"Constrained" Constitutional Courts as Conduits for Democratic Consolidation

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Many constitutional courts, particularly in Central and Eastern Europe, have more power than the "constrained court" model of judicial decisionmaking suggests because they operate in an increasingly international environment. By analyzing the Estonian Supreme Court's adjudication of minority linguistic rights, we show how even a new court can act as a "conduit" for democratic reform by identifying for legislators national constitutional paths along which domestically disliked but internationally defined democratic reforms can be pursued, preserving national integrity while acknowledging international reality. International pressures, while constraining courts, thus can free them from *national* constraints while allowing them to imprint their own vision.

Constitutional courts in the consolidating democracies of post-Communist Europe face a daunting task. They "must do what U.S. Chief John Marshall is credited with having done: transform public policy disputes into questions of constitutional interpretation that can be decided by texts, procedures, principles, and rules that are generally accepted as legal and not political" (Schwartz 2000:5). Other studies echo this endorsement of the critical role of the judiciary in the transition to democracy (Stotzky 1993), a role which depends heavily on court decisions, even unpopular ones, being accepted, because courts are viewed as appropriate institutions for making such decisions, and a "commitment to procedure and process trumps concerns over outcomes" (Gibson & Caldeira 2003:2). Yet studies of judiciaries in consolidating democracies argue that such courts operate in an environment of national political constraints that compromise their own institutional legitimacy and decisional efficacy (Vanberg 1998; Epstein, Knight, & Shvetsova 2001).

If even the highly respected U.S. Supreme Court can only offer a "hollow hope" of bringing about social change (Rosenberg 1991), we might expect that the constraints faced by the newly established

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constitutional courts of Central and Eastern Europe would render them largely ineffective in legitimizing controversial public policy. In contradistinction to such a "constrained court" view, we argue that the case of the Constitutional Review Chamber (CRC) of the Republic of Estonia suggests that courts in the consolidating democracies of post-Communist Europe are able to loosen their national political constraints and act as "conduits" for significant democratic reform—even when their own institutional legitimacy is not well-established.

Our assertion is that constitutional adjudication by these "constrained" courts can "channel legislative initiative down [particular] paths" and "reconstitute the choice contexts in which legislative decision making takes place" (Stone Sweet 1998:337) and thus help facilitate democratic consolidation. We suggest that this occurs when the constitutional court negotiates a *national* space for policymaking that is consonant with recognized but still resented and resisted *international* constraints on national political actors. In negotiating this space, through constitutional adjudication, the court's decision making serves both nationally defined interests of democratic governance and the judicial goal of securing judicial institutional authority. "By stamping [its] constitutional imprimatur" on controversial, national legislation made under conditions of international influence, the constitutional court settles political conflict (Gibson & Caldeira 2003:5) over the legislative policy in a national way.

Our findings regarding the decisionmaking by one constitutional court in a consolidating democracy over a nationally controversial area of legal policy—the Estonian Supreme Court's adjudication of minority linguistic rights—illustrate that a court can act as a conduit for significant democratic reform. We choose this metaphorical concept to convey the idea of a (judicial) device that allows a substance (reformative policy) to pass, facilitating or affecting the nature of its passage. We suggest this process occurs even where we would expect a "constrained court," its decisionmaking hampered by national institutions and the preferences of their political actors. Instead, we observe judicial decisionmaking that furthers goals of democratic consolidation *by* identifying for legislators national constitutional paths along which internationally defined democratic reforms may be pursued, preserving national integrity while acknowledging international reality. This "international reality" is the context of powerfully felt but often nationally distasteful international constraints within which democratic consolidation is taking place in post-Communist Central and Eastern Europe.

We draw on the Estonian case to challenge the generalizability of the constrained court model. We argue that existing studies have overlooked the importance of the supranational/international

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context in which courts function. In some cases, this international context serves to *enable*, rather than constrain, courts to promote social change and policy reform. We suggest the concept of a conduit court because it (1) admits the national institutional constraints faced by a court in endorsing constitutionalism, (2) accepts the international political constraints potentially influencing *and* constraining national policymaking, and (3) proposes that constitutional courts may successfully *negotiate* such constraints and thus exert a dynamic influence on policy by issuing rulings that articulate a constitutional pathway—a conduit—for reformative legislative action. To determine whether a court acts as a conduit, we assess whether the court's decisions uniquely contribute to and exert an independent influence (see Bosworth 2001:25) on the process of accommodating national policymaking to international objectives.

While one case does not prove that the conduit model of courts exists, the Estonian case study does call into question the assumption that constitutional courts in consolidating democracies are largely subjugated to the institutional constraints displayed by national political actors. The Estonian case also complicates the rather uncomplicated understanding of how international organizational pressures operate on national governments by highlighting the critical role played by judicial actors in *translating* international influence into more palatable national constitutional arguments. We examine the evolution of the Estonian Language Act and the language requirements for candidacy in the Local Councils Election Act, because these statutes directly impacted minority rights within the country and because their policy exemplifies how international pressure on Estonia to adapt to international rights standards has been exerted and judicially "translated."

To make this argument, "A Theory of Courts in Democratic Consolidation" outlines our theoretical framework for analyzing the context of constraints under which courts operate, suggesting when that context does *not* constrain. "The Estonian National Context" examines the national political setting with respect to the policy question scrutinized and delineates the domestic environment regarding minority rights in which the Estonian Supreme Court operates. "International Constraints" describes the international pressures on the Estonian government to enhance its minority rights protection, showing the conflict between national political actors' preferences and those of significant international organizations. "The Evolution of a Jurisprudence on Minority Rights" presents evidence from the decisional and legislative records demonstrating that the CRC acted to facilitate a particular legislative response on minority rights while still asserting judicial independence. The concluding section extrapolates from our

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findings on this case to its lessons for understanding of the role of constitutional courts in other consolidating democracies.

