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Constitutional review in Estonia: Procedural Questions and their Practical Implications

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Introduction

Estonian system of constitutional review is based on the 1992 Constitution and the Constitutional Review Court Procedure Act of 1993. Discussions about possible amendments to the Constitutional Review Court Procedure Act or about the need to pass a new, more detailed act incorporating the experience acquired in the practice and curing some deficiencies started already four or five years after its enactment. Several models or unofficial drafts were elaborated, and an international seminar was organised in co-operation with the Venice Commission in 1998 in Tartu. The new Constitutional Review Court Procedure Act was finally passed by the Estonian Parliament in March this year, and it will become effective from the 1 July 2002.

Main features of the system of constitutional review

What are the main characteristic features of the Estonian system of constitutional review, and which amendments does the new law bring about?

The Estonian system of constitutional review is sometimes described as a mixture of the European and American models of constitutional control. According to the Constitution the Supreme Court of Estonia is also the court of constitutional review. There is no separate constitutional court. However, similarly to the European model, the Supreme Court exercises also abstract review, including preliminary (*ex ante*) review and there is separate constitutional review court procedure distinct from ordinary (civil, criminal, and administrative) court procedures. There is a Constitutional Review Chamber within the Supreme Court, although the Supreme Court in plenary may also review constitutional cases.

Subjects entitled to initiate the proceedings

According to the old Constitutional Review Court Procedure Act the subjects entitled to initiate the proceedings are:

1) the President (*ex ante* abstract review);
2) the Legal Chancellor (*ex post* abstract review);
3) the courts (*ex post* concrete review).

The new Constitutional Review Court Procedure Act adds one more type of subjects entitled to submit a petition to the Supreme Court – the local government councils. Their right to initiate constitutional review proceedings is limited to the legislation infringing upon the constitutional guarantee of the autonomy of local self-government.

Procedure

One of the deficiencies of the old Constitutional Review Court Procedure Act concerns the proceedings initiated by an ordinary court within civil, criminal or administrative court proceedings. Every court has the right – actually even an obligation – to declare unconstitutional any law which is in conflict with the Constitution. There is no preliminary referral procedure in the strict sense of the word. The court itself has to decide the case finally, including the question of constitutionality of a law. This does not mean, however, that there is a system of diffuse review of constitutionality in Estonia. The decision of the ordinary court shall be submitted to the Supreme Court where constitutional review procedure shall be initiated. To be precise, the chairman of the relevant court shall submit a

petition, based on the court decision, to the Supreme Court, together with the decision. The Supreme Court, then, within a separate constitutional review procedure, shall decide on the constitutionality of the law. It is only within the powers of the Supreme Court do declare a law invalid. Such a decision of the Supreme Court has *erga omnes* effect, differently from the decision of the ordinary court on unconstitutionality with *inter partes* effect.

This procedure has – as already mentioned – certain shortcomings. Firstly, the decision of the ordinary court and the petition by the chairman of the court sometimes differ from each other. The Supreme Court has considered the court decision decisive. Secondly, and more substantially, when the Supreme Court does not agree with the ordinary court and finds the law to be in conformity with the Constitution, the decision of the ordinary court may still remain in force. This is the case, when none of the parties of the initial case appealed the original decision. When some of them appealed the original decision, two proceedings will proceed in parallel – the appellate proceedings in the ordinary court of next instance and the constitutional review proceedings in the Supreme Court.

The new Constitutional Review Court Procedure Act provides for some adjustments. The requirement of the petition by the chairman of the ordinary court in order to initiate constitutional review proceedings in the Supreme Court will be given up. The decision of the ordinary court will be enough in order to initiate the review of constitutionality in the Supreme Court. The two parallel procedures will be avoided by a regulation that an appeal against the decision of the ordinary court can be lodged only after the Supreme Court has rendered a decision on constitutionality of the relevant law. When none of the parties of the original case submits an appeal, the incorrect decision of the ordinary court still may remain in force, although this situation is somewhat unlikely after the parties have learned the viewpoint of the Supreme Court.

