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CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

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The Supreme Court of Estonia

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?

Justices of the Supreme Court are appointed to office by the Parliament (the *Riigikogu*), at the proposal of the Chief Justice of the Supreme Court. The Chief Justice of the Supreme Court first considers the opinion of the Supreme Court *en banc* and the Council for Administration of Courts concerning a candidate (subsection 55 (4) of the Courts Act[1]). On the basis of subsection 65 (7) of the Constitution, the *Riigikogu* shall, at the proposal of the President of the Republic, appoint to office the Chief Justice of the Supreme Court.

According to subsection 29 (1) of the Courts Act (hereinafter the CA), the Supreme Court has the Constitutional Review Chamber, which is comprised of nine justices of the Supreme Court (from the Civil Chamber, Administrative Chamber and Criminal Chamber). It is a body corresponding to a constitutional court. According to subsection (2) of the same section, the Chief Justice of the Supreme Court is the chairman of the Constitutional Review Chamber and other members of the Chamber are appointed by the Supreme Court *en banc*. According to subsection 29 (3) of the CA, the internal rules of the Supreme Court provide for the term of authority of the members of the Constitutional Review Chamber and the procedure for the substitution of members of the Constitutional Review Chamber. According to article 29 of the internal rules of the Supreme Court, each year the Supreme Court *en banc*, at the proposal of the Chief Justice of the Supreme Court, appoints two new members to the Constitutional Review Chamber, taking into account the position of the Administrative Law, Civil and Criminal Chambers of the Supreme Court and the equal representation of the Chambers in the Constitutional Review Chamber, and removes the two most long-serving members of the Constitutional Review Chamber. The internal rules of the Supreme Court are adopted by the Supreme Court *en banc*.[2]

A justice can be removed from the Constitutional Review Chamber only if the justice resigns from their position or if the Chief Justice resigns from their position. According to § 99 of the CA, a judge is released from office; at the request of the judge; if the judge has attained 68 years of age; due to unsuitability for office – within three years after appointment to office; due to health reasons that hinder work as a

[1] The texts of the legal acts are available in Estonian at www.riigiteataja.ee and in English at www.just.ee/23295.

[2] The approval of the Council for Administration of Courts is required for adoption of the internal rules of the Supreme Court (clause 41 (1) 7) of the CA).

judge; upon liquidation of the court or closure of the courthouse or reduction of the number of judges; if after leaving the service in the Supreme Court, the Ministry of Justice or an international court institution, a judge does not have the opportunity to return to their former position as a judge, and they do not wish to be transferred to another court; if a judge is appointed or elected to the position or office that is not in accordance with the restrictions on services of judges; if facts become evident, which, according to law, preclude the appointment of the person judge.

Justices of the Supreme Court are released by the *Riigikogu* at the proposal of the Chief Justice. The Chief Justice of the Supreme Court is released by the *Riigikogu* at the proposal of the President of the Republic, but if the Chief Justice of the Supreme Court is unable to perform his or her duties for six consecutive months due to illness or for any other reason, the President of the Republic shall file a reasoned request to the Supreme Court *en banc* to declare by judgment that the Chief Justice of the Supreme Court is unable to perform his or her duties. In such an event a judgment of the Supreme Court *en banc* shall release the Chief Justice of the Supreme Court from office.

Thus, neither the *Riigikogu* nor the Government of the Republic have any chance of releasing a Justice exclusively from the position of member of the Constitutional Review Chamber.

2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

The Supreme Court is financed directly from the state budget. The size and structure of the budget of the Supreme Court requires the approval of the Government. The drafting of the state budget is organised and coordinated by the Ministry of Finance pursuant to the requirements of the State Budget Act. According to subsections 6 (3) and 12 (1) of the State Budget Act (SBA), the Supreme Court itself negotiates its draft budget, notably the reasonableness and advisability of the budget expenditure with the Ministry of Finance.

With the help of the Director of the Supreme Court the Chief Justice ensures that the court's budget and, where necessary, the budget amendment draft are submitted to the ministry in a timely manner. The reasonableness and advisability of the budget expenditure is negotiated between representatives of the Ministry of Finance and the Supreme Court. Following the negotiations and resolution of disagreements at the governmental level the Ministry of Finance draws up the draft state budget and submits it to the Parliament via the Government. In the budget negotiations with the officials of the Ministry of Finance the Supreme Court is represented by the Director of the Supreme Court and in negotiations with the members of the Government and the Parliament by the Chief Justice.

According to subsection 15 (2) of the SBA, upon amendment or omission of amounts allocated to the Supreme Court in the draft state budget, the Government of the Republic shall present the amendments with justification therefore in the explanatory memorandum to the draft state budget aimed at the Parliament. According to subsection 21 (1) of the SBA, the *Riigikogu* adopts the state budget.

Inside the Supreme Court the Supreme Court's budget issues are, in accordance with article 9 of the internal rules approved by the Supreme Court *en banc*, are discussed in the management that comprises the Chief Justice, Chairmen of the Chambers and the Director of the Supreme Court or, at the request of the Justices, in the Court *en banc*. According to subsection 32 (1) of the CA, the salaries of the court officers of the Supreme Court, the procedure for payment of additional remuneration, bonuses and benefits shall be determined by the Chief Justice of the Supreme Court within the limits of the budget of the Supreme Court The salary levels of the Justices arise from the Salaries of Civil Servants Appointed by the *Riigikogu* or President of the Republic Act.

The Chief Justice of the Supreme Court is responsible for the designated use of the budget funds of the Supreme Court approved by the Parliament. Day-to-day supervision over the implementation of the budget is the function of the Director of the Supreme Court.

3. **Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?**

Although there is no legislation to bind the Parliament to the duty of asking for the opinion of the Supreme Court when amending the organisation of the Court or the rules of the constitutional review procedure, both the Supreme Court as well as the Council for Administration of Courts are usually involved in the procedure of such legislation at the stage where opinions are asked.[3]

4. **Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?**

The Constitutional Review Chamber reviews legislation of general application, including acts adopted by the Parliament and regulations adopted by the Government,

[3] In Estonia, courts of the first and second instance (and not the Supreme Court) are administered by the Minister of Justice in cooperation with the Council for Administration of Courts. The Council for Administration of Courts comprises the Chief Justice of the Supreme Court (the chairman of the Council), five judges appointed by the Court *en banc* (General Assembly of all Estonian judges) for three years, two members of the *Riigikogu*, an attorney-at-law appointed by the Board of the Estonian Bard Association, the Chief Public Prosecutor or a public prosecutor appointed by the Chief Public Prosecutor, the Chancellor of Justice or a representative appointed by the Chancellor of Justice. The Minister of Justice or the representative appointed by the Minister participates in the Council having the right to speak.

ministries and local authorities (see Chapter 2 of the Constitutional Review Court Procedure Act (CRCPA)). Based on an appeal, the Chamber also reviews decisions of the *Riigikogu*, the Board of the *Riigikogu* and the President of the Republic (Chapter 3 of the CRCPA). The Chamber does not have the authority to review single decisions of the Government or ministers.

5. **Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.**

The Constitutional Review Chamber can pursue five different types of proceedings:
1) constitutional review of legislation of general application (Chapter 2 of the CRCPA);
2) appeals against decisions of the *Riigikogu*, the Board of the *Riigikogu* and the President of the Republic (Chapter 3 of the CRCPA);
3) declaring an official unable to perform their duties for an extended period, terminating the term of office of a member of the *Riigikogu* and granting consent to the President of the *Riigikogu* acting in the capacity of the President of the Republic (Chapter 4 of the CRCPA);
4) terminating the activities of a political party (Chapter 5 of the CRCPA);
5) appeals and protests against decisions of electoral committees (Chapter 6 of the CRCPA).

6. **a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.**

Generally speaking, judgments of the Supreme Court are generally binding (to be adhered to by lower courts and by the Supreme Court itself), including for the Legislature. The judgments of the Constitutional Review Chamber of the Supreme Court enter into force as of their public pronouncement (subsections 58 (1) and (2) of the CRCPA). Also, the Court has the right to postpone the entry into force of a judgment made in the procedure of constitutional review of legislation of general application by up to six months (subsection 58 (3) of the CRCPA).

The Constitutional Review Court Procedure Act in force does not touch upon the issue of the bindingness or enforcement of judgments. [4]

According to § 152 of the Constitution, in a court procedure, the court shall not apply any law or other legislation that is in conflict with the Constitution. A judgment

[4] Below, answers to points 4.8 and 5.1 of the questionnaire of the XIV Congress of the Conference of European Constitutional Courts "Problems of Legislative Omission in Constitutional Jurisprudence" drawn up by the Constitutional Court of the Republic of Lithuania have partially been used. Available in English at http://www.riigikohus.ee/?id=1088

refusing to apply an act in force is declarative, because, according to the second sentence of subsection 149 (3) and subsection 152 (2) of the Constitution, only the Supreme Court has the competence to bindingly identity conflicts with the Constitution. Upon reviewing the constitutionality of an act or other legislation, the constitutional court has the obligation to make a decision as provided for in § 15 of the CRCPA. Such a decision certainly has a partial legislative impact as well. Upon annulment of a provision of general application, the constitutional court steps in the position of the Legislature and exercises the right that, in essence, is part of constitutional review. Once a conflict between an act that has not entered into force yet and the Constitution is identified, the President of the Republic will not proclaim the act, the act will not enter into force and the Legislature is obligated to eliminate the conflict with the Constitution. Upon identification of the unconstitutionality of an act that has entered into force, the Supreme Court declares in the decision of the judgment the legislation to be fully or partially invalid.[5] It may be assumed that the goal of declaring legislation partially invalid is to leave the legislation as such in force. If, upon weighing different values the constitutional review court has come to the conclusion that a provision of law does not fit in the legal order, the court is obligated to eliminate the provision, i.e. correct the mistake made by the Legislature. Such an obligation of the Supreme Court to act as a negative Legislature arises from subsection 152 (2) of the Constitution. M. Sepp, the Head of the Legal Department of the Chancellery of the *Riigikogu* notes: "[s]ince the Supreme Court has the chance to declare an unconstitutional act or any of its provisions invalid, we can conclude that a judgment of the Supreme Court has power equal to that of an act, ending the validity of the act.
However, it does not become an act or a prima facie source of law."[6] Due to the bindingness of judgments the Legislature must respect the instructions of conduct given in them and constantly take them into account in its future activities. As a result thereof the constitutional court makes certain that the fundamental rights and freedoms are independent factors in political life. They do influence politics, but politics does not influence them.[7]

No separate regulation has been established for discussion of judgments of the constitutional court. In the general legislative activities the *Riigikogu* follows the Constitution. According to § 102 of the Constitution, laws (acts) shall be passed in accordance with the Constitution. The following have the right to initiate laws: a

[5] Instead of repealing legislation, a judgment of the constitutional court may also contain binding interpretations, i.e. that a provision of law remains in force, but the right way of how the provision must be interpreted in order to prevent a conflict between the provision and the Constitution. In addition to binding interpretations, the constitutional court may, as one option, give legal orders on further conduct of the Legislature. Legal orders always require active steps by the Legislature, improvement of the legal order, but the court has refrained from prescribing specific provisions.
[6] The VII, VIII and XI composition of the *Riigikogu*. Statistics and Comments. Tallinn: Chancellery of the *Riigikogu* 2004, p. 310.
[7] M. Hartwig. Role and Position of Constitutional Courts in Ensuring Fundamental Rights and Freedoms. Interpretation of Fundamental Rights and Freedoms – Constitutional Courts as Protectors of Fundamental Rights and Freedoms. Tartu 1997, p. 30.

member of the *Riigikogu*, a faction of the *Riigikogu*, a committee of the *Riigikogu*, the Government of the Republic, the President of the Republic, for amendment of the Constitution and, furthermore, the *Riigikogu* has the right, on the basis of a resolution made by a majority of its membership, to propose to the Government of the Republic to initiate a bill (draft act) desired by the *Riigikogu* (§ 103 of the Constitution). The *Riigikogu* Rules of Procedure Act provides for the procedure for passage of laws (acts) (subsection 104 (1) of the Constitution). The Constitution establishes the rule of the majority of the membership of the *Riigikogu* in the case of constitutional laws (acts) (subsection 104 (2) of the Constitution). The Legislature is obligated to comply with the judgments of the constitutional court.

Thereby the Legislature has the following options: prevention, concerting action and inaction (see below).[8]

In the former CRCPA, there was a separate provision on enforcement of constitutional review judgments: § 23 "Compliance with judgments" ("Judgments of the Supreme Court shall be complied with by any and all state and government authorities, local authorities, courts, officials, entities and individuals in the Republic of Estonia."). The Supreme Court also lacks the right to terminate any violation of the Constitution, to restore the former state of affairs and to grant compensation to the victim (except for the exception specified in subsection 24 (2) of the CRCPA, if a resolution of the *Riigikogu* or a decision of the President of the Republic on the release from office of the appellant is declared unlawful by the Supreme Court without repeal the resolution or decision). Thus, in spite of the general bindingness of the judgments of the Supreme Court the Legislature has not created legal mechanisms ensuring enforcement of these judgments and the actual compliance with the judgments (the way and the time) tends to remain at the discretion of the Legislature. In legal writings (an opinion by Rait Maruste) it has been found that therefore the Estonian constitutional review procedure cannot be viewed as an effective protective measure for the purposes of article 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which must be exhausted before addressing the Strasbourg Court.

