capable of judicial determination and as such are not justiciable. Justice Brennan makes it clear that a question is not political solely for the reason that it is being considered by Congress or the President. 'Political' as an adjective refers not to everyday high (or low) politics. As the above quote signals, considerations supporting this gesture of self-restraint are informed in part by considerations related to separation of powers and to a large extent by prudential considerations. In this logic, a political question should be resolved not by courts of law but by the political branches.

At this point, two caveats are in order. First, it has to be admitted at the outset that, as it has been applied by the US Supreme Court, the political question doctrine has acquired a somewhat tainted reputation. There is no room here to elaborate on the relevant line of jurisprudence and scholarship. A reminder of the decision of the US Supreme Court in *Bush v. Gore*, 531 US 98 (2000), the case that ultimately determined the outcome of the 2000 presidential elections, stands as a stark reminder of the limits of judicial self-restraint.

Secondly, several types of powers exercised by constitutional courts are regarded by scholars and practitioners as political per se. According to Patricia Wald, preliminary review, abstract constitutional interpretation, and testing of the constitutionality of political parties are all tasks that could "catapult the courts into a political maelstrom".^{*29} To this list Herman Schwartz added the duty to oversee elections, and the dilemmas of economic and social transformation.^{*30} Furthermore, not all courts exercising constitutional review rely on the distinction between political and legal (constitutional) matters in determining justiciability. The German Constitutional Court, for instance, did not develop a doctrine similar to the US political question doctrine.^{*31}

In the light of these considerations, it is especially worth looking at the jurisprudence of the Canadian Supreme Court in drawing the line between political (and thus unjusticiable) and justiciable questions. The Supreme Court of Canada in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441^{*32}, unanimously was of the view that political or foreign-policy decisions are not exempt per se from constitutional review. In the words of Justice Wilson (in para. 64):

[I]f we are to look at the Constitution for the answer to the question [of] whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so.

²⁷ The case involved a challenge to the design of electoral districts, a matter traditionally regarded as unjusticiable by US courts. Justice Brennan accepted that, to the extent to which the design of electoral districts violated the Equal Protection Clause of the US Constitution, the matter was capable of judicial determination and thus justiciable.

²⁸ Note that in a case much preceding *Baker*, that of *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall used the following words (at 165–166): "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. [...] In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."

²⁹ Patricia M. Wald's foreword in Herman Schwartz. *The Struggle for Constitutional Justice in Post-Communist Europe*. 2000, p. xiv. Wald's examples include the Russian Constitutional Court's decisions on the legality of the Communist Party and the Fascist Party, and on the legality of the war in Chechnya, as well as the decisions of the Bulgarian Constitutional Court on bans affecting ethnic parties.

See also B. Bugarcic. *Courts As Policy-Makers: Lessons from Transition*. – *Harvard International Law Journal* 2001 (42), pp. 247–288 (especially p. 259).

³⁰ H. Schwartz (Note 29), p. 4.

³¹ See D. P. Currie. *The Constitution of the Federal Republic of Germany*. Chicago 1994, pp. 44–46.

³² The decision concerned human-rights-based challenges brought under the Canadian Charter against the decision of the Canadian government to permit the US to test cruise missiles in Canada. The German Constitutional Court handled similar objections, e.g., in the *Pershing 2* and *Cruise Missile I* case, (BVerfGE 66, 39) and *Cruise Missile II* case (BVerfGE 68, 1) available in English in D. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Duke 1997, p. 155 ff.

In one of its most politically charged decisions, in the Reference re Secession of Quebec case, [1998] 2 S.C.R. 217, a unanimous Canadian Supreme Court agreed to determine whether the province of Quebec had a unilateral right to secede from Canada. In a *per curiam* decision, the Supreme Court said (in paras 27–28):

As to the “proper role” of the Court, it is important to underline [...] that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions [...] as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. [...] As to the “legal” nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question.^{*33}

Most recently, the Canadian Supreme Court refused to handle a reference request because the government indicated that they would proceed with the measure in question irrespective of the court’s advice.^{*34}

Thus, even this brief account suggests that although the US Supreme Court and the Canadian Supreme Court differ greatly in their stance on justiciability, it is clear that both courts are unwilling to accept certain issues for judicial decision, matters that they deem it appropriate for the political branches to decide. These judicial stances are in part informed by separation of powers — well-grounded considerations, to which prudential concerns are added. Both courts are uneasy in making policy determinations: the US Supreme Court is uneasy when there is no judicially manageable standard, while the Canadian Supreme Court — taking a much more relaxed approach — prefers to stay away if it is asked to rubber-stamp a decision already taken by the political branches. These observations certainly do not offer a clear distinction between political and legal (constitutional) matters, but they at least shed light on some of the problems and dilemmas also faced by post-Communist constitutional courts.

3. Handling transitional justice cases: Never too political

In the early days of transition to democracy, post-Communist constitutional courts ended up deciding about the constitutionality of retroactive justice laws, compensation (restitution) laws, and lustration laws including transitional justice measures. Some of these decisions were handed down a long time ago, and in some cases the procedures initiated by the contested legal measures have already expired. Nonetheless, despite the passage of time, this body of jurisprudence continues to cast a long shadow over current constitutional jurisprudence. And as the second round of the lustration saga in the Czech Republic (discussed below) and also the most recent lustration controversy in Poland suggest, some of these matters keep re-emerging on the political horizon and thus before constitutional courts.

At the time at which these transitional justice measures were enacted as law, they were not required by national constitutions or international obligations. It was out of sheer political considerations that national legislatures decided to adopt such measures, which indeed often contravened existing international or constitutional obligations. Thus, once a bill or law was challenged before a constitutional court, the members of that court were trapped: the daily political considerations (interests and stakes) behind each legislative measure were all too clear, and all of a sudden striking down a measure on the basis of formal constitutional arguments (as in saying that it violates the constitutional prohibition of retroactive criminal legislation) seemed risky, as it might result in an open confrontation of the court with the legislature and the government.^{*35}

Without entering into a detailed discussion, it is important to emphasise that letting transitional justice measures stand was made possible via making exceptions to constitutional rules and principles in the name of ensuring justice in relation to the past.

In Czech constitutional jurisprudence, the principle of the rule of law suffered considerably when the Czech Constitutional Court approved the constitutionality of the Law on the Illegality of the Communist Regime and Resistance to It.^{*36} The Czech constitutional court’s judges, in their very first decision, upheld the law,

³³ In the decision’s paras 25 and 26, the Supreme Court made it clear that criteria for justiciability in reference cases (i.e., where the court issues advisory opinions on constitutional questions) were different from the test applied by the court when it handles ordinary litigation.

³⁴ Reference re. same-sex marriage, [2004] 3 S.C.R. 698, 2004 SCC 79, in para. 65 ff.

³⁵ For an exception, see Decision 11/1992 AB of the Hungarian Constitutional Court, declaring a retroactive criminal justice bill unconstitutional.

³⁶ Act No. 198/1993 (9 July 1993). The full text of the Czech law is available in English in N. Kritz (ed) *Transitional Justice, How Emerging Democrats Reckon with Former Regimes*. Vol. 2. Country Studies (Washington DC, U.S. Institute of Peace Press, 1995), on p. 366 ff. In addition to lifting the statute of limitations to allow for the prosecution of crimes committed between 25 February 1948 and 29 December 1989 that

arguing that there was a discontinuity of values between the Communist regime and the new regime, in the following terms:

The Czech Constitution accepts and respects the principle of legality as a part of the overall basic conception of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values. This means that even while there is continuity of “old laws” there is a discontinuity in values from the “old regime”. This conception of the constitutional state rejects the formal-rational legitimacy of a regime and the formal law-based state.^{*37}

The Czech Constitutional Court attributed significance to the fact that during the Communist regime certain crimes were not prosecuted, for ideological or political considerations — i.e., for extra-legal reasons. Therefore, according to the Czech court, the ordinary logic of legal certainty could not be invoked in the case: “This ‘legal certainty’ of offenders is [...] a source of legal uncertainty to citizens (and vice versa). In a contest of these two types of certainty, the Constitutional Court gives priority to the certainty of civil society, which is in keeping with the idea of a law-based state.”^{*38} It was on the basis of such considerations that the Czech Constitutional Court decided to uphold the law on the illegality of the Communist regime.

When keeping an eye out for political questions, one finds that judicially manageable criteria were scarce in the Czech constitution. While as a result of the decision the Czech Constitutional Court avoided an open confrontation with the political branches (as it upheld the law), it faced an unexpected collision with the ordinary courts and the Supreme Court, which were unwilling to enforce retroactive criminal measures in individual cases.

The other zone of transitional justice jurisprudence in which constitutional courts paved the way for conflicts stretching far into the future is lustration. In countries where lustration laws were enacted, this became an endless game of ping-pong between the courts and the political branches, with courts giving in to parliaments’ will by using some sort of transition exception, then being approached for further exceptions when the political forces saw further persecution as necessary. Since the primary purpose of lustration laws is to discredit political opponents^{*39}, a constitutional court ruling on extended, revised, or expanded lustration legislation is always catapulted into the limelight of public attention. The recent conundrum about the Polish lustration law is a clear example of this.

In its early decisions on lustration, the Czech Constitutional Court found the whole lustration procedure acceptable mainly because it was temporary (transitional).^{*40} Then in 2001 the lustration process was expanded, with the Constitutional Court finding the law constitutional again.^{*41} The same reasoning here does not look the same after almost a decade. References to the Constitutional Court’s established jurisprudence sounded strange, and the reinforcement of the notion of the need for transitional measures in 2001 appears a little out of place.

This last observation takes us to an important point: a judicial decision — and a constitutional court decision is no exception — is at least suspicious if it is not based on reasoning that is acceptable for a constitutional community. The short and often rather cryptic decisions of the French Constitutional Council, for instance, might not satisfy the needs of other polities for reasoned decisions on constitutional matters. And while constitutional courts’ decisions sustaining transitional justice measures may be justified as *sui generis* instances of the rule of law in scholarly works, on the level of constitutional praxis they seem to have introduced a genre of judicial reasoning in which situational and context-dependent exceptions become acceptable without much further ado. Such an approach does not assist constitutional courts in staying out of decision-making scenarios for which the constitution does not offer conclusive guidance, leaving decision-makers to exercise discretion with reference to pre- or extra-constitutional principles and considerations.

for political reasons were not prosecuted (Article 5), the law denounced the Czech Communist regime as “illegal and contemptible” (Article 2 (1)) and declared the Czech Communist Party a criminal organisation (Article 2 (2)).

³⁷ Pl. ÚS.19/93. Available in English at http://test.concourt.cz/angl_verze/doc/p-19-93.html.

³⁸ Pl. ÚS.19/93.

³⁹ It is often comfortably forgotten that victims and the polity receive information not from lustration clearances and ‘agent lists’ but from access to Communist secret police files. Alleged national security considerations plague any discussion on this aspect of access to information and prevent courts from interfering with governmental decisions out of (misunderstood) judicial self-restraint.

⁴⁰ Pl. US 1/92: “The conditions prescribed by the statute for holding certain positions shall apply only during a relatively short time period by the end of which it is foreseen that the process of democratization will have been accomplished” (by 31 December 1996) and “The basic purpose of this statute is to prescribe, exclusively for the future, the preconditions for holding certain narrowly defined offices or for engaging in certain activities precisely specified in the statute, and not permanently, but only for a transitional period.” Available in English at http://test.concourt.cz/angl_verze/doc/p-1-92.html.

⁴¹ Pl. US 9/01, available in English at http://test.concourt.cz/angl_verze/doc/p-9-01.html.

4. Courts participating in politics ordinary

Constitutional courts were burdened with many tasks, fears, and expectations when they were inserted into post-Communist constitutions. While the jurisdiction of these courts expands to adjudicating institutional conflicts between the various branches of government in order to safeguard separation of powers, the primary task of constitutional courts was the protection of human rights. Some courts were more eager than others when plunging into their mission — depending on the issues raised before them (thus also depending on rules of standing), on their individual members' readiness to tackle certain constitutional questions at a particular moment, or on the political climate of the day. Constitutional jurisprudence supplies excellent examples, and comparative literature is abundant on the subject. Instead of engaging in a detailed discussion of cases, it might be more useful to point out a few trends and phenomena that are relevant from the standpoint of the present study on political questions. For this discussion I will try to cite more recent or less famous cases, to further emphasise the sheer number of cases about which some of the points can be made.

The most obvious instances of political decisions are probably the ones that directly affect access to public office and the (re)distribution of powers among constitutional players. The cases are not political because they concern the powers of political players; after all, political players are usually constitutional players as well. Rather, as was mentioned above, these cases are political because abstract constitutional questions about eligibility of elected office or the protection of judicial independence emerge in the actual context of a concrete case in a manner that cannot be accounted for without reliance on premises that are not mandated by the state's constitution. The following section of the paper reflects on the role of constitutional courts in the Czech Supreme Court appointment saga⁴²; on the Lithuanian presidential impeachment cases of 2004; and, lastly, on the Hungarian referendum turmoil of 2007.

As a most recent example we can take the saga around the dismissal of Iva Brožová from the helm of the Czech Supreme Court by President Klaus on the grounds that she failed to fulfil her duties.⁴³ In a rushed appointment, Jaroslav Bureš (a former justice minister and presidential candidate) was appointed to the Supreme Court and was made Chief Justice to replace Brožová.

In response to the deposed Chief Justice Brožová's complaint, the Constitutional Court invalidated the law on which the dismissal was based, relying on Article 82.2 of the Czech Constitution, which declared the prohibition of removal of judges against their will.⁴⁴ In its decision the Constitutional Court responded directly to arguments made in the course of parliamentary debates that the principle 'he who appoints may remove' shall apply also to judicial appointment. The Constitutional Court said in the case:

[T]he principle "he who appoints, may remove" is inherent in a system of state administration [...] i.e. in relations of hierarchy, in other words, relations of superiority and subordination. [...] [I]n character, [however] the performance of state administration of courts does not correspond to the general definition of the performance of state administration. [...] [T]he office of chief judge of a court, just as the Chief Justice of the Supreme Court, is inseparable from the office of judge, for one cannot construe the dual nature of the legal status of a court chief judge as an official of state administration on the one hand and as a judge on the other. It is, thus, necessary to relate, in the above-indicated respect, the attribute of the independence of the judiciary, alternatively the independence of judges, also to the chief judges of courts.⁴⁵

The decision of the Constitutional Court that reinstated Iva Brožová in office and at the same time terminated the appointment of Jaroslav Bureš⁴⁶ did not put an end to the dispute over Supreme Court appointments. After the unsuccessful attempt to replace the Chief Justice, in November 2006 President Klaus decided to appoint a second deputy chairman to the Supreme Court, the same Jaroslav Bureš whom he meant earlier to lead the court. Article 62.f of the Czech Constitution provides that the President of the Republic "shall appoint from among judges the Chairperson and Vice-Chairpersons of the Supreme Court". Until this controversy erupted,

⁴² My discussion of these Czech cases owes much to the research assistance of Jana Jaseckova and Peter Kocvar (both students at CEU Legal Studies in the 2007–08 academic year). I remain fully responsible for all mistakes and misunderstandings.

⁴³ CTK National News Wire, 9 February 2006. The conflict over appointment of ordinary court judges commenced in 2005, when President Klaus refused to appoint 32 trainees to judicial positions. In the resulting cases, the President clashed with the Supreme Administrative Court and also with the Constitutional Court. For an account in English, see J. Kysela, Z. Kühn, *Presidential Elements in Government: The Czech Republic*. – *European Constitutional Law Review* 2007 (3), especially p. 107 ff.

⁴⁴ See Pl. US 18/06, decided 11 July 2006, available in English at http://test.concourt.cz/angl_verze/doc/p-18-06.html. The Czech Constitution's Article 82.2 reads: "Judges may not be removed or transferred to another court against their will; exceptions resulting especially from disciplinary responsibility shall be laid down in a statute," as available in English on the Web site of the Czech Constitutional Court, at http://test.concourt.cz/angl_verze/constitution.html.

⁴⁵ See Pl. ÚS 18/06, decided 11 July 2006. Available in English at http://test.concourt.cz/angl_verze/doc/p-18-06.html.

⁴⁶ Jaroslav Bureš questioned the legitimacy of the Constitutional Court proceedings, as he was not party to the procedure initiated by Chief Justice Iva Brožová against President Klaus. On this, see the document entitled 'Bures Says Constitutional Court Violates His Right to Just Proceedings', as available at http://www.ctk.cz/zpravy/anglicko_view.php?id=223854.

however, only one person served on the Supreme Court in the capacity of the latter, although the language of the Constitution clearly is in the plural.

In August 2007, President Klaus unsuccessfully challenged the constitutionality of legal rules on Supreme Court administration.^{*47} In September 2007, the Constitutional Court found the appointment of Dr. Bureš as the deputy chairman unconstitutional on grounds that he did not possess a valid judicial appointment.^{*48} Thereupon Dr. Bureš resigned from the Supreme Court to re-emerge in a few days as the deputy chairman of the High Court in Prague and as the chief co-ordinator for the planned judiciary reform.^{*49}

President Klaus employed a familiar justification for his actions: the mission of preventing government by the judiciary (*soudcokracie*). He argued that, as a necessary limitation, judicial administration has to be under administrative control.^{*50} Despite such submissions, according to eminent court-watcher Jiří Příbáň, in these cases the Czech Constitutional Court managed to preserve the bulwarks of judicial independence in its three decisions going clearly against President Klaus's preferences. Nonetheless, one cannot help but notice that in this lengthy contest over Supreme Court appointments the personalities of various decision-makers cast a long shadow over the constitutional boundaries of their powers.

The Czech Constitution provided at least some guidance regarding Supreme Court appointments. When the Lithuanian Constitutional Court had to decide about a newly enacted law preventing the impeached president of the republic from seeking re-election, the judges of the Lithuanian Supreme Court had less textual guidance.^{*51} On 4 May 2004, the Lithuanian parliament amended the Lithuanian Act on Presidential Elections, providing, inter alia, that a person who has been removed from office via impeachment may not be elected President of the Republic if less than five years has elapsed since his removal from office. The amendment was passed to address the freshly impeached Lithuanian president, Rolandas Paksas.^{*52} He had made it clear without delay that he planned to run in the upcoming presidential elections, in June 2004.

The petitioners in the case argued forcefully that under the Constitution the only consequence of impeachment is removal from office. The Constitutional Court, however, placed the entire constitutional and political crisis in the broader context of discussing the importance of preserving trust in a constitutional democracy based on the rule of law^{*53}, and the need for an opportunity for self-defence, including an authorisation for the removal of violators of the law and of the Constitution from the highest public offices.^{*54} Furthermore, the Constitutional Court accorded special significance to the fact that, upon entering office, the President of

⁴⁷ The complaint of President Klaus in the resulting case Pl. ÚS 87/06 is available in Czech at <http://www.vaclavklaus.cz/klaus2/asp/clanek.asp?id=zgUf44Tj3PIQ>. The President's complaint argues that since the Constitution employs plural language in its material on deputy chairpersons, he is entitled to appoint more than one such official.

⁴⁸ Decided together with President Klaus's complaint as Pl. ÚS 87/06, available only in Czech at <http://www.concourt.cz/scripts/detail.php?id=541&keyword=Pl.+%DAS+87%2F06>. Four Justices dissented, all of whom had been appointed to the Constitutional Court by President Klaus. On the controversial appointments to the Czech Constitutional Court of 2003–04, see J. Kysela, Z. Kühn (Note 43), p. 106 ff.

⁴⁹ Czech Justice Minister Proposes Bureš to High Court Post. 18 September 2007. Available in English at <http://www.czech-republic-prague.com/article-306624-en.html>.

When commenting on the decision of the Constitutional Court removing him from the office of Supreme Court Deputy Chairman, Dr. Bureš was reported to have said: "I remain a judge, and I intend to be a judge, so I'm hoping to receive an offer from a court chair." Quotation from English translation in: Klaus Loses to Brožová for Third Time. 17 September 2007. Available at http://www.hn.ihned.cz/c410048260-22039750-500000_d-klaus-loses-to-brozova-for-third-time.

⁵⁰ Centrum pro ekonomiku a politiku (the Center for Economics and Politics), a think tank close to President Klaus, produced a report to support this reasoning, which was marketed with the President's recommendation. See *Soudcokracie v ČR – fikce, nebo realita?* Available at <http://cepin.cz/cze/kniha.php?ID=71> (in Czech).

⁵¹ Case No. 24/04, of 25 May 2004, as available in English at <http://www.lrkt.lt/dokumentai/2004/r040525.htm>.

⁵² Under Article 74 of the Lithuanian Constitution, the grounds for impeachment are gross violation of the Constitution, breach of a public oath, and commission of a crime. President Paksas — the first European president to be removed by impeachment — was impeached on three counts: for improperly granting citizenship to a Russian businessman in exchange for campaign funds, breaching official secrets, and influencing the outcome of a privatisation. The Constitutional Court found him guilty with its decision in Case 14/04, of 31 March 2004, as available in English at <http://www.lrkt.lt/dokumentai/2004/c040331.htm>.

Parliament decided to amend the law on presidential elections and not the Lithuanian Constitution itself, as a constitutional amendment would have been formally impossible to enact following the impeachment of the President and before the upcoming presidential elections. See Articles 148 ff. on the amendment of the Lithuanian Constitution, as available in English at http://www.lrkt.lt/Documents2_e.html.

⁵³ Decision in Case No. 24/04: "[I]n order that the citizens – the state community – could reasonably trust the state officials [...] a public democratic control over the activity of the state officials comprising inter alia a possibility to remove from office the state officials who violate the Constitution and law, who bring their personal interests or the interests of the group above the public interests, or who disgrace state authority by their actions is needed. One of the forms of such public democratic control is the constitutional institute of impeachment." As available in English at <http://www.lrkt.lt/dokumentai/2004/r040525.htm>.

⁵⁴ Decision in Case No. 24/04: "The application of impeachment, an institute of a special parliamentary procedure, and the constitutional sanction – removal from office [...] is one of the measures of self-protection of the state community, the civil nation, a way of its own defence from the said top officials of state power who ignore the Constitution and law in such a manner that they are prohibited from holding certain office, as they do not fulfil their obligation unconditionally to follow the Constitution and law or follow the interests of the nation and the State of Lithuania, and who have disgraced state authority by their actions." As available in English at the Court's website.

the Republic takes an oath with more than symbolic consequences. The court stated that when the President of the Republic has sworn this oath, his duty emerges to act in only the way he is obliged to by the oath given to the nation, and to breach this oath under no circumstances. According to Article 74 of the Constitution, the breach of the oath is one of the bases for removal of the President of the Republic from office, according to the procedure for impeachment proceedings. The Constitutional Court Justices added that an impeached president “will always remain as the one who breached the oath to the Nation and grossly violated the Constitution, and who was removed from the office”.

Thereupon the Lithuanian Constitutional Court found the newly introduced limitations on eligibility for the office of President of the Republic acceptable in an unusual manner — expanding the scope of the ban to all public offices requiring an oath and with no time limitation. The following elections turned out to be rather close, though, after a barred Mr. Paksas openly supported Kazimira Prunskienė, the leader of the Peasants’ Party. She lost in the general election of June 2005 by a mere four per cent to Valdas Adamkus, who won 52 per cent of the vote. This story is not complete without adding that Dr. Adamkus had been the president of Lithuania between 1998 and 2003, and lost on account of a ‘populist grassroots’ protest stirred up by the impeached Mr. Paksas.^{*55} Note that the decision of the Constitutional Court effectively prevents Mr. Paksas from running for any public position that requires taking an oath.^{*56}

Yet another example of constitutional court justices rearranging the balance of powers between constitutional players comes from Hungary, where the Constitutional Court is entrusted with substantial powers to review referenda. The jurisdiction of the Constitutional Court over referenda is based on the election law, which grants the Constitutional Court jurisdiction to entertain objections (in extraordinary proceedings) against decisions of the National Election Commission concerning the acceptability of questions to be posed for referenda.^{*57} Among the challenges most often raised against questions proposed for referenda one finds the prohibition of constitutional amendment and raising of budgetary questions^{*58}, along with the requirement that questions for referenda be clear and unambiguous.^{*59}

The jurisdiction of the Hungarian Constitutional Court is not an unusual one among constitutional review fora. What makes it worthy of attention for the purposes of the present paper is how referenda have been used in Hungarian politics recently, a manner that has serious burdensome consequences also for the Constitutional Court. Hungarian party politics has become known to be rather polarised and immune to any attempt at consensus-seeking (save decisions that improve the position of members of Parliament). While the constitutional position of parliamentary opposition is rather strong, for reasons dating back to the Round Table Talks, parliamentary parties on the opposition side have regularly resorted to symbolic acts. Ever since becoming the largest party on the opposition side, the approach preferred by the Alliance of Young Democrats (FiDESz) to express its dissatisfaction with the government has been to resort to extra-parliamentary means, like being absent from parliamentary sessions. Stronger dissatisfaction prompts calls for referenda. When it came to challenging the Socialist–liberal coalition government’s convergence package in 2007, instead of challenging the measures in Parliament FiDESz initiated a string of referenda against all central measures of the package, such as the introduction of tuition fees for higher education^{*60} or the abolition of the ‘treatment (visit) fee’ for public health care providers^{*61} and the ‘*per diem*’ to be paid for stays in public hospitals.^{*62}

These calls for referenda have a complex impact on the Hungarian political scene, making the Constitutional Court rather vulnerable to previously unseen pressure. To begin with, the referendum proposals resulted in an open clash between the National Election Commission and the Constitutional Court. The National Election Commission refused to allow public votes on the above questions, saying, in essence, that the proposals affect the central budget and as such are precluded by law. A divided Constitutional Court, however, was of

⁵⁵ Independent Centrist is Lithuania Viktor. – The New York Times, 28 June 2004. Available at <http://query.nytimes.com/gst/fullpage.html?res=9F03E4DE1438F93BA15755C0A9629C8B63>.

⁵⁶ Mr Paksas challenged the domestic proceedings before the ECtHR. See Paksas v. Lithuania, Application No 34932/04 on the list of communicated cases in Information Note No. 94 on the case-law of the Court of February 2007, as available at <http://0-www.echr.coe.int/millennium.unicatt.it/Eng/InformationNotes/INFONOTENo94.htm>.

⁵⁷ Act No. 100 of 1997, on elections, which also sets forth the detailed rules on referenda and public initiatives. The jurisdiction of the Constitutional Court is based on Article 130.

⁵⁸ Article 28/C (5) of the Hungarian Constitution enumerates subject matter on which referenda may not be held. In addition, the act on elections imposes additional restrictions.

⁵⁹ Act No. 3 of 1999, on national referenda and popular initiative, requires in Article 13 that a referendum be about a specific question that allows a straightforward answer.

⁶⁰ With AB decision 465/H/2007 the Constitutional Court required the National Election Commission to reconsider its decision, refusing the referendum initiative. This is the least surprising of the referendum initiatives: when entering government in 1998, FiDESz was quick in abolishing the tuition fee introduced by its predecessor.

⁶¹ With AB decision 505/H/2007 the Constitutional Court required the National Election Commission to reconsider its decision, refusing the referendum initiative.

⁶² With AB decision 504/H/2007 the Constitutional Court required the National Election Commission to reconsider its decision, refusing the referendum initiative.

the opinion that these referendum initiatives affect a future budget and instructed the Election Commission to reconsider, which it eventually did.

In the meantime, using the momentum from FiDESz, a great number of referendum initiatives were lunched, essentially clogging the Constitutional Court's docket. Although it is not possible to tell what percentage of those proposals come from the ranks of the parliamentary opposition, it is clear that, instead of acting as a guardian of the Constitution in referendum cases, the Constitutional Court has become merely a toy in an increasingly populist political game, by now having to preside over a hundred objections in referendum cases. While some of the referendum initiatives landing in the Constitutional Court via objections against the decision of the National Election Commission do involve political 'hot potatoes' (such as the ones mentioned above), which also put the Constitutional Court in a fragile position, many of the questions are simply a waste of the Constitutional Court's time – and we are talking about more than 100 such objections on the Constitutional Court's docket by now.

Some of the questions are clearly rhetorical, and others appear to be plays on words as well. One proposed question was of this form: "Do you agreed with the finding that MPs are for us, and not that we are for the MPs?"⁶³ Consider also the initiative for the free distribution of beer, which the Constitutional Court found to be in violation of the Europe Agreement.⁶⁴ Or another initiative seeking to introduce a 'siesta', which was ultimately rejected as ambiguous.⁶⁵ What is clear from an overview of this large body of decisions is that, due to the referendum cases, the Constitutional Court has turned into a complaint forum for the people to a previously unseen extent. This is quite an achievement in Hungary, where the Constitutional Court is accessible to 'anyone' via *actio popularis*.⁶⁶ What distinguishes the new wave of cases from anything seen before is that — unlike with petitions coming before it through *actio popularis* before — in the referendum cases the Constitutional Court has to decide on each objection and provide a statutory remedy in each case.⁶⁷

Note, however, that not all of the initiatives are so playful. Among the referendum initiatives the Constitutional Court has had to decide upon is one raising the issue of the acceptability of the question "Do you agree with Parliament passing an act to legalise same-sex marriage?"⁶⁸ The National Election Commission rejected the question as an attempt at an indirect constitutional amendment. The Constitutional Court upheld the decision, making reference to its previous decision in 1995.⁶⁹ In the latter case, the Constitutional Court had said that, while marriage under the Hungarian Constitution was to be interpreted with reference to the traditional conception of 'union between man and woman', the Constitution leaves room for granting legal protection to alternative forms of private living arrangements. The main issue in the 1995 decision was the level of constitutional protection provided for *de facto* life-partnerships, irrespective of the sexual orientation of the partners. The Constitutional Court's decision prompted a minor amendment of the Civil Code and at the time was considered rather progressive.

In the recent referendum decision, the Constitutional Court simply repeated its words concerning the traditional conception of marriage as written in 1995. Nonetheless, without a reminder of the context of the 1995 decision and also considering the fact that same-sex couples continue not to have access to any legal recognition apart from the old-fashioned *de facto* life-partnership in the Civil Code, voices claiming that the Constitution or the Constitutional Court prohibited same-sex marriage are becoming stronger and more alarming. On a smaller scale, distorted references to constitutional jurisprudence impair any serious effort to introduce even such changes in the legal system as are less revolutionary than a (rather unlikely) constitutional amendment recognising same-sex marriage. On a larger scale, this decision indicates, in a national setting where the docket of the constitutional court is full already, how easy it is to place a major rights issue before the justices in a manner such that it does not merit proper consideration. In the current Hungarian setting, it seems that sending a referendum initiative by post is the best means of getting a hard constitutional question resolved in a short time.

⁶³ 1118/H/2007, AB ruling of 6 November 2007. The question was rejected by the National Election Commission because it raised an issue that is not within Parliament's competence to decide. The Constitutional Court rejected the objection for formal reasons because it did not contain any substantive legal arguments.

⁶⁴ 26/2007 (IV. 25) AB decision.

⁶⁵ 976/H/2007 AB ruling of 30 October 2007.

⁶⁶ See articles 1 (b) and 21 (2) of Act No. 32 of 1989 on the Constitutional Court of the Republic of Hungary, as available in English via <http://mkab.hu/en/enpage5.htm>.

⁶⁷ See Article 130 (3) of Act No. 100 of 1997, on elections.

⁶⁸ 966/H2007 AB ruling of 15 October 2007.

⁶⁹ 14/1995 (III. 13) AB decision.

5. Conclusions: Unexplored directions, lessons, and caveats

In opening the concluding section of this paper, it is appropriate to note that the above discussion does not in any way cover the entire spectrum of potential instances where constitutional courts decide on questions that are indeed 'political'. Without a comprehensive discussion of such cases, I wish to draw attention to a few themes that are worthy of consideration. Firstly, in discussions about constitutional review and political questions the role of constitutional courts in shaping the identities of their polities is considerable. Constitutional courts reviewing bans on ethnic, religiously based, or other political parties belong here alongside decisions on lustration rules, as in those instances courts prevent certain groups in the polity from participating in public affairs in a manner of their choosing. The frontiers of the polity are also delineated in cases concerning the rights of less popular groups, such as homosexuals, persons with disabilities, or the homeless. While these examples might be obvious, it is crucial to point out that some of the decisions marking the characteristics of belonging are rendered in less charged cases, such as in decisions on religious instruction or days of rest (Sunday laws), or on entitlement to old-age or disability pensions, or to health care benefits.

In such cases, issues typically come before constitutional courts in the form of complaints about the infringement of constitutional rights and not as separation-of-powers cases. While along the lines of reasoning followed by Justice Brennan in *Baker v. Carr*, these cases should be less problematic at first sight, as they are decided on rights or equal protection grounds. And rights cases or discrimination issues are exactly the matters that courts performing constitutional review are equipped to handle. Note, however, that in many such cases the judges make such discretionary decisions and rely on such value preferences as are difficult to locate in any constitutional prescription, let alone find in the black letter of the constitution. Often such cases are all the more interesting because — as typically happens in rights cases — private individuals have a great role in agenda-setting and timing.

Another factor that can make any constitutional decision highly political and that still needs to be mentioned is money — i.e., the financial consequences of the constitutional court's decision. Pension, health care, or welfare reform is not a political issue merely because it is a difficult decision to take away long-enjoyed benefits from potential voters. As post-Communist constitutional provisions say very little about the type of institutional setting in which social-welfare rights have to be realised, these constitutional rules do not offer judicially manageable standards for their enforcement. Any kind of intervention by the court will cost money, and a constitutional court is unlikely to be in a position from which it can assess the consequences of its decision. Costly constitutional courts decisions, in addition to being political because the court takes on a redistributive task entrusted to the other branches, are also likely to cause tension between the branches. After all, non-elected constitutional court judges do not have to face elections by voters who are also taxpayers.

The list of relevant issues and interesting cases worthy of further attention is constantly growing. When looking at political questions before post-Communist constitutional courts, one, of course, finds subtle webs of interaction between petitioners, political players, and the courts. It is apparent that in the course of these almost two decades constitutional courts have become competent participants in a public decision-making and discourse space where the affairs of their polities are conducted in an increasingly constitutionalised or judicialised fashion. Constitutional courts are routinely engaged in any matter of public concern that is or should be on the parliamentary or governmental agenda. Rules on jurisdiction and standing make the courts fairly accessible. The nature and extent of the court's participation depend on the willingness and temper of the constitutional court in question. In exchange, political players are increasingly well equipped to narrate their agenda items in light of a potentially impending hearing on the issue before the constitutional court.

While there are numerous examples of constitutional courts becoming ordinary participants in a decision-making process addressing matters of public concern, most constitutional courts in the region have experienced direct challenges to their institutional integrity from the political branches. Delays with judicial appointments maiming the courts for extended periods are not unprecedented. Hungary and the Czech Republic had their turn here in the mid-1990s while the Slovak Constitutional Court had its experience more recently. After the most recent lustration decision, the Polish Constitutional Tribunal also found itself in the middle where at issue was a public brainstorming campaign concerning whether reforming the manner of appointments to the Tribunal was necessary.⁷⁰

Over the years, post-Communist constitutional courts have experimented with many techniques to deliver their points to the political branches. Instead of striking down legislation, courts are inserting conditions of constitution-conformant interpretation in their rulings and many courts have been seen to give some time for parliaments to enact missing legal rules. Although these solutions do not always advance the goals of rights protection, they might have long-term political advantages. While open conflicts between constitutional courts

⁷⁰ As reported in English in Polish News Bulletin, 17 May 2007.

and the other branches are unavoidable, these result not from the fact that constitutional courts have touched political questions but from their having handled them improperly and without due care.

Post-Communist constitutional courts seem to be learning the most fundamental lessons and tricks of their trade — even if sometimes the lesson comes the hard way. The cases discussed in this paper demonstrate that although thoughtful constitution and legislative drafters are an important asset and certain scenarios are so unlikely to be realised that they are most difficult to prevent, judicial self-restraint and prudence is a property to be sought after in any constitutional case. At this point, one final caveat is in order: it is a problem, of course, if constitutional courts get tangled up in daily politics beyond the scope of those decisions that they are authorised to properly take within their respective jurisdictions. It is a problem not simply because they might clash with the political branches, but — more importantly — because such clashes could well undermine the powers and legitimacy of the courts in cases where the protection of constitutional rights and liberties is at stake.



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Judicial Activism in Constitutional Review Decisions of the Supreme Court of Estonia^{*1}

The choice of the subject of the international conference organised by the Supreme Court of the Republic of Estonia and dedicated to the 15th anniversary of the Constitution of the Republic of Estonia — Political Questions in Constitutional Review: What is the Dividing Line between Interference in Policy-Making and Routine Constitutional Review? — implies that the highest court in Estonia seems to feel somewhat uncomfortable about its task of constitutional review.² The Estonian Supreme Court is by no means exceptional in this regard. All over the world, constitutional courts or their counterparts entrusted with the review of the constitutionality of the decisions adopted by a democratically legitimised legislator must test the bases and the limits of their existence from time to time.

In the course of such fight for the right of existence of constitutional courts (and sometimes against it), a number of scientific works have been born. These can be broadly divided into three categories. Some researchers are dedicated, in line with their understanding of the substance and limits of the modern concept of the separation of powers, to advocating or criticising the interference of the constitutional courts in policy-making. A second school attempts to rank the constitutional courts of the world by the degree of their interference in policy-making. The third, predominantly social science approach, declares the search for the proper boundaries of the power of the courts and the relevant classification utterly useless.³ Regardless of the approach taken, the discussion upon the appropriate limits of constitutional adjudication employs the notion of judicial activism, which has become one of the key concepts of modern constitutional law.⁴ This article enters the discussion mentioned above, trying to answer the question about the degree of activism of the constitutional court closest to the author — the Supreme Court of Estonia (hereinafter the Supreme Court).

¹ The author would like to thank Dr. Taavi Annus for his comments on the text of the presentation on which this paper is based.

² There is no separate constitutional court in Estonia. Instead, the Supreme Court has been vested with the powers of constitutional review. The Supreme Court adjudicates constitutional review cases either in the sessions of the Constitutional Review Chamber, consisting of the members of the administrative law, criminal, and civil chambers or sitting *en banc*. For further information, see K. Merusk. The Republic of Estonia. – C. Kortmann et al. (eds.). *Constitutional Law of 10 Member States: The 2004 Enlargement*. Deventer: Kluwer 2006, pp. III-59–III-60. Hereinafter, unless indicated otherwise, the Supreme Court is considered in the context of performance of its duty of constitutional review.

³ For the latter, see further the article by Taavi Annus in this publication, pp. 22–30.

⁴ The author regards judicial activism and interference in policy-making as parallel notions: each time a court goes beyond the framework of ‘ordinary’ constitutional review, it involves in interference in policy-making — i.e., judicial activism. The legal literature still speaks mostly of judicial activism, which is why the author as well opts for the latter term.

Since there are practically as many definitions of judicial activism as there are commentators⁵, everyone taking up this task — to say something rational about the degree of judicial activism of a particular constitutional court — must first of all state what he or she means by judicial activism. In the light of the above, this paper aims to serve two goals. The first is to present different approaches to judicial activism and assess them from the perspective of their explanatory power. Secondly, the paper sets out to apply the explanations of judicial activism thus analysed for assessing the degree of judicial activism in the constitutional review decisions of the Supreme Court.

In presenting the different approaches to judicial activism, I have taken as the basis for the discussion the fact that the majority of the definitions of judicial activism are centred around three relatively distinguishable axes. I have referred to the dimensions thus created as methodological, procedural, and substantial activism. Further to that, I will introduce the classical concept of judicial activism standing outside this proposed division in three.

1. Judicial activism as conflict with classical policymakers — an approach past its prime

Although defining judicial activism as a mere conflict with other policymakers is not too prevalent in modern scholarly discussion upon constitutional courts, it should be mentioned in the interests of completeness. This is particularly the case because the only international study thus far on the activism of the Estonian Supreme Court, although proceeding from the perspective of political science, makes use of this approach.

Namely, Shannon Ishiyama Smithey and John Ishiyama published in 2002 their article ‘Judicial Activism in Post-Communist Politics’⁶ in *Law and Society Review*, in which they examined how the structure of the society influenced the occurrence of judicial activism in post-Communist countries. The percentage of the judicial activism of each country was calculated by dividing the number of cases where the court nullified a law or policy by the total number of nullification opportunities that the court had.⁷ By doing so, the authors proceeded from the most classical definition of judicial activism, according to which a constitutional court is considered activist each time its decisions come into conflict with those of any other political policymakers.⁸ Such an approach, directly rooted in the theory of democracy, considers illegitimate any change in public policy that does not stem from democratically elected legislature.⁹

According to this approach, whichever constitutional court is unavoidably activist each time it uses its powers to strike down laws assigned to it for review (in Estonia, on the basis of the Constitution itself). Such an approach is contradicted by the contemporary understanding of constitutional democracy with the human rights concept inherent in it as well as of its control mechanism, constitutional review.¹⁰

In the Estonian context, it is obligatory to refer also to the nature of the first constitutional decisions of the Supreme Court. For example, in the 1990s, the Supreme Court invalidated the provision that enabled security police officers to use operational and technical special measures without any legal basis if given the written

⁵ B. C. Canon. A Framework for the Analysis of Judicial Activism. – S. C. Halpern, C. M. Lamb (eds.). *Supreme Court Activism and Restraint*. Lexington, MA: Lexington Press 1982, p. 385. According to one of the most renowned constitutional law experts of the United States of America, Harvard University professor Mark Tushnet, the notion of judicial activism is in itself quite unhelpful, as it refers to too many things. See M. V. Tushnet. Comment: The Role of the Supreme Court: Judicial Activism or Self-Restraint? – *Maryland Law Review* 1987 (47), pp. 147–154, p. 147. Judicial activism has been considered to mean, for example, invalidation of legislation, abandonment of neutral principles of decision-making, decision on substantially political issues, resolution of questions not raised by the parties, use of teleological arguments, etc.

