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THE APPLICATION OF DIFFERENT TECHNIQUES OF INTERPRETATION OF THE CONSTITUTION AS A FACTOR OF DEVELOPMENT THEREOF

Report by

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Every political system needs to be modified over time. First, changes in the environment within which the political system operates may make present rules obsolete. This includes economic, technological and demographic changes. Second, changes in the values and attitudes of the population may generate a need to alter parts of the system. Political preferences are not constant over time. Third, we may want to modify the system because we learn about unintended, unexpected and unwanted consequences of the present institutions.

There are three main types of change in the constitutional arrangement of a country. The first possibility is revision or replacement of the constitutional document by means of the formal amendment procedure specified in the constitution itself. The second possibility is revision of the constitutional framework by means of judicial interpretation. An example is the landmark *Marbury vs. Madison* decision of the U.S. Supreme Court in 1803, through which the principle of judicial review was established. The third possibility is intended or unintended revision of the constitutional framework by means of political adaptation by legislative and executive bodies. An example of the latter in many European countries was the introduction or evolution of parliamentary government.

My report shall concentrate only on the judicial interpretation of the Constitution. In Europe, with the exception of Norway, the American concept was unacceptable for a long time. The principle of supremacy of law prevailed. The principle started to crack after World War I, when a constitutional court was formed in Austria on the basis of Hans Kelsen's model. After World War II centralised constitutional courts were set up first in Germany and then in Italy. There existed specific reasons for the formation of these courts. And later on constitutional courts were also established in those countries where authoritarian regimes were replaced by democratic ones.

One of the most important dilemmas in constitutional law arises from the tension between the basic principle that the Constitution bestows sovereign authority on the people, who have adopted the Constitution and elected their representatives, and the competing principle that, in interpreting the Constitution under the doctrine of judicial review, the courts have the final say over the outcome of political processes.

The tension between judicial review and democracy could be eliminated, or at least reduced, if judicial review were simply a process of mechanically deciding whether an Act of Parliament violates some decision made by the people adopting the Constitution. If the act of interpretation were essentially mechanical and involved no exercise of discretion or will on the part of the judges, the problems of the legitimacy of judicial review in a democratic society would be minimised. In such circumstances, the judges would not be imposing their own value choices, but simply forcing current legislatures to conform to earlier choices made by the people. At first glance it also appears that the problems of the rule of law would be minimised, if a constitutional review judge, when fulfilling his duties, confined himself to "strict" or "literal" interpretation, refraining from interpretations that could be qualified as "liberal" or "equitable". In general terms, "strict" interpretation rests on the sole use of linguistic and genetic arguments, while "liberal" interpretation requires the implementation of other legal arguments as well. But more often than not, it is difficult to draw a line between "strict" and "liberal" interpretation in judicial practice.

The same can be said about such concepts as judicial activism and judicial self- restraint. The distinction between "activist" and "non-activist" approaches to constitutional adjudication is not clear. Even in most deliberately "passive" versions, constitutional interpretation requires a certain amount of personal choice sitting in the relevant instances. It is probably true that a decision is most likely to be qualified as "judicial activism" if it limits the constitutional freedom of the political branches of government in a way that does not flow quite clearly from the text of the Constitution itself or from precedent.

Interpretation in the sense of specifying the meaning always has to do with language. If the language we use were always unambiguous, there would be no need for interpretation. The problems of law language and general language are the same: it is a good thing that a language is rich in expression and flexible, difficulties are caused by the unavoidable impreciseness. Impreciseness may consist in either the lack of clarity or in semantic ambiguity. Many constitutional provisions are vague and ambiguous thus calling for the exercise of discretion in the process of interpretation. The articles are norms with great openness, and margins of interpretation that are hard to delimit. Let us take as an example an article devoted to the family. In Estonian Constitution it opens with the sentence "The family, being fundamental to the preservation and growth of the nation and as the basis of society shall be protected by the state all" (§ 27). Or the last paragraph of the same article: "The family has a duty to care for its needy members". As the next article provides for a subjective right to state assistance in the case of need, the question arises as to the extent of obligations the state and the family have in supporting a needy person. What is meant by the term "family"? Does it mean only a family founded on marriage? Whether there could be a family in the legal sense where father and mother lived together unmarried with their child? Life offers a variety of examples of other forms of family. At present one vigorously argued question is how the constitutional concept of marriage is to be understood.

