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Abstract

Separation, balance and equality of powers as it is stipulated in § 4 of the Constitution of the Republic of Estonia can not be taken lightly when applying it; instead, it should be based on the concept and provisions of the Constitution. Therefore, changing the concept of the Constitution is not in accordance with § 4 and separating the court system into partly belonging under the administration of the executive power, taking the court system as a part of the law-enforcement body, considering the court of first instance and the appeal court to be independent solely on the fact that judges are sovereign in their rulings, excluding other activities of the court under the administration of governmental institutions, ignoring the restriction of fusion and allowing the right of the courts to self-regulate to be given to the Ministry of Justice and to its directors of administration to regulate. By that the concept of separation of powers that was adopted during the referendum has been altered and people’s faith in the separation, balance and equality of legislative, executive and the court power (court system) has been lost.

According to § 4 of the Constitution of the Republic of Estonia, the court system should be separated from other powers and it should balance them and appear this way to the citizens in order for them to have trust in the courts as independent and objective institutions.

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1. Introduction

Democracy and the separation of powers are both constitutive features that characterise a state based on the rule of law (Narits, 2002). Fixing these concepts in a state’s constitution is a prerequisite for the development of the state based on the rule of law and the realisation in practice proves how close by or away the given state and its people are from a state based on the rule of law. Concentration of absolute power and the absence of control present a danger to democracy and to the concept of a state based on the rule of law, which has been comprehended since John Locke and Charles de Montesqueieu till nowadays by people who appreciate a democratically organised state. Furthermore, in order to operate a social environment steadily, a certain division of work is necessary between the legislative, executive and judicial power, which will only be effective if the named powers are equal, independent, separated and balanced.

2. Independent Third Power

The fact that the principle of separation and balance of triple-division power was explicitly incorporated into the Constitution of the Republic of Estonia (hereinafter PS or the Constitution) as an essential condition for running a state and for accomplishing the rule of law (RT 1992, 26, 349; RT I 2003, 64, 429) is the achievement of the composers of the Constitution and that of the people who adopted it during the referendum. It is an effective remedy to oppose the concentration of absolute power “… because this is the only method for keeping governmental power in the boundaries of the law” (Randla, http://www.parmu.ee/raulpage/kodaniku/oigusedhtm/).

The principle of separation, balance and equality of powers and reciprocal control does not exclude the possibility of cooperation. Contrarily, this democratically organised states´ principle is a substantial assurance that should prevent the concentration of absolute power and it should promote the legality of governmental authority. This is necessary for dividing governmental power between different branches (legislative, executive and judicial branches), for the distribution of functions to be most appropriate. These three branches of power constitute three components of a unified system, which proceed from a common goal to operate in the interest of the Estonian state and to cooperate according to the concept and provisions of the Constitution of the Republic of Estonia.

The named equal, independent and mutually balanced branches need to meet the requirements of two fundamental principles for their professions, which are the right of self-regulation and -estimation within the limits of their capacity. If one of these branches starts to organise the activities of another, then this is the most serious violation of the concept and provision of § 4 of the Constitution.

The court has never attempted to regulate the activities of the legislative power nor given operating instructions to governmental institutions. Nevertheless the executive and legislative branches are doing this to the legislative power while ignoring the provisions of the Constitution.

The authors of the commented edition of the Constitution of the Republic of Estonia consider this as self-evident and declare that, according to the law, “… the right
for self-regulation is not given to the courts, except the Supreme Court, because the administration of the court of first instance and the appeal court is in the competence of the executive power (Ministry of Justice)” (Constitution of the Republic of Estonia, § 146, com. 15).

Here lies a question whether by ignoring the superiority of the Constitution it is possible to change its provisions by other legal acts, even those provisions that according to PS §162 can be amended only by a referendum (Chapter I General Provisions and Chapter XV Amendment of the Constitution).

People often attempt to declare when interpreting PS § 4 that the independence of the court is the autonomy of decisions by judges from other branches, based only on the Constitution and laws.

Evidently, we can talk about the independence of the court as a sovereign institution only when and to such a degree as the activities of the court as an institution are organised, when its primary function is the distribution of justice.

The fact that different registries have been integrated to the court can not be the justification for declaring the court a part of the executive branch. Preferably, these registries should not belong to the court. Contemporary understanding about the distinction of the institutional and personal section of the judicial power is indicated in the above-mentioned commented edition of the Constitution (Constitution of the Republic of Estonia, § 146, com 14, p. 611).

