ON ESTONIAN CONSTITUTIONAL TRADITIONS

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Abstract

The article aims in four steps to identify Estonian constitional traditions at a large scale, the constitutional core, or the constitutional DNA. First, the background, i.e. the main origins of Estonian constitutional thinking at large, is scrutinised. Secondly, the five fundamental principles of the Constitution are briefly presented. Thirdly, the five general fundamental rights are outlined. And fourthly, the key elements of the institutional framework are briefly depicted. An annex is added to the basic text, presenting key developments in case law on two fundamental rights – freedom of expression and freedom of movement.

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1. Introductory remarks

The purpose of this paper is to present Estonian constitutional traditions that could serve as sources for common constitutional traditions (CCTs) under Article 6(3) TEU or preamble or Article 52(4) CFR. However, this task boils down to the task to find a needle in a haystack because it is unpredictable in which context a reference to the CCTs might become necessary in the opinion of the Court of Justice of the European Union (CJEU). It would be impossible to treat all imaginable cases, rules, principles and procedures. Therefore, the modified purpose is to present the most important aspects of Estonian Constitution, the constitutional core, or the constitutional DNA, that from the perspective of a member state would be the most suitable source for the CCTs.

Neither the Estonian legal language nor the case law of the Estonian Supreme Court (SC) knows a developed concept of constitutional tradition.[2] The Estonian translation of the Treaties

[2] I will concentrate myself to judgements (j) and rulings (r) of the SC en banc (SCeb), of the Constitutional Review Chamber of the SC (CRCSC) and of the

uses the term 'custom' (*tava*) and not 'tradition' (*traditsioon*).[3] However, the SC uses the term 'custom' rather in its usual sense.[4] The term 'tradition' is occasionally used in untechnical sense by the SC.[5] However, there are a few examples of using this term in a technical legal sense. The CRCSC, while controlling the constitutionality of the Clemency Procedure Act, referred inter alia to the traditions of Estonia's legal practice without specifying the meaning of the concept.[6] Elsewhere, the CRCSC referred to the traditions of legislative drafting while criticising the legal clarity of key norms of the Administrative Reform Act.[7] The ALCSC has referred to an Estonian legal tradition that allegedly consists in the exceptional nature of the compensation of a non-pecuniary damage.[8] This is a unique statement and the Chamber did not bother itself to present any proof that such a tradition exists. In dissenting opinions of other cases there has been one reference to

Administrative Law Chamber of the SC (ALCSC). Occasionally, judgements and rulings of the Criminal Chamber (CRCSC) and of the Civil Chamber of the SC (CLCSC) will be addressed. Selected Constitutional Review judgments and selected judgments of the Administrative Law Chamber are available in English: <https://www.riigikohus.ee/en/judgements>.

[3] Cf. to the Estonian usage of the term 'custom' R. Maruste, *Põhiõiguste harta Euroopa põhiseaduslikus lepingus [Charter of Fundamental Rights in European Constitutional Treaty]*, Juridica 656 (2004); U. Lõhmus, *Põhiõiguste kaitse kolmnurgas riik – Euroopa Nõukogu – Euroopa Liit [Protection of Fundamental Rights in the Triangle State – Council of Europe – European Union]*, Juridica 358 (2010); U. Lõhmus, *Põhiõigused ja Euroopa Liidu õiguse üldpõhimõtted: funktsioonid, kohaldamisala ja mõju [Fundamental Rights and General Principles of EU Law: Functions, Scope of Application and Impact]*, Juridica 640 (2011); A. Laurand, *Euroopa Liidu liitumine inimõiguste ja põhivabaduste kaitse konventsiooniga [Entering of the European Union into the European Convention on Human Rights]*, Juridica 677 (2013).

[4] E.g. CRSCj 05.03.2001, 3-4-1-2-01, para. 16: "the Court observes the custom not to interfere with the sovereign activities of the legislator, except in the cases when restrictions on rights and freedoms established by law are not necessary in a democratic society or distort the nature of the rights and freedoms restricted." This statement of the SC is for two reasons problematic. First, it does not involve legislative omissions, and second, it is not just a custom but a constitutional obligation of the SC not to interfere unless it is necessary for constitutional reasons.

[5] E.g. CRCSCj 15.12.2009, 3-4-1-25-09, para. 26 ("traditional company", "traditional proprietary benefit"); ALCSCj 11.04.2016, 3-3-1-75-15, para. 16 ff. ("untraditional means of payment", "traditional currencies").

[6] CRCSCj 14.04.1998, 3-4-1-3-98, para. II.

[7] CRCSCj 20.12.2016, 3-4-1-3-16, para. 113.

[8] ALCSCj 09.12.2015, 3-3-1-42-15, para. 29; 16.03.2017, 3-3-1-83-16, para. 25.

the tradition of states with written law[9] and one to the tradition originating from the socialist period[10].

The essence of the CCTs is a matter of comparative law, however, the CJEU has given methodologically not much guidance on how to identify a CCT.[11] One of the best known examples of the comparative method of the Court is an early judgement in the Algera case.[12] Although this judgement concerned administrative law questions and not fundamental rights, it made the reasoning of the Court transparent stating that it was "a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries."[13] What followed, was a rather detailed analysis of French, German and Italian law and a reference to Belgian, Luxembourgian and Netherlands law. Another example is the Hauer case which dealt with establishing the right to property and its limits in the Community Law.[14] The Court found first: "The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights."[15] To the limits the Court explained that "to answer that question, it is necessary to consider also the indications provided by the constitutional rules and

[9] Dissenting opinion of Justice Harri Salmann to the ALCSCr 25.11.1994, III-3/1-11/94.

[10] Dissenting opinion of Justice Eerik Kergandberg to the SCebj 17.03.2003, 3-1-3-10-02, para. 10.

[11] K. Neukamm, *Bildnisschutz in Europa*, cit. at 11, 37,44, 63. According to Katrin Neukamm, there are three possible theories for determination of the CCTs: the minimum fundamental rights standard, the maximum high level fundamental rights standard and the evaluative comparative law standard.

[12] ECJ 12 July 1957, *Algera and Others v. Assemblée commune*, C-7/56 and C-3/57 to C-7/57, EU:C:1957:7.

[13] Cf. K. Neukamm, *Bildnisschutz in Europa*, cit. at. 11, 45; K. Lenaerts. *The European Court of Justice and the Comparative Law Method.* – European Review of Private Law (2017), 299.

[14] ECJ 13 December 1979, *Hauer v. Land Rheinland-Pfalz*, C-44/79, EU:C:1979:290.

[15] A more recent example is significantly more laconical, Opinion of AG Kokott in Berlusconi and Others, C-387/02, C-391/02 and C-403/02, EU:C:2004:624 (rec. 156) and EU:C:2005:270 (rec. 68).

practices of the nine Member States."[16] The Court followed that the right to property may be subject to restrictions. However, above these two famous examples not much methodological guidance can be found.[17]

First a brief overview of the background of contemporary Estonian constitutional thinking shall be presented. Then the fundamental constitutional principles, some basic aspects of fundamental rights and of institutional questions shall be discussed.

2. Background – main origins of Estonian constitutional thinking at large

Identifying the origins of constitutional thinking is a tricky task. Evidently, it would be impossible to identify the origins of every theory and every thought. Therefore, I restrict myself to the origins at large to which hints can be found in constitutional literature or case-law.

First, we shall deal with a historical look back to the 1920s and 1930s. Secondly, we look briefly at the influence of the ECHR to the Estonian Constitution. Thirdly, constitutions of other European states, mainly the German *Grundgesetz* have played an important role. Fourth, we will take a closer look at elaborations of the SC on the general principles of law. Finally, the facticity of Soviet occupation has certainly also formed at least some constitutional interpretations.

[16] Cf. K. Neukamm, *Bildnisschutz in Europa*, cit. at 11, 45.

[17] In some later cases the opinions of the Advocate General give make the comparative trains of thought explicit, Opinions of AG Warner and of AG Sir Gordon Slynn in *AM & S v. Commission*, C-155/79, EU:C:1981:9 (sec. V) and EU:C:1982:17; Opinion of AG Mischo in *Hoechst v. Commission*, C-46/87 and C-227/88, EU:C:1989:73, rec. 49 ff. Cf. K. Neukamm, *Bildnisschutz in Europa*, cit. at 11, 45. A more recent example is significantly more laconical, Opinion of AG Kokott in *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2004:624 (rec. 156) and EU:C:2005:270 (rec. 68). Cf. K. Lenaerts, *The Court of Justice and the Comparative Law Method*, ELI Annual Conference 8 (2016). <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2016/K._Lenaerts_ELI_AC_2016.pdf>.

2.1. Estonian constitutional history

Main models of Estonian Constitution of 1992 were the Constitutions of 1920 and 1938.[18] The Constitution of 1920 has been named ultra-democratic[19]: The constitutional rights were positioned clearly in the foreground, the parliament was elected proportionally in one single electoral district, the government was based on the confidence of the Parliament, and there was no presidential institution separate from the government. Unfortunately, the first Constitution presupposed perhaps a too optimistic conception of a citizen and survived only thirteen years, having in this time 17 governments[20]. In 1932-33, there were three attempts to reform the Constitution and finally, the third, the most radical one succeeded and turned Estonia towards autocracy. In contrast to the first, the new Constitution of 1938 that was supposed to bring Estonia out of the autocracy was, however, a step into the opposite direction: the constitutional rights were still in the foreground but with significantly limited sphere of freedom, a strong presidential power with the right to install and to dismiss governments and to dissolve the Parliament was established and the Parliament became two chambers, whereas the size of the directly elected lower chamber was 20% reduced compared to the former single chamber Parliament. As one significant example, the second chapter that in the Constitution of 1920 was headed with 'On Constitutional Rights of Estonian Citizens' beared in the Constitution of 1938 the title 'The Rights and Duties of Estonian Citizens'. The added term 'duty' characterises best the changed approach.[21]

The Constitution of 1992 is an interesting mixture of the ideas of Constitutions of 1920 and 1938, whereas the liberal-democratic ideas of the Constitution of 1920 prevail.[22] However, the

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[18] M. Luts, J. Sootak, *Rechtsreform in Estland als Rezeptions- und Bildungsaufgabe*, 53 Juristenzeitung 401 (1998); S. Raudsepp, *Vastab Põhiseaduse Assamblee juhataja Tõnu Anton [The President of the Constitutional Assembly Tõnu Anton Answering],* Eesti Jurist 120 (1992).

[19] K. Loewenstein, *Das Gleichgewicht zwischen Legislative und Exekutive: Eine vergleichende verfassungsrechtliche Untersuchung* (1938); H. Rausch (ed.). *Zur heutigen Problematik der Gewaltentrennung*, Darmstadt (1969).

[20] J. Toomla, *Valitud ja valitsenud [The Elected and the Regnants*] (1999).

[21] Cf. to the Constitutions of 1920 and 1938 in general M. Luts-Sootak, H. Siimets-Gross, *Eesti õiguse 100 aastat [100 Years Estonian Law]* (2019).

[22] The main author of the first draft of the Constitution of 1992 Jüri Adams explained by the presentation of the draft that it follows the spirit of the

Constitution of 1992 – while having the constitutional rights again clearly in the foreground – has corrected some crucial shortcomings of the Constitution of 1920, especially regarding political instability. The most important outcome is that the electoral system together with more stable coalitions guarantee more political stability while preserving the democratic essence of the political system.

2.2. European Convention on Human Rights

Already in *travaux préparatoires* of the Constitution the prominent role of the ECHR was emphasised[23] and the ECHR became one of the main models for the constitutional rights chapter of the Constitution. The influence of the ECHR on the Constitution of 1992 can be seen in the wording of many provisions of the constitutional rights (e.g. §§ 26, 43, 45, 47) and in the wording of several of the restriction clauses of the constitutional rights.[24] The SC used the ECHR as an interpretation argument even before Estonian accession to the ECHR[25] and has repeatedly done this after the accession.[26] The SC has underlined that "the European Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an inseparable part of Estonian legal order and the guarantee of the rights and freedoms of the Convention is, under §14 of the Constitution, also the duty the judicial power."[27]

2.3. Comparative, mainly German law

Historically bound to the German legal culture, after regaining the independence in 1991 Estonia took again mainly an example of the German legal doctrine. The most influential model for reconstruction of vast parts of the Estonian legal order became

Constitution of 1920 (J. Adams, *Põhiseadus ja Põhiseaduse Assamblee [Constitution and Constitutional Assembly* (1997). I can only agree with this assessment.

[23] V. Rumessen, *Põhiseadus ja Põhiseaduse Assamblee [Constitution and Constitutional Assembly]* (1997).

[24] Cf. U. Lõhmus. Põhiõiguste kaitse kolmnurgas riik – Euroopa Nõukogu – Euroopa Liit [Protection of Fundamental Rights in the Triangle State – Council of Europe – European Union], cit. at 3, 355.

[25] CRCSCj 12.01.1994, III-4/1-1/94; cf. CLCSCj 12.12.1995, III-1/3-47/95.

[26] Cf. SCebj 06.01.2004, 3-1-3-13-03; 06.01.2004, 3-3-2-1-04; 18.03.2005, 3-2-1-59-04; 14.04.2009, 3-3-1-59-07, para. 32; 12.04.2011, 3-2-1-62-10, para. 48.4, 57.3, 62.2; CRCSCj 04.04.2011, 3-4-1-9-10.

[27] SCebj 06.01.2004, 3-1-3-13-03, para. 31; cf. CRCSCj 04.04.2011, 3-4-1-9-10, para. 54.

modern German law.[28] This applied already to the *travaux preparatoires* of the Constitution of 1992.[29] Furthermore, the President of the Constitutional Assembly Tõnu Anton mentioned apart from the German Constitution also Hungarian, Austrian, Swedish, Finnish and Islandic Constitutions as models.[30] However, the influence of the latter has been limited.

Wolfgang Drechsler and Taavi Annus have observed an immense influence of German doctrine to Estonian constitutional interpretation.[31] This can be explained first with similar fundamental structures of legal systems deriving from common history and similar thinking models deriving from common tradition, second with similar norm structures based on similar normative statements and third with universal quality of many German doctrines that eases their transferability.

2.4. General principles of law

Another important source for constitutional thinking have been the general principles of law. The CRCSC declared in 1994 in one of its best-known *obiter dictums*:

"In democratic states the laws and general principles of law developed in the course of history are observed in law-making as well as in implementation of law, including in the administration of justice. When creating the general principles of Estonian law the general principles of law developed by the institutions of the Council of Europe and the European Union should be taken into consideration alongside the Constitution. These principles have their origin in the general principles of law of the highly developed legal cultures of the member states. […] The validity of the principles of a state based on democracy, social justice and the rule of law means that in Estonia the general principles of law recognised within the European legal space are in force. Pursuant

[28] M. Luts, J. Sootak, *Rechtsreform in Estland als Rezeptions- und Bildungsaufgabe*, cit. at 402.

[29] According to the main author of the first draft of the Constitution of 1992, Jüri Adams, the basis of his draft were both the German and the Austrian Constitutions (J. Adams, *Põhiseadus ja Põhiseaduse Assamblee [Constitution and Constitutional Assembly]*, cit. at 22.

[30] S. Raudsepp, *Vastab Põhiseaduse Assamblee juhataja Tõnu Anton [The President of the Constitutional Assembly Tõnu Anton Answering]*, cit. at 18, 120.

[31] W. Drechsler, T. Annus, *Die Verfassungsentwicklung in Estland von 1992 bis 2001*, 50 Jahrbuch des öffentlichen Rechts der Gegenwart NF 489 (2002).

to the Preamble of the Constitution, the Estonian state is founded on liberty, justice and law. In a state founded on liberty, justice and law the general principles of law are in force. Consequently, an Act which is in conflict with these principles is also in conflict with the Constitution."[32]

With the introduction of the general principles of law the SC paved the way for faster integration of those doctrines and structures into Estonian legal system that have been developed by states with advanced legal culture. With the help of the catalyst of the general principles of law the SC stimulated the development of particularly the following principles in Estonian constitutional review: legality[33], prohibition on retroactivity[34], legitimate expectations[35] and the even broader legal certainty[36] and the principle of equal treatment[37]. The principle of proportionality may also be considered to be a general principle of law deriving from legal systems of constitutional democracies with highly developed legal culture.[38]

The use of general principles of law in the reasons of early constitutional judgements represents a willingness to integrate the Estonian legal system that for a long time was locked behind the iron curtain into the (continental) European legal culture and to open it up to human rights-based values and to speed up the

[32] CRCSCj 30.09.1994, III-4/A-5/94. Cf. CRCSCj 17.02.2003, 3-4-1-1-03.