A Theory of Courts in Democratic Consolidation: When the Context of Constraints Does Not Constrain

The judicial role in furthering and maintaining democratic governance differs in task, scope, and magnitude when the context is a consolidating versus an established democracy. Yet the theoretical framework often used to assess courts' efficacy is drawn from studies of courts in established democracies, if not courts in the U.S. context. Rosenberg, who assessed the performance of the contemporary U.S. Supreme Court across a range of legal policy issues, concluded that "the constraints derived from the Constrained Court view best capture the capacity of courts to produce significant social reform . . . because courts depend on political support to produce such reform" (1991:336). Courts can effectively produce policy change, Rosenberg allowed, only in situations where the court's power stems from seconding the interests of other, more important domestic political agents (1991:33–35), rather than play a part in shaping those interests. This modest view of court capacity and performance finds accordance in the work of comparative courts scholars who model European constitutional courts as constrained by their national institutional political environment (Vanberg 1998; Epstein, Knight, & Shvetsova 2001).[1]

What unites studies of constitutional courts and their capacity to affect the policy process is that they are influenced by a constrained-unconstrained court categorization that understands judicial performance largely in terms of national political dynamics. Yet with respect to the newly democratized states of Central and Eastern Europe, the judicial role in constitutional developments cannot be understood solely in terms of the national political and institutional context. The democratic transitions in Central and Eastern Europe are unique because *supranational* institutions are relevant for the new states as both sources of authoritative legal traditions and sites of organizational dis/approbation. While other

[1] Epstein, Knight, and Shvetsova (2001) contrast a "European system" and an "American system" of constitutional courts in terms of the institutional structure, timing, and type of judicial review employed. Some scholars view the European system as creating courts that are relatively unconstrained actors (see Jacob et al. 1996); indeed, one account depicts the constitutional courts of Western Europe as situated in a different national policy sequence than the U.S. Supreme Court and, thus, as free to effectuate their favored policy (see, e.g., Stone Sweet 2000).

The European system has been the more prevalent model for the constitutional courts of Central and Eastern Europe. Despite this, Epstein, Knight, and Shvetsova argue that these constitutional courts, as courts in societies moving toward democracy, should be modeled as constrained actors (2001:125, note 12).

studies have noted the constituting role played by legal and judicial responses within political transitions occurring in a globalized setting (Klug 2000), the nature of the judicial response mechanism has been underspecified. To understand the judicial influence on the development of national constitutional law and policy in contemporary consolidating democracies, then, an analytic categorization of courts' efficacy or capacity must take account of international circumstances.

At first glance, the judicial job appears doubly constrained for the constitutional courts of the Central and Eastern European states: by national political actors and institutions, for whom the legitimacy of the judicial institution may be dubious, and by international bodies and their rules, whose authoritative force may not be directly exerted on judges but may constrain their decisions nonetheless. However, the nature of the latter constraints is fundamentally different from the constraints that national actors may impose, for international standards have the potential to liberate constitutional courts from some national constraints and uniquely position them to solidify democratic transitions while simultaneously reinforcing their own powers.

Three contextual attributes of the democratic consolidation process in Central and Eastern Europe facilitate the activity of the court-as-conduit. First, international constraints are typically imposed through international organizations that emphasize the nature and logic of legal constraints. This fact alone strengthens the legitimacy of the national constitutional courts referencing these norms, as it helps them appear politically disinterested (or, at least, more disinterested than other national actors).

Second, the most nationally distasteful international legal constraints revolve around minority rights, often centering on the use of language. Because the conflict stems from disagreement over how majority and minority interests in the same right (use of language to preserve ethnic identity) should be reconciled, constitutional courts have the opportunity to reaffirm the fundamental validity of *both* majority and minority rights—regardless of their final decision—by balancing the two. Direct responsibility to the electorate may prevent other national political actors from engaging in such overt balancing, if public opinion is tilted against minority rights.

Third, the new Central and Eastern European constitutions share the explicit incorporation of international law (Vereshchetin 1996: 29), which allows those constitutional courts to reference the national constitution when invoking international legal principles, effectively linking the legitimacy of the two. As the final arbiter of constitutional meaning, the constitutional court can trump other national political actors employing the same argument. Thus, to

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the extent that international standards impose direct limits on national policy outcomes, constitutional courts can still *reconstitute* these standards and thereby exert a unique, independent, and dynamic influence on policymaking. As national veto players, they can imprint their particular vision by issuing rulings that articulate the national constitutional path for needed reformative legislative action.

Do accounts of famous failures—new constitutional courts that attempted to dynamically pursue social reform and were slapped down by national political forces (Scheppele 2001; Foglesong 2001)—negate the above and confirm the constrained court explanation for consolidating democracies? While the constrained court model predicts calculated caution for courts—judicial compliance with national political institutions' strongly held policy preferences—those preferences are themselves subject to strong limiting conditions (see Kelley 2000; Barrington 2001) that can favor a constitutional court. These conditions are the incentives introduced by international organizations to induce compliance by the national governments of the region with European norms of human rights protection.[2] This situation can encourage national constitutional courts to realize their own institutional goals through membership in the European/international judicial hierarchy (Alter 2001; Nyikos 2001)—if studies of the "regime" of judicially enforced European law are to be believed. By making decisions that converge with the international norms of this judicial hierarchy, the new constitutional courts secure membership, the authoritative respect it confers, and a means to leverage their national governments.

Overall, then, the externally imposed constraints tend to reinforce the power of national constitutional courts more than limit it, and they promote their distinctive contribution to the national governmental process. The case of Estonia[3] exemplifies the conditions

[2] While international relations scholars debate whether the force of international norms should be explained through processes of convergence or policies promoting conditionality (Kubicek 2002; Grugel 1999), both explanations stress the importance of receptive domestic constituencies.

[3] While single-case studies are questioned in contemporary political science as insufficiently systematic in generating explanations of political phenomena, they do have the virtue of drawing attention to "outliers" not explained by research designs which address aggregate patterns of political interaction and behavior. Outlier cases may be simple anomalies, or they may indicate conditions and relationships neglected by existing models. With respect to comparative politics, it is worth remembering that the function of the comparative method is to test and verify empirical hypotheses, a process that "a single case in the case study method [performs] within the framework of a larger number of cases" (Arif 2001:52). With respect to comparative judicial studies, the potential misapplication of explanatory models of judicial decisionmaking derived from the American case can be avoided by conducting intensive single-case studies of non-U.S. courts and structuring them to test extant explanations.

under which the constitutional courts of the new democracies of the region can and do "recast policy-making environments, [and] encourage certain legislative solutions while undermining others" (Stone 1995:225) and act, not as constrained, nor as "catalysts" in an exclusively national policy setting, but as conduits for policy change.