⁶ See S. I. Smithey, J. Ishiyama. *Judicial Activism in Post-Communist Politics*. – *Law and Society Review* 2002 (36) 4, pp. 719–742.

⁷ In “order” of judicial activism, calculated in this manner, Estonia came second after Latvia with 79% of activist decisions as a proportion of all constitutional review cases. Applying a similar metric today, the proportion of activist decisions appears to have dropped to 74% of the total number of cases.

⁸ See, e.g., G. Schubert. *Judicial Policy Making: The Political Role of the Courts*, revised ed. Glenview 1974, p. 213. Cited in: J. B. Board. *Judicial Activism in Sweden*. – K. M. Holland (ed.). *Judicial Activism in Comparative Perspective*. London: Macmillan 1991, p. 175.

⁹ The right of judges who have not been elected democratically to nullify the decisions of democratically legitimised bodies is classically described as the ‘countermajoritarian difficulty’, illuminated by Alexander Bickel in 1961: “[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.” – A. M. Bickel. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. 2nd ed. London & New Haven, CN: Yale University Press 1986, p. 17.

¹⁰ The classical argument to justify constitutional review is that, instead of being undemocratic, the constitutional limits to the political process promote democracy, as they were adopted by people in the ‘era of heightened democratic awareness’ and, as such, preside over the decisions made by ‘temporary majorities’. When viewed from this angle, the power of review signifies not the supremacy of the will of the judiciary over the legislator but the supremacy of the fundamental will of the people over both of them. See, e.g., C. Wolfe. *Judicial Activism: Bulwark of Freedom or Precarious Security?* Pacific Grove, CA: Brooks/Cole Publishing Company 1991, p. 14.

consent of the Justice of the Supreme Court appointed by the Chief Justice of the Supreme Court.^{*11} In such cases and similar ones that have now become virtually extinct among the constitutional decisions of the Supreme Court, the Supreme Court rather played the role of a reminder of basic principles of law that were not familiar in the previous legal formation, and it does not appear to be justified to speak about particular judicial activism.

Having said this, one has to move on to approaches that take more account of the modern context when substantiating judicial activism.

2. Methodological activism — what counts as an argument?

One of the most attractive approaches, probably because of its simplicity, to judicial activism analyses activism through the lens of the methods and arguments used in constitutional interpretation, relying on the assumption that it is possible to distinguish between legal and non-legal arguments, and the premise that some arguments and interpretive theories are more suitable than others for avoiding interference in policy-making.

In this vein, the notion of judicial activism has been used in many comments to signify judicial argumentation that does not entirely rely on the text of the Constitution^{*12}, or which diverges from the intention of the authors of the Constitution, i.e., the will of the ‘fathers of the Constitution’.^{*13} Reliance on allegedly non-legal arguments, such as value arguments, consequential reasoning, and references to history and traditions^{*14}, or on ambiguous and abstract principles that require a value-oriented assessment (such as human dignity, equality, and a state based on the rule of law) is also considered activist under this approach.^{*15}

As Keenan D. Kmiec has critically noted, “Although judicial activism is often equated with the failure to use ‘proper’ interpretive tools, divergences of opinion over what constitutes an appropriate interpretive tool make it difficult to distinguish principled but unorthodox methodologies from ‘activist’ interpretation”.^{*16} In addition to this, it is impossible to declare the orthodox interpretation methodologies, such as loyalty to the original intentions of the authors of the Constitution — commonly referred to as “originalism” — apolitical.^{*17} Moreover, those who study the US Supreme Court have described the attempt to implement the will of the ‘fathers of the Constitution’ as one of the manifestations of conservative judicial activism.^{*18} By the same token, teleological interpretation, which is often described as a stronghold of judicial activism for not meeting the requirements of objectivity and mechanical applicability^{*19}, and contemporaneous interpretation (i.e., interpretation taking into account the principles and values prevalent in a given society at a given time) are becoming more and more established also in the Romano-Germanic legal tradition, which has traditionally been considered positivist.^{*20}

¹¹ The decision of the Constitutional Review Chamber of the Supreme Court of 12 January 1994 in matter III-4/1-1/94. Available in English at <http://www.nc.ee/?id=486> (28.11.2007).

¹² D. Smilov. *The Character and Legitimacy of Constitutional Review: Eastern European Perspectives*. A Review of: Wojciech Sadurski (ed.). *Constitutional Justice, East, and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague, London, & New York: Kluwer Law International 2003, 450 pp.). R. Prochazka. *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe*. (Budapest & New York: Central European University Press 2002, 358 pp.) – *International Journal of Constitutional Law* 2004 (2) 1, pp. 177–194, p. 184.

¹³ See, e.g., M. J. Perry. *Judicial Activism*. – *Harvard Journal of Law and Public Policy* 1984 (7), pp. 69–75, p. 69.

¹⁴ R. Uitz. *Constitutional Activism and Deference through Judicial Reasoning: Confirming an Indeterminacy Thesis*. – *Juridica International* 2002 (7), pp. 65–75, p. 66.

¹⁵ See D. Smilov (Note 12), p. 185.

¹⁶ K. D. Kmiec. *The Origin and Current Meanings of ‘Judicial Activism’*. – *California Law Review* 2004 (92), pp. 1441–1474, pp. 1473–1474.

¹⁷ For an excellent overview of the originalism debates, see M. J. Gerhardt et al. *Constitutional Theory: Arguments and Perspectives*. 2nd ed. New York: Lexis Publishing 2000, pp. 119–131.

¹⁸ As Wildhaber & Diggelmann wittily point out, those who were entitled to be counted as ‘fathers of the Constitution’ were exclusively white property-owners, a category constituting some five per cent of the total population. There were no ‘mothers of the Constitution’, no blacks, Indians, Jews, Hispanics, or Asian-Americans. According to these authors, it is difficult to see why one would consider the will of selected white-property owners living in the 18th century to be binding in the name of democracy in the 21st century. See further, L. Wildhaber, O. Diggelmann. *The European Convention on Human Rights and the Protection of the Private Sphere: Recent Developments and Trends*, amended text of the public lecture held in the Office of the Chancellor of Justice of Estonia on 6 July 2006 (in the author’s possession), p. 4.

¹⁹ See, e.g., D. P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 2nd ed. Durham & London: Duke University Press 1997, p. 43.

²⁰ For addressing of this point in the German context, see, e.g., J. Sanden. *Methods of Interpreting the Constitution: Estonia’s Way in an Increasingly Integrated Europe*. – *Juridica International* 2003 (8), pp. 128–139, pp. 131–134. Sanden cites Beatty thus: “Not only does the text

The use of abstract principles of law and value arguments in reasoning as a manifestation of judicial activism has also been severely criticised. Firstly, it is not possible to claim that the ‘ambiguity’ of the principle of legal certainty outweighs the ‘ambiguity’ of a provision of the Constitution prescribing a fundamental right. As Christopher Wolfe has elegantly pointed out, “Ambiguity is the *raison d’être* of modern judicial review”.^{*21} Secondly, one could argue the shift from the traditional perception of law as a set of rules to the understanding of law as a set of values and principles.^{*22} The importance of constitutional values and principles is particularly evident in Estonian legal doctrine, where the second sentence of § 152 of the Constitution provides thus: “The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and **spirit** of the Constitution” (emphasis added).

However, there is a category of arguments, in the ‘non-legalness’ of which there seems to exist a more uniform agreement. This pertains to arguments from substantive reasons^{*23} — that is, the most abstract level of objective-teleological interpretation, which takes account of the values prevalent in society, relying, inter alia, on social science findings. For instance, even in Germany, where the constitutional court is relatively well known for the use of novel interpretation methods, the question of whether interpretation of the constitution should consider not only the legal interpretation principles but also political and economic evaluations, is partly answered in the negative.^{*24} There are no cases in the practice of the Supreme Court in which the court’s reasoning has explicitly relied on the values prevailing in society, and where social science studies have been used to substantiate the court’s position.^{*25}

In a situation in which the entire problem of constitutional law is considered to lie in the fact that nobody knows what counts as an argument^{*26}, and where the arguments used or methods applied are not reflected at least in full in the decision, substantiating judicial activism through them does not seem very helpful.

There is another classification proposed in the debate over the proper limits of the constitutional adjudication that may provisionally be placed under methodological activism. Namely, those activities of the constitutional court in which the court does not confine itself to the invalidation of a law or a part thereof (negative policy-making) but imposes detailed rules for restoring a situation that is in conformity with the Constitution on the legislator (positive policy-making), instead, have also been considered to be ‘political’ in nature.^{*27} The more detailed the precepts are, the more reason we have to speak of judicial activism. The so-called *numerus clausus* cases^{*28} serve as notorious examples of positive policy-making of the German Federal Constitutional Court, while in the United States, the determining of the temperature of showers in prisons or the inmate release rates by the courts has been referred to.^{*29} No similar example can be brought from the practice of the Supreme Court of Estonia.

of the Constitution figure less prominently in the judgments of the German Court, its method of interpretation is quite different as well. More emphasis is put on the words and structure of the document and especially on the purposes and values they express. Rather than looking to history and case law to give meaning to the text, the German Court proceeds in a more purposeful and logical way.” *Ibid.*, p. 134.

²¹ As cited in Note 10 *supra*, C. Wolfe. *Judicial Activism: Bulwark of Freedom or Precarious Security?* Pacific Grove, CA: Brooks/Cole Publishing Company 1991, p. 29.

²² M. L. F. Esteban. *The Rule of Law in the European Constitution*. The Hague 1999, p. 38. Cited in: M. Linntam. *Building a Just Society: The Role of the Constitutional Judge — Idea of Justice in the Contemporary Value Jurisprudence and the Process of Argumentation*. – *Juridica International* 2002 (7), pp. 49–57, p. 49.

²³ When operating with practical reasons, the moral, social, economic, and political values prevailing in the given society are taken as the basis. To identify such values, social surveys can be used. The governing idea in using practical reasons consists in the understanding that if there is some goal considered to be of value or some conception of rightness that is considered fundamentally important to the given legal order, then the provision ought to be interpreted in the manner that upholds this value or conception of rightness. See D. N. MacCormick, R. S. Summers. *Interpretation and Justification*. – D. N. MacCormick, R. S. Summers (eds.). *Interpreting Statutes: A Comparative Study*. Dartmouth: Aldershot 1991, pp. 514–515.

²⁴ J. Sanden (Note 20), p. 134.

²⁵ Provisionally. *Compulsory portion* can be regarded as a case the adjudication of which proceeds from the values prevailing in society. The Supreme Court *en banc* adjudicated the matter, giving preference, to use the words of Justice Ants Kull, to ‘postmodernist assessments of life values related to family law and law of succession, based on personal freedom of decision and unlimited liberty, which is avanguardist in Continental Europe’. See Justice Ants Kull’s dissenting opinion in SCeb 22.02.2005, 3-2-1-73-04, available at <http://www.riigikohus.ee/?id=11&tekst=222478593> (in Estonian) (28.11.2007). Attribution of such application of practical reasons to the Supreme Court in this case is still relatively indirect; that is why I will analyse this case in greater detail under the category of substantial activism. See below, section 4.2.

²⁶ M. J. Gerhardt et al. (Note 17), p. 1.

²⁷ See, e.g., B. C. Canon (Note 5), p. 400.

²⁸ In order to assess the compliance of the admission criteria of institutions of higher education with the constitutional right to choose an occupation, the Federal Constitutional Court of Germany, inter alia, created a formula to assess the capacity of each ‘teaching unit’, which included variables such as the number of full-time teachers, demand for the course, the volume of classrooms, and teaching equipment. For greater detail, see R. Merritt. *The Courts, the Universities and the Right of Admission in the Federal Republic of Germany*. *Minerva* 1979 (17) 1, Spring, pp. 1–32 (pages 20–21 in particular).

²⁹ See, e.g., M. Shapiro. *The United States*. – C. N. Tate, T. Vallinder (eds.). *The Global Expansion of Judicial Power*. New York: NY University Press 1995, p. 50.

3. Procedural activism — choosing form over content

The procedural approaches to judicial activism identify judicial activism according to procedural criteria without considering the substance of the matter. In this approach, judicial activism is defined as disregard for procedural limits or the interpretation of theirs that allows for more extensive intervention of the judiciary. The main procedural limits that are tackled within the framework of that dimension are the doctrine of standing, the case and controversy doctrine, and the doctrine of political question.

The political question doctrine serves particularly in the United States as an important lever to try to avoid intervention in politics by the US Supreme Court. The doctrine that David Beatty calls “by far the bluntest device that judges have developed [...] to mark off broad areas of law which are declared to be immune to an attack on the basis that they violate people’s constitutional rights”, defined by the US Supreme Court in *Baker v. Carr*³⁰ in 1962, holds in essence that courts should abstain from resolving constitutional issues that are better left to other departments of government, mainly the national political branches. As one of the justiciability doctrines present in the US constitutional jurisprudence, it has, over the years, excluded from the scope of judicial review questions concerning foreign policy, national security, and the operational structures of government.

Estonian jurisprudence does not recognise the political question doctrine. Estonian procedural laws do not allow for rejecting an appeal in the stage of establishing its admissibility with a reference to non-justiciability, either. It seems that the idea that none of the areas of state activity is exempt from constitutional review as an obligatory requisite of a state based on the rule of law seems to have been taken over from the German legal doctrine.³¹ This assumption also appears to apply to such areas as foreign and security policy, which have classically been regarded as ‘political’.³²

However, in the Estonian context, we can speak about the doctrine of standing, which as a general principle requires that the individual’s right of recourse to the courts be established in the legal system of the relevant country in order for the judicial control mechanism to be initiated, and of the case and controversy doctrine, according to which judges must settle only actual disputes, and refrain from settling hypothetical disputes, to objectively establish the constitutionality of a legal provision. In countries such as Estonia, where abstract constitutional review is recognised, the case and controversy doctrine is not fully applicable.³³ Yet one could consider as relevant also in the Estonian context the facet of the case and controversy doctrine that prohibits the settlement of issues not raised by the participants in the proceedings at the initiative of the courts. Namely, the Constitutional Review Proceedings Act prescribes that the matter before the court shall be settled only to the extent requested³⁴, and that only the provision relevant to the settlement of the case shall be reviewed.³⁵

Thus, the constitutional court may adjudicate cases brought to it by persons having the right of recourse in the case, and do so to the extent requested from it. If the court adjudicates the request of a person who did not have the right to bring the matter before it, settles more or broader issues than those raised in the request, or verifies the constitutionality of irrelevant provisions, its action functions as procedural judicial activism.

The Supreme Court has unambiguously ignored the procedural limits in at least two instances. In *Brusilov*³⁶, a person who considered himself to have developed the right to benefit from a more lenient penal code in

³⁰ 369 U.S. 186 (1962).

³¹ However, many scholars argue that, although it is often claimed that German constitutional law contains no political question doctrine, which would withdraw certain areas of inquiry from scrutiny of the German Constitutional Court, as a practical matter, the Constitutional Court has been extremely cautious in the exercise of any actual power relating to national security, by adopting a form of political question doctrine in practice. See, for example, P. E. Quint. ‘The most extraordinarily powerful court of law the world has ever known’? – Judicial Review in the United States and Germany. *Maryland Law Review* 2006 (65), pp 152–170, p. 166.

³² Yet it has not been possible to verify that the assumption holds in practice. In its 15 years of jurisprudence, the Supreme Court has not had to settle disputes with a significant foreign or security policy dimension. Thus, it is difficult to predict what the course of action of the court might be if a problem belonging to the domain of the classical political question doctrine were to appear.

³³ The substantive nature of the abstract review of legal acts is to identify potential cases of unconstitutionality before they become a reality. The *ex ante* review of the constitutionality of legal acts that have not entered into force yet by the President of the Republic and the *ex post* review of legislation of general application by the Chancellor of Justice of the Republic of Estonia as prescribed in the Constitutional Review Proceedings Act do not preclude but facilitate the objective establishment of the constitutionality of a legal provision.

³⁴ Subsection 4 (1) of the Constitutional Review Proceedings Act stipulates: “The Supreme Court shall verify the conformity of legislation of general application, the refusal to issue an instrument of legislation of general application or the conformity of an international agreement with the Constitution on the basis of a reasoned request, court judgment or ruling.”

³⁵ Subsection 14 (2) of the Constitutional Review Proceedings Act stipulates: “In the adjudication of the matter on the basis of a court judgment or court ruling the Supreme Court may repeal or declare to be in conflict with the Constitution legislation of general application, an international agreement or a provision thereof or the refusal to issue an instrument of legislation of general application which is relevant to the adjudication of the matter.”

³⁶ The decision of the Supreme Court *en banc* of 17 March 2003 in matter 3-1-3-10-02 (*Brusilov*). Available in English at <http://www.nc.ee/?id=419> (28.11.2007).

relation to the terms of punishment reviewed during the penal law reform submitted a petition to the Supreme Court. Although according to the Code of Court Procedure Mr. Brusilov lacked procedural basis for a request to the Supreme Court^{*37}, the Supreme Court accepted the request on the grounds that Mr. Brusilov did not have access to effective procedure to protect his fundamental rights. The Supreme Court acted in a relatively similar manner in *Veeber*^{*38}, in which it recognised the right of recourse to the Supreme Court belonging to an individual with regard to whom a judgment of the European Court of Human Rights had entered into force in a situation in which the national procedural law did not allow for reopening his criminal matter on that basis. Insofar as these decisions admitted in principle an individual constitutional complaint not recognised by the Constitutional Review Proceedings Act, the relevant conduct of the Supreme Court may be considered highly activist under a procedure-based criterion.

At the same time, the Supreme Court has in several instances used the argument of procedural limits to avoid answering to sensitive questions. For example, in 2004, the Supreme Court dismissed the request of an administrative court to declare invalid the provision of the Health Insurance Act that imposed a transition period in connection with the expiry of the insurance cover of persons dependent of an insured spouse. The Supreme Court concluded that the contested provision prescribing the transition period was irrelevant, as its repeal would not restore the right of the person concerned to insurance cover, but rather shorten the coverage time by the transition period, which would deteriorate the complainant's situation.^{*39} The Supreme Court noted that, although the procedural limits did not preclude the broadening of the object of the proceedings, arising from the fact that the provisions were inseparably interrelated, a situation could not be allowed in which the Supreme Court declares to be constitutional a provision whose constitutionality was brought before the court for review but then starts searching for an unconstitutional provision on its own initiative.^{*40} In this, the Supreme Court departed from a principle that it earlier had postulated itself, according to which it was the duty of the court to establish the actual will of the complainant.^{*41}

Hence, the question of the constitutionality of the exclusion of a particular group of persons from the insurance cover did not receive an opinion from the Supreme Court, regardless of the fact that the actual object of the administrative action was the contestation of the expiry of the insurance cover that had extended to the person until that time, and a request for the recognition of the continuing insurance cover. Appealing to procedural limits, the Supreme Court in fact refrained from answering the question of whether the changes in the health insurance system were in compliance with everyone's constitutional right to health protection.

4. Substantial activism — out of the frying pan into the fire?

This approach, supported by many contemporary scholars, calls for the analysis of the content of the decision in question rather than drawing of conclusions from the interpretive methodology used or procedural limits transgressed, arguing that, in essence, there is greater justification for the courts' engagement in policy-making in some areas than in others. According to this approach, judicial activism or substantive policy-making involves the interference by the court in directing social processes in areas where it lacks the so-to-say privilege of policy-making.^{*42} Below, I will discuss the areas to which this privilege applies ('routine constitutional

³⁷ The Estonian legal order does not provide for the right of individuals to have direct recourse to the Supreme Court for the assessment of the constitutionality of a legal act or an action. This does not mean, however, that an individual has no right to verify the constitutionality of the legislation of general application applied to his or her case. Administrative courts are obliged to verify that the administrative act that violates the rights of an individual conforms to the law and the Constitution. If a court, regardless of its instance, establishes that the legislation of general application to be applied to the case is in conflict with the Constitution, it will not apply it, declare it unconstitutional, and forward it to the Supreme Court to be declared invalid.

³⁸ SCeb 6.01.2004, 3-1-3-13-03 (*Veeber*). Available in English at <http://www.nc.ee/?id=410> (28.11.2007).

³⁹ CRCSCd 31.05.2004, 3-4-1-7-04 (*Toom*). Available in English at <http://www.nc.ee/?id=405> (28.11.2007).

⁴⁰ *Ibid.*, p. 23.

⁴¹ The Administrative Law Chamber of the Supreme Court has established that the duty of the administrative court to establish the actual will of the complainant upon hearing the matter derives from the second sentence of § 19 (7) of the Code of Administrative Procedure, according to which an administrative court shall not be bound by the wording of an action. See, e.g., ALCSCd 5.02.2004, 3-3-1-3-04, p. 12. There is no reason to claim that a similar duty, unless carried out by a lower court applying to the Supreme Court for the review of constitutionality, does not extend also to the judicial panel adjudicating the constitutional dispute.

⁴² In the broad sense, the constitutional court always engages in policy-making. According to the seminal definition offered by David Easton, politics is the authoritative allocation of values. See D. Easton. *An Approach to the Analysis of Political Systems*. – *World Politics* 1957 (9), pp. 383–400, p. 383. Cited in: A. Stone Sweet. *The Politics of Constitutional Review in France and Europe*. – *International Journal of Constitutional Law* 2007 (5), pp. 69–92, Note 12. Given the authoritative status and the normative nature in the sense of choosing between competing values of any judgement a constitutional court renders, all constitutional courts are involved in politics already by definition. For discussion in greater detail, see R. Hodder-Williams. *Six Notions of 'Political' and the United States Supreme Court*. – *British Journal of Political Science* 1992 (22) 1, pp. 1–20, pp. 2–3. Unauthorised interference in policy-making or policy-making in stricto sensu (i.e., judicial activism) is what is meant here.

review'), and will touch upon the category of activities that are fairly universally considered to be 'interference in policy-making' in the sense of the topic of the conference having given rise to this publication.

4.1. Preservation of the democratic process versus substantive policy-making

Firstly, a distinction is made between the preservation of democracy and substantive policy-making within the framework of this dimension. According to Bradley Canon, decisions related to the integrity of the democratic political processes, such as those involving freedom of expression, conduct of elections, and the nature of representation, are not to be treated as activist, as they do not directly affect substantive politics, while decisions falling outside the scope of that 'privilege' should be considered making substantive policy.^{*43}

This special privilege of the courts to strike down laws concerning political processes without fear of being accused of overstepping the boundaries of the judicial power is inherent in the prerequisite of democracy. As Bojan Bugarcic notes, this exception to traditional judicial statecraft emerges from the democratic ideal of popular self-government, well reflected in John Hart Ely's representation-reinforcement theory of judicial review, according to which judicial review should primarily focus on strengthening the process of political representation, clearing obstacles to political change, and facilitating minority representation.^{*44} Drawing on that, any measure having impact on the political processes should be protected to a greater extent by not having been left to be decided by the parliamentary majority, often said to be apt to constrain the rights of minorities.

The Supreme Court has, by overruling the choices made by the legislator, repeatedly contributed to preservation of democracy in the above sense. Paradoxically, the first decision of this kind has received severe criticism in the Estonian press as one of the most political decisions in the history of the Supreme Court. This case merits discussion here.

In 2002, the Chancellor of Justice requested that the Supreme Court declare unconstitutional the provision of the Local Government Council Election Act that prohibited the participation of the citizen election coalitions in the election of the representative body of the local government. The Supreme Court granted the petition of the Chancellor of Justice, reasoning that the restrictions of the subjective right to vote must not prevent persons and groups who have real supporters from running as candidates, as thus the representative body would not be capable of becoming sufficiently representative.^{*45} In 2005, the Estonian parliament (the *Riigikogu*) prohibited the local election coalitions again and the Chancellor of Justice turned to the Supreme Court for the second time. The Supreme Court declared the provision prohibiting election coalitions partly invalid, due to conflict with the right to stand as a candidate and the principle of local autonomy.^{*46} Proceeding from the above-described privilege of policy-making, these two decisions of the Supreme Court were clearly aimed at the greater representation of the local representative bodies and thus at the strengthening of (local) democracy, and cannot hence be classified as activist on the scale of substantial activism.

In this respect, one has to pay attention to another decision of the Supreme Court dating from 2005, where, appealing to the principle of democracy, the Supreme Court decided on an important issue in an area in which — in the author's opinion — it lacked the privilege of policy-making. In that matter, the President of the Republic^{*47} contested a provision that allowed for simultaneous membership of the *Riigikogu* and a local government council, on the grounds that such simultaneous membership of two representative bodies was in conflict with the principles of separation of powers, local government autonomy, and incompatibility of offices.^{*48} The Supreme Court granted the petition of the President of the Republic yet did not consider any of the grounds highlighted by the President of the Republic. The Supreme Court established instead that making amendments to the Election Code immediately before the elections was not in conformity with the principle of democracy. Such appeal to the principle of democracy and the prohibition of rapid changes derived therefrom in a situation in which the President of the Republic had instead pointed to a conflict with the principles that are diversely furnished in the practice of the European constitutional courts, such as separation of powers and local government autonomy, appears to the author to be cutting the Gordian knot to the disadvantage of the

⁴³ See B. C. Canon (Note 5), p. 399.

⁴⁴ See B. Bugarcic. Courts as Policy-Makers: Lessons from Transition. – Harvard International Law Journal 2001 (42), p. 274.

⁴⁵ CRCSCd 15.07.2002, 3-4-1-7-02 (*Election coalitions I*). Available in English at <http://www.nc.ee/?id=428> (28.11.2007). Finally, the chamber established that the prohibition of the election coalitions was not justified in the "legal and social context" of the time and because of the short time remaining until the elections. According to the court, making changes to the Election Code immediately before the elections was not democratic.

⁴⁶ SCeb 19.04.2005, 3-4-1-1-05 (*Election coalitions II*). Available in English at <http://www.nc.ee/?id=391> (28.11.2007).

⁴⁷ The President of the Republic may refuse to proclaim an act adopted by the *Riigikogu*. Unless the *Riigikogu* amends said act, the President of the Republic may propose to the Supreme Court to declare the act unconstitutional. See § 107 of the Constitution.

⁴⁸ CRCSCd 14.10.2005, 3-4-1-11-05 (*Two chairs*). Available in English at <http://www.nc.ee/?id=563> (28.11.2007).

legislator in a situation in which the relation to the preservation of democracy is rather indirect, and hence an instance of judicial activism.

4.2. Universally accepted rights *versus* complex issues

In addition to the preservation of democracy, greater freedom of intervention for the courts has also been sought for activities protecting the universally recognised fundamental rights. According to this approach, the courts should afford greater protection to those principles that, according to universal consensus, deserve to be protected^{*49}, while decisions that regulate the non-political-process activities of groups, impinge upon people's careers, lifestyles, or moral or religious values, and decisions making economic policy can be regarded as highly activist.^{*50}

This far, the Supreme Court has not had to take a stand on highly sensitive issues, such as euthanasia, abortion, same-sex marriages, etc., in which the practice of democratic countries diverges. However, the decision of the Supreme Court *en banc* by which the institution of compulsory portion in the law of succession was furnished differently from the interpretation applied so far may be considered activist in this context. Namely, in 2005, the Supreme Court *en banc* established that the provision that provides for allocation of a compulsorily specified portion of the estate to the bequeather's descendants who are incapacitated for work had to be interpreted such that it excluded from among the persons entitled to succeed to the compulsory portion those old-age pensioners who were not in factual need of support for their livelihood.^{*51} The Supreme Court arrived at the conclusion, after considering contradictory values such as freedom of intestacy and the hereditary succession of the family, to give greater weight to the former. Although the Supreme Court left it to the legislator to further develop the institution of the compulsory portion, the amendment of the long-term application practice as a result of balancing such ideologically loaded principles may be considered to be substantive policy-making and thus a manifestation of judicial activism.

As the world practice shows that such universal consensus does not exist, particularly with regard to issues that are actually addressed in constitutional courts, and since it is impossible to preclude the existence of a broad but perhaps morally questionable consensus on certain sensitive issues, this criterion, as well as many of its predecessors, seems to be relatively unreliable for judgment on judicial activism. However, broad scholarly consensus does seem to exist as to the 'substantiveness' of a specific area of policy-making.

Namely, the activities of the courts in areas where they lack both the necessary means and adequate preparation for rendering a decision, are rather uniformly considered as substantial policy-making. Such areas have been, above all, claimed to include economic policy, where the impact of a decision is predominantly not linear^{*52}, and issues such as the appropriate size of local government units.^{*53} Cass Sunstein warns that, because of the lack of means for settling such complex issues, the courts may, in such areas, produce unfortunate systemic effects, with unanticipated negative consequences that are not visible to them at the time of decision.^{*54} Those studying constitutional courts of post-Communist countries, in particular, severely criticise judicial policy-making that concerns transition issues as special cases of complex issues — that is, issues such as privatisation of state enterprises, reform of social security systems, and return of unlawfully expropriated property.^{*55} In addition to complexity, the trickiness of reform decisions by the court is further exacerbated by the nature of the reform as something that by definition changes the status quo.^{*56}

The Supreme Court has not, over the years of its existence, engaged in economic policy-making or adopted positions on issues such as the appropriate size of local government units. The Supreme Court has, however, been involved in reform policy repeatedly. The conduct of the Supreme Court from the perspective of judicial activism as judged by the criteria presented in this section of the paper has not been uniform in that respect.

⁴⁹ For example, Bugaric argues that whenever there is universal consensus on, for instance, gender equality, the courts should not hesitate to vigorously protect the legal principles that underlie such rights. See B. Bugaric (Note 44), p. 287.

⁵⁰ B. C. Canon (Note 5), p. 399.

⁵¹ SCeb 22.02.2005, 3-2-1-73-04 (*Compulsory portion*). Available in English at <http://www.nc.ee/?id=394> (28.11.2007).

⁵² L. L. Fuller calls such issues polycentric. For details, see L. L. Fuller. *Forms and Limits of Adjudication*. – Harvard Law Review 1978 (92), pp. 353–409, pp. 394–395.

⁵³ See, e.g., B. Bugaric (Note 44), pp. 268–269.

⁵⁴ See C. Sunstein. *Legal Reasoning and Political Conflict*. 1996, p. 45. See also B. Bugaric (Note 44), pp. 262–269.

⁵⁵ See, for example, B. Bugaric (Note 44).

⁵⁶ Hungarian constitutional scholar Peter Paczolay refers in this relation to the notorious distinction, made by Carl Schmitt, between times of normalcy and extraordinary times, noting that historical conditions of the transition make necessary the use of exceptional means and call for ignoring temporarily the strict measures of the rule of law. See P. Paczolay. *Judicial Review of the Compensation Law in Hungary*. – Michigan Journal of International Law 1992 (13), pp. 806–831, p. 828. This, above all, applies to the implementation of the principle of legitimate expectation in reform situations.

In 2005, the Supreme Court established in *Desintegraator*, which concerned compensation for damages incurred by a successor to a Soviet co-operative organisation and caused to it by the privatisation obligation in the course of the ownership reform, that “the legislator has a wide discretion for the protection of public interests upon transforming ownership relationships in the course of a wide-scale reform. The legislator is entitled to decide on essential expropriations and establish special means of compensation, fair from the aspect of transformation of relationships, which do not need to guarantee total compensation of market value to the owner of property.”⁵⁷ Thus, the Supreme Court expressly effected self-restraint in verifying the legislative choices made during the reforms.

However, the Supreme Court did not show such modesty concerning the other group of cases in the context of the ownership reform. Namely, in 2002, the Supreme Court declared unconstitutional a provision of the Principles of Ownership Reform Act according to which the issue of the return of the property of the people emigrating from Estonia to Germany in 1941 had to be decided by an international agreement, because of its conflict with the principle of legal clarity. The court did not declare the provision invalid because the property of the resettled people would have to be returned or compensated for as a result of the invalidation. According to the Supreme Court, the latter would have been “a political decision the court had no competence to make”.⁵⁸ In 2006, the Supreme Court still declared the same provision invalid⁵⁹, as a result of which the principled decision — to return such property — was eventually made by the Supreme Court.⁶⁰

However, it must be admitted that the Supreme Court made what one could call a political substantially decision (to return the property) in circumstances in which the legislator for three years had been unable to decide whether to return the property to the group of aggrieved persons or not. The Supreme Court thus made use of its powers in a situation in which the legislator, on account of the issue’s sensitivity, did not wish to address it at all. For example, according to Canon, the absolute lack of interest on the part of the political branches of government in addressing an issue finally settled by the court legitimises powerful intervention of the constitutional courts.⁶¹

In the opinion of the author, the steps taken by the Supreme Court in reforming penal law can be considered activist without reservation. Namely, in 2003, the Supreme Court established that, upon moderation of punishments within the framework of the penal law reform, the constitutional principle of applying a lesser punishment gave rise to the obligation to review the decisions concerning people who had been convicted by a court and were serving a prison sentence before the entry into force of the amendments to the Penal Code.⁶² The obligation to extend the principle of application of a lesser punishment to those already convicted and serving an actual prison sentence cannot be found in international practice. Through such an innovative interpretation of the Constitution, the Supreme Court considerably restricted the legislator’s freedom to reform penal law. The dissenting opinion appended to the decision also points to the threat that, because of the decision, the legislator might, by way of autolimitation, give up the idea of reforming penal law in the future after all.⁶³ Thus, the development of national penal policy has been made problematic for the legislator.

⁵⁷ SCebd 18.03.2005, 3-2-1-59-04 (*Desintegraator*). Available in English at <http://www.nc.ee/?id=393> (28.11.2007).

⁵⁸ SCebd 28.10.2002, 3-4-1-5-02 (*Resettlers I*). Available in English at <http://www.nc.ee/?id=430> (28.11.2007).

⁵⁹ SCebd 12.04.2006, 3-3-1-63-05 (*Resettlers II*). Available in English at <http://www.riigikohus.ee/?id=735> (28.11.2007).

⁶⁰ For the sake of precision, it is still necessary to note that the Supreme Court deferred entry into force of that decision in accordance with the Constitutional Review Proceedings Act (põhiseaduslikkuse järelevalve kohtumenetluse seadus. – RT I 2002, 29, 174; 2007, 44, 316 (in Estonian)), in order to give the legislator an opportunity to decide on the desirability of returning the property to the people who had resettled. Before the entry into force of the decision of the Supreme Court, the legislator adopted an amendment that would have had an effect similar to the decision of the Supreme Court and that prescribed rules of procedure for returning property to people who had resettled. The President of the Republic refused to proclaim the act, referring to the violation of the principle of equal treatment in the rules of procedure, and appealed to the Supreme Court, requesting that it declare the act unconstitutional. The Supreme Court granted this petition (CRCSCd 31.01.2007, 3-4-1-14-06 (*Resettlers III*)). While the petition was being processed, the decision of the Supreme Court in the case SCebd 12.04.2006, 3-3-1-63-05 (*Resettlers II*) entered into force, as a result of which the persons who had resettled acquired the right to regain their property or receive compensation. The parliamentary debates unjustly indicated that the Supreme Court by its decision imposed a single option — to return such property — on the legislator.

⁶¹ B. C. Canon (Note 5), pp. 402–403. Here it becomes important whether the legislator could have been compelled to act even via less activist conduct by the court. In that, the opinion of the author coincides with that of Justice Eerik Kergandberg, whose dissenting opinion set forth a position according to which the Supreme Court could have confined itself to the invalidation of the provision concerned to only the extent to which the issue of the return of the property of the people resettling in Germany had to be decided by means of an international agreement. See Justice Eerik Kergandberg’s dissenting opinion in SCeb 12.04.2006, 3-3-1-63-05 (*Resettlers II*), available at <http://www.riigikohus.ee/?id=11&tekst=222487194> (in Estonian) (28.11.2007).

⁶² SCebd 3-1-3-10-02 (Note 36).

⁶³ See Justice Tõnu Anton’s dissenting opinion in SCeb 17.03.2003, 3-1-3-10-02 (*Brusilov*), available at <http://www.riigikohus.ee/?id=11&tekst=222465805> (in Estonian) (28.11.2007).

5. Conclusions

To sum up, in its almost fifteen years of activity, the Supreme Court has not been obliged to answer exceptionally sensitive questions — disputes concerning, for example, same-sex marriages, euthanasia, abortion, and freedom of religion have not been brought before the court. Unlike its German and US counterparts, the Supreme Court of Estonia has so far also managed to escape from developing formulae for calculating specific ‘teaching unit capacity’ or regulating the shower temperatures in prisons. The decisions in *Brusilov*, *Compulsory portion*, *Two chairs*, and provisionally *Resettlers* aside, the Supreme Court has not shown particularly activist stance in shaping the life of the polity. Rather, the court has hidden behind procedural justifications in cases concerning sensitive issues in order to avoid answering, for example, the question of the extent to which the Constitution of Estonia ensures everyone’s right to health protection (*Toom*).

In the end, it must be noted that, although the proportion of activist, as defined by the author above, decisions among all constitutional review decisions of the Supreme Court is not large, all of these have been rendered in the past five years of operation of the Supreme Court. Hence, time will tell whether it is justified to speak of all the more noticeable appearance of the Supreme Court on the arena of policy-makers in Estonia.



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Rights, Democracy and Local Self-governance: Social Rights in the Constitution of Finland

1. The argument from democracy

Economic, social, and cultural rights, enshrined in a state's constitution, pose difficult problems as to their legal significance and their compatibility with such basic principles of the constitutional state — the democratic *Rechtsstaat* — as democracy, the separation of powers, and local self-governance. These rights, often termed second-generation constitutional rights, can easily be interpreted as symptoms of an excessive constitutionalisation of the legal order and of a development toward the so-called judicial state. Such a development involves — in a rather paradoxical way — the risk of both a politicisation of adjudication and a juridification of politics: a politicisation of adjudication in the sense that courts take a position on issues of a political nature that should be left to the domain of political decision-making in the Parliament and the government and a juridification of politics in the sense that legislative activities are increasingly seen as a specification and implementation of decisions already made at the constitutional level. If the municipalities are entrusted with the organisation of, for instance, social and health services — as is the case in the Nordic countries — the problems raised by the second-generation basic rights also touch on the relationship between the judiciary and local self-government. I shall try to analyse these general problems through the example provided by the Finnish Constitution. However, I shall start with a brief discussion at the level of constitutional theory and philosophy.

At this level it can be demonstrated that constitutional economic, social, and cultural rights do not stand in any necessary contradiction with the principles of democracy and popular sovereignty and that the realisation of these principles, in fact, requires such rights. The so-called argument from democracy can be raised in relation to constitutional rights in general. The argument proceeds as follows. Provisions on constitutional rights exclude certain decisions on the common life of society from democratic political processes. They restrict the possibilities of the Parliament and the government to regulate and steer societal development according to the demands of the situation and the political aims of the political majority. In addition, there occurs a transfer of power from the Parliament and the government to the judiciary, which is not subject to democratic control and which lacks democratic legitimacy; it is the judiciary that ultimately monitors the observance of constitutional basic-rights provisions. Thus, constitutional rights may also accelerate development toward a judiciary state.

However, it can be argued that democracy and constitutional rights presuppose each other and make each other possible in the first place. This holds for all the various groups of basic rights — that is, for both the rights to liberty that protect private and public autonomy and the economic, social, and cultural rights safeguarding the factual, material conditions for the exercise of the former rights.

There should be no objection to the claim that democracy is not possible without political constitutional rights guaranteeing political participation, communication, and organisation. Democracy cannot be realised without the granting of such citizenship rights. By contrast, to claim that democracy also requires liberty rights protecting private autonomy, as well as economic, social, and cultural rights, is more controversial.

In relation to liberty rights that safeguard private autonomy, the claim can be justified as follows. Only independent persons whose private autonomy is ensured are able to participate in public discourse and political decision-making processes, essential to a functioning democracy. The exercise of public autonomy presupposes the protection of private autonomy. But legally ensured private or public autonomy does not have any significance for persons who do not possess the factual means of putting their autonomy into effect. The realisation of public autonomy and the respective political rights is dependent on the economic, social, and cultural preconditions that the second-generation constitutional rights are supposed to protect.

2. The legal effects of economic, social, and cultural rights

Thus, at the level of normative ideas underlying the ideal of a democratic *Rechtsstaat*, it can be demonstrated that democracy and constitutional rights are in harmony with each other. But, of course, there is a long way to go from basic rights and democracy as fundamental, deep-structural normative ideas to a positive constitution and complementary legislation.

One of the crucial problems in regulating constitutional rights — especially economic, social, and cultural rights — is to obtain the appropriate middle ground between overly detailed and overly vague provisions. This problem must, of course, be solved on a case-by-case basis. However, one of the guidelines to be followed should be based on the distinction between preconditions of and restrictions to democracy. One should not, through excessively detailed constitutional provisions, lock in place specified solutions to issues that citizens should deliberate in public discourses and that should be settled in democratic decision-making processes. Basic rights as normative ideas are, and should be, open to interpretations and specifications that take account of the actual state of society. This is an important consideration for all constitutional rights, but it has specific significance in the context of economic, social, and cultural rights; the way in which they are to be realised is immediately dependent on concrete societal circumstances. Too detailed constitutional provisions on these rights constitute a clear case of the juridification of politics — that is, of reducing legislative activity to a concretisation of decisions already taken at the constitutional level.

However, in the debate on constitutional economic, social, and cultural rights, it is often ignored that their formulation as subjective, justiciable rights is only one available alternative. There are other alternatives, too, as the following list of possible legal effects of economic, social, and cultural rights indicates:

- (1) establishment of a subjective, justiciable right;
- (2) constitutional mandate;
- (3) prohibition against retrogressive measures;
- (4) interpretative effect; and
- (5) programmatic effect.