[33] CRCSCj 12.01.1994, III-4/1-1/94: According to the principle of legality, which is a generally recognised principle of (international) law and is established in §3 of the Constitution of the Republic of Estonia, fundamental rights and freedoms may be restricted solely on the basis of law".

[34] CRCSCj 30.09.1994, III-4/A-5/94.

[35] CRCSCj 30.09.1994, III-4/A-5/94; 30.09.1998, 3-4-1-6-98, para. II.

[36] CRCSCj 30.09.1998, 3-4-1-6-98, para. II.

[37] ALCSCr 24.03.1997, 3-3-1-5-97, para. 4.

[38] The ALCSC declared the principle of proportionality to a general principle of administrative law, ALCSCr 13.04.1998, 3-3-1-14-98, para. 3; ALCSCj 17.06.2002, 3-3-1-32-02, para. 21; 26.11.2002, 3-3-1-64-02, para. 10. Cf. the early defelopment in the case law of the CRCSC: CRCSCj 06.10.1997, 3-4-1-3-97, para. I; 14.04.1998, 3-4-1-3-98, para. IV; 30.09.1998, 3-4-1-6-98, para. III; 28.04.2000, 3-4-1-6-00, para. 13. Cf. to the contemporary development in the case law of the CRCSC: CRCSCj 06.03.2002, 3-4-1-1-02, para. 15; cf. CRCSCj 12.06.2002, 3-4-1-6-02, para. 12; 30.04.2004, 3-4-1-3-04, para. 31; SCebj 17.03.2003, 3-1-3-10-02, para. 30; 17.06.2004, 3-2-1-143-03, para. 20 ff.; 03.01.2008, 3-3-1-101-06, para. 27; 17.07.2009, 3-4-1-6-09, para. 21; 07.12.2009, 3-3-1-5-09, para. 37; 15.12.2009, 3-4-1-25-09, para. 24; 21.01.2014, 3-4-1-17-13, para. 32 ff.

transformation of the legal system. The SC has essentially succeeded in reaching this aim.

Furthermore, the SC has deduced from "general principles of law of a democratic *Rechtsstaat*" the right to self-regulation, i.e. "that the branches of state power and constitutional institutions must have autonomy in the exercise of the competencies given to them by the Constitution".[39] This is essentially a concretisation of the checks and balances principle. Later, the SC added the autonomy of local governments as "a general constitutional principle".[40] The autonomy is set out, as the principle of local self-government, in XIV Chapter of the Constitution. It is structurally similar to the autonomy of universities and research institutions (§38(2)) and the autonomy of the Bank of Estonia (§111 and §112) – all three are guarantees for the lower-level public law legal persons to decide some issues on their own responsibility. These two principles differ from the principles mentioned above because they belong to the law relating to the organisation of the state and they do not concern the relationship between the state and individuals. However, they have become important principles of the Estonian constitutional law as well.

2.5. Soviet law

Justice Eerik Kergandberg has made a reference to traditions stemming from the socialist era having in mind some neighbouring countries.[41] However, the influence of the Soviet era to Estonian constitutional thinking cannot completely be denied as well. The facticity of the Soviet occupation did not only influence the *travaux preparatoires* of the Constitution of 1992 but also some of its practice. Professors of University of Tartu Marju Luts and Jaan Sootak have called this phenomenon a dynamic doctrine of continuity[42] admitting that the *de facto* starting point of the transformation of the legal system in 1991/92 was the Soviet law. Estonia has made a lot to overcome the Soviet heritage, however, the Soviet legal thinking

[39] CRCSCj 14.04.1998, 3-4-1-3-98, para. IV.
[40] SCebj 19.04.2005, 3-4-1-1-05, para. 24.
[41] Dissenting Opinion of Justice Eerik Kergandberg, joined by Justices Jaak Luik and Hele-Kai Remmel, to the SCebj 17.03.2003, 3-1-3-10-02, para. 10 (referring to some practices in Russian Federation, Latvia and Poland).
[42] M. Luts, J. Sootak, *Rechtsreform in Estland als Rezeptions- und Bildungsaufgabe*, cit. at 401.

can still be identified even in some reasons of judgements of the SC. The Soviet-like thinking can be found in the cases where the train of thought of the court cannot be rationally reconstructed.

As an example of the Soviet-like thinking may be considered the 'Traffic Act saga' cases.[43] In these cases the SC held legal provisions that foresaw a combination of misdemineour and administratice proceedings for constitutional. Namely, the police or a court that conducted the misdemineour proceedings for a traffic breach had only a right to impose a fine but not to suspend the right to drive. Once the decision in the misdemineour proceedings entered into force, it was forwarded to a separate administrative body that suspended the right to drive for a period of one to 24 months within three days. The latter adiminstrative body had no discretionary power, no hearing of the person took place, and the person had no effective legal remedy against the suspension of the right to drive. Despite that, the SC upheld these legal provisions and argued that "the facts necessary for formalising the suspension of the right to drive are, as a rule, correctly ascertainable without hearing a person […], and it is in very rare instances that the non-hearing of a person results in a wrong decision. […] The infringement is proportional because, as a rule, the non-hearing of a person does not result in an incorrect decision."[44] Furthermore, the SC explained: "Upon suspending the right to drive there is no proceeding in the [administrative body] on the merits, the role of the agency is confined to formalisation of the suspension of the right to drive."[45] If the statutory regulation may, in individual cases, well result in a false ruling and no proceedings on the merits are conducted in order to avoid false rulings then how can such proceedings be in accordance with the Constitution? These judgements have been heavily criticised in the literature[46] and the statutory provisions in question were corrected by the lelgislator even before the judgements of the SC from June 2005 were delivered[47].

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[43] SCebj 25.10.2004, 3-3-1-29-04; 25.10.2004, 3-4-1-10-04; 27.06.2005, 3-4-1-2-05; 27.06.2005, 3-3-1-1-05; CRCSCj 10.12.2004, 3-4-1-24-04.

[44] SCebj 27.06.2005, 3-4-1-2-05, para. 37.

[45] SCebj 25.10.2004, 3-4-1-10-04, para. 19.

[46] Cf. M. Ernits, *An Early Decision with Far-reaching Consequences,* 12 Juridica International 28 (2007).

[47] '*Väärteomenetluse seadustiku, karistusseadustiku ja liiklusseaduse muutmise seadus*', passed on 16.06.2005 (RT I 2005, 40, 311).

Another example where the argumentation of the court is incoherent and which, thus, might have been influenced by the Soviet legal thinking was the 'Party financing case' where the SC stated: "Even if we admitted that the regulatory provisions […] are not perfect, this would not give rise to conflict with the constitution. Not everything imperfect is unconstitutional."[48]

[48] SCebj 21.05.2008, 3-4-1-3-07, para. 50. The case dealt with the question whether the control mechanism of the party financing was sufficiently effective and met the constitutionally required minimum. The SCeb summarised the core of the abstract norm control: "although the legislator has established legal regulation to check the sources of political party funding, it has chosen a mechanism which does not allow to ascertain the actual sources of political party funding." (para. 23) The SCeb observed that the Parliament select committee of the implementation of the Anti-corruption Act was composed of the representatives of the political parties represented in the Parliament and one of the tasks of this committee was to ensure the accessibility of election campaign funding. (para. 40, 47) The SCeb agreed "that in regard to a body formed on political party bases […] it is difficult to achieve the body's apparent independence through legal regulation." (para. 38) But the Sceb did not ascertain any unconstitutionality. The SCeb simply presumed that "political parties who politically compete with each other are interested that none of the political parties achieved a competitive advantage thanks to uncontrollable funds." It did not even discuss the possibility of a collusion. Furthermore, the SCeb stated despite the inquisitorial principle of the constitutional review proceedings that no evidence was presented to the SCeb "enabling the Supreme Court *en banc* to conclude that the described manner of setting up the committee does not guarantee the actual independence". "Instead, the documents of this court case tend to indicate that the 11th *Riigikogu*, and thus also the select committee of the implementation of Anti-corruption Act set up by the 11th *Riigikogu*, do have the interest of ascertaining the actual sources of political party funding. Namely, The Estonian People's Union faction, the faction of the Social Democratic Party, Estonian Green Party faction and Pro Patria and Res Publica Union faction consider the control mechanism of political party funding established in the Political Parties Act unconstitutional." (para. 40) Consequently, according to the Supreme Court, the control mechanism of the party financing was in accordance with the principle of democracy although the regulation did not ensure that all actual sources of political party funding were made public.

3. Fundamental constitutional principles

The Estonian constitutional order is determined by five fundamental constitutional principles: human dignity,[49] democracy,[50] rule of law,[51] social state[52] and Estonian identity[53].[54]

3.1. Human dignity

The Constitution only mentions human dignity in one place – in §10. According to the SC, the human dignity is the foundation of all fundamental rights and the goal of protecting fundamental rights and freedoms.[55] In the case-law of the SC, there are four main areas where the argument of human dignity has occurred in the reasons so far.

First, the SC has emphasised in several cases that the conditions of detention must not stay below a threshold beneath which they become violating the human dignity; the threshold is

[49] Judgement of the CRCSC (CRCSCj) 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49; ruling of the Administrative Law Chamber of the Supreme Court (ALCSCr) 04.05.2011, 3-3-1-11-11, para. 10.

[50] Supreme Court *en banc* judgement (SCebj) 01.07.2010, 3-4-1-33-09, para. 52, 67; ALCSCr 16.01.2003, 3-3-1-2-03, para. 11; 27.01.2003, 3-3-1-6-03, para. 11. Cf. to the early case law J. Põld, B. Aaviksoo, R. Laffranque, *The Governmental System of Estonia* in N. Chronowski/T. Drinóczi/T. Takács (eds.), *Governmental Systems of Central and Eastern European States*, Warsaw: Wolters Kluwer Polska (2011)

[51] CRCSCr 07.11.2014, 3-4-1-32-14, para. 28. Cf. CRCSCj 19.03.2009, 3-4-1-17-08, para. 26,; 06.01.2015, 3-4-1-34-14, para. 33; ALCSCr 16.01.2003, 3-3-1-2-03, para. 11; 27.01.2003, 3-3-1-6-03, para. 11 and to the early case law J. Põld, B. Aavikso, R. Laffranque, cit. at 50, 235.

[52] CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49.

[53] CRCSCj 04.11.1998, 3-4-1-7-98, para. III.

[54] To the debate about fundamental principles of the Constitution see: W. Drechsler, T. Annus, *Die Verfassungsentwicklung in Estland von 1992 bis 2001*, cit. 31, 473; M. Ernits, *20 Jahre Menschenwürde, Demokratie, Rechtsstaat, Sozialstaat*, in S. Hülshörster, D. Mirow (eds.). *Deutsche Beratung bei Rechts- und Justizreformen im Ausland: 20 Jahre Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit (IRZ)*, (2012); R. Maruste, *The Role of the Constitutional Court in Democratic Society*, 13 Juridica International 8 (2007); R. Maruste, *Democracy and the Rule of Law in Estonia*, 26 Review of Central and East European Law (2000), 311; J. Laffranque, *A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act*, 12 Juridica International 55 (2007); R. Narits, *About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia*, 16 Juridica International 56 (2009). See compilation of the sources in Estonian and presentation of the debate: M. Ernits, *Põhiõigused, demokraatia, õigusriik [Constitutional Rights, Democracy, Rule of Law]*, 5 Tartu, 23 (2011).

[55] ALCSCj 22.03.2006, 3-3-1-2-06, para. 10; 28.03.2006, 3-3-1-14-06, para. 11.

determined by several circumstances, particularly by the duration, the physical and psychological effects, special characteristics of the victim and the overall circumstances of the detention.[56] Secondly, the SC has connected the human dignity with the general right to government assistance in the case of need and explained that making the latter right fragmentary or application for the assistance unreasonably complicated violates human dignity.[57] Thirdly, the SC has followed the principle of individual guilt from the principle of human dignity requiring that "a person may be punished for a specific act but not more than required by the gravity of the offence committed".[58] Fourth, the SC has established a connection between the human dignity and the right to be heard in administrative proceedings.[59] Furthermore, the Criminal Law Chamber of the SC has also mentioned the legal equality of persons and the rights to identity and to informational self-determination as aspects of the human dignity.[60]

3.2. Democracy

According to the SC: "The democratic nature of the Estonian political order is a very important constitutional principle. […] Democracy is one of the most important principles of organisation of the Estonian state."[61] As a constitutional principle, the democracy is multifaceted and governs the entire process of legitimisation of the state power. The constitutional source of democracy are §1 and §10.[62] "The principle of democracy is aimed at the legitimacy of the public authority, containing formation, legitimation and supervision of public bodies, and affecting all stages of formation of a political will."[63] "The principle of democracy requires that a voter be able to choose between different election platforms and ideas, and the candidates and lists representing these. From the point of view of functioning of

[56] CRCSCj 20.06.2014, 3-4-1-9-14, para. 36; 31.12.2014, 3-4-1-50-14, para. 33.
[57] CRCSCj 05.05.2014, 3-4-1-67-13, para. 49. Cf. CRCSCj 21.01.2004, 3-4-17-03, para. 14.
[58] CRCSCj 23.09.2015, 3-4-1-13-15, para. 39.
[59] ALCSCr 08.10.2002, 3-3-1-56-02, para. 9.
[60] CLCSCj 26.08.1997, 3-1-1-80-97, para. I.
[61] SCebj 01.07.2010, 3-4-1-33-09, para. 52, 67.
[62] CRCSCj 14.10.2005, 3-4-1-11-05, para. 21.
[63] SCebj 12.07.2012, 3-4-1-6-12, para. 132.

democracy it is essential that different social interests be represented in the process of political decision-making […] as far as possible."[64] The essential content of the democracy principle can be summarised in the way that the formation process of the political will must be governed by rules of fair game.

The most important elements of the principle of democracy are the sovereignty of the people and the principle of representation. On the one hand, the "democracy implies the exercising of power with the people's participation and making important management decisions on a basis that is as broad and harmonized as possible".[65] On the other hand, the "democracy is representative democracy where political authority is indeed vested in the people but political authority is exercised by different public bodies under the people's authorisation."[66]

Estonian democracy is a political party democracy[67] where the political liability must be guaranteed[68]. "One of the most essential special rights of political parties is the right to participate in the elections to the *Riigikogu* and in local elections with their lists of candidates. Other persons and organisations do not have the possibility to submit lists of candidates."[69] "The more stable the composition of political forces standing as candidates, the more clear the political liability, because it is only in the next elections that the voters can express their judgment on the fulfilment of campaign promises made in the course of previous elections."[70]

The democratic nature of the Constitution is based clearly on the heritage of the Constitution of 1920, correcting, however, the previous mistakes. In legal literature, further elements of the principle of democracy have been identified[71] but the

[64] SCebj 19.04.2005, 3-4-1-1-05, para. 26.
[65] SCebj 12.07.2012, 3-4-1-6-12, para. 132; cf. CRCSCj 21.12.1994, III-4/1-11/94, para. I.
[66] SCebj 12.07.2012, 3-4-1-6-12, para. 132.
[67] CRCSCj 02.05.2005, 3-4-1-3-05, para. 31.
[68] SCebj 19.04.2005, 3-4-1-1-05, para. 26.
[69] SCebj 19.04.2005, 3-4-1-1-05, para. 40.
[70] SCebj 19.04.2005, 3-4-1-1-05, para. 26.
[71] Cf. M. Ernits, *Commentaries to §10, Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne [The Constitution of the Republik of Estonia. A Commentary],* 4 ed. Tallinn 18 (2017); M. Ernits, J. Jäätma, *Põhiseaduse aluspõhimõtted ja riigikorraldusõigus [The Fundamental Constitutional Principles and State Organisation Law]* in J. Sootak (ed.), *Õigus igaühele*, Law for Everyone, 87 (2017); J. Põld, B. Aaviksoo, R. Laffranque, *The Governmental System of Estonia.* – in N. Chronowski/T. Drinóczi/T. Takács (eds.), *Governmental Systems of Central and Eastern European States*, cit. at 51, 239.

aforementioned shall suffice here. The fundamental sub-principle of free elections shall be treated below.