The Estonian National Context: Political Setting and Policymaking Constraints

Constitutional developments on minority rights in the Baltic nation of Estonia provide the opportunity to examine the extent to which these have been judicially driven, internally, while a variety of international actors also attempt to shape that developmental process, externally. The Estonian case also allows us to refine extant explanations of the influence of international law and rights-regimes on domestic policymaking. The Estonian CRC's endorsement of minority rights protections suggests how judicial power can be wielded in the nexus between international and national law.

This nexus is salient when a divergence exists between the policy preferences of national political actors and international organizations over constitutional rights. Rights protections for members of minority groups are particularly contentious in those newly democratized states of Central and Eastern Europe which were formerly part of the USSR, due to the Soviet legacy of forcibly assimilating non-Russian ethnicities and resettling ethnic Russians from other parts of the Soviet Union (Lieven 1994). Now independent, some of these states find themselves with a sizeable, distinctively Russophone minority population. Granting special minority rights, or vigorously applying constitutional mandates for such rights, in order to protect this Russian group is typically less than a popular enterprise for national political leaders in places such as the Baltic states. Thus, a constitutional court that rules in favor of such rights protections—particularly where a tradition of judicial independence and respect for the authoritativeness of judicial rulings is imperfect—risks defiance by other national political actors.

The National Ethnic Context and Minority Rights

Minority rights in Estonia are framed by the history of the country's ethnic situation. The single largest minority group in Estonia today is of Russian ethnicity, dating from the Soviet-era practice of settling Russians in all parts of the Soviet Union, especially annexed regions such as Estonia (Commission of the European Union 1997:18). As the Russians came more or less as an occupying force, there were few incentives for them to integrate

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into Estonian society or to learn to speak Estonian (a Finno-Ugric language grammatically distinct from the Indo-European family of languages, including Slavic languages like Russian). In Soviet-controlled Estonia, Russia dominated both politically and culturally: Russian was the official language, with Estonian being little more than tolerated by the authorities and Estonians having little choice but to accept Russian hegemony. Two separate ethnic societies emerged (Kelley 2000:2; Berg 2001:8). These separate societies proved to be a source of tensions as Estonian independence and the collapse of the Soviet Union left the country facing an ethnic Russian minority amounting to 28% of the overall population. Overall, the country has a minority population of 35%, which includes the smaller minority groups of Ukrainians (2.7%) and Belorussians (1.5%) (Commission of the European Union 1997:18).

As the smallest of the Baltic states, Estonia was dramatically affected demographically by aggressive Soviet policies of Russification including deportation; not surprisingly, then, during the early stages of its national consolidation following independence, an ethno-nationalist definition of the state predominated. The Russian minority population was perceived as a legacy of the Soviet occupation and "not historically grown"; hence, Estonia's priority task as a "reborn" nation-state was the restoration/continuity of the "titular nation," its political elite, language, and culture, by means of classic interest group politics (Berg & van Meurs 2001:144). Initially, Estonian legislation regarding citizenship and language usage gave protection of the titular nation priority over an integrative concept of the nation, enshrining a closed political opportunity structure which privileged members of the "core nation" in political, social, and economic life (Berg 2001:12).

Following the legal restoration of Estonian statehood in 1991–1992, only the citizenship of prewar citizens and their direct descendants was renewed. Most Russians, given their immigrant roots, were left without automatic citizenship, becoming stateless (Berg 2001:12; Pettai 1998) and facing cumbersome and stringent naturalization procedures that included waiting periods as well as certification in the Estonian language (a requirement that did not apply to the émigré descendants of Estonian citizens). Moreover, Estonia's national legislation has occasionally taken a very restrictive view on minority rights—even as to the definition of which inhabitants legitimately qualify as "minority."[4] While Russophones in Estonia do not constitute a homogenous minority in terms of civil rights, consisting of citizens, noncitizens with residency

[4] A 2001 EU Commission Opinion report used harsh, undiplomatic terminology to scold Estonia (and Latvia) for defining "minorities" as excluding those inhabitants without citizenship (Berg & van Meurs 2001:160).

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permits, and resident-alien Russian citizens, roughly 25% of the Estonian population is alien, and only about 30% of the non-Estonian population has gained citizenship (Berg & van Meurs 2001: 145). Nevertheless, noncitizens are barred from certain occupations, cannot directly acquire ownership of land, and cannot vote in national elections; in addition, facility in the Estonian language is intertwined with naturalization for Russophones—just as access to the nation's economic and political life is restricted for non-Estonian speakers.[5] Acquiring language facility is difficult, even when desired, for the state has failed to provide sufficient and effective Estonian-language training opportunities for Russophone communities,[6] which maintain their own separate schools, media channels, and cultural systems. In the words of one Estonian commentator, "Estonia today resembles more a segregated society than an integrated entity" (Berg 2001:8).

Notwithstanding the historical experience and checkered present, the 1992 Estonian constitution in its Article 50 guarantees minority rights. In addition, Article 156 grants noncitizens the right to vote in municipal elections, specifically to allow that portion of the Russian minority the opportunity to participate in the political process at the local level. However, since public opinion has not been in favor of interpreting those rights extensively, and due to the presence of the moderately nationalistic Pro-Patria Party in successive coalition governments, Estonian politicians typically have taken a cautious stance. Thus in 1995, the Estonian parliament, the Riigikogu, passed the Language Act, which established provisions regarding the official status of the Estonian language and facility in it as a qualification for public and private employment. Then in 1996, the parliament passed the Local Councils Election Act, which detailed the qualifications for noncitizens'/aliens' voting rights as well as the qualifications for citizens' candidacy in municipal elections.[7] Among these latter qualifications was the requirement of proficiency in Estonian, at the level stipulated by the 1995 Language Act.

With respect to internal political pressures, minority rights questions under Estonian constitutional law are inseparable from language issues. Language usage is intimately related to citizenship status and community membership and, fundamentally, to national

[5] For a catalogue of status distinctions between citizens and noncitizens in Estonia, see the report by the Legal Information Center for Human Rights, "Differences in the Legal Status of Residents According to Estonian Legislation" (http://www.lichr.ee/eng).

[6] In June 1999, the Estonian parliament endorsed an official minority integration policy and, subsequently, created and funded a special Integration Foundation. See Pettai (2001:276).