The very first analysis[9] of constitutional review judgments of 2004-2009 was completed in the Supreme Court in spring 2010. It focused on the enforcement of/compliance with Estonian constitutional review judgments and the impact on the Legislature and the Judiciary. Among other things, the analysis of judgments allowed analyst Gea Suumann to conclude that in the constitutional review procedure there is no need for direct coercive measures comparable to those of the civil or criminal court procedure, which would help to ensure enforcement of/compliance with the judgments of the constitutional court. "It is not thinkable that in a democratic state the

[8] *op cit* Ralf Järvamägi. "Impact of Constitutional Review on the Legislature" – Juridica no. 6, 2006, pp. 416-419.
[9] Available in Estonian at: http://www.riigikohus.ee/vfs/988/PSJV_lahendite_taitmine_2010.pdf.

Legislature as a sovereign representation of the people could be directly forced into passing certain acts. Compliance with judgments of the constitutional court is ensured through public pressure. This alone motivates the Legislature to act voluntarily and even resolve complicated issues."

It was found in the analysis that during the observed period the Supreme Court has reviewed 31 cases in the constitutional review procedure where the unconstitutionality of a provision or a legal gap was identified (among other things, cases relating to the Executive and regulations adopted by the local authority, were left out of the analysis). Two of the observed cases have been initiated by the Chancellor of Justice and three by the President of the Republic in the framework of abstract review of provisions. However, courts of lower instances have been more active in initiating constitutional review proceedings, for they have initiated proceedings in 17 instances. At the request of the Chambers of the Supreme Court, the Court *en banc* has resolved the issue of the constitutionality of provisions in 10 instances. It also became evident that nearly a half of the constitutional review cases discussed in the analysis have risen from the administrative court procedure. The results of the analysis shows that in nearly 2/3 of the cases the activities of the Legislature have been in compliance with the constitutional review judgment or prevented it (in 19 cases of 31). Adding the judgments for the enforcement of which the *Riigikogu* has shown serious will, but spent a long time on reaching concerted action due to the complexity of the problem, the Legislature's positive action can be observed in the case of 25 judgments, i.e. 3/4 of the 31 cases observed.

Upon enforcement of/compliance with the constitutional review judgments of the Supreme Court in the period under observation, the Legislature's action for elimination of the unconstitutional situation may be confirmed in four different ways of enforcement/compliance.

(1) Prevention of constitutional review judgments

Since 2004 three examples can be given on actions aimed at preventing a judgment, where the *Riigikogu* has amended the disputed regulation before the Supreme Court has made a constitutional review judgment. These cases[10] are the following:

a) amendment of the Social Welfare Act before judgment no. 3-4-1-7-03 of the Constitutional Review Chamber of the Supreme Court of 21 January 2004, by which the Legislature expanded the circle of contracts serving as the legal basis for using residences upon granting subsistence benefits;
b) amendment of the Misdemeanour Procedure Act before judgment no. 3-4-1-1-04 of the Constitutional Review Chamber of the Supreme Court of 25 March 2004, by which the Legislature also allowed for challenging rulings rejecting appeals;

[10] English translations of the constitutional judgments of Estonian Supreme Court are available at http://www.riigikohus.ee/?id=823

c) adoption of the Police and Border Guard Act before judgment no. 3-4-1-41-09 of the Supreme Court *en banc* of 20 October 2009, which no longer contained any provisions allowing for gender discrimination when releasing police officers from service.

In the case of the so-called preventive action the Legislature may not directly admit in the procedure of a case or in the explanatory memorandum of the draft act that the former legislation is defective, but it may be assumed that among other things the constitutional review procedure initiated against the challenged provision has made the Legislature take action.

(2) Acting in compliance with judgments

Mostly, the activities of the Legislature following constitutional review judgments may be classified as "in compliance with the judgment." Such generalisation is somewhat contingent, because the number of cases falling into this category is relatively high, but each case has an individual status. However, common denominators can be pointed out.

2.1. Starting from more positive examples and moving gradually towards more problematic cases, we should first point out the ones where the *Riigikogu* has exceptionally quickly reacted to judgments of the Supreme Court in constitutional review cases:

a) the Legislature complied with judgment no. 3-3-1-60-03 of the Supreme Court *en banc* of 25 February 2004 regarding declaring a provision of the Weapons Act partially unconstitutional and invalid in four months, making various amendments to the Weapons Act taking into account the judgment of the Supreme Court concerning the prerequisites of issuing a weapons permit to aliens staying in Estonia;
b) nearly a month after judgment no. 3-4-1-8-08 of the Constitutional Review Chamber of the Supreme Court of 30 September 2008 the Legislature amended a provision of the State Pension Insurance Act concerning the terms and conditions of including compulsory military service in the pension qualifying period.

2.2. From the point of the subject of the analysis the cases where the Legislature's passiveness has sufficed for complying with a judgment may also be considered problem-free. These include, above all, cases raised by the President of the Republic in abstract preliminary review and where, as a result of declaring the unconstitutionality, the Legislature has not had to react in any way (there has been no legal vacuum). The following acts did not enter into force:

a) by judgment no. 3-4-1-11-05 of the Constitutional Review Chamber of the Supreme Court of 14 October 2005 (the right of members of the *Riigikogu* to belong to local councils);
b) by judgment no. 3-4-1-14-06 of the Constitutional Review Chamber of the Supreme Court of 31 January 2007 (the act of declaring a provision of the Principles of Ownership Reform Act passed on 27 September 2006 invalid);

c) by judgment no. 3-4-1-18-08 of the Supreme Court en banc of 23 February 2009 (amendment of the salary of the members of the *Riigikogu* currently in office).

2.3. Often, a notation regarding a constitutional review judgment is indicated in the beginning of an act or next to the relevant provisions, but the Legislature fails to amend the wording of the legislation. In such an event the specific circumstances of the case and the interpretation given by the Supreme Court must be kept in mind to understand whether such way of acting is in line with the idea of the judgment and whether it is enough for implementing the legal framework in force without any problems. The failure by the legislator to adopt new legislation may be deemed a way of acting in compliance with the judgment if by making the notation a situation of sufficient legal clarity has been achieved for the application of the provision. There are four examples of such cases:

a) a notation concerning the partial unconstitutionality of the continuing professional restrictions of persons leaving the civil service as identified in judgment no. 3-1-1-92-06 of the Supreme Court en banc of 25 January 2007 has been made to the respective provision of the Anti-Corruption Act;
b) misdemeanour proceedings for riding without a ticket can, in the light of judgment no. 3-1-1-86-07 of the Supreme Court *en banc* of 16 May 2008, be carried out without delegating the state's penal authority so that the provisions of the Public Transportation Act and the Misdemeanour Procedure Act do not have to be declared invalid;
c) a reference to judgment no. 3-4-1-16-08 of the Constitutional Review Chamber of the Supreme Court of 26 March 2009 has been added to a provision of the Weapons Act, according to which the absence of the right of discretion upon refusal from granting a weapons permit is unconstitutional; in addition, the Parliament is reading a bill that suggests a solution complying with the judgment of the Supreme Court;
d) a notation on declaring a provision of the Maritime Safety Act partially invalid by judgment no. 3-4-1-14-09 of the Constitutional Review Chamber of the Supreme Court of 20 October 2009 has been made next to the provision; in addition, the part of the sentence that was found to be unconstitutional, has been deleted.

2.4. A clearly concordant action is the model of behaviour where, within a reasonable term after the judgment of the Supreme Court was made, the *Riigikogu* attends to the provision that has been declared unconstitutional and invalid by adopting a new constitutional solution. Five such examples can be given from the period under observation:

a) a provision of the Estonian Health Insurance Fund Act was declared invalid after judgment no. 3-2-1-143-03 of the Supreme Court *en banc* of 17 June 2004, which released a person having social tax arrears from the obligation to pay health insurance sums in addition to social tax;
b) in accordance with judgment no. 3-4-1-33-05 of the Constitutional Review Chamber of the Supreme Court of 20 March 2006 a subsection was added to a

provision of the Parental Benefits Act, containing additional grounds in the case of which no reduction of the benefit is applied;
c) the Value Added Tax Act was amended after judgment no. 3-4-1-12-07 of the Constitutional Review Chamber of the Supreme Court of 26 September 2009, ending the unconstitutional unequal treatment discriminating against performing arts institutions and concert organisers whose operating expenses were not covered by the state budget. Instead of granting incentives to everyone on equal grounds, the Legislature decided to abolish the value added tax incentive of all their tickets;
d) after various provisions of the Public Service Act had been declared (partially) invalid, the Equal Treatment Act was passed, taking into account the argumentation set out in judgment no. 3-4-1-14-07 of the Constitutional Review Chamber of the Supreme Court of 1 October 2007 regarding the respect for the fundamental right of equality upon removing officials from office due to age;
e) the definition "soft drink" as an object of taxation was specified in a provision of the Excise Duty Act in accordance with judgment no. 3-4-1-18-07 of the Constitutional Review Chamber of the Supreme Court of 26 November 2007.

2.5. More interesting cases include the ones where the reaction of the Legislature is in line with a judgment only in the period under observation, after attention has been drawn to the problem several times, but where there have been problems in complying with constitutional review judgments having similar substance. Therefore the present analysis places the Legislature in a more favourable light than it could have been done a few years ago. Such examples include the prohibition of election coalition and the so-called resettlers' cases:

a) the Legislature disregarded judgment no. 3-4-1-7-02 of the Constitutional Review Chamber of the Supreme Court of 15 July 2002, but after judgment no. 3-4-1-1-05 of the Supreme Court *en banc* of 19 April 2005 the Legislature accepted the position of the Supreme Court regarding election coalitions and has not tried to question them anymore;
b) the Legislature disregarded judgment no. 3-4-1-5-02 of the Supreme Court *en banc* of 28 October 2002, but after judgments of the Supreme Court *en banc* in case no. 3-3-1-65-05 of 12 April 2006 and 6 December 2006 declared a provision of the Principles of Ownership Reform Act invalid, the issue of restitution of the property of the so-called resettlers that caused disputes for a long time was finally resolved; in the light of the constitutional review judgments the Legislature has started seeking suitable and proportional measures for completing the ownership reform.

(3) Time spent on compliant action is in correlation to the complexity of the problem

In addition to the aforementioned preventive or compliant action by the Legislature, the *Riigikogu* has in the observed period seriously tried to attend to the issues pointed out in six constitutional review cases, but due to the complexity of the problems a long time has been spent on coordinating the solution.

3.1. It is difficult to give a single term that should be spent on complying with a judgment, but if on average more than two years are spent on finding a solution, it is too long a period that should be subject to evaluation as to how complicated the impediments that stand in the way of acting in compliance with the judgment.

a) the unconstitutional situation identified in judgments no. 3-1-3-13-03 and 3-3-2-1-04 of the Supreme Court *en banc* of 6 January 2004 (failure to adopt legislation of general application) was eliminated within 2006, after which all the court procedure codes stipulate that identification of the violation of European on Convention Human Rights by the European Court of Human Rights is one of the grounds for revision of judgments that have entered into force;
b) in judgment no. 3-4-1-3-04 of the Constitutional Review Chamber from 30 April 2004 attention was drawn to the fact that the act should provide for more securities for landowners regarding tolerating public utilities and the weighing of different interests should be made possible. Holistic legislation concerning the construction, tolerance and payment for tolerance of utility networks and utility works entered into force in March 2007;
c) instead of the excessive additional remuneration of enforcement officers declared invalid by judgment no. 3-4-1-9-07 of the Constitutional Review Chamber of the Supreme Court of 15 June 2007 the *Riigikogu* approved additional remuneration of enforcement officers as a fixed hourly rate in the Enforcement Officers Act that entered into force on 1 January 2010. As a single issue the rate of the additional remuneration could have been established sooner, but since the Parliament read the Enforcement Officers Act as a whole, the time spent on complying with the judgment of the Supreme Court can be considered understandable;

3.2. This group also includes two judgments for compliance with which the legislative procedure of bills is still at the early stage. It is not yet known how long it may take to reach an approval or whether after a few years we can still say about these cases that "the time spent on approval is in correlation to the complexity of the problem." But for the time being they can be added to the group for the reason that initiation of the procedure as such expresses the Legislature's will to attend to the problem.

a) One of the most problematic issues concerning compliance with a constitutional review judgment is the regulation of the procedure for resolving public procurement disputes. By judgment no. 3-4-1-7-08 of the Supreme Court *en banc* of 8 June 2009 a provision of the Public Procurement Act precluding administrative courts from processing public procurement disputes was declared invalid. The Government of the Republic initiated a bill (draft act) where an opportunity for bringing the procedure for disputing public procurements into compliance with the Constitution was suggested. Later, the Legislature left the provisions concerning the dispute procedure out of the bill, because it found that the subject needs a more thorough-going analysis in the framework of the new draft Public Procurement Act. Thus, although the

Riigikogu has not amended the act after the judgment of the Supreme Court en banc of 8 June 2009, it has expressed the will to attend to the issue.
b) We are still lacking such regulation that would allow for paying a salary or other benefits to a judge whose service relationship has been suspended pending a criminal investigation – this means the failure to adopt legislation of general application that the Supreme Court *en banc* declared unconstitutional in judgment no. 3-3-1-59-07 of 14 April 2009. Similarly to the case of the additional remuneration of enforcement officers, as a single issue the legal gap identified in this judgment could have been filled sooner, but the Parliament is reading the new draft Courts Act as a whole, which means that complying with the judgment is stuck behind thorough-going discussions on the court reform.

(4) Judgment has been taken into account only from the substantive or formal aspect

Complying with a constitutional review judgment is questionable in these three events where the Legislature has not amended the provisions that have been declared unconstitutional in a judgment of the Supreme Court, but where the legislation has virtually been brought into compliance with the Constitution or where the legislation has been formally amended, but substantively the unconstitutional situation remains.