3.3. Rechtsstaat

Rule of law or more precisely *Rechtsstaat* is one of the fundamental principles of the Constitution anchored in §10 and determining the rules and principles for exercise of the state power.[72] The *Rechtsstaat* is the most complex principle of the Constitution containing further sub-principles like separation of powers and due checks and balances, supremacy of law, legal reservation and certainty of law, non-retroactivity, legitimate expectations, principle of proportionality, access to courts, effective remedy, judicial independence etc. Therefore, it has been called an 'umbrella principle'.[73] Five key elements of the *Rechtsstaat* principle can be identified: (1) restriction of the state power by constitutional rights and the principle of proportionality, (2) separation of powers and due checks and balances, (3) legal certainty, (4) legality and (5) access to courts, judicial independence and constitutional review. Subsequently, the proportionality, legal certainty, and the access to courts shall be presented. The legality, the separation of powers and due checks and balances, the judicial independence and the constitutional review shall be treated below under the institutional aspect.

3.3.1. Proportionality

The SC introduced proportionality requirement in 1997, without connecting it with any constitutional provision, holding a restriction of freedom of movement for justifiable "if it is proportional with the desired goal and it is impossible to achieve the desired goal by other means".[74] It therefore was first introduced essentially as a general principle of law. In 1998, the SC reformulated the core of the principle of proportionality deducing it from the *Rechtsstaat*: "Pursuant to the principle of proportionality, valid in a state based on the *Rechtsstaat*, the measures taken must be

[72] Cf. CRCSCj 19.03.2009, 3-4-1-17-08, para. 26.
[73] J. Põld, B. Aaviksoo, R. Laffranque, *The Governmental System of Estonia*, in N. Chronowski/T. Drinóczi/T. Takács (eds.), *Governmental Systems of Central and Eastern European States*, cit. at 51, 235.
[74] CRCSCj 06.10.1997, 3-4-1-3-97, para. I.

proportional to the objectives to be achieved"[75] and delivered the following justification: "It is a principle of constitutional jurisdiction that when assessing the conflicting rights or competencies a solution has to be found that does not damage constitutional stability, that would restrict rights as little as possible, and would maintain the constitutional nature of law, and guarantee a justified and constitutional exercise of rights."[76] The next milestone was judgement of the SC from 2000, where the SC for the first time clearly applied the scheme of infringement and limits as well as all three levels of the principle of proportionality and stated: "Restrictions must not prejudice legally protected interests or rights more than is justifiable by the legitimate aim of the provision. The means must be proportional to the desired aim […]. The legislators, as well as those who apply law, must take the proportionality principle into consideration."[77] In this decision the SC also connected for the first time the principle of proportionality with §11 of the Constitution. From 2002 on the SC has applied the fully developed three level principle of proportionality:

"The principle of proportionality arises from thesecond sentence of §11 of the Constitution, pursuant to which the restrictions on rights and freedoms must be necessary in a democratic society. The compliance with the principle of proportionality is reviewed by the courts on three consecutive levels – first the suitability of a measure, then the necessity of the measure and, if necessary, also the proportionality of the measure in the narrower sense, i.e. the reasonableness thereof. If a measure is manifestly unsuitable, it is needless to review the necessity and reasonableness of the measure. A measure that fosters the achievement of a goal is suitable. For the purposes of suitability, a measure, which in no way fosters the achievement of a goal, is undisputedly disproportional. The requirement of suitability is meant to protect a person against unnecessary interference of public power. A measure is necessary if it is not possible to achieve the goal by some other measure which is less burdening on a person but is at least as effective as the former measure. In order to determine the reasonableness of a measure the extent and intensity of the interference with a fundamental right on the one hand and the importance of the aim on the other hand have to be weighed.

[75] CRCSCj 30.09.1998, 3-4-1-6-98, para. III.
[76] CRCSCj 14.04.1998, 3-4-1-3-98, para. IV.
[77] CRCSCj 28.04.2000, 3-4-1-6-00, para. 13.

The more intensive the infringement of a fundamental right the weightier the reasons justifying it have to be."[78]

3.3.2. Legal Certainty

The legal certainty is one of the five central postulates of the *Rechtsstaat* principle and it is intended to create order and stability in society.[79] The SC has stated: "The principle of legal certainty is based on §10 of the Constitution […] In the most general sense this principle should create certainty in regard to the current legal situation. Legal certainty means clarity regarding the content of valid norms (principle of legal clarity) as well as certainty that the enforced norms shall remain in force (principle of legitimate expectation)."[80] In addition to the two aforementioned, one further sub-sub-principle – prohibition of secret law – shall be analysed.

Legal clarity has in Estonian Constitution a double nature. First, it is as a fundamental right guaranteed by §13(2) of the Constitution, according to which "the law shall protect everyone from the arbitrary exercise of state authority".[81] Already in its early case law the SC proclaimed that "insufficient regulation upon establishing restrictions on fundamental rights and freedoms does not protect everyone from the arbitrary treatment of state power".[82] The classic meaning was given to the subjective legal clarity by the SC *en banc* in 2002: "Legal norms must be sufficiently clear and comprehensible, so that an individual could foresee the conduct of public power with certain probability and could regulate his or her conduct. A person "must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

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[78] Formulation from CRCSCj 17.07.2009, 3-4-1-6-09, para. 21 and 15.12.2009, 3-4-1-25-09, para. 24. Beginning with CRCSCj 06.03.2002, 3-4-1-1-02, para. 15; cf. CRCSCj 12.06.2002, 3-4-1-6-02, para. 12; 30.04.2004, 3-4-1-3-04, para. 31; SCebj 17.03.2003, 3-1-3-10-02, para. 30; 17.06.2004, 3-2-1-143-03, para. 20 ff.; 03.01.2008, 3-3-1-101-06, para. 27; 07.12.2009, 3-3-1-5-09, para. 37; 21.01.2014, 3-4-1-17-13, para. 32 ff.

[79] CRCSCj 30.09.1994, III-4/1-5/94; 23.03.1998, 3-4-1-2-98, para. IX.

[80] CRCSCj 02.12.2004, 3-4-1-20-04, para. 12; 15.12.2005, 3-4-1-16-05, para. 20; 20.03.2006, 3-4-1-33-05, para. 21; 31.01.2007, 3-4-1-14-06, para. 23.

[81] SCebj 28.10.2002, 3-4-1-5-02, para. 31; CRCSCj 20.03.2006, 3-4-1-33-05, para. 21; judgement of the Criminal Law Chamber of the SC (CLCSCj) 28.02.2002, 3-1-1-117-01, para. 12.

[82] CRCSCj 12.01.1994, III-4/1-1/94. See also Alexy 2001, p. 36.

Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable".[83]

Secondly, according to the SC the legal clarity also derives as an objective principle directly from the *Rechtsstaat* vested in §10 of the Constitution.[84] This objective obligation comes to application when the principle of legal clarity is applied in legal relations between exercisers of public authority.[85] In evaluating the legal clarity in legal relations between exercisers of public authority, the SC "proceeds from the fact that the addressees and implementers thereof are public servants with appropriate professional training, who must be capable to overcome – through interpretation – the possible ambiguities or implementation difficulties […]. What is also to be taken into account is the fact that the required level of legal clarity of these provisions is not the same regarding all the norms; instead, it depends on the consequences of application of these norms".[86]

Legitimate expectations include three subcategories: *nulla poena sine lege*, non-retroactivity and legitimate expectation in narrower sense.[87] First, the *nulla poena sine lege* rule (§23(1), (2)1) can be identified as *lex specialis* to the general principle of legitimate expectations. According to these provisions no one shall be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed, and no one shall have a more severe punishment imposed on him than the one that was applicable at the time the offence was committed.[88]

The second element is the non-retroactivity which derives from the constitutional interpretation of the SC. The SC proclaimed already in its early case law in 1994: "One of the general principles

[83] SCebj 28.10.2002, 3-4-1-5-02, para. 31. In this decision the SC cites the judgment of the ECHR 26.04.1979, *Sunday Times v. United Kingdom*, para. 49; compare to CRCSCj 15.12.2005, 3-4-1-16-05, para. 22.
[84] SCebj 10.12.2003, 3-3-1-47-03, para. 30; CRCSCj 31.01.2007, 3-4-1-14-06, para. 22.
[85] The SC: "The Chamber points out the fact that local governments, being the exercisers of public authority, cannot invoke §13(2) of the Constitution. This provision, pursuant to which the law shall protect everyone from the arbitrary exercise of state authority, is in Chapter II "Fundamental Rights, Freedoms and Duties" of the Constitution. Chapter II primarily deals with the relations between persons and those who exercise public authority." (CRCSCj 19.03.2009, 3-4-1-17-08, para. 25.)
[86] CRCSCj 19.03.2009, 3-4-1-17-08, para. 27.
[87] Ernits, *supra note* 182, §10 p 3.4.3.2.
[88] Cf. SCebj 17.03.2003, 3-1-3-10-02; 28.04.2004, 3-3-1-69-03; 02.06.2008, 3-4-1-19-07.

of law is that as a rule, laws must not have retroactive effect."[89] Later, referring to its earlier case law, the SC specified that the legislator is entitled to issue legislation with retroactive effect not pertaining to criminal law, but it must thereby take into account the will of the people expressed in the Constitution, bear in mind the general public interests of the state, and consider the actual situation as well as the principle of legality.[90] The administrative law chamber of the SC stated even more precisely that the legislator may give retroactive force to a law if there is a well-founded need for that, it does not cause disproportional damage to legitimate expectations and the law is not surprising for the person concerned.[91] Since all by both chambers named aspects are included in the proportionality test, a retroactive effect is only legitimate if it is proportionate. Later the SC restricted its point of view: "It is generally inadmissible to increase obligations with a genuine legal instrument of retroactive force, which means that no legal consequences may be established on actions already performed in the past."[92] While this was an *obiter dictum* it remains to be seen whether the SC will use the proportionality test in the future to determine the legality of a retroactive law.

The third element of legitimate expectations is the legitimate expectation in narrower sense. In Estonian doctrine the legitimate expectation in the narrower sense concerns the non-genuine retroactive force: "Retroactive force is non-genuine if it concerns an activity that has started, but not yet ended by the time of the adoption of a legal instrument, to be more exact, if it establishes prospectively legal consequences on an activity that has started in the past."[93] The most important definition derives from 2004: "Pursuant to the principle of legitimate expectation everyone should have a possibility to arrange his or her life in reasonable expectation that the rights given to and obligations imposed on him or her by the legal order shall remain stable and shall not change dramatically in a direction unfavourable for him or her."[94] Thus, according to the principle of legitimate expectation in narrower sense "everyone has a right to conduct his or her activities in the

[89] CRCSCj 30.09.1994, III-4/1-5/94.
[90] CRCSCj 20.10.2009, 3-4-1-14-09, para. 50.
[91] ALCSCj 17.03.2003, 3-3-1-11-03, para. 33.
[92] CRCSCj 16.12.2013, 3-4-1-27-13, para. 61.
[93] CRCSCj 16.12.2013, 3-4-1-27-13, para. 61.
[94] CRCSCj 02.12.2004, 3-4-1-20-04, para. 13; 31.01.2012, 3-4-1-24-11, para. 49.

reasonable expectation that applicable Acts will remain in force. Everyone must be able to enjoy the rights and freedoms granted to him or her by law at least within the period established by the law. Modifications to the law must not be perfidious towards the subjects of the law".[95] If something is promised by law, the legitimate expectation that what has been promised shall be applied towards those who have started to exercise their rights.[96] "Thereby, the realisation of one's own rights, i.e. the exercise of the rights and freedoms granted to a person by law, requires acting on the basis of a legal provision, hoping that it will remain in force. It is possible to talk about the perfidiousness of the state if a person has with their activities fulfilled all the prerequisites, arising from which they have a right in the future to the application of legislation that is favourable to them."[97] "The principle of legitimate expectation does not mean that any restriction of persons' rights or withdrawal of benefits is impermissible. The principle of legitimate expectation does not require fossilisation of valid regulatory framework – the legislator is entitled to re-arrange legal relationships according to the changed circumstances and, by doing this, inevitably deteriorate the situation of some members of society. The legislator is competent to decide which reforms to undertake and which groups of society to favour with these reforms."[98] To determine whether the amendment corresponds with the legitimate expectation in narrower sense, the court that exercises the constitutional review must conduct balancing: "Sufficiency or reasonableness can be assessed taking into account the nature of the legal relationship under discussion, the extent of change of the relationship and the necessity of re-arrangement of the activities of addressees of norm arising from the change, and also by assessing whether the change in the legal situation was a predictable or unexpected one."[99] Lately, the SC has used another formulation: "Non-genuine retroactive force is admissible if the public interest

[95] CRCSCj 30.09.1994, III-4/1-5/94; 02.12.2004, 3-4-1-20-04, para. 13; 31.01.2012, 3-4-1-24-11, para. 49 and 50; cf. SCebd 16.03.2010, 3-4-1-8-09, para. 78.
[96] CRCSCj 17.03.1999, 3-4-1-2-99, para. II.
[97] CRCSCj 16.12.2013, 3-4-1-27-13, para. 50.
[98] CRCSCj 02.12.2004, 3-4-1-20-04, para. 14; cf. CRCSCj 31.01.2012, 3-4-1-24-11, para. 49; ALCSCj 29.03.2006, 3-3-1-81-05, para. 14.
[99] CRCSCj 02.12.2004, 3-4-1-20-04, para. 26.

in the amendment of the legislation overrides the legitimate expectation of persons."[100]

The rule that only published laws can be valid, or the prohibition of secret law plays in Estonian Constitution a central role – §3(2)2 states explicitly: "Only published laws have obligatory force." This norm can be considered as a reaction to the habits of Soviet occupant regime to apply from time to time secret laws. Especially the deportations in June 1941 which lead to expatriation and transportation to Siberia of more than 10,000 persons and in March 1949 which lead to expatriation and transportation to Siberia of more than 20,000 persons were based on secret Soviet law.[101] Above that, the *vacatio legis* principle can be considered as a part of the prohibition of secret law principle: "The requirement arising from the *vacatio legis* principle is that, prior to entry into force of amendments, persons concerned must have sufficient time for examining the new legislation and taking it into account in their activities."[102]

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[100] CRCSCj 16.12.2013, 3-4-1-27-13, para. 61.

[101] The deportations of 1941 were based on an inofficial secret summary of the secret decision of the Central Committee of the Communist Party and of the Council of People's Commissars of the USSR No. 1299-526 "Concerning deportations of socially foreign elements from the Baltic republics, Western Ukraine, Western Byelorussia and Moldavia" from 14.05.1941 (Deportation from Estonia to Russia. Vol. 6: Deportation in June 1941 & Deportation in 1940-1953. Compiled by L. Õispuu. Tallinn 2001, p. 20 f., 235 <https://www.memento.ee/wp-content/uploads/2017/05/Memento-Raamat-6.pdf>) (in Estonian).
The deportations of 1949 were based on the secret regulation of the Council of Ministers of the USSR No. 390-138 (for organising the deportations of 29,000 families from the territories of Lithuania, Latvia and Estonia) from 29.01.1949 and on the secret regulations of the Council of Ministers of Estonian SSR No. 014 (on deportation of 3,824 families to faraway places of the USSR for good according to the annexed lists submitted by the executive committees of the counties) from 14.03.1949 and No. 015 (to deport additionally 128 families to the faraway regions of the USSR for good according to the annexed lists submitted to the by the executive committees of the counties) from 22.03.1949 (Võimatu vaikida [Impossible to Keep Silent]. Vol. 2. Compiled by H. Sabbo, Tallinn, 845 ss (1996); L. Õispuu, *Deportation from Estonia to Russia*, Vol. 4: Deportation in March 1949, Tallinn 39 - 43 (2003) <https://www.memento.ee/wp-content/uploads/2017/05/Memento-Raamat-4.pdf>) (in Estonian).

[102] CRCSCj 16.12.2013, 3-4-1-27-13, para. 51.