But this is not the only problem. Constitutional principles involve numerous collisions, such as those between freedom of expression and a person‘s honour and good name or between the right to engage in commercial activity and nature protection.

The openness and breadth are not defects of the Constitution. It is difficult not to consent to the ideas of the Former President of the Federal Constitutional Court of Germany Jutta Limbach, who has written that "A constitution can generally be regarded as successful if it is couched tersely and vaguely. For a constitution that were not open and therefore to some extent capable of ever-new interpretation would inevitably soon come into hopeless contradiction with its object. That is why a constitution has to be understood as a living instrument that has to be interpreted in the light of current circumstances"[1]. She added: "We must accordingly concede that judicial decision making is not only law-finding, but always also law-making. The judge creates law in the process of finding a decision. Adjudication thus always has a political dimension, too. This is certainly true of constitutional jurisdiction".[2] The President of the Supreme Court of Israel, Aharon Barak, when characterising his court, has often clearly underlined the role of law-making. "We are very active in making law. It is a non formal court. Substance, not form is its message. Our tool is, of course, interpretation - teleological interpretation. We do not ask what was the intention of Parliament when drafting a statute; we ask what the purpose of the statute is. Both in interpreting and developing our common law, we often use the general principle of our legal system. We created interpretive presumption, by which we presume that the purpose of every statute is to further the basic values of the Israel legal system".[3]

The term "living instrument", used by Jutta Limbach to characterise a constitution, is a loan from the vocabulary of the European Court of Human Rights, and this is the principle to be observed when interpreting the European Convention on Human Rights. On numerous occasions the Court has emphasised that the Convention is "a living instrument which should be interpreted according to

[1] Jutta Limbach. *The Concept of the Supremacy of the Constitution*. The Modern Law Review, 2001, Vol.64,No1,p.8

[2] Jutta Limbach, p.8

[3] A. Barak. *Some Reflections of the Israeli Legal System and Its Judiciary*, vol 6.1 Electronic Journal of Comparative Law, (April 2002) - http://www.ejcl.org/61/art61-1.html

present-day conditions". The standards of the Convention are not regarded as static, but as reflective of social changes. This *dynamic or evolutive* interpretation of the Convention implies that the Court take into account contemporary realities and attitudes, not situation prevailing at the time of the drafting of the Convention in 1949-1950. The Court argues that especially important for the further development of the law is *teleological or purposive* interpretation. The Court has emphasised the importance of "real and effective" safeguards for individuals. In *Airey Case* (1979) the Court considered whether the applicant had had an effective right of access to the courts for obtaining a separation from her husband. Although Article 6 of the Convention was not held to guarantee a right of free legal aid for every dispute relating to a "civil right", the Court accepted that this provision may sometimes compel the State to provide for the assistance, if is indispensable for an effective access to court. There is also an obvious link between the recognition of certain positive obligations for the state and the principle that the Convention rights are intended to be practical and effective. There are a number of areas where it is established that there are positive obligations on the state to take action to prevent Convention violations. The positive obligation on states in Article 2(1) to protect everyone's right to life has been interpreted as creating a positive duty to safeguard lives. In *Osman vs. United Kingdom (1998)* for example, the Court found a positive obligation to take preventive operational measures to protect those whose lives were at risk from criminal attack.

In case of *I.vs. United Kingdom (2002)*, changing its previous case-law on the rights of transsexuals, the Court expressed the referred principles in a nutshell.

"51. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foresee ability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, the *Cossey* judgment, p. 14, § 35, and *Stafford v. the United Kingdom* [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR, §§ 67-68). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above-cited *Stafford v. the United Kingdom* judgment, § 68). In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (see the *Rees* judgment, § 47; the *Cossey* judgment, § 42; the *Sheffield and Horsham* judgment, § 60).

52. The Court proposes therefore to look at the situation within and outside the Contracting State to assess “in the light of present-day conditions” what is now the appropriate interpretation and application of the Convention (see the *Tyrer v. the United Kingdom* judgment of 25 April 1978, Series A no. 26, § 31, and subsequent case-law)."

The proportionality principle, which implies the need to strike proper balance between various competing interests, permeates the whole interpretation of the Convention. Some deviation from the fundamental freedoms guaranteed will be considered acceptable under Convention if the proportionality principle is observed. The principle requires, in particular, that the extent of such deviation is not excessive in relation to the legitimate needs and interests which have occasioned it.