4.1. Sometimes the Legislature amends an act, brining it into compliance with the Constitution pursuant to the idea of a constitutional review judgment, but fails to touch the provisions of law whose unconstitutionality is referred to in the decision of the judgment of the Supreme Court. This happened, for instance to judgment no. 3-4-1-20-07 of the Constitutional Review Chamber of the Supreme Court of 9 April 2008, which declared some provisions of the Code of Civil Procedure unconstitutional and invalid insofar as they do not allow for appealing against rulings rejecting appeals for securing actions and transferring the securities paid into the public revenues. The Legislature did not amend the provisions that were declared unconstitutional, but amended another provision of the code as a result of which no security will have to be paid upon applying for securing an action any more. By doing so the Legislature virtually eliminated the impediment to the exercise of the right of appeal. Thus, the Legislature's actions can be deemed to comply with the judgement after all.

4.2. If a formal reference in an act to a judgment of the Supreme Court does not eliminate an unconstitutional situation, the judgment of the Supreme Court cannot be deemed as properly complied with.

a) Thus, following judgment no. 3-1-1-88-07 of the Supreme Court *en banc* of 16 May 2008, the Code of Misdemeanour Procedure should, in the interests of legal clarity, be modified so it unambiguously indicates on what grounds a person outside the procedure can protect their rights upon confiscation of their assets and property in the misdemeanour procedure.
b) Also, the notation made to the Code of Civil Procedure and the State Fees Act on judgment no. 3-4-1-25-09 of the Constitutional Review Chamber of the Supreme

Court of 15 December 2009, merely admitting that a state fee of a certain size is too high for challenging the decisions of certain entities, cannot be deemed sufficient. In order to substantively comply with a judgment of the Supreme Court, new grounds for determining the state fee should be established so that the possibility of challenging the decisions of the entity whose goal is not the obtaining of a traditional material benefits, would be real, not merely imaginary. However, the judgment is barely six months old, so considering the multiple sides of the issue, the term for bringing the legislation into compliance with the judgment can be considered understandable.

6. **b) Parliament can invalidate the constitutional court's decision: specify conditions.**

The law does not give the *Riigikogu* any such competence directly. However, it is possible (see the answer to question 6a) that the *Riigikogu* refuses to comply with a judgment of the Supreme Court. According to Gea Suumann's analysis, only in three instances out of 31 cases through 2004-2009 the Legislature can be accused of passiveness or of disregarding of a judgment of the Supreme Court: "It is interesting to note that all these three cases have been initiated by courts of lower instances and they have been resolved by the Constitutional Review Chamber of the Supreme Court in the framework of specific review of provisions. Perhaps it is not too arbitrary to conclude that the constitutional review procedure initiated by courts may attract less public attention, as a result of which the Parliament feels less pressure to overcome the problems pointed out in these cases as quickly and accurately as possible. In certain instances the problem may be very complicated."

Thus, the *Riigikogu* has failed to react to judgment no. 3-4-1-9-04 of the Constitutional Review Chamber of the Supreme Court of 21 June 2004, which declared certain provisions of the Aliens Act unconstitutional insofar as these do not provide for the right of discretion upon refusal to grant a residence permit on the ground of submission of false information. The unconstitutional provisions have not been amended and no notation concerning the constitutional review judgment has been added to the act either.

The analysis revealed two cases where the legislation disregarding a judgment of the Supreme Court is still in force and does not substantively differ from the provisions declared unconstitutional in the constitutional review judgment.

For instance, in judgment no. 3-4-1-15-07 of 8 October 2007 the Constitutional Review Chamber of the Supreme Court drew attention to the fact that the provisions of payment for liquid fuel reserves, which come after the challenged wording of the Liquid Fuel Reserves Act, but which entered into force before the constitutional review judgment, do not differ substantially from the challenged and unconstitutional wording in terms of the rules of procedure. The Ministry of Economic Affairs and Communications has promised that the bill regulating the collection of the reserve

payment in compliance with the judgment of the Supreme Court is being drafted and will be sent to other ministries for approval in July 2009. In spite of a notation and the promise the Legislature has not amended the questionable sections of the Liquid Fuel Reserves Act or initiated any respective bill over a period of more than two years.

Also, by judgment no. 3-4-1-6-08 of 1 July 2008 the Constitutional Review Chamber of the Supreme Court declared unconstitutional a provision of the Aviation Act, which established a financial obligation in public law without specifying the required elements of the obligation. After the judgment of the Supreme Court the Aviation Act has been amended several times, but the legislation in force still obligates economic operators to pay the costs of examination of the compliance of their civil aircraft with the requirements without specifying the elements of this obligation. Thus, the Legislature has virtually failed to comply with the judgment of the Supreme Court. However, the case law of the Administrative Chamber of the Supreme Court (judgment of 12 November 2009 in case no. 3-3-1-48-08) follows the position of the Constitutional Review Chamber of the Supreme Court regarding the unconstitutionality of the respective provision of the Aviation Act.

7. **Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?**

The Chief Justice of the Supreme Court is a member of the Council for Administration of Courts. The Council for Administration of Courts attends to with general issues of administration justice and issues of the courts of the first and second instance and does not decide or discuss issues concerning the Supreme Court or the Constitutional Review Chamber.

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

1. What are the characteristic traits of the contents of organic litigations (legal disputes of a constitutional nature between public authorities)?

Estonia does not have a special procedure for competence disputes between bodies of the highest public authority that would resemble the special procedure observed in Germany. So far organic litigations have taken place in Estonia in the form of abstract review of provisions and it is not possible to have recourse to the Supreme Court for the purpose of pursuing organic litigations. However, issues of competence have been the substantive objects of many disputes. Since by structure the Republic of Estonia is a unitary state (subsection 2 (2) of the Constitution), resolution of disputes between the subjects of the federation and central authorities – another possibility of organic litigations – is not the substance of constitutional review procedure in Estonia. However, in two instances, i.e. in the case of the so-called Narva and Sillamäe referendum cases, the Supreme Court has engaged in the issues of attempts of building a federal state order on one's own initiative, making a decision in these cases in the form of indirect review of provisions (judgments no. III-4/1-2/93 and III-4/1-3/93 of the Constitutional Review Chamber of the Supreme Court of 11 August 1993 and 6 September 1993). On the basis of subsection 4 (2) of the Constitutional Review Court Procedure Act (CRCPA) a local council has the right to address the Supreme Court, requesting that the constitutionality of the legislation of general application be reviewed. Thus, through the review of provisions a local authority may apply for a review of competence as well as of respect for the rights and freedoms (e.g. local self-government disputes).

Thus, in the broad sense, "organic litigation" might mean the constitutional review of legislation of general application (i.e. acts and regulations) under the constitutional review procedure, which can be initiated by the President of the Republic, the Chancellor of Justice, local councils and also, in certain instance, courts that initiate the procedure by submitting a judgment or ruling to the Supreme Court. In that case the other body involved in the dispute is the *Riigikogu*, the Government of the Republic, the Minister or the local authority that adopted or did not adopt the legislation.

Thereby the President of the Republic may submit a request to the Supreme Court to declare an Act that has been passed by the *Riigikogu* but has not been proclaimed by the President to be in conflict with the Constitution if the *Riigikogu* has passed it again unamended after it has been returned for renewed deliberation and decision (§ 5 of the CRCPA).

According to § 6 of the CRCPA, the Chancellor of Justice submit an application to the Supreme Court:
1) to repeal legislation of general application passed by the legislative or executive powers or by a local authority or a provision thereof which has entered into force;
2) to declare to declare an Act that has been proclaimed but has not yet entered into force to be in conflict with the Constitution;
3) to repeal legislation of general application of the legislative or executive powers or a local authority that has not entered into force to be in conflict with the Constitution.

A local authority's council may submit a petition to the Supreme Court to declare an Act that has been proclaimed but has not yet entered into force or a regulation of the Government of the Republic or a minister that has not yet entered into force to be in conflict with the Constitution or to repeal an Act that has entered into force, a regulation of the Government of the Republic or a minister or a provision thereof if it is in conflict with constitutional guarantees of the local self-government (§ 7 of the CRCPA).

If a court of first instance or a court of appeal has not applied, upon adjudication of a matter, any relevant legislation of general application, declaring it to be in conflict with the Constitution or if the court of first instance or the court of appeal has declared, upon adjudication of a matter, the refusal to issue legislation of general application to be in conflict with the Constitution, it shall forward the corresponding judgment or ruling to the Supreme Court. The court shall annex in the decision of the judgment or ruling that is forwarded to the Supreme Court the text of the legislation of general application that is declared to be in conflict with the Constitution or relevant excerpts thereof (§ 11 of the CRCPA).

Organic litigation in the narrower sense might mean disputes over the competence of adoption of regulations, whereby the petition is submitted mainly by the Chancellor of Justice or the council of a local authority. Also, a dispute over the competence of issuing regulations may reach the Supreme Court via a court of the first or second instance. Thereby disputes over the competence to issue rulings are naturally directly related to the issue of constitutionality.

Also, theoretically, the possibility to challenge resolutions of the Riigikogu provided for in Chapter 3 of the CRCPA could be called organic litigation of competence (§ 16: "*A person who finds that their rights have been violated by a resolution of the Riigikogu may submit a petition to the Supreme Court to repeal the resolution of the Riigikogu.*"

Section 65 of the Constitution provides for the competence of the *Riigikogu*:
1) passes acts and resolutions;
2) decides on the holding of a referendum;
3) elects the President of the Republic, pursuant to § 79 of the Constitution;

4) ratifies and denounces international treaties, in accordance with § 121 of the Constitution;
5) authorises the candidate for Prime Minister to form the Government of the Republic;
6) passes the state budget and approve the report on its implementation;
7) at the proposal of the President of the Republic, appoints to office the Chief Justice of the Supreme Court, the Chairman of the Supervisory Board of Eesti Pank, the Auditor General, the Chancellor of Justice, and the Commander or Commander-in-Chief of the Armed Forces;
8) at the proposal of the Chief Justice of the Supreme Court, appoint to office Justices of the Supreme Court;
9) appoints members of the Supervisory Board of Eesti Pank;
10) at the proposal of the Government, decides on borrowing by the state and on the assumption of other proprietary obligations by the state;
11) presents statements, declarations and appeals to the people of Estonia, other states, and international organisations;
12) establishes state awards, and military and diplomatic ranks;
13) decides on the expression of no confidence in the Government of the Republic, the Prime Minister or individual ministers;
14) declares a state of emergency in the state, pursuant to § 129 of the Constitution;
15) at the proposal of the President of the Republic, declares a state of war, and orders mobilisation and demobilisation;
16) resolves other national issues that the Constitution does not vest in the President of the Republic, the Government of the Republic, other state bodies or local authorities.

In the procedure for constitutional review the appeals submitted in the events provided for in subsection 65 (2) of the Constitution could theoretically be considered "organic litigations". According to subsection 6 (5) in the Chapter "Review of Legislation of General Application" of the CRCPA, the Chancellor of Justice may submit an application to the Supreme Court to repeal a resolution of the *Riigikogu* concerning the submission of a draft Act or other national issue to a referendum if a draft Act, except a draft Act to amend the Constitution, or other national issue that is submitted to a referendum is in conflict with the Constitution or the *Riigikogu* has materially violated the established procedure upon passage of the resolution to hold the referendum (see subsection 65 (2) of the Constitution).

A separate procedure for challenging resolutions of the *Riigikogu* in other events listed in § 65 of the Constitution has not been provided for in the CRCPA. One may even think that the challenging of resolutions of the *Riigikogu* pursuant to the procedure provided for in Chapter 3 of the CRCPA in other events listed in § 65 of the Constitution cannot probably be considered organic litigations. Therefore the questionnaire will discuss organic litigations resolved mainly on the basis of Chapter 2 of the CRCPA ("Constitutional Review of Legislation of General Application").

2. **Specify whether the Constitutional Court is competent to resolve such litigation.**

The Supreme Court is competent to adjudicate requests to verify the conformity of legislation of general application or the refusal to issue legislation of general application with the Constitution (subsection 2 (1) of the CRCPA) pursuant to the procedure provided for in Chapter 2 of the CRCPA ("Constitutional Review of Legislation of General application): on the basis of proper petitions of entitled persons. Also, subsection 6 (5) of the CRCPA provides for the right of the Chancellor of Justice to challenge a resolution of the *Riigikogu* concerning the submission of a draft Act or other national issue to a referendum.

A petition submitted to the Supreme Court must be reasoned and must set out the provisions or principles of the Constitution that the contested legislation of general application or resolution of the *Riigikogu* is not in compliance with; the person submitting the petition must sign the petition and annex the text or relevant excerpts of the contested legislation of general application or resolution of the *Riigikogu* and other documents that are the basis for the petition (subsections 8 (1) and (2) of the CRCPA). If a request does not conform to the requirements of law, the Supreme Court shall designate a term to the petitioner for elimination of the deficiencies.

If the petitioner fails to eliminate the deficiencies within the designated term, the Supreme Court shall return the petition without review. The petition shall be returned to the petitioner without review if the review does not fall within the competence of the Supreme Court (subsections 11 (1) and (2) of the CRCPA).

3. **Which public authorities may be involved in such disputes?**

As described above, in different instances the parties to the dispute may be the President of the Republic, the Chancellor of Justice or the council of a local authority (the petitioner) on the one hand and the *Riigikogu*, the Government of the Republic, a minister or a local authority (the adopter of the legislation) on the other hand; in certain instances also an individual as a participant in the procedure.

