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RÉPUBLIQUE D'ESTONIE/REPUBLIC OF ESTONIA/ REPUBLIK ESTLAND/ ЭСТОНСКАЯРЕСПУБЛИКА

The Supreme Court of Estonia

Riigikohus

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XVIIth Congress of the Conference of European Constitutional Courts

Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles

Questionnaire

For the National Reports

I. The role of the constitutional court in defining and applying explicit/implicit constitutional principles.

1. Does the constitutional court or equivalent body exercising the power of constitutional review (hereinafter referred as the constitutional court) invoke certain constitutional principles (e.g. separation of powers; checks and balances; the rule of law; equality and non-discrimination, proportionality, reasonableness, human dignity, etc.) in the process of constitutional adjudication? To what extent does the constitutional court go in this regard? Does the constitution or any other legal act regulate the scope of constitutional decision-making in terms of referring to specific legal sources within the basic law that the constitutional court may apply in its reasoning?

The Supreme Court is the highest court of the Republic of Estonia. The Supreme Court is also the court of constitutional review. In the resolution of the question of constitutionality, the Supreme Court very often refers to the principles of the Constitution. The Supreme Court has also explained already in its early practice that in democratic countries the legislative drafting and implementation of the law, including the administration of justice, is guided by the laws and the general principles of law that have been historically developed.[1]

The assessment of the conformity with the principles of the Constitution may be a part of the control scheme of fundamental rights (e.g. conformity with the various aspects of the principle of a state based on the rule of law is checked by the assessment of the formal constitutionality of the infringement of a fundamental right; while conformity with the principle of proportionality is assessed by checking the substantive constitutionality of the infringement of a fundamental right), but is also an independent object of control (primarily in abstract norm control).

The Constitutional Court is free in the reasoning of its decisions. The Constitution (C) or other legislation does not prescribe requirements or restrictions in this respect.

2. What constitutional principles are considered to be organic in your jurisdiction? Are there any explicit provisions in the constitution setting out fundamental principles? Is there any case-law in respect of basic principles? How often does the constitutional court make reference to those principles?

The principles that are characteristic of the Estonian legal order are primarily principles which are established in or arise from C. Noteworthy is § 10 of C, which does not contain a complete catalogue of the fundamental principles of C but still lists several important ones.[2] The specified section lists the principles of human dignity and social justice, and a democratic government founded on the rule of law. In the Supreme Court's consideration, the principle of a state based on the rule of law includes the principles of legal certainty and legal clarity, and the principle of legal certainty in turn contains the principles of legitimate expectation and *vacatio legis*.

The Constitution also specifies e.g. the principle of the separation and the balance of power (§ 4); the principle of proportionality (§ 11); the principle of equal treatment (§ 12); and the prohibition of the arbitrary exercising of governmental authority (§ 13).

[1] RKPJKo 30.09.1994, III-4/1-5/94

[2] PS kommenteeritud väljaanne (Republic of Estonia Constitution. Commented Edition), 2012. PS § 10 komm 1.

The term "fundamental principles of the Constitution" was first used in § 1 of The Constitution of the Republic of Estonia Amendment Act (PSTS). In a referendum held on 14 September 2003, the people of Estonia adopted The Constitution of the Republic of Estonia Amendment Act (PSTS). Pursuant to § 1 of the PSTS, Estonia may belong to the European Union, provided that the fundamental principles of the Constitution of the Republic of Estonia are respected.

Until the PSTS entered into force, the distinction between the fundamental principles of C and its other principles did not hold meaning from the position of the law in force. Therefore, § 1 of the PSTS results in the distinction of the fundamental principles of C from its other principles.[3]

Originally, this term gathered the principles of human dignity and social justice and a democratic government founded on the rule of law (C § 10) and the values and principles established in the preamble to C, according to which the state of Estonia is founded on liberty, justice and the rule of law, and which must guarantee the preservation of the Estonian people and their culture through the ages.

The fundamental principles of C are not clearly established in C. The failure to list the fundamental principles of C in § 1 of the PSTS means that there is no objectively specified and closed catalogue of the fundamental principles of C.[4] The list of the fundamental principles of C has been proposed by the legal literature and by expert opinions, and the Supreme Court has also considered the fundamental principles of C in its practice.

