International Conference on the 15th Anniversary of Operation of the Senate and Chambers of the Supreme Court of Latvia
"Judicature of the Supreme Court and its role in the development of judicial thought in Latvia"

"The Judiciary – a building stone of independent statehood in a changing Europe"

Märt Rask
Chief Justice of the Supreme Court of Estonia
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Esteemed Members of the Supreme Court of Latvia,
Ladies and Gentlemen,

It is my great honor to address you here in the heart of Riga.

First of all I want to congratulate the Supreme Court of the Republic of Latvia on the 15th anniversary of operation of the Senate and Chambers of the Supreme Court and wish you, on behalf of the justices of the Supreme Court of Estonia, happiness and success in your work.

I also thank you very much for the warm welcome!

The topic of my speech can be divided into two: what 'independent statehood' is and what contribution judges can make to building it up.

1) Changes in law

According to the traditional textbook approach, national self-determination is a principle of international law based on the sovereignty and equality of peoples. Thus, every nation has the right to independent statehood, the right to adopt the constitution, to determine the state order, the structure of state authorities and the economic system, and the right to direct and organise the state and society as it sees fit. In order to be recognised by other states, the nation as the potential bearer of sovereignty and equality must achieve a level of maturity of national self-determination and its true implementation.

Thus, the constitutional law aspects of the state's self-image, the constitutional identity and its international law aspects (recognition by other states, the reasons thereof) are inseparable. By the present day the connections and mutual impact of constitutional and international law have intensified. At least in the European Union public law has become a multi-layer phenomenon whereby constitutional law, European law and classical international law are strongly entwined.

By joining the European Union states have given a large chunk of their sovereignty to the Union. The Union law has supremacy over national law, even the constitution. Therefore,

in the event of a conflict between European Union and national law, state authorities are obligated to apply European Union law.

In Estonia, the conflict of limitation of sovereignty was resolved by adding, before the accession to the European Union, to the constitution an all-embracing provision according to which Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia. By modifying the Constitution a bridge between two separate legal orders, i.e. Estonia and the European Union, was built. This bridge connects these two legal orders of Estonian law and European Union law and brings out their common part. European Union law that since 2004 has been drafted with Estonia's active participation is now part of Estonian law.

Recent developments in European law have resulted in new challenges to constitutional law. With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union became binding upon the Member States. Furthermore, the European Union as an institution is in a process of joining the Convention for the Protection of Human Rights and Fundamental Freedoms. This has created an unprecedented European system for protection of human rights and fundamental freedoms in the framework of which a citizen can address the European Court of Human Rights against the arbitrary conduct of an institution of the European Union. [1]

2) Cooperation in the more complex legal environment

Often, the constitutional courts of states have to express their opinion on the position of European Union law in the legal order of the state. In Estonia this issue rose a year after the accession to the European Union.[2] The Supreme Court *en banc* followed the case law of the Court of Justice of the European Union and pointed out the widespread principle according to which in the event of a conflict with European law the law of the Member States recedes and the principle of supremacy of application applies (European law is applied instead of Estonian law). However, the Court *en banc* considered it to be a national decision and found that it is within the competence of, above all, the Estonian legislature to decide whether in the result of the supremacy of application, Estonian law conflicting with European law should be declared invalid.

Next, the Estonian legislature extended the competence of the Supreme Court in resolving issues of European Union law. The Supreme Court was given the competence

[1] The joining of the Convention makes it possible for a national of the European Union to appeal to the Court of Human Rights against the acts of bodies of the European Union and at least against secondary law. However, the challenging of primary law is an issue, because the Court of Justice of the European Union cannot question it, but according to the overall doctrine of the Human Rights Convention, it cannot fall outside the scope of application of the Convention. Due to the requirement of prior exhaustion of national legal remedies arising from the principle of subsidiarity, one should, in the event that European Union law violates the rights and freedoms arising from the Convention and before addressing the Strasbourg court, exhaust the legal remedies at the level of the European Union. Thus, there may be a situation where European courts that have so far operated in different areas may come to different opinions in a situation where the dispute concerns application of human rights in the areas covered by European Union law. So far it is not finally clear whether the Strasbourg court should have the final word in such matters.

[2] Judgment of the Supreme Court *en banc* of 19 April 2005 in constitutional review case No. 3-4-1-1-05. Available in English: http://www.nc.ee/?id=391.

to issue, at the request of the Parliament, an opinion on how to interpret the Constitution in conjunction with European Union law, in cases when interpretation of the Constitution is of decisive importance for the adoption of a draft act required for performance of the obligations as a member of the European Union. The Supreme Court has given such an opinion once.[3] In addition to interpreting the relevant provision of the Constitution, the Constitutional Review Chamber also specified the criteria of addressing the Court. The Court found that it is necessary to ask for an opinion if the meaning of a provision or principle of the Constitution is, upon its interpretation in conjunction with Estonian and European Union law, unclear or disputable, making the reading of the respective draft act complicated in the Parliament.