So, the constitution of a state develops with the help of certain principles or interpretation methods. This principles are very often the same, yet different courts may underline different aspects. In Estonia, the Constitution itself seems to encourage judges to interpret the Constitution as a "living instrument". According to article 152,

> "The Supreme Court shall declare invalid any statute or other legislation that is in conflict with the provisions and spirit of the Constitution."

The “spirit of the Constitution” is mentioned also in article 10 on the development of fundamental rights:

> "The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law."

What is meant by the “spirit of the Constitution”? The clause indicates that constitutional interpretation should be much more than determining the meaning of the words used in each provision of the Constitution.

The Supreme Court proceeds from R. Alexy‘s idea that a constitution seen as a substantive basic order is more than a text, more than a set of formulations.[4] In addition, it contains a system of principles. A system of principles cannot move or develop itself. It is moved by rational argumentation. Thus, the spirit of the Constitution is composed of three elements: (1) principles, (2) the system that these principles make up, and (3) rational argumentation. Together the three create a systematic whole on the basis of which conclusions on the existence of concrete rights and duties can be drawn.

Linguistic arguments can serve as a starting point when resolving cases. Also reference to the intent of the drafters of the Constitution, that is genetic arguments, may be of significance. But if these simple means do not solve the problems, systematic and general practical arguments have to be employed.

One constitutional principle frequently referred to by a constitutional judge can be found in article 11:

> *"Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted."*

The criterion "necessary in a democratic society" has been taken from the European Convention on Human Rights and Fundamental Freedoms. The Supreme Court is of the opinion that

[4] See R. Alexy. *Põhiõigused Eesti Põhiseaduses (Fundamental Rights in the Estonian Constitution)* - Juridica 2001, special edition, pp. 88-89.

> "Restrictions must not prejudice legally protected interests or rights more than is justifiable by the legitimate aim of the provision. The means must be proportionate to the desired aim…"[5]

The review of constitutionality of a provision of law or a measure may conventionally be divided into two steps: firstly, an infringement of a fundamental right must have a legitimate ground and secondly, the infringement must be proportional. The principle of proportionality requires weighing and balancing: We have to put a fundamental right on one scale. On the other scale we have to place the reasons justifying the infringement of the fundamental right, which deserve recognition in a democratic society. According to the criterion applied by the Supreme Court a measure infringing upon a fundamental right is necessary in a democratic society only if it is suitable for achieving the alleged aim, if it is necessary and proportionate in the narrower sense.

On the one hand the principle of democracy empowers only a directly elected parliament to set restrictions on fundamental rights and freedoms. On the other hand, the clause "necessary in a democratic society" is also binding on the legislator, a fact that has repeatedly been stressed by the Supreme Court. It is the task of courts to assess whether a law limiting or restricting fundamental rights or freedoms is necessary in a democratic society and does not distort the nature of the rights and freedoms restricted.

Another example illustrates the interpretation of the Constitution, more specifically article 12 (1) on everyone‘s equality before the law. These words first and foremost grant equality with respect to the application of the law and also contain the requirement to implement valid law impartially and uniformly in respect of everyone. According to the Court, the spirit of the Constitution requires that

> *"the first sentence of article 12 (1) of the Constitution is to be interpreted as also meaning the equality of legislation. The equality of legislation requires, as a rule, that persons in similar situations must be treated equally by the law. This principle expresses the idea of essential quality: those, who are equal, have to be treated equally and those, who are unequal, must be treated unequally. But not any unequal treatment of equals amounts to violation of the right to equality. The prohibition against treating equal persons unequally has been violated if two persons, groups of persons or situations are treated arbitrarily unequally. Unequal treatment can be deemed arbitrary if there is no reasonable justification for it."*[6]

Comparative arguments have an important role among interpretation methods. The Supreme Court uses judgments of international courts, especially those of the European Court of Human Rights, but also the judgments of constitutional courts of other countries. In some cases our judgments include direct references, often we take the referred judgments into account when interpreting our Constitution without a direct reference.

I could not cover all possible techniques of interpretation within the framework of this presentation. I was trying to deal with the most essential ones, applied both by the European Court of Human Rights and the Supreme Court of my country.

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[5] Judgment No 3-4-1-6-2000.

[6] Judgment No 3-4-1-2-2002.