If the rights are formulated as constitutional mandates, their immediate legal effects concern state organs; they achieve legal effect with respect to individual citizens only through ordinary legislation, fulfilling the mandate. The constitutional mandate is usually complemented, as its reverse, with a prohibition against retrogressive measures, such as legislation weakening the level of the rights' realisation from that already achieved. In their interpretative role, economic, social, and cultural rights also function in a mediate way, through a 'rights-affirmative' interpretation of ordinary legislation. The last alternative listed above — programmatic effect — actually means the absence of any legal effect; the provisions, at the most, only impose political or moral obligations on constitutional organs, mainly the government and the parliament. What, of course, is important is that the constitutional legislature makes clear to itself what the intended legal effects of economic, social, and cultural rights are and also expresses its intentions clearly in the wording of the respective constitutional provisions.

3. The Finnish example

Striking an appropriate balance between constitutional economic, social, and cultural rights, on one hand, and the principles of democracy coupled with the separation of powers is not only an issue facing the constitutional legislature; it is an ever-new challenge facing all of the constitutional organs: the (ordinary) legislator, the government, and the judiciary. I will try to thematise some of the relevant issues through an analysis of the constitutional situation in Finland.

One of the main aims of the 1995 reform of the chapter on constitutional rights in Finland was to create constitutional guarantees for social, economic, and cultural rights. The two main premises in the assessment of the legal effects of the respective constitutional provisions are that, on one hand, these provisions do not as a rule establish subjective, justiciable rights and that, at the same time, they have legal relevance — i.e., they are not of a mere programmatic nature. The main provisions on social rights are included in § 19:

Section 19 — The right to social security

Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care.

Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.

The public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population. Moreover, the public authorities shall support families and others responsible for providing for children so that they have the ability to ensure the wellbeing and personal development of the children.

The public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing.

The right guaranteed in § 19 (1) constitutes an exception to the rule that the constitutional provisions do not immediately give rise to subjective, justiciable rights. It may have practical significance especially in the field of social services, but the clear emphasis in the effects of the provisions of § 19 lies on constitutional mandates and prohibitions against retrogressive measures. The main addressee of the provisions is the legislator (the Parliament). There is no constitutional court in Finland, and the emphasis in the control of the constitutionality of law lies on *ex ante* scrutiny of governmental bills. The main monitoring body is the Constitutional Law Committee of the Parliament, consisting of members of the Parliament but assisted by constitutional experts. This method of monitoring the realisation of constitutional rights seems to avoid the pitfalls of a development toward a judicial state; the monitoring process can be characterised as a democratic self-control of the Parliament.

However, the truth is not that simple: the Constitutional Law Committee is a quasi-judicial body within the Parliament, with a quasi-judicial pattern of argumentation. The role of the committee within the legislative process has clearly grown since the basic-rights reform of 1995 and the entry into force of the new constitution in 2000. Thus, we can argue that, in a slightly paradoxical way, the enhanced position of the Constitutional Law Committee attests to a judicialisation of the political process occurring within the main legislative body. In a constitutional system that includes a constitutional court, the potential threat of a step toward a judicial state, with the concomitant danger of the politicisation of adjudication and juridification of politics, is even more evident. It can be warded off only through judicial self-restraint, exercised by the constitutional court.

If the constitutional provision on a social right is of the character of a constitutional mandate, guaranteeing it as a subjective, justiciable right whose realisation is not subjected to budgetary restraints is one way of fulfilling the mandate. The crucial question, of course, is who has the power to decide whether a social benefit is to be guaranteed as a subjective right. Should the exclusive competence rest with the legislator?

In a constitutional system like the Finnish one, the answer is in the affirmative. In some constitutional provisions, the legislator is already indicated as the main addressee of the mandate. For example, § 19 (3) of the Finnish Constitution lays down that “[t]he public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population”. In addition, and even more importantly, the exclusive competence of the legislator is supported by the principles of democracy and the separation of powers; these principles must be duly considered in determination of the division of labour between the various branches of the state in the fulfilment of constitutional mandates.

Thus, the courts — in Finland, the administrative courts — should respect the position of the legislator by, for instance, not treating as subjective rights those social, health, and medical services whose procurement the legislator has left to the care of the municipalities within the limits of their budgetary means and decisions. If the courts do not respect this premise, they intrude on the competence of the legislator and, simultaneously, violate the municipalities’ right to self-governance. The new constitution of 2000 introduced a system of *ex post* constitutional review: according to § 106, in cases where the application of a provision in an ordinary law would lead to an apparent contradiction with the Constitution, the courts are obliged to give primacy to

the latter. The position I have taken entails that the courts should not, on the basis of this provision, substitute their own view of how a constitutional mandate should be fulfilled for that adopted by the legislator.

This does not, however, mean that decision-making in the municipalities on the allocation of budgetary resources to social benefits and the distribution of these resources in individual cases falls entirely outside judicial control. The municipalities have a legal duty to allocate sufficient means to services whose organisation the legislator has entrusted to them. In addition, in individual acts of decision-making, general principles of both administrative and social law should be respected, and even here administrative courts have a controlling role. These principles, in turn, may find their justification and institutional support in provisions on constitutional rights. When relying on principles anchored in these provisions, the courts also fulfil their obligation of a 'basic-rights-affirmative' interpretation, an obligation stressed in the *travaux préparatoires* both of the reform of the chapter on constitutional rights in 1995 and of the new constitution of 2000. And, it may be added, 'basic-rights-affirmative' interpretation is the main means by which the courts should contribute to the realisation of the constitutional mandates concerning economic, social, and cultural rights. From the perspective of the courts, the interpretative effect is the most important aspect of the functioning of the provisions on economic, social, and cultural rights.

In conclusion, I think it is possible to stake out an appropriate division of labour among the legislator, the municipalities, and the judiciary in fulfilling constitutional mandates concerning economic, social, and cultural rights while paying due attention to the fundamental principles of democracy, the separation of powers, and local self-governance. It is not always easy to maintain this division of labour, and it cannot, of course, be excluded that administrative courts interfere with issues that should be left to the legislator or to local self-government. From the perspective of an eventual development toward a judicial state, we move in risky territory.



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Discrimination Law and Social Rights: Intersections and Possibilities

1. Introduction

In both academic articles and court judgments, a connection is frequently drawn between the idea of substantive equality, developed in the sphere of discrimination law, and social rights. To give just one example, in *Grootboom*, the South African Constitutional Court's leading judgment on social rights, the court observed that the case brought home "the harsh reality that the Constitution's promise of dignity and equality for all remains a distant dream".¹ Generally, however, such statements are left undeveloped. Part of the aim of this article is to explore the connection between social rights and equality, so often drawn but so seldom elaborated. A further aim is to consider the limits of judicial activism in this area. How far can courts go in enforcing social rights, given the clear policy questions that these rights would seem to raise?

This article discusses these issues in light of the social rights jurisprudence of the South African Constitutional Court. The first part introduces the concepts of social rights and substantive equality. In brief, it argues that the substantive approach to discrimination law is distinctive insofar as it allows for preference to be accorded to worse-off groups, thereby accommodating the promotion of equality within the sphere of discrimination law. Thereafter, the article discusses the most obvious connection between discrimination law and social rights — that is, where a social programme distinguishes between people on the basis of a ground of discrimination. This discussion is undertaken in light of the Constitutional Court's judgment in *Khosa*.²

There is, however, a less obvious intersection between substantive equality and social rights. This concerns the principle, integral to substantive equality, that preference should be accorded to those who are worse off. This principle finds expression in *Grootboom*, where the court ordered that the state's housing programme should be adjusted so as to accord priority to those who are destitute. The court did not, however, order that all such individuals be provided with relief, and the judgment has been criticised for accorded insufficient priority to those whose needs are most urgent. The final part of the article discusses the extent to which this criticism is valid and argues for an approach that, while not extending individual entitlements to the social right in question, nevertheless steps beyond *Grootboom*. It is suggested that this approach would adequately reflect the limits of judicial activism in this area.

¹ *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC).

² *Khosa v. Minister of Social Development*, 2004 (6) BCLR 569 (CC).

2. Social rights and substantive equality: An overview

Social rights require governments to provide their citizens with the most basic amenities of life, such as food, water, and shelter. Typically, the state need only meet this obligation progressively and within the limits of the resources available to it. This is, for instance, the case under the International Covenant on Economic, Social and Cultural Rights (ICESCR)³ and the South African Constitution.⁴

Although the ICESCR has been widely ratified, only a handful of states have taken steps to enshrine social rights constitutionally. This means that the question of how social rights should be enforced has received relatively little attention. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has, however, recommended that a ‘minimum core’ approach be adopted.⁵ In essence, the minimum core refers to obligations that should be fulfilled immediately, notwithstanding the fact that social rights are subject to progressive realisation. One such obligation is that the state initially concentrate on the needs of those who are worse off, before moving on to other, less pressing, needs. Thus, in the sphere of housing, for instance, the state should first cater to people who have no shelter whatsoever before making provision for people who already have some form of housing, however inadequate.

The minimum core does not require that those who are worse off be provided with the relevant social right in its most expansive form. Instead, only ‘minimum essential’⁶ levels of the right need be provided, although the expectation is that these will be progressively upgraded.⁷ The minimum core should, however, be made available as a matter of individual right.⁸ In certain circumstances, the state may be able to justify failures to meet its core obligations. However, the argument is that it should do so on the same basis upon which rights are limited generally, which in South Africa would be a limitation clause enquiry under § 36 of the Constitution.⁹ The South African Constitutional Court has, by contrast, formulated a somewhat different approach to the enforcement of social rights, which is discussed in greater detail below.

Substantive equality, on the other hand, embodies a particular approach to discrimination law. In this regard, a good starting point is Aristotle’s view that equality consists in treating like cases alike and unlike cases differently.¹⁰ Although this formula has been subjected to criticism,¹¹ it is submitted that it is not so much wrong as empty.

An initial problem is that almost all legislation draws distinctions between people for one purpose or another. In other words, governments habitually treat people differently from one another on the basis of perceived differences or similarities. However, not all of these distinctions can be closely scrutinised by the courts. To do so would be impractical and would result in the judiciary making determinations for which it is ill-qualified.

This discussion relates to the grounds of discrimination, or the type of distinctions that should attract judicial solicitude on the basis that they potentially give rise to issues of equality. Clearly, Aristotle’s formula gives us little guidance about how to approach this issue. In the US, courts have attempted to resolve this question by focusing upon process-related factors. Thus, in the seminal judgment of *Carolene Products*, Justice Stone held that legislative classifications should be regarded as ‘suspect’ if they are directed at “discrete and insular” minorities or groups that are at a disadvantage in the political process, the classic example of which are racial minorities.¹²

Quite apart from the question of grounds of discrimination, a further difficulty with the Aristotelian formula is that it does not tell us what should count as like and unlike cases. One attempt to lend it content is formal equality. In essence, formal equality takes the view that equality inheres purely in consistency of treatment; that is, all individuals should be treated alike, regardless of their membership of particular groups. In other

³ Article 2 (1) of the ICESCR obliges each State Party to “take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant [...]”.

⁴ Sections 26 and 27 of the South African Constitution provide that the state must take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the rights of access to housing, health care, food, water, and social security.

⁵ General Comment 3: The Nature of States Parties Obligations (1990), para. 10.

⁶ *Ibid.*

⁷ D. Bilchitz. Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance. – South African Law Journal 2002 (3), pp. 484, 493.

⁸ For example, General Comment 15: The Right to Water (2002), para. 44.

⁹ K. Iles. Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses. – South African Journal on Human Rights 2004 (20), p. 448.

¹⁰ *Ethica Nichomachea*. 3rd ed. Oxford: OUP 1925, pp. 1131 a10–b15.

¹¹ For example, S. Fredman. *Discrimination Law*. Oxford: OUP 2002, pp. 7–11.

¹² *United States v. Carolene Products*, 304 US 144 (1938).

words, formal equality gives content to the Aristotelian formula by stipulating that, in judging the similarity or dissimilarity of two cases, group membership should never be taken into account.

Formal equality is now widely maligned, and the difficulties with this approach are well-documented. Nevertheless, it bears reiteration that a central objection to formal equality is that it is capable of disallowing measures that are designed to promote equality. For instance, by insisting that individuals should always be treated alike, regardless of attributes such as race and sex, a formal approach appears to preclude positive action in the form of, for instance, affirmative action. Policies such as these recognise that disadvantage frequently tracks characteristics such as race and sex and therefore takes these into account rather than ignoring them completely. What formal equality fails to recognise, in other words, is that it is only in certain contexts that such characteristics are irrelevant and detrimental.^{*13}

Substantive equality, in contrast, takes account of the position of the individual in society and the impact that the measure is likely to have upon him or her.^{*14} In particular, government action that entrenches pre-existing disadvantage is unlikely to be upheld, whereas measures that promote disadvantaged groups are likely to be endorsed.^{*15} Unlike formal equality, substantive equality therefore authorises, although it does not require, positive action. We should note, however, that substantive equality does not imply a rejection of the Aristotelian formula. Instead, like formal equality, it lends it content, yet does so in a different way, by stipulating that whether someone is better off or worse off is relevant to whether that person should be considered 'like' other individuals and thus whether he or she may be treated differently. A key feature of substantive equality is therefore its commitment to improving the position of worse-off sectors of society.

The substantive approach to discrimination law raises, of course, a host of further questions. Of these, the most obvious is: If preference may be accorded to worse-off groups, how far may such preference extend? Put differently, at what point does the pursuit of equality cease to treat those adversely affected as equals?

To answer this question, we need to understand the centrality of dignity in the South African Constitutional Court's equality analysis. In the words of the court, unfair discrimination "principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity".^{*16} Dignity therefore serves as the test, or touchstone, of whether unfair discrimination has occurred. In so doing, it also tells us how far the remedial measures authorised by substantive equality may extend; equality may be pursued to the extent that it does not violate the dignity of better-off members of society.^{*17}

Dignity is, however, a notoriously vague value. How then should a violation of this standard be determined? The Constitutional Court has attempted to resolve this question by stipulating that various contextual factors must be taken into account. These include the position of the complainant in society, the nature of the discriminatory law or action and the purpose sought to be achieved by it, and the extent to which the rights of the complainant have been impaired.^{*18}

An exhaustive discussion of the court's application of these factors is beyond the scope of this article. However, it is submitted that one way of understanding the court's approach is that it is applying a proportionality standard, albeit in a loose and unstructured form. Put differently, in determining whether the complainant's dignity has been violated, the court is weighing the impact of government action against the objective that the state is seeking to pursue. This is implied by the court's emphasis upon the purpose that the discriminatory law or action is seeking to achieve, and the extent to which the rights of the complainant have been infringed.

As for the third factor cited by the court — the position of the complainant in society — we have seen already that the court is more inclined to uphold government action that promotes the position of disadvantaged individuals and less inclined to uphold government action that entrenches pre-existing disadvantage. This could be taken as an indication that the proportionality standard is applied more or less intensely depending upon the position of the complainant in society.^{*19} In other words, the worse off someone is, the more intensely the standard will be applied and the greater the weight that will be attached to his or her interests. This would accord with the emphasis of substantive equality upon improving the position of worse-off groups.

With this background in mind, we can now turn to the first, and most obvious, connection between equality and social rights — namely, where a social programme differentiates between people on the basis of a ground of discrimination.

¹³ S. Fredman, *Providing Equality: Substantive Equality and the Positive Duty to Provide*. – *South African Journal on Human Rights* 2001 (25), pp. 164, 165.

¹⁴ *Harksen v. Lane* NO, 1998 (1) SA 300 (CC), para. 53.

¹⁵ *Law v. Canada* (1999), 1 SCR 497, para. 88; *President of the Republic of South Africa v. Hugo*, 1997 (4) SA 1 (CC), para. 41.

¹⁶ *Prinsloo v. Van der Linde*, 1997 (3) SA 1012 (CC), para. 31.

¹⁷ For example, *Pretoria City Council v. Walker*, 1998 (2) SA 363 (CC).

¹⁸ *Harksen* (Note 14), para. 52.

¹⁹ As Paul Craig notes, proportionality is capable of being applied with different levels of intensity. See *Administrative Law*, 5th ed. London: Sweet & Maxwell 2003, pp. 627–628.

3. Khosa v. Minister of Social Development

Khosa, the Constitutional Court's most recent social rights judgment, concerned a challenge to those provisions of the Social Assistance Act^{*20} that reserved welfare benefits solely for South African citizens. The applicants, who were permanent residents, and who were therefore not entitled to benefits under the act, raised two arguments. Firstly, they submitted that their exclusion was inconsistent with § 27 of the Bill of Rights, the relevant provisions of which read as follows: "(1) (c) Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights." Secondly, the applicants argued that the legislative scheme unjustifiably discriminated against them on the basis of their non-citizenship and therefore violated their right to equality under § 9 of the Constitution.

Khosa is therefore especially pertinent to this article, given that the applicants had been denied access to a social programme on the basis of their citizenship, a ground that the court had previously recognised as analogous to those enumerated in the Bill of Rights.^{*21} The case therefore raises questions about the intersection between social rights and discrimination law. As Mokgoro J remarks, "What makes this case different to other cases that have previously been considered by this Court is that [...] the social-security scheme put in place by the state to meet its obligations under § 27 of the Constitution raises the question of the prohibition of unfair discrimination".^{*22}

How did the court approach this issue? To understand this, we need to take a step back and recall that in Grootboom — the Constitutional Court's leading social rights judgment, which is discussed in greater detail below — the court adopted reasonableness as the standard that is applicable in social rights cases. The court did so because, as indicated, the Bill of Rights requires the state to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".^{*23} The term 'reasonable' therefore describes the measures that the state should implement.

What, however, is meant by reasonableness? This issue is also explored in greater detail below. However, we can provisionally understand reasonableness as embodying a standard that is pitched roughly midway between rationality and correctness review.^{*24} Furthermore, in Khosa the court develops the reasonableness standard introduced in Grootboom by importing a measure of proportionality. In the words of Mokgoro J, "In considering whether that exclusion is reasonable, it is relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose".^{*25} With this in mind, it is submitted that an analogy can be drawn between reasonableness and what the US Supreme Court terms 'intermediate'-level review. The latter is applied in certain categories of equal protection cases and requires the state to adduce compelling reasons that are substantially linked to the achievement of important governmental objectives.^{*26}

In Khosa, the question for the court was the nature of the relationship between the reasonableness standard and the standard employed by the court in the sphere of discrimination law. In her lead judgment, Mokgoro J conceptualises the relationship between these standards as follows: "Equality in respect of access to socio-economic rights is implicit in the reference to 'everyone' being entitled to have access to such rights in § 27".^{*27} In other words, where the state draws lines, or formulates criteria, that deny some people access to resources while providing them to others, it cannot unfairly discriminate on the basis of a ground of discrimination. To do so would amount to a violation of the equality **and** social rights guarantees.

For Mokgoro J, discrimination law and social rights therefore overlap, or intersect, with one another. Equality does not exhaust reasonableness; it is merely a component thereof. In this sense, equality is implicated in some social rights decisions — those involving listed or analogous grounds — but not all. In Mokgoro J's judgment in Khosa, discrimination law therefore forms one aspect of a broader discussion of reasonableness. It was on this basis that the court held that the exclusion of permanent residents from welfare benefits is unconstitutional.

A similar approach has, incidentally, been adopted by the CESC, the body tasked with monitoring the implementation of the ICESCR. As mentioned above, in the view of the CESC, states parties are subject to

²⁰ Act 59 of 1992.

²¹ Larbi-Odam v. MEC for Education (North-West Province), 1998 (1) SA 745 (CC).

²² Khosa (Note 2), para. 44.

²³ See §§ 26 and 27 of the South African Constitution.

²⁴ In Khosa (Note 2) Mokgoro emphasises that the standard of reasonableness is "a higher standard than rationality" (para. 67). However, in Grootboom (Note 1) Yacoob J states that "[a] court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent" (para. 41).

²⁵ Khosa (Note 2), para. 49.

²⁶ Craig v. Boren, 429 US 190 (1976).

²⁷ Khosa (Note 2), para. 42.

certain minimum core obligations or duties that should be fulfilled immediately, notwithstanding the fact that social rights are subject to progressive realisation. In this regard, the CESCR has emphasised that social rights should be implemented in a manner that is non-discriminatory. Thus the CESCR has, for instance, stated that a minimum core obligation in the field of health is “to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups”.^{*28} This understanding of the relationship between social rights and discrimination law resembles that of the Constitutional Court in Khosa because it suggests that discrimination law is an aspect of the state’s social rights obligations that arises whenever a social programme differentiates between people on the basis of a ground of discrimination.

However, is there a deeper connection between social rights and equality? We have already seen that in Grootboom the court suggested that there might be by commenting that the case brought home “the harsh reality that the Constitution’s promise of dignity and equality for all remains a distant dream”.^{*29} In a similar vein, in Khosa, Mokgoro J stated that “decisions about the allocation of public resources represent the extent to which poor people are treated as equal members of society”.^{*30} These statements seem to imply that concerns about equality are implicated in the realisation of social rights generally, not just when there is differentiation on the basis of a ground of discrimination. Unfortunately, in both Grootboom and Khosa, such statements remain brief and undeveloped. It is precisely these questions that are explored in the remainder of this article.

4. Government of the Republic of South Africa v. Grootboom

The case that best enables us to explore further connections between social rights and discrimination law is Grootboom. The facts in Grootboom are now well-known, but a brief summary is in order. The claim was brought on behalf of a group of people who had no access to shelter whatsoever and were therefore genuinely destitute. They alleged that their circumstances violated § 26 of the Constitution, which reads, in part, as follows: “(1) Everyone has the right to have access to adequate housing; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

As noted above, in making sense of this obligation the court focuses upon the term ‘reasonable’ in § 26 (2). As for what reasonableness entails, we have already seen that it is analogous to what the US Supreme Court terms intermediate-level review. However, in Grootboom the court also stipulated that reasonableness entails a number of more specific obligations. These include that a “programme that excludes a significant segment of society cannot be said to be reasonable”^{*31} and that “Those whose needs are most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right [...] If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test”.^{*32}

On this basis, Yacoob J found the state housing programme to be invalid to the extent that it failed to make provision for people in immediate and desperate need. Although laudable, the programme concentrated unduly on the goal of constructing permanent houses for as many people as possible over time, instead of providing shelter for the desperate in the interim. The court therefore held that the programme would have to be modified so as to include a component catering for those in immediate need, even if this decreased the rate at which permanent housing could be constructed. As for the form of that component, that was left in the hands of the state, as was the exact proportion of the housing budget that should be allocated for that purpose. The court did, however, stipulate that “a significant number of desperate people in need [must be] afforded relief, though not all of them need receive it immediately”.^{*33}

Grootboom has been predominantly understood within an administrative law paradigm, no doubt because of the court’s use of the term ‘reasonableness’ to describe the standard of review. On this basis, the court’s decision has been both praised^{*34} and criticised.^{*35} Whatever the merits of this interpretation, it is submitted that it obscures an important feature of Grootboom, which is that the decision can be read in light of principles of

²⁸ General Comment 14: The Right to the Highest Attainable Standard of Health (2000).

²⁹ Grootboom (Note 1).

³⁰ Khosa (Note 2), para. 74.

³¹ Grootboom (Note 1), para. 43.

³² *Ibid.*, para. 44.

³³ *Ibid.*, para. 68.

³⁴ C. Sunstein. Social and Economic Rights? Lessons from South Africa. – Designing Democracy: What Constitutions Do. New York: OUP 2001, p. 224.

³⁵ M. Pieterse. Possibilities and Pitfalls in the Domestic Enforcement of Social Rights. – Human Rights Quarterly 2004 (26) 4, p. 882.

substantive equality notwithstanding the fact that, in contrast to Khosa, a ground of discrimination was not expressly implicated in the facts of that judgment.

Firstly, recall that in Grootboom the court found that social programmes may not exclude a significant segment of society.^{*36} This principle is a key step in the court's judgment. It justifies Yacoob J's finding that those whose needs are most basic should not be excluded — in the sense of not being specifically or adequately catered for — from the state's housing programme.^{*37} They, in the view of the court, constitute a 'significant segment of society'.

What, however, is meant by the latter phrase? Clearly, this cannot be taken to mean an **arbitrary** group in society. After all, certain groups are simply not in need of assistance. Rather, it must be taken to refer to people who cannot meet their socio-economic needs independently, on the basis of their own resources. If such a group is excluded, the legality of the state's social programme will be thrown into doubt.

The mere fact that a group is vulnerable, or unable to meet its needs independently, cannot, however, mean that it automatically has a claim to public resources. What is required, therefore, is an examination of whether the group has a legitimate claim to inclusion in a social programme from which others already benefit. In practice, this means that the state must explain why it has allocated resources in a particular manner. The task of the court is then one of evaluation. It must consider whether the state's explanation is convincing, or whether the reasons advanced justify exclusion of the group. In this regard, the standard is, as outlined, one of reasonableness.

In light of this, it is submitted that Grootboom accords with a classic justification for judicial review in the area of discrimination law, which is that courts should protect the interests of vulnerable sectors of society who are unable to avail themselves of majoritarian political processes. As previously mentioned, in the US the seminal case in this regard is *Carolene Products*^{*38}, in which Justice Stone held that "strict scrutiny" should be applied where legislation appears to burden "discrete and insular" minorities. Like the discrete and insular minorities of *Carolene Products*, the groups whom the court undertakes to protect in Grootboom — people who cannot meet their basic needs — are, one might say, similarly marginalised and unable to draw attention to their plight through conventional means.^{*39}

A further parallel that can be drawn between Grootboom and substantive equality is that in determining whether the complainants had been unjustifiably neglected a key consideration was their position in society. Had, for instance, the claim been brought on behalf of people who already had some form of shelter and were asking that their shelter be improved, it is likely that the court would have been less sympathetic. As we have seen, substantive equality provides that members of worse-off groups may be accorded priority *vis-à-vis* more privileged individuals and is therefore similarly committed to improving the position of worse-off sectors of society. In the areas of both social rights and substantive equality, the focus is on groups that are worse off.

These observations point to a relationship between social rights and substantive equality that is more far-reaching, and less obvious, than that identified by the Constitutional Court in Khosa. However, they also lead to further questions. The analogy between Grootboom and *Carolene Products* might, for instance, seem to imply that 'poverty', or some such criterion, can be recognised as a ground of discrimination — an assertion that is likely to strike many as implausible.

Unfortunately, this and other such issues cannot be explored here.^{*40} Instead, the remainder of the article discusses the chief criticism of Grootboom, which is that, even though the judgment correctly accords priority to those who are worse off, it does not push this principle far enough. As outlined, the Constitutional Court held that the state need not cater to everyone in desperate need of housing. Instead, it need only provide relief to a 'significant' number of such individuals.^{*41} Critics have argued that the court should have adopted the 'minimum core' approach advocated by the CESCR, in terms of which **all** destitute individuals would have been entitled to relief as a matter of right.^{*42}

³⁶ Grootboom (Note 1), para. 43.

³⁷ T. Roux. Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court. – *Democratization* 2003 (10) 4, pp. 92, 96.

³⁸ *Carolene Products* (Note 12).

³⁹ This argument is also made in M. Wesson. Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court. – *South African Journal on Human Rights* 2004 (20), p. 284.

⁴⁰ For further discussion, see M. Wesson. Equality and Social Rights: An Exploration in Light of the South African Constitution. – *Winter Public Law*, Winter 2007, p. 748.

⁴¹ Grootboom (Note 1), para. 68.

⁴² Bilchitz (Note 7).

5. The minimum core

Is this criticism of Grootboom persuasive? At the outset, the numerous attractions of the ‘minimum core’ approach should be noted. The most obvious of these has been mentioned already, which is that the minimum core would seem to better accord with the principle that priority should be given to those who are worse off. Secondly, by allowing social rights to be claimed by individuals, the minimum core would seem to do justice to the inclusion of social rights in the South African Constitution as rights instead of, for instance, directive principles of state policy.^{*43} Thirdly, the minimum core lends content to the idea of progressive realisation. By suggesting that the state should first focus upon those whose needs are most urgent, before moving on to those whose needs are less urgent, the minimum core would seem to suggest a clear series of steps that should be taken toward the goal of full realisation of social rights.

However, despite these apparent attractions, it is submitted that the minimum core is subject to difficulties that ultimately make it an unappealing approach to the enforcement of social rights. These difficulties can be best approached by noting that the minimum core is especially attractive in the context of housing. This is because in this area it is possible to identify a particular group of people — those without any form of shelter — as worse off than everyone else. It is also possible to posit a spectrum ranging from those who are destitute and therefore worst off to those who live in permanent structures and are therefore best off. In between are various gradations, such as people living in informal settlements. With this spectrum in mind, it seems to make sense to argue that the needs of those who are worst off should ‘trump’ those of all others.

Nevertheless, it is submitted that this logic does not hold true for all social rights. A good example is the right to health care services. Where the minimum core of this right is discussed, it is usually identified with various forms of primary health care, such as the provision of essential drugs.^{*44} However, unlike in the context of housing, primary health care is not co-extensive with the category of people who are worst off. Indeed, in the sphere of health, the difficulty is that there is **more** than one group of people who are worst off.

Amartya Sen makes this point well. He asks us to imagine two people, A and B, where A has an income lower than that of B. Let us surmise further that A cannot access even primary health care. B, on the other hand, has chronic renal failure and cannot access treatment for his condition. Who, asks Sen, is worse off? Sen suggests that B might be worse off, given that he has a more “restricted capability set” and is therefore less able to achieve “functionings” that he has reason to value.^{*45}

In the context of health, it is possible to imagine many more such scenarios. Is someone worse off if he or she has cystic fibrosis or has not been adequately immunised against major infectious diseases? Is it worse to be schizophrenic or without access to essential drugs? The difficulty is that, unlike in the area of housing, here one set of needs cannot automatically be assumed to be most urgent and therefore to trump all others.

Similar difficulties arise in respect of the right to social security. Consider, for instance, Sandra Liebenberg’s attempt to define the minimum core of the right to social security. For her, “the most disadvantaged and vulnerable groups [should be] provided with basic levels of social security”.^{*46} This includes the “elderly, people living with disabilities and HIV/AIDS, and the primary care-givers of poor children, and more generally those who are destitute and have no other means of supporting themselves and their dependants”.^{*47}

It should be clear, however, that Liebenberg’s formulation encompasses a number of different groups, with different needs, rather than a single class of individuals. And this, in turn, leads to problems of enforcement. At any time, only one of these groups is likely to be represented before a court. According priority to that group is likely to have repercussions for groups who are not represented. Again, unlike in the area of housing, where people without shelter can be identified as those who are worst off, there is no one category of people whose needs can automatically be assumed to trump the needs of other individuals catered to by the social security budget.

Fundamentally, the difficulty is that the minimum core embodies two competing rationales. On the one hand, it seeks to guarantee certain basic forms of provision, such as rudimentary forms of shelter and primary health care. On the other hand, it seeks to cater to those who are worst off. In respect of housing, these rationales can be made to converge, which is why the minimum core is especially attractive in that context. However, in areas such as health and social security, these rationales diverge or pull in opposite directions. Proponents of the minimum core are therefore faced with a difficult choice between, on one hand, abandoning their commitment to prioritising those who are worst off (in which case a key attraction of the minimum core is lost)

⁴³ Social rights are included as directive principles of state policy in the Indian and Namibian constitutions.

⁴⁴ For example, General Comment 14: The Right to the Highest Attainable Standard of Health (2000).

⁴⁵ *Inequality Re-examined*. New York: OUP 1992, p. 107.

⁴⁶ *The Right to Social Security: A Response from a South African Perspective*. – D. Brand, S. Russell (eds.). Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives. Pretoria: Protea Book House 2002, pp. 147, 158.

⁴⁷ *Ibid.*

or, on the other, discarding their commitment to providing only basic services (in which case the minimum core threatens to become impracticable).

Whether an alternative approach to the enforcement of social rights is available is discussed below. For now, the remainder of this section considers whether the minimum core remains an attractive approach in areas beyond the rights to health and social security, such as the rights to housing, education, and water.

In respect of these rights, I simply wish to sound a cautionary note. Consider, for instance, the minimum core of the right to housing. In the court *a quo* in *Grootboom*, in a judgment that cannot be discussed in full here, the South African High Court adopted what was virtually a minimum core approach by stipulating that the claimants should be provided with tents, portable latrines, and a regular supply of water (albeit transported).^{*48}

It is submitted that the difficulty with these measures, and the type of emergency relief advocated by proponents of the minimum core in general, is that they do not constitute long-term investments. Instead, they constitute an ongoing drain on resources. If measures such as this are to be effective, they might well have to be carefully targeted and, once in place, rapidly upgraded. In short, it can be argued that emergency relief should be linked to programmes — such as the construction of low-cost housing — that constitute durable investments, thereby freeing up resources that can be applied elsewhere. In a rigid form, the minimum core would, however, preclude the allocation of any resources to non-core needs until the core needs of **everyone** are met. In the long term, this might not constitute the most effective allocation of scarce resources.

Of course, it could be argued that the minimum core does not have this effect. Instead, it simply provides that where resources are devoted to non-core needs at the expense of core needs this should be justified in terms of the limitation clause, in the same manner that limitations of rights are justified generally.^{*49} In this way, it is possible to compromise the minimum core in order to, for instance, strike a proper balance between the short- and long-term goals of social programmes.

However, the difficulty with this suggestion is that the limitation clause constitutes a highly structured and exacting proportionality enquiry.^{*50} It might not be a correctness standard, but it certainly verges upon that. The proposed approach would therefore place judges in the invidious position of having to decide, via the limitation clause, the exact balance that should be struck between the short- and long-term aims of social programmes. In effect, this would amount to the courts **themselves** making these determinations, which they are poorly qualified to do.

6. A third way?

We therefore have reasons to doubt whether the minimum core constitutes an attractive and viable approach to the enforcement of social rights. On the other hand, the Constitutional Court's current social rights jurisprudence is also not without difficulties. Firstly, the approach adopted by the Constitutional Court in *Grootboom*, where the court desisted from recognising an entitlement to shelter, makes it extremely difficult for individuals to allege that their social rights have been violated.^{*51} Furthermore, the vagueness of the court's orders in cases such as *Grootboom* means that its judgments have not always been properly implemented.^{*52}

In the remainder of this article, I therefore outline an alternative approach that might constitute a 'third way' between *Grootboom* and the minimum core. Put briefly, the argument is that the court should, in accordance with the principles of substantive equality, vary the intensity of its review depending upon whether the claimant is better or worse off. The better off someone is, the less intense the court's review should be. Thus, if a housing claim is brought on behalf of people who have virtually adequate housing and wish to have that housing upgraded, the court should apply a rationality standard. If, on the other hand, the claim is brought by someone who has no shelter whatsoever, the court's standard should be more probing but should not exceed the intermediate standard that the court **already** employs.

This approach overcomes the difficulties inherent in both *Grootboom* and the minimum core. In contrast to the *Grootboom* approach, the court's review would be focused on individuals rather than groups. In other words,

⁴⁸ *Grootboom v. Oostenberg Municipality*, 2000 (3) BCLR 277 (C).

⁴⁹ K. Iles (Note 9).

⁵⁰ Section 36 (1) provides that "the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; (e) less restrictive means to achieve the purpose".

⁵¹ The court was more willing to recognise individual entitlements to services in *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) and *Khosa* (Note 2). However, *Grootboom* arguably remains the 'default' position of the court. See Wesson (Note 39), pp. 295–297.

⁵² K. Pillay. *Implementing Grootboom: Supervision Needed.* – *Economic and Social Rights Review* 2002 (3), p. 1.

a worse-off individual, rather than a worse-off group, would be able to approach the courts and request an explanation — one that satisfies intermediate-level review — as to why he or she has not been assisted.

On the other hand, in contrast to the minimum core, this approach does not seek to identify one group of worst-off people in respect of each right who should be accorded priority. It acknowledges that there may be more than one set of individuals who are worst off and provides that each should be able to approach the courts. Put differently, the chronically ill individual and the individual without access to primary health care, being similarly worse off, should be entitled to comparable explanations as to why they cannot be assisted, if that is the case.

Of course, in reality, a claim brought by a chronically ill individual in a country such as South Africa would be unlikely to succeed. His or her interest in treatment would in all likelihood be outweighed by the interests of a far greater number of others in primary health care. At the very least, however, the proposed approach would ensure that such individuals are treated as equal members of society.

A final, and crucial, distinction between the proposed approach and the minimum core is that the approach advocated here employs intermediate-level review as opposed to a limitation clause enquiry. As mentioned above, the latter verges upon a correctness standard. Consequently, a key difficulty with the minimum core is that it might require courts to make difficult judgments about the exact balance that should be struck between the short-term and long-term aims of social programmes.

In terms of the approach suggested, the courts would not be required to make such determinations themselves. Instead, they would exercise a secondary judgment that would require the state to demonstrate that it has compelling reasons for not catering to those who are worst off. The state could, for instance, demonstrate that the allocation of resources elsewhere is necessary to preserve the long-term integrity of the relevant social programme, or that resources have been allocated to more pressing needs. Fundamentally, however, the state should be required to meet a proportionality test that, while not placing the courts in the position of primary decision-makers, would ensure that appropriate weight is accorded to those whose need is greatest.

7. Conclusions

In conclusion, this article set out to discuss the relationship between substantive equality and social rights. The most obvious connection between these concepts is where a social programme differentiates between people on the basis of a ground of discrimination. This was, for instance, the case in *Khosa*. There is, however, a further connection between substantive equality and social rights, which concerns the principle that preference should be accorded to those who are worst off. This principle found clear expression in *Grootboom*, where the state was ordered to prioritise the needs of those who are destitute. However, a key criticism of that judgment is that by failing to adopt the minimum core, in terms of which all destitute individuals would have been entitled to relief as a matter of individual right, the Constitutional Court did not accord sufficient priority to those who are worst off. The final part of the article outlined several criticisms of the minimum core and proposed an alternative approach that, it was argued, would treat social rights litigants as equals while also reflecting the limits of judicial activism in this area.



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How to Handle a Double-edged Sword Safely: Protection of the Elements of the Principle of the Social State in the Constitutional Jurisprudence of the Supreme Court of Estonia

Most traditionally, it has been held that guaranteeing a modicum of social protection to those in need would be the exclusive task of the legislator within the political process.^{*1} According to this approach, social entitlements were deemed not to belong to a constitution^{*2}; and even if some social rights did, in fact, appear in a constitutional text, they would have been considered mere directive principles.^{*3}

In contemporary constitutional democracies, however, the tide has turned. Social rights are taken increasingly seriously as legal rights capable of being invoked before domestic^{*4} or international courts.^{*5}

Once social-rights-related claims have entered the realm of judicial decision-making, the courts concerned must make up their minds as to how to handle such claims safely, as implementation of social rights routinely gives rise to a number of complex issues that may lead to questioning the legitimacy of judicial intervention or demonstrate the incompetence of the courts. The most cautious courts could combine various judicial techniques in order to achieve a balance between their obligation to protect fundamental rights of individuals and that of reasonably preserving the balance of powers.

¹ See T. Marauhn. *Social Rights beyond the Traditional Welfare State: International Instruments and the Concept of Individual Entitlements*. – E. Benvenisti, G. Nolte (eds.). *The Welfare State, Globalization, and International Law*. Berlin, Heidelberg, New York, Hong Kong, London, Milan, Paris, & Tokyo: Springer 2004, p. 275.

This approach would also correspond to the views of John Rawls, who sets forth in his world-famous treatise ‘A Theory of Justice’ that his second principle of justice, the difference principle, should be effected by choosing welfarist economic and social policies and upheld through appropriate legislation. See C. Kukathas, P. Pettit. *Rawls: ‘A Theory of Justice’ and Its Critics*. Polity Press 1998, pp. 49–50.

² See T. Marauhn (Note 1), pp. 276.

³ J. Cottrell, Y. Ghai. *The Role of the Courts in the Protection of Economic, Social & Cultural Rights*. – Y. Ghai, J. Cottrell (eds.). *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*. London: Interights 2004, pp. 66–70.

⁴ See F. Coomans (ed.). *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*. Antwerp: Intersentia 2006; D. Bilchitz. *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights*. Oxford & New York: Oxford University Press 2007; Y. Ghai, J. Cottrell (Note 3); A. Brudner. *Constitutional Goods*. Oxford & New York: Oxford University Press 2007, pp. 173, 278.

⁵ See, for example, M. Scheinin. *Economic and Social Rights As Legal Rights*. – A. Eide, C. Krause, A. Rosas (eds.). *Economic, Social and Cultural Rights*. Dordrecht, Boston, & London: Martinus Nijhoff Publishers 2001, pp. 29–54; S. Hyttinen. *A Second View from Elsewhere – the EU Debate on the Justiciability of Fundamental Social Rights and the International Justiciability Discourse*. – *Nordisk Tidsskrift for Menneskerettigheter* (Nordic Journal of Human Rights) 2006 (24) 1, pp. 1–14.

My aim is to present the experience of the Supreme Court of Estonia in dealing with social-rights-related cases, complemented with some comparative remarks about other jurisdictions that have dealt with social rights cases, mainly South Africa and Germany. In this article, I analyse how the interpretations (that is, techniques of interpretation) and the standards of review that can be found in the case law of the Supreme Court of Estonia and other constitutional courts relate to the elements of the principle of the social state that underlies the concept of fundamental social rights. In doing this, I hope to demonstrate that the nature of the principle of the social state is twofold: it is both a guiding interpretative principle and a substantive structural principle of constitutional law, including a set of intertwined systemic elements. In addition, as a reply to a recent opinion that solving social rights cases depends on the way in which a particular decision-maker views the relationship between social rights and various civil and political rights⁶, I will show that the way courts handle social-rights-related cases depends on their understanding of the social state principle as a general principle of constitutional law in the particular historical, social, and economic context in which the court finds itself.