In the law, the fundamental principles were not specified primarily because of the large division of positions. Even though a consensus has still not been reached, an understanding is now reaching maturation in the course of the discussions and discourse, whereby the fundamental principles should be understood as the core values, without which the state of Estonia and the constitution would lose its nature.[5] It has been found in the legal literature that the principles which are to be deemed as the fundamental principles of C cannot be abstractly and fully determined, but a consensus in respect to the minimum list of the fundamental principles is necessary.[6] Five fundamental principles have been proposed in the legal literature as one such possible list: human dignity (C § 10), a social state (C § 10), democracy (C § 1 (1) and § 10), a state founded on the rule of law (C § 10) and the Estonian identity i.e. a nation state (C preamble, § 1 (2)). The remaining principles and rules would then derive from these.[7]

The Supreme Court has, so far in its practice, named as the **fundamental principles of C** the principle of a state based on the rule of law[8] and the principles of human dignity and a social state[9]. The Supreme Court has also said that the fundamental principles of the constitution form the core of the basic order of the Republic of Estonia and are the most important norms of the legal order.[10]

As the fundamental principles of C the Supreme Court has specified the principles of a social state and of human dignity (RKPJKo 21.01.2004, 3-4-1-7-03, para 14; RKHKm 04.05.2011, 3-3-1-11-11, para 10) as a fundamental principle of the Estonian organisation of its state and the principle of a state founded on law i.e. a state founded on the rule of law (RKPJKo 19.03.2009, 3-4-1-17-08, para 26), democracy as the most important principle of the Estonian state-building organisation (RKÜKo 01.07.2010, 3-4-1-33-09, para 67) and the principle of sovereignty as the basis of the Estonian people and the state (RKÜKo 12.07.2012, 3-4-1-6-12, para 127). **As the carrying principles of C** the Supreme Court has specified the principles of legal clarity, legal certainty, separation and the balance of power (RKÜKo 03.12.2007, 3-3-1-41-06, para 21; 02.06.2008, 3-4-1-19-07, para 25). The term

[3] PS kommenteeritud väljaanne 2012. PSTS § 1 komm 10.
[4] PS kommenteeritud väljaanne 2012. PSTS § 1 komm 13.1.
[5] PS kommenteeritud väljaanne 2012. Sissejuhatus.
[6] PS kommenteeritud väljaanne 2012. PSTS § 1 komm 14.3.
[7] PS kommenteeritud väljaanne 2012. PS § 10 komm 3. See also M. Ernits. Fundamental Constitutional Principles. - RiTo 24, 2011. Online: http://www.riigikogu.ee/rito/index.php?id=16009&op=archive2
[8] RKPJKo 19.03.2009, 3-4-1-17-08, para 26; RKPJKm 07.11.2014, 3-4-1-32-14, para 28; RKPJKo 06.01.2015, 3-4-1-34-14, para 33.
[9] RKPJKo 05.05.2014, 3-4-1-67-13, para 49.
[10] RKPJKo 05.05.2014, 3-4-1-67-13, para 49.

“general principles of law” can also be seen in the earlier practices of the Supreme Court, which are lawfulness (RKPJKo 12.01.1994, III-4/A-1/94), the prohibition of (unfavourable) retrospective effects and the principle of legitimate expectation (RKPJKo 30.09.1994, III-4/A-5/94), or the principle of legal certainty and legitimate expectation (RKPJKo 30.09.1998, 3-4-1-6-98, p II), and the principle of equal treatment (RKHKm 24.03.1997, 3-3-1-5-97, para 4).[11]

Of the more important judgments, where the Supreme Court has considered the principles of C (without fundamental rights), the constitutionality review of the Courts Act may be named from among the more recent practices, where the application of the principle of a state based on the rule of law in general was dealt with. The question was related to the fact of who can administer justice, and Subsection 146 (1) of C was deemed to be essentially the concretisation of the principle of a state based on the rule of law (RKÜKo 04.02.2014, 3-4-1-29-13). In the case of the immunity of a member of the Riigikogu (the Parliament), the question in large part came down to the principle of democracy (RKPJKo 17.02.2014, 3-4-1-54-13).

In the context of the European Union, the principle of a democratic government founded on the rule of law and Estonian sovereignty has been considered in a court case in which the Supreme Court en banc dismissed the application of the Chancellor of Justice to declare Article 4 (4) of the Treaty establishing the European Stability Mechanism to be in conflict with the Constitution. The Supreme Court found that the disputed article did indeed restrict the financial competence of the Riigikogu and the principle of a democratic government founded on the rule of law and Estonian sovereignty, but in this case the restriction was justified (RKÜKo, 12.07.2012, 3-4-1-6-12).