3.3.3. Access to courts and right to effective remedy

Access to courts and right to effective remedy result from §15(1) of the Constitution: "Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional." The guarantee – a constitutional right itself – is wide and strong and must be regarded as a core element of the *Rechtsstaat*.[103] As a matter of fact, it should be understood in a comprehensive and gapless manner, guaranteeing effective legal protection by any infringement of any right. Besides enhancing primarily the administrative court proceedings, it embraces the civil court proceedings, too. In the end, it enables the constitutional rights to make the *Rechtsstaat* fully justiciable, i.e. if there is an infringement of any constitutional right, which constitutes a violation of any of the sub-principles of the *Rechtsstaat*, the constitutional right is also violated.[104]

3.4. Social state

The social state dimension is mentioned in §10 whereas the general social right is embedded in §28(2)1 of the Constitution. According to the SC, the social state belongs to the fundamental principles of the Constitution,[105] i.e. legal rules that leave the right to state assistance in the case of need fragmentary or make its application unreasonably difficult touch the core of the Estonian constitutional order.[106] The SC stated 2004 in the fundamental judgement to social rights: "The concept of a state based on social justice and the protection of social rights contain 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."[107] However, since such cases are rare where the issue consists in a not granted minimum, the yardstick for the distribution of social benefits is in

[103] Cf. CRCSCr 05.02.2008, 3-4-1-1-08, para. 3.
[104] The SC has also stressed the tight tie between the Article 6(1) of the ECHR and the §15(1) of the Constitution: "The violation of Article 6(1) of the Convention, found by the European Court of Human Rights, constitutes a violation of §15 of the Constitution, too." (SCebj 06.01.2004, 3-3-2-1-04, para. 27.)
[105] CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49.
[106] CRCSCj 05.05.2014, 3-4-1-67-13, para. 49
[107] CRCSCj 21.01.2004, 3-4-1-7-03, para. 14.

most cases the equality principle.[108] The SC has also stressed several times that limited funds must not be distributed by violating the fundamental right to equality arising from §12(1) of the Constitution.[109]

Furthermore, the SC dealt with the question of social assistance briefly in a case, where the limits of the financial autonomy of local governments were concerned: "An important criterion for determiningthe minimum funding needs of local functions in the case of a specific local authority is that the level of the local public services of the local authority does not fall substantially below the general level of similar services in other local authorities in Estonia due to the lack of funds. For instance, according to the purpose of §28 of the Constitution, a situation where the secured main social fundamental rights, to the extent for which the local self-government is responsible, vary substantially in different regions of the state due to differences in the economic capacity of local authorities, is unacceptable. According to §14 of the Constitution, the guaranteeing of rights and freedoms is the duty of the legislature, the executive, the judiciary, and the local self-government. According to the said provision, the state cannot allow a situation where the availability of primary public services depends largely on what the economic capacity of the local authority of a person's residence or registered office is."[110] According to this judgement, the state has to consider the equality of social services by determining the financial support to the local governments.

3.5. Estonian identity and eternity clause

According to the preamble, the Constitution of 1992 embodies the inextinguishable right of the people of Estonia to national self-determination, forms a pledge to present and future generations for their social progress and welfare and must guarantee the preservation of the Estonian people, the Estonian language and the Estonian culture through the ages. This expresses the existential concern of a small nation and explains one of the main motivators

[108] Cf. M. Ernits. The Principle of Equality in the Estonian Constitution. – European Constitutional Law Review 10 (2014), p. 444 ff.
[109] SCebj 07.06.2011, 3-4-1-12-10, para. 58; CRCSCj 27.12.2011, 3-4-1-23-11, para. 67; 03.12.2013, 3-4-1-32-13, para. 56; 02.02.2015, 3-4-1-33-14, para. 29, 35 ff.
[110] SCebj 16.03.2010, 3-4-1-8-09, para. 67.

of the Singing Revolution that preceded and aimed the restoration of the Republic of Estonia in 1991. Today the Estonian identity is commonly considered to be one of the fundamental constitutional principles.[111]

The most powerful expression of the idenitity principle is the eternity clause, which is included in §1(2): "The independence and sovereignty of Estonia are timeless and inalienable." It is one of the strongest sovereignty accentuations in Europe[112] and perhaps even worldwide. The main consideration behind its wording was the fear of a rollback to Soviet Union-type political entity.[113] However, the eternity clause should at least also be considered as the special emphasis of the wish of a small nation to preserve its traditional way of life and language,[114] mainly because under international and supranational structures, the traditional understanding of the independent statehood has lost a great deal of its original function to serve as the only and ultimate lawmaker.[115]

The substance of the principle of Estonian identity consists mainly in protection of Estonian language. The SC has emphasised that "the protection and use of the Estonian language are established as constitutional goals and the state power is to secure the achievement of the goal. Thus, the steps to ensure the use of the Estonian language are constitutionally justified."[116]

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111 R. Alexy, *Põhiõigused Eesti põhiseaduses [Constitutional Rights of Estonian Constitution]*, Juridica Special Issue 89 (2001); T. Annus, *Riigiõigus [Constitutional Law]*, 2. ed. Tallinn 116 (2006); J. Laffranque, *Sõltumatu ja demokraatlik õigusriik Riigikohtu praktikas. Eesti Euroopa Liidu liikmesuse kontekstis [Independent and Democratic Rule of Law in the Case Law of the Supreme Court. Estonia in the Context of the Membership of the European Union]*, Juridica 499 (2009).

112 A. Albi, *Estonia's Constitution and the EU: How and to What Extent to Amend It?*, 7 Juridica International 42 (2002); cf. the table in A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe,* Cambridge University Press (2005).

113 Cf. J. Raidla, *V. Peep (ed.). Põhiseadus ja Põhiseaduse Assamblee [The Constitution and the Constitutional Assembly]*, Tallinn 68 (1997).

114 Cf. R. Alexy, *Põhiõigused Eesti põhiseaduses, [Constitutional Rights of Estonian Constitution]*, cit. at 111, 89.

115 However, the SC has so far rather put emphasis on the institutional aspect, namely on the independent statehood (SCebj 12.07.2012, 3-4-1-6-12, para. 127 f.).

116 CRCSCj 05.02.1998, 3-4-1-1-98, para. II.

4. Constitutional rights

The Constitution of 1992 turned the independent but still Soviet type power structure into a liberal-democratic constitutionalist state not least because of an extensive catalogue of constitutional rights. This rather detailed catalogue of 48 provisions is provided in the 2nd Chapter of the Constitution. It is obvious that such a quantity of constitutional rights needs to be systematised in order to be accessible. Five general rights can be identified: general liberty right in §19(1), general equality right in §12(1), general right to state protection in §13(1), general right to organization and procedure in §14 and general social right in §28(2)1.[117] The chapter on constitutional rights is otherwise also rather comprehensive and detailed.[118] In addition, §10 opens the constitutional rights catalogue towards human rights and constitutes a constitutional rights development clause.[119] Constitutional rights are enforceable in courts. They are procedurally guaranteed by the general right to address a court in case of an alleged violation of a right in §15(1).

4.1. General right to freedom

The general right to freedom is one of the most important achievements of the liberal-democratic understanding of the relationship between an individual and the state. According to §19(1) of the Constitution: "Everyone has the right to free self-realisation." According to this principle, everything that is not prohibited is (*prima facie*) permitted.[120] The special freedom rights

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[117] This division was first introduced by Robert Alexy in the first systematic monograph concerning fundamental rights in the Estonian Constitution: R. Alexy, *Põhiõigused Eesti põhiseaduses, [Constitutional Rights of Estonian Constitution]*, cit. at 111 51 – 68, 73 -76.

[118] It contains classic rights and liberties like the right to privacy (§26), freedom to choose occupation (§29(1)), freedom of enterprise (§31), right to property (§32), inviolability of the home (§33), right to free movement (§34), freedom of schience and art (§38), freedom of religion (§40), secrecy of correspondence (§43), freedom of expression (§45), freedom of assembly (§47), freedom of association (§48) etc. as well as special social rights like e.g. the right to education (§37).

[119] P. Häberle, *Dokumentation von Verfassungsentwürfen und Verfassungen ehemals sozialistischer Staaten*, 43 Jahrbuch des öffentlichen Rechts der Gegenwart NF 177 (1995); R. Alexy. *Põhiõigused Eesti põhiseaduses [Constitutional Rights of Estonian Constitution]*, cit. at 111, 87; M. Ernits, *Põhiõigused, demokraatia, õigusriik [Constitutional Rights, Democracy, Rule of Law]*, cit. at 54, 140.

[120] Cf. fundamentally R. Alexy. *Põhiõigused Eesti põhiseaduses ,[Constitutional Rights of Estonian Constitution]*, cit. at 111, 51.

only guarantee specific spheres of freedom whereas the general right to freedom is a 'catch-all' fundamental basic right. Thus, in order to guarantee the individual freedom on constitutional level, principally the general right to freedom would suffice.

The general right to freedom protects e.g. the freedom of contract,[121] driving a motor vehicle,[122] hunting either with or without a gun,[123] and the right to acquire a firearm[124].

4.2. General right to equality

The general principle of equality is provided for in §12(1) of the Constitution being one of the general constitutional rights in Estonian constitutional rights catalogue.[125] Coming from an equality-oriented society the courts had some difficulties at first with the application of the principle of equality in the 1990s. Although several debates are still ongoing there is a general consensus that the general right to equality is "the right of a person not to be treated unequally"[126], i.e. a subjective right.

The principle of equality is in the first place a general *prima facie* right to legally equal treatment. The SC found first that the general principle of equality "means a requirement to implement valid laws in regard of every person impartially and uniformly."[127] Later the SC clarified that also "the legislator must observe the principle of equal treatment".[128]

4.3. General right to protection

According to the SC, "the general right to protection, established in §13 of the Constitution, is every person's right that must be guaranteed equally to everybody".[129] This right means the

[121] CRCSCj 30.04.2004, 3-4-1-3-04, para. 21.
[122] SCebr 28.04.2004, 3-3-1-69-03, para. 33.
[123] SCebj 11.10.2001, 3-4-1-7-01, para. 13.
[124] CRCSCj 11.10.2001, 3-4-1-7-01, para. 13; 26.03.2009, 3-4-1-16-08, para. 22; 14.12.2010, 3-4-1-10-10, para. 40; 26.04.2011, 3-4-1-2-11, para. 38.
[125] Cf. M. Ernits, *The Principle of Equality in the Estonian Constitution*, 10 European Constitutional Law Review 444 (2014).
[126] CRCSCj 03.04.2002, 3-4-1-2-02, para. 16.
[127] CRCSCj 03.04.2002, 3-4-1-2-02, para. 16.
[128] SCebj 30.06.2016, 3-3-1-86-15, para. 47; CRCSCj 20.03.2006, 3-4-1-33-05, para. 25.
[129] CRCSCj 31.01.2007, 3-4-1-14-06, para. 22.

the state is obliged to protect persons against attacks from third parties. The 'attack' has hereby to be understood broadly, i.e. it includes all kinds of infringements from third parties.

4.4. General right to organisation and procedure

The SC criticised already in 1993 the legislative failure to regulate the procedure by enacting the Taxation Act. The CRCSC stated: "Entitling a tax inspector to enter real or personal property under a person's control simply on the basis of his or her opinion, without requiring the existence of reasonable grounds or documentary evidence or factual basis, creates conditions for uncontrolled restriction of constitutional rights at the discretion of an official. […] Also, the procedure for solving disputes and the guarantees of the taxpayer have been established in an incomplete manner."[130] The reference to §14 of the Constitution was not yet included in this judgment. §14 was connected with the idea of a general constitutional right to organization and procedure in 1994, when the SC discussed the elements of the implementation of special measures of the police and the procedure, and stated that the law, which does not provide for all these elements, violates §14 of the Constitution. The SC deduced from this provision a positive obligation of the legislator: "The *Riigikogu* itself ought to have established the concrete cases and a detailed procedure for the use of special operative surveillance measures, as well as possible restrictions of rights related to the use of such measures".[131] Later the SC confirmed explicitly the fundamental rights' nature of §14: "Although §14 of the Constitution has been worded objectively, it also gives rise to subjective rights, including the general fundamental right to organisation and procedure".[132]

4.5. General social right

According to §28(2)1 of the Constitution: "Every citizen of Estonia is entitled to government assistance in the case of […] need." The SC has stressed the subjective nature of the social rights: "The right to receive state assistance in the case of need is a subjective right, in the case of violation of which a person is entitled

[130] CRCSCj 04.11.1993, III-4/1-4/93.
[131] CRCSCj 12.01.1994, III-4/1-1/94.
[132] CRCSCj 17.02.2003, 3-4-1-1-03, para. 12; 20.03.2014, 3-4-1-42-13, para. 43 f.

to go to court, and the courts have an obligation to review the constitutionality of an Act granting a social right."[133] Later the SC confirmed this key message once again and added: "As the general social fundamental right is the right to receive state assistance in the case of need a performance right which confers to citizens a subjective right to request assistance and imposes on the state a positive obligation to provide assistance in order to ensure the minimum necessary means for subsistence. An infringement of the performance right referred to in §28(2) first sentence occurs in case of a failure to grant the constitutionally required subsistence minimum."[134]

The SC restricts the right to state assistance in the case of need with the constitutional duty of the family to care for their needy members (§27(5)): "[…] it proceeds from the Constitution that the right of claim of a needy person under §28(2) of the Constitution is totally or partly excluded if he or she has family members, capable of caring for the needy members of family."[135] Furthermore, the SC stressed several times: "Upon ensuring social rights, the Legislature has an extensive right of discretion and the courts must not make social policy-related decisions in lieu of the Legislature. The exact volume of social fundamental rights also depends on the state's economic situation."[136] Thus, according to the SC the economic situation of the state limits the right to social assistance. The Administrative Law Chamber of the SC brought it to the point if it said that the state cannot grant more or no-one may request more than the state is capable to grant.[137] However, it is not clear from the case law of the SC how the collision of human dignity and the core of the Estonian constitutional order with the state's economic situation should be solved if the latter would not allow to satisfy the primary needs of needy persons.

[133] CRCSCj 21.01.2004, 3-4-1-7-03, para. 16.
[134] CRCSCj 05.05.2014, 3-4-1-67-13, para. 31.
[135] CRCSCj 21.01.2004, 3-4-1-7-03, para. 18; 05.05.2014, 3-4-1-67-13, para. 32.
[136] SCebj 07.06.2011, 3-4-1-12-10, para. 58; CRCSCj 27.12.2011, 3-4-1-23-11, para. 67; 03.12.2013, 3-4-1-32-13, para. 56. Cf. SCebj 26.06.2014, 3-4-1-1-14, para. 127; CRCSCj 21.01.2004, 3-4-1-7-03, para. 15 f.; 02.02.2015, 3-4-1-33-14, para. 29; ALCSCr 17.06.2004, 3-3-1-17-04, para. 32.
[137] ALCSCr 17.06.2004, 3-3-1-17-04, para. 32.

5. Institutional framework

Many of the above-mentioned principles more or less determine the institutional framework of the state, too. In following, the key principles closest to the institutional framework shall be taken under a closer look: separation and balance of powers, free elections, legality of administration, independence of judiciary and constitutional review.

5.1. Separation and balance of powers

Separation and balance of powers is a complex principle anchored in §4 in conjunction with §14 of the Constitution. Since legislative, executive and judicial branch have in certain sense opposing interests, they must be separated and balance each other mutually.[138] The separation of powers has functional, institutional or organisational and personal component.[139]

The functions of the legislative branch are more closely described in §65 of the Constitution that contains a quite detailed catalogue of legislative functions. Crucial is furthermore §3(1)1 of the Constitution that provides for: "Governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith." The functions of the executive branch are contained in the catalogue of §87 of the Constitution, the functions of the judiciary in §15(2) and §146 (to 'administer justice') of the Constitution and specified in §149 of the Constitution.

According to the principle of institutional separation of powers, "the branches of state power and constitutional institutions must have autonomy upon organising the exercise of the competencies expressly conferred to them by the Constitution".[140] The institutional separation of powers is for the legislative branch specified in §59 of the Constitution, for the executive branch in §86 of the Constitution, and for the judiciary in §146 first sentence, §149 and §152(2) of the Constitution.

According to the personal separation of powers: "If a person simultaneously fulfils the functions of two branches of state power and is remunerated by both, it may give rise to conflict of ethics and

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[138] Cf. CRCSCj 02.11.1994, III-4/A-6/94, para. 2.