Having split the judicial power by laws into Supreme Court, which is equal, independent and has a balanced right for self-regulation, and to the first instance and appeal court where the right of self-regulation is administered by the executive power (Ministry of Justice) (RT I 1995, 15, 172), which also administers the Prosecutor’s Office and the prisons, an unbalanced system of powers has been created legally. If to add the police department here, then we would have a strong executive power structure, whose administrative field would include pre-trial procedure, public prosecution, court session, serving the punishment. Then it remains to find a Duce, Führer or a Riigiisa who would exploit the imbalance of state powers.

The fact that problems with the independence of the judicial power are relevant was also indicated during the constitutional law seminar by the former Chief of Justice of the Supreme Court, Uno Lõhmus, who emphasised that a court who administers justice should be independent not only when making judgements but also in other fields of its functions. This is necessary in order to protect members of the society from tyranny. “The independence of courts as institutions and of judges is related to such a degree that distinguishing them would be inconceivable,” (Lõhmus, http://www.euroskepsis.ee/ laine/laine2.htm) noted Uno Lõhmus, who also pointed out that the independence of judicial power has been in the focus of attention in international arena. This issue was debated in the meeting of ministers of justice from the states of the Council of Europe in Kishinev, in the summit of the Chief of justices of the highest courts in Europe in Ljubljana, in the annual meeting of the International Association of Judges in Taiwan. These issues were also discussed in the Council of Europe, in the Ministers Committee recommendations in 1994 and were adopted in 1998 in Strasbourg and in the European Charter on the Statute for Judges.

Moreover, the tendency in Estonia is shifting towards diminishing of the judicial power and making it even more dependent on the executive branch. These drifts are possible because the judicature has practically been discouraged from self-regulation and the representative of the executive body, the Ministry of Justice, has incurred it.

The acknowledgement and fulfilment of constitutional provisions that have been fixed in the Constitution of the Republic of Estonia should be on the agenda
especially now, since we have become a member of the European Union and the regulation of the legal order and fulfilment or disregard of the Constitution indicates the level of the legal culture. How is the observation of § 4 of the Constitution arranged in Estonia? Has the Constitutional Review Chamber of the Supreme Court interpretation of § 4 of the Constitution, made on 20.12.1996, reached the knowledge of the officials in the executive branch and maybe they even implement it?

For those who do not understand the concept of separation of powers, since there is no legal definition of separation and balance of powers, I will quote the interpretation of the Supreme Court, which assists to comprehend the essence of the problem. The Constitutional Review Chamber of the Supreme Court decision of 20.12.1996 declares the next:

“According to the Constitution executing the public authority democratically and constitutionally, it needs to be founded on law (the preamble) and on the principles of separation and balance of powers (§ 4), democratic rule of law (§ 10) and on legitimacy (§ 3 section 1). In order to comply with the named principles and to protect the fundamental rights and freedoms of everyone, the legislative and the administrative functions need to be differentiated and precisely regulated and the fulfilment of their functions needs to correspond with the Constitution and the acknowledged provisions of the theory of law. The vagueness of competent and exceeding the capacity impairs the legal certainty and is a threat to the state founding principles in the Constitution, as well to the fundamental rights and freedoms of everybody” (RKPJKo 20.12.1996 - RT I 1997, 4, 28).

According to the Constitution of the Republic of Estonia, “Riigikogu (the parliament), the President of the Republic, the Government of the Republic, and the courts shall be organised on the principle of separation and balance of powers” (PS § 4). § 146 specifies that “…the courts shall be independent in their activities and shall administer justice in accordance with the Constitution and the laws.”

Although the excitement about the independence of the courts, meaning the practice of the above-mentioned paragraphs of the Constitution, has faded and the judiciary have accepted the limitations established in the new Courts Act (hereinafter KS, RT I 2002, 64, 390) and have independently surrendered, without the dictation from the executive branch, the right to regulate their activities, we still should contemplate about the coherence of the provisions and the meaning of the Constitution, as well as whether the provisions of the Constitution can be annulled with a lower-level legal act.

The separation and balance of powers holds a great political significance. In a democratic parliamentary republic the foundation of the state’s regulation is determined by this concept. One of the requirements of the separation of powers is that independent state institutions, possessing the right of self-regulation and -control, would fulfil their competence according to the Constitution autonomously (Eesti Vabariigi Põhiseadus, 2002). According to the principle of separation and balance of powers, the exercise of the legislative branch is in the competence of Riigikogu (the parliament), executive branch in the competence of the Government of the Republic and the judicial branch in the competence of the courts. None of these named institutions can have the prejudgement right over the other in fulfilling their constitutional functions or regulating their activity.