In Supreme Court practice, the fundamental principles of C as well as the principles deriving from them play a very important role in ascertaining the purpose of C, and therefore referring to these principles is also a common occurrence in Supreme Court practice.

3. Are there any implicit principles that are considered to be an integral part of the constitution? If yes, what is the rationale behind their existence? How they have been formed over time? Do they originate from certain legal sources (e.g. domestic constitutional law or the constitutional principles emanating from international or European law; newly-adopted principles or ones re-introduced from the former constitutions)? Has academic scholars or other societal groups contributed in developing constitutionally-implied principles?

An integral part of the Constitution is the principles, which are explicitly provided in C, or which arise from the values and principles provided in C (see the response provided for the previous question).

The Supreme Court has explained that, when shaping the general principles of Estonian law, the general principles of law shaped by the Council of the European Union and the institutions of the European Union must also be taken into account besides the Constitution.[12]

§ 10 of C provides that: "The rights, freedoms and duties set out in this chapter do not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and which are in conformity with the principles of human dignity, social justice and democratic government founded on the rule of law." The Supreme Court has explained that the applicability of the principles of a democratic and social state, based on the rule of law, means that those general principles of law which are recognised in the European legal space also apply in Estonia. The Supreme Court has additionally explained that, pursuant to the preamble of C, the state of Estonia is founded on liberty, justice and law. In a state which is founded on liberty, justice and law, the general principles of law apply. Any law which is in conflict with these principles is also in conflict with C.[13]

[11] PS kommenteeritud väljaanne 2012. PS § 10 komm 3.
[12] RKPJKo 30.09.1994, III-4/1-5/94.
[13] RKPJKo 30.09.1994, III-4/1-5/94.

In the preparation of C, which was adopted in 1992, the earlier Constitutions of the Republic of Estonia (1920, 1938) were relied upon, as well as international acts, incl. the Convention for the Protection of Human Rights and Fundamental Freedoms.

From the time of the adoption of the Constitution the court practice, and especially constitutional review, has taken into use the general principles of law which are used by the Court of Justice of the European Union and the European Court of Human Rights (e.g. the principles of proportionality, legitimate expectation, legal certainty, etc.). From the position of our legal system, these principles are the principles of international law.[14]

Subsection 3 (1) of C prescribes that the generally recognised principles and rules of international law are an inseparable part of the Estonian legal system.

The Constitution and the principles deriving from it have been a topic of discussion for jurists in Estonia, and due to this the contribution of such jurists has also been remarkable. A significant part of this discussion has been collected into the commented edition of the Constitution, which has so far been published three times (most recently in 2012). This commenting on the Constitution has, since 2002, been organised by the public law professors at the University of Tartu School of Law. Most of the best experts in various fields have been invited to be the authors of the comments.[15]

4. What role does the constitutional court has played in defining the constitutional principles? How basic principles have been identified by the constitutional court over time? What method of interpretation (grammatical, textual, logical, historical, systemic, teleological etc.) or the combination thereof is applied by the constitutional court in defining and applying those principles? How much importance falls upon travaux preparatoires of the constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do universally recognised legal principles gain relevance in this process?

The Supreme Court has had a carrying role in the determination and interpretation of the principles of C (see the above response to the second question). The practices of the Court of Justice of the European Union and the European Court of Human Rights have also been an important support when interpreting the principles.

The Supreme Court has mainly used the grammatical, systematic, historical and teleological interpretation method.

The preparatory acts of the Constitution are an important source for the interpretation of the Constitution. The Supreme Court still mainly refers to the materials of the Constitutional Assembly[16] upon its interpretation of the specific norms of C.[17]

The preamble of C plays an important role in the interpretation of the principles of the Constitution. The values contained in the preamble affect the principles of the constitution and the other provisions, and as such shape the meaning of the Constitution.[18]

5. What is a legal character of the constitutional principles? Are they considered to be the genesis of the existing constitutional framework? What emphasis is placed upon the fundamental principles by