The impact of European Union law in the light of the Lisbon Treaty has been analysed by the constitutional courts or their equivalents of several Member States. For instance, *Conseil constitutionnel*[4] in France, *Conseil d'État*[5] in Belgium, and the Czech,[6] Latvian[7] and German[8] constitutional courts. These judgments analyse how much an independent democratic state based on the rule of law can delegate competencies to the European Union and where the borders of such delegation lie. The courts have analysed the essence of the EU's Charter of Fundamental Rights, possible limitations to sovereignty related to judicial cooperation in civil and criminal matters, establishment of the European Prosecutor's Office, and the new procedure that allows for easier amendment of the fundamental treaties of the European Union. The courts that have examined the Lisbon Treaty have come to the conclusion that the Treaty is in accordance with the constitutions of these states. The courts also found that the EU would not become a state or a federal state (federation) once the Lisbon Treaty entered into force, and that the European Union would not be one nation, but would continue to be comprised of multiple nations.[9]

Based on the interpretations of the Court of Justice we have gotten used to considering the supremacy of European Union law all-embracing and unlimited. Thus, in certain areas, states have given control to the Union. According to "compensating constitutionalism," the globalisation of law forces states to give up national control in certain areas, but it is compensated by legal protection at the international level. However, Member States' courts have frequently not been prepared to go that far, but

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[3] Opinion No. 3-4-1-3-06 of the Constitutional Review Chamber of the Supreme Court of 11 May 2006 on the interpretation of the Constitution. Available in English: http://www.nc.ee/?id=663.
[4] Judgment of 20.12.2007 in case No. 2007-560DC.
[5] Opinion No. 44.028/AG of 29.01.2008.
[6] Judgment No. Pl.˝US 19/08 of the Czech Constitutional Court of 26.11.2008.
[7] Judgment of the Latvian Constitution Court of 07.04.2009 in case No. 2008-35-01.
[8] Judgment of the Second Senate of the German Constitutional Court (*Bundesverfassungsgericht*) of 30.06.2009 in cases No. 2 BvE 2/08 – BvE 5/08 – 2 BvR 1010/08 – 2 BvR 1022/08 – 2 BvR 1259/08 – 2 BvR 182/09.
[9] According to the German Constitutional Court, the EU still remains a special union of independent states. The Czech Constitutional Court finds that the EU remains a unique organisation established on the basis of international law. The Latvian Constitutional Court discussed in detail the issue of leaving the Union and called the Union a new political and legal order, but the Court believes the Union respects the identity and the right of self-determination of the Member States, the equality of the Member States, their political and constitutional structures, territorial integrity and independence upon exercising the state authority, incl. upon ensuring security.

have explicitly retained the possibility of turning around the hierarchy arising from the supremacy of European Union law in extreme situations, i.e. to declare provisions of EU law inapplicable.[10] For instance, in Estonia the fundamental principles of the Constitution could be precluded from the scope of application of supremacy.

But besides limiting sovereign rights, the Lisbon Treaty also imposes on national parliaments the responsibility for monitoring that the European Union stays within the limits set to it, especially the principle of subsidiarity. In Estonia, the procedure for processing European Union matters was modified in the *Riigikogu* Rules of Procedure and Internal Rules Act. It was specified how the *Riigikogu* gives reasoned opinions in matters where it believes that draft legislation of the EU is in conflict with the principle of subsidiarity or how the *Riigikogu* demands that the Estonian government submit the respective complaint to the Court of Justice of the European Union.

Thus, one the one hand the scopes of application of national and international law have gotten mixed and become more entwined, but on the other hand cooperation between respective institutions and mutual supervision rights have increased.

3) Judge as an upholder of values

In modern society no power can be fully independent. The former borders of politics and administration of justice are outdated. The Judiciary has been given considerable power over the legislature and the executive upon exercising supervision. According to the Estonian model of diffused or dispersed constitutional review, each judge exercises constitutional review. The activities of judges cannot be viewed as something completely non-political. Judges are no longer merely "the mouth of the law", but the present times have advanced them to creators. From time to time judges have to fill in gaps of law or mend deficiencies of legislation. A court is also the forum of equal opportunities. It gives citizens the chance to speak to a representative of the authority as equals. At any rate, both as supervisors of constitutionality as well as reconciling parties between the state and the individual, judges have become assessors of the values of society. The choices made by judges have social and political consequences. Judges inevitably set the legal limits of democracy.

Judicial modification and adjustment of laws does not mean that the powers are out of balance. In a state based on a rule of law a court does not make amendments and specifications arbitrarily, but based on specific rules and principles. Judgments must be based on legal wisdom – the generally recognised principles and methods of jurisprudence. Any deviation, be it related to refusal to apply or novel interpretation of laws, calls for thorough-going weighing and motivation.

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[10] For instance, the Czech and German constitutional courts retained the competence to exercise supervision over the constitutionality of the EU legislation, however, noting that such supervision can be exercised in exceptional circumstances and *ultima ratio*. The Karlsruhe court explained that under the Lisbon Treaty the power of the European Union has increased and the integration of Europe must not take a form whereby the Member States do not have enough room for filling their economic, cultural and social living conditions with political substance. This concerns areas related to the protection of the fundamental rights and freedoms of citizens, social security and areas that influence cultural, historic and linguistic prejudices.

Thus, the work of judges upon criticising the legislature is made legitimate merely by judgements that are lawful, reasoned and understandable. Judges must know and understand society when making judgments. Administration of justice is based on laws, and laws much be approached taking into account the values of the society.

Upon exercising constitutional review, a court does not express its will like the Parliament does on the basis of the mandate received from the people. A court reminds the legislature how the people as the supreme upholders of the state power have decided on the disputed issue upon adoption of the Constitution. It is a matter of judicial activism how actively a court reminds the legislature of the Constitution.

In summary, in a situation where in the traditional sense the right of national self-determination has shrunk substantially or is much more limited in the European Union, judges and justices have the important role of helping to find the right and just way through the multi-level labyrinth of legal norms.