Speech on the occasion of the 90th anniversary of the Supreme Court of Estonia
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Honourable President of the Republic of Estonia,
President of the Riigikogu, Prime Minister, Rector of Tartu University,
Ministers, members of the Riigikogu, heads of constitutional institutions,
Your Excellencies,
dear guests, dear colleagues.

The assembly hall of Tartu University is a sacred place for many of us, because it is in this hall that the majority of Estonian lawyers and those who work as judges today were conferred their diplomas. There is no other place more dignified than this to celebrate the 90th anniversary of the Supreme Court.

This public ceremony is made even more festive by the fact that the following are honouring us with their presence: The President of the Republic, the President of the Riigikogu, the cabinet on Ministers headed by the Prime Minister, members of parliament, heads of constitutional institutions – everybody, on whom the wellbeing of Estonian state and society depends, are present. There are not many such events in Estonia where all high civil servants would be present. If you allow me, I will draw the conclusion that the highest leadership of the state does not ignore the summonses of the court. Thank you for your law-abidance, or - in more solemn words – we regard this as high recognition and an honour.

More decorum is added to this public celebration by our foreign guests from Finland, Sweden, Denmark, Norway, Latvia, Lithuania, Russia and Luxembourg; as well as by our former colleagues who now work in the European Court of Human Rights, in the European Court of Justice and in the General Court of the European Court of Justice. Dear guests, thank you all very much for coming!

To add some historical context to this assembly we have to recollect the events that took place about 92 years ago and which gave rise to the establishment of our own judicial system. The Manifesto of Estonian Diet to all peoples of Estonia of 24 February 1918 stated that all citizens of the Republic of Estonia, irrespective of their religion, national origin, political views shall be equally protected by the laws and the courts of the Republic. The Manifesto emphasised the protective role of laws and courts, which –in the modern sense – clearly indicates the rule of law aspect.

The actual creation of the judicial system of the independent state began in the autumn of 1918, on the basis of a regulation „On Establishing Temporary Courts“. The regulation was based, to a great exrent, on the 1864 Law on Courts of the Russian Empire, and it restored – with some changes – the judicial organisation that had existed before 1917. Besides the regulatory framework on judicial organisation the regulation included clear guidelines on abolition of special courts for the estates and it contained a decision of utmost importance pursuant to which, finally, the language of the court was to be Estonian.

It was only one and a half months ago, on 1 December, that we celebrated, in this very hall, the 90th jubilee of the Estonian language University. The vernacular University and judicial system created the foundation for the development of Estonian law language, legal terminology and concepts, for the creation of Estonian legal science and legal thinking.

Despite all historical events justice has been administered in the Estonian language for 90 uninterrupted years. Unfortunately, this continuity does not apply to the judicial system as a whole. The tradition of our own independent administration of justice is significantly shorter and more fragmented.

The Supreme Court held its first public session in Tartu Town Hall on 14 January 1920; this is the birthday of Estonia's independent three-level court system.

Ladies and gentlemen!

The general developments of Estonia before World War II did not leave the judicial system unaffected. On the basis of a Decree of the State Head the Supreme Court was relocated from Tartu to Tallinn. On 12 February 1935 the Chief Justice of the Supreme Court, Kaarel Parts, held a speech at a meeting devoted to the relocation of the Supreme Court from Tartu, pointing out that „*the Supreme Court has been able to develop its activities, without being hindered, especially because of the peculiar prerequisites that Tartu and its surroundings offer. Members of the Supreme Court have been able to work here in close connection and relations with the University and the scientific and academic atmosphere thereof.*“ Only five years later, on the 5th of August 1940, the Chief Justice of the Supreme Court issued an order of the day no. 251 on his leaving his office, where he thanked all court employees for their honest service and, among other things, pointed out the following. „*In the Union of Soviet Socialist Republics, which we have joined, holds labour in the highest esteem. The hard-working Estonian people will not lack a dignified place here. May the people of the court contribute to the winning of this dignified place.*“

I do not want to criticize the activities and decisions of Kaarel Parts in those difficult times, yet it must be pointed out that he - being the first and only Chief Justice in the period between World War I and World War II – is more and more becoming a symbol of toughness and stability of judicial system.

These quotes give us an indication of the emotions and way of thinking in the judicial system at that time. We get an idea about whether and to what extent the society of those times valued the principle of separate and balanced powers. We get an idea whether the court was, in fact, independent so that all peoples of Estonia could address the courts for the protection of their rights; or whether the independence existed only as a constitutional declaration, with no protection.