4. **Legal acts, facts or actions which may give rise to such litigations: do they relate only to disputes on competence, or do they also involve cases when a public authority challenges the constitutionality of an act issued by another public authority? Whether your constitutional court has adjudicated upon such disputes; please give examples.**

Broadly speaking, the competence issue may arise, above all, in connection with acts that may be subjected to preliminary review by the President of the Republic and to follow-up review by the Chancellor of Justice and, to a limited extent, also by local authorities; the issue may arise in a judicial dispute in the first or second instance. The

issue of passing legislation of general application may arise, above all, in connection with the regulations of the Government of the Republic, ministers as well as local authorities. Constitutional review over legislation of general application passed by the Government of the Republic, a minister or a local authority may be requested both by the Chancellor of Justice as well as the council of a local authority (but not with regard to a deed of the local authority); the issue may arise in a judicial dispute in the first or second instance.

The possibilities of initiation of the aforementioned constitutional review procedure cover a smaller part of the court disputes resolved by the Supreme Court by way of the constitutional review procedure. Out of the 225 disputes resolved by way of the constitutional review procedure through 1995-2009 110 involved the review of the constitutionality of an act, 26 involved that of a regulation of the Government of the Republic, 12 involved that of a regulation of a minister and 17 involved that of a regulation of a local authority. In 14 of all the instances the petitioner was the President of the Republic, in 22 instances the Chancellor of Justice, in 11 instances local authorities and in 103 instances courts. In what instances we could speak of an organic litigation should be decided case by case.

The President of the Republic has had recourse to the Supreme Court in order to protect his competence (judgment no. III-4/A-4/94 of the Constitutional Review Chamber of the Supreme Court of 13 June 1994), requesting that subsection 2 (2) of the President of the Republic Procedures Act adopted on 3 May 1994 be declared to be in conflict with § 109 of the Constitution, because the provision unconstitutionally deprived the President of the right to independently decide on the initiation of decrees. The Supreme Court declared the provision unconstitutional.

The Supreme Court also declared the Peacetime National Defence Act adopted on 8 November 1994, which limited the right of the President as the supreme commander of the national defence to give an order for using the Defence Forces for military activities during peacetime (judgment no. III-4/A-11/94 of the Constitutional Review Chamber of the Supreme Court of 21 December 1994), unconstitutional for limiting the competence of the President. The Supreme Court has also stated that “the fact that the state seal is held by the Secretary of State … does not subject the head of the state to the supervision by the Government of the Republic via the Secretary of State ... and the principle of separation and balance of powers ... is not violated” (judgment no. III-4/A-1/93 of the Constitutional Review Chamber of the Supreme Court of 22 June 1993). Also, in the issue of awarding decorations the Supreme Court has found that “the Government of the Republic and the committee formed by it do not have the right to decide on the issues placed within the competence of the President by the Constitution” (judgment no. III-4/A-3/94 of the Constitutional Review Chamber of the Supreme Court of 18 February 1994). The Supreme Court has also declared the provisions of the Pardon Procedure Act unconstitutional, which provided for a preliminary decision-making procedure restricting the President’s right of pardon and, violating the President’s autonomy, established the membership of the committee by an act

(judgment no. 3-4-1-3-98 of the Constitutional Review Chamber of the Supreme Court of 14 April 1998).

Regarding the relationships between the Supreme Court and the Executive (competence to issue regulations), the Supreme Court has found in a case of the Police Act Amendment and Modification Act that "the *Riigikogu* should have established the specific cases and detailed procedure for application of operative-technical special measures and possible restrictions of rights relating thereto, not to delegate these to Security Police officials and Justices of the Supreme Court. What the Legislature is entitled and obligated to do under the Constitution cannot be delegated to the Executive, not even temporarily and not even if the Judiciary has the chance to control it" (judgment no. III-4/A-1/94 of the Constitutional Review Chamber of the Supreme Court of 12 January 1994). In connection with the aforementioned the Supreme Court has found the following in a case involving the Wages Act and a regulation of the Minister of Finance establishing the procedure for and conditions of disclosure of the wages of officials: "The first sentence of the first subsection of § 3 and the first sentence of § 11 of the Constitution allow for restricting a person's fundamental rights and freedoms only in the events and pursuant to the procedure established by an act passed by the *Riigikogu* or a referendum. The Legislature must decide on its own any and all issues that are important from the point of view of the fundamental rights and must not delegate their provision to the Executive. The Executive may only clarify the restrictions to fundamental rights and freedoms provided by law, not establish additional restrictions in comparison with what has been provided for in law" (judgment no. 3-4-1-10-02 of the Constitutional Review Chamber of the Supreme Court of 24 December 2002). The aforementioned is supplemented by the position of the Supreme Court in a case concerning the approval of the Statutes of the Security Police Board and the Temporary Procedure for Application of Operative-Technical Special Measures by the Government of the Republic on 23 July 1993: "According to subsection 87 (6) of the Constitution, the Government of the Republic issues regulations and orders based on acts.
The aforementioned displays the constitutional hierarchy of legislation and the conclusion that the Executive cannot regulate areas that, according to the Constitution, must be regulated by acts, using *praeter legem* regulations" (judgment no. III 4-1/1-2/94 of the Constitutional Review Chamber of the Supreme Court of 12 January 1994). In very many different cases the Supreme Court has analysed the competence of the Government to issue regulations. Thus, the Supreme Court found that by establishing the obligation to pay a participation fee in order to participate in a land auction the Government of the Republic exceeded the limits of the authorisation granted by the Legislature (judgment no. 3-4-1-10-00 of the Supreme Court *en banc* of 22 December 2000). The Government of the Republic also exceeded the authorisation provided for in the Non-Residential Premises Privatisation Act by establishing a participation fee for participation in an auction of non-residential premises by way of the procedure for privatisation of non-residential remises by a regulation of 18 June 1996 (judgment no. 3-4-1-16-06 of the Constitutional Review Chamber of the Supreme Court of 13 February 2007). The Supreme Court denied the

right of the Government of the Republic to restrict the grounds of designation of land required for servicing buildings and to establish additional terms and conditions in comparison with the Land Reform Act by its regulation of 30 June 1998 establishing the Procedure for Designation of Land Required for Servicing Buildings (judgment no. 3-4-1-2-07 of the Constitutional Review Chamber of the Supreme Court of 2 May 2007). The Supreme Court has also found that neither the Income Tax Act nor other acts have given the Ministry of Finance the function to organise (by the guidelines of implementation of the Income Tax Act), the accrual of personal income tax to the state budget to the extent of 48% (judgment no. III-4/1-9/94 of the Constitutional Review Chamber of the Supreme Court of 7 December 1994) and, in an example originating from later times, the Supreme Court found: "Delegation of financial obligations in public law to the Executive may be permitted on the condition that it arises from the nature of the financial obligation and the Legislature determines the scope of discretion, which may lie in the provision of the minimum and maximum rate of the fee in an act, in the establishment of the grounds of calculation of the fee, etc." and declared a provision of the Enforcement Officers Act and regulation of the Minister of Justice "Rates of Enforcement Officer Fees" of 16 February 2001 adopted on the basis thereof unconstitutional (judgment no. 3-4-1-22-03 of the Constitutional Review Chamber of the Supreme Court of 19 December 2003).

Regarding the relationships between the *Riigikogu* and local authorities the Supreme Court has found: "Due to the simple reservation of the law contained in § 154 of the Constitution the Legislature can restrict the autonomy of local authorities, but precluding some essentially local issues from among the same with good reason. Thereby it must be kept in mind that the constitutional guarantee of the local self-government would remain intact" (judgment no. 3-4-1-4-07 of the Constitutional Review Chamber of the Supreme Court of 8 June 2007). The Supreme Court has also found that "Since pursuant to the Constitution local authorities act on the basis of acts, the *Riigikogu* cannot delegate its legislative powers in the area of regulation of the activities of local authorities" (judgment no. III-4/1-4/93 of the Constitutional Review Chamber of the Supreme Court of 4 November 1993). The Supreme Court has confirmed the aforementioned in many court cases. Thus, the Supreme Court has found that the provisions of the Taxation Act are in conflict with § 154 and subsection 157 (2) of the Constitution, "because the designation of the essence of local taxes, their approval and registration by the Minister of Finance or pursuant to the procedure established by the Minister of Finance precludes any independent action of the local authorities upon imposing taxes on the basis of law" (judgment no. III-4/1-4/93 of the Constitutional Review Chamber of the Supreme Court of 4 November 1993). The Supreme Court has declared unconstitutional the Guidelines for Compulsory Removal of Vehicles and Using Equipment Preventing Movement approved by a regulation of the Tallinn City Government of 16 April 1004 (and a related regulation of the City Government and a decision of the City Council), because it established the measure of locking the wheels of vehicles parked in the wrong place (judgment no. III-4/1-7/94 of the Constitutional Review Chamber of the Supreme Court of 2 November 1994). In connection with the City of Narva the Supreme Court has both in 2001 as well as in

2010 discussed regulations of the City of Narva regulating border crossing (judgment no. 3-4-1-2-00 of the Constitutional Review Chamber of the Supreme Court of 9 February 200 and judgment no. 3-4-1-1-10 of the Constitutional Review Chamber of the Supreme Court of 8 June 2010). In both cases there was no legal ground either for making border crossing waiting lists of vehicles or a more detailed procedure for border crossing or for introduction of a fee charged for waiting in line. One of the most important judgments concerning the relationships between the central power and the local level is judgment no. 3-4-1-8-09 of the Supreme Court en banc of 16 March 2010, the so-called local authorities' funding case, where the Supreme Court explained, what obligations are imposed on the state by the Constitution in connection with funding local authorities, i.e. what can local authorities demand from the state on the basis of the Constitution: the Legislature is obligated to identify what functions imposed on local authorities by law are national and what are local. Upon division of functions, it must be made certain that the body that is as close to the people as possible would perform them, that the functions "grow" out of the local community and that there are agreements with local authorities.
National functions must be funded from the state budget, which must indicate at least function by function how much money is allocated to the local authorities for performance of these functions.

No petitions of the Chancellor of Justice to declare a bill unconstitutional or hold a referendum on another national matter [if the Chancellor of Justice finds that a bill put on a referendum (except for a bill of amendment of the Constitution) or another national issue is in conflict with the Constitution or the *Riigikogu* has committed a serious breach of the rules of procedure upon adoption of the decision to hold a referendum] have been submitted to the Supreme Court, so there is no respective case law.

5. **Who is entitled to submit proceedings before the Constitutional Court for the adjudication of such disputes?**

See the answers to questions 3 and 4.

6. **What procedure is applicable for the adjudication of such dispute?**

The ordinary constitutional review procedure applies (see Chapter 2 of the CRCPA: §§ 4-15; Chapter 7 of the CRCP describes the procedure for reviewing cases (§§ 47-63): the language of the judicial procedure, calculation of terms and representation in court, rights and obligations of participants in the procedure, manner of reviewing the case, joining of cases, publicity of an oral procedure, procedure for court hearing, minutes of hearing, termination of procedure, judgment, pronunciation and entry into force of the judgment, explanation of the judgment, position, ruling, correction of errors, publication of cases, legal expenses.)

In addition to the answers given to questions 1-2 above, it may be noted that in the procedure for review of legislation of general application the participants in the procedure in the case of "organic litigations" (§ 10 of the CRCPA) include the body that adopted or issued the challenged legislation of general application, the body that refused to adopt or issue the legislation of general application, the participants in the procedure initiated on the basis of a judgment or regulation, the council of the local authority (provided that the petition is filed by the council of the local authority), the Chancellor of Justice, the Minister of Justice, and the minister representing the Government of the Republic. In a procedure of the constitutional review of legislation of general application the Supreme Court asks the parties in the procedure for an opinion on the constitutionality of the challenged legislation. The Supreme Court gives the body that adopted or issued the challenged legislation of general application, the body that did not adopt or issue the legislation of general application and the participants in the procedure initiated on the basis of a judgment or ruling the chance to submit an additional opinion or explanation on the opinions given to the Supreme Court and, where necessary, demands that the body that adopted or issued the legislation of general application or the body that did not adopt or issue the legislation of general application give an explanation on the legislation of general application or a provision thereof.

The Supreme Court may, on the basis of a reasoned request of a participant in the procedure or on its own motion, suspend with good reason the enforcement of the challenged legislation of general application or a provision thereof until entry into force of the judgment of the Supreme Court (§ 12 of the CRCPA).

The Supreme Court resolves a case within reasonable time, but not over a period exceeding four months as of the receipt of a proper petition, whereby a petition by the Chancellor of Justice to annul a resolution of the *Riigikogu* concerning putting a bill or another national matter on a referendum is resolved by the court within two months as of the receipt of a proper petition (§ 13 of the CRCPA).

It is also important to note that (see § 14 of the CRCPA) upon adjudication of a case the Supreme Court is not bound to the reasons of the petition, judgment or ruling. Upon resolution of a case on the basis of a judgment or ruling, the Supreme Court may declare legislation of general application or a provision thereof as well as the non-issue of legislation of general application that is relevant upon resolution of the case invalid or unconstitutional. Thereby the Supreme Court does not resolve a legal dispute that is subject to resolution pursuant to the provisions of judicial procedure applicable in administrative, civil or criminal cases or administrative offence cases. However, a matter handed over on the basis of a ruling of a Chamber or a Special Panel of the Supreme Court in accordance with the respective procedure code is resolved by the Court *en banc* in any and all relevant matters, thereby concurrently applying the procedural code applicable to the type of the case and this Act.