3. The System Was Split into Two
The Constitution regards the courts as a single three-stage legal system and does not split it into self-regulating and not self-regulating parts. Therefore, the Constitution stipulates that courts, meaning the entire court system and not only the Supreme Court, are independent in their activity (their institution is independent). There are no provisions in the Constitution indicating that a part of the court system should be administered by the executive authority. The solidarity and self-sufficiency of the courts is also pointed out in § 152 of the Constitution, which stipulates that “… court shall not apply any law or other legislation that is in conflict with the Constitution.”

The court can control the legality of a legal act of the public authority when deciding a case and therefore, it has the role of protecting individuals against the unlawful acts and activities of the executive authorities (Lõhmus, http://www.euroskepsis.ee/laine/laine2.htm).

It seems that the executive branch is ambitious everywhere, because otherwise it would not have been mentioned in the annual meeting of the International Association of Judges, where it was emphasised that courts need to be protected from the legislative and executive authorities, first of all from the pressure of the executive branch in administration of justice or in other fields of activity.

How is the independence of courts regulated according to the Constitution of the Republic of Estonia in practice?

With the Government of the Republic Act of 13th December 1995 (RT I 1995, 15, 172) the court system was split into two.

Professional activities and the legal services (in other words, their institutional independence) of the court of first instance and the appeal court have been given to the Ministry of Justice to administrate. The Supreme Court was left independent. The ambitions of the executive authority are also apparent due to the fact that in one of the draft versions of the Courts Act an attempt was made to subordinate the Supreme Court to the Ministry of Justice, by making them answerable to the Minister of Justice. However, this plan was dropped.

According to § 39 of the Courts Act, enacted on 19th of June 2002, the administration of the court of first instance and the appeal court is handled in cooperation between the Council for Administration of Courts and the Ministry of Justice. Courts fulfil the obligation of administrating the court if it is imposed on them by law or if the Ministry of Justice has transferred the right of administration of the courts to the courts.

Although the Minister of Justice does not have the right of discipline and order over judges, he has the full capacity to administer the court of first instance and the appeal court. This right is executed through the head of the administration, who is appointed by the Minister of Justice and who exercises the executive control over the court and through whom the institutional control of the court is carried out.

Therefore, the executive authority in the courts’ activity is apparent since the Minister of Justice appoints the head of administration to the court (or to more courts at the same time) who is not answerable to the Chief of justices of the court, who organises everyday activity of the court, regulates the usage of funds, commands the budget, supervises the organisation of accounting, appoints the court employees, manages the registry and the probation departments, approves the composition of the court’s structure and of the court’s employees (excluding the function of administration of justice), prepares (in cooperation with the court’s Chief of justices the draft budget for the court and presents it to the Minister of Justice, and fulfils other obligations appointed to him in the court regulation.
Moreover, the Minister of Justice names the range of jurisdiction of the county, city and administrative courts, the exact location of these and the appeal courts, the number of judges, the Chief of justices of the courts and also releases them. At the same time, the Minister decides whether there is a registration department and probation with the court or not and decides the number of appeal court judges.

If all of this is not taking away the self-regulation right from the courts and giving it to the executive branch, then what is?

4. Three Bodies without Rights

In order to seemingly involve the judges in the activity of the judicial power, a full court of judges, the Court *en banc*, and Council for Administration of Courts are established.

What is their contribution to the administration of courts?

A full court (where all judges of the particular court belong to) approves the division of task plans of judges, provides an opinion on the appointment to office and on the release from office of the Chief of Justice, makes recommendations to the Chief of Justice concerning the preparation of the draft budget of the court and the use of budget funds (although in fact the head of administration drafts the budget and decides it usage), and perform other duties arising from law and the internal rules of the court. Therefore, the role of the full court is only to give opinions and the court’s right of self-regulation is non-existent.

Maybe the court’s right of self-regulation has been given to the competence of the court *en banc*?

The Court *en banc* is comprised of all judges of the Republic of Estonia and it is convened regularly once a year. The extraordinary Court *en banc* may be convened by the Minister of Justice or the Chief of Justice of the Supreme Court.

The task of the Court *en banc* is to hear reports by the Chief of Justice of the Supreme Court and the Minister of Justice, elect its representatives in the Disciplinary Chamber, in the judge’s examination committee, in the training committee and the advocates’ professional suitability assessment committee, in the prosecutors’ competition and evaluation committee, approve the code of ethics of judges, elect members of the Council for Administration of Courts, discuss problems of administration of justice and other issues concerning courts and the work of judges. Therefore, the Court *en banc* has only the role of hearing out and electing representatives, lacking the right of decision-making and no sign of the right of self-regulation.