For the sake of clarity, the article is divided into four parts. Firstly, I will describe in broad terms how the principle of the social state has been understood in the theory so far and how it appears on the constitutional level. In doing so, I will present my understanding of the elements of the social state principle. The second, third, and fourth part of this article will be devoted to analysis of the judicial dynamics in cases addressing the various elements of the principle of the social state.

1. The principle of the social state and its elements

The essence of the principle of the social state is that the state — or, more broadly, the public power as a whole — has to take care of its people. The questions that immediately follow are why, how, and to what extent. In addition a question arises as to who is responsible for its implementation.

Answers to the ‘why’ question can mostly be grouped into dignity-, justice-, and solidarity-based arguments, if one presumes that the justice-grounded arguments encompass equality.

1.1. Dignity

Thus, for example, Günther Dürig has emphasised that human dignity would be violated if a human being were to be forced to exist economically in living conditions that would degrade him to the level of an object.⁷ This is an argument in true Kantian spirit. I would also like to refer to the writings of Sandra Liebenberg⁸, who thinks, combining her own thoughts with the capabilities approach of Martha Nussbaum, that human dignity requires that there be at least certain basic material conditions in place, enabling people to develop and exercise their capabilities.⁹ More specifically, she adds, respect should be shown for human potential and agency by creating an environment of basic liberties and material support that enables them to flourish.¹⁰

⁶ In a recent article, Rosalind Dixon describes, using the wealth of literature on the landmark social rights cases of the Constitutional Court of South Africa as a basis, several equally plausible methods of judicial interpretation of social rights claims. According to her, social rights claims are prioritised according to how a particular person/decision-maker views the relationship between social rights and various civil and political rights. Thus, depending on the convictions of the decision-maker, priority should be either given to those rights that are necessary to ensure survival or protect the right to life or to rights linked to the right to dignity (understood either as a guarantee of a certain physical or material baseline necessary for a person’s life to count as fully human or as a relationship between persons that is based on respect for and recognition of human subjectivity) or given to equality-based concerns, with the idea of trying to improve first the condition of the worst off in the society. See R. Dixon. Creating Dialogue about Socio-economic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited. – *International Journal of Constitutional Law* 2007 (5) 3, July, pp. 391–418 (see especially pp. 399–400).

⁷ See G. Dürig. *Verfassung und Verwaltung im Wohlfahrtsstaat*. – *Juristen Zeitung* 1953, p. 197, quoted in H. Gerber. *Die Sozialstaatsklausel des Grundgesetzes*. Ein Rechtsgutachten. – *Archiv des öffentlichen Rechts*. Vol. 81. Tübingen: J.C.B. Mohr (Paul Siebeck) 1956, p. 19.

⁸ While the concept of the necessity of having a social state clause in the constitutional text was rejected in the debates prior to the adoption of the Constitution of South Africa (see the description of the debates preceding the adoption of the South African Constitution in: E. de Wet. *The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model for South Africa*. Durban, Johannesburg, & Cape Town: Butterworths 1996, pp. 99–104), I think that one should not draw far-reaching conclusions from this. The debate over whether one should have a list of social rights or just a social state clause that might not be capable of producing justiciable subjective rights was, in my opinion, more about the form than concerned with the substance of the Constitution. I believe that, when one considers the promises made in the preamble to the South African Constitution, and its overall spirit, along with the catalogue of social rights and substantive equality jurisprudence, the social state principle might appear in the background as an unwritten structural constitutional principle. The appearance of this mostly Continental European constitutional principle in the South African Constitution might well be related to the growing internationalisation of constitutional law through constitutional dialogues.

⁹ S. Liebenberg. *The Value of Human Dignity in Interpreting Socio-economic Rights*. – *South African Journal on Human Rights* 2005 (21) 1, pp. 1–12 (see especially the material on pp. 7–12).

¹⁰ *Ibid.*, p. 8.

Similarly, a number of eminent German constitutional lawyers^{*11} emphasise that the aim of application of the social state principle is to create social and economic conditions in which individuals can exercise their fundamental rights.^{*12}

In my opinion, the last two dignity-based arguments for the protection of the social state principle resemble each other significantly, differing at most in their details. Most importantly, they highlight the necessity to respect the private autonomy of the recipient of state assistance. This means that the individual's perception of a good life and life plans should not be interfered with. In addition, creating the social and economic prerequisites for enjoyment of fundamental rights advances also the public autonomy of the individual to participate meaningfully in the life of the society and therefore indirectly also the principle of democracy. The minimalist approach of Günther Dürig seems to require only fulfilment of basic economic needs and would thus not take into account other necessities (capabilities) that human beings in want might have.

The social aspect of human dignity is elucidated by Peter Häberle, according to whom the concept of human dignity includes an element of mutual respect and concern that he calls solidarity.^{*13} Uwe Volkmann goes even further and argues that human dignity entails a mutual obligation to guarantee — partially individually, partially collectively — care for the well-being of others.^{*14}

1.2. Justice

If the public authorities are supposed to care for individuals, they have to do it justly.^{*15}

The difference principle, the Rawlsian second principle of justice, requires that “social and economic inequalities are to be arranged so that they are both: a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and b) attached to offices and positions open to all under conditions of fair equality of opportunity”.^{*16} He also contends that “fair, as opposed to formal[,] equality of opportunity requires that the government, in addition to maintaining the usual kinds of overhead social capital, tries to ensure equal chances of education, and culture through subsidised or public schooling, tries to ensure equality of opportunity in economic activities by policing the conduct of firms, and preventing monopolies, and generally guarantees a social minimum income”.^{*17} It must be noted that this conception of justice goes further than the traditional Aristotelian understanding of justice in that it allows affirmative action to remedy social injustices. On the other hand, Rawls seems to be very cautious in his approach, as government only has to try to achieve the substantive requirements he proposes. This weakens his difference principle considerably.

The argument of justice, proposed by Hans F. Zacher, is much firmer. Thus, in a social state, the principle of social justice is to be incorporated into the legal order as a fundamental value, in order to promote substantial, material equality.^{*18} On the other hand, it is not clear whether implementation of this notion of justice requires assistance by the state or is satisfied with just distribution of state assistance, if it should be decided for any reason that the state has to provide it.

In this regard, the collective responsibility to correct market outcomes in terms of (social) justice, by conferring on all citizens a right to those resources that may not be secured for each person in a fair and predictable manner by the market, underlined by Raymond Plant^{*19}, is a much more dynamic conception of justice. Even if it is hard to determine in individual cases what kinds of resources a fair market would have provided to the persons concerned, this argument brings to the foreground that the principle of the social state functions always as a corrective mechanism to the invisible hand of the market economy.

The most down-to-earth equality-based theory is the social citizenship theory of T. H. Marshall. In his opinion, there is a kind of basic human equality associated with full membership of a community — i.e., citizenship —

¹¹ Thorsten Kingreen refers to Ernst Benda, Hans Buchheim, Shristoph Degenhart, Horst Dreier, Rolf Gröschner, Hans D. Jarass, Paul Kirchhof, and Karl-Peter Sommermann in T. Kingreen. *Das Sozialstaatsprinzip im europäischen Verfassungsverbund*. Mohr Siebeck 2003, p. 129.

¹² I qualify this argument as a dignity argument in its broader sense, because it has been pointed out that human dignity is regarded as the foundational value of all fundamental rights in the German constitutional system. See A. Chaskalson. *Human Dignity As a Constitutional Value*. – D. Kretzmer, E. Klein (eds.). *The Concept of Human Dignity in Human Rights Discourse*. The Hague, London, & New York: Kluwer Law International 2002, p. 135.

¹³ See U. Volkmann. *Solidarität – Programm und Prinzip der Verfassung*. Tübingen: Mohr Siebeck 1998, p. 223.

¹⁴ *Ibid.*, p. 226.

¹⁵ As I have noted above, I will consider the justice- and equality-based arguments for the social state to belong to one and the same category, as any notion of equality is based on some understanding of justice.

¹⁶ C. Kukathas, P. Pettit (Note 1), p. 43.

¹⁷ *Ibid.*, p. 275.

¹⁸ See H. F. Zacher. *Soziale Gleichheit. Zur Rechtsprechung des Bundesverfassungsgerichts zu Gleichheitssatz und Sozialstaatsprinzip*. – *Archiv des öffentlichen Rechts* 1968, No. 93, p. 341.

¹⁹ R. Plant. *Citizenship, Rights and Welfare*. – A. Coote (ed.). *The Welfare of Citizens: Developing New Social Rights*. London: IPPR/Rivers Oram Press 1992, p. 19.

that is not inconsistent with the inequalities that distinguish the various economic levels in a society.^{*20} Thus his theory is not supposed to include a transformative notion of justice. This understanding seems to be in conflict with his description of social citizenship, which is supposed to contain “the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society”.^{*21}

It appears that some commentators from outside Continental Europe prefer to refer to the principle of the social state as social democratic constitutionalism motivated fully by support for social democracy.^{*22} Despite this, Gavin W. Anderson captures the essence of the principle well, in describing it as follows:

First, social democracy sees the state as not only having a legitimate role, but, as the historical record would appear to bear out, the best hope for achieving progressive social change. Second, social democracy does not valorise civil society for its own sake, but rather sees it as a potential source of oppression, and so contemplates checking social and economic inequalities where necessary. Third, social democracy sees reducing material inequality as a necessary precondition of political freedom, and so values those rights, such as second and third generation rights, which focus “less on governability than on citizen empowerment and social justice”.^{*23}

1.3. Solidarity

Solidarity, also known as fraternity, presupposes a sort of social cohesion or commonness between equal members of a group, based on some common features, beliefs, etc., that is then the main reason why members of such a group should help each other if the need arises.^{*24} In fact, the proper content and role of solidarity are a subject of lively debate between liberals and communitarians; whereas the liberals emphasise the autonomy of individuals to pursue their own plans for a good life, as well as freedom of choice, the communitarians underscore the dependence on community and traditions.^{*25} Volkmann concludes that perhaps a more liberal notion of solidarity should be preferred, where mutual recognition of individuals that is based on the right to equal respect, the co-operation of all members of society in building just institutions, and a resulting equal concern for each other would not exclude redistribution of goods in favour of the disadvantaged and would include an extensive neutrality with regard to diverging visions of what constitutes a good life.^{*26} Alternatively, one could perhaps consider another compromise, the liberal communitarian approach.^{*27}

The social state is just the means best situated to mediate and facilitate this process of social inclusion, by formalising mutual dependency and creating access to resources that enable all members of society to participate in the society’s life without any distinctions.^{*28} Some early conceptions of solidarity have maintained that the aim of solidarity is to create more just and equal societies.^{*29} Contemporary conceptions of the principle of solidarity go further than that and stipulate that it aims to create equal opportunities for individuals and to enable them to make use of their freedom within the society.^{*30}

²⁰ T. H. Marshall, T. Bottomore. *Citizenship and Social Class*. London: Pluto Classic 1992, pp. 6–7.

²¹ *Ibid.*, p. 8.

²² See G. W. Anderson. *Social Democracy and the Limits of Rights Constitutionalism*. – *Canadian Journal of Law and Jurisprudence* 2004 (17) 1, pp. 31–58. Anderson has based his article on the works of R. Plant and N. MacCormick. See footnotes 1 and 2 in T. H. Marshall, T. Bottomore (*ibid.*), p. 31. I disagree with the association of the principle of the social state with social democracy. Even if this normative principle of governance has historically emerged out of practical considerations (see G. S. Katrougalos. *Constitution, Law and Rights in the Welfare State ... and Beyond*. Athens & Komotini: Ant. N. Sakkoulas Publishers 1998, pp. 28–35), in a clash between the supporters of liberal capitalism and socialism (see E. Laaman. *Solidarism ja selle rakendumine meie põhiseadustes* (Solidarism and Its Implementation in our Constitutions). – *Õigus* 1938/9, p. 410 (in Estonian), in *Continental European constitutional systems the social state principle has long been an inherent element of constitutionalism, irrespective of the political preferences of the political parties in power* (see, for example, the systematic thesaurus of the constitutional law database CODICES published by the Venice Commission of the Council of Europe, available at <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>).

²³ T. H. Marshall, T. Bottomore (Note 20), p. 34.

²⁴ See T. Kingreen (Note 11), pp. 244–246.

²⁵ See U. Volkmann (Note 13), pp. 20–49.

²⁶ See U. Volkmann (Note 13), p. 49.

²⁷ See W. Brugger. *Communitarianism As the Social and Legal Theory behind the German Constitution*. – *International Journal of Constitutional Law* 2004 (2) 3, July, pp. 431–460. Also *mutatis mutandis* Katrin Saaremäel-Stoilov. *Liberal Communitarian Interpretation of Social and Equality Rights: A Balanced Approach?* – *Juridica International* 2006 (11), pp. 85–92; M. Galenkamp. *Individualism Versus Collectivism: The Concept of Collective Rights*. Rotterdam: Sanders Instituut, Erasmus Universiteit / Gouda Quint 1998, pp. 63–84.

²⁸ T. Kingreen (Note 11), pp. 253–258.

²⁹ Eduard Laaman refers to the essay ‘*Essai d’une philosophie de la Solidarité*’ of Leon Bourgeois, written in 1902, in his analysis of expression of solidarity in the Estonian constitutions in: E. Laaman (Note 22), p. 409.

³⁰ T. Kingreen (Note 11), pp. 253–254.

In my opinion, there are two ways in which the preceding theories can be perceived. Firstly, it is possible to argue that a contemporary and normative conception of solidarity is capable of encompassing the justice, equality, and dignity concerns presented above. Then, essentially, the principle of the social state would be based on a broad notion of solidarity. Alternatively, one could stipulate that any kind of social state should be directed toward promotion of human dignity and social justice based on and enhancing the solidarity in a given society. In an attempt to simplify the sub-principles of the principle of the social state, we would necessarily have to take into account the implications for constitutionalism in general of omitting some of the aspects thereof. Thus, for example, if we leave human dignity (including the respect for autonomy and fundamental rights of an individual) out of our equation, we might end up in a situation where the only aim of the social state would be promotion of social justice as a common good without taking into account the individual necessities and capabilities of the persons in need. This would resemble the pre-Second-World-War understanding of solidarity, advanced by Léon Duguit, wherein the intervention of a social state would be deemed justified for achievement of greater justice and equality as a common good, for improving the society and creating greater cohesion, not for the gain of its individual members.³¹ In contemporary constitutionalism, based on rule of law³², such an approach would not be acceptable. In addition, it has been demonstrated that the reasons that the state should take care of its people are not mutually exclusive. Rather, by complementing each other, they create a clearer idea of the state's obligations and can be used dynamically to elucidate different aspects of the whole. This is why the option of a social state directed towards promotion of human dignity and social justice through solidarity in any given society should be preferred.

The solidarity and equality concerns answer to a great extent the 'how' question posed at the beginning of the article. The principle of the social state is highly abstract, and the goals to be achieved — the protection of human dignity and achievement of greater social justice — are demanding and dependent on the available resources and on the historical and cultural context. This is why it can only be said that the principle of the social state should be guaranteed on the basis of some redistribution of resources that would enable the state to cover the costs necessary for providing adequate social assistance, required by dignity and social justice. At the same time, the dignity of those whose economic rights are limited for the sake of protecting the dignity of the least advantaged must be guaranteed too. This is why any limitations must not go further than necessary for achieving the desired goal and must correspond to the principle of equal treatment.

The extent question is partly answered by the answer to the 'why' question, as dignity, justice, and solidarity require different degrees of protection of individuals but are, on the other hand, still very abstract and flexible terms. A number of historical³³, cultural, political, social³⁴, economic, and institutional concerns enter the forum when the extent of justified state intervention is discussed. But this should not result in a 'proceed as you like' kind of empty standard.³⁵ Rather, a somewhat relaxed but still adequate standard of protection, perhaps best termed as at least 'reasonable care', should be required under the principle of the social state.

The 'who' question is mostly answered with a democratic bias in favour of the legislature³⁶, but, as has been mentioned above³⁷, protection of the principle of the social state is not considered to belong to the exclusive

³¹ See references to the treatise *Traité de droit constitutionnel I* of Léon Duguit, published in Paris in 1930, in: E. Laaman (Note 22), p. 411.

³² In German constitutional law, the notion of *sozialer Rechtsstaat* (the social state based on rule of law) has been developed in order to protect the social state against its inherent collectivist tendencies by means of subjecting it to the principles of rule of law — legal certainty, liberty, and separation of powers — and the principle of the social state is therefore not regarded as an independent phenomenon. Conversely, the social state principle is supposed to mitigate the injustices that would have arisen from the non-involvement of the rule-of-law-based state in socio-economic processes (see E. de Wet (Note 8), pp. 32–33). Estonian constitutional law follows the same approach — see the wording of § 10 of the Constitution of the Republic of Estonia: "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" (*sozialer und demokratischer Rechtsstaat*).

³³ George S. Katrougalos emphasises that, in a social state, the minimal constitutional protection is the maximum possible under the actual historical and economic circumstances. See G. S. Katrougalos (Note 22), p. 165.

³⁴ Lon L. Fuller coined the term 'polycentric' to describe choices to which broad social considerations, extrinsic to the litigants' interactions, are relevant, when he argued that the judges are not suited for making them. See Lon L. Fuller. *The Forms and Limits of Adjudication*. – Harvard Law Review 1978 (92), pp. 394–404.

³⁵ The 'Commentary' to the social state clause in § 10 of the Constitution of the Republic of Estonia is quite close to depriving the social state principle of any independent legal meaning. According to it, the Constitutional principle only requires that the state guarantee the minimum immediately necessary for survival (staying alive) to those who cannot earn their living themselves, and anything beyond that is a political question. See the commentary on § 10 by Madis Ernits. – *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (Constitution of the Republic of Estonia. Commented Edition). Panel of editors led by E.-J. Truuväli. Tallinn: Juura Õigusteabe AS 2002, p. 106 (in Estonian).

³⁶ J. Waldron. *A Right-Based Critique of Constitutional Rights*. – Oxford Journal of Legal Studies 1993 (13), pp. 18–51; E. Forsthoff. *Begriff und Wesen des sozialen Rechtsstaates, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Heft 12*, Berlin: Walter de Gruyter & Co. 1954, p. 20; K.-P. Sommermann. *Staatsziele und Staatszielbestimmungen*. Tübingen: Mohr Siebeck 1997, p. 424; W. Osiatynski. *Social and Economic Rights in a New Constitution for Poland*. – A. Sajo (ed.). *Western Rights? Post-Communist Application*. 1996, as reprinted in V. C. Jackson, M. Tushnet. *Comparative Constitutional Law*. New York: Foundation Press 1999, p. 1485.

³⁷ See Notes 4 and 5 above.

domain of the legislator anymore.^{*38} In contemporary constitutional democracies, the courts have an increasing role to play, too, having to keep in mind the principle of separation and balance of powers. Besides the horizontal separation of powers, the response to the ‘who’ question can be influenced by the vertical one, as, in some contexts, the primary responsibility to provide social assistance may lie with the local governments^{*39}, the states^{*40}, or provinces, or it may be linked to obligations on supranational^{*41} or international level.^{*42}

1.4. Textual level

On the constitutional level, the permissibility of judicial implementation of the principle of the social state is expressed by insertion of catalogues of social rights and equal protection clauses into the constitutional texts that are regarded to produce subjective and justiciable rights for individuals. Textually, the social state principle can be expressed either in a separate clause^{*43} or through the establishment of fundamental social rights and the prohibition of unequal treatment on the basis of social or economic status. As all of the duties referred to inevitably incur expenses, they relate directly to the redistributive function of the state, which is expressed in the constitutions through the competence of the state to levy taxes in the broader sense. The principles (values) of human dignity and justice^{*44} are also closely intertwined with the principle of the social state.

As the constitutional provisions are just a basis for judicial interpretation, which is the main focus of my interest, I will not stop short here but instead will describe briefly what kind of influence the principle of the social state could exert on judicial application of its elements.

1.5. Influence of the nature of the social state principle on jurisprudence concerning some of its elements

As has been demonstrated above, the principle of the social state is a complex phenomenon. Any increase in the level of protection of one social right could mean that the economic rights of the taxpayers or the economic freedom of entrepreneurs would have to be limited more intensely, or that the protection of other economic, social, or cultural rights might be weakened thereby. Judges try to strike a reasonable balance between the interests of the community and its vulnerable individuals, as well as between the priority of claims to protection of different vulnerable groups. In addition, they must tackle complicated questions of how to determine desert and social necessity whereby they may end up at the boundaries of their competence or risk extensive public criticism. Therefore, figuratively speaking, elements of the principle of the social state are like a double-edged sword that might cut in unwanted directions and even hurt the sword-bearer at the same time. In order to protect themselves, the courts have equipped themselves with significant armour. This armour includes a set of judicial techniques.

Courts elaborate on the admissibility criteria rather carefully, as they are mindful of their limited role in the protection of the elements of the social state principle. The factors listed above as influencing the manner of implementation of the principle create significant tension and bring about a significant degree of deferentialism in the jurisprudence of constitutional courts concerning elements of the social state. In judgments, it can be expressed as judicial self-restraint or leaving of a wide margin of appreciation to the legislator. In addition, the resource restraint may be specifically mentioned in the reasoning of judicial decisions.^{*45} Due to the complexity and indeterminacy surrounding the extent question, constitutional courts tend to apply a relaxed review standard in deciding cases involving some elements of the social state principle, which, depending on the legal tradition, could be called a reasonableness test, rational and relevant reason test, intermediate scrutiny, or relaxed proportionality test. In addition, the scope of protection of various elements of the principle of

³⁸ Cécile Fabre argues that the democratic majority does not have the right to have its preferences implemented in those cases where application of its preferences would harm individuals’ interest in adequate minimum income, housing, education, and health care. See C. Fabre. *Social Rights under the Constitution: Government and the Decent Life*. Oxford: Clarendon Press 2000, p. 110.

³⁹ In Estonia, § 28 of the Constitution emphasises the importance of local governments in the sphere of social assistance.

⁴⁰ In the US, there are a number of states whose constitutions include obligations of state assistance, whereas the Federal Constitution seems to be more or less silent on that particular issue.

⁴¹ See K. Lenaerts, T. Heremans. *Contours of a European Social Union in the Case-Law of the European Court of Justice*. – *European Constitutional Law Review* 2006 (2), pp. 101–115; K. Saaremäel-Stoilov. *Polish Plumbers, the EU Constitutional Treaty, and the Principle of the Welfare State*. – *Juridica International* 2005 (10), pp. 126–134.

⁴² See T. Marauhn (Note 1); K. Saaremäel-Stoilov (Note 27), pp. 85–92.

⁴³ Some constitutions, like the 1992 Constitution of the Republic of Estonia or the Basic Law of the German Federation, include an explicit social state clause.

⁴⁴ The Finnish Constitution of year 2000 makes reference to promotion of justice in the society. See § 1 of the Finnish Constitution. Available at <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf> (03.11.2007).

⁴⁵ See *Soobramoney v. Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC).

the social state is frequently interpreted in a manner that uses the highest values of the legal order — justice, equality, and dignity^{*46} — to legitimise the judicial intervention and its result beyond any reasonable doubt. Solidarity, as a more dubious argument, appears in the argumentation of the courts less frequently.

I will continue with analysis of the constitutional jurisprudence of the Supreme Court of Estonia, also making some comparative remarks about the jurisprudence of the Federal Constitutional Court of Germany and the Constitutional Court of South Africa in similar cases. In doing that, I try to identify how these courts have tackled the difficulties surrounding the principle of the social state and its elements.

2. Does the social state principle equate to the principle of human dignity?

In January 2004, the Constitutional Review Chamber of the Supreme Court of Estonia was faced with a case involving the right to housing subsistence benefits, the first constitutional review case before it involving arguments of protection of the right to social assistance by the state and the principle of the social state.^{*47} A university student had been denied subsistence benefits by local authorities because he was residing in a student dormitory and the Social Welfare Act had not foreseen a possibility of paying subsistence benefits to persons living in dormitories. Any other kind of accommodation, including a leased or owned apartment, corresponding to the requirements prescribed by the Social Welfare Act would have been acceptable. At about the same time as the court received a referral from the first-instance administrative court to review the constitutionality of the pertinent norm of the Social Welfare Act, the Legal Chancellor submitted a similar application to the court. These two cases were joined. The Supreme Court began its analysis with explanation of what the social state principle entails. Accordingly, “the concept of the social state principle and protection of social rights contains an idea of state assistance and care to all those who are not capable of coping independently and sufficiently. Human dignity of those persons would be degraded if they were deprived of the assistance they need for satisfaction of their primary needs.”^{**48}

As the chamber refers simultaneously to both the principle of the social state and the principle of human dignity, and explains the meaning of those principles jointly, one could erroneously conclude that the social state principle lacks any independent meaning and coincides fully in meaning with the principle of human dignity.

I am convinced that this is not the case. Instead, the court has tried to identify the necessary level of state assistance by using dignity, one of the core elements of the principle of the social state, as a yardstick. The question that remains, however, is whether the level of protection described in this judgment is to be the general standard, applicable in all subsequent social rights cases, or whether the court has focused fully on the influence of the social state principle on subsistence benefits, which constitute — by definition — at least the minimum necessary for survival.^{*49}

Taking into account the principle of continuity of the constitutions of the Republic of Estonia^{*50}, the reference to human dignity is not very surprising.^{*51} The 1920 and 1937 constitutions of the Republic of Estonia, and

⁴⁶ These are the arguments that the principle of the social state is based on; therefore, it is hard to agree with the claim of Rosalind Dixon that the way social rights claims are prioritised depends on how a particular person/decision-maker views the relationship between social rights and various civil and political rights.

⁴⁷ A couple of months before that, the Administrative Law Chamber of the Supreme Court considered it necessary to initiate constitutional review proceedings in a genuine right to health care case, but it succumbed to procedural deficiencies of the Estonian constitutional review procedure. See the judgment of the Administrative Law Chamber of the Supreme Court of Estonia of 10 November 2003 in case No. 3-3-1-65-03, available in Estonian at <http://www.riigikohus.ee/?id=11&tekst=RK/3-3-1-65-03>, as well as the subsequent judgment of the Constitutional Review Chamber of the Supreme Court of Estonia in the same case contending that the contested norm was not pertinent, and thus that its constitutionality could not be reviewed (i.e., the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 31 May 2004 in case No. 3-4-1-7-04, paras 17–23).

⁴⁸ Judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 21 January 2004 in case No. 3-4-1-7-03.

⁴⁹ It must be kept in mind that this was a mixture of abstract and concrete norm control, as the court decided to review the applications of the Legal Chancellor and the first-instance administrative court jointly.

⁵⁰ For example, Hesi Siimets-Gross considers the constitutions of 1920 and 1937 to have been the direct predecessors of the current 1992 Constitution of the Republic of Estonia. See H. Siimets-Gross, *Social and Economic Fundamental Rights in Estonian Constitutions between World Wars I and II: A Vanguard or Rearguard of Europe?* – *Juridica International* 2005 (10), pp. 135–143.

⁵¹ It must be noted, however, that the current (1992) Constitution limits itself to mentioning the principle of the social state as one of its basic principles in § 10 and does not expressly state what the principle would mean. The Proceedings of the Constitutional Assembly do not contain any discussion of the principle of the social state either. Head of the Redaction Committee of the Constitutional Assembly Liia Hänni has just noted as a reply to the questions of why the Constitution’s text contained too little social rights that it is questionable to what extent a constitution could in fact guarantee such rights and that it is hoped that the Government of the Republic of Estonia and the parliament would conduct such social policies as would guarantee these rights even if they would not be fixed specifically in the Constitution. See Põhiseadus ja Põhiseaduse Assamblee. *Koguteos* (Constitution and Constitutional Assembly. Digest). Tallinn: Juura Õigusteabe AS 1997, p. 943 (in Estonian).

even the 1919 Interim Constitution, have all included a social justice clause, aimed at ensuring a dignified life for the peoples of Estonia.⁵² What seems to have gone missing from the interpretation of the Supreme Court as compared to the texts of the two previous constitutions is the justice element.⁵³ This kind of dignity-based approach is not very typical for Eastern European countries, save for in the practice of the Hungarian Constitutional Court⁵⁴, but it makes sense if one takes a look at the social state jurisprudence of the German Federal Constitutional Court, from which both the Hungarian Constitutional Court and the Supreme Court of Estonia have drawn inspiration. After initial rejection of it⁵⁵, the German Federal Constitutional Court accepted that a right to minimum social subsistence can be derived from respect for human dignity.⁵⁶ It must be noted, however, that the German Federal Constitutional Court does not rely solely on human dignity in its social state jurisprudence and that it bases its decisions extensively on the notion of social justice.⁵⁷ Thus, the Supreme Court of Estonia seems to have followed only a suitable and minimalist part of the jurisprudence of the Federal Constitutional Court. Why?

It seems that the experience of having been part of a totalitarian Soviet regime, where social security was provided as a trade-off for deprivation of liberty and property, has pushed the pendulum towards the other extreme in Estonia. Thus, liberty and property are considered to be more important than social solidarity. Moreover, it is feared that anything having something to do with social justice or the social state could, in fact, lead back to socialism.⁵⁸ This attitudinal change is visible even in the Preamble of the 1992 Constitution, where the values of justice, law, and liberty have been rearranged to liberty, justice, and law.⁵⁹ It must also be taken into account that, during the drafting process of the first social justice provisions, the prevailing ethos among the drafters was that, first of all, it is the duty of the individual and his family to take care of him and that the state would intervene only if they fail to do so.⁶⁰ The spirit of the Constitution of Estonia today is very similar.⁶¹ These considerations may explain the very cautious interpretation of the principle of the social state by the Supreme Court of Estonia.⁶²

⁵² Section 7 of the Temporary Regime of Government of the Republic of Estonia (Eesti Vabariigi ajutise valitsemise kord; RT 1919, 44, 345 (in Estonian)), also known as the Interim Constitution, stated that a dignified standard of living must be secured through laws on granting land for cultivation, securing housing and employment, and protecting mothers and the labour force, as well as on providing the necessary support in situations of youth, old age, incapability to work, or occupational accidents (see E. Laaman (Note 22), pp. 417–419).

Section 25 of the 1920 Constitution of the Republic of Estonia took over the wording of the Interim Constitution and added the requirement of organisation of economic life based on principles of justice from the Weimar Constitution (see E. Laaman (Note 22), p. 419). It stipulated: “The organisation of economic life in Estonia must correspond to the principles of justice, aiming to secure a dignified standard of living through laws on granting of land for cultivation; securing of housing and employment; protection of mothers and the labour force; and provision of the necessary support for youth, those of old age, those with incapability to work, and those having suffered occupational accidents”. – RT 1920, 113/114, 243 (in Estonian).

Section 24 of the 1937 Constitution of the Republic of Estonia was worded as follows: “The organisation of economic life must be based on the principle of justice, the aim being the development of creative forces, the promotion of general prosperity, and the attainment through this latter of a standard of living compatible with human dignity”. – RT 1937, 71, 590 (in Estonian). For English translation see *The Constitution of the Republic of Estonia with the Decision of the Estonian People for Convening the National Constituent Assembly and the Law for the Transition Period, Preceded by Introductory Articles* by J. Uluots and J. Klesment. Tallinn 1937, pp. 16–17.

⁵³ See Note 52 above. It should not be concluded from the fact that the provision on organisation of economic life on the basis of the principle of justice is borrowed from the German Weimar Constitution that justice is just an imported value in the Estonian constitutional tradition. To the contrary, all the preambles of the constitutions of the Republic of Estonia have emphasised justice, law, and liberty as the primary values on which the state is based. See the ‘Preamble’ sections of the 1920, 1937, and 1992 constitutions. For some reason, however, the Supreme Court of Estonia does not tend to use the justice argument very frequently. See M. Linntam. *Õigluse idee kui argument Eesti Vabariigi Riigikohtus ja Euroopa Kohtus (The Idea of Justice as an Argument in the Jurisprudence of the Supreme Court of Estonia and the European Court of Justice)*. – *Juridica* 2002/1, pp. 49–57 (in Estonian).

⁵⁴ A. Sajo. *Implementing Welfare in Eastern Europe after Communism*. – Y. Ghai, J. Cottrell (Note 3), p. 56.

⁵⁵ BVerfGE 1, 104.

⁵⁶ BVerfGE 40, 133; 103, 197.

⁵⁷ BVerfGE 5, 198; 22, 180 at 204; 27, 253 at 283; 35, 202 at 235.

⁵⁸ T. Annus, A. Nõmper. *The Right to Health Protection in the Estonian Constitution*. – *Juridica International* 2002 (7), pp. 117–126 (see especially p. 118); W. Drechsler, T. Annus. *Die Verfassungsentwicklung in Estland von 1992 bis 2001*. *Jahrbuch des öffentlichen Rechts der Gegenwart, Neue Folge* 2002 (50). Tübingen: Mohr Siebeck, pp. 473–492. Material reprinted in T. Annus. *Governance and Law in Transition States*. Tartu University Press 2004, p. 105.

⁵⁹ As has been noted above, the two previous constitutions stated that the state is based on justice, law, and liberty.

⁶⁰ See E. Laaman (Note 22), p. 416; E. Laaman. *Kodaniku põhiõigused ja kohused (Fundamental Rights and Duties of a Citizen)*. – *Põhiseadus ja Rahvuskogu (Constitution and Constitutional Assembly)*. Tallinn 1937, p. 355 (in Estonian).

⁶¹ It contains, similarly to the earlier constitutions, in its § 27 (5) a clause stating that it is the obligation of the family to take care of those of its members who need assistance.

⁶² It must be noted that the approach of the Supreme Court also coincides with the minimalist interpretation offered in the ‘Commentary’ material on § 10 of the Constitution as referred to in Note 35 above.

3. Is only the core of fundamental social rights justiciable?

Another question that arises when one reads the decision of the Supreme Court of Estonia in the Social Welfare Act case is whether only the core of the fundamental social rights can be considered justiciable. In this decision, the Supreme Court explains that, in order to delimit different branches of public power and to preserve the balance between them, the court may intervene in social rights cases only if this is necessary for the prevention of violation of human dignity — it is not for the court to replace the legislator or the executive and to make or second-guess choices of social and budgetary policy. Accordingly, the court may deal with subsistence benefits cases only when the assistance provided by the state remains below the required minimum level. With this stance the court is consciously avoiding any activism.

The position of the court might be regarded as problematic, as it has been argued that the catalogue of fundamental rights enshrined in the Constitution of the Republic of Estonia is a very well balanced and minimalist one.^{*63} The drafters have fleshed out the core of certain social rights that could potentially be fully justiciable. If the Supreme Court were to decide to render only the core of such social rights provisions justiciable, only ‘the core of the core’ of social rights would be enforceable, and the resulting level of protection of these rights could be remarkably low. Whereas the priority of judicial protection of the core of social rights has been emphasised by several scholars^{*64}, they have not gone so far as to suggest that only the core of those rights should be judicially enforceable.^{*65} Perhaps it is because these scholars have based their argumentation on the South African experience, wherein the Constitutional Court explained in the *Grootboom*^{*66} and *TAC*^{*67} cases that the government has to take into account both the immediate necessity and the aspirational aspects^{*68} of social rights. Taavi Annus and Ants Nõmper have argued that, in the Estonian constitutional context, different layers of social rights require the use of differing judicial techniques, and that the courts should be most careful in dealing with resource-dependent aspects of social rights.^{*69} Even if one might imagine that the position of the court, as voiced in the Social Welfare Act case, is just a starting point, concerning exclusively the fulfilment aspect^{*70} of this particular social right and not applicable in any further cases concerning the respect and protection aspects of social rights before it, it still fails to address several practical issues.

Firstly, it cannot be clear for applicants — until sufficient case law has emerged — what kind of interference with fundamental social rights constitutes at the same time a violation of the principle of human dignity and a situation in which they would be entitled to recourse to the courts for the protection of their fundamental social rights.

Secondly, it remains unclear in this case how to guarantee satisfaction of the requirement of the UN Covenant on Economic, Social and Cultural Rights that the level of protection of social rights be gradually raised, taking into account the economic possibilities of the state concerned.^{*71} When the justiciability of fundamental social rights is restricted in a manner described above, there is no domestic mechanism to compel the legislator and the executive to take steps in that direction if they fail to act on their own initiative. The same problem arises with regard to guaranteeing compliance with the ban on regressive measures that is established in the Covenant.

It can be argued that, within the system of balance of powers emanating from the court’s reasoning, the powers of the state are separated but the balance has been struck between them in a manner that clearly favours the legislator and the executive.

⁶³ R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in the Estonian Constitution). – Special Issue of *Juridica* 2001, p. 76 (in Estonian).

⁶⁴ T. Roux. Understanding *Grootboom* — a Response to Cass R. Sunstein. – *Constitutional Forum* 2002 (12) 2, pp. 112–122, especially p. 46; D. Bilchitz (Note 4), p. 208.

⁶⁵ See D. Bilchitz (Note 4).

⁶⁶ *Government of South Africa v. Grootboom*, 2001 (1) SA 46 (CC).

⁶⁷ *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC).

⁶⁸ By ‘aspirational aspect’ I refer particularly to the standard-setting *Grootboom* case, where the court stated that the government must set forth reasonable, balanced, and flexible programmes addressing social problems in short-, medium-, and long-term perspective.

⁶⁹ T. Annus, A. Nõmper (Note 58), pp. 121–125.

⁷⁰ See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. – *Human Rights Quarterly* 1998 (20), pp. 691–705. Consider here also the duty to avoid deprivation, the duty to protect from deprivation, and the duty to aid the deprived, proposed by Henry Shue; see H. Shue. *Basic Rights*. Princeton: Princeton University Press 1980, p. 52.

⁷¹ It must be taken into account that the 1992 Constitution of the Republic of Estonia is particularly open to international law. For details, see H. Vallikivi. *Välislepingud Eesti õigussüsteemis: 1992. aasta põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus* (Treaties in the Estonian Legal System: The Domestic Validity and Applicability of Treaties Concluded under the Constitution of 1992). Tallinn: Õiguskirjastuse OÜ 2001 (in Estonian).

The Supreme Court has so far not rendered any other judgments on the merits in genuine social rights cases, although it had a theoretical possibility of doing so in the case of Johannes Toom^{*72} and in the rent restrictions case^{*73} initiated by the President of the Republic.

4. Equal access to social rights as a solution to the ambiguity related to social rights

The test that the Supreme Court would apply in cases concerning possible restriction of social rights remains unclear, because all of the cases concerning social rights, including the groundbreaking Social Welfare Act case, have so far been adjudicated on the basis of the ‘equality in lawmaking’ principle^{*74}, derived from § 12 of the Constitution. Moreover, the Supreme Court has considered it essential to point out that fundamental social rights and the general right to equality are more closely connected to each other than other fundamental rights are to the right to equality.^{*75}

The principle of equality in lawmaking^{*76} requires, pursuant to the Supreme Court’s jurisprudence^{*77}, that laws treat all persons who are in a similar situation similarly. Departure from this principle is permissible if there is a reasonable and appropriate justification for this.^{*78}

Bearing in mind that the Supreme Court applies the full proportionality test^{*79} when considering freedom rights in combination with equality rights, it can be argued that in the cases concerning social rights the Supreme Court intentionally leaves the legislator a much wider margin of appreciation than that provided in freedom rights cases.^{*80}

Yet it seems that, when solving concrete cases, the Supreme Court has encountered situations where applying a stricter test^{*81} would have been necessary for achievement of the desired result. For example, in the Parental Benefit Act case^{*82} the Supreme Court pointed out that the application of the contested norm of the Parental

⁷² See the judgment of the Administrative Chamber of the Supreme Court of Estonia of 10 November 2003 in case No. 3-3-1-65-03, as well as the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 31 May 2004 in case No. 3-4-1-7-04.

⁷³ See the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 2 December 2004 in case No. 3-4-1-20-04.

⁷⁴ See the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia in the early-retirement pension case (that is, the judgment of 21 June 2005 in case No. 3-4-1-9-05, RT III 2005, 24, 250, paras 14 and 19), in the Social Welfare Act case (i.e., the judgment of 21 January 2004 in case No. 3-4-1-7-03, RT III 2004, 5, 45, para. 17), and in a key case of dismissal on the grounds of age that constituted a double discrimination case (namely, the judgment of 1 October 2007 in case No. 3-4-1-14-07, RT III 2007, 34, 274, para. 13).

⁷⁵ Similarly, the Constitutional Court of South Africa pointed out in the Khosa case that the requirement of equal access to social rights can be derived from the social rights as such (see *Khosa v. Minister of Social Development*, 2004 (6) SA 505 (CC), para. 44). In Estonia, the aim of connecting the two intertwined elements of the principle of the social state – social rights and the right to equality – might have been to prepare the grounds for a more relaxed review standard for social rights similar to the standard for equality in lawmaking review. In South Africa, the aim might have been to adjust the standard of review for equal access to social rights cases to incorporate the reasonableness review employed in social rights cases.

⁷⁶ In German constitutional law, there is also a concept of equality of lawmaking (*Rechtssetzungsgleichheit*), binding the legislator to the right to equality. See P. Martini. Art. 3, Abs. 1. GG als Prinzip absoluter Rechtsgleichheit. Cologne, Berlin, Bonn, & Munich: Carl Heymanns Verlag 1997, pp. 5–6. In concrete cases, however, the stringency of the standard of review depends on the intensity of the interference with the right to equality and on whether and to what extent a person can influence the factors on which the differential treatment was based. In cases involving right-to-equality claims in the sphere of application of the principle of the social state, the German Federal Constitutional Court employs the most lenient ban-of-arbitrariness test, which may be strengthened if a freedom right has been infringed at the same time. See H.-M. Kallina. Willkürverbot und Neue Formel. Der Wandel der Rechtsprechung des Bundesverfassungsgerichts zu Art. 3 I GG. Tübingen: Köhler-Druck 2001, pp. 26–29. In a case concerning old-age pension insurance, the GFCC explained that even if the primary responsibility for making social policy decisions lies with the legislator, it is bound by the Constitution’s social equality requirements. Thus the expediency arguments should be overridden by social justice arguments. See BVerfGE 36, 237.