On 22 June 1994, in his speech on the occasion of inauguration of the Supreme Court building, President Lennart Meri said the following: „*Separation and balance of powers is one of the most brilliant generalisations of mankind*", and „*a state will be anaemic and helpless and its constitution weak when the constitutional institutions grab to themselves and concentrate into themselves the functions of other constitutional institutions. Consequently, the growth of one power can only take place at the expense of weakening the others. A state is a sum, it is a whole. The strength of a state is determined by its weakest link. Our bitter constitutional law experience of 1939 to 1940 should be regarded as a warning example in this regard, one way or the other.*"

Dear participants. In day to day life of a state the separation and balance of powers is not a mere abstract principle; it is a rather practical guideline on how to organise community life democratically.

The judicial power has the closest contacts with the legislative and executive powers within the constitutional review court proceedings. The roots of Estonian constitutional review date back to the pre-war activities of the Supreme Court.

From 1919 to 1940 the Administrative Chamber of the Supreme Court had an important function to monitor that the authority of the state is exercised solely on the basis of the Constitution and the laws that are adopted on the basis of the Constitution. Some criticism published in the law literature of that time pointed out a gap in the Constitution of 1920 – namely, the independent watchdog of the Constitution should be determined by the Constitution and this should be the Supreme Court. This criticism was realised only in the Constitution of 1992, where it is fixed, for the first time, that the Supreme Court shall also be the court of constitutional review.

This is how it was born – a unique Estonian phenomenon, integrating the supreme court of general jurisdiction, the supreme administrative court and the constitutional court. There is no dispute that such a model of a constitutional court is much more economical for a small country that a separate constitutional court, as many European states know it. Besides many positive characteristics, such as the interpretations of law that are born out of cooperation between different Chambers of the Supreme Court and the Supreme Court *en banc*, which create more legal clarity, we can not ignore the criticism addressed against this model.

Thus, Rait Maruste, former Chief Justice of the Supreme Court, has expressed his opinion that *efficient protection of human rights and fundamental freedoms is guaranteed only when there exist the individual constitutional complaint and a separate constitutional court.* As the Supreme Court has functioned as a constitutional court for only 17 years, we have to admit that this dispute is very new. The present model of the Supreme Court has room for development in order to afford more effective protection to human rights and fundamental freedoms and to be an effective watchdog of the Constitution. For me the criticism of Rait Maruste indicates his wish to strengthen the rule of law and to find the best mechanism of protection of fundamental rights peculiar to Estonia.

Probably, we have reached the era in our state building where there is no need to copy the legal systems and structure of state bodies of old democracies.

We are not striving to get to Europe, we are in Europe. The Constitution Amendment Act, adopted by a referendum on 14 September 2003, by which we decided, unambiguously, to join the European Union legal system, leaves no room to think otherwise. The question of Estonia's sovereignty within the European Union is somewhat more complex; from the point of view of the courts this is a question of relations between the European Union law and the Estonian Constitution. As a result of this constitutional amendment our constitutional legal system became a rather multi-layered one and complex, because at the time when the Constitution was written the utmost objective was the restoration of the independent state, and the partial waiver of sovereignty was not spoken of publicly.

On 11 May 2006 the Constitutional Review Chamber of the Supreme Court rendered an opinion where it interpreted how the Eesti Pank should function as a central bank in the euro zone after it loses the exclusive right to emit Estonian currency. Uno Lõhmus, the former Chief Justice of the Supreme Court, has reproached his former colleagues that *in the referred opinion the Supreme Court recognised, with elegant ease, the unconditional supremacy of European Union law. The question was not so much in the*

content but in the form, i.e. not whether we recognise the supremacy of European Union law, but how we do it. Whether we do it by undermining the clarity and authority of the Constitution, or by adapting it to local situation. The Supreme Court did not create a new interpretation of the Constitution in the referred opinion, instead it pragmatically respected what the people had stated when adopting the Constitution Amendment Act. The Supreme Court publicly recognised what everybody understands – the European Union law has supremacy even over our Constitution. I find that the criticism of Uno Lõhmus conceals the search for Estonia's own identity in clearing up the relations between the European Union law and the Estonian Constitution. Thank you very much, Rait and Uno, for competent criticism with the aim of advancing improvement. Thank you also for the fact that you have not lost contact with administration of justice in Estonia. Your word has much weight, for you both are former Chief Justices of the Supreme Court and acknowledged lawyers.

My words of recognition and gratitude also go out to Küllike Jürimäe, the judge of the General Court of the European Court of Justice, who has managed – through weekly radio programmes – to explain to the Estonian audience what and how is decided in the European Court of Justice. These programmes have been very comprehensive and easy to follow, explaining all complicated legal issues in plain but precise manner. Thank you!

Ladies and gentlemen.