Maybe the court’s right of self-regulation is left in the competence of the Council for Administration of Courts? At least the name of the Council is promising.

The Council is comprised of six judges and six non-members of the judiciary (two members of the *Riigikogu*, two representatives of the Ministry of Justice, representatives of the Chancellor of Justice and of Bar Association).

The Council provides an opinion on the candidates for a vacant position of justice of the Supreme Court and on the release of the judge; and discusses the reports of the Chief of Justice of the Supreme Court and other issues at the initiative of the Chief of Justice of the Supreme Court or the Minister of Justice.

The Council grants approval for the determination of the territorial jurisdiction of courts, of the structure of courts, exact location of courts, for the premature release of judges, determination of the number of lay judges, internal rules of the courts,
determination of the number of candidates for judicial office, appointment to office of candidates for judicial office, as well for the payment of special additional remuneration to judges. This law, however, does not specify whether the approval of the Council for Administration of Courts is to the Minister as decision-maker a recommendation or an obligation.

If to consider that the Council also grants approval for the determination of the internal rules of procedure of the Supreme Court (KS § 41, subsection 1(7)), which will be approved by the Supreme Court en banc (KS § 33, section 1) to whom the Council cannot make any dictations because of the independence of the Supreme Court from the legislative and the executive branch, and considering that according to KS § 41, section 2 and § 43, sections 1 and 3, the Minister is obliged to take into account only the principles of drafting of and amendment to the annual budget of the courts, it can be assumed that the Council’s consent is only a recommendation to the Minister.

If to compare the right of self-regulation and decision-making of the courts and the decision-making power given to the Minister of Justice in the court system, it cannot be claimed that the activities of the court are organised according to the stipulations of § 4 of the Constitution about the separation and balance of powers (Nuuma, 2004).

The vice-chancellor of courts in the Ministry of Justice claimed that the purpose of the above is prior to prove that the concept of separation and balance of powers has not been assured in Estonia and the scheme of administration of courts in cooperation between courts and the Ministry of Justice has been selectively criticised, but the fundamental guarantees for the independence of the judges has not been considered (Sarapuu, 2004).

Seeing that there might be others who have misunderstood the opinions, I consider it necessary to point out once again some facts.

Before repeating the prime principles of separation, balance, independence and suspension of powers, I have the pleasure to recognise that the primary representative of the executive power who administers the first instance and appeal courts reacted to the above-mentioned opinion. If the executive branch has found it necessary to create a high position to administrate the courts and it is truly carried out, then at this point I can conclude with only considering the realisation of the stipulations of the Constitution as declared by John Locke and Charles de Montesquieu in their theory of the separation of powers.

Even the one who only knows his ABC understands that the given opinion has not compared the Estonian and US understanding of the separation and balance of powers; the administration styles or the guarantees for the independence of judges in Estonia has not been compared to Finland, Sweden or any other country; there were no and could not have been any objections to the independence of Estonian judges when solving cases and to the guarantees ensuring the independence of decisions of the judges (for example, the lifetime nomination, laws relating to the remuneration, special order for discharge etc). Therefore, the reviewer mistakenly claims that as the author of the opinion I set the purpose beforehand to prove that the independence of decision-making by judges in Estonia is not assured. I repeat once again that I have never questioned the latter and neither do I question the cooperation between the courts and the Ministry of Justice or even the genuine desire of the officials in the executive branch to relieve the courts from the burden of self-regulation and the right of decision-making, considering the right of judgement to be enough for the fulfilment of § 4 of the Constitution. However, the above-mentioned is only a part of the independence of the court system as an institution.
I agree with the officials in the Ministry of Justice that there is a problem of shortage of suitable candidates, lack of knowledge about amendment to laws etc. Therefore, there is no need to discuss the matters that were not mentioned in the opinion or in what the opinion coincides.

5. Conclusions: Ten Prerequisites for the Independence of the Judicial Power

In conclusion I think it is necessary to point out that:

1. When considering the separation and balance of powers different positions are often taken, as it was pointed out by the judge in the European Court of Human Rights, Rait Maruste (Maruste, 2004) This might be the consequence of the opinion and experience of the soviet times that courts are a part of the legal protection system that is supervised by the state authorities and originating from the idea of constitutionalism and the simplification of the courts in a democratic society. This has caused the difference in opinions and attitudes towards the principle of separation of powers.

