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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.