[14] U. Lõhmus. Generally recognised principles of international law as part of the Estonian legal system – Juridica 1999, No. 9, pp. 425-430.
[15] PS kommenteeritud väljaanne 2012. Eessõna.
[16] With a resolution of the Supreme Council of the Republic of Estonia of 20 August 1991 "On the Independence of the Estonian State" the formation of the Constitutional Assembly was prescribed for the purpose of developing the Constitution.
[17] RKÜKo 23.02.2009, 3-4-1-18-08, paras 20 and 22 (C § 75, The remuneration of members of the *Riigikogu*); RKPJKo 19.03.2009, 3-4-1-17-08, para 33 (C § 133, Right of the National Audit Office to audit the use of public assets); RKÜKo 21.06.2011, 3-4-1-16-10, para 86 (C c 20 (2) 3), Deprivation of liberty to prevent a criminal or administrative offence).
[18] Põhiseaduse kommenteeritud väljaanne, 2012. Sissejuhatus.

the constitutional court in relation to a particular constitutional right? Are basic principles interpreted separately from the rights enumerated in the constitution or does the constitutional court construe fundamental principles in connection with a specific constitutional right as complementary means of latter's interpretation? Can the basic principles in your jurisprudence constitute a separate ground for unconstitutionality without their connection with a concrete constitutional norm? Is there any requirement in law placed upon the judicial acts of enforcement of constitutional principles?

The fundamental principles of C are those norms which form the basis for all the rest of the principles and rules of C. By their legal nature, these norms containing the fundamental principles are principles (not rules), as a result of which the dimension of importance arises especially clearly. The basic principles, as the basis of the remaining norms of C, determine the core of the basic order of the Republic of Estonia. These are the most important norms in the Estonian legal order.

The Supreme Court interprets the fundamental principles in relation to a specific constitutional right in its review scheme, uses the principles as an additional tool in the interpretation of the fundamental rights, and as well applies the principles independently. For example, the Supreme Court has noted that the first sentence of Subsection 28 (2) of C ensures the basic right to government assistance in the case of need, which is one expression of the principles of a social state and human dignity in the Constitution. The fundamental right to state assistance in the case of need established in the first sentence of Subsection 28 (2) of C affirms the applicability of the principle of human dignity and a social state, and also gives everyone a sense of security for coping in the case of material hardship.[19]

The principles of the Constitution may be an independent ground for the declaration of unconstitutionality. The Supreme Court has declared a legal norm as unconstitutional, e.g. due to a conflict with the principle of legitimate expectation.

The Supreme Court explained, in a court case concerning a tax exemption pursuant to the Farm Act, that pursuant to the meaning of C the general principle of law in Estonia is the principle of legitimate expectation. Pursuant to this principle, everyone has the right to operate with the reasonable expectation that the applicable law will remain valid. Every person should be able to use the rights and freedoms given to them by the law, at least during the term provided in the law. Also, an amendment made in the law should not break its word in respect to the subjects of the law. As the state promised the farms created pursuant to the Farm Act a tax exemption for the first five years, the farmers had the right to expect and to operate according to the calculation that the tax exemption would apply for five years. The Supreme Court found that the cancelling of the tax exemption during that time was in conflict with the principle of legitimate expectation deriving from § 10 of C, and therefore Subsection 25 (3) of the Law of Property Act Implementation Act was unconstitutional in the part which declared Subsection 30 (2) of the Farm Act invalid.[20]

There is no requirement in the law that places upon the judicial acts an enforcement of the constitutional principles.

6. What are the basic principles that are applied most by the constitutional court? Please describe a single (or more) constitutional principle that has been largely influenced by constitutional adjudication in your jurisdiction. What contribution does the constitutional court has made in forming and developing of such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.

In resolving the question of constitutionality, the Supreme Court has most often implemented the principle of proportionality. This is followed by the principle of equal treatment and the principle of a state based on the rule of law, together with the principles of legal certainty and of legitimate expectation included in it.

[19] RKPJKo 05.05.2014, 3-4-1-67-13, paras 31 and 49.
[20] RKPJKo 30.09.1994, III-4/A-5/94.