2. The constitution does not divide courts into administrable by the executive authority and into not administrable Supreme Court, the courts are regarded as a unified system with all its sections. There is no other way of interpreting the provisions of § 146, 148 and 149 in the Constitution.

3. Since courts have the right and obligation to decide over the superior virtues of the mankind, make final rulings about the quality of freedom, life, property, honour and dignity etc, it is significantly different from other institutions and this is why in a democratic society it cannot be reduced to the same line as a segment of the system of legal protection bodies (Maruste, 1997).

4. The separation of powers assumes coordination and control between powers rather than subordination relationships. According to § 4 of the Constitution, the powers stand together as equals, having autonomy within their competence. This however is not achieved if one of the powers is subordinated to another.

5. According to § 146 of the Constitution, the court (meaning the entire court system, because otherwise there should be a separate stipulation about this) “… is independent in their activities and shall administer justice in accordance with the Constitution and the laws.” The activities of the court include not only passing of judgements but also activities of the entire institution, their financial administration, self-regulation and right of decision. If the institution has been left without the right of self-regulation and the courts have only seemingly been involved in this, then this is not in accordance with the stipulations and the concept of § 4, 146, 148 and 149 of the Constitution. The authors of the commented edition of the Constitution also emphasize that a requirement for the separation of powers is the independence to carry out their own functions (Eesti Vabariigi Põhiseadus, 2002), but at the same time they try to explain how this independence does not
exist to the main part of the court system. Since there are few constitutions in the world where the concept of separation and balance of powers is stipulated as explicitly as a primary principle and privileged norm in the constitution that can only be changed by referendum, then neither the parliament, government nor the courts have the right to revise this. Not without effect has R. Maruste pointed out a warning by Montesquieu: “For no one to abuse power, consequently from the essence of things powers need to be controlled by powers” (Maruste, 1997).

6. The separation of powers is connected with the restriction of fusion, meaning the restriction to unify professions in two powers. This requirement is breached by the Minister of Justice by appointing the head of administration for the courts, who in practice does not conform to the position of Chief of Justice, who cooperates with the Minister and who has the full power to run the court, which in accordance with § 4 of the Constitution is questionable.

7. The more depoliticised, independent and developed the court is, the more it can proceed from the principles of independence, impartiality, autonomy and judicial argumentation. Moreover, the court should not only be separated as a system from other powers and balance them but it should also seem to be like this (Kergandberg, 1996). If people lose faith in the independence and impartiality of courts, then the same processes will take place as with one of the branches of executive power, the police department, which is not trusted by people and where the number of reports about incidents is declining, although the crime rate has not decreased.

8. It has been claimed that the concept of separation of powers lacks a universal, judicially acceptable legal definition. What is meant by the separation and balance of powers is explained in the works of Charles de Montesquieu. Since the society is constantly changing, the concept we should consider under the separation and balance of powers has been explained by the Supreme Court of Estonia (RT I 1994, 80, 1377; RT I 1997, 4, 28; RT I 1998, 36/37, 558).

9. When contemplating over the present topic it needs to be noted that during the last years, through the political and legal integration, the Continental Europe and the Anglo American considerations have converged. Is it not time to apply the principles from the constitution as important legal norms having priority? Democracy would captivate and the threat of power being converged to the hands of the executive branch would decrease. That is what has happened in recent history repeatedly. The belief in the commented edition of the Constitution about § 146 is that “The assurance for the independence of the court system is the separation of powers that makes the court independent from other powers. The lack of hierarchy in the court system in relation to other state powers is closely tied to the concepts of democracy and the assurance of fundamental rights and freedoms of people” needs to be fully supported. But this can be assured only if the entire court system is actually independent and not only judges when solving cases.

10. The convergence of the legislative, executive and court branch in their operative activity has been happening and will continue to happen. But this should be done within strict constitutional limits of the separation and balance of powers, which has been adopted in the referendum.
Currently, intensive work is going on for the elaboration of the Constitution for the European Union, which will be binding also for Estonia. Therefore it is time to prepare a new and more modern version of the Estonian Constitution, “… in order to achieve the necessary legal clarity and certainty and also a better understanding…” as it has been repeatedly pointed out by the European Court of Human Rights judge, Rait Maruste (Maruste, 1997).

It seems that in the new version of the Constitution, the separation of powers as a state order should not be declared or it should be actually fulfilled according to the stipulations and concept of the Constitution.

Apparently, there are some changes in the attitude towards the independence, equality and separation of the court system. This was promised when the Chief of Justice of the Supreme Court recognised that the administration of the courts needs to be changed (Rask, 2005). It remains to be hoped that within conformity with the Constitution.

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