According to the new Constitutional Review Court Procedure Act, the parties of the original proceedings can also take part in the constitutional review proceedings in the Supreme Court. This is not the case under the old Constitutional Review Court Procedure Act.

Constitutional review practice

General

Majority of the constitutional review cases the Supreme Court has been discussing have been submitted to the Supreme Court by ordinary courts in concrete review procedure. The role of the President as an initiator of constitutional review proceedings has been decreasing. The tendency that the courts are the largest source of constitutional review cases seems to be growing. The cases have had their origin overwhelmingly in administrative court proceedings. The latter can be explained by the fact that in administrative law matters the question whether the restrictions of fundamental rights have been imposed in a constitutional manner arises quite often.

During the first years of the Constitution of 1992 the constitutional cases quite often dealt with the questions of separation of powers, delimitation of the scope of authority of the state institutions, with the problems of delegation of legislative powers. During the past few years, however, the control over the constitutionality of restrictions of the fundamental rights has become one of the most important – if not the most important – areas of jurisdiction of the Constitutional Review Chamber of the Supreme Court.

The argumentation of the Supreme Court has evolved considerably during that time. The Supreme Court examines whether the restrictions of fundamental rights pursue a legitimate aim and whether the restrictions are necessary in a democratic society. Techniques such as the test of proportionality, known from the jurisprudence of the European Court of Human Rights and from German constitutional jurisprudence, are applied when exercising control over constitutionality of restrictions of fundamental rights.[1] Since the Constitution of Estonia covers almost all the rights guaranteed by the European Convention of Human Rights, the text of the later usually does not serve as an independent reference point for establishing violation or non-violation of individual rights. European Convention of Human Rights and the practice of the European Court of Human Rights has been used, rather, as tools for interpreting the Estonian Constitution.

Problems occurred

Some of the problems arisen in the practice of the Supreme Court have been addressed above. Two more examples of problematic cases will be addressed.

A matter to be confronted first by the Legal Chancellor and then by the Supreme Court, is the question of whether it should be possible to challenge legislative omissions. The case itself is following.

The Parliament passed a new Local Government Council Election Act according to which party lists and individual candidates may run for the local councils. Under the previous law also lists of election coalitions (*i. e.* lists of political parties or individuals) could participate in the elections. The Legal Chancellor proposed the Parliament to bring the new act into conformity with the Constitution. The Parliament did not agree with the Legal Chancellor. The Legal Chancellor challenged the new Local Government Council Election Act with the Supreme Court, since the Act unconstitutionally restricts the right to stand for elections. However, according to the Constitutional Review Court Procedure Act the petition for the review of constitutionality must, *inter alia*, state the provision of the challenged act deemed to be unconstitutional. The Local Government Council Election Act does not include any single unconstitutional provision, it rather – this is the position of the Legal Chancellor – omitted a provision which existed in the previous act, and the result of that omission is unconstitutional. The Legal Chancellor submitted a petition to the Supreme Court seeking to declare Sections 31.1, 32.1 and 33.2.1 of the Local Government Election Act invalid to the extent that they do not enable the individuals eligible to run for the elections of local government councils in the lists of electoral coalitions of citizens. However, textually there is not much in these provisions to be declared invalid.[2] The question of whether the validity of

[1] *See, e. g.*, Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-1-02, 6.03.2002. English translation available at http://www.nc.ee.

[2] **Section 31. Political Party**

(1) Political parties which are entered in the non-profit associations and foundations register on the last day of registration of candidates at the latest, may take part in the elections of the local council.

…

Section 32. Independent Candidate

(1) Every person entitled to run for the local council (Sections 5.5 and 5.6) may present himself or herself for registration as an independent candidate and may conclude necessary formalities in person. Another person may

the previous Act might be restored – if the Supreme Court would declare the new Act invalid – might be put forward, as well. Or, alternatively, would the Supreme Court itself create a substantial legal norm by the way of specifically worded declaration of invalidity of some norms?