Both the Constitution and the legal order created on the basis thereof have resisted the first test of time, during which we have witnessed power crises, intoxicating economic rise and depressing decline, sprawling crime and the state's attempts to assert itself. Estonia today has no experience of constitutional crisis, because irrespective of criticism our Constitution, by nature, is a directly applicable modern piece of legislation and not a collection of declarations, and it is also sufficiently universal and flexible.

The Constitution of Estonia who had restored its independence was created at the time when the people were most enlightened. The Constitution was written bearing in mind previous historical and political dangers, with the aim of avoiding repetition of former mistakes. It is probably because of the scanty experience of democratic statehood that the Constitution was furnished with several protection mechanisms to help the state, in the case of re-appearance of weak democratic culture, to find balance and stay on the right course.

This has resulted in the openness of the Constitution to international law. Some authors are of the opinion that when trying to avoid being confined and self-absorbed we have reached the other

extreme. It has been suggested in law literature that it is time for the Supreme Court of the Republic of Estonia to give more thought to the constitutional identity of Estonia. To think about developing and preserving our own peculiar understanding of democracy in the judicial practice of constitutional review. This theoretical opinion is probably a sign that the internationally recognised human rights and rule of law standards have become so deeply rooted in Estonian legal order that they form a basis on which Estonia's own identity in the protection of fundamental rights could be created. This opinion is indicative of new objectives.

We could engage ourselves in long discussions about whether the rule of law principles have become an inseparable part of Estonia's legal culture or whether the struggle to impose and clarify these principles will go on for ever. In other words, the question is whether Estonia is a rule of law state or not. I am of the opinion that although the Supreme Court in its judicial practice has been steadfast in observing the principles of separation of powers, independence of the judiciary, legality of administration and proportionality, the activities of the Supreme Court alone are not sufficient for the strengthening of the rule of law. Ryle of law is very much a question of attitudes in the society and of legal culture. It may take generations to change attitudes.

Rule of law must be safeguarded and developed by all branches of state power both independently and in cooperation, while avoiding interfering into each other's spheres of discretion. We understand that the Supreme Court does not govern the state. Nevertheless, we consider it our duty to check that the state is governed in conformity with the Constitution and the laws. The Supreme Court, being the watchdog of the Constitution, has been taking care of Estonia according to its best discretion in order to strengthen the rule of law.

Customarily, in Estonia judges do not participate in public discussions concerning daily or political party policies, they do not judge what is going on in the parliament or government. That is true. Yet, there are very recent exceptions. The political decision-making process of the government and the legislator is, as a rule, oriented to the future and based on prognoses and beliefs. Each political decision contains a fair amount of belief in the happy future and emotions based on world view. The court gives its legal opinion on the events that have already taken place and does it on the basis of legal arguments. The reasoning behind legal and political decision-making models is different, yet both decisions must fit into constitutional frames. Neither of the models can be regarded as right or wrong, if they are used at the right time in the right place. Just like the court does not render a legal opinion on political decisions, the politicians, too, should refrain from evaluating judicial decisions.

It is clear that no court judgment stands outside criticism, but court judgments are disputed on the basis of legal, not political arguments. This, too, exemplifies the practical implications of the principle of separation of powers.

It is true that we have no facts that the executive has attempted, illegally, to affect the resolution of court cases, yet the myths survive in the society. These myths are fed by the predominantly money- and the executive power centred turn of mind, which – in a misleading and simplified manner – treats the parliament as the extension of the government and the courts as establishments of the Ministry of Justice.

It seems to me that in Estonia there are no impediments to rendering a fair and justified court judgment even in the conditions of intense public pressure. To make a judgment which goes counter to already formed public opinion, a judge must be very responsible and have courage to decide and stand by his legal principles. Unfortunately, it is not always understood that the administration of justice is not a gamble where rising the stakes will enable to predict a judgment to one's taste.

The activities of the judicial system can not be analysed separately from the legal system. Estonian parliament has been able to create, in a very short time, our own written legal order. Unfortunately, the activities of the legislator can not be assessed only on the basis of the impressive number of enacted laws. The quality of legislator's work is characterised by the systematic organisation legal order, legal clarity and constitutionality of regulatory frameworks.

From the aspect of the courts the stability of legal order and legislative conservatism are big values. These values are not counter-balanced by hasty law amendments dictated by day-to-day politics, although, at the first glance and from the aspect of the evening news the decision-makers may feel that quick changes to laws are inevitable. They say that a law is functioning well when a grandfather can tell his grandson that it has always been like it is written in the law. We do not have the experience of our independent statehood extending over generations, and we have to bear in mind that quick changes in legal order waste the resources of the society, beginning with the need to study the amended laws to the ensuring of the application of these laws through the enforcement by state or with the support of state authority.

Dear members of the audience.

What I spoke about where the general issues that are worrying me; but I can not ignore also the more specific problems and more cheerful aspects of the development of Estonian judicial system.