The Constitutional Review Chamber of the Supreme Court (RKPJK) recognised the validity of the principle of proportionality in the Estonian legal order for the first time in 1997, when the court noted: "It is possible to restrict a minor's freedom of movement if the restriction is justified by the need to prevent leaving the minor unsupervised, if it is proportional to the desired goal and if it is impossible to achieve the desired goal by other means" (RKPJKo 06.10.1997, 3-4-1-3-97, p I). Less than a year later, the RKPJK worded the core of the principle of proportionality as: "Pursuant to the principle of proportionality, valid in a state based on rule of law, the measures taken must be proportionate to the objectives to be achieved" (RKPJKo 30.09.1998, 3-4-1-6-98, p III). The same year, the RKPJK also added a further justification: "It is a principle of constitutional jurisdiction that, when assessing the conflicting rights or competencies, a solution should be found that does not damage the constitutional stability, that restricts rights as little as possible, that maintains the constitutional nature of law, and that guarantees a justified and constitutional exercising of rights" (RKPJKo 14.04.1998, 3-4-1-3-98, p IV).[21]

A three-step proportionality principle was first reflected in Supreme Court practice in 2000 (RKPJKo 28.04.2000, 3-4-1-6-00, paras 13, 16 jj). From 2002, the Supreme Court has applied a high-level consideration, which has today become a consistent practice: "The principle of proportionality derives from the second sentence of § 11 of the Constitution, pursuant to which the circumscriptions of rights and freedoms must be necessary in a democratic society. Correspondingly, the principle of proportionality is reviewed by the court on three consecutive levels – first, the suitability of the measure; then the necessity; and if necessary, also the proportionality in a narrower meaning i.e. the reasonableness. In the case of a clearly unsuitable measure, it is not necessary to check the necessity and reasonableness of the measure. A measure is suitable if it promotes the achieving of the aim of the restriction. From the position of suitability, a measure is without dispute disproportionate if it does not promote achieving the aim of the restriction in any case. The aim of the suitability requirement is to protect the person from the unnecessary intervention of a public authority. A measure is necessary if the aim cannot be achieved by some other measure that burdens the person less, and is at least as efficient as the first one. In order to decide the reasonableness of the measure, the extent and the intensity of the intervention with the fundamental right must be weighed on the one hand, and the importance of the aim of the restriction on the other. The more intense the infringement of the fundamental right, the weightier the reasons justifying it must be."[22]

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

1. Do the constitutional principles enjoy certain degree of superiority in relation to other provisions in the basic law? How are constitutional principles and other constitutional provisions related to international law and/or to the European Union law? Are there any provisions in international or the European Union law that are deemed superior than the national constitutional principles? If yes, how such higher international provisions are applied with regard to the national constitutional principles? What is the prevailing legal opinion among both academic scholars and practitioners in your jurisdiction about attaching higher value to certain constitutional principles over other provisions of basic law?

The Supreme Court has noted, in considering the principles of human dignity and a social state, that the fundamental principles of the Constitution form the core of the basic order of the Republic of Estonia and are the most important norms of the legal order.[23]

The second sentence of Subsection 3 (1) of C prescribes that the generally recognised principles and rules of international law are an inseparable part of the Estonian legal system. It has been established in § 123 of C that: "The Republic of Estonia may not enter into international treaties which are in

[21] PS kommentaarid 2012, PS § 11 komm 3.
[22] Ibid.
[23] RKPJKo 05.05.2014, 3-4-1-67-13, para 49.

conflict with the Constitution. When the laws or other legislation of Estonia are in conflict with an international treaty that is ratified by the Riigikogu, the provisions of the international treaty apply."

Having presumed that the Constitution is in accordance with the "generally recognised principles and rules of international law", it is still presumed at the same time in the legal orders of most states that the Constitution is the highest legal norm for the state and, for example, international agreements are still lower than the Constitution of the state itself in the hierarchy of the legislation.[24] International agreements that are ratified by the Riigikogu are supreme to the legislation but lower than C.

After joining the European Union, those legislative acts of the EU which are directly applicable or which have an immediate legal effect are supreme in relation to the national laws and C (excl. the fundamental principles of C).

The Constitutional Review Chamber of the Supreme Court stressed in its position of 11 May 2006, in Case No. 3-4-1-3-06 (c-s 15 and 16): "Pursuant to § 2 of the Constitution of the Republic of Estonia Amendment Act, the Constitution applies while taking account of the rights and obligations arising from the Accession Treaty. As a result of the adoption of the Constitution of the Republic of Estonia Amendment Act, the European Union law became one of the grounds for the interpretation and application of the Constitution. In the substantive sense, this amounted to a material amendment of the entirety of the Constitution, to the extent that it is not compatible with the European Union law. To find out which parts of the Constitution this is applicable to, it has to be interpreted in conjunction with the European Union law, which became binding for Estonia through the Accession Treaty. Then, only that part of the Constitution is applicable which is in conformity with the European Union law, or which regulates the relationships that are not regulated by the European Union law. The effect of those provisions of the Constitution that are not compatible with the European Union law, and thus are inapplicable, is suspended. This means that, within the spheres which are within the exclusive competence of the European Union, or where there is a shared competence with the European Union, the European Union law shall apply in the case of a conflict between the Estonian legislation, including the Constitution, and the European Union law."