⁷⁷ See the judgments of the Supreme Court of Estonia in the following cases: No. 3-4-1-2-02, para. 17 (RT III 2002, 11, 108); No. 3-1-3-10-02, para. 36 (RT III, 2003, 10, 95); No. 3-4-1-33-05, para. 26 (RT III 2006, 10, 89).

⁷⁸ The ‘reasonable and appropriate justification’ test of the Supreme Court of Estonia resembles the reasonableness test of the South African Constitutional Court, applied in the Khosa case, in that the differentiation must not be arbitrary, and the court leaves the legislator considerable leeway in choosing means for achievement of the constitutionally required goals. However, the reasonableness and appropriateness test of the Supreme Court of Estonia does not require assessment of the impact of the limitation.

⁷⁹ See, for example, the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 1 September 2005 in case No. 3-4-1-13-05, para. 32 (RT III 2005, 26, 262). Available at <http://www.riigikohus.ee/>.

⁸⁰ The court explicitly expressed such a necessity in the Social Welfare Act case.

⁸¹ Conversely, it has been pointed out that “substantive equality manifests as judicial deference when it protects the state from having to explain its decision to exclude a particular group from a particular benefit.” See S. Fredman. Providing Equality: Substantive Equality and the Positive Duty to Provide. – *South African Journal on Human Rights* 2005 (21) 2, pp. 163–190 (especially the material on p. 175).

⁸² Judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 20 March 2005 in case No. 3-4-1-33-05. Available at <http://www.riigikohus.ee/>, also published as RT III 2006, 10, 89.

Benefit Act had led to an unjust result^{*83}: a mother remaining at home with a child and receiving her salary for past work periods with a significant delay that was caused through the fault of her employer would be deprived of parental benefits. That is why the court found that the argument of complexity of administration invoked by the state did not outweigh the infringement of the general right to equality, where weighing refers to the principle of proportionality. The need to weigh the different interests at stake was also mentioned by the court in the early-retirement pension case. Thus, it remains to be seen whether the Supreme Court will consider it possible to apply a more stringent test in future social and equality rights cases.

Unlike many other constitutions, the 1992 Constitution of the Republic of Estonia contains a specific ban of discrimination based on a person's economic or social status.^{*84} Still, the Supreme Court of Estonia has so far refrained from applying this ban and refers in solving cases that would qualify as economic or social status discrimination cases instead to the general right to equality in combination with some social rights. Perhaps the court has followed this approach in an attempt to avoid the application of a strict proportionality test^{*85} in such cases.

Another aspect that deserves attention is whether and how the court has based its decisions on particular social and economic context arguments. So far, the court has abstained from any explicit analysis of social and economic data, with the exception of the early-retirement pension case. In that case, the court performed a rather thorough analysis of social and economic data when assessing the social and budgetary impact of the legislative change required for equal treatment of different groups of pensioners.^{*86} This does not mean, however, that the court would normally not take into account the social and economic effects of its decisions, or its inability to predict these. Similarly to the historical and cultural background issues, these kinds of considerations can sometimes be read between the lines.

5. Conclusions

The Supreme Court of Estonia has dealt with social-state-related cases extremely carefully, mindful of all the dangers that could emanate from such claims, and it has used most of the judicial tools at its disposal to protect itself from the double-edged sword. This has led to a moderate level of judicial protection of social rights and leaves most of the questions for the legislator to solve. The level of protection of the principle of the social state by the Supreme Court of Estonia is comparable to that offered by the German and South African constitutional courts, as both use a relaxed standard of review in social-rights-related cases. Compared to the practice in jurisdictions that have not declared social rights justiciable, however, the constitutional jurisprudence of the Supreme Court of Estonia is progressive.

Although the judicial restraint exercised by the Supreme Court of Estonia in social-rights-related cases can be ascribed in part to a particular historical and social context, it is guided by the nature of the social state principle, as an interpretative principle. A particular feature of the Estonian social state jurisprudence is that it hardly ever mentions solidarity. Equally the (social) justice element can also be found relatively rarely in the cases of the Supreme Court of Estonia that address the principle of the social state.

As there is an ambiguity in the jurisprudence of the Supreme Court of Estonia as to what extent the social state principle and fundamental social rights are independently justiciable, the case law on the elements of the social state has so far been concentrated around the principle of equal treatment. The general right to equality and the principle of equality in lawmaking, arising from the former, do not enable the resolution of all types of social rights disputes. Thus, for example, if the state fails to establish a system for the protection of certain types of social rights, the question of observance of the principle of equal treatment cannot be invoked, as in such a case all persons concerned are equally unprotected. That is why the Supreme Court will have to decide in the future whether (and, if at all, how strictly) to apply the proportionality test to social rights cases, or whether to proceed from the more lenient 'reasonable and appropriate justification' test instead.

⁸³ Besides being an excellent example of how the Supreme Court of Estonia has based its decision on the value of justice as an element of the principle of the social state, this decision is also one of the first ones where the court has in fact ruled a legislative provision unconstitutional because of its disparate / indirectly discriminating effect on the applicant.

⁸⁴ See the second sentence of the first paragraph of § 12 of the Constitution of the Republic of Estonia.

⁸⁵ Whereas Robert Alexy and Katri Lõhmus consider it necessary to solve all discrimination cases on the basis of strict proportionality analysis. See R. Alexy (Note 63), p. 78; K. Lõhmus. Võrdsusõiguse kontroll Riigikohtus ja Euroopa Inimõiguste Kohtus. – *Juridica* 2003/2, pp. 107–119, especially p. 108 (in Estonian). Taavi Annus contends that socio-economic discrimination is less burdensome, and that therefore the court should apply a rational reason test. See T. Annus. *Riigiõigus* (Constitutional Law). Tallinn: Juura 2001, p. 299 (in Estonian).

⁸⁶ The reason the court was willing to engage in this kind of analysis in that case was, perhaps, that the court had to analyse the effect of a piece of legislation in the past, and by the time of the proceedings, the parliament had already changed the unconstitutional provisions to bring it into conformity with the Constitution. By that time, the data regarding the social and budgetary impact of the legislative changes had been made readily available in the explanatory note to the Amendment Act.



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A Comparative Presentation on Constitutional Courts as Guardians of Competition between Political Parties

1. Democracy means competition

1.1. Democracy as an arrangement of competition

One major feature of any form of democracy is that there is some form of competition among candidates and/or parties to come into positions that are vested with the power to make binding decisions. Behind this struggle for decision-making positions, of course, there is a competition among different interests and ideas.^{*1} This means that democratic competition is only on its surface a competition among persons and organisations. Underlying that competition and fuelling it are strong antagonisms between rival conceptions as to how society **should** be.

The use of this concept of democracy does not mean that democracy should be defined only via this competition-based approach, as Joseph A. Schumpeter does.^{*2} Democracy means more than just an electoral method; it has to do with certain degrees of freedom, with the emphatic idea of individual and collective autonomy and self-determination. In any case, competition is an indispensable element of any modern form of democracy.^{*3}

¹ M. Morlok. Parteienrecht als Wettbewerbsrecht – P. Häberle, M. Morlok, V. Skouris (eds.). Festschrift für Dimitris T. Tsatsos, 2003, p. 408.

² J. A. Schumpeter. Capitalism, Socialism and Democracy. 1st ed. 1942 (reprinted in 1962), Chapter 22.

³ For a fine expression in a constitutional context, see Ústavní soud České republiky (Constitutional Court of the Czech Republic), Decision Pl. ÚS 26/94, which states: “The Constitution of the Czech Republic is based on representative democracy, in which the creation of political will and formation of state power is the result of free competition of political parties (Art. 5 of the Constitution) within a democratic state based on the rule of law” (Translation of the Court). See also Ústavný súd Slovenskej Republiky (Constitutional Court of the Slovak Republic), Decision PL. ÚS 15/98 as cited by E. Bárány, L. Orosz. The Institution of the Political Party in the Slovak Republic. – D. T. Tsatsos, M. Morlok, D. Schefold, C. Grewe (eds.). Parteienrecht im europäischen Vergleich. 2nd ed. 2008 (forthcoming), Fourth Part, section I.

1.2. Functions of competition

Competition is associated with several advantages.^{*4} It stimulates the development of ideas and problem-solving methods^{*5}; the rivalry among those making different proposals enhances their efforts; by means of competition for voters or votes, the interests and convictions of the voters are best served; and — last but not least — open competition serves as a device acting against the misuse of power: The democratic competition keeps the persons who are actually in power in fear of the sovereign: the people.

1.3. Legal framework for competition

Any competition needs a framework in which to take place^{*6}, even more: without a set of rules and institutions, there can be no effective competition, at least not over longer periods of time. An unregulated competition will develop unfair practices, cartels, and obstacles against new competitors, thereby eliminating the above-mentioned advantages of competitive structures of decision-making systems.^{*7} In the long run, an unregulated competition is likely to see a change from its originally democratic character. Therefore, there is a need for a legal arrangement that ensures lasting free competition.

1.4. Elements of a legal arrangement for competition

Let me specify some of the elements of such a legal arrangement for lasting and effective competition among political parties. The basic functional prerequisite is the equality of rights and chances of all participants. Further on, there should be precautions against unfair competition or fraud and also rules that prevent settlements or agreements among competitors against other competitors, especially new ones. Of course, measures to ensure the openness of the competition are of importance.

We learn from economic theory that the effects of competition result not only from the competition itself but also from the reactions of the actual competitors to potential new competitors. They strive to keep new competitors out by preventing them from appearing attractive. Therefore, tendencies to turn an open competition into an oligopolistic one should be given serious consideration. This means there must be realistic chances to enter into competition; the obstacles to entering the market should be as low as possible.^{*8}

Finally, there should be means of control and enforcement of these rules safeguarding competition.^{*9}

2. The law of the political process as competition law

2.1. Law regulating political competition

If it is true that competition depends on a particular legal arrangement, then in a stable democracy there must be a set of legal rules that functions as competition law. The law regulating the political process — which is a competitive one — may be considered a special form of competition law. This holds true for the law of political parties and for voting law, but also for the law regulating the parliamentary process. It might be helpful to conceive of these legal matters as a kind of competition law. It is only by means of these legal rules that a fair, effective, and sustained political competition is maintained.^{*10}

⁴ E. Kantzenbach. Die Funktionsfähigkeit des Wettbewerbs: Weite Oligopole als Wettbewerbsbedingung, – K. Herdzina (ed.). Wettbewerbstheorie. 1975, p. 196 ff.

⁵ F. A. von Hayek. Die Verfassung der Freiheit. 3rd ed. 1991, p. 46 ff.

⁶ B. Ackermann. Wettbewerbsrecht. 1997, p. 4 ff.; G. Speckmann. Wettbewerbsrecht. 2000, p. 1; O.-F. von Gramm. Wettbewerbsrecht. 1987, p. 7 ff., p. 49 ff.; H. Berg, D. Cassel, K. Hartwig. Theorie der Wirtschaftspolitik – D. Bender et al. (eds.). Vahlens Kompendium der Wirtschaftstheorie und Wirtschaftspolitik 2003 (2), p. 199; C. D. Edwards, Die Erhaltung des Wettbewerbs: Das Ziel – K. Herdzina (Note 4), p. 215 ff.; M. Morlok (Note 1), p. 415.

⁷ R. S. Katz, P. Mair. Changing Models of Party Organisation and Party Democracy: The Emergence of the Cartel Party. – Party Politics 1995, p. 5 ff.; R. S. Katz, P. Mair. How Parties Organize. 1994.

⁸ M. Morlok (Note 1), p. 432 ff.; BVerfGE 111, p. 404 ff. See also, referring to the latter, M. Morlok. – NVwZ 2005, p. 157 ff.

⁹ M. Morlok (Note 1), p. 416.

¹⁰ *Ibid.*, p. 417.

2.2. Elements of political competition law

Let me enumerate some of the elements of such a political competition law. In their basic structure these are the same elements as associated with any competition. We need freedom of action for all participants, enshrining the freedom to compete. This freedom is guaranteed by the usual fundamental rights; here I shall name only freedom of expression and the freedom to assemble and to associate. Perhaps the most striking element of a legal framework for political competition is the guarantee of equality of the rights of all competitors.^{*11} A special aspect of this equality of chances concerns the funding of political activities — namely, the financing of political parties and of election campaigns. Here we do need an elaborate system of rules to deal with public financing as well as financing from private sources.^{*12} The legal regime for the financing of political activities has to do justice to parties with a rich base of funding but also to parties the members of which are on the middle or lower rungs of the income scale.^{*13}

Again, it is important that there is open access to political competition^{*14}; thresholds for entering the market may have different forms. Of course, there are legal thresholds in the voting law but also prerequisites for registration as a political party. Access to the mass media is important, and, as always, the financing regime is crucial. If there are public subsidies for political parties, parties should qualify for these by achieving a rather low percentage of votes; otherwise, newcomers will not have an equal opportunity to enter the competition. All of this holds true also regarding **potential** rival parties.

2.3. Control and enforcement

All legal regulation is of little value as long as obedience to the existing rules is not controlled and compliance with the norms not enforced. This is even more true in fields where there are strong motives not to comply. This is the case in the political arena where the struggle for power takes place. To come into power is a very strong motivator, which endangers abidance by the law. Therefore, the legal arrangement that guides the political competition needs institutions of control and law enforcement.

There may be special agencies for controlling political parties and voting campaigns — for instance, special committees such as the United Kingdom's Electoral Commission^{*15} — or it may be the task of general institutions to control the behaviour of political actors in whether they obey the law. Of course, there also is need for a system of sanctions in case of violation of the legal competition rules. The courts, of course, play an important role in the enforcement process for the law of the political process.

3. The particular task of constitutional courts

Constitutional courts play a special role in this context. As the highest of all courts, this level possesses clear importance and — it is hoped — enjoys supreme prestige. The importance of constitutional courts stems from their unique function of interpreting authoritatively the uppermost layer of legal rules. To use Montesquieu's terms^{*16}, the constitutional court is *la bouche de la constitution*. As — due to the hierarchical structure of legal systems — every other national law has to follow the guidelines supplied by the constitution, the only source of binding constitutional interpretation wields great power, also, as often is overlooked, concerning everyday legal matters, such as divorcements, sureties, and the possibility to deduct donations given to a political party from one's taxes due.

This can be explained by the fact that the legal mainstays of a well-functioning political competition — such as the rules for financing of political parties — usually can be deduced from constitutional principles such as the equality of all political competitors. A constitutional court thereby is empowered — and indeed has the duty — to control the compliance with the constitution of every sub-constitutional legal norm dealing with political competition. To put it another way, even the parliament as legislator can distort the free and equal

¹¹ BVerfGE 111, p. 382 ff.; M. Morlok. Konkurrenz belebt das Geschäft. Jura 2006, p. 701; A. Kießlinger. Das Recht auf politische Chancengleichheit. 1998, p. 87 ff.

¹² M. Morlok (Note 1), p. 418 ff.

¹³ BVerfGE 8, p. 51 ff.

¹⁴ BVerfGE 111, p. 382 ff.

¹⁵ Consult K. Ewing. The Institution of the Political Party in the United Kingdom. – D. T. Tsatsos et al. (Note 3), Fourth Part: Party Financing: Controls and Sanctions.

¹⁶ See Montesquieu. De l'esprit des lois. 1748: "Le juge est la bouche qui prononce les paroles de la loi" Book XI, Chapter VI, 'De la Constitution d'Angleterre'.

competition of the political antagonists.¹⁷ Normally the only remedy against such distortion is to appeal to the constitutional court, which in most legal systems is the only court vested with the powers to repeal a law passed by the parliament. Since the members of Parliament themselves usually are deeply involved participants in the political competition that Parliament was intended to regulate, the constitutional court occupies a central position in controlling the legislator.

4. Some comparative findings

This thesis according to which constitutional courts function as guardians of competition of political parties can be confirmed by a comparative look at the activity of constitutional courts in different countries, especially in the member states of the European Union.

4.1. Differences between countries

The findings from the various countries differ from each other as a result of different conditions of context. This goes without saying for countries that do not know a constitutional court. In those countries that do have such a court, its role is defined by its legal powers and its institutional design. But, of course, other factors, of a purely cultural and social nature, are of eminent importance too. One has to reckon with the history and tradition of each country and the political culture that has evolved from these. For long-established and stable democracies, such as the UK or the Netherlands, with deeply rooted traditions of an open and fairly balanced political competition, it may be viable to reduce juridical controls to a minimum.

Important constitutional court decisions that are closely related to the rules of political competition can be found in considering a number of countries, among them Germany, France, Spain, Hungary, Slovakia, Slovenia, the USA, and the Czech Republic.¹⁸ Reportedly of lesser consequence with regard to the competition between political parties is the role of the constitutional court in Austria¹⁹ and Lithuania.²⁰ The same holds true for Malta.²¹

4.2. Subjects of constitutional control

a) I now come to the various issues that have been the objects of constitutional court decisions. By way of summary, one could describe them as cases centred on the two great questions of the law of political competition — i.e., freedom of political activity and equality of the participants in that competition.

b) As far as **freedom** is concerned, the protection of political parties and candidates against being arbitrarily put at a disadvantage by the authorities is at the centre of jurisdictional attention. Obviously, opposition parties are more likely than others to become the target of repressive measures by state authorities, but that is not necessarily so, as, for example, Turkish history over the past two or three decades shows. In general, all political parties, their candidates, and their supporters profit from a special legal status at a constitutional level that ensures their freedom of action against such discriminatory measures.

c) This leads us to the core of the rules of political competition — namely, the principle of equality of opportunities. That principle has been expounded upon by the constitutional courts, thereby developing into different, subsidiary branches of law as follows.

The first of these areas is **electoral law**. Quite a few questions lie in the realm of electoral law, among them those related to gerrymandering, electoral thresholds, franchise, eligibility, and (of course) the financing of election campaigns.²²

Furthermore, there is a specific field of **law of election campaigning**. Court decisions in the latter realm deal with the transmission times the political parties are given for their campaign advertisements by the broadcasting

¹⁷ Consult A. von Brünneck. *Verfassungsgerichtsbarkeit in den westlichen Demokratien*. Baden-Baden 1992, pp. 81–82.

¹⁸ Consult the various reports in D. T. Tsatsos et al. (Note 3); A. von Brünneck (Note 17), p. 80.

¹⁹ M. Stelzer. *Die Institution der politischen Partei in Österreich*. – D. T. Tsatsos et al. (Note 3), Second Part, section III, 4; H. Schäffer. *Landesbericht Österreich*. – C. Starck (ed.). *Grundgesetz und deutsche Verfassungsrechtsprechung im Spiegel ausländischer Verfassungsentwicklung*. 1990, p. 70.

²⁰ E. Sileikis. *Die Institution der politischen Partei in Litauen*. – D. T. Tsatsos et al. (Note 3), Fifth Part, section II.

²¹ H. Frendo. *Die Institution der politischen Partei in Malta*. – D. T. Tsatsos et al. (Note 3), Second Part, section II.

²² Consult the work of A. von Brünneck (Note 17), pp. 81–84.

stations and the parties' right to have these spots broadcast uncensored and unchanged.^{*23} Directly touching on constitutional questions are the issues of the government's right to influence public opinion via its public relations bodies during an election campaigning period.^{*24} Another problem that frequently arises is that of access to public facilities such as city halls and the like.^{*25}

Political party law deals specifically with political parties as organisations. First of all, one should name the freedom of founding a new party as a means of entering the political competition.^{*26} That freedom usually is guaranteed, but differing registration requirements may exist. The equality of opportunities of political parties forms, as I mentioned above, the core of the regulations on political competition.

Apart from that, the internal life of political parties is regulated as well. The paramount importance of parties for the political competition and the fact that this competition to a large extent takes place *within* the parties means that the internal proceedings of these organisations have to be seen to by the legislator and in consequence by the (constitutional) courts. The rules of internal competition must ensure that the internal life of political parties complies with the principle of democracy.^{*27} The focal point of these rules will be the process of nomination of candidates for public offices.^{*28}

Another area of focus is **political parties' financing**. As usual, questions concerning money are of utmost importance. That applies to both public and private financing of political parties.^{*29} In order to guarantee equality of opportunities, private financing has to be subject to regulation.^{*30} There are two main reasons for this. First, political parties with a well-to-do following (i.e., with financially stronger social interest groups behind them) are likely to obtain disproportionately great private financing. Second, the regulation of private financing is necessary to prevent particularly rich persons or interest groups from 'buying' a political party. Political power must come not from the briefcase but from the ballot box.

Yet it still must be considered that the control of the financial management of political parties by state authorities, like the Audit Office, is a sensitive question.^{*31}

Lastly, the **principle of protection of competition** itself has been developed, to an especially great extent by the Constitutional Court of the Czech Republic^{*32} and the Constitutional Court of the Slovak Republic.^{*33}

As a summary we can formulate a conclusion that — with all things taken together — there is well-developed jurisdiction of the constitutional courts in serving protection of the competition between political parties.

²³ An example is found BVerfGE 47, p. 225 ff.; for further material, see BVerfGE 67, p. 169 ff.; BVerfGE 69, p. 368.

²⁴ BVerfGE 44, p. 125.

²⁵ On this, see Bundesverfassungsgericht, Decision 2 BvR 447/07.

²⁶ Constitutional Court of the Republic of Slovenia, Decision No. Up-301/96 (1998) as cited by M. Cera, I. Lukšič. Die Institution der politischen Partei in Slowenien. – D. T. Tsatsos et al. (Note 3), First Part, section II.

²⁷ Consult Ústavný súd Slovenskej Republiky, Decision PL. ÚS 15/98 as cited by E. Bárány, L. Orosz (Note 3), Fourth Part, section I.

²⁸ Tribunal Constitucional (Constitutional Court of Spain), Decision STC 160/1989 as cited by J. M. P. Ramírez. Die Institution der politischen Partei im Königreich Spanien. – D. T. Tsatsos et al. (Note 3), Second Part, section A).

²⁹ Conseil constitutionnel (Constitutional Council of France), Decision No. 88-242 DC, 10.03.1988 as cited by M. Fromont. Landesbericht Frankreich. – C. Starck (ed.). Grundgesetz und deutsche Verfassungsrechtsprechung im Spiegel ausländischer Verfassungsentwicklung. 1990, p. 70.

³⁰ BVerfGE 8, p. 66.

³¹ Ústavní soud České republiky, Decision Pl. ÚS 26/94.

³² Ústavní soud České republiky, Decision Pl. ÚS 26/94: "In order for democratic state bodies to be created at all, they must be preceded by the free competition of autonomous political parties independent of the state, because it is only in the results of this competition that the political contours and dimensions of the state are formed. In this basic function, political parties move in a sort of foreground of the state, and therefore intervention by state bodies, whose composition is a product of this process, in the process itself is undesirable if it can politically affect the course of free competition of parties — e.g., by describing the actions of particular parties as uneconomical or unpurposeful" (translation of the Court).

³³ Ústavný súd Slovenskej Republiky, Decision PL. ÚS 15/98 as cited by E. Bárány, L. Orosz (Note 3), Fourth Part, section I.

5. Conclusions

5.1. Different legal options for the constitutional court in addressing political competition

a) Political competition, just as any other competition, needs a legal framework. This set of legal norms must be enforced by institutions of the state. The constitutional courts in quite a number of states do play an important role in carrying out this task.

The importance of constitutional courts in different countries depends on a range of factors. The stronger the constitutional safeguards against any infringements of political parties' rights, the greater the (potential) role constitutional courts may play in safeguarding equality of opportunities in the political competition.

The design of the relative procedural law is of great importance also. A constitutional court in a legal system that includes remedies via which the individual citizen may claim his constitutional rights usually plays a much more active role, also in matters of the political process.

b) Institutions have their own traditions that contribute to their attitudes. These attitudes of constitutional courts and their justices are also important for the measure and the way in which constitutional courts function as guardians of the political competition. For instance, the courts having a solid reputation may help them to take decisions against political groups that are in power.

There are good reasons for a constitutional court to take an attitude of self-restraint — in order to preserve wide discretion for the democratically elected parliament and not to put the court's decision in the place of decisions of Parliament. But in the field of political competition things are different. Here the actual majority might be tempted to modify the legal framework of the competition — the terms of competition, as it were — in the direction of a more favourable pattern for their own party or parties. In relation to this danger it becomes obvious that one pivotal task of a constitutional court consists in safeguarding political competition. This constellation brings about good reasons for an attitude of judicial activism — because there are no other means to be applied against distortion of competition by the legislative majority.

5.2. A new frontier for defending democracy

Typically, rights to democratic participation are endangered by an authoritarian or undemocratic state. Under such circumstances, the law and the courts have to defend the citizens' rights. In well-functioning democracies, another problem is more prominent: minority rights have to be defended against the majority that has the power to create or change the law. The defence of fair rules of political competition against the democratic legislator is the main task of constitutional courts within a democratic system.^{*34}

5.3. Conditions for the justification of unequal treatment

A necessarily superficial overview of the jurisdiction of constitutional courts seems to confirm a tendency toward stricter standards of judgement as far as the protection of equality of political opportunities is concerned. Any deviations from the principle of equality of the political competition seem to be much harder to justify than, for example, encroachments on economic rights such as property rights or the free choice and practice of one's profession.^{*35}

5.4. Law and the standards of political culture

The law is not the only factor determining human behaviour. Purely social norms, traditions, and personal convictions are at least equally important. We can therefore observe that in old and long-established democracies law has a much lesser role in protecting the democratic process than in younger democracies, especially in countries with an undemocratic or even totalitarian history. So it came to pass that Germany after 1945 emphasised legal instruments very strongly to protect the newly established democratic system. A similar phenomenon can be observed in other states.

At the same time, there is a contrary or rather a converging tendency. The UK as the classical democratic and parliamentary state, one that traditionally did not rely much on legal instruments to protect its political

³⁴ A. von Brünneck (Note 17), pp. 88–89.

³⁵ *Ibid.*, p. 88.

system, has done so increasingly in recent years. New laws have been enacted to protect competition among political parties. Regulations concerning political finances come to mind.^{*36} Legal guarantees for the freedom and equality of the political competition seem to be indispensable.

However, to become effective, these legal norms must be transformed into and accepted as social norms that determine individual and collective behaviour. This leads to a new aspect for consideration: the regulations concerning political competition may initiate an improvement and further refinement of the standards of political culture. The rulings of constitutional courts may thus serve as catalysts for such development.

³⁶ Consult K. Ewing (Note 15), Third Part: The Financing of Political Parties.



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Relationship of the State and Political Parties in Estonia

1. Introduction

I consider the relationship of the state and political parties of Estonia by raising the question of what the role of the state is — and could be — in regulating and ensuring competition between political parties, such that power is exercised in the public interest and not in return for donations or any other grants a political party might receive.

When speaking of the state I refer to the system of state authorities as a whole, especially the legislative body and court system. According to the Estonian Political Parties Act¹, a political party is a registered legal entity, a not-for-profit association that has at least one thousand members who are citizens of Estonia or any other Member State of the European Union with a right to vote. This is a legal definition. There is, of course, a wider definition under which it is possible to treat other unions oriented to executing political power (e.g., election coalitions of citizens) as political parties. That the concept of a political party and the state's activities is, in fact, formed by political parties both by making laws and by distributing the taxpayers' money while being the decision-makers on their own matters, among other things, is intriguing.

Political life in Estonia is led by political parties, which correspond to a strict legal concept and are represented in Parliament (the Riigikogu), and which have this right in front of other political parties and unions by advantages given in electoral laws, laws on political parties, the state budget, etc. The question is whether these privileges are justified. Is the political party landscape too closed, and should competition be activated? Perhaps it is the opposite: maybe the state should take additional steps to make the political party landscape more stable, strengthen political responsibility, and decrease the number of political parties. Should coalitions of citizens be represented in political life through political parties and by single court cases initiated in open proceedings? Has the concept of involvement lost all of its respectable content both for the state and for the citizens, and should involving norm-setters in setting the norms be strongly encouraged? What does public servants' political independence mean, and how should it be ensured in practice? How should financing of political parties by private sources be restricted, or should it even be completely prohibited? Should we aim to disclose lists of businessmen and lobbyists who are friends of political parties? Will the listing of income and expenses of political parties suffice? How can we find out who does favours for whom, and for what? Is journalism so independent that we can rely on it to reveal connections of business and politics? Is the border between decisions made in public interests and in private interests more easily detectable than the boundary between legal and ordinary politics? These are not the only questions that arise concerning the relationship of the state and political parties.

¹ Erakonnaseadus. – RT I 1994, 40, 654; 2007, 24, 126 (in Estonian).

2. Competition of political parties

Totally free competition of political parties would mean that establishment of political parties and obtaining of mandates in the representative body is, in a manner of speaking, artificially unrestricted by legal provisions: with no establishment restrictions, a threshold related to public support is not applied, establishment of factions in the representative body is not restricted, members of the parliament are not restricted from changing party affiliation, etc. In this scenario there are no measures implemented to ensure formal similarity of the prospect of being elected: each political party can nominate an unlimited number of candidates for elections, advertise freely, and so on. Unrestricted competition may result in a fragmented and unstable political party landscape and utter simplicity of evading accountability to election platforms and promises, or, in Estonian phrasing, insufficient political responsibility.

The following sections of the paper discuss the restrictions on free competition of political parties that are applicable in Estonia.

2.1. Requirement of 1000 members and publicising of membership

A political party is a not-for-profit association that is registered in a state register and has at least one thousand members who are citizens of Estonia or another Member State of the European Union and who do not belong to any other political parties registered in Estonia. Membership lists of political parties are made public on the Web site of the commercial register, at <https://ar.eer.ee/erakonnad.py>. This characteristic distinguishing them from ‘ordinary’ not-for-profit associations is prescribed by § 28 (1) 28 of the Public Information Act.*2

Both public and hidden election coalitions — the latter can be formed by allowing members of different parties to feature as candidates on one party’s list — are prohibited in Riigikogu elections. In order to enforce this prohibition, the National Electoral Committee needs precise membership lists of political parties but not necessarily publicising of the membership lists. Publicising can be treated as a resource for checking the accuracy of the lists, but mandatory publishing of party membership lists can directly reduce the legitimacy of parties: the public nature of the information may inhibit people’s willingness to join a certain party; moreover, there have been scandals concerning persons who have never joined a party and whose name nonetheless appeared on a party membership list.*3 The Web site of the commercial register has a search engine that enables easy determination of a person’s membership in a political party.

On 10 July 2007, the information system of the commercial register showed the total number of people belonging to political parties as 51,012 and the number of people belonging to several parties being 483 (even though belonging to several political parties at once is, in fact, prohibited). By 1 November 2007, the number of people belonging to several political parties at the same time had fallen to 128 and the total number of members of parties had increased by 363. Thus, less than 6% of people with a right to vote belong to Estonian political parties.

Table 1. Political parties in Estonia.

Political party	Number of members (date)	Results of the election in 2007: Votes (%), Riigikogu mandates
Estonian People’s Union (Eestimaa Rahvaliid)	10,005 (9.05.2007)	39,315 (7.1%), 6
Estonian Centre Party (Eesti Keskerakond)	9,998 (18.01.2007)	143,518 (26.1%), 29
Union of Pro Patria and Res Publica (Isamaa ja Res Publica Liit)	8,676 (30.05.2007)	98,347 (17.9%), 19
Estonian Reform Party (Eesti Reformierakond)	6,294 (1.10.2007)	153,044 (27.8%), 31
Social-democratic Party (Sotsiaaldemokraatlik Erakond)	3,262 (10.04.2007)	58,363 (10.6%), 10

*2 Avaliku teabe seadus. – RT I 2000, 92, 597; 2006, 58, 439 (in Estonian).

*3 See Ü. Madise. Interneti teel hääletamise õiguslikke ja poliitilisi aspekte (Legal and Political Aspects of Internet Voting). – *Juridica* 2006/10, pp. 663–672 (in Estonian).

Estonian Christian Democrats (Eesti Kristlikud Demokraadid)	2,117 (18.01.2007)	9,456 (1.7%), 0
Constitutional Party (Konstitutsioonierakond)	1,597 (18.01.2007)	5,464 (1%), 0
Farmers' Union (Põllumeeste Kogu)	1,434 (1.07.2007)	Did not participate
Estonian Green Party	1,379 (30.08.2007)	39,279 (7.1%), 6
Russian Solidarity Party (Vene Ühtsuspartei)	1,314 (1.01.2002)	Did not participate
Russian Party in Estonia (Vene Erakond Eestis)	1,189 (18.01.2007)	1,084 (0.2%), 0
Republican Party (Vabariiklik Partei)	1,058 (18.01.2007)	Did not participate
Estonian Independence Party (Eesti Iseseisvuspartei)	1,011 (1.10.2007)	1,273 (0.2%), 0
Estonian Left Party (Eesti Vasakpartei)	1,041 (18.01.2007)	607 (0.1%), 0
Democrats – Estonian Democratic Party (Eesti Demokraatlik Partei)	1,000 (18.01.2007)	Did not participate
Total	51,375 (1.10.2007)	

The requirement for one thousand members undoubtedly consolidates the party landscape by preventing the emergence of regional and other small parties. Yet it constitutes a considerable restriction to the freedom of establishment. The number of citizens entitled to vote is approximately 900,000 dispersed over a territory of 45,227 km². According to the data of the Ministry of Internal Affairs, there are 227 local government units in Estonia, 181 of which have fewer than 5000 inhabitants (119 of these with fewer than 2000 residents).

As can be seen from Table 1, there are 15 political parties in total in Estonia, most of which have only a thousand members. The number of members of larger parties is increasing, and the number of members of smaller parties decreasing.

We can state on the basis of experience that, despite the 1000-member requirement, establishment of new parties in Parliament has been successful. In 2007, 61.91% of citizens entitled to vote, which is 550,213 citizens in total, participated in the elections of the XI Riigikogu. The Riigikogu mandates were gained by the five political parties with the largest membership and the Green Party established prior to the elections. A totally new party — Res Publica — emerged in the Riigikogu elections in 2003, gaining 24.6% of the votes and 28 mandates in the subsequent elections. In comparison of election results, this gave them second place after the Centre Party, which received only a few more votes. The parties that participated in the elections but did not obtain representation in the Riigikogu also had poor results in the elections in 2003. Although most parties in Estonia do not have a permanent following and people change election preferences easily, election results show that people do not vote for an existing small party but vote for either a new party or another successful party.

2.2. Restrictions on submitting lists of candidates in electoral law

The Estonian proportional electoral system provides that mandates will be first divided among lists of candidates and thereafter among specific candidates. A five per cent threshold is applied. Not a single independent candidate has been successful in Riigikogu elections, and this prompts the important question of who may submit a list of candidates. Election lists for Riigikogu elections and the European Parliament elections can be submitted only by political parties. Standing with a common list of political parties, standing of a candidate of one party in the list of another party, and coalitions of citizens are not permitted in these elections.

The Local Government Council Election Act⁴ (LGCEA) as passed on 27 March 2002 and taking effect on 6 May 2002 reserved the right to submit lists of candidates to local government elections also only to political parties. The Chancellor of Justice disputed this act in the Supreme Court. Similarly to Riigikogu elections, local government elections use the proportional electoral system, which gives an advantage to candidates on election lists. Given the small populations of rural municipalities and towns, on one hand, and the strict terms for establishing political parties, on the other, it is not realistic to believe that existing parties can ensure fair representation of local communities in all local government units.⁵

Another way to interpret the decision of the Supreme Court from 2002 is that the right to stand as a candidate is in keeping with the Constitution where there are enough organisations entitled to submit lists of candidates. These might be only political parties, but it is unjustified for local interests to be forced into a framework involving only one or two political parties. It is likely that the Riigikogu applied this interpretation, as the amendment act that was passed on 30 July 2002 and took effect on 7 August of that year permitted election coalitions again in the elections of 2002, but the LGCEA was supplemented with § 70¹, which states that the right to form election coalitions ends on 1 January 2005. Before the local government elections in 2005, the Chancellor of Justice disputed prohibition of election coalitions in the Supreme Court once again.

The experience from local government elections affirms the accuracy of the social-scientific reasoning of the Supreme Court. Not a single political party participated with its own lists in local government elections in 2005 in all towns and rural municipalities. Only four parties managed to submit their own list in more than a hundred local government units: the People's Union in 174, the Centre Party in 168, the Reform Party in 116, and Res Publica in 102 local government units. In eight rural municipalities there were no political parties participating; in some cases, an election coalition stood against one party and beat that party.⁶ In the court proceedings in 2005, the Chancellor of Justice submitted similar data for 2002: there were 14 local government units where none of the political parties submitted lists in 2002. In 46 local government units, only one party was represented. In the local government elections in 2002, the Estonian People's Union was represented with its own list in 159 local government units, the Estonian Centre Party in 157, and the Union for the Republic (Res Publica) in 117. Election lists of other political parties were represented in under 60 local government units.

In interpreting the data, it should be taken into account that permitting election coalitions could have changed the election strategies of political parties both in 2002 and in 2005. Nevertheless, it can be concluded that it would have been impossible to give the voters the possibility to choose between different lists without permitting election coalitions.

2.3. Restrictions on election advertising

Freedom of competition also gives the freedom to advertise oneself. The prohibition of outdoor advertising in electoral law extends to all persons, mostly to political parties and candidates. Prohibition of outdoor advertising was implemented with the Election Act Amendment Act passed in June 2005 and entering into force in July 2005 — thus a mere three months prior to local government council elections. As, in practice, advertising spaces are reserved in advance for a longer period, this might have been a violation of the legitimate expectations of political parties. Total prohibition of outdoor advertising during active campaigning (i.e., for more than a month before elections) may not be necessary for achieving the objective of the prohibition⁷ or less a violation of fundamental rights. This was also admitted by the Chancellor of Justice in his written report to the Riigikogu on 6 September 2005. The act in question was not sent forward for constitutional review proceedings.

Several legal disputes occurred, as the restrictions are provided for in a manner that can be interpreted in various ways⁸ and balancing on the borderline of the restriction is one of the advertising strategies. Most

⁴ Kohaliku omavalitsuse volikogu valimise seadus. – RT I 2002, 36, 220; 2007, 44, 316 (in Estonian).

⁵ Judgment of the Constitutional Review Chamber of the Supreme Court of 15 July 2002, 3-4-1-7-02, online at <http://www.nc.ee/?id=428>; Judgment of the General Assembly of the Supreme Court of 19 April 2005, 3-4-1-1-05, available at <http://www.nc.ee/?id=391>.

⁶ Data from the National Electoral Committee.

⁷ Draft Act No. 620 (Euroopa Parlamendi valimise seaduse, kohaliku omavalitsuse volikogu valimise seaduse ja Riigikogu valimise seaduse muutmise seadus (Act to Amend the European Parliament Election Act, Local Government Election Act, and Riigikogu Election Act)), X Riigikogu. See the principal progress of the draft act during readings and the explanatory memorandum enclosed with the original text. Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=050950027&login=proov&password=&system=ems&server=ragne11> (in Estonian).

⁸ Section 6¹ of the Local Government Election Act sets forth the following: “Prohibition of political outdoor advertising. Advertising an independent candidate, a political party or a person standing as a candidate in the list of a political party, an election coalition or a person standing as a candidate in the list of an election coalition, or their logo or any other mark of identification or platform on a building, facility, public transport vehicle, or inside or outside part of a taxi and any other outdoor political advertising is prohibited during active campaigning.”

well-known is the K-kohuke case⁹ (see judgment 3-4-1-27-05 of the Constitutional Review Chamber of the Supreme Court of 14.11.2005 and decisions 34 of 2.11.2005 and 39 of 18.11.2005 of the National Electoral Committee).¹⁰

Prohibition of outdoor advertising without setting of a maximum limit for election campaign costs does not necessarily mean a decrease in amounts spent on advertising or a decrease in the scope of advertising. Eliminating one way of advertising leads to direction of costs to other advertising channels. Obligations to mediate election advertising set for public broadcasting and for private media should be reviewed separately. The Broadcasting Act¹¹ provides that all political parties and political movements shall be granted transmission time to present their positions on balanced principles (§ 6¹, on political balance, states: “Upon granting transmission time to a political party or a political movement to present its positions, a broadcaster shall also provide an opportunity to grant transmission time in the same programme service for other political parties or movements without undue delay”). Grammatical interpretation of this norm leaves the obligations of a broadcaster unclear, although the objective of the provision is clear in its title.

However, the Estonian National Broadcasting Act¹² specifies the principle of political balance in a wider sense. In addition to the requirement of political balance of programmes (above all, election programming) in § 6 (5), the act provides that a member of a management body of a political party registered in Estonia shall not be a member of the Management Board of the national broadcasting organisation, in its § 24 (4) 6). The requirements of the act are supplemented and specified by the principles of independence and balance of the programme of the National Broadcasting Company as approved by the Broadcasting Council.

Another restriction on creation of advertising strategies of political parties is the Personal Data Protection Act¹³, with, e.g., its restriction on access to the election lists.