We have to admit that the dispute about the administrative model of Estonian court system and the problems related to this issue are as old as is our independent statehood.

Estonia, having restored its independence, started out with court houses that were falling apart and with non-existent information technology. To put it euphemistically, the judge's salaries and social guarantees were modest. On the occasion of this jubilee we have to point out that in comparatively short time we have achieved success in repairing court houses and improving working conditions. In the last 17 years much more resources have been spent to improve the work conditions of courts than during any other earlier period. Presentable appearance of a court-house paves the way to the increase of the authority of courts. Yet, a house does not administer justice. The judges create the intellectual content of administration of justice. The Courts Act of 2002 ensured to all judges a just salary and strong social guarantees. The effects did not fail to appear. There have been public competitions where ten qualified lawyers run for one vacancy. During the last 5 years the Supreme Court has had the possibility to select the very best among the best as judges. The prestige of judges is high and it must be maintained so, because a mistake made in the selection of judges will last for at least 30 years, as judges are appointed for life. There can be no dignified administration of justice if the position of judge is not dignified.

The judiciary does not exist outside statehood and the judges understand that when the state budget and salaries are reduced, the judges can not go unaffected, if we are to economise solidarily. Nevertheless, one should not get carried away by trying to economise at the expense of the courts. The desire to dramatically cut the number of judges in the conditions where the number of cases is growing, may easily destroy the values that may take decades to restore, because the confidence in independent administration of justice is fragile. If justice is not administered within reasonable time in the courtroom, it will be administered in the streets instead. We have witnessed a period like this in our recent history and this is not something worth re-living.

At first glance it may seem that legal protection is a deeply domestic issue, to be evaluated only by Estonian citizens or – if you wish – voters.

Yet, legal protection is the very sphere where the international obligations that we ourselves have undertaken pose strict and precise requirements concerning what our state must be able to offer our citizens. These requirements apply in all situations – irrespective of economic or political circumstances.

Estonian court system participates in 6 international co-operation networks. Judges have the possibilities of self-improvement in other countries, of exchanging experiences, comparing judicial and legal systems. Very often we have the tendency to compare ourselves to our closest neighbours. This is probably because of the similarity of the climate, because - bearing in mind the historical differences and differences in the experience of democratic rule of law statehood – the experience of our close neighbour - Finland - can not be utilised here one-to-one. Also, the economic wealth of our two states is different. Nevertheless, the developments of these two judicial systems deserve to be analysed and compared.

Last autumn I had the pleasant opportunity to participate in the events commemorating the 200th anniversary of administration of justice in the highest level in Finland, and to listen to the refreshingly northern style formal speech delivered by the President of the Supreme Court of Finland, Mrs Pauliine Koskelo, who is also present here today. While listening to her speech I sometimes felt that she was speaking about the stagnation in the development of Estonian court system. Because the problems she pointed out in regard to the budget of courts, judicial training, the implements available to judges and judicial administration sounded so very similar. Mrs President pointed out, among other things, the following: *„In the creation of central judicial administration Finland has fallen behind others with its system where the administration is exercised through the ministry, and the principal and practical problems of which become more and more apparent. In Denmark, it seems, they have succeeded in creating a central administrative authority, where the structural independence of courts is guarantee, for example, by the fact that the budget is prepared and resources are distributed separately from political interests.“*

We have to ask where are we in the developing of our judicial system. Do we also have the danger of becoming a state where, instead of legal protection, we offer compensations for the lack of the protection, like Mrs Koskelo warned in regard to Finland.

A new draft of the Courts Act, to which the judiciary has given much thought, is currently in the legislative proceeding of the Riigikogu. Thank you, dear colleagues, for the contribution that you made in the better preparation of the draft. The new Courts Act should solve the problems that have emerged in our judicial organisation and create possibilities for the actual realisation of the separation

of powers principle. Uno Lõhmus, while being the Chief Justice, has expressed his conviction that *an independent judicial system does not need a political supervisor in the form of Minister of Justice*. The draft is based on this very principle, yet it is still too soon to state how the legislative proceeding thereof in the parliament will go and what the end result will be. I hope that the Riigikogu will be able to rise above party politics when dealing with the Courts Act, because both those who are in the government and those who are in the opposition need independent judiciary. I have to admit that among the judiciary itself there are the proponents and strong opponents to the draft. It is also true that the draft has not been prepared to please the judiciary, instead it was prepared in order for the Estonian judicial system to be able to develop and offer more effective protection to our citizens.

Lawyers, especially judges, are a conservative lot. This is a good quality for the preservation of standing values, but it should not become a holdback of development.

Dear colleagues! Dear participants !
Goodness has not disappeared, because the Supreme Court is standing in the defence thereof.
Happy anniversary!