Jurists shared the view on the fact that the fundamental principles, i.e. the general principles of C, are those norms which form the basis for all the remaining principles and rules of C. The basic principles, as the basis for the remaining norms of C, determine the core of the basic order of the Republic of Estonia. These are the most important norms in the Estonian legal order.[25]

It has been explained in the legal literature that, in the law, the fundamental principles were not specified primarily because of the large division of positions. Even though a consensus has still not been reached, an understanding is now reaching maturation in the course of the discussions and discourse, whereby the fundamental principles should be understood as the core values, without which the state of Estonia and the constitution would lose its nature.[26]

2. How are the constitutional principles related to each other? Is there any hierarchy within those principles? What approach has the constitutional court taken in terms of determining a hierarchy within the constitution? Is it possible to conclude from the jurisprudence of the constitutional court that it has given principal status to some constitutional principles over the rest of the basic law?

The fundamental principles of C are those norms which form the basis of all the remaining principles of C. (See also the response to the second question of Part I.)

The Supreme Court has said that the fundamental principles of the Constitution make up the core of the basic order of the Republic of Estonia, and are the most important norms of the legal order.[27]

[24] PS kommentaarid, 2012. PS § 3 komm 3.5.
[25] PS kommenteeritud väljaanne, 2012. PS § 10 komm 3.
[26] PS kommenteeritud väljaanne, 2012. Sissejuhatus.
[27] RKPJKo 05.05.2014, 3-4-1-67-13, para 49.

3. How is the constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the basic law? How the constitution was established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the basic law? Has the constitutional principles ever been subjected to change in your jurisdiction? If yes, what were the reasons behind it?

Pursuant to § 163 of C, the Constitution may be amended by an Act which has been passed by: 1) a referendum; 2) two successive memberships of the Riigikogu; 3) the Riigikogu, as a matter of urgency.[28] A bill to amend the Constitution will receive three readings in the Riigikogu, where the interval between the first and the second reading may not be shorter than three months, and the interval between the second and the third reading may not be shorter than one month. The manner in which C is to be amended is determined during the third reading.

The right to initiate an amendment to the Constitution rests with not less than one fifth of the members of the Riigikogu and with the President (C § 161). In the explanatory memorandum to the bill to amend C, the person or persons who introduce that bill must state the method by which they propose to pass the Act to amend C (Riigikogu Rules of Procedure and Internal Rules Act, Subsection 122 (3)). Chapter I (General Provisions) and Chapter XV (Amendment of the Constitution) of the Constitution may only be amended by a referendum (C § 162).

The people of Estonia adopted the Constitution in force in the referendum held on 28 June 1992. C does not prescribe any provisions which cannot be amended; however, the Constitution does prescribe the amendment of the above provisions only by way of a referendum.

The Estonian Constitution has been amended on five occasions. The Principles of the Constitution were amended with The Constitution of the Republic of Estonia Amendment Act, in which the right of Estonia to belong to the European Union was established. The PSTS was adopted by a referendum and the Act entered into force on 06.01.2004.

The principle of the primacy of EU law is not limited to regular laws, as the European Union law also dominates over the Constitution. It has been stated in the legal literature that the accession to the European Union completely changed the situation in Estonia, and created a completely new situation from the economic, organisational and legal perspective. It has also been admitted that the fragmentation of public authority brought about a reduction of the impact of the Constitution in Estonia, similarly to the other Member States of the European Union.[29]

4. Should constitutional amendment procedure be subjected to judicial scrutiny or should it be left entirely up to the political actors? What is the prevailing legal opinion in this regard among academic scholars and other societal groups in your jurisdiction?

The need for a judicial review has so far not arisen in Estonia. In the creation of the Constitution, attention has been paid to the preclusion of the opportunity to amend the Constitution too lightly.