7. What choices are there open for the Constitutional Court in making its decision (judgment). Examples.

In a procedure of the constitutional review of legislation of general application, the Supreme Court may (§ 15 of the CRCPA):

1) declare legislation of general application that has not yet entered into force to be in conflict with the Constitution;
2) declare legislation of general application that has entered into force or a provision thereof to be in conflict with the Constitution and repeal it;
2^1) declare the refusal to issue legislation of general application to be in conflict with the Constitution;
4) repeal the resolution of the *Riigikogu* concerning submission of a draft Act or other national issue to a referendum;
5) declare that the contested legislation of general application or the refusal to issue legislation of general application was in conflict with the Constitution at the time of submission of the petition;
6) dismiss the petition.

Thereby legislation of general application that has been declared to be in conflict with the Constitution does not enter into force (e.g. if an international agreement or a provision thereof is declared to be in conflict with the Constitution the body that has entered into agreement is required to withdraw from it, if possible, or commence denunciation of the international agreement or amendment thereof in a way that would guarantee its conformity with the Constitution; an international agreement that is in conflict with the Constitution is not applied nationally).

Out of the 255 constitutional review cases adjudicated through 1995-2009 the Supreme Court approved the petition, appeal or protest or declared the unconstitutionality in 98 instances (incl. partially on 8 occasions). Thereby on one occasion the Supreme Court declared the refusal to issue legislation of general application unconstitutional and in 19 instances that the legislation or international agreement was in conflict with the Constitution (the legislation had already been repealed by the time of making the judgment). In 103 instances the Supreme Court rejected the petition, appeal or protest or made a judgment denying any conflict with the Constitution and in 36 instances the Supreme Court returned the petition, appeal or protest without review.

In no instance has the Supreme Court discussed a petition to annul a resolution of the *Riigikogu* regarding putting an act, bill or another national issue on a referendum or a petition to annul a resolution of the *Riigikogu*.

8. Ways and means for implementing the Constitutional Court's decision: actions taken by the public authorities concerned afterwards. Examples.

In specific cases the Supreme Court has, in the interests of resolution of cases, also spoken of the further obligations of the Executive or the Legislature in eliminating the unconstitutional situation. For instance, repealing regulations of the Council of the Keila Rural Municipality, which regulated the organisation of shooting exercises of firearms in the Rural Municipality of Keila, the Supreme Court described the further obligations of the Executive in its judgment: "As long as the Government of the Republic or a minister authorised by it has not established requirements for the shooting areas of the Defence Forces and a procedure for use thereof, no shooting exercises may be organised in such shooting areas" (judgment no. 3-4-1-3-00 of the Constitutional Review Chamber of the Supreme Court of 8 March 2000). Also, declaring a provision of the Taxation Act and regulations of the Minister of Finance issued on the basis thereof and establishing an interest rate unconstitutional, the Supreme Court noted: "This judgment does not affect the Tax Board's obligation to pay interest to taxpayers on the basis of these rates" (judgment no. 3-4-1-8-02 of the Constitutional Review Chamber of the Supreme Court of 5 November 2002). An even more accurate obligation of the Executive was specified in adjudicating a case involving a petition by N. Irihin for declaring the steps of the Tallinn Police Prefecture invalid and ordering that a weapons permit be issued. The Supreme Court found that: "As a rule, an administrative court cannot obligate an administrative body to make a decision of discretion identified by the court. It is possible only if due to the circumstance of the case it is obvious, what decision would be lawful. … The Court *en banc* does not, due to the discretionary character of the granting of a weapons permit, obligate the executive to issue a weapons permit, but it is possible to obligate the Executive to review the application requesting the issue of a weapons permit. … N. Irihin's petition must be adjudicated after the entry into force of … of the decision of this judgment, taking into account the regulation currently applicable to the issue of weapons permits to persons residing in Estonia on the basis of a temporary residence permit and not having any permanent residence outside Estonia" (judgment no. 3-3-1-60-03 of the Supreme Court *en banc* of 25 February 2004).

Also, guidelines for the Legislature and the Executive have been set forth in the judgment of the Supreme Court: "Regardless of the fact that the Court en banc declares [a provision of the Citizenship Act] partially invalid and [another provision of the same act] partially unconstitutional, the Court *en banc* cannot obligate the Executive in this case to resolve the language training issue of V. Fedtschenko. … The situation will resolve once the Legislature establishes a procedure that allows for releasing persons having poor hearing from the language proficiency examination when obtaining citizenship, based on whether the hearing disability prevents the learning of the language or not" (judgment no. 3-4-1-47-03 of the Supreme Court *en banc* of 10 December 2003).

Since the analysis of the constitutional review judgments of 2004-2009 covered judgments where the unconstitutionality of a provision or a legal gap was identified and the judgments where the constitutionality of the Executive or regulations of local authorities was evaluated were not observed, the question put in the questionnaire cannot be answered exhaustively.

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

1. **The Constitutional Court's decisions are:**
   a) **final;**
   b) **subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;**
   c) **binding *erga omnes;***
   d) **binding *inter partes litigantes.***

Judgments of the Supreme Court are generally binding, i.e. they have to be complied with by courts of lower instances, the Supreme Court itself and the Legislature (see the answer to question 6a in part I above). Judgments of the Constitutional Review Chamber of the Supreme Court enter into force as of their public pronouncement (subsections 58 (1) and (2) of the CRCPA). Judgments of the Supreme Court are final and not subject to appeal.

If all national remedies have been exhausted, one can, in some instances, have recourse to the European Court of Human Rights on the basis of the system of the European Convention on Human Rights.

Generally speaking, judgments made by the Constitutional Review Chamber of the Supreme Court in the procedure for the abstract review of the constitutionality of legislation of general application (on the basis of a petition of the President of the Republic, the Chancellor of Justice and a local authority) are binding *erga omnes*, while judgments made in the procedure for the abstract review of provisions (on the basis of a request from a court) are, above all, binding *erga omnes* and in certain instances the bindingness *inter partes litigantes* is also added (e.g. the right to receive benefits emerges *ex nunc*, etc.). The revision option available in civil, criminal and administrative proceedings is associated with the latter if the Supreme Court, by way of the constitutional review procedure, reopens a procedure in a case where a judgment has entered into force because the legislation of general application or a provision thereof that served as the basis for the judgment or ruling has been declared unconstitutional (see also the answer to question 3 below).

As for the *erga omnes* bindingness, the Supreme Court has found: "If some provisions of an act have been repealed in the constitutional review procedure, the remaining provisions of the act must be interpreted on the basis of the judgment of the Supreme Court" (judgment no. 3-4-1-9-98 of the Constitutional Review Chamber of the Supreme Court of 25 November 1998). Also, in a case concerning the Alcohol Act the Supreme Court has found that until the amendments required in the act are made, the declaration of a provision of the Alcohol Act unconstitutional does not preclude declaring an activity license invalid in the event of a serious offence and on the basis of a provision in force that provides for such an opportunity if, considering all the

circumstances of the offence, it is necessary. If the issuer of the activity license has declared the activity license invalid on the basis of the unconstitutional provision of the Alcohol Act and the judgment has been challenged in an administrative court, the court must substantively weigh whether declaring the activity license invalid was necessary and reasoned in the given circumstances (judgment no. 3-4-1-6-00 of the Constitutional Review Chamber of the Supreme Court of 28 April 2004). The Supreme Court also found in the first case of the principles of the ownership reform: "The Court *en banc* admitted that declaring the unconstitutionality of the provision means the continuance of the vague situation. The Legislature must issue proper legal regulation to overcome this. Until the act is brought into compliance with the principle of legal clarity, restitution or compensation of the property that belongs to the resettlers cannot be decided and the property cannot be privatised" (judgment no. 3-4-1-5-02 of the Court *en banc* of 28 October 2002).

The Supreme Court *en banc* has seen a restriction of the bindingness of *erga omnes* in subsection 58 (3) of the CRCPA, which allows for postponement of the entry into force of a judgment: "Provision of the grounds for revision … in the Code of Civil Procedure does not mean the automatic retroactive impact of all judgments made in the constitutional review procedure. Subsection 58 (3) of the CRCPA allows for making a judgment in the constitutional review procedure, which does not have any retroactive *erga omnes* impact. The unclarity of the people that submitted the application … must be ... ended as to what will become of the applications submitted with regard to the unlawfully expropriated property of those who resettled in Germany. These applications must be processed. … the applications must be … reviewed regardless of the fact whether the applications have earlier not been reviewed or approved [on the basis of an unconstitutional provision] … also these applications with regard to which a judgment made by the administrative court has [on the basis of an unconstitutional provision] been declared unlawful or annulled by a judgment of the administrative court must be reviewed." The Court *en banc* did not preclude submission of new applications, but "Upon submission of such an application, it must be weighed in each and every single event whether the application has been submitted within reasonable time" (judgment no. 3-3-2-1-07 of the Supreme Court *en banc* of 10 March 2008).

The *ex tunc inter partes* impact was confirmed by the Supreme Court in the event where the Government of the Republic had amended the challenged regulation in such a manner that the wording in force did not contain the challenged provision (judgment no. 3-4-1-8-06 of the Constitutional Review Chamber of the Supreme Court of 2 May 2007). The Supreme Court has also noted: "By giving the possibility of revising judgments in the administrative court procedure the Legislature has clearly emphasised that judgments made in the constitutional review procedure may have retroactive power. The revision of a judgment would be unthinkable if judgments made in the constitutional review procedure had merely *ex nunc* impact" (judgment no. 3-3-2-1-07 of the Supreme Court en banc of 10 March 2008).

The *ex nunc* impact of the constitutional review judgments of the Supreme Court is related to the *inter partes* bindingness: "Since the judgment of the Chamber has *ex nunc* impact, the judgment is not a ground for refunding income tax paid on fringe benefits to the taxpayers who have not disputed the taxation or with regard to whose complaint a judgment of the administrative court has entered into force" (judgment no. 3-4-1-5-00 of the Constitutional Review Chamber of the Supreme Court of 12 May 2000). The Supreme Court has similarly found: "By declaring … a regulation of … the Minister of Justice unconstitutional, no obligation to refund the enforcement officer's fees paid will arise. Only those debtors who challenged the lawfulness of the decision to set the enforcement officer's fee have the right to a refund of the fees paid in the enforcement procedure" (judgment no. 3-4-1-22-03 of the Constitutional Review Chamber of the Supreme Court of 19 December 2003). See also the Alcohol Act example in the same answer above (judgment no. 3-4-1-6-00 of the Constitutional Review Chamber of the Supreme Court).

2. **As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:**
   a) **repealed;**
   b) **suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;**
   c) **suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;**
   d) **other instances.**

Judgments of the Supreme Court *en banc* and of the Constitutional Review Chamber of the Supreme Court, which contain a decision on the constitutionality (§ 62 of the CRCPA; clause 2 (2) 7) of the *Riigi Teataja* Act) of legislation of general application published in the *Riigi Teataja* are published in the *Riigi Teataja* (an electronic state gazette available at www.riigiteataja.ee). Other reasoned judgments and rulings of the Supreme Court in cases resolved on the basis of the CRCPA are published on the website of the Supreme Court (§ 62 of the CRCPA; address: www.riigikohus.ee).

Since, according to subsections 58 (1) and (2) of the CRCPA, a judgment of the Supreme Court made on the basis of the Act enters into force as of its pronouncement, no separate procedure for disclosure (printing) required for the entry into force has been established. According to the regular practice, in the *Riigi Teataja* a reference to a constitutional review judgment of the Supreme Court is added instead of or next to a provision that has been declared unconstitutional and repealed in connection with legislation in force relating to the case (clause 15 (1) 2) of the CRCPA). Specific further steps in connection with the amendment of the unconstitutional provision remain up to the legislature to decide (see the answer to questions 6a and 6b in part I of the questionnaire).

Upon declaring legislation of general application that did not enter into force unconstitutional (clause 15 (1) 1) of the CRCPA), it will not enter into force (subsection

15 (2) of the CRCPA). In events when the Supreme Court admits that challenged legislation of general application or refusal to issue legislation of general application was in conflict with the Constitution at the time of submission of the petition (clause 15 (1) 5) of the CRCPA), the legislation is already repealed legislation, but even in such an event a reference to the judgment of the Supreme Court is added in the *Riigi Teataja* next to the respective unconstitutional provision in the wording of the legislation that is no longer in force.

In the event of a judgment of the Supreme Court that recognised the unconstitutionality of legislation that has been repealed certain *inter partes* impact arising from declaring the repealed legislation unconstitutional cannot be precluded (see the answer of question 1 in the same part above).

The Supreme Court has the right to postpone the entry into force of a judgment made in the procedure of constitutional review of legislation of general application by up to six months (subsection 58 (3) of the CRCPA). The latter opportunity was used, for instance, in a case concerning the Principles of Ownership Reform Act where it was noted: "The Executive and the Legislature must make a choice between the possible solutions in the matter of restitution, compensation or privatisation of property unlawfully expropriated from persons who resettled in Germany on the basis of the agreement made with the German state in 1941. … The Supreme Court *en banc* cannot assume the role of the Legislature or make choices between different solutions and draft respective legal regulations instead of the Parliament. The Legislature needs time for resolution of these issues." The provision of law is repealed six months after the arriving deadline, provided that an act amending or repealing the provision has not been adopted by the time (partial judgments no. 3-3-1-63-05 of the Supreme Court en banc of 12 April 2006 and 6 December 2006). Concerning this question see also the answer to question 6a in the first part of the questionnaire.