Another topic to be addressed concerns constitutional review proceedings initiated by ordinary courts. According to Article 15 of the Constitution everyone has the right, while his or her case is before the court, to petition for any relevant law to be declared unconstitutional. What is the "relevant law"? The Constitutional Review Court Procedure Act uses the term "law to be applied". The Supreme Court has held that the "relevant law" is a law that is decisive for resolving the case before the ordinary court.[3] The law is to be considered relevant, if the outcome of the case depends on the validity or invalidity of the law. Several questions arise, however. Up to whom is it to determine, whether the law is relevant? – First and foremost, this should be up to the ordinary court, since it has to resolve the original case. The ordinary court has to interpret and to apply the law, it has to determine which norm is to be applied.

The Supreme Court, however, has deviated from that principle sometimes. This applies in particular to the cases where several provisions of a law taken together lead to an unconstitutional result. The Supreme Court has tried to find a middle way between three requirements: (1) to review the constitutionality of the law relevant to the original case ("the law to be applied"); (2) to confine itself to the petition of the ordinary court; and (3) to observe the principle of procedural economy. There has been a case, for example, where the original petitioner in the administrative court has challenged the constitutionality of one norm; the administrative court has found some other norms to be relevant to the case and has declared the latter unconstitutional; and the Supreme Court in the constitutional review court procedure partly invalidated a combination of norms challenged by the petitioner in the original proceedings and norms challenged by the administrative court.[4] It has been quite difficult to cope with situations where a norm closely related to the original case in the ordinary court has been challenged by the court, but the Supreme Court reaches to the conclusion that the norm was not decisive for resolving the original case. So far, the Supreme Court has usually accepted the position of the ordinary courts – not, perhaps, so much because of the restraint from interfering into the questions of ordinary law, but rather because of the reasons of procedural economy. And obviously it would be hard to expect wide acceptance of decisions where fundamental rights of an individual would have left

be presented for registration and necessary formalities may be concluded on his or her behalf by an authorised individual having the right to vote according to Sections 5.1, 5.3 and 5.4 of this Act.

…

Section 33. Documents for Running as a Candidate

…

(2) In the application for running as a candidate the individual:

1) shall express his or her consent to run as a candidate of a list of a political party or as an independent candidate;

…

[3] Decision of the Supreme Court *en banc*, 3-4-1-10-2000, 22.12.2000. English translation available at http://www.nc.ee.

[4] Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-2-01, 5.03.2001. English translation available at http://www.nc.ee.

unprotected because the ordinary court challenged a wrong norm (from the viewpoint of the Supreme Court) or where an unconstitutional norm would remain untouched since the ordinary court should not have applied that norm at all.

Of course, such kind of rational considerations cannot stretch too far without claims of judicial activism – accusations the Supreme Court of Estonia has managed to avoid almost completely. It remains to be seen how the dispute concerning election coalitions mentioned above – probably one of the most political cases the Supreme Court has confronted so far – will be settled, whether procedural or substantial questions will prevail.

Constitutional Review Decisions taken by the Supreme Court (1993– 31.05.2002)

Year		1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	Total
Applicant	President	2	3	-	1	-	2	-	-	-	-	8
	Legal Chancellor	2	6	-	1	-	3	-	3	-	-	15
	Courts	-	2	4	2	3	5	3	6	7	4	36
Total number of decisions		4	11	4	4	3	10	3	9	7	4	59
Legal act challenged	Law	2	7	3	2	-	7	2	4	4	4	35
	Governmental regulation	-	2	-	2	2	3	1	2	3	-	15
	Regulation of a minister	-	1	1	-	-	1	-	-	-	-	3
	Legislation of a local self-government	2	2	-	-	1	1	-	2	-	3	11
Decision	Declare the legal act unconstitutional or invalid	3	9	2	3	2	10	2	5	5	4	45
	The legal act had already been declared invalid by the time the decision was taken	-	2	-	1	-	2	1	3	1	2	12
	Not to declare the legal act unconstitutional or invalid	1	1	2	1	1	-	1	2	1	1	11

Note: The numbers in the table do not sum up exactly in all instances, since in some cases several acts have been challenged in one petition, some untypical types of legal acts have been omitted, etc.