



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