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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/133167.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).