[7] This act was passed *in spite of* prodding by the Council of Europe in 1993 that Estonia extend the right to stand for local elected office to noncitizens as well. See Pettai (2001:274).

identity: language is the chief marker of both the Russian minority and the Estonian majority, and language is central to both the minority's rights and the majority's sovereignty. Thus, the loading of national goals onto minority rights policy questions characterizes the adoption of the Language Act of 1995 and the legislative debate over its subsequent revisions of 1997, 1999, and 2000, as it also characterizes the adoption of the Local Councils Election Act of 1996 and the debate regarding its subsequent revisions of 1998 and 2001. Hence, any constitutional inquiry into the rights of minorities by the CRC must navigate this nationalistic landscape—or navigate the values of national protectionism that permeate the legislative debate over language policies/minority rights.

The National Institutional Context and the CRC

In terms of the political setting in which the Estonian Supreme Court functions, basic institutional boundaries are respected, elections are considered free and fair, and peaceful democratic transitions between parties-in-power and opposition parties have occurred (Ostrow 2000). When Estonia drafted its new, democratic constitution in 1991–1992, there was broad agreement to create constitutional review, and a national Supreme Court was created that was charged with constitutional supervision (Article 149) and the right to declare unconstitutional legislation null and void (Article 152). The Supreme Court is the highest Estonian court and functions as both the final court of appeal and a constitutional court, departing from the usual European practice of a separate and distinct organ that reviews only constitutional questions.[8] Depending on which of its functions is involved, the court sits in several chambers—administrative, civil, criminal, or constitutional—but the chamber of most interest for constitutional development is the CRC, which consists of five justices, including the Chief Justice of the Supreme Court.

Cases may be brought to the CRC in one of three ways: ex ante constitutional review of pending legislation, initiated by the President of the Republic (Estonian Constitution, Article 107); ex ante review of laws passed by parliament, after consideration by and referral from the office of the Legal Chancellor (Article 148); and ex post review of laws set aside from judgment by the lower courts and then appealed to the CRC by the regular court (Article 15).[9]

[8] According to Schwartz, the reason the constitutional review jurisdiction was lodged in the Estonian Supreme Court was that, at the time of the constitution's drafting, the Estonians anticipated too few constitutional cases to justify the trouble and the expense of establishing a separate tribunal (2000:253, note 7).

[9] The President and the Legal Chancellor initially took the lead in submitting constitutional cases to the Supreme Court, but the lower courts began in 1995 to be more active in exercising their review prerogatives and by 1997 had passed the other two institutions in the total number of cases referred to the constitutional chamber (Pettai 2000:13).

Even though it is still a young institution, the CRC is establishing its place within the political system. From its creation in 1993 through 2003, the CRC heard 66 cases (Maveety & Pettai 2003). Some investigators have found a pattern of activism in the decisions of the constitutional court, with activism defined as the invalidation of government action (Herron & Randazzo 2000). While this finding was based on a limited number of cases in aggregate analysis, court scholars could certainly agree that the CRC has adjudicated a wide variety of cases—including those clarifying the separation of powers within the political system and elaborating on procedural rights, as well as a small number concerning minority rights.

Much such constitutional adjudication—including that concerning minority rights—has come at the behest of national political actors. Yet this procedural fact about constitutional review in Estonia has allowed the CRC to serve as a transmitter of international legal standards of minority rights protection.

International Constraints: Organizational Pressure for Adaptation

Before considering how the constitutional court has affected the debate over the national validity of international pressures to reform minority rights policies, those international pressures must be described.

Clearly, international actors have had the opportunity to impact Estonian legal developments with respect to minority rights. After gaining independence, Estonia sought to join and hew to the guidelines of international organizations such as the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe (COE), and the European Union (EU). All of these organizations have undertaken concerted efforts to influence Estonia's minority rights jurisprudence (Grosskopf & Maveety 2001).

Organizational pressure for greater minority rights protections is an international constraint because although Estonia has sought membership in and thus conformity with these international organizations,[10] Estonian legislation on behalf of the Estonian language has been and remains central to the state's mission since democratic transition and throughout democratic consolidation. This mission, and the close connection of language with cultural identity and political resurrection, proves somewhat resistant to international

[10] Even among EU applicant states, Estonia has had a fairly low regard for European integration and the European Union (Kubicek 2002). Although it was clear that Estonia would fulfill all accession criteria in October 2002, the country still had the lowest support scores of applicant countries for European integration across a wide range of indicators (Commission of the European Union 2002:2–4). The 2003 referendum favoring EU membership has not altered this.

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arm-twisting for minority rights reform, because its effectiveness depends on whether international institutions can combine pressure with concrete membership incentives (Kelley 2000).

The two international organizations of chief concern in terms of the pressures they have exerted on Estonian national political actors are the OSCE and the EU; both have stressed the need for greater minority rights protections than the revised Language Act of 1997 and 1999 provided. Their complaints—and the differences between the various versions of the Language Act—have centered on the legislation's implementation aspects, which were left vague and unsettled in the statute's 1995 version and thus necessitated subsequent revision. These implementation aspects included the following questions: What is proficiency in Estonian? What degree(s) of proficiency is required by law? For whom and for what activities must proficiency be required? Who determines whether proficiency requirements have been met? And, directly to the point of Estonia's political integration in Europe, at what point do language proficiency requirements become discriminatory and exclusionary, and thus inconsistent with democratic governance?

Pressure Exerted by the OSCE

The OSCE would appear to be the primary source of international pressure on Estonia, a member state since 1991, but its impact has been limited despite its minority rights focus. The breakup of the former Yugoslavia prompted the OSCE to identify (language) rights for national minorities as one of the recurrent problematic areas in the democratic consolidation process and to establish the office of a High Commissioner on Minorities in late 1992 (Conference for Security and Co-operation in Europe 1992:Section II). Max van der Stoel, the first High Commissioner, became actively involved in monitoring minority rights in the OSCE area, visiting Estonia (as well as Latvia and Lithuania) in early 1993 and issuing a series of recommendations in which he first identified language-related problems in the integration of national minorities (van der Stoel 1993). The OSCE also established a mission in Estonia in 1993 to engage in preventive diplomacy over potentially destabilizing minority rights conflicts (Organization for Security and Co-operation in Europe 2000:93). Still, these efforts and all other OSCE linguistic rights documents (see Organization for Security and Co-operation in Europe 1998, 1999) are mere nonbinding recommendations, since the OSCE human rights regime does not provide for sanctions.