[139] Cf. J. Põld, B. Aaviksoo, R. Laffranque. *The Governmental System of Estonia*, in N. Chronowski/T. Drinóczi/T. Takács (eds.). *Governmental Systems of Central and Eastern European States*, cit. at 51, 237.

[140] CRCSCj 02.05.2005, 3-4-1-3-05, para. 42.

interests between the functions of these powers to be fulfilled and, consequently, between the personal and public interests. A conflict of interests as a situation where a state official simultaneously implements essentially opposing functions and strives for opposing aims, may give rise to forfeiture in fulfilling his duties and may create preconditions for corruption. Conflicts of interests must be avoided in every state office."[141]

The balance of powers or checks and balances means that the powers must control and balance each other mutually. The biggest potential point of conflict is traditionally the boundary between the legislative and executive branch: "The general principle of subject to be established by law delimits the competence of the legislative and the executive powers. The Constitution does not exclude the legislator's possibility to delegate some of its legislative competence to the executive. The general principle of subject to be established by law prohibits the legislator to delegate to the executive those functions the performance of which is imposed on the legislator by the Constitution."[142]

5.2. Free elections

The principle of free elections, provided for in §60(1) and §156(1) of the Constitution, is one of the most important sub-principles of democracy. According to §60(1) the members of the *Riigikogu* are elected in free, general, uniform and direct elections in secret voting according to the principle of proportional representation. This corresponds to the universal principles of free and secret ballot and universal suffrage. The SC has several times stressed the importance of the free elections. "Democracy presumes that voters, by their preferences and votes, can influence the decisions of the public authority which are made in respect of them. […] The possibility to exercise the electoral rights is the main characteristic of democratic political order."[143] "Each elector and group of electors must be guaranteed a possibility to influence the formation of the composition of the representative body."[144] "It is presumed by the principle of democracy that voters have the possibility to make an informed choice between different election

[141] CRCSCj 02.11.1994, III-4/A-6/94, para. 2.
[142] CRCSCj 20.10.2009, 3-4-1-14-09, para. 32.
[143] SCebj 01.07.2010, 3-4-1-33-09, para. 39, 52.
[144] CRCSCj 15.07.2002, 3-4-1-7-02, para. 20.

programmes and ideas, and candidates and lists representing these programmes and ideas."[145] According to the Democracy Index 2018, Estonia shared the 23th position in the global ranking[146] – not a bad result for a small society that had to spend 50 years under the Soviet occupation.

5.3. Legality of administration

The rule that imposition of obligations, administrative charges or penalties and criminal punishments is only permissible on the basis of a parliamentary statute derives from §3(1)1 of the Constitution, according to which: "The state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith." Several subprinciples derive from this norm. In the following, the two subprinciples most important in the present context shall be presented briefly.

According to the principle of parliamentary reservation, the legislator would have to regulate essential questions in law itself: "What the legislator is […] obliged to do under the Constitution cannot be delegated to the executive, not even temporarily and under the condition of court supervision."[147] This principle specifies the separation of powers principle, more precisely the division of powers between the legislator and the government as issuer of regulations: "The reservation by law principle delimits the competence of the legislative and executive powers."[148] Robert Alexy has called this aspect the democratic dimension of the principle of legislative reservation.[149] The SC stated that in regard to issues concerning fundamental rights all decisions essential from the point of view of exercise of fundamental rights must be taken by the legislator.[150]

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[145] SCebj 01.07.2010, 3-4-1-33-09, para. 67.

[146] See https://www.eiu.com/public/topical_report.aspx?campaignid=Democracy2018.

[147] CRCSCj 12.01.1994, III-4/1-1/94. Cf.: CRCSCj 26.11.2007, 3-4-1-18-07, para. 36; 20.10.2009, 3-4-1-14-09, para. 32.

[148] CRCSCj 26.11.2007, 3-4-1-18-07, para. 36; 20.10.2009, 3-4-1-14-09, para. 32.

[149] R. Alexy, *Põhiõigused Eesti põhiseaduses [Constitutional Rights of Estonian Constitution],* cit. at 111, 36.

[150] SCebj 03.12.2007, 3-3-1-41-06, para. 21; 02.06.2008, 3-4-1-19-07, p 25; cf. CRCSCj 24.12.2002, 3-4-1-10-02, para. 24.

According to the principle of legal basis, every infringement of any constitutional right needs a legal basis. "Pursuant to this principle an authorisation by the legislator is required for the restriction of fundamental rights by a body ranking lower than the legislator."[151] Only then is the public authority entitled to act if there is a legal basis or enabling act permitting to do so. The law must determine the conditions and the extent of every infringement.

Thus, the legislator has the obligation to define conditions and extent of restrictions of constitutional rights. The legislator is always obliged to decide the most important questions. The executive power is not entitled to infringe a constitutional right without the corresponding legal basis. However, the latter one is a principle and valid until there are no higher values that outweigh the previously named formal principles. The ALCSC maintained 1997 a regulation that imposed restrictions to the ownership of firearms to protect the right to life.[152]

5.4. Independence of judiciary

"The court as an institution has been arranged into the following instances: 1) county and administrative courts, 2) circuit courts, and 3) the Supreme Court that hear cases as courts of first instance, courts of appeal and a court of cassation."[153] The appointment procedure of the judges is laid down in §150 of the Constitution: "(1) The Chief Justice of the Supreme Court is appointed to office by the Riigikogu on a recommendation of the President. (2) Justices of the Supreme Court are appointed to office by the Riigikogu on a recommendation of the Chief Justice of the Supreme Court. (3) Other judges are appointed to office by the President on a recommendation of the Supreme Court." Thus, the only judge, whose selection procedure is political, is the Chief Justice of the SC. The selection procedure of other Justices of the SC is determined by the Chief Justice, the selection procedures of the judges of lower courts are mainly affected by their competence.

According to §146 second sentence of the Constitution the courts are independent and according to §147(4) the legal status of judges and guarantees for their independence are to be provided by

[151] CRCSCj 13.06.2005, 3-4-1-5-05, para. 9; 20.10.2009, 3-4-1-14-09, para. 34.
[152] ALCSCr 30.05.1997, 3-3-1-14-97, para. 1.
[153] SCebj 04.02.2014, 3-4-1-29-13, para. 44.1.

law. Furthermore, §147(1)–(3) provide guarantees of judicial indepence, containing appointment for life, the possibility to remove from office only by a court judgment, and prohibition to hold any other elected or appointed office. The SC held that salary is a constitutional guarantee for the independence of judges, too.[154]

The independence of a judge, of a court and of the entire judiciary have to be distinguished.[155] The SC stated that: "Upon ascertaining the extent of the guarantees for the independence of judges it is not only the Estonian legal order […] that [has] to be taken into account. What is to be considered is also what other democratic states mean by the guarantees for the independence of judges."[156]

This derives from the Šuvalov case. The following facts were underlying the case: Judge Šuvalov was suspended from his duties because criminal charges against him. He was suspected of accepting a bribe. Because of his suspension, the payments of his salary were suspended, too. He contested the suspension of salary. Lower courts dismissed his action because no legal act provided a possibility to pay salary to a judge in the case of removal from office for the period of criminal proceedings.

The SC declared the failure to pass such legislation, that would allow to pay a salary or other equivalent compensation to a judge, whose service relationship is suspended for the duration of a criminal proceeding, to be unconstitutional, and rendered a new judgment, satisfying the action of Mr. Šuvalov in part and requirying to pay him 50% of his salary for the period when his duties were suspended.[157] The SC stated that the Courts Act expressly and unambiguously precludes any other employment of judges except in teaching and research and because of that Mr. Šuvalov could not ensure his income by being employed elsewhere during the period of suspension from duties. Thus, the SC examined, whether the lack of the regulatory framework that would allow to pay salary or other equivalent compensation to Mr. Šuvalov is in conformity with the constitutional principle of the independence of judges.[158] The SC gave the judicial independence

[154] SCebj 14.04.2009, 3-3-1-59-07, para. 34 ff.
[155] Cf. J. Ginter, *Guarantees of Judicial Independence*, 1 Juridica International 75 (1996).
[156] SCebj 14.04.2009, 3-3-1-59-07, para. 31.
[157] SCebj 14.04.2009, 3-3-1-59-07, decision.
[158] SCebj 14.04.2009, 3-3-1-59-07, para. 29–37.

a twofold meaning. "[T]he independence of judges means, on the one hand, a privilege of each judge without which he or she would not be able to perform the role he or she is expected to perform and to act as an independent third person in solving social conflicts. […] On the other hand, in addition to the aforesaid, the independence of judges in the democratic states has a significantly broader meaning. Namely, the independence of judges also serves the interest of all those people who apply for and count on the fairness of the administration of justice."[159] The latter idea was founded with a reference to Article 6(1) ECHR. Thereafter, the SC considered, based on Article 6.1 of the European Charter on the Statute for Judges, "to be universally recognised that remuneration is one of the guarantees for the independence of judges."[160] Subsequently, the SC established: "Sufficient income guaranteed by the state to the judges while they hold the office of judge allows them to perform the role of judge as expected and, at the same time, constitutes a guarantee to participants in proceedings that their cases are heard by an independent and impartial tribunal. The Constitution does not allow for the conclusion that the guarantees for the independence of judges are not applicable to a judge during certain periods of time while he or she holds the office of judge, e.g. during the suspension of a service relationship."[161] The SC presumed that a judge whose service relationship is suspended lacks the means of subsistence and followed that the failure to pass legislation which would allow to pay a salary or other equivalent compensation to judges whose service relationship has been suspended for the period of criminal proceedings is in conflict with the Constitution.[162] For Mr. Šuvalov, it followed that he was entitled to receive a salary or other equivalent compensation for the whole period while the performance of his duties were suspended. However, the SC added one more aspect: "On the one hand, the judge's salary is a guarantee of his or her independence, on the other hand, the salary payable to a judge must be in elementary correlation to his or her actual work contribution."[163] In determining the amount of salary payable to a judge removed from

[159] SCebj 14.04.2009, 3-3-1-59-07, para. 32. Cf. CRCSCj 08.05.2018, 5-17-43, para. 40.
[160] SCebj 14.04.2009, 3-3-1-59-07, para. 33.
[161] SCebj 14.04.2009, 3-3-1-59-07, para. 34.
[162] SCebj 14.04.2009, 3-3-1-59-07, para. 36 f.
[163] SCebj 14.04.2009, 3-3-1-59-07, para. 43.

service for the duration of criminal proceedings, the SC let himself be guided by 'the principle of reasonableness' and stated that a reduction of salary by up to one half is not unreasonable.[164] Therefore, the SC required to pay to Mr. Šuvalov 50% of his salary.

The Šuvalov case is the most important case concerning the judicial independence. However, other important cases followed. The next one was the 'Judicial clerk case'.[165] The procedural law was amended with the possibility that requests for the determination of the amount of the procedural expenses can be decided by judicial clerks[166] instead of judges. A County Court challenged this provision with a request for concrete norm control. The SC established first, that the decision of the sum of the procedural expenses had to be considered as an administration of justice in the substantive sense. Then, it continued that only judges can be the special-type officials, whose main function is to administer justice and, thus, as the court, exercise state authority. Therefore: "Only judges, for the purposes of §§ 147, 150 and 153, have been secured constitutional guarantees, such as the appointment to office for life, removal from office only by a judgment, the requirement that the grounds and procedure for release of judges from office as well as the legal status of judges and guarantees for their independence are to be provided by law (§147 of the Constitution), incl. special procedure for appointment to office (§150 of the Constitution) and bringing criminal charges against judges (§153 of the Constitution)."[167] The SC pointed out the additional restrictions for judges, too, like the prohibition to hold any other elected or appointed office (§147(3)), and added: "The guarantees of independence of a judge can be deemed to cover their work on the basis of merely the Constitution and laws, in line with his or her conscience and judgments, which also ensure the required impartiality in respect of parties to proceedings."[168] Thus, because judges have been appointed to office and the guarantees and restrictions provided for in the Constitution apply to them,

[164] SCebj 14.04.2009, 3-3-1-59-07, para. 44.
[165] SCebj 04.02.2014, 3-4-1-29-13. Cf. SCebr 26.06.2014, 3-2-1-153-13.
[166] §125[1](1) of the Courts Act: "A judicial clerk is a court official who participates in the preparation for proceeding and in proceeding of cases to the extent prescribed in the court procedure law either independently or under the supervision of a judge".
[167] SCebj 04.02.2014, 3-4-1-29-13, para. 44.4.
[168] SCebj 04.02.2014, 3-4-1-29-13, para. 44.5.

presumably, the judge complies with the requirements for independence and impartiality. And therefore, in the court justice can be administered exclusively by a judge.[169] Since the judicial clerks were not judges in the constitutional sense, the rule that provided for the possibility that requests for the determination of the amount of the procedural expenses could be decided by judicial clerks was unconstitutional.[170]

The next case was the 'Pension case'.[171] As one of the afterplays of the economic crisis of 2009, the *Riigikogu* detached 2012 the pensions of former judges from the current salary of the judges. Thus, the pensions of already retired judges were to be smaller than they would have been under the former regulation according to which the pension was attached to the respective current salary of the judges. Some of the retired judges challenged the decision of the pension authority. The constitutional case was a concrete norm control, initiated by the Administrative Court, and the SC found a violation of the rights of the retired judges. As to the judicial independence, the SC established: "The judge's pension is one of the guarantees of the independence of judges and courts."[172] In the opinion of the SC, the pension was to reduce the risk of corruption and a compensation for the prohibition to hold other offices, too.

Finally, there was a 'Salary case' concerning the judges.[173] In this case some judges challenged a complicated formula stipulated by law, according to which the salary of all judges was decreased in the years of economic growth after the economic crisis of 2009 instead of being increased. Again, the constitutional procedure was a concrete norm control. The SC dismissed the application and maintained the formula. The key message of the SC concerning the judicial independence can be summarised as follows: The Constitution obliges the lawmaker to establish salary that would be sufficient in order to guarantee the independence, impartiality and expertise of judges and the Constitution establishes a subjective

[169] SCebj 04.02.2014, 3-4-1-29-13, para. 44.6.
[170] In another case the SC found that deleting a registered association from the register is no administration of justice and may therefore be carried out by an assistant judge (SCebj 02.10.2018, 2-17-10423, para. 35–38). Assistant judges (§§ 114–124 of the Courts Act) are no judges but court officials employed by the civil courts that fulfil different rather technical tasks.
[171] SCebj 26.06.2014, 3-4-1-1-14.
[172] SCebj 26.06.2014, 3-4-1-1-14, para. 96.
[173] CRCSCj 08.05.2018, 5-17-43. (Disclaimer: In my capacity as a judge, I was a member of the panel that initiated the concrete norm control in this case.)

right of judges that corresponds to this obligation.[174] However, according to the SC, the subjective right would only be infringed when the reduction of the salary would be so extensive that the remaining salary would not be sufficient anymore in order to guarantee the independence, impartiality and expertise of judges.[175] Since the reduced salary was still sufficient in the opinion of the SC, there was no infringement and, therefore, no need to assess the proportionality of the reduction of the salary. It remains to be seen whether this solution is a sustainable one. Compared to the former cases addressing the judicial independence, it seems to constitute a step backwards. Even if the SC indicated *inter alia* that it still holds itself to be competent to react to attempts to influence the judges through the salary,[176] the SC missed the opportunity to define the limits of judicial independence more precisely in order to more effectively prevent any influencing attempts in the future.

5.5. Constitutional review

The highest appeal court is the Estonian Supreme Court (SC), which unifies the functions of the final appellate instance of civil, criminal, and administrative jurisdictions, alongside with the constitutional review. This follows from §149 of the Constitution. The power of constitutional review can be exercised either by the CRCSC or, alternatively, by the SC *en banc*. The constitutional procedural law is regulated by the Constitutional Review Court Procedure Act (CRCPA)[177] which provides 14 different types of proceedings. The most important type of proceedings – the concrete norm control which may be initiated by any court that concludes that a law, on whose validity its decision depends, is unconstitutional – is provided for by §15(1)2 and §152(2) of the Constitution. However, neither the Constitution nor the CRCPA provides explicitly an individual constitutional complaint to the SC. In spite of that, there has been one successful precedent[178] and the

[174] CRCSCj 08.05.2018, 5-17-43, para. 42.
[175] CRCSCj 08.05.2018, 5-17-43, para. 43 f.
[176] CRCSCj 08.05.2018, 5-17-43, para. 44.
[177] *Põhiseaduslikkuse järelevalve kohtumenetluse seadus*. – RT I 2002, 29, 174; I, 07.03.2019, 1.
[178] SCebj 17.03.2003, 3-1-3-10-02 (Brusilov), especially para. 17. Cf. ALCSCr 10.11.2003, 3-3-1-69-03, and SCebr 28.04.2004, 3-3-1-69-03; ALCSCr 22.12.2003, 3-3-1-77-03, and SCebj 30.04.2004, 3-3-1-77-03.