3. **Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?**

Based on the first sentence of subsection 3 (1) of the Constitution, a judgment of the Supreme Court in constitutional review cases is, in terms of substance (declaring legislation of general application or a provision thereof unconstitutional and repealing it and declaring that the challenged legislation of general application, the refusal to issue the legislation of general application or the international agreement was in conflict with the Constitution at the time of submission of the petition – clauses 15 (1) 2) and 5) of the CRCPA), binding upon courts of lower instances as well as on the Supreme Court itself: "The powers of state shall be exercised solely pursuant to the Constitution and acts that are in conformity therewith." According to clauses 2 1) and 4) of the Code of Criminal Procedure, the sources of criminal procedure law are, among other things, the Constitution of the Republic of Estonia and judgments of the

Supreme Court in issues that are not regulated by other sources of criminal procedural law but that arise in the application of law.

According to subsection 9 (1) of the CRCPA, if a court of first instance or a court of appeal has not applied, upon adjudication of a matter, any relevant legislation of general application, declaring it to be in conflict with the Constitution or if the court of first instance or the court of appeal has declared, upon adjudication of a matter, the refusal to issue legislation of general application to be in conflict with the Constitution, it shall forward the corresponding judgment or ruling to the Supreme Court. Thus, in the specific case the court of first instance or the court of appeal has already made a judgment where it has resolved the case placed before the court, without applying the legislation or its provision(s) that it declared unconstitutional or legislation that is constitutional and subject to application. Thus, the judgment of the Supreme Court will not bring about any changes for the court of the same instance in connection with the judgment made. However, constitutional review judgments of the Supreme Court bring abut procedural consequences in civil, criminal and administrative court procedure regarding terms of appeal and these judgments of the Supreme Court serve as the basis for revision in all the three procedures. In the light of the judgment of the Supreme Court other courts develop their case law in pending and new cases until the Legislature has amended the unconstitutional legislation or provision or established new regulation.

Thus, in the criminal procedure judgments of the Supreme Court in constitutional review cases are associated with the term of submission of an appeal as well as an appeal in cassation: If, upon adjudication of a criminal case, a court declares legislation of general application subject to application in the conclusion of a court judgment to be in conflict with the Constitution and refuses to apply the legislation of general application, an appeal shall be filed in writing to the court who made the judgment within fifteen days as of the day following pronunciation of the judgment made concerning the legislation of general application that is not applied by way of constitutional review of the Supreme Court (subsection 319 (5) of the Code of Criminal Procedure). If, upon adjudication of a criminal case, a circuit court declares legislation of general application subject to application in the conclusion of a court judgment to be in conflict with the Constitution and refuses to apply the legislation of general application, an appeal in cassation shall be filed within thirty days as of the day following pronunciation of the judgment made concerning the legislation of general application that is not applied by way of constitutional review of the Supreme Court (subsection 345 (4) of the Code of Criminal Procedure).

If, by a ruling made in a criminal case, a court declares legislation of general application subject to application to be in conflict with the Constitution and refuses to apply the legislation of general application, the term for filing an appeal against a ruling concerning the legislation of general application that is not applied shall be calculated as of pronunciation of the judgment made by way of constitutional review of the Supreme Court (subsection 387 (3) of the Code of Criminal Procedure).

The Code of Civil Procedure (CCP) provides for the opportunity to suspend a procedure during the time when the constitutional review case is adjudicated in the procedure of the Supreme Court if this may affect the validity of legislation of general application subject to application in the civil case (subsection 356 (2) of the CCP).

In the civil procedure the term has been regulated similarly to the criminal procedure: If, upon adjudication of a case, a county court declares in the decision of a court judgment the legislation of general application subject to application to be in conflict with the Constitution and refuses to apply the legislation of general application, the term for appeal shall not begin to run before the pronunciation of the judgment made by way of constitutional review of the Supreme Court concerning the legislation of general application that was not applied (subsection 632 (2) of the CCP). If, upon adjudication of a case, the court declares in a ruling the legislation of general application subject to application to be in conflict with the Constitution and refuses to apply the legislation of general application, the term for appeal against the ruling shall not begin to run before the pronunciation of a judgment made by way of constitutional review of the Supreme Court concerning the legislation of general application that was not applied (subsection 661 (3) of the CCP). If, upon adjudication of a case, a circuit court declares in the decision of a court judgment the legislation of general application subject to application to be in conflict with the Constitution and refuses to apply the legislation of general application, the term for cassation shall be calculated as of pronunciation of the judgment made by way of constitutional review of the Supreme Court (subsection 670 (2) of the CCP). If, upon adjudication of a case, a court declares in the decision of a court judgment or ruling the legislation of general application subject to application to be in conflict with the Constitution and refuses to apply the legislation of general application, the term for appeal against the legislation of general application that is not applied shall be calculated as of pronunciation of the judgment made by way of constitutional review of the Supreme Court (subsection 698 (3) of the CCP).

In the administrative court procedure, upon adjudication of a case, an administrative court shall not apply any Act or other legislation of general application that is in conflict with the Constitution of the Republic of Estonia. If an administrative court has not applied, upon adjudication of a case, any relevant legislation of general application or international agreement declaring it to be in conflict with the Constitution or if an administrative court has declared the refusal to issue an instrument of legislation of general application to be in conflict with the Constitution it shall forward the corresponding judgment or ruling to the Supreme Court, whereby a constitutional review procedure shall be commenced in the Supreme Court (subsections 25 (9) and (10) of the Code of Administrative Procedure (CAP)).

Regarding terms, a procedure similar to other procedures is applied in the administrative court procedure in connection with constitutional review judgments of the Supreme Court. If, upon adjudication of a case, an administrative court declares in the decision of a court judgment the legislation of general application subject to

application to be in conflict with the Constitution and refuses to apply the legislation of general application, the term for filing an appeal concerning the legislation of general application that is not applied shall be calculated as of pronunciation of the decision made by way of constitutional review of the Supreme Court (subsection 31 (6) of the CAP). If, upon adjudication of a case, the court declares in a ruling the legislation of general application subject to application to be in conflict with the Constitution and refuses to apply the legislation of general application, the term for appeal against the ruling shall not begin to run before the pronunciation of a judgment made by way of constitutional review of the Supreme Court concerning the legislation of general application that was not applied (subsection 47^{1} (4) of the CAP). If, upon adjudication of a case, the court declares in a ruling the legislation of general application subject to application to be in conflict with the Constitution and refuses to apply the legislation of general application, the term for appeal against the ruling shall not begin to run before the pronunciation of a judgment made by way of constitutional review of the Supreme Court concerning the legislation of general application that was not applied (subsection **74^{1}** (4) of the CAP).

In criminal cases review procedure means hearing of a petition for review by the Supreme Court in order to decide on the resumption of the procedure in a criminal case in which a court judgment has entered into force (subsection 365 (1) of the Code of Criminal Procedure). A ground for review is, among other things, that the Supreme Court declares, by way of a constitutional review procedure, the legislation of general application or a provision thereof on which the court judgment or ruling in the criminal case subject to review was based to be in conflict with the Constitution (clause 366 6) of the Code of Criminal Procedure).

In the civil procedure, too, a ground for review is that the Supreme Court declares the legislation of general application or a provision thereof on which the court judgment in the civil case subject to review was based to be in conflict with the Constitution (i.e. if new facts become evident in a case, a new hearing of a court judgment that has entered into force may be organised pursuant to the procedure for review on the basis of a petition filed by a party in the case of an action or, in the case of a matter on petition, based on a petition filed by a participant in the procedure or another person who should have been involved by the court in the hearing of the matter – subsection 702 (1) of the CCP) (clause 702 (2) 7) of the CCP).

Similarly, in the administrative court procedure a new hearing of a judgment or ruling that has entered into force may be conducted on the basis of a petition of a participant in the procedure after new facts become evident (review). The grounds for review of a judgment made in administrative court procedure are the grounds for review provided for in civil procedure (§ 75 of the CAP).

The analysis[11] of the constitutional review judgments through 2004-2009 brings out some examples of how courts have reacted to the judgments of the Supreme Court in constitutional review cases:

1. Case no. 3-4-1-14-07 (Release of an official from service due to age)

On 1 October 2007 the Constitutional Review Chamber of the Supreme Court declared unconstitutional and repealed § 120 of the Public Service Act (PSA), according to which an official may be released from service due to age if the official has reached the age of 65 years, as well as subsection 130 (1) insofar as it concerns advance notification of release from service due to age, subsection 130 (3) insofar as it concerns compensation for release from service due to age and subsections 133 (1) and (3) insofar as they concern time limits of release from service due to age. The Chamber found that it constituted a violation of the fundamental right of equality, because the repealed provisions allowed for keeping one official who had reached the age of 65 years in service and release another by justifying it solely with the person's age.

After the judgment of the Supreme Court the Tartu Administrative Court has adjudicated an appeal where it was requested that a directive releasing an official from service on the basis of § 120 of the PSA be retroactively declared unlawful (judgment of the Tartu Administrative Court of 14 February 2008 in case no. 3-07-2413/3). In the judgment the court found: *"A single administrative decision issued on the basis of legislation of general application that has been declared unconstitutional is also unconstitutional, i.e. unlawful. In this case the unconstitutionality of § 120 of the PSA, which allowed for releasing officials from service due to age, one they reached 65 years of age, has been identified by the constitutional review court. The appellant has been released from service by a specific administrative decision issued on the basis of this very unconstitutional provision of law, which means that the appellant has been released by an unlawful administrative decision. Based on the aforementioned, the appeal is subject to approval and the court declares order no. 145-p of the Tartu Governor of 20 December 2004 to be unlawful."* Thus, the administrative court recognised the retroactive impact of the judgment of the Constitutional Review Chamber. The same was confirmed by the Tartu Circuit Court in the appeal procedure of the same case (judgment of the Tartu Circuit Court of 6 May 2008 in case no. 3-07-2413/8).

2. Cases no. 3-1-3-13-03 and 3-3-2-1-04 (Reopening of the procedure following a judgment of the European Court of Human Rights)

On 6 January 2004 the Supreme Court *en banc* found in two judgments that if the European Court of Human Rights has identified that the rights secured by the European Convention on Human Rights have been violated in Estonia upon conviction of a person, at the request of the person their case must be reviewed again,

[11] Available in at: http://www.riigikohus.ee/vfs/988/PSJV_lahendite_taitmine_2010.pdf.

provided that the violation of the right continued and is substantial and the person's legal status can be improved by such review. The court also noted that: *"The Supreme Court en banc argues that the best fulfilment of this duty would require the amendment of procedural laws so that it would be unambiguous whether and in which cases and how the new hearing of a criminal matter should take place after a judgment of the European Court of Human Rights."* (case no. 3-1-3-13-03 point 31).

Only two years later, on 1 January 2006 the new Code of Civil Procedure entered into force, containing the following ground for revision: the European Court of Human Rights has established a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, or Additional Protocols belonging thereto in making the judgment, and the violation cannot be reasonably eliminated or compensated in any other manner than by revision (clause 702 (2) 8) of the CCP). It took even longer to insert similar grounds for full compliance with judgments of the Court of Human Rights in other acts and codes regulating judicial procedure.

In the Code of Administrative Procedure, the former list of grounds for revision was replaced with a blank reference to the grounds of revision provided for in the civil procedure (the provision entered into force on 1 September 2006). And even later, after nearly two years of processing the bill in the Parliament, provisions of the Code of Criminal Procedure and the Code of Misdemeanour Procedure entered into force on 18 November 2006, stipulating as a ground for revision the satisfaction of an individual appeal filed with the European Court of Human Rights against a court judgment or ruling in case subject to review filed with the European Court of Human Rights, due to violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or a Protocol belonging thereto. The additional condition is that the violation may have affected the resolution of the case and it cannot be eliminated or damage caused thereby cannot be compensated in a manner other than by revision.

During this period of 2-3 years the Supreme Court had to stay true to its previous judgment in spite of the absence of legislation. On 22 November 2004 the Criminal Chamber of the Supreme Court decided to reopen the procedure in case no. 3-1-3-5-04, where a person had been found guilty in Estonia. The reason for the reopening lied in the fact that the European Court of Human Rights had rejected the judgment based on Article 7(1) of the Human Rights Convention, which contains the *nullum crimen nulla poena* principle. The Criminal Chamber acquitted the person concerning the acts with regard to which the criminal procedure had been reopened.

3. Case no. 3-4-1-20-07 (Appeal against ruling rejecting the securing of an action in the civil procedure)

On 9 April 2008 the Constitutional Review Chamber of the Supreme Court declared the first sentence of subsection 390 (1) and subsection 660 (1) of the Code of Civil Procedure unconstitutional and repealed them insofar as they do not allow for

appealing against a ruling rejecting the securing of an action and transferring the security paid into public revenues. According to these provisions, parties could submit appeals against such rulings of country courts and circuit courts, by which the court approved a petition for securing an action, replaced one measure with another or annulled the securing of an action. However, the provisions of law did not contain any right to submit an appeal against a ruling rejecting a petition to secure the action.

In the autumn of the same year, on 1 October 2008, the Civil Chamber of the Supreme Court has to proceed from the referred judgment of the Constitutional Review Chamber in resolving case no. 3-2-1-71-08. The Civil Chamber found that since the provision, according to which in the event of rejection of a petition to secure an action, the security paid is transferred to public revenues, the person who paid the security must be allowed to submit an appeal to the circuit court against the ruling of the county court by which the petition to secure the action was rejected.