Diplomatic pressure was nevertheless exerted by the High Commissioner. The OSCE issued a list of minority rights issues Estonia would need to address before the mission could be closed

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(Sarv 2002:94).[11] Van der Stoel, who was concerned with both the 1997 and 1999 amendments because of their potential effect on minority rights, also wrote a series of letters to the Estonian government (see for instance van der Stoel 1998; some letters are still unpublished; see Sarv 2002:92, 95) to protest the Language Act and even urged President Meri not to promulgate the law (Sarv 2002:92). When the Riigikogu eventually amended the offending passages of the Language Act in 2000, van der Stoel issued a statement expressing his satisfaction with the legislative changes, while hinting that he would continue monitoring the application of the revised law (van der Stoel 2000). Such efforts, of course, could not compel the Estonian government to comply with the High Commissioner's wishes.

Pressure Exerted by the EU

The more successful of the two international, "constraining" organizations has been the EU, as it has been in a position to apply pressure on Estonia by threatening to withhold membership. It is initially surprising that the EU would become involved in linguistic minority rights issues, given that it is a mainly economic organization; however, a political decision was made following the 1993 Copenhagen European Council that respect for minority rights would be an explicit precondition for membership (European Council 1993). When Estonia concluded the Europe Agreement in 1995 and began negotiations for EU membership in 1998 (Sedelmeier 2000b:174),[12] a monitoring process commenced in which Estonia was obliged to issue yearly progress reports (see Estonian State Chancellery 2001) and the Commission of the European Union issued its own yearly reports monitoring progress toward full compliance with accession criteria (see Commission of the European Union 1998, 1999, 2000). It was in these Commission progress reports that the EU tackled the Language Act.

EU cooperation in the economic sector occurs at a well-developed level of supranational decisionmaking, while its human rights dimension is weak and mainly effected through other international organizations. Consequently, the EU justified intervention opposing the changes to the Estonian Language Act by emphasizing the *economic* aspects of the policy. A minority rights question could be transformed into an economic rights question because the 1999 Language Act revisions required language skills in both the governmental and nongovernmental sectors. The act's implementing

[11] After Estonia had revised the Language Act to the OSCE's and EU's satisfaction in 2001, the mission's mandate was not renewed and it closed (Hill 2001).

[12] Accession negotiations were successfully concluded in December 2002, with formal accession scheduled for April 2004.

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directives required that a variety of public and private workers be proficient in Estonian, arguably impeding the free movement of services and labor that the EU guarantees (Commission of the European Union 1999:15).

The annual reports and upcoming EU meetings that would decide further aid to Estonia, as well as its readiness for membership, thus supplied the pressure to adapt on the minority rights issue (Kelley 2000:21). The EU considered the Language Act amendments not merely a breach of the political accession criteria, but a breach of the Europe Agreement—the treaty paving the way to EU membership (Commission of the European Union 1999:15; Grosskopf & Maveety 2001). Bluntly put, while coordinating with the OSCE high commissioner (Sarv 2002:92), the EU effectively employed the "stick" of withholding membership against Estonia. This constraint was an inducement for the Estonian parliament to alter the relevant passages of the Language Act and agree to undertake further measures (see footnote 6) to better integrate Russophones into Estonian society.

Clearly, constitutional development in Estonia is not taking place in a national vacuum. However, the saga of the Language Act's international reception also demonstrates that not all attempts to exert international pressure to adapt national legislation are equally effective—it takes more than persuasive arguments by external actors to overcome nationalist resistance. Yet resistance is not imperviousness, for one could interpret the exceptions for national minority language usage within the otherwise-criticized 1999 Language Act revisions as national policy makers' concession that political integration entails some limits on the dominance of the Estonian language.

Still, to see this and other reformative action by the Riigikogu as uncomplicated "obeisance" to international actors is to fail to consider the relevance of the "conduit" function performed by the national CRC. Its recasting of international constraints—and national, nationalistic constraints—into a debate about constitutional power reconstitut[ed] the choice context of the legislature in such a way as to present obeisance to international standards as nationally acceptable. If the decisional record of the CRC is any guide, the court is a critical actor—as a *judicial* actor—in putting such outside, international pressure into a national, constitutional framework.

The Evolution of a Jurisprudence on Minority Rights: Court-as-Conduit

Although international pressure was a constant, it was not until *after* the CRC's decisions on minority rights—which renegotiated

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the terms of the policy debate between national and international actors—that Estonian politicians began to respond to that pressure.

The CRC did act cautiously in its two minority rights rulings, both in 1998: employing technical rather than value-based arguments in deciding the cases, and resorting to *dicta* in opinions for its more sweeping pronouncements regarding minorities' political identity and constitutional protections. Yet even these cautious rulings had the impact of providing a national constitutional pathway for legislative reform that tapped the normative legal force of international sources while preserving national political integrity and credibility.

Evidence of the decisions' utility for legislators undeniably susceptible to international constraints on minority rights yet politically uncomfortable with abjectly succumbing to them is found in the Estonian legislative record of 1998–2001 and the minutes of the Riigikogu discussions of the 1999 and 2000 amendments to the Language Act and the 1998 and 2001 amendments to the language requirements in the Local Councils Election and Riigikogu Election Acts. Study of this record reveals that the CRC functioned in the minority rights context as a conduit, its decisions channeling legislative initiative. The multiple occasions on which this is seen in the legislative record suggest that the Court's conduit function has not been limited to one statutory example or moment in time. Nor did the CRC simply defer to national constraints that are the product of international constraints; rather, it recast the policymaking environment through its decisions.

Decision I: The Language Act Amendment Case

The two minority rights decisions by the CRC and their legislative fallout both stemmed from cases concerning the application and interpretation of the Language Act as it affects eligibility for local council candidacy. The first decision was part of a two-case sequence examining the nexus between language usage and political access.