SC has in several decisions stressed the possibility of the individual constitutional complaint deriving directly from §15(1) of the Constitution[179]. Nevertheless, it is still disputed in Estonian constitutional law theory whether the Constitution establishes a right to individual constitutional complaint to the SC or do all courts have the obligation to enforce constitutional rights and there remains no room for a direct complaint to the SC.[180] The author of this paper is of the opinion that there are far better arguments that support the necessity of the individual constitutional complaint. It is indispensable in order to meet the requirements of §15(1) of the Constitution. Without the individual complaint the constitutional review system cannot be considered being exhaustive and the bearers of constitutional rights would still lack the ultimate remedy to enforce their rights. Even more, the individual constitutional complaint may under certain circumstances be the only effective domestic legal remedy, e.g. in case of an imaginary extensive surveillance legislature.

6. Concluding remarks

The present overview of Estonian constitutional core or DNA is a small piece in the puzzle of the Constitutions of the Member States. Most of the principles, presented above, are positivised in the primary law of the EU, e.g. in Article 2 TEU. Nonetheless, every national tradition strengthens and helps to guarantee the national principles mutually. This reciprocal effect should not be underestimated.

The CCTs are for the CJEU a source for general principles of EU law that constitute one of the sources for fundamental rights. After entering into force of the Charter together with the Treaty of Lisbon the original function of the CCTs – to justify the existence of

[179] CRCSCj 09.06.2009, 3-4-1-2-09, para. 36; CRCSCr 23.03.2005, 3-4-1-6-05, para. 4; 09.05.2006, 3-4-1-4-06, para. 8 f.; 20.05.2009, 3-4-1-11-09, para. 5 ff.; 07.12.2009, 3-4-1-22-09, para. 7; 10.06.2010, 3-4-1-3-10, para. 13 f.; 23.01.2014, 3-4-1-43-13, para. 9; 27.01.2017, 3-4-1-14-16, para. 22.

[180] Cf. e.g., the materials of the 2013 conference on the Brusilov case (SCebj 01.01.2009, 3-1-3-10-02), (available in Estonian) http://www.oigus-selts.ee/konverentsid/kumme-aastat-brusiloviga-kuidas-edasi and a brief summary of the recent debate in M. Ernits, *The Use of Foreign Law by Estonian Supreme Court,* in G. F. Ferrari, *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems* (2019).

fundamental rights in the primary law of the EU – has been relativised. Today the primary law provides us a positivised catalogue of fundamental rights.

As we have seen, §10 of Estonian Constitution provides a fundamental rights development clause opening up the constitutional rights catalogue towards new unwritten rights. One possibility to increase the importance of the CCTs again would be to redefine the CCTs as fundamental rights development clause similar to §10 of Estonian Constitution. However, then the CJEU would only come last because, in order to establish a new right on the basis of all constitutional traditions, logically all Member States would come first. Therefore, this approach is unsatisfactory, too.

Consrequently, it remains to be seen which way the CJEU takes in order to rethink the CCTs. Or as Koen Lenaerts has formulated the core of the issue: "[F]inding a dynamic balance between those two competing elements [i.e. unity and diversity], without one always prevailing over the other as only the two together give real meaning to European integration."[181]

Annex: On two special liberty rights

Subsequently, the freedom of speech or rather freedom of expression (§45) and the freedom of movement (§34) will be presented as examples of the more concrete constitutional rights practice.

1.1. On free speech

Although society accepted the substantial turn of 1992 quickly and readily, the constitutional freedom of expression guaranteed by §45 of the Constitution[182] has not been applied so frequently in the

[181] K. Lenaerts, *The Court of Justice and the Comparative Law Method. – ELI Annual Conference*, cit. at 17,1. https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2016/K._Lenaerts_ELI_AC_2016.pdf.

[182] §45 of the Constitution: "(1) Everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. This right may be circumscribed by law to protect public order, public morality, and the rights and freedoms, health, honour and good name of others. This right may also be circumscribed by law in respect of public servants employed by the national government and local authorities, or in order to protect a state secret,

constitutional review proceedings. The numerous questions that have arisen have been solved mostly in lower level courts and mostly in civil court proceedings.

Estonian understanding of the constitutional notion of the freedom of expression has been deeply influenced particularly by two judgements of the European Court of Human Rights – both non-violation cases – the 'Tammer case' and the 'Delfi case'. These cases and their influence will be presented briefly. Thereafter the most important case of constitutional freedom of expression – the 'Political outdoor advertising case' – will be presented, too. Finally a brief overview of the rest of the noteworthy case-law will be given.

1.1.1. Tammer case

The first case, the 'Tammer case' arose from an interview of a journalist and editor (Enno Tammer) of one of the biggest daily newspapers in Estonia with another journalist who had helped a woman (L) – who was a former mistress and later wife of a very influential politician – to write her memoirs and had published them without her consent.[183] L had been the politician's assistant when he was Prime Minister and later Minister of Interior, and had had his child while he was still married to his first wife; she had left the child's upbringing to her parents. These matters were referred to in her memoirs. In the interview, Mr. Tammer used in one of his questions two Estonian words which characterised L as a marriage-breaker (*abielulõhkuja*) and an uncaring mother (*rongaema*). Mr. Tammer was convicted for these expressions of insulting her and fined 220 kroons (around 14 euros). His appeals were dismissed.

Particulary, the Criminal Chamber of SC confirmed the conviction of Mr. Tammer.[184] First, the SC emphasised the importance of the freedom of expression: "the principle of free speech including the journalistic free speech is an indispensable guarantee for the democratic arcitechture of the society and

trade secret or information received in confidence which has become known to the public servant by reason of his or her office, and to protect the family and private life of others, as well as in the interests of the administration of justice. (2) There is no censorship."

[183] ECtHR 06.02.2001, 41205/98 – Tammer v. Estonia.

[184] CRCSCj 26.08.1997, 3-1-1-80-97; cf. SCebj 09.04.1998, 3-1-2-1-98.

therefore one of the most important social values."[185] Then the SC postulated that there are no limitless constitutional rights in a society and stated: "The exercise of any constitutional right can only continue to this point, where the exercise of another constitutional right is not impeded. In a situation of competing constitutional rights, there will inevitably be a need to restrict constitutional rights."[186] Then, the SC found that at that time if the honour of a person was offended by value judgements – like in the present case – the criminal law resources were the only possible means to sanction a behaviour like that. Finally, the SC established that used expressions lead to a degrading and thus inappropriate treatment of L in public. The SC added that Mr. Tammer had the opportunity to eliminate the injustice by publishing an apologising article but he did not use this opportunity. An attempt to renew the proceedings, was held to be inadmissible.[187]

The European Court of Human Rights found unanimously that there had been no violation of Article 10 ECHR.[188] In the center of Courts reasoning was the criterion 'necessary in a democratic society'. The Court agreed that the use of the expressions was offensive and that they constituted negative value judgments. The Court found particularly that the use of the impugned terms in relation to L's private life was not justified by considerations of public concern and that they did not bear a general importance. The Court found that the Estonian courts fully recognised that the present case involved a conflict between the right to impart ideas and the reputation and rights of others and that it could not find a failure properly to balance the various interests involved in the case. The Court took into account the margin of appreciation and recalled that, in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account. In the case of Mr. Tammer, the fine imposed was relatively small. Recapitulating, the Court considered that the conviction and sentence of Mr. Tammer were not disproportionate to the legitimate aim pursued and that the reasons advanced by the domestic courts were sufficient and relevant to justify such interference.

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[185] CRCSCj 26.08.1997, 3-1-1-80-97, para. I.
[186] CRCSCj 26.08.1997, 3-1-1-80-97, para. I.
[187] SCebj 09.04.1998, 3-1-2-1-98.
[188] ECtHR 06.02.2001, 41205/98 – Tammer v. Estonia.

One of the main, although indirect results of this most famous insult was the abolishment of criminal liability for insults. By abolishing the criminal liability for insult entirely, the *Riigikogu* expressed indirectly its assessment that a criminal stigmatisation that Mr. Tammer was subjected to by his criminal conviction was an overreaction. The new Penal Code that entered into force on 1 September 2002 does not criminalise the general insult anymore. The Minister of Justice at that time, Märt Rask, made while defending the new approach in front of the *Riigikogu* an indirect reference to the Tammer case and explained the abolishment with sufficient efficency of private law means.[189] Parallel to that, the new Law of Obligations Act (LOA) that entered into force 1 July 2002 eliminated the shortcomings of the earlier civil law referred to in the Criminal Chamber judgement in the Tammer case and established civil liability for defamation for passing undue value judgements (§1046 LOA) and for disclosure of defamatory facts (§1047 LOA). Thus, the Tammer case paved the way to the contemporary, essentially private law oriented practice of freedom of expression in Estonia.[190]

1.1.2. Delfi case

The next important case is the 'Delfi case'.[191] Delfi AS is a public limited company which owns one of the largest Internet news portals in Estonia. In January 2006, a critical article concerning a ferry company was published on the portal, triggered by the ferry company's decision to change the route that some ferries took. Because of this change, the ferries had broken the ice where ice roads could have been opened in the near future. Ice roads are public roads over the frozen sea between the Estonian mainland and big islands that are opened by sufficient ice conditions and that are a cheaper and faster connection to the islands compared to the

[189] IX Riigikogu Verbatim Record, III Session, Wednesday, 03.05.2000, at 13:00 http://stenogrammid.riigikogu.ee/et/200005031300 (in Estonian). As a footnote, Märt Rask and Enno Tammer were members of the same coalition party – the Estonian Refom Party (*Eesti Reformierakond*).

[190] Cf. overview of the case law until 2007 by M. Ernits, *Põhiõigused, demokraatia, õigusriik* ,Constitutional Rights, Democracy, Rule of Law, Tartu 188–243 (2011).

[191] ECtHR (GC) 16.06.2015, 64569/09 – Delfi AS v. Estonia; cf. ECtHR 10.10.2013, 64569/09. To the latter cf. M. Susi. Delfi AS v. Estonia. – The Americal Journal of International Law 108 (2014), p. 295–302. Cf. CLCSCj 10.06.2009, 3-2-1-43-09.

ferry services. As a result, the opening of the ice roads was postponed for several weeks. Below the article, readers were able to add comments and to access the comments of other users of the site. Once posted on the news portal, the actual authors of the comments could not modify or delete their comments anymore. About 20 anonymous comments containing personal threats and offensive language directed against the major shareholder and member of the supervisory board of the ferry company (L) were posted underneath the article about the ferry company, like: 'burn in your own ship, sick Jew!', 'go ahead, guys, [L] into the oven!', 'knock this bastard down once and for all', '[L] very much deserves [lynching], doesn't he', 'a good man lives a long time, a shitty man a day or two', 'I pee into [L's] ear and then I also shit onto his head' etc. Six weeks after the publication, lawyers of L requested Delfi to remove the offensive comments and claimed 500,000 kroons (around 32,000 euros) as a compensation for non-pecuniary damage. Delfi complied immediately with the request for removal but refused to pay the compensation. Upon defamation lawsuit, Delfi was ultimately ordered to pay 5,000 kroons (around 320 euros) in damages.

The SC rejected Delfi's argument that, under Article 14 of the e-Commerce Directive,[192] its role as an information society service provider or storage host was merely technical, passive and neutral, finding that the portal exercised control over the publication of comments. The SC recognised that there was a difference between a portal operator and a traditional publisher of printed media, pointing out that the former could not reasonably be required to edit comments before publishing them in the same manner as the latter. However, both had an economic interest in the publication of comments and therefore both should be considered as a 'publisher/discloser' (*avaldaja*). The SC therefore held Delfi liable under the relevant domestic law, notably the Constitution, the General Part of the Civil Code Act and the Law of Obligations Act, finding that the portal had not only failed to prevent the publication of comments which degraded human dignity, contained threats and were thus clearly unlawful but also to remove the comments

[192] Directive 2000/31/EC of the European Parliament and of the Council of 08.06.2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), (OJ 2000 L 178, p. 1).

from its portal on its own initiative.[193] Delfi appealed to the European Court of Human Rights, complaining that holding it liable for the comments posted by the portal's readers infringed its freedom of expression.

The Delfi judgment of the European Court of Human Rights has a broader importance.[194] For Estonian understanding of the freedom of expression the interpretation of the criterion 'necessary in a democratic society' of the European Court of Human Rights was decisive. The main question before the Grand Chamber was whether the Estonian courts' decisions, holding Delfi liable for comments posted by third parties, were in breach of its freedom to impart information.

The Grand Chamber scrutinised four criterions: the context of the comments, the liability of the actual authors of the comments as an alternative to Delfi being held liable, the steps taken by Delfi to prevent or remove the defamatory comments, and the consequences of the proceedings before the national courts for Delfi.

First, regarding the context, the Grand Chamber agreed with the SC that although Delfi had not been the actual writer of the comments, it was responsible for their content because of its economic interest and because of the technical possibilities. First, the number of visits to the news portal depended on the number of comments; the revenue earned from advertisements published on

[193] Cf. the translation of the relevant reasoning of CLCSCj 10.06.2009, 3-2-1-43-09 in: ECtHR (GC) 16.06.2015, 64569/09, para. 31, and the summary of the SC judgement's reasoning in: Press Realease issued by the Registrar of the Court, ECHR 205 (2015), 16.06.2015 https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5110487-6300958&filename=Grand%20Chamber%20judgment%20Delfi%20AS%20v.%20Estonia%20-%20liability%20of%20Internet%20news%20portal%20for%20offensive%20online%20comments.pdf.

[194] Cf. M. Husovec, *General monitoring of third-party content: compatible with freedom of expression?*, 11 J. Intell. Prop. L. 17-20 (2016); L. Brunner, *The Liability of an Online Intermediary for Third Party Content. The Watchdog Becomes the Monitor: Intermediary Liability after Delfi v Estonia*, 16 Human Rights Law Review 163–174 (2016); R. Spano, *Intermediary Liability for Online User Comments under the European Convention on Human Rights*, 17 Human Rights Law Review 665–679 (2017); J. Šidlauskienė, V. Jurkevičius, *Website Operators' Liability for Offensive Comments: A Comparative Analysis of Delfi as v. Estonia and MTE & Index v. Hungary*, 10 Baltic Journal of Law & Politics 46–75 (2017).

the portal, in turn, depended on the number of visits. Therefore, Delfi was interested in attracting a possibly large number of comments on news articles published by it. Secondly, once a comment was posted, only Delfi had the technical means to modify or delete the comment.

Secondly, Delfi had not ensured a realistic prospect of the authors of the comments being held liable. Since Delfi did not register the identity of the commentators, the measures to establish their identity remained uncertain.

Thirdly, the steps taken by Delfi to prevent or remove the defamatory comments once published without delay had been insufficient. The Grand Chamber established that Delfi had an automatic system of deletion of comments based on stems of certain vulgar words and it had a notice-and-take-down system in place, whereby anyone could notify it of an inappropriate comment by simply clicking on a button designated for that purpose to bring it to the attention of the portal administrators. In addition, on some occasions the administrators removed inappropriate comments on their own initiative. Nevertheless, both the automatic word-based filter and the notice-and-take-down system had failed to filter out the manifest expressions of odious hate speech and speech inciting violence for six weeks. The Grand Chamber concluded that Delfi's ability to remove offending comments in good time was therefore limited. Furthermore, the Grand Chamber held the obligation of Delfi to remove from its website, without delay and even without notice, clearly unlawful comments, to be proportionate because the ability of a potential victim of hate speech to continuously monitor the Internet is more limited than the ability of a large commercial Internet news portal to prevent or rapidly remove such comments.