2.4. Direct financing from the state budget

Enabling direct financing from the state budget for only those political parties represented in the parliament (the amount prescribed for other parties in § 12⁵ (2) of the Political Parties Act is more of a formality: 1% of votes in Riigikogu elections gives an annual grant of 150,000 kroons and 4% of votes 250,000 kroons) can also be regarded as a restraint on fair competition, as it grants a distinct advantage to parties that are successful in Riigikogu elections. The question of when an allocation from the state budget encroaches on the uniformity of the right to stand as a candidate under the Constitution by virtue of size (see the total amount of allocations, in Table 2) has not yet been discussed in Estonia. We should take into account that allocations from the state budget are distributed according to Riigikogu mandates and not the number of votes (under § 12⁵ (1) of the Political Parties Act) and that this transfers the amplification arising from the modified d'Hondt distribution method used in distributing compensation mandates (under § 62 (5) of the Riigikogu Election Act¹⁴) to financing of political parties from the state budget.

As is commonly done in other countries, we should pay attention to indirect public financing in addition to direct financing from the state budget. Indirect public financing can take the form of the salaries paid to faction officials and advisers and to assistants of political officials, and opportunities to use office rooms and supplies. In practice, work tasks of political officials often involve work related directly to the political party and not to the institution paying the salary. Indirect public financing can have other forms as well. For instance, the Income Tax Act¹⁵ permits deducting donations and gifts that are given to a party and that can be certified from taxable income (§ 27 (1)). Subsection 10 (3) of the Local Tax Act¹⁶ exempts political parties, election coalitions, and independent candidates from local advertising tax.

⁹ After outdoor advertising was prohibited before election, posters that had symbols, letters and colours very similar to the symbolism of a party participating in the election were exposed and the posters were instantly connected to the said party in the media.

¹⁰ Decisions of the Supreme Court are translated into English and can be found on the website given in Note 5 above. As a rule, the judgments of the Electoral Committee are not translated into English, these are available only in Estonian.

¹¹ Ringhäälinguseadus. – RT I 1994, 42, 680; 2007, 10, 46 (in Estonian). Translation into English available at www.legaltext.ee. The translation does not include a few of the latest amendments.

¹² Eesti Rahvusringhäälingu seadus. – RT I 2007, 10, 46 (in Estonian). Translation into English available at www.legaltext.ee.

¹³ Isikuandmete kaitse seadus. – RT 2003, 26, 158; 2007, 11, 53 (in Estonian).

¹⁴ Riigikogu valimise seadus. – RT I 2002, 57, 355; 2007, 44, 316 (in Estonian). Translation into English available at www.legaltext.ee and the website of the National Electoral Committee.

¹⁵ Tulumaksuseadus. – RT I 1999, 101, 903; 2007, 44, 316 (in Estonian).

¹⁶ Kohalike maksude seadus. – RT I 1994, 68, 1169; 2005, 57, 451 (in Estonian).

Table 2. Allocations from the state budget to political parties for 1996–2008.

	Sum in millions of euros	Euros per person with the right to vote
1996	0.32	0.40
1997	0.64	0.81
1998	0.84	1.07
1999	0.54	0.63
2000	1.02	1.19
2001–2003	1.28	1.49
2004–2007	3.83	4.46
2008–... ^{*17}	5.77	6.33

An act was passed after the Riigikogu election in 2003 that provided tripling of allocations from the state budget as of 2004 and that declared invalid the provisions, which had not yet taken effect, according to which results of local government council elections would have been taken into account as well. The latter amendment of an act did not reach constitutional review proceedings, although state funding did constitute the majority of the officially declared total income of several political parties after the tripling of allocations from the state budget (see Table 3). The objective of increasing funding from the state budget and prohibiting donations of legal persons declared in public was to reduce illicit connections between private interests and decisions of public power arising from financing of political parties. To what extent this objective has been achieved needs separate study.

Table 3. Allocations from the state budget as a percentage of the officially declared total income of a political party.

	Centre Party	Reform Party	People's Union	Pro Patria	Res Publica	Social-democratic Party
2002-I	75%	92%	63%	54%	0%	87%
2002-II	49%	54%	32%	53%	0%	66%
2002-III	24%	30%	34%	46%	0%	39%
2002-IV	13%	12%	26%	23%	0%	32%
2003-I	8%	7%	10%	19%	0%	28%
2003-II	77%	29%	45%	23%	37%	65%
2003-III	89%	70%	53%	54%	47%	95%
2003-IV	23%	22%	19%	79%	21%	38%
2004-I	95%	79%	100%	92%	93%	88%
2004-II	90%	75%	93%	74%	95%	
2004-III	97%	77%	100%	73%	54%	
2004-IV	94%	87%	96%	48%	97%	
2005-I	97%	89%	97%	61%	97%	97%
2005-II	83%	85%	97%	53%	96%	97%
2005-III	71%	41%	57%	61%	75%	96%
2005-IV	74%	45%	83%	15%	82%	71%
2006-I	69%	78%	99%	95%	100%	98%
2006-II	73%	77%	74%	72%	83%	97%
2006-III	85%	68%	87%	54%	98%	95%

Source: Reports of political parties.^{*18}

¹⁷ There is an allocation in the amount of 90,000,000 kroons in the draft of the state budget for 2008 (122 SE I) prescribed for political parties. Information is available at http://www.riigikogu.ee/?page=pub_ooc_file&op=emsplain&content_type=application/vnd.ms-excel&file_id=149563 (in Estonian).

¹⁸ Information from the fourth quarter of 2006 is still being collected and processed.

There are no more direct allocations from the state budget provided for political parties or any other political unions. Thus, for example, the Youth Work Act^{*19} excludes a political party or its youth section from receiving allocations from that portion of the state budget prescribed for youth organisations (in § 8 (3)).

The strict definition of a political party and the complexity of establishment arising from it, and the organisation of financing favouring political parties in the parliament, has not excluded the forming of new political parties in practice; thus, there is no reason to regard rules set with the objective of regulating (stabilising) the political landscape as (at least not clearly) unconstitutional. The Supreme Court has noted repeatedly that strengthening the responsibility of elected representatives and avoiding confusion of voters are legitimate objectives. Resources for achieving these objectives must be appropriate to a democratic state based on rule of law and proportional to the objective. The Supreme Court noted in judgment 3-4-1-3-05^{*20} that rules put in place since 1992 have become stricter to restrain the political landscape from changing between elections^{*21}, and there is no reason to declare unconstitutional the rule of one political party, one faction^{*22}, such that creating new factions between elections is precluded in a case where a group of representatives elected from one political party decide to leave the party and wish to create their own faction.^{*23} At the same time, the Constitutional Review Chamber did not rule out the possibility of restrictions on creating a faction being unconstitutional when, after a political party has been divided, a new political party is formed that is clearly determined and has declared its position through the platform of the previous party.^{*24}

3. Control of political parties' financing as a resource to ensure government in public interests

One of the most interesting topics of disputes related to democratic rule is the question of how to ensure a state of rule of law in its material definition or the exercise of state authority subject to laws, and legislation with the purpose of creating a fair and moral social order.

The possibility of creating an effective control system for financing of political parties is cast into strong doubt because of the fact that avoiding and/or discovering indirect financing would demand very intensive interference in the activities of a political party, including direct observation, surveillance, etc. of communication and persons, which is inconceivable in a democratic state of rule of law. Even the Surveillance Act^{*25} provides that surveillance shall not be applied in favour of political parties or in order to discredit parties (in § 5 (3)). A mere connection with a political party should not be deemed sufficient cause for surveillance with the purpose of preventing a criminal action. Discovering indirect financing afterwards, in cases of actions performed for a specific cause, is unlikely. It can be presumed that exposing the making of decisions in private interests instead of public interests will be primarily possible for enquiring media and a challenge for political culture, as is the case in many other countries. This does not, however, mean that control cannot or should not be made more effective.

3.1. Public disclosure of income

According to § 12³ of the Political Parties Act, a political party shall disclose all donations and donors on its Web site.^{*26} Disclosure of election costs is regulated by electoral laws. A report of donations and gifts made to a political party shall be submitted to the Tax and Customs Board for every calendar year (see § 57¹ (3) of the Income Tax Act). Also, § 27 (1) 7) of the Taxation Act^{*27} provides that a tax official is entitled to disclose the content of this report to anyone. Thus, disclosing of a party's income is rather thoroughly regulated.

But control of use of the existing money is not the problem. A private auditor or any other supervisor can easily check whether the money has been used legitimately: accounting is in order; taxes have been paid on salaries, etc. The main problem is how to discover hidden donations, indirect financing. The usual supervision methods are not of help here. How should events be classified that were not paid for by the political party yet either directly or indirectly serve the interests of the party? How can it be explained that it was not 10 citizens

¹⁹ Noorsootööseadus. – RT I 1999, 27, 392; 2007, 45, 320 (in Estonian).

²⁰ Judgment of the Constitutional Review Chamber of the Supreme Court of 2 May 2005. Available at <http://www.nc.ee/?id=389>.

²¹ *Ibid.*, para. 28.

²² *Ibid.*, para. 19.

²³ *Ibid.*, paras 33, 36, 40, and 48.

²⁴ *Ibid.*, para. 43.

²⁵ Jälitustegevuse seadus. – RT I 1994, 16, 290; 2005, 39, 307 (in Estonian).

²⁶ This provision makes having a website practically compulsory for political parties.

²⁷ Maksukorralduse seadus. – RT I 2002, 26, 150; 2007, 44, 316 (in Estonian).

who donated 25 kroons each to the party but was a certain interest group that does not wish to be connected to the party or to a decision made in favour of the group?

According to § 12³ (3) of the Political Parties Act, the management board of a political party is responsible for the accuracy of the data in the register of donations. Misdemeanour charges for violating the provisions on disclosing the income of a political party and their procedure are provided for in the Political Parties Act (§ 12¹⁴ to 12¹⁶), and criminal offences are specified in the Penal Code^{*28} (§§ 402¹ and 402²). It is well known that under the penal provisions the guilty person must be clearly determined and proved. Who planned, who provoked, and who executed? In order to create an emotional image of the situation for the public, the state need not be involved; the media will handle that. A political party can be convicted and punished only by a court's decision (according to § 48 (4) of the Constitution) and by following a prescribed procedure.

Another interesting topic is determination of the existence and status of political corruption and lobbying. This has not been reasonably settled in Estonia and other countries in Europe. Even Siim Kallas asked in his speech before the European Parliament on 16 July 2007: "But if the lobbying professionals question that money does bring influence, I wonder why they are in business at all? And why does this business appear to be growing? In fact, if spending money on lobbying gives no influence, I wonder what the lobby professionals say to their clients when they bill them."

3.2. Organisations related to political parties

According to § 11 (4) 8) of the Income Tax Act, an association is deemed to be a political association if it is a political party or election coalition or if the main objective of the association or the principal activity of the political party or election coalition is organising campaigns or collecting donations for or against a person running for an elected or appointed office of a political party or election coalition, or an office for the performance of public duties. Such associations are not entered in the register of not-for-profit associations given tax incentives. This shows that related organisations consist of any political associations the activities of which are directed to achieving the main objective of the political party. At the same time, the Political Parties Act gives a much more narrow definition of a related organisation; it is basically unregulated (§ 12⁶ restricts donations of persons who are not members of the political party to the not-for-profit association of which the political party is a part; by this provision, political parties are permitted to make donations to such not-for-profit associations).

The Act to Amend the Political Parties Act as passed in the Riigikogu at the end of 2003^{*29} abandoned the initial plan to define related organisations (see Draft Act No. 184 in process of the X Riigikogu^{*30}). The initial text of the draft includes a much wider definition, similar to that set forth in the Income Tax Act. The wording of § 12^{12a} of the initial text was as follows: "Donations to a related organisation of a political party. Requirements of a political party provided for in § 12⁷ to 12¹² of the present Act extend to not-for-profit associations and foundations of which the political party is a member or to any other legal entity the activities of which are directly or indirectly directed to achieving the objective of the political party (related organisation of the political party)."

In conclusion, donations of legal entities to not-for-profit associations that support an election campaign of a political party or a candidate or collect donations are permitted, and they are not subject to disclosure. It is very dubious whether such associations' support for a political party is regulated by § 12¹ (3) of the Political Parties Act, which specifies that an indirect donation is transfer of any goods, services, or proprietary or moral rights to a political party under conditions that are not accessible to other persons. Another thing that should be analysed here is whether the concept of indirect donation is narrower than the concept of indirect financing.

3.3. Influence of political parties on formation of constitutional institutions and public service

When political parties in the parliament have — without a doubt — tried to increase their advantages in maintaining and regaining power, politically independent constitutional institutions have worked against this. Both cases concerning local government election coalitions, but also a decision (3-4-1-11-05^{*31}) made in constitutional review proceedings on the possibility to unite the mandates of membership of the Riigikogu

²⁸ Karistusseadustik. – RT I 2001, 61, 364; 2007, 45, 320 (in Estonian).

²⁹ Erakonnaseaduse muutmise ja sellest tulenevalt teiste seaduste muutmise seadus. (The Act to Amend the Political Parties Act and other acts arising from that act). – RT I 2003, 90, 601 (in Estonian).

³⁰ Explanatory memorandum, available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=033100017&login=proov&password=&system=ems&server=ragnell> (in Estonian).

³¹ Judgment of the Constitutional Review Chamber of the Supreme Court, 14 October 2005. Available at <http://www.nc.ee/?id=563>.

and of a local government council can be cited as examples. In the latter judgment the court clearly noted that “In the present case it is obvious that the changes introduced shortly before the elections are aimed at improving the position in local elections of those political parties that have seats in the parliament, in comparison to those political parties that do not, and in comparison to election coalitions and independent candidates”³² and declared invalid the amendment of an act that would have restored the provision, which was declared invalid but had not yet taken effect, that one cannot simultaneously work in local government and be a member of the Riigikogu. Thus a member of the Riigikogu cannot serve as a member of a local government council. The court did not take a fundamental position on whether uniting mandates is contrary to the principle of separation of powers or restrictions of employment of a member of the parliament.

The amendment of the act, which had waited to take effect and which provided that certain high officials (including the Chancellor of Justice, judges, and the Auditor General) are permitted to hold membership in a political party, was declared invalid by the Riigikogu on 11 October 2006 — i.e., before it was due to take effect.

The Constitution and other laws use two different methods in providing restrictions on membership of political parties: one method restricts membership of political parties itself, and the other restricts participation in activities of political parties. Most of the restrictions on membership of political parties are set forth in § 5 (3) of the Political Parties Act. In addition to the Political Parties Act, restrictions on membership arise from other acts as well. For example, § 35 (3) of the Personal Data Protection Act bars the Director General of the Data Protection Inspectorate from participating in activities of political parties, and § 20 (1) 3) of the Security Authorities Act³³ prohibits officials of a security authority from belonging to political parties.

Several acts prohibit hiring members of a management board or management body of a political party to work in certain positions. The pertinent clause of the National Broadcasting Act is referred to above. Another provision of relevance here is § 12 (4) of the Notaries Act³⁴, which prohibits notaries from belonging to political parties and from belonging to political associations of a foreign country.

Decisions exist on cases in the Estonian legal order that are directed at restricting fusion of political parties and coalitions of citizens. For example, the Consumer Protection Act³⁵ provides that a consumer association shall be independent from all political parties (in § 15 (3) 2)); the National Defence League Act³⁶ specifies that the National Defence League is an organisation that does not belong to a political party, and thus that activities of political parties or any other political associations in the National Defence League are prohibited (see § 6).

4. Conclusions

One can presume that anyone who can, by reasoning unambiguously and clearly, suggest a justified, moral, and law-based but functioning model for the relationship of the state and political parties and a scenario for enacting it as laws deserves both a Nobel Prize and an Academy Award. The author does not aspire to such honours. However, the author does wish to suggest avoiding decisions that weaken the political responsibility of political parties, destabilise the political party landscape, or lead to politicisation of constitutional institutions put together more or less on the basis of competence.

Careful analysis and resourceful development should be applied to measures of financing political parties and adhering to the procedure of financing. There is not a single element in the system of financing political parties, the separate change of which would give useful results. For instance establishing an independent body for inspecting the financing of political parties would not be useful, as the body would not have authorities that would complement the authorities of the select committee of Riigikogu of implementing Anti-corruption Act. The main problem is detecting the donations that are not reflected in any of the four income reports of political parties or the amount or the donor of which is reflected incorrectly. As a rule, it is not possible to identify the missing entry only by viewing the register of donations, the income report submitted to the Tax and Customs Board, the annual report or the income report of a political party. Making existing entries public, which is provided in Estonian legal system for years already, gives, in addition to the body inspecting the financing of political parties, to others the possibility to draw the attention of the police or the public prosecutor's office to possible misdemeanours or criminal offences. Even if the new body inspecting the financing of political parties is granted the authority to give notices, a qualitative change compared to the results of the present inspection will not be expected. Efficient proceeding of violations of the procedure of making donations public would require skilful police work. Capability of investigating economic offences is limited not only in Estonia but

³² *Ibid.*, para. 22.

³³ Julgeolekuasutuste seadus. – RT I 2001, 7, 17; 2006, 48, 357 (in Estonian).

³⁴ Notariaadiseadus. – RT I 2000, 104, 684; 2006, 7, 42 (in Estonian).

³⁵ Tarbijakaitseadus. – RT I 2004, 13, 86; 2005, 71, 547 (in Estonian).

³⁶ Kaitseliidu seadus. – RT I 1999, 18, 300; 2005, 64, 484 (in Estonian).

also in other countries and resources are rather spent on restricting money laundering than on investigating smaller offences with poor results. The slogan “DO SOMETHING!” is particularly absurd as it does not know all aspects of the system on financing political parties and ignores reality. In order to do something useful, one should, at first, know what should be done and what is useful, and then it should actually be DONE, without just raising panic among people.

The relationship between the state and political parties of Estonia can probably be assessed as traditionally European, meaning that a certain balance has been achieved but that, analogously to driving a speeding car on a bumpy road, the course must always be adjusted slightly. Rushing into a ditch in a moment of distraction cannot be ruled out as impossible.



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Safeguarding Municipal Autonomy by the Supreme Court

The title of this article implies that the supreme court of a state, and that of Estonia in particular, plays a role, and perhaps a central one, in safeguarding municipal autonomy. Potentially, this is indeed the case, but is it factually so? The central normative–theoretical question behind this is, of course, that of the position of the autonomous municipality *vis-à-vis* the nation-state, for which the supreme court, systemically part of the latter, has — arguably — a particular responsibility. But the question that logically precedes this is whether the relevant state’s constitution properly and sufficiently guarantees municipal autonomy to begin with.

I.

The need for municipal autonomy is brought out nicely as early as 1834, in Georg von Brevern’s thesis, *Das Verhältnis der Staatsverwaltungsbeamten im Staate*¹, arguably the most important early Estonian contribution to the topic. The author, a Baltic-German nobleman, who later held high positions at the Tsarist court and in the St. Petersburg administration, for political reasons stays very vague in indicating when he is dealing with local matters and when with general ones. Nonetheless, arguing as he does for an organic², citizen-centred image of the state³ — in his context, a rather brave stance — he points out that the municipality comes into existence before or, at best, together with the state, so municipalities derive not from the state but, rather, like the state itself, “from the natural development of human society”.⁴ In Estonia, obviously, municipal autonomy is much older than the nation-state (rather young in its current form); the great city of Tallinn, then called Reval, could boast Lübeckian Law, and thus a high degree of municipal autonomy, since 15 May 1248, when the King of Denmark, Erik IV Plogpenning, conveyed it to her.⁵ But already in noticing this, we find that an important

¹ G. v. Brewern. *Das Verhältnis der Staatsverwaltungsbeamten im Staate*. Leipzig, Riga, Dorpat 1835. On v. Brevern, as his name was spelled later on, see his autobiography, *Über mein Leben. – Zur Geschichte der Familie von Brevern*, vol. 4. Berlin 1885, pp. 137–173.

² On the organic metaphor of the state, see most recently A. Koschorke et al. *Der fiktive Staat. Konstruktionen des politischen Körpers in der Geschichte Europas*. Frankfurt/Main 2007.

³ G. v. Brewern (Note 1), § 17.

⁴ *Ibid.*, § 6.

⁵ Cf. W. Drechsler (ed.). *Die selbstverwaltete Gemeinde: Beiträge zu ihrer Vergangenheit, Gegenwart und Zukunft in Estland, Deutschland und Europa*. Berlin 1999.

issue presents itself — Tallinn was not a city of the Estonians, nor was it to be so until many centuries later, and it has had Estonian domination of the citizenry for perhaps 150 of the last 750 years.⁶

In the spirit of subsidiarity, the state's task, according to v. Brevern, is the co-ordination and to some extent control of the municipalities and the management of those affairs that the municipalities cannot cope with themselves because they are missing the larger national perspective.⁷ As is usual in this kind of literature, v. Brevern does not deny the necessity of central administration, he only resents its excess.⁸ The state is based on municipalities but subordinates them.⁹ In essence, this is the approach that most municipal autonomy scholars would still agree with today.

This, precisely, is also already the perspective of the most important European establishment of municipal autonomy, one that is of direct importance for Estonia and the Estonian Constitution, which is based on it: Heinrich Friedrich Karl vom und zum Stein's Prussian municipal reforms of 1808, whose bicentennial will be celebrated next year (Stein's own 250th birthday is this year). These reforms, too, were clarifying in scope, simplifying municipal administration and certainly not interfering with legitimate central administration.¹⁰ The impetus for the reforms was motivation of the citizens such that they would take care of their own business¹¹ and thus see the city and also the state again, or newly, as 'us' and not as 'them'.¹² This was based on vom Stein's insight into the "necessity to give to the cities a more autonomous and better constitution, to legally form for the citizens' community a firm place of unification, to convey to them an active influence on the administration of the municipality, and to create and maintain community spirit through this participation".¹³ This is the role of the municipality as the cradle or school of democracy.¹⁴

Initially, this was not appreciated by the beneficiaries, both citizens and (potential) politicians and administrators, and it needed some 20–25 years to work at all, which is an important lesson for all municipal reforms that argue the inability and/or unwillingness of the locals to commit themselves and participate.¹⁵ In fact, as recent research once again has underscored, indeed it did work — the option of commitment preceded actual commitment.¹⁶ This is actually the model that goes beyond the concept of civil society and of governance without supplanting it, in that it re-includes the citizen directly into government and the policy process.¹⁷ In a time of political alienation, this is an aspect well worth remembering.

But if this is so, why is municipal autonomy in constant danger, always under threat? Why does it need a supreme court to protect it? In order to answer this, we have to face the central question of the matter: Why does the state exist at all? Only then can we judge the municipalities' role in context. If we believe with Aristotle that "a state comes into existence for the purpose of ensuring survival, and it continues to exist for the purpose of the good life"¹⁸ and continue with Marsilius of Padua that the good life "is the perfect final cause of the state"¹⁹, then there is no question of the importance of the municipality — and this is also the role of the municipality itself. This is especially crucial in a time of globalisation, when the municipality becomes the citizens' genuine home; it is also the municipality in which the citizen meets the state in everyday life.²⁰ Its working or not working conditions the citizen's attitude toward the state to a decisive extent. And so, especially in multicultural times, in that of the EU and the possibility of moving, there are plenty who identify with a

⁶ Cf. G. v. Rauch. *Geschichte der baltischen Staaten*. Stuttgart 1970, p. 19.

⁷ G. v. Brewern (Note 1), § 7. This is the idea of subsidiarity as developed by Christian Wolff; see J. Backhaus, C. Wolff. *Subsidiarity, the Division of Labor, and Social Welfare*. – *European Journal of Law and Economics* 1997 (4) 2, pp. 129–146, pp. 135–139.

⁸ G. v. Brewern (Note 1), § 12.

⁹ *Ibid.*, § 15.

¹⁰ H. Duchhardt. *Stein. Eine Biographie*. Münster 2007, pp. 199–203; see G. Ritter. *Stein. Eine politische Biographie*. 4th ed. Stuttgart 1981, pp. 196–199.

¹¹ *Ibid.*, p. 196.

¹² *Ibid.*, p. 198.

¹³ *Ordnung für sämtliche Städte der Preußischen Monarchie mit dazu gehöriger Instruktion, Behuf der Geschäftsführung der Stadtverordneten bei ihren ordnungsmäßigen Versammlungen*. Vom 19ten November 1808, Introduction, § 2; new text ed. as *Die Preußische Städteordnung von 1808*. Stuttgart, Köln 1957, p. 45.

¹⁴ H. Drechsler. *Kommunalpolitik*. – H. Drechsler, W. Hilligen, F. Neumann (eds.). *Gesellschaft und Staat. Lexikon der Politik*. 10th ed. München 2001.

¹⁵ H. Duchhardt (Note 10), p. 267.

¹⁶ *Ibid.*, p. 202; s. also H.-J. Vogel. *Die bundesstaatliche Ordnung des Grundgesetzes*. – E. Benda, W. Maihofer, H.-J. Vogel (eds.). *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*. Berlin, New York 1983, pp. 809–862, p. 858.

¹⁷ Cf. W. Drechsler. *Governance, Good Governance, and Government: The Case for Estonian Administrative Capacity*. – 'Governance and Good Governance', theme issue of *Trames* 2004 (8) 4, pp. 388–396.

¹⁸ Arist. *Pol.* I 1252b.

¹⁹ Marsilius of Padua. *Defensor Pacis* I iv 1.

²⁰ Cf. F. Stern. *Europäische Union und kommunale Selbstverwaltung*. – M. Nierhaus (ed.). *Kommunale Selbstverwaltung. Europäische und Nationale Aspekte*. Berlin 1996, pp. 21–44, esp. p. 43.

city but not with the country.^{*21} This is the old idea that one could even say that countries, that nation-states are constructed^{*22} — while cities are ‘real’.

Yet precisely this is a problem from the state perspective, where not all of this may be appreciated and indeed, systemically, it would not be. Especially if the state exists for the nation and the nation is more important than the citizens and their well-being, the autonomous municipality may appear as an obstacle, a problem, and nothing else. This is all the more urgent a consideration if the state is seen as under constant threat or attack, so that the political is always existential.^{*23} And such a state is, after all, far from being just a theoretical construct. However, we may think back to vom Stein and his insight that the autonomous municipality, far from endangering it, strengthens the nation-state — the democratic nation-state, of course, not the authoritarian one.^{*24} The Estonian Constitution can be said to combine the two approaches, in that its preamble arguably connects them to each other in an additive way (“to strengthen and develop the state which [...] shall protect internal and external peace, and is a pledge to present and future generations for their social progress and welfare; which shall guarantee the preservation of the Estonian nation and its culture throughout the ages” — since 21 July 2007 (RT I 2007, 33, 210), “Estonian nation, language and culture”).^{*25}

The Estonian Constitution places municipalities on the same level as the German ones — this is no accident, as the respective paragraphs are based on the German ones, but in a weaker form^{*26}. This is very likely no accident either, arguably for three classic reasons: Too much municipal autonomy may give a power base to the opposition party or parties, which is a good thing in a democracy but not really appreciated by the majority in the government.^{*27} It may do the same for an ethnic minority if that minority is concentrated in specific municipalities or regions. It may thus indeed be that one reason for keeping municipalities from being stronger was the prevention of loci of minority — *viz.* Russian(-speaking) — power.^{*28} In relation to this, one can hypothesise the specificity of small countries where another level of government might be seen as superfluous. Note that all three of these reasons tend to go against the idea of devolved government and speak for unity as a primary national goal.

However, it seems that in any context, not only in that of a state that puts the nation before its citizens, the conflict between municipality and state is a logical and systemic one, and there are legitimate rights on both sides. The state as such has a tendency toward unity, the municipality toward autonomy. This tension cannot be resolved; it needs to be borne.^{*29} In the end, it is better for the state, even a very traditional nation-state, to have autonomous municipalities, but the self-logic of the central administration, especially if its officials lack a genuinely larger perspective, goes against the communities. Yet ‘naturally’, it is the cities that are weaker and should indeed be championed and protected if the tension is not to be resolved in favour of only one party. This is, then, the task of the supreme court, all the more because it is functionally part of central government and thus institutionally biased in its favour. (Placing the Estonian Supreme Court away from the capital is a physical recognition of that fact.)

²¹ Cf., e.g., E. F. Isin. *Being Political: Genealogies of Citizenship*. Minneapolis 2002; <http://www.ucalgary.ca/agf/caloyouth/city>.

²² See, e.g., B. Anderson. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Revised ed. London 1991.

²³ See C. Schmitt. *Der Begriff des Politischen*. 7th ed. Berlin 1996.

²⁴ This actually was the problem with vom Stein’s reform from the perspective of the ‘reactionary’ Prussia; cf. H. Duchhardt (Note 10), pp. 198–199, 202–203 *et passim*.

²⁵ Preamble of the Estonian Constitution, as translated at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0000K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F5hiseadus>.

²⁶ Estonian Constitution, Chapter XIV, §§ 154, 160 (guarantee of municipal autonomy § 154); regarding the interpretation, see Ü. Anton. *Kohaliku omavalitsuse garantii Eesti Vabariigi 1992. aasta põhiseaduses* (Local Government Guarantee in the 1992 Constitution of the Republic of Estonia). – *Juridica* 1998/6, pp. 305–313 (in Estonian), with further references (including the German advisory opinions); cf. also Narits. – K. Merusk, R. Narits. *Eesti konstitutsiooniõigusest* (On Estonian Constitutional Law). Tallinn 1998, pp. 149–159 (in Estonian); V. Olle et al. *Põhiseaduse XIV ptk kommentaar* (Comments on Chapter XIV of the Constitution). – Panel of editors led by E.-J. Truuvali. *Eesti Vabariigi põhiseadus: kommenteeritud väljaanne*. Tallinn 2002, pp. 639–669, esp. p. 641 (in Estonian); pp. 639–642 argues that there is a strong guarantee of municipal autonomy.

²⁷ In my own experience outside of Estonia, certainly the same was the case: A Latin American president who had asked me to look into the establishment of a municipal autonomy think-tank because he wanted to devolve the country’s government structure cancelled these plans after a local election put many representatives of the opposition party into power. See W. Drechsler. *Wissenschaft, Politikberatung und Verantwortung*. – M. Sutrop, U. Sutrop (eds.). *Teadus ja teadmistepõhine ühiskond / Wissenschaft und wissenschaftsbasierte Gesellschaft*. Tartu 2005, pp. 109–117, p. 115.

²⁸ Thus M. H. Wiegandt. *Grundzüge der estnischen Verfassung von 1992*. *Jahrbuch des öffentlichen Rechts der Gegenwart*. – NF 1997 (45), pp. 151–175, pp. 158–159.

²⁹ Cf. W. Drechsler. *Kollektivismus*. – H. Drechsler, W. Hilligen, F. Neumann (eds.) (Note 14); C. Schmitt. *Verfassungslehre*. 5th ed. Berlin 1970, pp. 370–379.

II.

But, perhaps as often as not, safeguarding of municipal autonomy by the supreme courts is endangered not by ill will on the side of the courts but by following fashion and ideology.^{*30} The most important instance in our context concerns the ‘right’ of the state to reconfigure, and especially merge, municipal units against their will. In Estonia, as is generally the case elsewhere, this is constitutionally legitimate.^{*31} (Another example is the right of the state to interfere with municipal autonomy by means of the State Audit Office, which will be addressed in the subsequent paper.^{*32}) While this has been tried many times in Estonia, it is one of the most fortuitous aspects of Estonian public administration reform that no full-scale municipal unit reform ever took place, because not one of those attempts would have been helpful.^{*33}

The application of erroneous social-scientific assumptions by supreme courts is a serious general problem, but it is difficult to prevent, because the social sciences share their tendency toward fashion and ideology with the courts, just as with government. This is why reliance on expertise is such a tricky business, and, while it may be said that going beyond it is the task of courts as well as government^{*34}, this is very difficult to accomplish. Such erroneous uses are not as rare as one would like to believe.^{*35}

Regarding municipal autonomy, an almost identical fallacy is to think that larger municipal units increase efficiency, and it is not unusual to argue this way — the otherwise very important *Rastede* decision of the *Bundesverfassungsgericht*, for instance, *en passant* proclaimed the same view.^{*36} But this is completely erroneous and really only a combination of 1970s and 1990s fashion and ideology, of the former’s social-engineering progressivist reform-mindedness and faith in ‘doability’, with the latter’s efficiency creed and unsophisticated transfer of business and managerialist principles to the public sphere.^{*37} In fact, however, we know, among many other things, of

- efficiency losses through size;
- the lack of savings in personnel costs associated with the amalgamation of municipalities;
- the increased viability of small communities because of ICT solutions;
- ideal company size, which may be very small according to the tasks; and
- the possibilities of co-operation in specific areas beyond forced unification.

We know as well that bigger communities serve less as schools of democracy, lead to less civic commitment, and the list goes on. And, once again, sometimes this is desired: emasculated municipalities are a hallmark of authoritarian and totalitarian regimes.^{*38} Again, we have no reason whatsoever to believe that increased municipal unit size automatically increases efficiency, and we do know that there is a tendency for it to weaken democracy and citizens’ identification with the community.

³⁰ On the key role of fashion and ideology, and the difference between them, see W. Drechsler. The Rise and Demise of the New Public Management. – Post-Autistic Economics Review 2005/33, 14 September 2005. Available at <http://www.paecon.net/PAERreview/issue33/Drechsler33.htm>.

³¹ Section 158 of the Estonian Constitution demands only that the views of the municipalities concerned be “consider[ed]”.

³² Mihkel Oviir, this journal issue *infra*.

³³ See W. Drechsler. Kommunale Selbstverwaltung und Gemeindegebietsreform: Deutsche Erfahrungen, generelle Erwägungen, estnische Perspektiven. – W. Drechsler (Note 5), pp. 119–135; W. Drechsler. Eesti kohaliku omavalitsuse haldusterritoriaalse reformi põhimõttelised küsimused (Principle Issues of the Administrative-Territorial Reform of Estonian Local Governments). – Riigikogu Toimetised / Journal of the Estonian Parliament 2000/2, pp. 145–150 (in Estonian); W. Drechsler. Eelmärkusi teisele, eestikeelsele väljaandele (Preliminary Comments to the Second, Estonian-language Edition). – P. Schöber. Kohalik omavalitsus. Tänapäevase kohaliku omavalitsuse idee (Local Government. Idea of the Modern Local Self-Government). 2nd (Estonian) ed. Tallinn 2003, pp. 5–8.

³⁴ H.-G. Gadamer. Die Grenzen des Experten. – Das Erbe Europas. Beiträge. Frankfurt/Main 1989, pp. 136–157.

³⁵ In Estonia, a good example is that of the Supreme Court’s decision regarding e-voting. While acknowledging that the law would actually make the e-votes in some sense more ‘valuable’ than the others because they could be altered by the voter during the e-voting period, the court argued that this would be outweighed i.a. by increased participation in elections (and the implementation of new technologies. See decision 3-4-1-13-05 of 1 September 2005 of the Chamber of Constitutional Review of the Estonian National Court; cf. Ü. Madise. Elections, Political Parties, and Legislative Performance in Estonia: Institutional Choices from the Return to Independence to the Rise of E-Democracy. PhD thesis. Tallinn: Tallinn University of Technology, 2007, pp. 18–19), although there is no scholarly reason to think that e-voting would indeed cause this (see W. Drechsler. E-Voting: Dispatch from the Future. – The Washington Post, ‘Outlook’ section, 5 November 2006, p. B01). And in fact, even the most ardent promoters of e-voting admit that the Estonian case shows that this is not the case. See F. Breuer, A. H. Trechsel. E-Voting in the 2005 Local Elections in Estonia: Report for the Council of Europe. Strasbourg 2006. Available at http://www.coe.int/t/e/integrated_projects/democracy/02_Activities/02_e-voting/00_E-voting_news/FinalReportEvotingEstoniaCoE6_3_06.asp#TopOfPage; cf. Ü. Madise, pp. 20–21.

³⁶ BVerfGE 79, 127: “In many respects, however, a centralistically organised administration could work more rationally and cheaply”, p. 153. On the positive aspects of *Rastede*, see E. Schmidt-Abmann. Kommunale Selbstverwaltung ‘nach Rastede’ – Funktion und Dogmatik des Art. 28 Abs. 2 GG in der neueren Rechtsprechung. – D. Franßen, E. Redeker, K. Schlichter, O. Wilke (eds.). Bürger – Recht – Staat. FS Sendler, München 1991, pp. 121–138.

³⁷ See W. Drechsler (Notes 30 and 33, respectively).

³⁸ In detail and with further references, W. Drechsler (Note 33), pp. 101–107.

In this context, it is interesting to look at a good recent supreme court decision. Just a few weeks ago, the Supreme Court of the Land of Mecklenburg-Vorpommern struck down the county reform for 2009 proposed by the state government, which consisted, in essence, of a radical reduction and fusion of counties, because of its unconstitutionality.^{*39} It is important to note that this was done because the “right to municipal autonomy granted to the counties is violated by the creation of the new mega-counties” and that the citizens would have a right to *überschaubare* counties. The verdict once again does imply that a reduction in the number of counties would generally lead to savings, which, as we know, is not the case^{*40}, but, as the court argues, this would not outweigh the other considerations. By acknowledging that too large structures disenfranchise the citizen, in terms of both service delivery and the possibility of commitment, and that this violation of municipal autonomy outweighs the assumed efficiency gains — even though it was about counties, not cities — the decision can well serve as a model: In the state context, efficiency is not everything, not even the main thing.^{*41}

III.

In sum, municipal autonomy is as important, for state, society, and citizen, as it ever was. But municipal autonomy and the central state are suspended in a necessary institutional tension, and thus the demand for the supreme court to protect the municipalities, which are the weaker side, is and will always be there. This is even more so because the supreme court is part of the central government.

The history and present situation of safeguarding of municipal autonomy by the supreme courts also stresses the danger of following fashion and ideology — indeed, the *Zeitgeist* — rather than carefully studying and evaluating issues, evidence, and options. But this is tough, and there are still movements afoot today that are geared toward the reduction, in number and autonomy, of municipalities, and, even in the face of all the evidence to the contrary, this is still sometimes sold as modern, efficient, and sensible reform, even in such successful countries as Finland and Denmark.^{*42}

That, of course, opens a discussion far beyond the current one, and actually leads into an altogether different direction from that of the conference, which, by highlighting ‘interference with policymaking’, appears to be based on the assumption that policymaking without interference is generally a good thing — a bold assumption indeed. It may, after all, well be argued that such interference is precisely the role of the supreme court in a post-Montesquieuian state, especially in a democracy, the purpose of which as a form of government is arguably as much to prevent as to create or enable — but these would be arguments well beyond the questions currently at hand. In such a case, however, if a supreme court were to follow the one in Mecklenburg-Vorpommern and thus interfere with policymaking that would, to the detriment of the citizens, abrogate municipal autonomy, this would be a good case in which policymaking by the state might be interfered with, not only constitutionally and legitimately so, yet also clearly in the best interest of citizens, society, and the state itself as well.

³⁹ Judgment of the LVerfG MV of 26 July 2007.

⁴⁰ *Ibid.*; F. Pergande. Den Landkreis kennen. Warum die Gebietsreform in Mecklenburg-Vorpommern gescheitert ist. – Frankfurter Allgemeine Zeitung, 28 July 2007, p. 8; see also Neuer Anlauf zur Kreisreform in Mecklenburg-Vorpommern. Innenminister Caffier sammelt Stellungnahmen aus dem Land. – Frankfurter Allgemeine Zeitung, 4 August 2007, p. 4; F. Pergande, R. Burger. Großkreise wird es nirgends geben. Das Greifswalder Urteil über die Gebietsreform interessiert auch anderswo. – Frankfurter Allgemeine Zeitung, 8 August 2007, p. 8, which emphasises the meaning for reforms in other German states.

⁴¹ An almost self-satirical account in favour of the larger counties is an interview with the main expert employed to promote the reform, Helmut Seitz: Rückschlag für Reformen. Landesverfassungsgericht Mecklenburg-Vorpommern kippt die Kreisgebietsreform 2009 – Experten beziehen Position. – ‘Öffentliche Finanzen’ special supplement. Frankfurter Allgemeine Zeitung, 12 September 2007, pp. 1, 6.

⁴² See the respective country reports at http://ec.europa.eu/growthandjobs/key/nrp2006_en.htm; on Finland, see specifically M. Suksi. Sub-National Issues: Local Government Reform, Re-Districting of Administrative Jurisdictions, and the Åland Islands in the European Union. – European Public Law 2007 (13) 3, pp. 379–406, esp. pp. 379–383; on Denmark, [Danish] Ministry of the Interior and of Health. The Local Government Reform — In Brief. Copenhagen 2006, which, e.g., does not even consider the appropriateness question.



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Extension of the National Audit Office's Powers to Audit of Local Governments: Limitation or Constitutional Protection of Local Democracy?

On 1 January 2006, an amendment to the National Audit Office Act¹ entered into force in Estonia, which extended the powers of the National Audit Office to include auditing of the activities of local governments. The National Audit Office thus became the external inspection body for local governments.

The purpose of this article is to highlight the problems pointed out during the discussions that preceded the extension of the National Audit Office's powers, as well as the positions of the participants in the discussion in favour of and against the extension, and to briefly summarise the first results of the National Audit Office's activity as the external inspection body for local governments.

The dilemma referred to in the title mainly lies in the need to weigh the balance between two constitutional principles. On the one hand there is local government autonomy — a local government's right to independently and finally resolve and manage local issues. On the other hand there is the principle of democracy, which pertains to the public nature of power and the legal liability of those who exercise power, and of democratic control, including the nation's right to know how public resources are being used.

1. Local government following the principle of autonomy

The Constitution of the Republic of Estonia² clearly recognises the principle of local government autonomy, implying local governments' right to independently and finally resolve and manage local issues (in § 154 of the Constitution). This is thus a guarantee given to local governments by the Constitution. According to the Constitution, a local government is free to manage its procedures while being a part of the state as a whole.³

¹ Riigikontrolli seaduse ja kohaliku omavalitsuse korralduse seaduse muutmise seadus. – RT I 2005, 32, 235 (in Estonian).