Noncitizens in Estonia—principally, the Russian minority—have the constitutional right to vote in municipal elections, but only citizens are eligible as candidates. The 1996 Local Councils Election Act stipulated that qualifications for candidacy included proficiency in Estonian, at the level set by the Language Act of 1995. However, this act did not clearly identify the level of proficiency required or the procedure for its certification; the Riigikogu attempted to address this in its 1997 amendments to the Language Act. These amendments included a provision delegating to the Government of the Republic the authority to describe the level of Estonian

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proficiency required for members of local government councils (and for members of the Riigikogu). Then-President Meri refused to promulgate the amended act and filed a petition in December 1997 with the CRC, questioning the constitutionality of such executive discretion and seeking a constitutional justification for language proficiency requirements in general.[13]

The CRC answered the President's petition in its decision of February 5, 1998 (case number 3-4-1-1-98), the Language Act Amendment Case. The legislation had been challenged both normatively and procedurally: on the constitutional justification for Estonian language proficiency requirements and for the method of devising and applying such requirements. In addition, two categories of persons were affected by the 1997 amendments to the Language Act: parliamentary and local government representatives already elected and subsequently made subject to the executive's Estonian language certification, and "employees of commercial undertakings, non-profit associations or foundations, and sole proprietors, foreign experts and foreign specialists, in work-related dealings with private persons," who were also subject to language proficiency and certification requirements (Subsection 2, Section 5 of revised 1997 Language Act). The linguistic restrictions affecting local council members were most directly related to minority political rights, as their certification for seating implicated the voting rights of noncitizen, minority group members.

The CRC's 1998 opinion contained both a broad and sweeping validation of the protected use of Estonian and a careful, technical critique of the procedure by which such use would actually be implemented. The court found in both the preamble to the constitution and its Article 6 sufficient justification for the protection of the Estonian language as "an essential component" of the preservation of Estonian nation and culture (Case number 3-4-1-1-98, section II, paragraph 1). Moreover, the opinion linked this overarching state objective to the promotion of a working democracy, wherein "persons who exercise power . . . use a single sign system in doing [state] business" (Case number 3-4-1-1-98, section II, paragraph 5). But with respect to effectuating this, the opinion made clear that the use of the right to vote may not be altered by decisions of the executive—only a law passed by a majority of the parliament may establish conditions for elections and the right to vote. Because election laws are "constitutional acts" under Article 104 (2) of the Estonian constitution, only the Riigikogu may establish standards of profi-

[13] His motives for doing this are unclear: Meri's Pro Patria Party endorsed language protectionism, but he was also keenly aware of both international and domestic sentiments urging solicitude for minorities and their language rights. According to Sarv, High Commissioner van der Stoel urged President Meri in an unpublished letter not to promulgate the law (2002:91).

ciency in Estonian for members of those elected bodies—decisions about language proficiency for elected representatives cannot be delegated (Case number 3-4-1-1-98, section III, paragraph 5). The 1997 amendment to the Language Act was declared unconstitutional, as a delegation contravening the separation of powers. "The requirements for the command of Estonian by the members of local government councils must be established," the opinion directed, "by a legislation [*sic*] at the level of law"(Case number 3-4-1-1-98, section IV, paragraph 5). With this phrasing, the CRC was evoking the principle of *relevance* from European jurisprudence, according to which decisions of the highest relevance for a democratic society—such as those dealing with individual rights—must be made at the level of government closest to the people: the legislature, rather than the executive (Eberle 2002:19).

The concern for the arbitrary placing of language restrictions on persons in the private sector was also part of the presidential petition's complaint against the 1997 Language Act amendments. Sympathetic with the claim that "the content, aim and extent of the delegation have not been specified, giv[ing] rise to the unconstitutionality of the delegation norm" (Case number 3-4-1-1-98, section V, paragraph 4), the CRC nevertheless argued that the issue was not ripe for decision until "after the government has established the requirements for the command of Estonian by its regulation" (Case number 3-4-1-1-98, section V, paragraph 7). Observance of judicial restraint did not prevent the opinion from commenting that "the Chamber considers it necessary to stress that the wording" [on required language proficiency "in work-related dealings with private persons"] "of the Language Act ***may invade*** *the exercise of constitutional rights and freedoms*" (Case number 3-4-1-1-98, section V, paragraph 8, emphases added). Even as the CRC invalidated the law on technical grounds, it seemed to be reserving the right to scrutinize the government's balancing of constitutional rights.

Such constitutional advice-giving notwithstanding, caution was the better part of valor for the CRC in the 1998 Language Act Amendment Case: its invalidation of the 1997 amendments to the Language Act rested on the technical infirmities of the delegation of legislative power to set electoral qualifications. Perhaps because of this, the CRC's ruling became fodder for both sides of the parliamentary debate over reforming the act, which began later that year. The more nationalist, Pro Patria delegates downplayed the CRC's warning about the language requirements' possible conflict with constitutional norms, stressing that the court had found that the language requirement for the private sector was "nothing unconstitutional in itself" (Delegate L. Vahtre, Minutes of the First Reading of the Reform Act to the Language Act, November 23,

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1998). More centrist party delegates emphasized the court's invalidation of the delegation procedures of the 1997 amendments in conjunction with the statute's generally unsatisfactory reception by international organizations.

Decision II: The Harju County Court Case

Meanwhile, in September 1998, the CRC was asked to review another petition from the Harju County Court regarding the Estonian language proficiency requirement in the Local Councils Election Act. This controversy had been winding its way through administrative and judicial channels as the Riigikogu had been debating the Language Act amendments, and the issues raised in the petition were very much interconnected with those considered by the CRC in its February 1998 ruling. The Maardu city election committee had registered the newly elected members of its local city council—a Russophone-dominated jurisdiction—with the National Election Committee, which then filed a petition in June 1997 to annul the registration of one elected candidate because he could not confirm in writing that he was proficient in Estonian at the level required in the 1997 Language Act. Such proficiency demonstration was a requirement for candidacy under section 3(3) of the Local Councils Election Act, but the Language Act, of course, had not specified the requisite level of proficiency, leaving this to be determined by the government. Such determination had been made in Governmental Regulation no. 188, "Enactment of the description of the level of the command of Estonian language necessary to work in the Riigikogu and local government councils."