Finally, the Grand Chamber held that the consequences of Delfi having been held liable were small. The 320-Euro fine was by no means excessive for Delfi, one of the largest Internet portals in Estonia, and the portal's popularity with those posting comments had not been affected. Therefore, the measure did not constitute a disproportionate restriction on the Delfi's right to freedom of expression.

For Estonia, the Delfi judgement confirmed that the SC's interpretation of the freedom of expression was in accordance with the ECHR. Because of the SC judgement from 2009 Estonian courts started to declare the removal of offensive and/or insulting

comments to be a sufficient redress.[195] There is one further development in the field of internet comments that is worth mentioning. In this case an Estonian private limited-liability company operating in Sweden was blacklisted for its allegedly questionable business practices on the website of a Swedish employers' federation, attracting several hostile comments from its readers. These comments were addressed partly against the company but partly against its sole shareholder and sole member of the managing board (W) personally. The company and W brought an action before the Estonian courts against the Swedish federation complaining that the published information had negatively affected their honour, reputation and good name. They asked the Estonian courts to order that the Swedish federation rectify the information and remove the comments from its website. They also requested damages for harm allegedly suffered as a result of the information and comments having been published online. The County Court ordered that the claims of the company be severed from the claims of W. The proceedings against the company were subject to a preliminary reference.[196] They were finally terminated because the Estonian courts had no jurisdiction in this case.[197] The proceedings of W ended with a friendly settlement.[198] In this settlement the Swedish board obliged to remove offensive comments from its webpage but no compensation was awarded to W. This solution reaffirms once again the post-Delfi case-law that – except extreme cases – the obligation of the 'publisher/discloser' consists as a rule in the removal of defarmatory commentaries without undue delay.

[195] E.g. Judgment of the Tallinn Court of Appeal 21.02.2012, 2-08-76058; Judgment of the Tallinn Court of Appeal 27.06.2013, 2-10-46710. Cf. M. Kuurberg, *Euroopa Inimõiguste Kohtu suurkoja 16. juuni 2015. a otsus asjas Delfi vs. Eesti*, Juridca 592 (2015); ECtHR (GC) 16.06.2015, 64569/09, para. 43.

[196] CJEU 17.10.2017, C-194/16 – Bolagsupplysningen OÜ; cf. Opinion of AG Bobek 13.07.2017, C-194/16, and CLCSCr 23.03.2016, 3-2-1-2-16. CJEU interpreted Article 7(2) of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

[197] CLCSCr 21.12.2017, 2-16-4631.

[198] Ruling of the Harju County Court 08.10.2019, 2-15-14492. Cf. Judgement of the Harju County Court 21.08.2017, 2-15-14492; Judgement of the Tallinn Court of Appeal 29.03.2018, 2-15-14492.

1.1.3. Political outdoor advertising case

In the constitutional review proceedings, the freedom of expression has mainly been used to assess restrictions to different kinds of advertisements. In 2005 the SC had to decide whether a prohibition of advertising low-alcohol beverages by a local city council that extended to the whole territory of the local government was legal.[199] The Advertising Act of the Parliament prohibited the advertising of low-alcohol beverages in proximity to buildings housing a nursery school, school, other educational institution, children's or youth centre. The Act left the local governments the right to determine the areas which were deemed to be 'in proximity'. First, the SC identified an infringement of the freedom of expression and of the freedom of enterprise. Then, the SC analysed the extent of the purpose of the legal basis and found that the local government had exceeded the extent permitted.[200] Thus,

[199] CRCSCj 13.06.2005, 3-4-1-5-05.

[200] CRCSCj 13.06.2005, 3-4-1-5-05, para. 16–19: "[T]he "area in proximity to" the structures […], which is deemed to be a zone wherein advertising of low-alcohol beverages is prohibited, must be defined through the purpose of the provision delegating authority, that is, we should endeavour to find out the aim of the legislator upon authorising the local governments to determine the areas deemed to be in proximity to the objects referred to […] for the purpose of imposition of restrictions on advertising low-alcohol beverages. […] Neither the explanatory letter to draft Advertising Act nor the Riigikogu stenographs explain the aim of the restrictions on advertising. […] [T]he prohibition of advertising of low-alcohol beverages on educational, health-case and sports structures and in proximity thereof must guarantee that it will not be possible to associate the institutions engaged in educating and intended for restoration and fostering (public) health with advocating consumer habits damaging to health. […] [T]he Chamber considers it necessary to interfere in such cases when it is manifest that upon imposing restrictions on advertising of low-alcohol beverages the limits of the aim set by the legislator – to preclude the so called approving relationship between educational, health-care and sports structures and advertising of low-alcohol beverages – have been violated. […] The Chamber is of the opinion that when prohibiting the advertising of low-alcohol beverages on the whole administrative territory of the local government unit the local government has manifestly violated the limits of the provision delegating authority […] The term "area in proximity to" can not be defined in a manner which results in absolute prohibition on advertising low-alcohol beverages in a local government unit. [The corresponding provision] clearly indicates at the will of the legislator not to authorise local governments to prohibit the advertising of low-alcohol beverages on the whole territory of a local government unit. A restriction on freedom of enterprise and freedom of commercial speech as extensive as this one under discussion would have required a clear permission by law. Secondly, it appears from the map of [the] city, included in the materials of the case, that although

the local government regulation was found to be unconstitutional. As a matter of fact, it was a rather simple administrative law case which, because of the specifics of Estonian procedural law, had to be decided in the constitutional review procedure.

The only genuine constitutional review case in which the SC applied among other rights the freedom of expression explicitly is another advertisement case, i.e. a case that concerned the so-called political outdoor advertising.[201] In 2005, the *Riigikogu* amended several electoral acts with prohibitions of the 'political outdoor advertising' during active campaigning and put into effect misdemeanour sanctions in case of a violation of these prohibitions. The prohibition of the political outdoor advertising included the prohibition of commission, distribution and production of advertising as well as of presentation, exhibition and transmission of the advertising to the public. It was prohibited to advertise an independent candidate, a political party or a person standing as a candidate in the list of a political party or their logo, another distinctive mark or programme on buildings or structures or on the inside or outside of means of public transport or taxis. It was completed by a general clause prohibiting 'other political outdoor advertising'. During active campaigning meant the period from the last day for the registration of candidates until the election day, i.e. the last 45 days prior to elections. In short, a complete ban of political advertisement in public sphere for the last one and a half months before elections was put into effect.

After a four-and-a-half-year public dispute about the constitutionality of these prohibitions, the Chancellor of Justice initiated 2009 an abstract norm control in the SC. The SC, sitting the case *en banc*, decided to dismiss the request of the Chancellor of Justice.

First, the SC reflected extensively upon the infringement of rights and found that the prohibitions infringed the right to vote, the right to stand as a candidate in conjunction with the freedom of expression, the right to engage in enterprise, the freedom of property and the freedom of activity of political parties. The SC established particularly: "Political outdoor advertising may be one of the channels for the communication of information to voters

educational, health-care and sports structures are dispersed over the city […], there are still areas on the administrative territory of the city which can by no means be deemed to be in proximity to these structures."

[201] SCebj 01.07.2010, 3-4-1-33-09. Cf. CRCSCj 18.05.2017, 3-4-1-3-17.

regarding political parties, election coalitions and independent candidates and their views. By the establishment of restrictions regarding political outdoor advertising, the legislature shapes the conditions for the exercise of the right to vote. If substantial information on political intentions is communicated through outdoor advertising, a prohibition thereon during the period of active campaigning restricts the possibility of voters to receive information for forming their election decision. By performing the obligation to create the necessary conditions for the periodical exercise of the right to vote, the legislature has also infringed the freedom to receive information for forming the election decision, which is included in the right to vote."[202] Furthermore, the SC established: "Primarily, the right to stand as a candidate provides protection from the preconditions or censuses established regarding standing as a candidate. Upon standing as a candidate for a representative body, the freedom of a candidate to disseminate and introduce his or her views is important. […] In conjunction with the freedom of expression provided for in §45 of the Constitution, the right to stand as a candidate also includes the right of candidates to introduce their political views to voters and to participate in political discussion. The prohibition on political outdoor advertising which is one of the conditions for the exercise of the right to stand as a candidate, restricts the right of candidates to introduce themselves and the association they represent. Therefore the prohibition infringes the right to stand as a candidate […] in conjunction with the freedom of expression."[203]

In the next step, the SC scrutinised the criterion of legal clarity and stated that there is no legal definition for political outdoor advertising. However, the SC emphasised that the National Electoral Committee and courts have repeatedly applied the prohibition concerned. It concluded that: "With reasonable effort and applying different ways of interpretation, state bodies applying the prohibition are able to determine a functioning code of behaviour from these provisions and the objectives of the prohibition, for the ignoring of which, a punishment is prescribed or, for the violation of which, it may be necessary to assess the impact of the violation on the election results. […] With the help of court practice and by applying different ways of interpretation,

[202] SCebj 01.07.2010, 3-4-1-33-09, para. 30.
[203] SCebj 01.07.2010, 3-4-1-33-09, para. 31.

state bodies and courts are, also in ambiguous situations, able to determine which activity is permitted and which prohibited."[204] The SC concluded that regulations providing for the prohibition on political outdoor advertising could not be considered 'so unclear' as to constitute a reason for considering the prohibition to be in conflict with the constitutional principle of legal clarity.

Subsequently, the SC turned to the principle of proportionality. The SC found that the objective of the prohibition on political outdoor advertising was, primarily, to ensure the equality of political parties and individual candidates through reduction of the expenses incurred by political parties on election campaigns and the role of money in the achievement of political power. In addition, the SC established that the objective to reduce the inappropriate influencing of voters (manipulating the will of voters without communicating substantial information on the political programme and intentions, without involving voters in the discussion) with the influencing methods used in outdoor advertising may also be seen behind the prohibition.[205]

Thus, the case had to be decided with the help of the proportionality test. Concerning the suitability, the SC established: "[T]he prohibition on political outdoor advertising is appropriate in order to reduce the role of money in the achievement of political power by reducing election campaign expenses, to increase the role of substantial political debate, to free the public space from excessive outdoor advertising which may cause public resentment towards political advertising and politics as a whole, and to reduce the inappropriate influencing of voters."[206]

As alternative measures, the SC considered restrictions on political outdoor advertising and establishment of a ceiling for election expenses. However, the SC was of the opinion that the general uniform prohibition was necessary for achieving the established objectives. The SC agreed that a detailed restriction would restrict rights less. However, it was of the opinion that a detailed restriction would be also less effective because: "First, […] imposition of a uniform prohibition is simpler and cheaper. Secondly, the specified restrictions do not facilitate, to the same extent, the reduction of campaign expenses or freeing of the public space from political advertising with the objective of reducing the

[204] SCebj 01.07.2010, 3-4-1-33-09, para. 48 f.
[205] SCebj 01.07.2010, 3-4-1-33-09, para. 51.
[206] SCebj 01.07.2010, 3-4-1-33-09, para. 54.

resentment of voters towards political advertising and politics as a whole."[207] Furthermore, relating to the setting a ceiling for election expenses the SC expressed doubts whether a ceiling could ever be as effective as the general ban and put it aside as well.

As to the proportionality in the narrower sense, the SC balanced the infringed rights with countervailing reasons. Essentially, it found that both the intensity of the infringement and the efficiency of the means taken were unclear. It established: "The prohibition only directs political discussions into other channels where there is more likelihood that they become more substantial than the slogans and pictures displayed in outdoor advertising. At the same time, in these channels, there are less possibilities to influence voters inappropriately."[208] It emphasised that "the right to vote and the right to stand as a candidate, the freedom of activity of political parties, and the freedom of political expression as fundamental rights without which democracy would be impossible, have been restricted in the interests of exercise of the same rights in order to ensure better functioning of the democratic decision-making processes."[209] And it came to the conclusion that the established objectives were so weighty that they justified the restrictions in question.

Compared to the argumentation concerning the prohibitions, the justification of the sanctions was scarce. The SC simply noted that "a punishment for a misdemeanour upon violation of the prohibition is a necessary sanction in order to ensure adherence to the prohibition" and that "[t]he legislature has a wide margin of appreciation upon imposition of punishments corresponding to offences".[210] Thus, according to the SC, the sanctions were constitutional, too.

This judgement deserves a criticism that cannot be elaborated thoroughly here. Therefore, only a few brief remarks shall be made. First and foremost, as we saw above, the principle of legal certainty requires that the individual addressee of a prohibition has to be able to foresee the conduct of public power with certain probability and to regulate his conduct correspondingly. Therefore, not the perspective of the authorities applying the sanctions was decisive but that of the individuals. And the latter was not considered at all.

[207] SCebj 01.07.2010, 3-4-1-33-09, para. 57.
[208] SCebj 01.07.2010, 3-4-1-33-09, para. 63.
[209] SCebj 01.07.2010, 3-4-1-33-09, para. 67.
[210] SCebj 01.07.2010, 3-4-1-33-09, para. 73.

At least the general clause prohibiting 'other political outdoor advertising' could possibly meet the legal clarity criterion. Secondly, it was methodologically erroneous to scrutinize all the infringements of different rights in one bundle because in this way particularly the specific infringenement of the freedom of expression remained in the background. Thirdly, the arguments presented to support the verdicts of necessity and proportionality in the narrower sense were not convincing because of the methodological issue. Furthermore, the total ban of political advertisement from public places in a democratic society rather seems to cause more problems than to solve any. The main problem was not the posters in public places as such but the size of the posters. The last months before the election day enormous posters with faces of politicians covered the public sphere. As a result, the campaign costs became enormous, it became for individual candidates almost impossible to attract public attention and the substantive debate about the election platforms was pushed into the background. However, restriction of the size of the posters were reachable simply restricting the size of the posters. Therefore, it remains at least doubtful whether the prohibitions really were necessary and whether they were proportionate. As an afterplay, the *Riigikogu* restored the original situation, abolished all restrictions of the political advertisement completely and allowed the campaign posters even on the election day.[211] *Riigikogu* justified the turn firstly with the lacking evidence that the quality of the political debate had been improved, secondly, that the expected reduction of campaign costs did not occur, and thirdly, that the advertisement had moved into other channels like the Internet and therefore still being omnipresent in the pre-election period. The abolition of the prohibition of campaign posters on the election day that had existed since 1994 was justified with the argument of equality: since ever more voters use one of the early-voting methods (in 2019 nearly 40%), the conditions of the voting should be equalised.[212] Thus, the pendulum has swayed from one extreme

[211] '*Euroopa Parlamendi valimise seaduse, kohaliku omavalitsuse volikogu valimise seaduse, Riigikogu valimise seaduse, rahvahääletuse seaduse ja karistusseadustiku muutmise seadus (valimispäeval valimisagitatsiooni piirangu ja välireklaami keelu kaotamine)*' was passed 11.12.2019 (RT I, 03.01.2020, 2).

[212] Cf. the explanatory report to the draft of the '*Euroopa Parlamendivalimise seaduse, kohaliku omavalitsuse volikogu valimise seaduse, Riigikogu valimise seaduse, rahvahääletuse seaduse ja karistusseadustiku muutmise seadus (valimispäeval*

to the other and the judgment of the SC seems to have left no effect whatsoever.

1.1.4. Criminal liability cases

So far, the SC has decided one genuine hate speech case. In this case a young man (K) wrote and published on Internet a text with the title 'Our Fight' that was directed against jews, christians and democracy, e.g.: "Since the Christianity must vanish from Estonia, the only possibility to reach this goal is to liquidate all Christians and Jews and to destroy the churches." Furthermore, the text included an appeal to armed terror. He was accused of having committed the incitement of hatred (§151 of the Penal Code)[213]. The Court of Appeal convicted him, however, the SC acquitted him in 2006, founding the result essentially to the assumption that there was no concrete danger caused by this act.[214] Furthermore, the SC criticised the lower courts that they had not analysed whether the text might have been meant sarcastically.[215] Indeed, the accused had not taken any further action to reach his declared goal. But the narrow interpretation of the SC was still somewhat surprising and it is questionable whether the SC would decide a similar case in the same way today. E.g. a City Court had earlier found that racist graffiti was punishable according to the same provision.[216]

Another noteworthy criminal case is a more recent one. In this case a novelist wrote and published on the Internet in 2014 a text that described in great detail fictitious rapes and other kind of violent activities against children. However, several experts confirmed that the text as such had a literary value. The novelist was accused of having committed the manufacture of works involving child pornography and making child pornography

valimisagitatsiooni piirangu ja välireklaami keelu kaotamine)' 51SE from 09.09.2019 <https://www.riigikogu.ee/download/9b673cd1-c336-4314-88fa-4b6df0c51801> (in Estonian).