Subsection 163 (2) of C orders the Riigikogu to consider the Bill to amend C in three separate readings. There are minimal intervals prescribed in C, which should be left between the readings. The purpose of these requirements is to ensure that amendments to C are not made in a rush, but are considered thoroughly.[30] Amending the provisions specified in the Constitution only in a referendum shall help to avoid those provisions being left to the mercy of the political powers.

[28] The opportunity for the speedy amendment of the Constitution means that in the Constitution these exists the ability to amend the Constitution by the same composition of the Riigikogu. This manner of amendment does take less time than the others, but still lasts a total of at least seven months taking into account the procedural terms and a term of at least three months that is prescribed for the amendments to enter into force.
[29] U. Lõhmus. Amendment of the Constitution and Changes in the Constitution. - Juridica 2011 No. 1, pp. 12-26.
[30] PS kommenteeritud väljaanne, 2012. PS § 163 komm 8.

Attention has been drawn in the legal literature to the fact that, so far, no political power has challenged the fundamental principles of the Constitution, but a situation where the fundamental principles can be changed by a speedy procedure cannot be accepted.[31]

5. Does the constitution in your jurisdiction provide for constitutional overview of the constitutional amendment? If yes, what legal subjects may apply to the constitutional court and challenge the constitutionality of the amendment to the basic law? What is the legally-prescribed procedure of adjudication in this regard?

The Constitution does not explicitly provide for a constitutional overview of a constitutional amendment. The constitutional review of an Act adopted in the Riigikogu can be applied for, according to the normal procedure. Therefore, the President of the Republic and the Chancellor of Justice have the right to commence a review.

Pursuant to the Constitutional Review Court Procedure Act, the President of the Republic has the right to commence a constitutional review of a law passed by the Riigikogu and not promulgated by him or her, if the Riigikogu passes the law for a second time and without amending it after it is returned for a new debate and decision.

The Chancellor of Justice has the right to submit a request for the constitutional review of an Act which has been promulgated, but which has not yet entered into force.

A constitutional review cannot be carried out over an Act that was adopted in a referendum.

6. Is the constitutional court authorised to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds? In the absence of explicit constitutional power, has the constitutional court ever assessed or interpreted constitutional amendment? What has been the rationale behind the constitutional court's reasoning? Has there been a precedent when the constitutional court had elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? What is legal effect of a decision of the constitutional court finding the constitutional amendment in conflict with the constitution? Please, provide examples from the jurisprudence of the constitutional court.

The Supreme Court has not carried out a review of a constitutional amendment.

A position has been declared in the legal literature, whereby if the Riigikogu adopted the Constitution of the Republic of Estonia Amendment Act, then the President of the Republic should have the right to refuse to proclaim the Act if the Riigikogu has disregarded the procedural requirements prescribed in C. For example, the President of the Republic should check before proclaiming the Constitution of the Republic of Estonia Amendment Act whether the Riigikogu has followed the provisions which concern the number of votes required for adopting an Act, or that the Riigikogu has not adopted the amendments which, pursuant to C, should be decided in a referendum.[32]

7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of constitutional court's power to check amendments to the basic law? Do academic scholars or other societal groups advocate for such development? How the judicial review is observed in this regard? Would the expansion or recognition of constitutional court's authority encourage the realisation of constitutional ends or threaten its viability? Please, elaborate on existing discussion in your jurisdiction.

With regards to this question, the Supreme Court has not expressed its position. This topic has so far also not been considered in the commented editions of the Constitution, but it will probably be

[31] U. Lõhmus. Amendment of the Constitution and Changes in the Constitution. - Juridica 2011 No. 1, pp. 12-26.
[32] PS kommenteeritud väljaanne, 2012. PS § 167 komm 6.

considered in the new commented edition, which is currently being prepared. There are also no thorough considerations on this topic in the legal literature, but in discussions positions have been provided both in favour, as well as against, broadening the jurisdiction of the constitutional court.

The Estonian constitution is relatively young (it has been in force since 1992) and during its period of validity there has been no need to significantly amend the Constitution. Still, the political circumstances are currently undergoing changes (arising from the populist political forces); therefore, it is not precluded that in the near future there may be a wish to make amendments in the Constitution (e.g. the establishment of a marriage/family definition in the Constitution in such a manner that it would definitely preclude protection for same-sex couples has been a topic of discussion). In turn, such tendencies also raise questions about the potential role of the constitutional court in controlling the amendment of the Constitution.