² Eesti Vabariigi põhiseadus. – RT I 2003, 29, 174; 2007, 33, 210 (in Estonian).

³ V. Olle et al. – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition). Tallinn: Juura Õigusteabe AS 2002, p. 641 (in Estonian).

The European Charter of Local Self-Government (hereinafter also referred to as the Charter), which Estonia ratified on 28 September 1994⁴, recognises the right of local incorporated territories to local governments, while leaving it up to each state to decide on their organisation.

The preamble of the Charter contains important principles for setting up local governments, including the principle of local government autonomy, whose implementation entails the existence of local authorities endowed with democratically constituted decision-making bodies and possessing broad autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised, and the resources required for their fulfilment.⁵ The principle of local government autonomy serves the purpose of decentralising public authority and limiting and balancing the authority of the state.⁶

According to § 154 (1) of the Constitution of the Republic of Estonia, local governments resolve and manage local issues independently, while the bases for their activity are provided by law. The Constitution recognises local governments — bodies of persons constituted on a territorial basis — as legal subjects separate from the state and not being part of the authority of the state in the narrower sense. This is why the activities of local governments must comply with constitutional principles.

Section 14 of the Constitution specifies the guarantors of fundamental rights (i.e., the addressees of personal rights and freedoms).⁷ The provision mentions local governments in addition to the authority of the state. Local governments' duty to guarantee the fundamental rights of persons arises from the fact that this is a duty of the state authority in its entirety.⁸ On the basis of the opinion of the Constitutional Review Chamber of the Supreme Court, local governments exercise the authority of the state both when complying with their state duties and when acting within their guaranteed autonomy; i.e., the relationship of local governments to fundamental rights applies to both their public-law and private-law activities.⁹

The legal delimitation of a local government organisation should take into account the long historical development of local governments and the developments and trends of the political system. Any indirect interference by the state must also be justified by overriding public interest and follow the principle of proportionality.¹⁰

For example, the European Charter of Local Self-government also provides that, as far as possible, grants to local authorities shall not be earmarked for the financing of specific projects; neither does the provision of grants remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction (Article 9). The Charter thus places great emphasis on the appropriateness of the local government's funds for its duties. For example, although local governments may borrow money under certain conditions, there are cases where the excessive loan burden of local governments has caused problems and even led to the insolvency of local governments. It should be stressed that bankruptcy proceedings with respect to local governments are precluded by constitutional law principles: the local government's constitutional guarantee and the principle of the rule of law.

2. The National Audit Office as a state body exercising economic control

Pursuant to § 132 of the Constitution, the National Audit Office shall be, in its activities, an independent state body responsible for economic control. The main function of the National Audit Office as set out in the Constitution — the content and scope of economic control — is specified in the National Audit Office Act.¹¹ According to § 137 of the Constitution, the organisation of the National Audit Office shall be specified in the law. The law thus referred to in the Constitution is the National Audit Office Act, which specifies the organisation and the bases for the activities of the National Audit Office, including the control powers (addressed in § 1 of the National Audit Office Act).

In the course of performing its main function, the National Audit Office may assess the audited entities' internal control, financial management, financial accounting, and financial statements, as well as the legality of their economic activities, including economic transactions; performance with regard to the audited entities' management, organisation, and activities; and the reliability of their information technology systems (§§ 16

⁴ Euroopa kohaliku omavalitsuse harta ratifitseerimise seadus. – RT II 1994, 95 (in Estonian).

⁵ CRCSCd 15.07.2002, 3-4-1-7-02. – RT III 2002, 22, 251 (in Estonian).

⁶ SCEbd 19.04.2005, 3-4-1-1-05. – RT III 2003, 5, 48 (in Estonian).

⁷ See SCEbd 3-4-1-1-05 (Note 6).

⁸ M. Ernits. – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Note 3), p. 128.

⁹ CRCSCd 6.10.1997, 3-4-1-3-97. – RT I 1997, 74, 1268.

¹⁰ V. Olle et al. – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Note 3), p. 664.

¹¹ Riigikontrolli seadus. – RT I 2002, 21, 117; 2006, 48, 357 (in Estonian).

(2) and (3) of the National Audit Office Act). Section 7 of the National Audit Office Act also specifies the audited entities: in addition to the institutions and persons listed by law, the National Audit Office audits local governments. The law determines the content and scope of the economic control exercised by the National Audit Office (control powers) and the bases for audit activities (procedure). The control powers of the National Audit Office are extended not to the entire scope of local government activities but to a limited set of them.^{*12} Until 1 January 2006, the economic control exercised by the National Audit Office over local governments covered allocations for specific purposes and subsidies granted from the state budget for the immovable and movable property of the state transferred into local governments' possession, and funds allocated for the performance of state functions.

3. The necessity of control of local governments

The insufficiency of local governments' control system has been pointed out in many international reports concerning Estonia. An example can be found in the 2001 report of GRECO (Group of States Against Corruption, Council of Europe).^{*13} Amongst other things, it recommended that Estonia review the National Audit Office's activities and strengthen control over local governments. Other methods of strengthening control over local governments were considered in order to solve these problems and attain the goals. These methods include, for example, improving the efficiency of audits commissioned from private auditors, establishing a special auditing institution for external audit of local governments, and strengthening auditing conducted by the audit committee. Thorough analysis led to the conclusion that extension of the National Audit Office's powers was the best solution.^{*14}

The Supreme Court's position concerning control over local governments is based on Article 8 of the European Charter of Local Self-government, under which administrative supervision of local authorities may be exercised only according to such procedures and in such cases as are provided for by the constitution or by statute. Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision shall be exercised in such a way as to ensure that the intervention of the controlling authority remains in proportion to the importance of the interests it is intended to protect.^{*15}

4. The objectives of extending the control powers of the National Audit Office

Extension of the control powers of the National Audit Office to local governments served two main objectives:

- to help strengthen external control over the lawful use of public-sector resources; and
- to help reduce corruption risks and disclose cases of corruption.^{*16}

Both objectives are in line with the main purpose of the National Audit Office — to exercise economic control in order to assure the Riigikogu and the public that the funds of the public sector are being used legally (§ 3 of the National Audit Office Act). It is important to note that the purpose of economic control is not only to identify shortcomings but particularly to give an overview of the actual situation.

The Constitution does not prevent the extension of the National Audit Office's powers by law, because it is not essentially contrary to the Constitution to assign new duties to constitutional institutions in addition to their duties under the Constitution. In assignment of new duties, it should be taken into account that the new duties must not prevent the performance of the main duty or run counter to other constitutional principles. It was therefore concluded that adding the function of economic control over local governments to the duties of an independent constitutional institution does not go against constitutional principles.^{*17}

¹² Letter by the Chancellor of Justice to the Auditor General of 6.09.2004, No. 6-1/04/1154, p. 2.

¹³ Available at http://www.coe.int/t/dg1/Greco/Default_en.asp

¹⁴ Explanatory memorandum to the National Audit Office Act and Local Government Organisation Act Amendment Act, p. 2. Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?login=proov&password=&op=ems&system=ems&server=ragne11&itemid=050950014> (04.11.2007) (in Estonian).

¹⁵ CRCSCd 5.02.1998, 3-4-1-1-98, Chapter II. – RT I 1998, 14, 230 (in Estonian).

¹⁶ See letter of the Chancellor of Justice to the Auditor General of 6.9.2004, No. 6-1/04/1154, p. 2.

¹⁷ *Ibid.*, p. 3.

The shorthand notes from the discussion in the Riigikogu concerning amendment of the National Audit Office Act reveal another issue — the concern of practitioners about the independence of the National Audit Office and doubts as to whether the amendment is going to achieve its intended purpose. It was concluded in the analysis of the issue that no new inspection body or type of inspection will be established for local governments. Instead, the National Audit Office will be able to perform its current duties — of ensuring control of transparency and lawfulness — to a higher standard of quality and in a manner that does not result in a constant risk of legal disputes. The risk of legal disputes implied a ‘grey area’ in assessing the lawfulness of the use of assets of the state and of local governments.^{*18}

Assessments and conclusions of an independent body responsible for external audit should additionally provide the audited entity with a good basis for quality decisions and enhance the reliability of the audited entity in the eyes of third parties.

The National Audit Office’s right to audit local governments also means the latter’s obligation to tolerate control procedures and to co-operate. Such duties can be assigned only by means of a law governing the relations between state and local government.^{*19}

5. A look at the debate over the scope of local government control in 1937

There is nothing new in the current discussion. A similar discussion was held over the draft Constitution in 1937.

The National Audit Office was established by a decision of the *ad hoc* Land Council of 27 December 1918. The first Constitution of the Republic of Estonia took the view that control of state agencies’ and enterprises’ economic activities and of implementation of the state budget was a function of the Riigikogu, for which the Riigikogu was to set up the relevant bodies. The Constitution of 1937 inclined the National Audit Office toward executive power.

The draft Constitution provided for the possibility of assigning to the National Audit Office the duty of auditing the economic activities of local governments. At the second reading of the draft Constitution, § 101 (2) of Chapter 10, ‘National Audit Office’, was worded as follows: “Audit of the economic activities of local governments and other public institutions may be assigned to the National Audit Office by law” (translation from the original Estonian).^{*20}

Some arguments **in favour of local government autonomy** from the 26th set of minutes of the meeting of the general committee for the Constitution at the first National Assembly, held on 27 May 1937 in the Riigikogu building (discussion of § 101 (2))^{*21}, were set forth as follows (originally in Estonian).

- Kaarel Eenpalu: “We have gone too far with this section. We do respect local governments, but only in our words. What is a local government? A government’s being local means that it determines its budget itself and also supervises its implementation. It would be too far-fetched to assign this supervision to the National Audit Office. We should act against this.”
- Värdi Velner: “Even during Russian times they did not go so far as to impose a national audit, for example, on rural municipalities. Neither can we go so far. Local governments have their own audit committees that exercise control. Nothing has gone wrong with this system so far.”
- Herbert Treial: “If the National Audit Office were to control the economic activities of local governments, this might interfere too much with local government affairs, which is why this committee takes the view that the state can control the economic activities of local governments not from the premise of purposefulness but only on the premise of lawfulness.”

Arguments **for local democracy** were put forth at the same meeting:

- Juhan Kaarlimäe: “Although local governments are audited in many ways, none of the audits are conducted to the end, because each body audits only certain aspects, and such audit is not purposeful.”

¹⁸ Draft National Audit Office Act and Local Government Organisation Act Amendment Act (603 SE, 614 SE), second reading, 10.05.2005. Available at http://web.riigikogu.ee/ems/stenograms/2005/05/t05051013-03.html#P323_94193.

¹⁹ L. Lehis. Arvamus Riigikontrolli auditeerimispädevusest seoses kohalike omavalitsustega (Opinion on the Auditing Powers of the National Audit Office with Respect to Local Governments). Tartu 27.08.2004, p. 2.

²⁰ Estonian State Archives, unit 77, directory 3, item 77a, p. 287.

²¹ Estonian State Archives, unit 77, directory 3, item 77a, p. 288.

- Anton Uesson: “The stronger the control of local governments, the better the local government representatives and leaders have managed these governments.”
- Kaarel Eenpalu: “I must say that any abuses that we have had occurred at the time when our local governments were almost completely without supervision. Parliament factions supported them, and where units of these factions existed at the local government level there was no power that could control them. From this we may conclude that local governments had a good life if this was favoured by the central government itself.”

At the meeting of the third committee reviewing the draft Constitution, on 13 April 1937, committee member Ado Anderkopp voiced the following opinion: “The current procedure for auditing local governments is such that a ministry official arrives and goes through the local government’s records without actually being competent enough. It is better to replace this authoritative control by the impartial and competent control powers of the National Audit Office.”²²

Jüri Marksoo, a member of the third committee reviewing the draft Constitution, opined on the proposal to “also check the bodies’ own finances when checking the state finances” that such a scope of control would be difficult for the National Audit Office because it would imply checking the purposefulness of transactions carried out with local governments’ own funds.²³

At the committee meeting of 21 April 1937, committee member Herbert Treial said: “At the last meeting, committee member Kohver raised the question of whether it is purposeful to grant the National Audit Office the power to control the purposefulness of the economic activities of local governments. I think the National Audit Office should control only the lawfulness of the economic activities of local governments.”²⁴ At the same meeting, August Kohver himself adopted the same view: “[...] whether the National Audit Office controls the economic activities of local governments and other public agencies with a view to ensuring the lawfulness or purposefulness of these activities. National audit of these bodies is thinkable only in consideration of lawfulness, not purposefulness, because in the latter case we would restrict the self-governing activities of these bodies.”²⁵

The result of the discussion in 1937 was that § 101 (2) was passed in the vote unanimously as proposed:

- Contribution to the audit of the economic activities of local governments and other public institutions with a focus on the use of public finances may be assigned to the National Audit Office by law.²⁶

Two angles should be stressed here. Firstly, as now, so in 1937 the extension of powers was unanimously approved. Secondly, in 1937 the debate was over whether the National Audit Office should be given any power to control local governments at all. As a final solution it was decided that the National Audit Office could control the use of public funds by local governments. One should keep in mind the context of those times; while today the National Audit Office may make only advisory proposals, at that time, as Auditor General Karl Soonberg put it, the National Audit Office was a body “also having judicial functions, such as imposing additional payments and repayments”.²⁷

6. Discussion in the Riigikogu of the scope of local government control

The discussion of 2005 was similar to that of 1937 except that it went one step further — namely, the debate was over whether the National Audit Office should be given the powers to control not only public finances but also local governments’ own finances, and whether granting such powers would impinge on the discretion of local governments.

In the discussion of amendments to the National Audit Office Act in 2005, the debate over the powers of the National Audit Office sprang from § 133 3) of the Constitution, according to which the National Audit Office shall audit the use and disposal of state assets that have been transferred into the control of local governments. This provision was the subject of thorough discussion during the amendment of the National Audit Office Act.

²² Estonian State Archives, unit 77, directory 3, item 81, p. 111.

²³ Estonian State Archives, unit 77, directory 3, item 81, p. 110.

²⁴ Estonian State Archives, unit 77, directory 3, item 74, p. 132.

²⁵ Estonian State Archives, unit 77, directory 3, item 74, p. 133.

²⁶ Estonian State Archives, unit 77, directory 3, item 77a, p. 300.

²⁷ Estonian State Archives, unit 77, directory 3, item 81, p. 108.

Minister of Justice Rein Lang summarised the discussion at the Riigikogu session on 13 April 2005.^{*28} The main point at issue was whether the above-mentioned provision restricts the powers of the National Audit Office indeed to only the assets assigned to local governments or whether it should be allowed to give greater control powers to the National Audit Office so as to ensure the lawful and purposeful use of public resources as a whole. The narrow interpretation was no longer considered justified, and any fears concerning the extension of the National Audit Office's powers were largely viewed as groundless.

In the course of the discussion, the Chancellor of Justice took the view that the issue should be viewed in the light of the historically important role of the local governments' guarantee in Estonian society. However, it is important to admit that local governments are a part of public authority whose financial basis is formed of taxes. The constitutional function of the National Audit Office is to identify and disclose any misuse of public funds. A local government is a public authority and, as such, has been created not for the sole purpose of serving people better but to serve people better while enhancing democracy. The state should retain sufficient control mechanisms to achieve these goals^{*29}.

During the discussion of amendments to the National Audit Office Act, member of the Riigikogu Urmas Reinsalu pointed out the philosophical point of departure that taxpayers' money should be fully subject to external control and to auditing via external control. An important aspect of this principle is the legal certainty of those subject to the local government in knowing that their tax money and public services are lawfully handled — i.e., that inhabitants under the jurisdiction of the local government are guaranteed legal certainty. In addition, it also helps to realise the important principle of democracy of state government, one of whose elements is good governance.^{*30}

Local government authorities are often the first and closest point at which people come into contact with the public sector, and they have an impact on people's trust in the state. Therefore, strengthening control over local governments is important with a view to enhancing the legitimacy of the authority of the state. Local government autonomy need not mean absence of control. In addition, the explanatory memorandum to the legal amendment mentions that, because requirements have changed over time, it is reasonable to update the content of the relevant provision of the Constitution, so as to reduce the margin of no control to a minimum in the public sector.^{*31}

In its decision of 19 April 2005, the Supreme Court also took the view that it is admissible to impinge on rights arising from constitutional principles if a constitutional value is protected by the restriction and if the restriction is necessary in a democratic society. Impinging on the principle of local government authority as a general constitutional principle is also admissible if this is justified by the achievement of an important constitutional value.^{*32}

As regards supervision by the National Audit Office, it should be kept in mind that this does not constitute supervision in the traditional sense. The procedure conducted in the course of economic control by the National Audit Office does not result in a mandatory prescription or other immediate sanction or punishing act. The procedure merely results in an audit report containing observations, assessments, and recommendations for the elimination of shortcomings. Public disclosure of misconduct is the main 'sanction'.^{*33}

Therefore, there is not and could not be any essential conflict between those two principles. Rather, the question is one of how to achieve balance between the two important constitutional principles without restricting them unjustly.

The explanatory memorandum to the draft act proposed extending the economic control powers of the National Audit Office to local governments regardless of whether the control covers state or municipal assets. However, the intention was to limit the control of municipal assets to control of lawfulness. As the money always comes ultimately from taxpayers, the efficiency of control should not depend on the user of the money. In practice, there are often problems with distinguishing between national and local affairs.

Member of the Riigikogu Andres Herkel stated in the discussion of the National Audit Act amendment in the Riigikogu that the dispute over whether the National Audit Office's control of local governments is in line with the Constitution has continued for years. It was concluded as a result of the discussion that control cannot cover the purposefulness of policy decisions but only lawfulness and financial audit. At the same time, Herkel

²⁸ Shorthand notes of the Riigikogu, draft National Audit Office Act and Local Government Organisation Act Amendment Act (603 SE, 614 SE) first reading, 13.04.2005. Available at http://web.riigikogu.ee/ems/stenograms/2005/04/t05041311-10.html#P204_31987 (4.11.2007) (in Estonian).

²⁹ See letter of the Chancellor of Justice to the Auditor General of 6.09.2004, No. 6-1/04/1154;

³⁰ Draft National Audit Office Act and Local Government Organisation Act Amendment Act (603 SE, 614 SE), third reading, 11.05.2005. Available at http://web.riigikogu.ee/ems/stenograms/2005/05/t05051114-04.html#P291_46209 (4.11.2007) (in Estonian).

³¹ Explanatory memorandum to the National Audit Office Act and Local Government Organisation Act Amendment Act (Note 15).

³² SCEbd 3-4-1-1-05 (Note 6).

³³ Speech by R. Lang at the Riigikogu at the first reading of the draft National Audit Office Act and Local Government Organisation Act Amendment Act (29 SE, 614 SE), 13.04.2005 (Note 28).

considered it to be a draft law of European orientation that would help improve the efficiency of control over local governments.^{*34}

Also, Riigikogu member Urmas Reinsalu pointed out the positive attribute that the Riigikogu will have at its disposal, via the co-operation committee of the parliament and National Audit Office, additional information on the activity of local governments in using taxpayers' money.^{*35}

The legislature found that allowing an external inspection body to assess the lawfulness of local government activities while not allowing assessment of the sustainability, efficiency, and effectiveness of local government decisions is in line with the Constitution.

7. The National Audit Office as external inspection body for local governments

When it comes to implementing the extended powers of the National Audit Office, it seems clear at first glance how to act under the law. However, several disputes have already arisen in practice about the admissibility of assessing 'grey area' issues: is a formal audit of lawfulness sufficient for protecting local democracy, or should assessment cover whether local governments have indeed proceeded in their activities from the actual objectives of the law, the intent of the legislature, and the legitimate interests and needs of the inhabitants served by the local government?

We can cite an example:

- Can the National Audit Office assess, e.g., the following situations: in a city where roads are in extremely poor condition and need major repairs, a new local government building is erected, or, in the same city, instead of erecting a new building, workers acting on the city's behalf repair only the road leading to the mayor's residence? What kind of assessment can be made in such cases?
- The purpose of the Public Procurement Act^{*36} is to ensure the transparent, purposeful, and sustainable use of local government funds; equal treatment of persons; and efficient use of the existing competition situation in public procurements (§ 1). A key question is how to audit lawfulness while avoiding assessment of the sustainability of the activities of a municipality or rural incorporated area.
- A waste management plan deals with the organisation of waste management, the objectives of improving the efficiency of waste management, and optimisation of waste transport in the municipality or rural incorporated area concerned.^{*37} How can one audit the implementation of the waste disposal plan while avoiding assessment of the effectiveness of the activities of the municipality or rural incorporated area?

It is clear that merely formal control of lawfulness is not sufficient to protect local democracy, as this might not yield any objective or essential information about the local government's activities. The legislature's intention and the actual purpose of a law, as well as the legitimate interests of the inhabitants, also should always be kept in mind in assessments. Only this way can local democracy be essentially ensured without impingement on local government autonomy. This should be the point where democracy is ensured by public control, on the one hand, and the local government's right to independently and finally resolve local issues is not infringed, on the other.

It should be stressed that the chief purpose of economic control is to provide an overview of the actual situation. In addition, the assessments and conclusions of an independent external auditing body should provide the audited entity with a good basis for quality decisions and enhance the reliability of the audited entity in the eyes of third parties.

Therefore, the activity of the National Audit Office is not aimed just at representing the interests of public administration before municipal administration. The National Audit Office considers it equally important to assess whether and how local government issues are related to shortcomings in public administration and to what extent the state takes account of the justified needs of local governments. The principles for actions and reporting of the public sector have been undergoing constant rapid development, which is why the National

³⁴ Shorthand notes of the Riigikogu, draft National Audit Office Act and Local Government Organisation Act Amendment Act (603 SE, 614 SE) second reading, 10.05.2005 (Note 18).

³⁵ Shorthand notes of the Riigikogu, draft National Audit Office Act and Local Government Organisation Act Amendment Act (603 SE, 614 SE), third reading, 11.05.2005 (Note 30).

³⁶ Riigihangete seadus. – RT I 2007, 15, 76 (in Estonian).

³⁷ Subsection 39 (2) of the Waste Act (Jäätmeseadus. – RT I 2004, 9, 52; 2007, 44, 315 (in Estonian)).

Audit Office plays a major role in supplying the Riigikogu and the public with independent and objective feedback on the effectiveness of the choices made and on any shortcomings identified.

In the discussion of the legal amendment, Minister of Justice Rein Lang set in a positive light the addition to the draft law according to which the National Audit Office may make proposals to the Riigikogu, the Government of the Republic, and the minister, as well as local government bodies, concerning the drafting, amendment, and supplementation of legislation. This right to participate in legal drafting has the primary purpose of eliminating the shortcomings identified in the course of economic control and avoiding such shortcomings in the future. The provision also makes it possible for the National Audit Office to draw attention to potential gaps or shortcomings in legislation preventively, if relevant information is available to it. The National Audit Office has availed itself of this opportunity in connection with issues related to the functions of local governments.^{*38}

8. Activities of the National Audit Office in checks of local governments since 1 January 2006

On the basis of the new objectives, the National Audit Office started to exercise control of local governments on 1 January 2006 with respect to the following persons and areas:

- local governments in their possession, use, and disposal of municipal assets;
- foundations and not-for-profit associations in which a local government participates as a founder or member;
- companies controlled by local governments; and
- subsidiaries of such companies.

In these areas, the National Audit Office may assess the following aspects of the audited entities:

- internal control, financial management, financial accounting, and financial statements;
- the legality of their economic activities, including financial transactions; and
- the reliability of their information systems.

It should be pointed out here that in its activities the National Audit Office takes into account one of the main principles of local government organisation — the right of local governments to independently and finally resolve and manage local issues — which is why the control powers of the National Audit Office do not extend to assessing the effectiveness of local government management, organisation, and activities.

In addition, the National Audit Office continues to examine the use of immovable and movable property of the state that has been transferred into the possession of local governments, allocations for specific purposes and subsidies granted from the state budget, and funds allocated for the performance of state functions (including assessment of the effectiveness of the assets' use).

A special audit department was set up in the National Audit Office for these functions; 13 auditors currently work in this department. The department began its work on 1 January 2006. Key National Audit Office objectives for 2006 were to launch the department and determine its structure and responsibilities, on the one hand, and to launch actual auditing activities, on the other. According to the National Audit Office Act, the National Audit Office shall decide independently on the conduct of audits and the time and nature thereof (§ 37) and is committed to conducting audits impartially, in line with applicable law and internationally accepted auditing standards.

Due to the large number of entities within the scope of auditing and the limited resources of the National Audit Office, entities for auditing are selected on the basis of analysis of the information available to the National Audit Office and upon identification of areas of priority with respect to the efficient functioning of state and municipal administration and the related risks.

As regards local government audits, the National Audit Office has considered it necessary to apply the following types of audit especially:

- general or institutional audits of local governments or their units, their financial management, and their asset management and internal control systems; and
- subject-specific audits.

³⁸ Shorthand notes of the Riigikogu, draft National Audit Office Act and Local Government Organisation Act Amendment Act (603 SE, 614 SE), first reading, 13.04.2005 (Note 28).

The main purpose of **general audits** is to assess whether the activities of a local government and its financial and asset management are lawful and whether efficient internal control systems are in place. Before the end of the department's second year of activity, eleven cities and rural municipalities had been audited. The main problems, which largely represent the general problems of all local governments, are as follows:

- the internal control systems of all audited local governments need major improvements of efficiency;
- information is not disclosed in the required scope and manner;
- established procedures are not followed or are outdated; and
- budgeting and implementation of the budget, as well as financial transactions, are not always in line with the law.³⁹

The purpose of **subject-specific audits** is to assess the lawfulness of the management of a specific area of activities by all or a certain group of local governments. The areas to be audited are likely to be selected on the basis of a risk analysis from among the following areas of local government operations: management of fixed assets, granting of subsidies, organisation of public procurements, issue of activity licences, management of assets for a specific purpose transferred by the state to the ownership of local governments free of charge, use of support received from European Union Structural Fund programmes, and funding of the activities of the local government. Four such audits have been completed in the second year of the department's activity, in which the following problems were identified:

- the overall level of accounting is poor, and there are material shortcomings in financial statements, the latter also not being readily available to the public;
- planning of investments requires major improvements with a view to ensuring continuous development;
- there is no reliable and comparable information about the actual amount of personnel costs; and
- most local governments lack the capacity to handle IT and 'information society' issues.

Correctness and transparency in local government activities are not only formally important. It is clear that, by applying a balanced and well-considered approach, the National Audit Office can be of help to local governments, helping them ensure the lawful use of the funds at their disposal and also transparent and efficient administration, thus strengthening local democracy.

In performing its functions, the National Audit Office endeavours to be a source of impartial information and feedback for the public and the Riigikogu but also to help develop and improve the administrative arrangements and internal control systems of local governments.

³⁹ All audit reports of the National Audit Office are available in Estonian at <http://www.riigikontroll.ee/>.



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The Area of Responsibility of a Local Government at County Level and Possibilities for the Legal Organisation Thereof

1. Introduction

The local government has a significant role in a democratic society — as the main support in the organisation of a democratic method of government and at the same time a connecting point between civil society and the state, the local government is the main guarantee of the stable development of a society. If sufficient protection for the local government has been established in the legal order, it operates in true opposition to the centralisation of authority of the state, as a counterweight. Consequently, the legal bases for the organisation of local government are substantiated in the constitutions of most democratic countries. The legal regulation concerning the underlying principles of the organisation of a local government in the Constitutions of the Republic of Estonia has been consistent, and the associated provisions are contained in the constitutions of the years 1920, 1933, and 1992 (the current document). Therefore it can be said that, regardless of the differences in the theoretical starting points of local government dominating in various stages of the development of the country, the tradition of specifying the bases for the local government's organisation in the Constitution is comparable to the substantiation and regulation of fundamental rights, freedoms, and liabilities. Chapter XIV of the Constitution today gives various guarantees to a local government, which in interaction ensure it, as an independent subject of legal relationships, a fixed position in the organisation of public administration and relations with state administration; create a basis for its independent institutional framework; and guarantee the protection of its subjective legal status.*¹

However, the public relations of the state and the local government as well as the practice of the legal regulation ensuring it are not free from problems. The determination of the legal status of a local government, the substantiation of its area of responsibility, and the modernisation proceedings from the needs for development are affected by various factors. These may be political, economic, organisational, or legal. All of these factors have an independent effect and scope, but their close interrelations must also be identified. In transition societies, the main factor affecting and directing the public relations of the state and a local government is

¹ See Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition). Tallinn 2002, p. 641 (in Estonian).

the political-legal element, which, as a rule, leads to the development of decentralised public relations of the state and the local government. In the conditions of stable democracy, the political-legal factor loses its priority status in the public administration of a state, and the socio-economic element emerges as a stronger factor. The reason for this is mainly the economic relations between various regions of the state, which are becoming closer; the movement of labour both domestically and between countries, accompanying the development of infrastructure; and the rapid urbanisation that has been characteristic of all countries since World War II. As a consequence of the peculiarity of the era and a specific state, the political factor may dominate the substantiation of the public relations of the state and the local government and may do so for a long time, not surrendering its position to the socio-economic element, the typical scope of which is in the conditions of stable democracy. The domination of the political factor is inevitably accompanied by disturbances in the balance of the public relations of the state and the local government, and the local government's possibilities for performing the administrative functions distinctive to it in the organisation of public administration may actually not match the development needs of the society at all.

As a glance back at history often helps to clarify and develop visions of the future, it is instructive to recall that the Estonian people reached independent statehood in 1918 on account of a developed and efficient local government tradition. It is also remarkable that the process of restoration of independent statehood in Estonia that began with the end of the 1980s was started with the restoration of the local government. The Supreme Council that operated in that period passed a series of legal instruments that were called pre-constitutional instruments in later legal theoretical treatments.² The resolution of the Supreme Council of 8 August 1989 concerning the passing of the administrative reform in the Estonian SSR stipulated a transition from the administrative system then in force to a local government administrative system that would comprise the decentralisation of the power of the people to management at local government levels within the republic, clear differentiation of national and local government management, and reorganisation of the territorial administrative structure. The planned reform prescribed the formation of a common and uniform two-level local government taking the historical tradition into account. In this model, the first level is made up of self-governed rural municipalities, boroughs, and towns and the second level of counties — constituting both self-governed and state management — and republican towns in which the functions of the first-level local government are performed at the same time.³

The ideas of the planned administrative reform were implemented by passing laws regulating the legitimisation and organisation of the local government.⁴ The political factor clearly stood out from the factors affecting the passing of the local government reform as the local government that was restored and began operation in 1989 via elections of councils of local government turned out to be a significant judicial power in the process of restoring national independence and performing various functions. The restored two-level local government was, above all, a definite political guarantee in restoring state independence. Here, it may be worth recalling the plenary meeting of the legislators of all levels held on 2 February 1990 and the declaration passed with respect to the state independence of Estonia, which contained an important message to the international community and, at the same time, provided the political powers of the time with determination to act.⁵ On the other hand, the local government was the immediate executor or ensurer of all extensive land, ownership, and other reforms executed in that period. Today, in evaluating and analysing the efforts of several countries that have selected a democratic means of development in their transition to market economy relations, and in ensuring the stable development of the society, it can be said that the reason for failure and setbacks generally lies largely in the fact that the planned reforms are not based on the foundation of the society on self-government.

In the context of the development of Estonia, it is paradoxical that, in the abandoning of the two-level local government model in 1993, again the political factor was the deciding one, as the state administration restored after the adoption of the Constitution in 1992 had sufficient political ambition to secure a dominant position for managing affairs at the county level and no readiness to include the local government in this process. As a result of the abandonment of the county level of local government in 1993, the relations between the state and the local government were not shaped to completion, and intertwining and duplication between state and local government functions of various types could be noted, among them social welfare, education, transport, and environmental protection services. Also, the county governor's competence is to organise and co-ordinate the activity of local offices of ministries and other central administrative institutions active in a county was settled in a poor manner.

² See Taasvabanenud Eesti põhiseaduse eellugu (History Preceding the New Constitution of Estonia). Tartu 1997, p. 25 (in Estonian).

³ Haldusreformi läbiviimisest Eesti NSV-s (About the Administrative Reform in the Estonian SSR). – ESSR Supreme Council and Government Gazette 1989, 26, 348 (in Estonian).

⁴ See ENSV kohaliku omavalitsuse volikogude valimise seadus ((ESSR Local Government Councils Election Act), ENSV kohaliku omavalitsuse aluste seadus (ERSS Local Government Fundamentals Act). – ESSR Supreme Council and Government Gazette 1989, 26, 346; 34, 517 (in Estonian).

⁵ Valikkogumik Eesti NSV Ülemnõukogu poolt vastuvõetud seadusandlikest aktidest (A Selection of Legislative Acts Adopted by the Supreme Council of the Estonian SSR). Tallinn, 1990, pp. 88–90 (in Estonian).

As a result, a model for the administrative organisation of a county was established that was substantiated from one side only, and the disharmonies soon appearing as the model entered into operation inhibited the development of democracy on the regional level and restricted the efficient use of the existing resources. This, in turn, led to the development of various regional administration reform plans, in the years 1999, 2001, and 2003. Preparations for a new attempt to pass the regional administration reform were begun in 2007 as well. Analysis of all prior reform plans indicates that, in their development, attempts have been made to take into account the various factors affecting the local government reforms and associated elements, but no applicable results have been achieved yet. Probably, one of the reasons here is also the fact that the dominant political factor that initiated the Estonian local government reform is vital enough and that, at the same time, insufficient consensus has been found between the various political powers to neutralise or surpass it. On the other hand, a common factor of all reform plans developed so far is that all of them rely greatly on a disorganised theoretical foundation. This is mainly reflected in the proposed reform plans leaving several conceptual issues unanswered and, at the same time, not taking into account the systemic approach in the implementation of the model for the administrative organisation of a county in its functional and organisational dimension as well as its legal order. A peculiarity of the county administrative level is that here the state administration and local government administration intertwine to form a complete system that, in turn, holds various relationships with the central power of the state and the local governments of the first level. Given the above system and its concomitant issues as background, it was regarded as necessary to discuss several issues related to the subject at the conference dedicated to the 15th anniversary of the Estonian Constitution as well, because both the state and the local government have been assigned a fixed place in the Constitution via fundamental rights and freedoms and, through that, also in relation to the protection and guarantee of various constitutional values.

The present article attempts to point out the factors that have kept the issues related to the management at county administration level topical virtually uninterruptedly since the regaining of independence; after that, the general requirements are specified that should be taken into account in modernisation according to the development needs of the county public administration model. The author also provides explanations as to whether and how it is possible to determine the county-level scope of responsibility of the state and the local government under the conditions of one-level local government stipulated in the Constitution, as well as possible solutions for the legal organisation of this.

2. Why is the subject of county management topical?

The needs for modernisation and improvement of management at the county administration level are mainly caused by socio-economic development. Also, the nature and effect of this factor have not been thoroughly and systematically analysed, which is why the rearrangements made so far have been random; unsystematic; and often subject to insufficient organisational, financial, and legal grounding. The main changes in the public administration of the state in the time since the regaining of independence have occurred mostly in the sphere of state administration and have significantly affected the county level of administration. The consolidation of functions performed in various fields of state administration has taken several state administration tasks related to management of various sectors from county-level jurisdiction to national scope, inevitably accompanied by a decrease in the importance of territorial state administration, in the given case county governors and the county governments managed by them. This direction of development has also been supported by the regulator, by means of changes in the Government of the Republic Act⁶, according to which the inclusion of county governments within the purview of the Ministry of Internal Affairs significantly changed the status of the county government and that of the county governor as well. The competence for official supervision of the county governor was transferred to the Minister for Regional Affairs with the amendment of the same Government of the Republic Act.

In the light of the concentration of state administration, several key socio-economic and demographic changes at local government administration level have not been analysed sufficiently. Regardless of the fact that, in the last decade, several local government units have merged in Estonia, the rapid decline in the number of people in local government units located further from centres can still be felt. This has considerably decreased the administrative capabilities of the units in several fields assigned to the competence of the local government. Various assessments have been made of the situation, the factor that links them being the indication of the need for rapid changes.⁷

With the impact of socio-economic development speaking to the needs and desires for economic purposefulness, several co-operation regions have appeared outside the scope of local government units. In these, public services are rendered in various forms of co-operation between the local government units. At the

⁶ Vabariigi Valitsuse seadus. – RT I 1995, 94, 1628; 2007, 44, 316 (in Estonian).

⁷ Riigikontrolöör ei näe väikevaldadel tulevikku (Auditor General Sees No Future for Small Communes). – Postimees, 15 November 2007 (in Estonian).

same time, it must be admitted that the development phase of local government is not sufficiently supported by the organisational and legal elements. Thus, the legal substantiation of the co-operation between local government units has fallen well behind the development needs. However, at the same time, further expansion of the services beyond the territories of local government can be predicted. This is caused, in part, by the development of information technology but also by the domestic migration operating and expanding for various reasons between different regions of Estonia. However, the co-operation areas of local government units do not coincide with the scope of public administration, and activities that often have common goals are left with no co-ordination between the state administration and local government administration levels. As a result, differences between regions have increased with respect to both the availability of public services and their relative quality. And then there is the main issue: currently, the possibilities of the local government units and respective territorial communities for participating in developing resolutions related to the management of a county are rather limited.

What forecasts can we make with respect to the future of the county level of management in a situation in which several functions of state administration have been transferred to areas of scope comprising several counties and where the main organiser of co-operation between local government units is the local government association of the respective county? At the same time, we must also consider that the association of local government units of a county has been assigned a rather modest legal status in today's legal order, in the form of a not-for-profit association. This has created a real contradiction between the content of the tasks performed by them or that may be transferred to them in the future and the legal status needed for the performance of the tasks.

A development scenario according to which a county and the institutions managing it will find an honourable place in history in the nearest future is possible. The state administration functions performed by today's county government will in that case be performed with the help of different forms of co-ordination of sectors of state administration, and the local government organised on a territorial basis in rural municipalities and towns will be transformed, on county level, into forms of local government unit co-ordination operating on functional grounds. In case of such a development scenario being realised, a historical flashback to the organisation of county management in Estonia is justified, as is the identification of the nature and relationship of territorial and functional administration and learning of the critically assessed experience of other countries.

Between different sources, the definition of a region is ambiguous and often hard to identify, as this term can denote a county as well as other administrative units. In differentiating between region and county, it would be expedient and wise to proceed from the fact that, by their origin, regions (in the given case, the areas of scope of public administration formed in our country by the present time) belong to artificial administrative units; i.e., they are established by the state. It is also possible for a region to mark a sphere of activity for an administrative unit. A region may also be treated as a regional association (union) that is competent as a legal person in public law to complete the tasks imposed on it. However, the Estonian counties — though we treat these in the meaning of regions as well — have formed over the course of centuries of historical development and bear a territorial and communal identity that can be discriminated from those of others. The existence of such identity is a primary basis for substantiating a public administration model for potential use in a county. It is also important that those who bear county-level public administration authority — county government and county governor — have differing public relations with the central power of the state as well as local government units. It should also be noted that regions, as a general rule, are functional state administrative units or special administrative units. Unlike a region, a county can be treated as a general administrative unit in its main functions. Proceeding from the practice established in Western European countries, the regions operating as general administrative units are mainly local-government-oriented. In Estonia, regionalism has appeared to be efficient so far, but in a form contrasting against that typically seen in Western Europe, and state administration is organised in counties.*⁸

The need to position our regional administration organisation on the scale of comparison of the administrative space of European countries keeps the subject of the improvement of regional administration topical. It has become a significant external factor in the rearrangement of the county management level, and it is difficult to ignore its existence in making political resolutions and choices. A well-known truth is that the expanded and renewing Europe is firmly striding toward being a Europe that values local government administration. This is confirmed by general developments and in-depth assessments in several European countries. Traditionally, new challenges are seen in the substantiation of regional administration and policy in decentralising public administration*⁹, and, in relation to this, the source of and key to the economic success of countries is mainly sought in the development of regions.*¹⁰

⁸ Maakondlik ja regionaalne juhtimine. 1.–2. juuni ja 8.–9. detsembri 1994.a. konverentsi materjalid (County and Regional Management. 1–2 June and 8–9 December 1994 conference materials). Tallinn 1994 (in Estonian).

⁹ New Challenges Facing Public Administration and Regional Policy in Poland. – *European Public Law* 2003 (9) 3, pp. 335–344 (see especially p. 337).

¹⁰ Region and Place: Devolved Regional Government and Regional Economic Success. – *Progress in Human Geography* 2005 (29) 5, pp. 618–625.

The domestic regional policy factor has also started to affect the reforming of the regional administration level significantly. Due to the domination of sectoral policies, the indeterminacy of the functions of the state and the local government is deepening and several regional policy tasks have been left without an institutional carrier, which is why several opportunities for guaranteeing the balanced development of regions have been left unexercised.

3. Which requirements should one proceed from in the modernisation of the county administrative organisation model?

Finding solutions for every problem under investigation presumes the establishment of methodologically determined starting points and the setting of a few central requirements for the administrative organisation model of a county.

The treatment of the planned model in three balanced dimensions — functional, organisational, and legal — should be established as a general requirement, and the functional dimension of the model is the deciding one. Thus, one should identify first the administrative functions which are justifiably exercised on the county level, and then the organisational and legal order should be substantiated.

The second requirement is to determine who has primary competence to legitimise the institutions performing administrative functions on the county level. If, in the conditions of a single-level local government, we regard a county as a co-operation region of local government units, a general opinion should also be formed as to whether the regional administrative institutions on the county level are legitimised by the people of the given county directly or indirectly. In the latter case, the associated competence should be given to councils by law.