[213] §151(1) of the Penal Code: "Activities which publicly incite to hatred, violence or discrimination on the basis of nationality, race, colour, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status if this results in danger to the life, health or property of a person is punishable by a fine of up to three hundred fine units or by detention."

[214] CRCSCj 10.04.2006, 3-1-1-117-05, para. 28.

[215] CRCSCj 10.04.2006, 3-1-1-117-05, para. 23.

[216] Judgement of the Narva City Court 17.06.2003, 1-291/03 (the accused sprayed following words to the wall: 'White Power' and its abbreviation 'W.P.', '88', 'Juden tod toten kopf', 'Juden raus! Troll', 'Panzer Division SS', 'Skinheads wake up! 88', 'SS').

available (§178 of the Penal Code)[217]. However, the courts acquitted him.[218] The main reason for acquittance of the novelist was not the fictious character of the text but the fact that he had written the final version of the text abroad (in the USA) and published the work on a foreign server that was located in England, and the publication of such a text was neither punishable in the USA nor in England. Thus, according to the Court of Appeal, Estonian authorities lacked the competence to try the novelist. From the reasoning of the Court of Appeal can be followed that otherwise the court would probably have sentenced him.[219] The Court of Appeal even brought the freedom of expression into play but found that punishing a novelist for writing a novel like that would be in accordance with the freedom of expression.[220] However, the latter is a very disputable statement. The Court of Appeal drew a parallel with a total ban of the visual child pornography where the absolute prohibition is clearly justified with rights of concrete children. However, in the present case the situation was different and there was no victim. The story was purely fictitious and, according to some experts, had even literary value. In case like that, the freedom of expression must clearly prevail, otherwise it would be a crime of opinion.

There have been some further criminal liability cases.[221] However, because of the mostly Civil Law based remedies against alleged violations of privacy and honour, the case-law is not very numerous. E.g., the author did not find a single case where someone would have been punished for burning a flag of a foreign state or international organisation.[222]

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[217] §178(1) of the Penal Code: "Manufacture, acquisition or storing, handing over, displaying or making available to another person in any other manner of pictures, writings or other works or reproductions of works depicting a person of less than eighteen years of age in a pornographic situation, or a person of less than fourteen years of age in a pornographic or erotic situation, is punishable by a pecuniary punishment or up to three years' imprisonment."

[218] Judgment of the Harju County Court 16.05.2017, 1-15-11024; Judgement of the Tallinn Court of Appeal 13.09.2017, 1-15-11024.

[219] Judgement of the Tallinn Court of Appeal 13.09.2017, 1-15-11024, para. 20.

[220] Judgement of the Tallinn Court of Appeal 13.09.2017, 1-15-11024, para. 21.

[221] Cf. to the earlier case law M. Ernits, *Põhiõigused, demokraatia, õigusriik, [Constitutional Rights, Democracy, Rule of Law]*, cit. at 54, 188–243.

[222] §249(1) of the Penal Code: "A person who tears down, damages, profanes or otherwise defames the national flag, national coat of arms or any other official symbol of a foreign state, or an official symbol of an international organisation, or defames the national anthem of a foreign state, is punishable by a pecuniary

1.1.5. Civil liability cases

The main part of the case-law concerning the freedom of expression has so far been produced by civil courts. The Civil Chamber of the SC has continued to consider the freedom of expression fundamental for the democratic society: "[T]he freedom of communication is one of the preconditions for the functioning of the democratic society and the law-abiding press must not be restricted or prevented from publishing information."[223]

One of the most noteworthy cases was the ban of the movie 'Magnus' which was released in 2007. The plot was based on true events. In the center of the movie was a father-son relationship and the suicide of the son. The mother of the boy was depicted rather negatively. The actor that played the father in the movie was the real father of the boy. In the beginning the film participated in numerous film festivals and even won a couple of prizes.[224] It was *inter alia* the first Estonian movie ever that was selected for the official program of the Cannes Film Festival.[225]

Based on the claim of the divorced mother of the deceased boy, courts forbade the publication and distribution of the movie in 2010 until the end of 2025. Unfortunately, the judgments of the County Court and of the Court of Appeal have not been published at all in order to protect the private life of the parties to the proceedings.[226] From the judgment of SC[227] only a very small part of the reasons has been published. Therefore, the reasons can be reconstructed only on the bases of the plentiful media coverage from the time of the court proceedings.[228] According to the press,

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punishment or up to one year's imprisonment." Damaging of the Estonian flag is not punishable in Estonia.

[223] CLCSCj 05.12.2002, 3-2-1-138-02, para. 9.

[224] Cf. page of the film in the Estonian Film Database: <https://www.efis.ee/en/film-categotries/movies/id/775>.

[225] Cf. Cannes Film Festival press releases: <https://www.festival-cannes.com/en/69-editions/retrospective/2007/actualites/articles/the-camera-d-or-selection>; <https://www.festival-cannes.com/en/69-editions/retrospective/2007/actualites/articles/un-certain-regard-magnus-by-kadri-kousaar>.

[226] Judgement of the Harju County Court 12.05.2008, 2-07-10586; Judgements of the Tallinn Court of Appeal 09.02.2009 and 27.04.2010, 2-07-10586.

[227] CLCSCj 09.12.2009, 3-2-1-104-09.

[228] Cf. in English: Controversial Film Ban Decision Appealed. – ERR 06.08.2010 <https://news.err.ee/97589/controversial-film-ban-decision-appealed>;

the plaintiff sought ban of the film for 30 years. The County Court first upheld the action in part and banned the movie in Estonia, EU and elsewhere for 7 years. A very small part of the reasons of this judgment has been published in a weekly newspaper.[229] According to the County Court, the mother and her family were recognizable in the characters. However, the depiction used in the film was negative and endangered the right to self-expression of the real mother. The County Court held it for sufficient when the persons and their family life were recognizable for the family members and the circle of acquaintances. The identity of a person includes her name, appearance, emotions and thoughts, her past, religion and other beliefs. Human dignity means the value of a person in itself, of being a goal and not a means, the personality. The Constitution protects the right to human dignity, freedom of expression and the right to express oneself in society or not to express oneself. It therefore includes the right to portray oneself in public. There was a conflict of countervailing constitutional rights in this case. The spheres of privacy rights can be divided into the individual sphere, the private sphere and the intimate sphere. Sensitive personal data belongs to the intimate sphere of a person and showing it in a way that enables the person to be identified is a particularly serious violation of the general right to privacy. Undoubtedly identifiable serious violations of privacy rights cannot be justified by the artistic freedom. This was the most exhaustive publicly available substantive justification for the ban of the film.

The Court of Appeal first set aside the judgment of the County Court and dismissed the action. The SC dismissed the judgement of the Court of Appeal and sent the case back to the Court of Appeal which finally banned the movie in Estonia, EU and elsewhere until the end of 2025.

The main problem connected with the 'Magnus case' is that although this case could have had central importance for the interpretation of the freedom of expression in Estonia, the reasons

Controversial Film to Stay Banned. – ERR 02.09.2010 <https://news.err.ee/97739/controversial-film-to-stay-banned>; Banned Film Director Vows to Fight On. – ERR 24.01.2011 <https://news.err.ee/98974/banned-film-director-vows-to-fight-on>.

[229] T. Jõgeda, *Miks kohus keelas "Magnuse" näitamise? [Why the Court forbade showing 'Magnus'?],* Eesti Ekspress 15.05.2008 <https://ekspress.delfi.ee/kuum/miks-kohus-keelas-magnuse-naitamise?id=27677793> (in Estonian).

of the judgments are not publicly accessible. It is doubtful whether such an approach is in accordance with the constitutional principle that judgments must be pronounced publicly (§24(4) of the Constitution).[230] The SC missed regretfully the opportunity to define the limits of the freedom of expression for the future.[231] However, the outcome of the case seems to be balanced out. At least, based on the publicly available excerpt of the judgment of the County Court, the court balanced countervailing constitutional rights and the time-limited ban takes the interests of both sides into account.

There are relatively many other civil cases concerning the freedom of expression that have been decided by the Civil Chamber of the SC in the past 15 years where the main justification has been published.[232] However, it is not possible to analyse them all here. The presented examples shall suffice for a picture of the situation concerning the freedom of expression in Estonia. To conclude, one more important aspect shall be underlined. The SC has stated repeatedly: "When exercising the freedom of speech, including the freedom of press, pursuant to §19(2) of the Constitution, the rights and freedoms of other people must be respected and taken into account and the law must be observed."[233] This statement illustrates that the SC, while scrutinising claims to restrict the freedom of expression, always uses the balancing of countervailing rights scheme. As a matter of fact, the cases concerning the freedom of expression are the main examples of the *Drittwirkung* of constitutional rights to which the §19(2) of the Constitution makes a reference to.

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[230] Even if this article provides the possibility to restrict the principle of publicity ('except in cases where the interests of a minor, a spouse, or a victim require otherwise'), the main line of legal reasoning and the main justification of the operative part of the judgment must remain accessible to the public.

[231] Cf. Advokaat: "Magnuse" keeld sisulist lahendit ei toonud [Advocate: The Ban of 'Magnus' Did Not Give Any Real Answers]. – ERR 05.09.2010 <https://www.err.ee/409413/advokaat-magnuse-keeld-sisulist-lahendit-ei-toonud> (in Estonian).

[232] Cf. CLCSCj 10.10.2007, 3-2-1-53-07; 18.02.2008, 3-2-1-145-07; 13.01.2010, 3-2-1-152-09; 26.11.2010, 3-2-1-83-10; 09.12.2010, 3-2-1-127-10; 21.12.2010, 3-2-1-67-10; 20.06.2012, 3-2-1-169-11; 09.01.2013, 3-2-1-166-12; 26.06.2013, 3-2-1-18-13; 25.09.2013, 3-2-1-80-13; 18.02.2015, 3-2-1-159-14; 15.04.2015, 3-2-1-24-15; 17.12.2015, 3-2-1-144-15; 29.03.2017, 3-2-1-153-16; 19.03.2019, 2-17-17140.

[233] CLCSCj 05.12.2002, 3-2-1-138-02, para. 9; 26.06.2013, 3-2-1-18-13, para. 14.

1.2. On free movement

Compared to the freedom of expression, the freedom of movement guaranteed by §34 of the Constitution[234] has occurred only rarely in the case-law of the SC. It had great importance after regaining the independence and at the end of the Soviet occupation. E.g., the Soviets had declared the big islands in the Western part of the country entirely to a border zone and the entering of these islands required a permit, called in everyday speech an 'island-visa'. This requirement was abolished promptly after the Constitution entered into force. Later, the free movement inside the borders of the country became quickly self-evident, moving suddenly back to the spotlight again in the crisis of Wuhan-virus in 2020. However, there are no cases yet concerning the latter.

Although mentioned already in 1994,[235] the first and the most important case where the SC applied the freedom of movement was the 'Valga curfew case'.[236] Valga is a small border town near to Latvia. In 1996, Valga City Council issued a municipal by-law that forbade persons under the age of 16 to be in public places from 11 p.m. to 6 a.m. if they were unaccompanied by an adult. In 1997 a 15-year-old boy (Z) was found by police on the streets without any adult company and punished for the misdemeineour. Z challenged the sanction in the court and the court initiated a concrete norm control. The SC declard the by-law invalid.

Since there was no legal basis for the restriction of the right to move freely, it was a rather simple administrative law case. However, considering that in 1997 the legal system was still in the transformation process, the judgement has a broader importance. The SC found that there was an infringement of the freedom of movement because: "A person exercises his freedom of movement both in time and in space. If we presume that the restrictions on the freedom of movement do not embrace the possibility to restrict a

[234] §34 of the Constitution: "Everyone whose presence in Estonian territory is lawful has the right to move freely in that territory and to choose freely where to reside. The right to freedom of movement may be circumscribed in the cases and pursuant to a procedure which is provided by law to protect the rights and freedoms of others, in the interests of national defence, in the case of a natural disaster or a catastrophe, to prevent the spread of an infectious disease, to protect the natural environment, to ensure that a minor or a person of unsound mind does not remain unsupervised, or to ensure the proper conduct of a criminal case."

[235] CRCSCj 21.12.1994, III-4/A-11/94, para. II.

[236] CRCSCj 06.10.1997, 3-4-1-3-97.

person's stay in certain places at certain hours, this would mean that it would be impossible to legally assess the imposition of official closing time or a curfew on the basis of § 34 of the Constitution. This would hardly be compatible with the purpose of § 34 of the Constitution."[237] Then, the SC found that there must be a legal basis which did not exist in the present case: "Even if prevention of the leaving of a minor without supervision is a local issue, the local government may not impose restrictions on minors' freedom of movement, because §34 of the Constitution unambiguously states that the right to freedom of movement may be restricted solely in the cases and pursuant to procedure provided by law."[238] Thus, the case was actually solved. However, the SC added an *obiter dictum* that *inter alia* makes a statement concerning the essence of the freedom of movement: "Freedom of movement is an accepted and legally protected value in a democratic society, and it is closely related to other constitutional values, such as personal liberty, public security and order, rule of law and the rights and freedoms of other people."[239]

While scrutinising the 'Traffic Act saga' cases,[240] the SC established *inter alia* an infringement of the right to move freely, too.[241] The SC emphasised: "It has […] to be born in mind that the freedom of movement established in §34 of the Constitution is a fundamental right subject to qualified reservations by law. Thus, the freedom of movement may be restricted only in the cases enumerated in the second sentence of §34 of the Constitution."[242] Based on its earlier judgements,[243] the SC stated that the suspension of the right to drive was a punishment in the substantive sense. Then, it established that the aim was covered by the statutory reservation of §34 and argued that the prohibition to drive is a common type of punishment, that is effective for traffic violations and that the punishment is not manifestly excessive. The SC concluded that the suspension of the right to drive without any right of discretion did not amount to a disproportionate infringement of the freedom of movement. This is the only case

[237] CRCSCj 06.10.1997, 3-4-1-3-97, para. I.
[238] CRCSCj 06.10.1997, 3-4-1-3-97, para. I.
[239] CRCSCj 06.10.1997, 3-4-1-3-97, para. I.
[240] Cf. above.
[241] SCebj 27.06.2005, 3-4-1-2-05, para. 56–61.
[242] SCebj 27.06.2005, 3-4-1-2-05, para. 56.
[243] SCebj 25.10.2004, 3-4-1-10-04, para. 20; 25.10.2004, 3-3-1-29-04, para. 17.

where the SC has actually performed a proportionality test in order to assess an infringement of the freedom of movement. However, the reasoning of the SC was – concerning the freedom of movement – in this case rather scarce. The SC did not consider at all the lacking prior hearing of the person, the impossibility of an effective remedy against the suspension of the right to drive etc. Therefore, the assessment of proportionality was rather a declaration than a well-reasoned conclusion.

In further cases the SC has made clarifying statements towards the scope and infringements of the freedom of expression and has given guidelines for using the proportionality test. Concerning the scope the SC has established: "The right to freedom of movement first and foremost protects the right to reach a destination."[244] Concerning the infringement, the SC found "that the preventive measure – signed undertaking not to leave place of residence – applied in the criminal proceeding infringed the appellant's rights arising from the Constitution to move freely and choose a place of residence (§34 of the Constitution) and the right to leave the country (§35 of the Constitution)."[245] On the other hand, it has also stated that the Population Register Act does not restrict the right to move freely and to choose freely the place of residence.[246] The latter is a rather questionable assessment. Finally, as to the guidelines, the SC has established: "The right to freedom of movement is an essential expression of the individual right to self-determination and individual physical freedom"[247].

[244] CRCSCj 22.12.1998, 3-4-1-11-98, para. IV.
[245] SCebj 22.03.2011, 3-3-1-85-09, para. 133.
[246] CRCSCj 26.03.2019, 5-19-15, para. 18.
[247] CRCSCj 22.12.1998, 3-4-1-11-98, para. IV.