4. Case no. 3-4-1-7-08 (Preclusion of administrative courts from the procedure of resolving public procurement disputes)

On 8 June 2009 the Supreme Court *en banc* found that subsection 129 (1) of the Public Procurement Act (PPA) is unconstitutional and must be repealed. The provision authorised circuit courts to adjudicate appeals filed against decisions of the Dispute Committee of the Public Procurement Office and precluded review of such disputes by administrative courts as courts of first instance. The Supreme Court found that such regulation is in conflict with subsections 149 (1) and (2) of the Constitution and the first sentence of § 146 of the Constitution in conjunction with § 4 of the Constitution. The Supreme Court *en banc* found that, according to the Constitution, the discussion of all cases begins with the first instance and preclusion of administrative courts from discussing cases of a certain type, giving the respective competence to an administrative body, restricts the competence of the Judiciary.

In case law, declaring subsection 129 (1) of the Public Procurement Act unconstitutional and invalid while not providing any new regulation, has caused problems in connection with substantiating the competence and role of the Dispute Committee in the administrative court procedure. The Administrative Law Chamber has given the following interpretation thereto: *"After the judgment of the Supreme Court en banc of 8 June 2009 subsection 129 (2) of the PPA must be interpreted in such a manner that a decision of the Disputes Committee can be appealed against in an administrative court. Thus, the Rakvere City Government, which decided the organisation of the public procurement, is the respondent in the administrative procedure and in the Dispute Committee. The Dispute Committee is not a participant in the administrative court procedure and it does not have the right to submit an appeal."* (judgment of the Administrative Law Chamber of the Supreme Court of 4 March 2010 in administrative case no. 3-3-1-11-10, point 21)

5. Case no. 3-4-1-33-05 (Refusal from payment of the parental benefit)

On 20 March 2006 the Constitutional Review Chamber of the Supreme Court declared the second sentence of subsection 3 (7) of the Parental Benefits Act unconstitutional and repealed it insofar as it provided that the parental benefit designated for a person shall be reduced by the wages that had been earned earlier, but not received due to the fault of the employer and which were paid to the person in the month of payment of the parental benefit. According to the challenged provision, no benefit was paid if the revenue earned in the calendar month of payment of the benefit exceeded the benefit rate multiplied by five.

There is considerable case law of lower instance courts regarding the provision of law under observation. Although the Supreme Court found in judgment no. 3-4-1-33-05 that subsection 3 (7) is not in conflict with the principle of legal clarity, there have been some disagreements in interpreting it. In most of the judgments observed (see the judgment of the Tartu Circuit Court of 10 May 2006 in case no. 3-05-483 and judgments of the Tallinn Circuit Court of 15 March 2007 in cases no. 3-05-523 and of 14 May 2007 in case no. 3-06-1453; in addition, judgment no. 3-06-59 of the Tallinn Administrative Court of 30 June 2006 relies on the interpretation of subsection 3 (7) of the PBA by judgment no. 3-4-1-33-05 of the Supreme Court) it is found that the word "earns" used in the first sentence of subsection 3 (7) of the Parental Benefits Act (PBA) means amounts earned in the month of payment of the benefit, not the amounts paid in the month of payment of the benefit. Thus, one of the conditions of reduction of the benefit is that the person works in the calendar month for which the benefit is paid. If in the month of payment of the parental benefit the appellant received wages for the work performed earlier, but there is no ground for claiming that the wages were earned in the month of payment of the benefit, the recipient of the parental benefit has not earned any revenue subject to social tax for the purposes of subsection 3 (7) of the PBA in the month of receiving the benefit and the Pension Board has no right to withhold the parental benefit. A circuit court has assumed a different position in a judgment (see judgment of the Tartu Circuit Court of 29 February 2008 in case no. 3-07-1649) where it found that although in the period of payment of the parental benefit the appellant received wages for work performed earlier, the Pension Board's decision to reduce the parental benefit was justified, because it was not the employer's fault that the wages were not received sooner. "*Upon designation and payment of the benefit, not the actual time of performance of work is important, but the time of payment of the revenue and subjection of the revenue to social tax,"* noted the circuit court. It is not clear whether the interpretation of the referred provision of the Parental Benefits Act is that of principle or it is an accidental single exception. Thus, the case law arising from application of subsections 3 (7) and 7^1 of the PBA is still developing.

6. Case no. 3-4-1-8-08 (Inclusion of the time spent on the performance of the conscript service obligation in the pension qualifying period)

On 30 September 2008 the Constitutional Review Chamber of the Supreme Court declared clause 28 (2) 3) of the State Pension Insurance Act unconstitutional and repealed it insofar as it did not allow for including the time spent on the performance of the conscript or alternative service obligation in the pension qualifying period if the person resided in Estonia before and after being sent to perform the conscript or alternative service obligation outside Estonia and has obtained a 15-year pension qualifying period in Estonia. The said provision allows for including the time spent on the performance of the conscript or alternative service obligation only when the person was sent to serve from Estonia.

After the repeal of clause 28 (2) 3 of the State Pension Insurance Act there have been differences between the case law of the Supreme Court and courts of lower instances regarding the impact of the constitutional review decision on the activities of the Pension Board. The answer depends on whether, according to the court, the judgment of the Supreme Court repealing an act or provision thereof due to unconstitutionality has a retroactive effect or not. Referring to judgment no. 3-3-2-1-07 of the Supreme Court *en banc* of 10 March 2008, the Administrative Law Chamber of the Supreme Court once again confirmed in judgment no. 3-3-1-2-10 of 11 March 2010 that a judgment repealing a provision of law has a retroactive effect (point 19). The Administrative Law Chamber sent case no. 3-3-1-2-10 back to the administrative court for new review for the purpose of identification of the facts serving as the basis for the appeal concerning recalculation of pension (points 25-26).

7. Case no. 3-4-1-6-08 (inspection expenses paid under the Aviation Act)

On 1 July 2008 the Constitutional Review Chamber declared the second sentence of subsection 71 (2) of the Aviation Act unconstitutional and repealed it insofar as it did not ensure the identification of the elements of public financial obligations in accordance with the reservations of law provided for in § 113 of the Constitution. The provision obligated, in the wording in force from 26 April 2004 to 7 February 2007, undertakings to cover the expenses relating to identifying the airworthiness of civil aircraft and verification of the compliance of aviation undertakings and maintenance organisations with the national and international requirements, but did not identify the compulsory elements of the obligation.

On 12 November 2008 the Administrative Law Chamber of the Supreme Court confirmed in a judgment in case no. 3-3-1-48-08 the position of the Constitutional Review Chamber in judgment no. 3-4-1-6-08, therefore refusing to reassess the constitutionality of the second sentence of subsection 71 (2) of the Aviation Act again (point 12). The Administrative Law Chamber admitted that, by submitting an invoice on the basis of subsection 71 (2) of the Aviation Act that was found to be

unconstitutional and repealed, the Aviation Board caused unlawful damage to the undertaking by demanding payment of the challenged amount of money (point 15).

4. Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found– as a result of *a posteriori* and/or *a priori* review? [12]

Based on duration, approvals by the Legislature could be divided into extraordinary, ordinary and slow approvals.[13] Extraordinary are events where the Legislature has very quickly and accurately complied with the judgments[14] of the constitutional review court. Ordinary events are those where the time spent on the Legislature's approval is in correlation to the complexity of the problem. Slow events are those where the time spent on the approval is clearly too long, i.e. the *Riigikogu* expressed political unwillingness to attend to the problem pointed out by the Supreme Court.[15] An example of the *Riigikogu*'s slow action is the web of issues pertaining to the so-called public utilities case. For more information, see the answer to question 6a in part I of the questionnaire.

In addition to the requirement established in the judgment with regard to the Legislature to comply with the judgment of the Supreme Court immediately or as soon as possible within reasonable time, the Supreme Court has been given the legal right to postpone the entry into force of a judgment repealing legislation of general application or a provision thereof by up to six months.[16] Such an opportunity was

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[12] Below, answers to points 4.8 and 5.1 of the questionnaire of the XIV Congress of the Conference of European Constitutional Courts "Problems of Legislative Omission in Constitutional Jurisprudence" drawn up by the Constitutional Court of the Republic of Lithuania have partially bee used. Available in English at http://www.riigikohus.ee/?id=1088.

[13] Ralf Järvamägi. "Impact of Constitutional Review on the Legislature" – Juridica no 6, 2006, p. 419.

[14] Judgment of the Constitutional Review Chamber of the Supreme Court of 15 July 2002 in case no. 3-4-1-7-02.

[15] Here we could give examples of the so-called resettlers' cases (judgment of the Supreme Court en banc of 28 October 2002 in case no. 3-4-1-5-02, judgment of 12 April 2006 in case no. 3-3-1-63-05 and judgment of 6 December 2006 in case no. 3-3-1-63-05), because in these cases the Legislature acted constantly and even in autumn 2006 tries to regulate the situation by passing an act attempting to prevent the repealing judgment and the entry into force of the staggered repeal judgment of the Supreme Court, which was successfully challenged by the President of the Republic in the Supreme Court (Constitutional Review Chamber judgment of 31 January 2007 in case no. 3-4-1-14-06). The issue of the property of resettlers is currently regulated by another judgment of the Supreme Court in another resettlers case due to the expiry of the term of the entry into force of the judgment of the Supreme Court and the fact that the President did not proclaim the respective act of the Legislature. So far no efficient procedure for restitution of resettlers' property to which the Supreme Court referred to in the third resettlers' case has been established.

[16] Clause 15 (1) 2) of the CRCPA: in the adjudication of a case, the Supreme Court may declare legislation of general application that has entered into force or a provision thereof to be in conflict with the Constitution and repeal it; subsection 58 (3) of the CRCPA: The court has the right to postpone the entry into force of a judgment specified in clause 15 (1) 2) up to six months. The postponement of the entry into force of a judgment must be reasoned.

created, in order to avoid a situation where the absence of a provision of law would cause problems and where it is clear that the Legislature needs more time to draft constitutional regulation (see the judgment of the Supreme Court *en banc* of 12 April 2006 in case no. 3-3-1-63-05, points 28-31). Staggering a judgment declaring an act or its provision unconstitutional does not, according to the case law of the Supreme Court, mean that an unconstitutional act may be applied before the entry into force of the judgment.

The cases concerning the obligation to tolerate public utilities and the weapons permit for aliens can be pointed out from the period of 2004-2009[17] as positive examples of the decision-making time given to the Legislature and taking action by the Legislature (sometimes later than prescribed).

1. Case no. 3-4-1-3-04 (Obligation to tolerate public utilities)

On 30 April 2004 the Constitutional Review Chamber of the Supreme Court found that although the regulation of the obligation to tolerate public utilities provided for in subsection 152 (1) and 154 (2) of the Law of Property Act Implementation Act is, in general, constitutional, the act should give more guarantees to landowners and allow for weighing different interests (point 36). According to the Chamber, the regulation was unconstitutional insofar as it did not allow for the removal of public utilities on grounds other than the fact that the utilities are not being used according to their intended purpose anymore. The court did not consider it a proportional restriction of the right of ownership to release the owner of the civil engineering works from the payment of a fee and repealed subsection 15^4 (2) of the LPAIP, which released the owner from payment of a fee. The court postponed the entry into force of the judgment by six months regarding repealing the provision, i.e. until 30 October 2004. The Chamber noted that it may be necessary to adjust the entire regulation concerning public utilities.

The Civil Chamber of the Supreme Court had to apply unconstitutional and repealed provisions in several cases before the Legislature managed to adopt new regulation. In case no. 3-2-1-108-04 of 29 October 2004 the Civil Chamber found that since subsection 15^4 (2) of the LPAIA had been declared unconstitutional, it cannot be applied and therefore the plaintiff is not obligated to tolerate the public utility of a public utilities undertaking free of charge. Upon setting a fee for the plaintiff the court used analogy, requiring payment of reasonable compensation for the restriction on the immovable property. The case was sent back to the circuit court for a renewed review. In case no. 3-2-1-43-06 of 15 May 2006 the Civil Chamber had to admit that in spite of the fact that two years have passed from the judgment of the Supreme Court in the constitutional review case, the Legislature has failed to bring the regulation into compliance with the Constitution. The Civil Chamber gave the circuit court instructions for a renewed review of the case: *"If the court finds that the unloading*

[17] Available in Estonian at: http://www.riigikohus.ee/vfs/988/PSJV_lahendite_taitmine_2010.pdf.

node is a public utility and other prerequisites of tolerance have been fulfilled as well (i.e. the relevance of the provisions of the obligation to tolerate the civil engineering work has been identified) and the relevant provisions have not been brought into compliance with the Constitution, upon renewed reviewing of the case the non-application of the respective provisions in their entirety and initiation of a constitutional review procedure must be weighed" (point 17).

On 26 March 2007, three years after the judgment of the Constitutional Review Chamber of the Supreme Court was made, the General Part of the Civil Code Act, Law of Property Act, Law of Property Act Implementation Act, Building Act, Planning Act and Immovables Expropriation Act Amendment Act entered into force. In the explanatory memorandum it was stated that the purpose of the act is to create clear and unambiguous regulation concerning the construction, tolerance and remuneration of tolerance of public utilities and civil engineering works, which fits in the general context of civil law, because the obligation to tolerate civil engineering works restricts ownership. In the new wording of the LPAIA the tolerance obligation of the owner of an immovable has been limited and it is made possible to demand the removal of civil engineering works in the event of absence of the obligation to tolerate. Also, a fee has been foreseen for tolerance of ownership restrictions, which is calculated retroactively as of 1 November 2004, i.e. the day following the entry into force of the judgment of the Supreme Court.