A third requirement for the county administrative organisation model to be established is the consideration of democratic bases. This presumes the establishment of new opportunities for citizens for participation in community life, together with the opportunity to delegate their rights and obligations to a higher administrative level as well. The development of democratic bases in administrative organisation presumes the decentralisation of executive state power and the reallocation of functions between the state and local government administrative levels.

The fourth requirement is the consideration of evolutionary development in the functional and organisational organisation of local government. Here, consideration of the local government traditions of county governance is also justified, proceeding from the development needs and possibilities of public administration.

Guaranteeing of the stability of the model is the fifth requirement. This presumes renewal and adaptation in changing conditions. This involves achieving a so-called moving balance, under which a certain rigidity and functional flexibility of the organisational structure must be designed in, providing the new functions with a place in the existing structures and at the same time guaranteeing the ability for fast response in changing situations. With respect to certain parameters, the model must also allow alternative solutions in recognition of differences from one county to the next, to guarantee the efficient use of local conditions and opportunities.

The sixth requirement presumes the handling of the public administration organisation as a complete system with relations and balance among various administrative levels, and where the changes planned in the functions, organisation, and legal status of the parts of the system cause changes in the system as a whole as well. The implementation of this requirement, in the case of a regional administration model for establishment, presumes the identification of transfers and relations with the first level of state administration and local government.

Finally, the seventh requirement presumes the development of state supervision as a state guarantee of a balanced complete system and public interest in the activities of institutions engaged in county management, and co-ordination in the activities of bodies engaged in supervision.

4. What form of legal organisation can meet the requirements set for the county administrative organisation model?

In the Estonian legal order, the form providing various solutions is a legal person under public law. The analysis of the options for such a legal arrangement in the organisation of public administration was, however, compiled years ago¹¹ and the theoretical development of the concept of the legal person in public law has been modest in recent years.

When considering § 25 (2) of the General Part of the Civil Code Act¹² according to which “A legal person in public law is the state, local government unit and other legal person that has been established in the public interest and on the basis of a law applying to this legal person”, we can find support for further discussions here. In handling the state and a local government unit as a legal person in public law, we could position the county in this complete and logical system as well.

A county as a legal person in public law would unite the public interests of a county as a territorial community, connect the state and local government administrative functions at county level on clear and definite grounds, and enable unique substantiation for the organisation of the institutions performing the respective functions.

¹¹ K. Merusk. Avalik-õiguslik juriidiline isik avaliku halduse organisatsioon (Public Legal Person in the Public Administration). – *Juridica* 1996/4, pp. 174–178 (in Estonian).

¹² Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; 2007, 24, 128 (in Estonian). Available in English at <http://www.just.ee/23295> (26.11.2007).



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Settlement of Disputes Related to Election Rules for Local Government Councils: Judicial Practice of the Estonian Supreme Court

1. Introduction

According to the Constitution of the Republic of Estonia dated 1992¹ and the European Charter of Local Self-government as ratified by Estonia in 1994² (the ECLSG), our local government system derives from the base model of representative democracy. Hence, the existence and functioning of a representative body of the local government, elected by local people — that is, a local council — is an obligatory element under the Constitution. The first amendment of the 1992 Constitution relates to the elections of local government councils; made in 2003, it extended the term of authority of the representative body of a local government from the previous three years to four years, and a constitutional basis was provided for altering administrative-territorial organisation for the period between regular municipal elections.³ The municipal elections of a local government as a representative body of a constitutional institution are regulated by the Local Government Council Election Act⁴ (LGCEA), which, as a constitutional act, required the votes of a majority of the membership of the Riigikogu for its entry into force (Constitution the second sentence of § 104 (4)).

Since the restoration of independence in 1991, five local government elections have taken place in Estonia, held in 1993, 1996, 1999, 2002, and 2005.⁵ For the first two of them, the parliament established a new elections act⁶, the third elections were held on the basis of the previous Elections Act (as amended), and the fourth and the fifth elections were organised on the basis of the same Elections Act of 2002 (to which also several

¹ Eesti Vabariigi põhiseadus (RT 1992, 26, 349; RT I 2007, 33, 210 (in Estonian)) § 156 (1).

² European Charter of Local Self-government (RT II 1994, 26, 95 (in Estonian)), Article 3 (2).

³ Eesti Vabariigi põhiseaduse muutmise seadus kohaliku omavalitsuse volikogu valimiseks neljaks aastaks (Act to Amend the Constitution of the Republic of Estonia for Election of Local Government Councils for a Term of Four Years). – RT I 2003, 29, 174 (in Estonian).

⁴ Kohaliku omavalitsuse volikogu valimise seadus. – RT I 2002, 36, 220; 2007, 44, 316 (in Estonian).

⁵ For the relevant data, see the homepage of the National Electoral Committee. Available at <http://www.vvk.ee/kovindex.html> (08.11.2007) (in Estonian).

⁶ Kohaliku omavalitsuse volikogu valimise seadus (Local Government Council Election Act). – RT I 1993, 29, 505; 1995, 57, 981 (in Estonian); kohaliku omavalitsuse volikogu valimise seadus (Local Government Council Election Act). – RT I 1996, 37, 739 (in Estonian).

substantive amendments have been made).^{*7} During the above period, the Supreme Court (its Constitutional Review Chamber (CRC), or the Supreme Court *en banc* (SCeb)) has made several decisions concerning the constitutionality of the election rules for local government councils. Further to this, the decisions of the Supreme Court on the election rules of the Riigikogu are in many ways relevant to the municipal elections and *vice versa* (the same democratic principles of the right to vote apply both in parliamentary and in local government council elections), so that if we confine ourselves to the judicial practice regarding the constitutionality of the election rules of local government councils, the scope we have carved out for this discussion is to some extent artificial, which can be put down to the choice of the subject and the volume of the paper. This article discusses only the decisions that the highest national court has made on the election rules for local governments. In other words, the paper examines how the highest national court has, in decisions concerning the constitutionality of the election rules for local government councils within the framework of the constitutional review proceedings^{*8}, interpreted the democratic principles of the suffrage and furnished with content the autonomy of the local government as well as the principles for the representativeness of its representative body. Here it is important to specify that we will not discuss the decisions of the Constitutional Review Chamber of the Supreme Court by which the complaints and protests concerning the decisions and activities of the Electoral Committee have been settled — in other words, by which the Supreme Court has under § 2 10) of the Constitutional Review Proceedings Act^{*9} (CRPA) exercised its authority.^{*10}

2. Election rules and the Supreme Court as constitutional review court

The third paragraph of § 149 of the Constitution provides that the Supreme Court is also the court of constitutional review. According to the CRPA as currently in force, the Constitutional Review Chamber, or Supreme Court *en banc*, settles the matters placed within the competence of the Supreme Court by that act; this is set forth in § 3 (1). A similar regulation was contained in the previous CRPA (in § 9), adopted in 1993.^{*11}

In relation to the election rules, we have to keep in mind that the Supreme Court has two different spheres of competence. Thus, the Supreme Court settles, *inter alia*, petitions to verify the constitutionality of legislation of general application or the failure to adopt it (CRPA § 2 1)) as well as appeals and protests concerning the decisions and activities of the Electoral Committee (CRPA § 2 10)). While the former sphere of competence was described also in the earlier CRPA (§ 4 (1)), the situation has changed where the latter is concerned. The CRPA as applicable from 1993 to 2002 did not provide for the settlement of election complaints and protests by means of constitutional review proceedings.^{*12} As already noted in the introduction, this paper will not discuss the decisions of the Supreme Court that relate to election complaints and protests.

A reasoned petition for verifying the constitutionality of the LGCEA as legislation of general application may be submitted to the Supreme Court by the President of the Republic (Constitution § 107), the Chancellor of Justice (Constitution § 142), a local government council^{*13} (CRPA § 4 (2)), or the Riigikogu (CRPA § 4 (2)).^{*14} The court shall initiate proceedings by forwarding the decision or ruling to the Supreme Court (CRPA § 4 (3)).

The institute of electoral law is known to represent a set of constitutional provisions that forms an important part of constitutional law, an important institute thereof, and governs such important and politically highly sensitive social relationships as are created upon the election of state and local government bodies. On account of this, virtually all decisions in this area have also provoked rather active discussion in society. The issues of official language, citizenship, and suffrage constitute the main body of issues that have given rise to

⁷ See Note 4.

⁸ The decisions of the CRCSC and SCeb are available in English via the homepage of the Supreme Court, <http://www.nc.ee/> (10.11.2007).

⁹ Põhiseaduslikkuse järelevalve kohtumenetluse seadus. – RT I 2002, 29, 174; 2007, 44, 316 (in Estonian).

¹⁰ For the sake of practicability, the authority of the constitutional court in Europe is mostly confined to the election of the higher (central) bodies of authority. It is so in France, Austria, Germany, Greece, Portugal, etc. See R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse (Constitutionalism and Protection of Fundamental Rights and Freedoms). Tallinn: Juura 2004, p. 178 (in Estonian).

¹¹ Põhiseaduslikkuse järelevalve kohtumenetluse seadus. – RT I 1993, 25, 435 (in Estonian).

¹² See the ruling of the Administrative Law Chamber of the Supreme Court from 18 February 1994 in case III-3/11/94 (review of the appeal in cassation of the Electoral Committee of the Kihelkonna rural municipality due to the settlement of the election complaint in an incorrect court). – Riigikohtu lahendid 1993/1994 (Supreme Court Reports 1993–1994). Tallinn: Õigusteabe AS Juura 1995, pp. 62–63 (in Estonian).

¹³ If there is a conflict with the constitutional safeguards of the local government level (CRPA § 7).

¹⁴ The Riigikogu may submit to the Supreme Court a petition for the court to give its position on how to interpret the Constitution in conjunction with European Union law, if the interpretation of the Constitution is of decisive significance for the adoption of a draft act necessary for performing the duties of a European Union Member State (CRPA § 7).

great political tension in Estonia so far¹⁵ and that often have been accompanied by heightened international attention as well as political attacks from Russia. The Constitution as in force today does not comprise the suffrage as a fundamental right in its chapter on fundamental rights and freedoms (Chapter II), but it has been presented in §§ 57, 60, and 156 of the Constitution (the chapters entitled 'People', 'The Riigikogu', and 'Local Government', respectively). As it is a central institute of constitutional law, the Constitution (in § 104 second sentence (4)) also prescribes that the relevant legal regulation for electing local government shall be established by a constitutional act — the LGCEA.¹⁶

The first paragraph of § 156 of the Constitution provides that the representative body of a local government is the council, which shall be elected in free elections for a term of four years. The period of authority of a council may be shortened by an act as a consequence of a merger or division of local governments or the inability of the council to act.

The elections shall be general, uniform, and direct. Voting shall be secret (as specified in subsection 1) Similar democratic principles of the suffrage are prescribed by the ECLSG (Article 3 (2)), Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁷ (Article 3), and the International Covenant on Civil and Political Rights¹⁸ (Article 25¹ b). The legislative power has attempted to restrict the majority of these democratic principles of the right to vote by using various arguments (enhancement of political liability, etc.) when establishing election rules contrary to the Constitution. Problems have frequently occurred also in relation to the timing of the enactment of the election rules as such.

3. Judicial practice of the Supreme Court

3.1. The principle of *vacatio legis* in amendment of election rules

The Supreme Court has considered it very important to observe the principle of *vacatio legis* when making important amendments to the election rules. The court has declared unconstitutional those activities as the result of which the election rules are, immediately before the elections, amended such that certain political powers can benefit from them to the detriment of others.

On 12 May 2005, the Riigikogu adopted the Riigikogu Internal Rules Act Amendment Act, which was to enter into force on 17 October 2005 and abolish the prohibition, established in 2002, pursuant to which a member of the Riigikogu could not at the same time be a member of a rural municipality or town council. After the President of the Republic had refused to proclaim this act, the Riigikogu passed it unamended on 8 June that year. Here it is necessary to note that, in Estonia, the elections of local government councils are held on the third Sunday of October. Hence, the Riigikogu considerably amended the election rules three months before the elections of local government councils. The Constitutional Review Chamber of the Supreme Court (CRCSC) separately discussed in its decision on matter 3-4-1-11-05, of 14 October 2005¹⁹, whether the amendment made contained a reasonable term for its implementation. Although considering it impossible to say what would constitute a reasonable term for making amendments to the election rules, the CRCSC took the position that any amendment of the election rules that should enter into force at a time when under the CRPA a court action concerning the constitutionality of a regulation limiting the right to vote and stand as a candidate that has not been proclaimed by the President of the Republic could still be in progress has clearly been made too late. The chamber considered it a minimum requirement for amendment of the election rules that an act proposing a significant amendment be adopted such that it can enter into force well before the next elections and that both the voters and the candidates have enough time to examine the new rules and select a new way of action.²⁰ The CRCSC also stated that it considered the amendments made immediately before the elections, which could significantly transform the election results to the benefit of one or another political

¹⁵ See CRCSCd 11.08.1993, III-4/A-2/93 (Review of the petition of the Chancellor of Justice, pursuant to § 142, second paragraph of the Constitution, seeking to declare the resolution of the Narva City Council No. 15/163 dated 28 June 1993, entitled Regarding the Position on the Foreigners Act, to be null and void). – RT I 1993, 59, 841 (in Estonian); 6.09.1993, III-4/A-3/93 (Review of the Petition of the Chancellor of Justice pursuant to § 142, second paragraph of the Constitution, seeking to declare the resolution of the City Council of Sillamäe dated 6 July 1993, entitled Regarding the Execution of the Directions of the Participants of the Meeting of 30 June 1993, null and void). – RT I 1993, 61, 890 (in Estonian).

¹⁶ In relation to this, see also section 3.4 below.

¹⁷ Inimõiguste ja põhiwabaduste kaitse konventsiooni (täiendatud protokollidega nr. 2, 3, 5 ja 8) ning selle lisaprotokollide nr. 1, 4, 7, 9, 10 ja 11 ratifitseerimise seadus. – RT II 1996, 11–12, 34 (in Estonian).

¹⁸ Kodaniku- ja poliitiliste õiguste rahvusvaheline pakt. – RT II 1993, 10–11, 12 (in Estonian).

¹⁹ CRCSCd 14.10.2005, 3-4-1-11-05 (the petition of the President of the Republic to declare the Riigikogu Internal Rules Act Amendment Act unconstitutional). – RT III 2005, 31, 308 (in Estonian).

²⁰ *Ibid.*, para. 23.

power, to be in conflict with the principle of democracy arising from §10 of the Constitution.^{*21} The CRCSC had, in effect, expressed an analogous position three years before, in its decision on matter 3-4-1-7-02, on 15 July 2002^{*22} (paragraphs 26–28).

3.2. Freedom of elections and secrecy of ballot

The decision of the CRCSC of 1 September 2005 on matter 3-4-1-13-05^{*23}, which centred on the principle of the uniformity of the elections under the conditions of electronic voting (for discussion of this, see section 3.3 below), discussed also the principles of the freedom of elections and secrecy of ballot under the conditions of such an innovative voting method. The President of the Republic did not contest the LGCEA because of the violation of the principle of freedom of elections; however, it is clear — and this was also admitted by the court — that in the case of electronic voting (i.e., when the voter uses the Internet environment outside the polling place), it is more difficult to ensure national elections that are free of external influence and that maintain the essence of a secret ballot than it is in the case of voting in a voting booth in the polling place, where voters are alone.^{*24} On the basis of the principle of the freedom of elections, the state must, besides avoiding interference with the freedom of election of an individual, also guarantee the protection of the voter from persons attempting to influence his or her choice. The court stated that, in such a situation, the possibility of the voter to change his or her electronic vote submitted during the advance polls — such an opportunity had been prescribed by law — provided an important additional safeguard for the observance of the principles of freedom of elections and secrecy of the ballot. The CRCSC highlighted both the retrospective and preventive functions of the reversion of one's vote as exercised by an individual using the electronic voting system. The former concerns the possibility of later altering a vote cast under pressure, and the latter relates to decreased motivation to exert illegal influence on the voter. In relation to the preventive significance of penal measures, the court correctly stated that, unlike making use of the possibility to alter one's electronic vote, later punishment cannot eliminate the violation of the freedom of elections and secrecy of ballot.^{*25}

3.3. Uniformity of elections

The Supreme Court has analysed the principle of uniformity in relation to the election of local government councils in several cases. Firstly, we will examine the position of the court in relation to the right to revert a vote already made, as granted to voters by the legislator in the LGCEA, during an ordinary vote^{*26}. Here it must be emphasised that the court has not assumed a position regarding the general compliance of electronic voting with the Constitution, and it cannot be ruled out that the constitutionality of electronic voting will be contested in the future. In essence, electronic is an innovative voting method that is recommended also by the Congress of Local and Regional Authorities of the Council of Europe, besides other measures (voting by post, voting by proxy, extension of the opening hours of polling places, etc.) to increase the participation rate and enhance the involvement of those social groups that have participated to a lesser degree thus far.^{*27} On 30 September 2004, the ministerial committee of the Council of Europe adopted a recommendation addressed to the member states — Rec(2004)11 — on the legal, operational, and technical standards of electronic voting.^{*28} Estonia has used electronic voting twice now: in the election of the local government councils in 2005 and in the elections of the Riigikogu in 2007. The voter ticks the name of the candidate in the electoral district of his or her residence for whom he or she votes, then confirms the vote by providing his or her digital signature on the basis of the certificate entered in the identity card and allowing for digital signing.^{*29} According to the National Electoral Committee, more than 9000 people used the electronic voting option in the elections of local government councils in 2006, and 12,000 used it in the election of the Riigikogu in 2007.^{*30}

²¹ *Ibid.*, para. 22.

²² CRCSCd 15.07.2002, 3-4-1-7-02 (petition of the Chancellor of Justice to partly repeal §§ 31 (1), 32 (1), and 33 (2) 1) of the Local Government Council Election Act). – RT III 2002, 22, 251 (in Estonian).

²³ CRCSCd 1.09.2005, 3-4-1-13-05 (petition of the President of the Republic to declare unconstitutional the Local Government Council Election Act Amendment Act, adopted in the Riigikogu on 28 June 2005). – RT III 2005, 26, 262 (in Estonian).

²⁴ *Ibid.*, para. 28.

²⁵ *Ibid.*, paras 27–30.

²⁶ See Note 23.

²⁷ See Recommendation 182 (2005) on public participation in local affairs and elections. Available at [https://wcd.coe.int/ViewDoc.jsp?Ref=REC\(2005\)182&Sector=secCongress&Language=lanEnglish&Ver=original&BackColorInternet=e0cee1&BackColorIntranet=e0cee1&BackColorLogged=FFC679](https://wcd.coe.int/ViewDoc.jsp?Ref=REC(2005)182&Sector=secCongress&Language=lanEnglish&Ver=original&BackColorInternet=e0cee1&BackColorIntranet=e0cee1&BackColorLogged=FFC679) (08.11.2007).

²⁸ Available at <https://wcd.coe.int/ViewDoc.jsp?id=778189> (last accessed on 8 November 2007). See also CRCSCd 3-4-1-13-05, p. 17.

²⁹ LGCEA, § 50 (4).

³⁰ See <http://www.vvk.ee/elektr/index.html> (8.11.2007)

The LGCEA, as adopted by the Riigikogu on 27 March 2002, entitled voters holding a certificate for giving a digital signature to vote electronically on a Web page of the National Electoral Committee during the term prescribed for advance polling. Pursuant to the act (§ 74 (5)), electronic voting was not to be applied before 2005. On 12 May 2005, the Riigikogu amended the LGCEA, specifying the provisions of the act governing electronic voting. The amendments, inter alia, prescribed the right of voters to alter their electronically cast vote by submitting a vote by electronic means again during advance polling, voting by ballot paper during advance polling, and voting by ballot paper until 4:00 pm on the polling day. The President of the Republic perceived here a conflict with the principle of uniformity of elections and refused to proclaim the act. The Riigikogu made an amendment to the act, enabling voters to alter the electronically given votes by voting by electronic means again or voting via ballot paper from the sixth to the fourth day preceding the election day. The President of the Republic refused again to proclaim the act, as he continued to perceive a conflict with the principle of the uniformity of elections — a voter submitting his or her vote by electronic means gains an advantage over those voters using other methods of voting. As Parliament adopted the act that the President had refused to proclaim, doing so without amendment, the President appealed to the Supreme Court to declare said act unconstitutional.

The CRCSC did not agree to the arguments of the President of the Republic concerning the conflict of the legal regulation of electronic voting with the principle of uniformity of elections, for the following reasons:

- 1) In the electronic voting system, the registration of one vote is ensured by a system similar to the so-called two-envelope system used for voting outside a person's residence; the electronic vote does not influence the election results to a greater degree than those voters who use other voting methods.
- 2) The right of an individual casting an electronic vote to change his or her vote an unlimited number of times, which may be regarded as a restriction of the right to equality and the principle of uniformity, is not intensive enough to outweigh the aim of increasing the participation in elections and introducing new technological solutions. That is, the principle of uniformity does not mean that absolutely equal possibilities for performing the voting act in equal manner should be guaranteed to all people with the right to vote. People using different voting methods (those taking part in advance polls, people voting in a foreign state, people voting at home, etc.) are objectively in different situations.^{*31}

In its decision on matter 3-4-1-1-05 of 19 April 2005^{*32}, the Supreme Court *en banc*, inter alia, tackled the principle of the uniformity of elections in conjunction with the principle of equal treatment derived from § 12 of the Constitution with regard to the right to be elected and defined it as a guarantee of equal possibilities to all candidates for standing as candidates and for being successful in the elections. The decision sets out that, since a proportional electoral system is used for election of local government councils in Estonia, independent candidates and people running on lists are in a different situation and their comparison in such a context is neither reasonable nor possible.^{*33}

3.4. Constitutionality of a state language requirement imposed on council members as limitation of generality of elections

The applicable Local Government Council Election Act, dating from 2002 and amended several times since, does not impose a language qualification on the members of councils, but in the second half of the 1990s the requirement to know the state language had been prescribed for the members of a council^{*34} at the level of an act.^{*35} In November 1997, the Riigikogu adopted the Language Act and the State Fees Act Amendment Act, providing that the Government of the Republic was to establish the description of the level of proficiency in the Estonian language required for one to be a member of a council. The President of the Republic contested the conformity of the act with the Constitution in the Supreme Court. The President, inter alia, indicated that such a precept gave the Government of the Republic disproportionately extensive powers to decide on the language skills of members of local government councils.

³¹ CRCSC 1.09.2005, 3-4-1-13-05 paras 19, 20, 21, 23, 24, 28, 30, and 32.

³² SCeb 19.04.2005, 3-4-1-1-05 (the petition of the Chancellor of Justice to partly repeal § 70¹ of the Local Government Council Election Act and § 1 (1), the first sentence of § 5 (1), and § 6 (2) of the Political Parties Act). – RT III 2005, 24, 249 (in Estonian).

³³ *Ibid.*, para. 16.

³⁴ Also for the members of the Riigikogu, but this is not separately addressed in this paper.

³⁵ See I. Tomusk. Keeleseaduse muutmise ja täiendamise lugu (Story of the Amendment and Supplementation of the Language Act). Presentation at the seminar International Standards upon the Implementation of the Language Act, on 8 and 9 November 2001. – *Õiguskeel* 2001/5, pp. 9–15 (in Estonian).

In its decision from 5 February 1998 in case 3-4-1-1-98³⁶, the CRCSC admitted: “Pursuant to the second sentence of § 104 the election acts are among the laws which may be passed only by a majority of the membership of the Riigikogu. To decide on the right to vote and to establish the conditions for elections are the competencies of the legislative power which may not be delegated to the executive power. The Government of the Republic issues regulations on the basis of and for the implementation of law, and it is not allowed to establish the use of the right to vote by the decisions of the executive power. To do this would mean ignoring the principle of separated powers.”³⁷

The language skill requirement is an election qualification for a member of a representative body and affects the right to be elected. The court referred to § 8 of the ECLSG (on administrative supervision of local authorities’ activities) and pointed out that § 156 of the Constitution requires qualifications concerning the right to vote but fails to regulate the right to be elected for a local government council member. The CRCSC stated that regulation of the relationships falling within the area of regulation of the LGCEA (§ 104 second sentence (4) of the Constitution) as a constitutional act by means of ordinary legislative acts (the Language Act being an ordinary legislative act) is unconstitutional. In constitutional laws, neither the norms referring to simple legislation, nor delegation norms allowing the executive to issue general acts in matters which essentially belong to the sphere of regulation by constitutional laws, are allowed. Consequently, the requirement concerning the level of language skills may be imposed only by the LGCEA.³⁸ The Supreme Court declared the Language Act and the State Fees Act Amendment and Supplementation Act unconstitutional.

In its decision from 4 November 1998 in case 3-4-1-7-98³⁹, the CRCSC referred to its decision described above, noting that, on the grounds indicated in the decision, the Language Act (§ 5 (1)) was in conflict with the Constitution (§ 104 second sentence (4)) both as regards the determination of the level of language skills and as regards the powers given to the Government of the Republic to establish a procedure for supplying the description of the level of these language skills. The Supreme Court invalidated certain provisions of the LGCEA also in part where the provisions of this constitutional act referred to an ordinary legislative act and where the establishment of the description of the level of language skills was delegated to the Government of the Republic. Regulation 188 of the Government of the Republic, of 16 July 1996 (titled ‘Establishment of the Description of the Level of Estonian Language Skills Required for Working on a Local Government Council’), was repealed to the extent that it established the description of the level of the knowledge of Estonian necessary for working in a local government council.

It is important to emphasise that the Supreme Court did not call into question in either of the decisions the legitimacy of the requirement for knowledge of Estonian as a national language as such in respect of council members. Quite to the contrary, the court noted that the conformity of the language qualification derived from the preamble to the Constitution, according to which one of the goals of the Republic of Estonia was to guarantee the preservation of the Estonian nation and culture through the ages. As the Estonian language is an essential component of the Estonian nation and culture, without which the preservation of the Estonian nation and culture is not possible, the enacting of electoral qualifications guaranteeing the use of Estonian via the LGCEA is constitutionally justified.⁴⁰

3.5. Election rules and representativeness of representative bodies of local government

The issue of the representativeness of the representative bodies of local government had been raised already in the Constitutional Assembly. It is not a coincidence that the right to vote provided for in § 156 of the Constitution is related not to citizenship but to status as a permanent resident. The Supreme Court has had to address the problem of the representativeness of councils in another context.

Election rules have a very important role in determining the composition of the representative bodies of local governments. Also the ECLSG confirms in its preamble that the local authorities are one of the main foundations of any democratic regime. Section 1 of the Constitution declares that Estonia is a democratic republic. Legal acts establishing the election rules must be aimed at ensuring democracy and general well-being. The language qualification imposed for the election of a local government council, as described above, and the

³⁶ CRCSCd 5.02.1998, 3-4-1-1-98 (review of the petition of the President of the Republic of 30 December 1997 to declare the Language Act and the State Fees Act Amendment and Supplementation Act unconstitutional). – RT I 1998, 14, 230 (in Estonian).

³⁷ *Ibid.*, para. III.

³⁸ *Ibid.*, para. IV.

³⁹ CRCSCd 4.11.1998, 3-4-1-7-98 (review of the petition of the Harju County Court to partly repeal § 3 (3) and § 26 (7) 1) of the Local Government Council Election Act, § 5 (1) of the Language Act, and Regulation No. 188 of the Government of the Republic of 16 July 1996: Establishment of the Description of the Level of the Estonian Language Required for Working in the Riigikogu and a Local Government Council). – RT I 1998, 98/99, 1618 (in Estonian).

⁴⁰ CRCSCd 4.11.1998, 3-4-1-7-98, section III.

general requirement for knowing Estonian, which is constitutionally justified as repeatedly confirmed by the Supreme Court, must not damage fulfilment of the requirement arising from the first sentence of § 154 of the Constitution that all local issues be resolved and managed by local governments, which shall operate independently, pursuant to the law. The election qualification ensuring the use of the Estonian language, as justified by the Constitution, may at the same time be in conflict with the provision indicated in the Constitution because of the extent of the restriction, or it may undercut the principle of representativeness for a representative body of local government. Section 11 of the Constitution provides that any restrictions of rights and freedoms (including also conditions for election) must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted.^{*41}

On 27 March 2002, the Riigikogu adopted the LGCEA, which no longer provided for the possibility of election coalitions of political parties and citizen election coalitions running in elections held in October of the same year. The right to stand as a candidate was reserved only for the lists of political parties and independent candidates. The decision to forego election coalitions was justified in terms of the need to increase the political liability of the people elected to local government councils. The Chancellor of Justice proposed that the Riigikogu bring the act into conformity with the Constitution, the Riigikogu did not agree with the position of the Chancellor of Justice, and the latter appealed to the Supreme Court to settle the legal dispute. To provide complete information, it must be noted that at two municipal elections — held in 1996 and 1999 — the majority of the voters in rural municipalities and towns voted for citizen election coalitions and the candidates also preferred to belong to citizen coalitions. The situation was different, however, in larger local government units at that time, where people preferred political party lists.

In its decision from 15 July 2002^{*42} in case 3-4-1-7-02, the CRCSC considered the goal set by the legislator — to maintain the greater political accountability of the people elected to local government councils — as legitimate in itself and admitted that the measure used, that being the decision to forego election coalitions, may be legitimate. The CRCSC did not, however, consider it constitutional not to allow citizen election coalitions in the given legal and social situation, regarding it instead as a disproportional restriction of the right to vote. Thus, the court left it open that, in a different situation, a similar legal solution may be constitutional. This also left open the possibility that the question of whether the legal and social situation may have changed after a certain time to the extent that elimination of the election coalitions from the election process is justified might be addressed again, later on. In 2005, the Supreme Court had to process the petition by the Chancellor of Justice, which had, *inter alia*, been motivated by the legislator's intention to disallow the election coalitions in the elections of local government councils.^{*43} The question of the permissibility or impermissibility of the participation of election coalitions in the election process cannot in fact be answered metaphysically, apart from in terms of the social and legal reality of the relevant period.

Under the facts and reasons set forth for the decision, the CRCSC noted that § 156 of the Constitution might be interpreted such that its sphere of influence is not limited solely to ensuring formal equality established within the framework of the elections act. Section 156 of the Constitution does not exist in isolation from the other provisions and principles of the Constitution. The nature and the principles of democracy must be taken as the bases when one interprets § 156 of the Constitution. Referring to the preamble to the ECLSG as an international agreement containing important principles of local government, the court emphasised that the principle of democracy of forming a representative body for a local government was aimed at achieving sufficient representativeness of the body. The possibility of influencing the development of the composition of the representative body must be guaranteed to all voters and voter groups. The principles of democracy in themselves do not preclude reasonable restriction of the right to vote. For example, it is allowed to impose a threshold to discourage non-serious associations and independent candidates, in the form of requiring a certain number of signatures for nomination of a candidate. The restrictions must not, however, prevent individuals and groups having actual support from running in the elections. Restrictions running counter to this principle would damage both the right to stand as a candidate and the right to vote, and not just the right to nominate a candidate, and it would ultimately damage the bases for local government if the representative body were unable to be sufficiently representative.^{*44} Having analysed the election statistics, the court admitted that independent candidates were not on a competitive footing with the people in the election lists. The CRCSC also noted that there was no efficient alternative to the local election lists of national political parties for voters and candidates.^{*45} The court declared the LGCEA as adopted in 27 March 2002 unconstitutional to the extent that it did not allow for the participation of citizen election coalitions in local government elections.

⁴¹ *Ibid.*

⁴² See Note 22.

⁴³ For discussion of this, see section 3.6 below.

⁴⁴ *Ibid.*, para. 21.

⁴⁵ *Ibid.*, paras 29–30.

3.6. Election rules and local government autonomy

Local government autonomy is the core of the constitutional guarantee of the local government. This autonomy does not exist outside the legal or social situation of the relevant period. Election rules naturally have an important influence on local government autonomy either by enhancing it or, on the other hand, by weakening it. When speaking about local autonomy, we must keep in mind that it applies to relations between local government and the state; that is, in furnishing and construing election rules in a certain way, the natural core of local government — independence in deciding on local issues and their organisation — may be damaged by its excessive limitation for the benefit of the state. It would be *sancta simplicitas* to think that the political forces shaping the election rules lack sufficient argument to justify such activities.

The Supreme Court analysed the impact of the election rules for local government councils on local government autonomy in its *en banc* decision of 19 April 2005. Namely, the Chancellor of Justice submitted to the highest court of the state a petition to declare certain provisions of the LGCEA and the Political Parties Act (PPA) to be not in conformity with the Constitution and the Treaty establishing the European Communities⁴⁶ and thus to be invalid to the extent to which they did not allow for forming citizen election coalitions for local government council elections or allow political parties having fewer than one thousand members to be involved in deciding and managing local life issues, whose members could include citizens of the European Union. Before that, the Riigikogu had rejected the proposal of the Chancellor of Justice to bring the act into conformity with the Constitution.

It should already be considered of value that the highest court of the state has clearly and unambiguously stated that, according to the Constitution, a local government is based on the idea of a community, the duty of which is to resolve the problems of the community and manage the life thereof.⁴⁷ The court has also considered the principle of local government autonomy to be one of the underlying principles of the idea of democracy as contained in the Estonian Constitution.⁴⁸ Such a view is in compliance with the ECLSG, the preamble to which states that the local authorities are one of the main foundations of any democratic regime and that such local authorities are required as are endowed with democratically constituted decision-making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised, and the resources required for their fulfilment. The Supreme Court considers the natural content of local government autonomy to be the realisation of local interests on the local level, even in conflict with the interests of the central power.⁴⁹ This also is a clear rejection of the centralistic and state-focused perception according to which the state has one and only one centre of power. In the second half of the 1930s, the history of Estonia was characterised by an authoritarian period dominated by such ideas founded on the centralisation of power. The Supreme Court *en banc* does not consider local government autonomy to be an end in itself; rather, it defines as the goal of local government autonomy the decentralisation of public authority and the serving of the interests of restricting the state's authority and the counterbalancing thereof. The electoral system applied for local government councils should also be aimed at the protection of this constitutional value.⁵⁰ At the same time, the principle of local autonomy is not absolute, and its restriction is allowed, in fact, if justified for the realisation of an important constitutional value.⁵¹ In this case, the Minister of Justice and the Constitutional Committee of Parliament argued for the restriction of the right to stand as a candidate (the restriction of the suffrage derived from granting only political parties the right to submit lists) in terms of the need to ensure political liability. The Supreme Court *en banc* defined political liability as arising from the principle of democracy expressed in § 1 of the Constitution and specified as a possibility of evaluation of the activities of members of a local council once they have been elected, as well as assessment of how well they have fulfilled their campaign promises.⁵² The SCeb qualified political liability as a constitutional value and thus a goal legitimating restriction of the general principle of the Constitution. After that, the Supreme Court *en banc* assessed the proportionality of restriction of the principles of local autonomy and the equal right to stand as a candidate in consideration of the goal of political accountability, applying a familiar scheme: suitability — necessity — proportionality in a narrower sense.⁵³ But what constituted the restriction of the principle of autonomy arising from the constraint on the right to stand as a candidate at municipal elections from the point of view of the SCeb? The SCeb defined it as follows: “If the possibilities to represent communal interests are made dependent on the decisions of political parties active on the national level, the representation of local interests may be jeopardised. This, in turn, may be in conflict

⁴⁶ The issue of conformity with the Treaty establishing the European Communities is not considered in this paper.

⁴⁷ SCeb 19.04.2005, 3-4-1-1-05, p. 18.

⁴⁸ *Ibid.*, para. 30.

⁴⁹ *Ibid.*, para. 35.

⁵⁰ *Ibid.*, para. 17.

⁵¹ *Ibid.*, para. 24.

⁵² *Ibid.*, para. 26.

⁵³ Only local autonomy is tackled below, although the SCeb used the same arguments also in relation to restriction of the right to stand as a candidate.

with the principle of autonomy of local governments. In the case of a conflict of state and local interests, a member of a local government council must have an opportunity to resolve local issues independently and in the interests of his or her community. That is why the electoral system of municipal elections should guarantee those groups of persons who come from the local community and who have a common interest in resolving local issues the possibility of standing as candidates on an equal footing with those groups, such as political parties, who are interested in exercising power also on the national level.”⁵⁴

When applying the proportionality test (assessment of the restriction of local government autonomy in respect of the goal of strengthening political liability), the SCeb did not perceive any problems concerning the suitability and necessity of the restriction, but it did find issue in the case with proportionality (in its narrower sense). The question was that the restriction of the right to stand as a candidate that restricted also upon local government autonomy as one of the underlying principles of democracy presumed that the goals of the restriction are particularly significant.⁵⁵ The SCeb assessed the guaranteeing of political liability to be a constitutional value but only a non-primary, or secondary, value arising from the principle of democracy, since, besides political liability, the requirement that different political interests be represented as widely as possible in political decision-making is vital for the functioning of democracy in Estonia’s political system; the principle of separation of powers must also be taken into consideration.⁵⁶ On the other hand, the SCeb qualified the restriction as intensive for local autonomy⁵⁷ and arrived thus at the conclusion that in the current legal and social context of Estonia the aim of ensuring political liability does not justify the restriction of the principle of local autonomy and the equal right to stand as a candidate in the election of a local government council.⁵⁸ Hence, the Supreme Court *en banc* assessed as unconstitutional the relevant provisions of the PPA and LGCEA that in their conjunction prevent the residents of a local government jurisdiction from independently submitting lists in local government council elections.⁵⁹ However, only the contested provision of the LGCEA (§ 70¹) was repealed. The reason is that the SCeb assumed the position that the Chancellor of Justice had made an alternative petition to the Supreme Court⁶⁰: (1) to declare the provisions of the LGCEA and PPA invalid to the extent that the provisions do not allow forming of election coalitions of citizens in local government council elections and (2) to declare the provisions invalid to the extent that the provisions do not allow forming political parties with a membership of fewer than 1000 persons for deciding and arranging local issues.⁶¹ The Supreme Court *en banc* referred to the principle of legal certainty as the reason for its need to go beyond mere declaration of unconstitutionality of the provisions of the LGCEA and PPA in their conjunction. The Supreme Court *en banc* pointed out the small amount of time remaining before municipal elections. Upon the invalidation of the relevant provision of the LGCEA, it would be unambiguously clear who would be able to participate in the forthcoming local elections, provided that the legislator were not to establish other rules. In principle, the legislator should then have an opportunity to bring the whole body of regulation of the Local Government Council Election Act and of the Political Parties Act into conformity with the Constitution.⁶² The fact that the SCeb (or, strictly speaking, the majority of its panel) did not because of the principle of legal certainty consider it possible to simply declare the provisions of the LGCEA and PPA invalid in their conjunction (although the court admitted this in its argument) and that it invalidated only the relevant provision of the LGCEA and thereby decided on the question for the parliament also provided grounds for the dissenting opinion of one Justice of the Supreme Court.⁶³ The opinion he expressed, according to which it is the parliament that should be given the possibility of making a choice of legal regulation — as much as possible — concerning such sensitive issues as the fundamental right of political parties and suffrage rights instead of the court resolving the issue via a judgement for the Parliament, addresses what is, by nature, an issue of judicial activism and deserves to be discussed separately. We may still agree with the remark offered in the dissenting opinion that there were no flawless versions of decision possible in the situation that had evolved.

⁵⁴ *Ibid.*, para. 17.

⁵⁵ Here it must be noted that paragraph 30 of the reasons of the SCeb decision is worded incorrectly. It states: “That is why the reason for establishing restrictions on the exercise of suffrage in local elections must be especially weighty.” In fact, it is not the restriction as such but the goal justifying its imposition that must be weighty.

⁵⁶ *Ibid.*, para. 34.

⁵⁷ *Ibid.*, paras 31–34.

⁵⁸ *Ibid.*, para. 36.

⁵⁹ *Ibid.*

⁶⁰ Not all of the members of the panel of the Supreme Court *en banc* agreed that the Chancellor of Justice had made an alternative petition. See the dissenting opinion of Justice Lea Kivi, which is available in English at <http://www.nc.ee/?id=391>.

⁶¹ *Ibid.*, para. 44.

⁶² *Ibid.*, para. 47.

⁶³ See the dissenting opinion of Justice Jüri Põld. Available in English at <http://www.nc.ee/?id=391>.

4. Conclusions

The Supreme Court in the Constitutional Review Chamber of the Supreme Court, or Supreme Court *en banc*, has at several times assessed the constitutionality of the rules established for the election of local government councils in the course of constitutional review proceedings, filling out and shaping in their decisions the electoral law and its democratic principles that form an important institute of constitutional law. The principle of *vacatio legis* that serves as such a key element of a state based on the rule of law and the principles of the representativeness and autonomy of local government councils have been furnished and developed further in the judicial practice of the Supreme Court. As a whole, the judicial practice of the Supreme Court in the area of suffrage — and, naturally, not in that area alone — has definitely strengthened a democratic statehood of Estonia based on the rule of law. The positions expressed by the highest national court in defence of the principles of local government autonomy and the representativeness of its representative body are of lasting value for the guarantee of this constitutional institution that is closest to its citizens. Since the election rules have often been amended immediately before municipal elections, the Supreme Court itself has certainly felt the pressure of time in making the relevant decisions, but its lines of argument in the sphere of the suffrage as a whole are pertinent and the judgements supplied with sufficient reasoning.

Abbreviations

RT	<i>Riigi Teataja</i> (State Gazette)
CRCSC	Constitutional Review Chamber of the Supreme Court
CRCSCd	decision of the Constitutional Review Chamber of the Supreme Court
SCCCd	decision of the Criminal Law Chamber of the Supreme Court
SCeb	Supreme Court <i>en banc</i>
SCebd	decision of the Supreme Court <i>en banc</i>
ALCSCd	decision of the Administrative Law Chamber of the Supreme Court