Ostensibly, then, the Maardu city council question concerned the somewhat formalistic relationship between constitutional law, constitutional acts (legislation, such as that concerning elections, requiring a parliamentary majority for passage), and simple acts or ordinary governmental regulations. Could a constitutional act—here, the Local Councils Election Act—make reference for its operation to a simple act (i.e., Regulation no. 188) in delegating to the executive power of the government the right to decide on issues pertaining to constitutional law, such as voting rights? This rather technical question, arising from the CRC's February 1998 ruling, could not cloak the fact that the case ultimately was (re)addressing the breadth of a guiding principle of the Estonian constitution: that pursuant to Article 52 of the constitution, the official language of state agencies and local governments should be Estonian.

The CRC's November 1998 decision in the Harju County Court Case (case number 3-4-1-7-98) balanced internal constraints, both constitutional and political, in full cognizance of looming external, international constraints. The court held that the relevant provisions of the Local Councils Election Act and the Language

Act, as well as Regulation no. 188, were constitutionally invalid as improper delegations of legislative power to the executive.[14] Yet the CRC's opinion reiterated that language qualifications for local office-holding should proceed from the preamble of the constitution and further stressed that "the Estonian language is an essential component [for the preservation] of the Estonian nation and culture, [so] the enacting of electoral qualifications guaranteeing the use of Estonian . . . is constitutionally justified" (Case number 3-4-1-7-98, section III, paragraph 1).

Again, it was with the method for implementing the language requirement that the CRC found fault. The *Harju* opinion evoked Article 11 of the Estonian constitution and admonished that restrictions of rights and freedoms—such as electoral qualifications—must be "necessary in a democratic society" and may not "infringe [on] . . . the representative quality of a local government representative body" (Case number 3-4-1-7-98, section IV, paragraph 1). No detailed guidelines were adumbrated for ascertaining this but, tellingly, this interpretation of Estonian constitutional objectives implicitly evoked the European juridical principle of proportionality utilized by the European Court of Human Rights. Just as important, the CRC was asserting its own position as the ultimate judge of whether rights have been balanced properly under the Estonian constitution.

The ruling in the Harju County Court Case impelled the legislature to reform language proficiency requirements for the public sector. On December 15, 1998, the Riigikogu enacted the new Local Councils Election Act, which revised the language requirement for local office-holding, accommodating the concerns of the noncitizen minority for some flexibility in the operations of local government and in the linguistic qualifications of its preferred candidates, but providing legislative precision in establishing those qualifications. By returning the policy question to parliament purely on procedural grounds, the CRC indirectly gave more time for other influences in democratic governance, such as the domestic minority, to affect the policy process. But by grounding the policy debate in interpretive considerations of the Estonian constitution and its objectives, the CRC effectively reformulated the statute's objectives as the balancing of equally legitimate constitutional commands.

We find evidence of this in the legislative record on reforming the Local Councils Election Act. In the minutes of November 1998, on the first reading of the draft, a Reform Party delegate from the

[14] The basis for this holding was of course *the Court's own precedent* in the CRC decision of February 5, 1998, which stated that election laws are among the "constitutional acts" that may only be passed by a majority of the Riigikogu.

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governing coalition read the CRC as "confirm[ing] that the Estonian language has to be protected, but that the language requirements have to be fixed in [our] election laws" (Delegate T. Kabin, minutes of November 12, 1998). In a later legislative session, another delegate, from the more minority-friendly (and moderate Russian party) Estonian United People's Party, evoked the CRC as mandating that any language requirements under Estonian law "ha[d] to be . . . necessary in a democratic society" (Delegate V. Andrejev, minutes of November 23, 1998). Somewhat humorously, two delegates also referenced the Court's ruling in finding this common ground: that the constitutional infirmities of the delegation were the upshot of "following the suggestion of [the OSCE], [which] led us to take the wrong path" (Delegates T. Alatalu and T. Kabin, minutes of November 12, 1998). Here, the delegates seemed to share a conspiratorial lament over the pesky international pressure that was revealed, thanks to the CRC's scrutiny, as leading to incorrect policy. Yet due to that scrutiny, it was the inappropriateness of the delegation according to the Estonian constitution—*not* the validity of external pressure on Estonia to devise a more flexible approach to language requirements and their implementation—that was central to the delegates' debate over legislative reform. The CRC, as a conduit, helped shape the interests articulated in that debate.

The CRC's adjudication of the language issue offered a national constitutional explanation for the needed reforms to the 1997 Language Act, which the Riigikogu made in 1999 and 2000. After extensive and repeated reference to the "suggestions" of European "experts," delegates in legislative session throughout 1998–1999 agreed to tailor revisions to the deficiencies in the act identified by the CRC (Commentary of Vice Director Urmas Veikat, Language Inspection Agency, minutes of the sitting of the parliamentary committee on culture, November 16, 1998; and Delegate L. Vahtre, minutes of the parliamentary committee on culture, discussing the amendment proposals to the draft of the Reform Act of the Language Act, January 12, 1999). Most interestingly, the CRC's decisions were evoked to bridge the gap between national goals and international expectations. Illustrative are the words of a centrist delegate calling for amendments compatible with "international conventions on human rights and national minority rights" and alluding to the CRC's suggestion from its February 1998 decision as to how to proceed: to ask whether the Language Act "*may* invade the exercise of [Estonian] constitutional rights and freedoms" (Delegate T. Marja, January 12, 1999, emphasis added).[15]

[15] By the legislative session of February 9, 1999, delegates agreed that prospective reforms of the implementation of language proficiency requirements would satisfy *both* international organizations *and* the Supreme Court, prompting a delegate sympathetic

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A Conduit for International Pressure

On February 9, 1999, the Riigikogu legislated a number of changes to the Language Act, including codifying the exceptions to the official use of Estonian: local governments with a certain percentage of permanent residents of a national minority, and cultural-autonomy bodies of national minorities. The revised law also set three levels of proficiency in Estonian, provided exact descriptions of each, and stipulated a fairly broad (while at the same time vague) application for language proficiency—"at the level necessary for fulfilling their job requirements"—for persons employed in various private sector organizations.

The potentially negative impact on economic opportunity of the new language policy explained the Commission of the European Union's characterization of the 1999 Act as "a step backward," restricting the access of non-Estonian speakers in political and economic life and interfering with the free movement of people (Berg & van Meurs 2001:157)[16] Subsequently, the Riigikogu amended the Language Act again in spring 2000. As a representative from the Estonian Ministry of Education flatly stated, the 1999 Act was not seen as "compatible with the European requirements" and "to avoid possible misinterpretations, should be made more exact" (E. Enneveer, member of Executive Department, Ministry of Education, minutes of the sitting of the parliamentary committee on culture, May 11, 2000). The ensuing discussion among the Riigkogu delegates did not challenge this proposal. Accordingly, the 2000 Act clarified that the application of proficiency requirements to private sector operations and their employees would exist "if it is in the public interest . . . establishment of requirements concerning proficiency in and use of Estonian shall be justified and *in proportion to* the objective being sought and shall not distort the nature of the rights which are restricted" (Sections 2(2) [emphasis added] and 5(3) of 2000 Act). Arguably, the language of this last sentence was an effort to cast the reform as a reply to the CRC's cautioning in its Language Act decision of February 1998, as it evokes notions of proportionality and balancing of rights. And while this turgid prose on the rights of minority language speakers was fashioned for and has to date been acceptable to international audiences, the CRC would seem to continue to be the source of nationally acceptable interpretations of proportionality.

with the minority rights aims of the United Russian Faction in the Riigikogu to pronounce "that some compromises have been reached" (Delegate S. Ivanov, minutes of the second reading of the Reform Act of the Language Act, February 9, 1999, transcripts of legislative sessions available from authors).

[16] See the discussion in "International Constraints" herein on international organizational pressure on Estonia.

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The 1999–2000 saga of Estonia's national recitation of international protocols on the rights of linguistic minorities confirms that the CRC's decisions could not be described as "igniting" progressive legal change or reform. Estonian national political actors became reluctantly supportive of policy change on minority rights—pressured or constrained as the government was by EU membership incentives—and the CRC's role in the policy process was in facilitating the reluctant support, rather than instigating the policy change. But through its decisions, the CRC earmarked a national constitutional pathway for legislative reform on minority rights issues—explaining reform in terms of constitutional governance in a democratic society, separation of powers requirements, and, most important, accommodating the legislative reform with internal, nationalist goals *and with* externally defined, international objectives. In so doing, the CRC defused the reforms' objectionable, non-nationalist content as well as their objectionable, international impetus. The constitutional pathway—the conduit—did not exist prior to the CRC's action, and its articulation was not simply a judicial response to the political constraints of its national, institutional environment. The constitutional question of delegation of power was a dimension the court introduced, which fundamentally redirected the debate and shaped the legislature's policy response to the language issue.

Evidence of this admittedly modest court-as-conduit influence is seen in the Riigikogu's November–December 2001 consideration of amendments to the Local Councils and Riigikogu Election Acts that would abolish language requirements for electoral candidates entirely. The minutes of the legislative sessions of November 2001 include the trading of accusations that it was primarily to external, international pressures that national political actors were responding in subsequently passing those amendments in December 2001. "Where did you get the idea of making such an amendment," one Pro Patria delegate asked its legislative sponsors pointedly, "if it is not required by any international act?" (Delegate V. Rumessen, minutes of the first reading of the draft amending the Local Councils and Riigikogu Election Acts, November 7, 2001). The Moderate Party delegate presenting the draft amendment chose, in a subsequent legislative session, to recast the context of constraint, somewhat:

> I was willing to put forward this draft *not because one or another international organization suggested it,* but because we consider it right in principle that the Estonian citizens are treated equally in exercising their rights, and it shows the maturity of our society and politicians if we follow that principle."(Delegate T. Koiv, minutes of the second reading of the draft, November 21, 2001, emphasis added)

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"Follow[ing] that principle," as an element of Estonian jurisprudence, came at the prompting of the CRC.[17]

Like the ruling in the Language Act Amendment Case, the decision in the Harju County Court Case conformed to international norms regarding minority rights protections while at the same time enunciating nationalist objectives. Such attempts at accommodation could be interpreted as facilitating the democratic consolidation of Estonia, by indicating that international rights standards can be enforced consistent with national identity and integrity. Although it is unclear for whose ears the CRC's accommodationist arguments were intended, if the Language Act and Harju County Court cases are any indication, those ears were legislative.

Conclusion: Conduit, Constitutionalism, and Consolidation

While it is apparent that the international community influenced Estonian policy toward minorities, most discussions of international pressure shaping democratic consolidation do not adequately address what domestic actors might be transmitters or carriers of that pressure, to facilitate acceptance of its message. The leverage of external transmitters—the membership sanctions of international organizations—is assumed to be somewhat straightforward. Analysis of the Estonian case suggests the critical importance of the constitutional "leverage" of the CRC as a transmitter: as an internal, national translator of, and conduit for, the external, international message of minority rights reform. But the CRC is no simple handmaiden of the OSCE or EU, for it gains from the performance of its conduit role in terms of institutional visibility and domestic authoritativeness as constitutional interpreter, both alongside national political institutions and within the supranational judicial hierarchy.

Successful judicial negotiation of the dual set of national-international constraints describes a category of court efficacy or capacity fundamentally distinct from the constrained or unconstrained

[17] A similar position articulated by another delegate in effect describes the CRC as a conduit. In the legislative session of November 7, 2001, Foreign Affairs Minister and Moderate Party member Ilves noted that not only was the language requirement for candidacy incompatible with international conventions of human rights, it was fundamentally incompatible with Section 11 of the Estonian constitution, "which states that restrictions on rights have to be necessary in a democratic society" (transcripts of legislative sessions available from authors). His language came directly from the CRC's own reference to Section 11 and its "balancing test" in the Harju County Court Case. The irony is that the CRC's "necessary in democratic society" language was drawn from the Estonian constitution *and* from international legal norms, but it was connected by the court to domestic constitutional objectives in a way rhetorically persuasive to the parliamentary delegates.

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(or "dynamic") court conceptualizations found in the judicial literature. Where the national institutional and international organizational conditions found in the Estonian situation occur, we would expect to see the conduit category of court efficacy and capacity also occur. Key factors are some level of formal judicial empowerment and some discrepancy between national political interests and international institutional pressures on a social policy issue. Without the presence of these factors, there is respectively no option or no need for judicial translation or negotiation. But with the presence of these factors, a constrained contextual environment does not necessarily produce constrained court behavior. The lesson of this analysis to apply to other cases is that certain conditions of "constraint" present the opportunity for a court to be a conduit, and to *constitute* democratic consolidation.

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