2. Case no. 3-3-1-60-03 (Work permit as a prerequisite for issuing a weapons permit to an alien)

On 25 February 2004 the Supreme Court *en banc* identified the unconstitutionality of subsection 30 (2) of the Weapons Act insofar as it stated that the prerequisite for obtaining a permit to own a hunting gun for hunting purposes is, in the case of an alien residing in Estonia on the basis of a temporary residence permit, the holding of a work permit, and insofar as it demanded that the competent authority of the country of permanent resident of the alien has issued a weapons permit to the alien regarding the same type of gun. The Supreme Court repealed the provision, but postponed the entry into force of the judgment by four months so that the Legislature could establish proper regulation. In the event of immediate repeal of the provision aliens not having a weapons permit in their country of permanent residence would have had the right to own a weapon by way of a simplified procedure, i.e. without taking an examination and without their state of health being checked. This would have led to unequal treatment of persons who can apply for a weapons permit only in a general procedure and the legitimate goal of the restrictions on possession of weapons would have been undermined. The Legal Affairs Committee of the *Riigikogu* also supported the postponement of the entry into force of the judgment. Thus, the judgment entered into force on 25 June 2004.

On 28 June 2004 the *Riigikogu* adopted the Weapons Act Amendment Act, which entered into force retroactively on 25 June. The act gave aliens residing in Estonia on

the basis of a residence permit and not having a weapons permit issued by the competent authority of another state the chance to acquire, own and possess certain weapons (sports firearms and pneumatic, projectile and cut-and-thrust weapons), provided that they have received a weapons permit in Estonian on general grounds and pursuant to the general procedure provided for in the Weapons Act. Pursuant to subsection 34 (8^1) of the Weapons Act, the term of validity of a weapons permit issued to an alien holding a temporary residence permit must not exceed the term of validity of the residence permit. In the event the residence permit is declared invalid, the weapons permit will be declared invalid as well. Also, the unconstitutional condition of holding a work permit was abolished. According to the wording of the Weapons Act in force since 1 August 2008, people residing in Estonia on the basis of the right of residence can also, in addition to aliens residing in Estonia on the basis of a residence permit, apply for a weapons permit in Estonia.

5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.

The Legislature's failure to act in complying with a constitutional review judgment illustrates the court's inability to supervise compliance with its judgments. There are multiple reasons to such failure. Among all cases involving the Legislature's failure to acts, the Legislature's long-term failure to act is the best illustrated by the so-called resettlers' cases relating to the ownership reform (see judgment of the Supreme Court *en banc* of 12 April 2006 in case no. 3-3-1-63-05, points 28-31). There are no direct mechanisms that would make certain that the *Riigikogu* performed obligations arising from judgments of the Supreme Court.

In some cases the Supreme Court can be consistent in its case law, i.e. attend to one issue constantly and finally reach a result decisive for the legal system. Here, the four aforementioned resettlers' cases are a good example: judgment of the Supreme Court *en banc* of 28 October 2002 in case no. 3-4-1-5-02, judgment of 12 April 2006 in case no. 3-3-1-63-05, judgment of 6 December 2006 in case no. 3-3-1-63-05 and judgment of the Constitutional Review Chamber of the Supreme Court of 31 January 2007 in case no. 3-4-1-14-06; see also judgment of the Supreme Court *en banc* of 10 March 2008 in case no. 3-3-2-1-07).

<u>The Principles of Ownership Reform Act and the right of persons who left Estonia on the basis of agreements made with the German state in 1941</u>[18]

On 28 October 2002 the Supreme Court *en banc* declared subsection 7 (3) of the Republic of Estonia Principles of Ownership Reform Act unconstitutional. Although the Supreme Court did not question the reform policy decision of the *Riigikogu* in a

[18] The text originates partially from the analysis of constitutional review judgments through 2004-2009. Available in Estonian, at :http://www.riigikohus.ee/vfs/988/PSJV_lahendite_taitmine_2010.pdf.

matter of principle, the Supreme Court obligated the Legislator to bring the said provision into compliance with the principle of legal clarity. This case is also special because the *Riigikogu* has very seriously attended to the issue. This is confirmed by two draft acts amending subsection 7 (3) of the Republic of Estonia Principles of Ownership Reform Act. The explanatory memoranda of the first draft (1290 SE; dated 15 January 2003) and the second draft (15 SE II; dated 1 April 2003) are identical and it has been specified in a separate paragraph that the judgment of the Supreme Court must be complied with and subsection 7 (3) of the Principles of Ownership Reform Act must be amended. The authors of the draft act and the Legislature, the *Riigikogu*, acknowledged the judgment and started taking steps to comply with it. The problem did not lie in the acceptance of the judgment alone, but in reaching an agreement on the manner of complying with it.

On 12 April 2006 the Supreme Court en banc repealed subsection 7 (3) of the Principles of Ownership Reform Act, according to which the property unlawfully expropriated from persons who left Estonia on the basis of agreements made with the German state shall be restituted or compensated on the basis of an agreement between the states. Since no such agreement had been made over a period of nearly 15 years, uncertainty surrounded the property of these resettlers: will it have to be restituted or compensated to the resettlers or can the tenants residing on those premises be allowed to privatise them? The Supreme Court postponed the entry into force of the judgment by 6 months in order to give the Legislature time to draft new legal regulation. According to the interim judgment, if by 12 October 2006 an act amending or repealing subsection 7 (3) of the Principles of Ownership Reform Act has not entered into force, the judgment of the Supreme Court will enter into force. For years ago the Supreme Court had declared the said provision unconstitutional. At the time the Supreme Court did not repeal subsection 7 (3) of the Principles of Ownership Reform Act, because it did not want to make a political decision. The Supreme Court emphasised that the Legislature should draft a clear regulation regarding the restitution or privatisation of the property of resettlers. In spite of the fact that in the reports submitted to the *Riigikogu* the Chief Justice of the Supreme Court repeatedly drew attention to the deficiencies, the judgment of the Supreme Court of 2002 was not complied with. Therefore the Supreme Court emphasised in its judgment no. 3-3-1-63-05 in 2006 that by declaring subsection 7 (3) of the Principles of Ownership Reform Act unconstitutional for the second time without repealing the provision would not contribute to the resolution of the situation. The Supreme Court's position was the following: *"Subsection 7 (3) of the Principles of Ownership Reform Act must be repealed in order to put an end to the unconstitutional situation that has lasted for years."* The Parliament tried to comply with the judgment of the Supreme Court of 12 April 2006. To that end Subsection 7 (3) of Republic of Estonia Principles of Ownership Reform Act Repeal Act was adopted on 14 September 2006. But the President of the Republic refused to proclaim it, because he found that the amendment is not in accordance with the principle of legal clarity and the constitutional principle of legal protection. After the act was adopted without amendment, the President submitted to the Supreme Court the petition to declare the act unconstitutional. On 31

January 2007 the Constitutional Review Chamber of the Supreme Court approved the petition of the President of the Republic in case no. 3-4-1-14-06 and declared the non-proclaimed act unconstitutional. The Chamber found that the act ensured the right to a procedure only for those resettlers whose application for restitution or compensation of unlawfully expropriated property had not been reviewed. The act did not contain any efficient regulation that would have allowed resettlers and persons entitled to privatised unlawfully expropriated residential premises to exercise their rights. According to the Chamber, the act fails to resolve the legal issues relating to the repeal of subsection 7 (3) of the Principles of Ownership Reform Act in compliance with the Constitution and creates more problems by treating different groups of resettlers unequally. Since the act amending or repealing subsection 7 (3) of the Principles of Ownership Reform Act did not enter into force during the 6-month term given in the judgment of the Supreme Court *en banc* of 12 April 2006, the Supreme Court admitted that based on the same judgment subsection 7 (3) of the Principles of Ownership Reform Act is repealed as of 12 October 2006. The court found that the result of repealing subsection 7 (3) of the Principles of Ownership Reform Act is that the unlawfully expropriated property of the people who resettled in Germany on the basis of agreements made with the German state is subject to restitution, compensation or privatisation by the tenants on the general grounds and pursuant to the general procedure laid down in the Principles of the Ownership Reform Act.
"Such legal clarity allows for continuing /…/ processing the appeal in cassation," said the Supreme Court on 6 December 2006 in the second interim judgment and approved the appeal in cassation by persons who had resettled in Germany (judgment no. 3-3-1-63-05).

Since no alternative regulation replaced the repealed provision, the Supreme Court *en banc* once again emphasised in a judgment of 10 March 2008 in case no. 3-3-2-1-07 that, owing to the right to organisation and procedure arising from §§ 13 and 14 of the Constitution, the applications submitted with regard to the unlawfully expropriated property of people who resettled in Germany must be processed. The Court *en banc* instructed that the processing of the applications that had earlier been rejected on the basis of the repealed subsection 7 (3) of the Principles of Ownership Reform Act be treated not as a resumption of the administrative procedure, but as initiation of a new procedure. According to the judgment of the Supreme Court *en banc*, in the case of application not submitted earlier or returned without review on the basis of subsection 7 (3) of the Principles of Ownership Reform Act it must be weighed in every single event whether the application has been submitted within a reasonable term. Following these positions, the Administrative Chamber of the Supreme Court has on multiple occasions reviewed appeals in cassation and revision petitions submitted following the repeal of subsection 7 (3) of the Principles of Ownership Reform Act (judgment of the Administrative Chamber of the Supreme Court of 14 July 2007 in case no. 3-3-2-2-07; of 15 May 2008 in case no. 3-3-1-99-06; of 14 May 2008 in case no. 3-3-1-23-08; of 5 June 2008 in case no. 3-3-1-32-07; of 16 April 2009 in case no. 3-3-1-7-09 and of 10 December 2009 in case no. 3-3-1-84-09).

Summarising the entire case law concerning subsection 7 (3) of the Principles of Ownership Reform Act, it may be concluded that since the Legislature failed to reach a political compromise acceptable to all parties, the court had to find a solution to the problem on the basis of constitutional values and the general ownership reform legislation. By the repeal of subsection 7 (3) of the Principles of Ownership Reform Act, a long-term bone of contention, the issue of restitution of the property of resettlers, was finally resolved. The Legislature has accepted the constitutional review judgment and started looking for suitable and proportional measures for completing the ownership reform.[19]

For further information regarding the issue see the answer to question 6a in part I of the questionnaire.

6. **Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.**

According to § 59 of the Constitution, the legislative power is vested in the *Riigikogu* who is free to decide over the substance of the legislation to be adopted. At the same time the *Riigikogu* is bound by the Constitution. The first sentence of subsection 3 (1) of the Constitution demands: "The powers of state shall be exercised solely pursuant to the Constitution and acts that are in conformity therewith." Thus, a judgment of the Supreme Court declaring legislation or provision thereof unconstitutional, is binding upon the *Riigikogu* and restoration of the unconstitutional situation or regulation is unlawful and in conflict with the Constitution. The situation is different when it comes to authorisation to issue regulations in events where legislation of general application is unconstitutional due to exceeding the competence to issue the legislation: if new legislation of general application is adopted in a formally lawful manner, it may be legislation whose subject matter is not amended in the meantime, only the body that issued the legislation changes.

7. **Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?**

According to subsection 14 (3) of the CRCPA, a case handed over on the basis of a ruling of a Chamber or a Special Panel of the Supreme Court in accordance with the respective procedure code is resolved by the Court *en banc* in any and all relevant matters, thereby concurrently applying the procedural code applicable to the type of the case and this Act. Thus, if the Supreme Court *en banc* adjudicates, for instance, a case handed over by the Administrative Chamber of the Supreme Court, the Court *en*

[19] To that end the Government of the Republic initiated on 21 March 2010 the Acts Pertaining to Ownership Reform Amendment Act (715 SE).
Available at: http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=960515&u=20100420032958.

banc must assume a position with regard to the appeal in cassation of the person who addressed the court, i.e. that it decides, in addition to resolving the constitutionality issue, the matters pertaining to the specific case as well. For such events the Supreme Court has developed a very accurate procedure for compliance with its judgments (see, for instance, the judgment of the Supreme Court *en banc* in the Shuvalov case). In other events of constitutional review the Supreme Court does not have any specific procedure or opportunity for regulating compliance with the judgment. However, in several other constitutional review judgments the Supreme Court has given instructions for termination of an unconstitutional situation [election coalitions II, weapons permit case (suspension of the weapons permit or weapons acquisition permit of a person who is the suspect or the accused in a criminal case), etc.].

The analysis of the constitutional review judgments through 2004-2009[20] brings out some examples thereof:

1. Case no. 3-4-1-1-05 (election coalitions II)

On 19 April 2005 the Supreme Court *en banc* repealed § 70^1 of the Local Councils Election Act, which prohibited the submission to rural municipality or city election committees of applications for registration of election coalitions as of 1 January 2005. The Supreme Court found that the said provision in conjunction with the requirement arising from the Political Parties Act that a political party must have at least 1,000 members, prevent residents of local authorities from submitting lists in local council elections and are in conjunction unconstitutional. The Supreme Court assumed quite an activist position in this case, saying firstly that *"in principle, the Legislature has various options for eliminating the unconstitutional situation,"* but adding also that *"in local authorities were the number of residents is small, it is not constitutional to allow for nomination of candidates of nothing but political parties even if the political party requirement of 1,000 members is reduced, for instance, by ten times. In the case of the requirement of 100 members it would not be possible to form several local political parties in many local authorities."* Emphasising, that the time left until elections is short, the court dictated the Legislature the only possible course of action – the re-allowing of election coalitions.

The Supreme Court reached a similar conclusion also in the first election coalitions case in 2002 (judgment no. 3-4-1-7-02 of the Constitutional Review Chamber of the Supreme Court of 15 July 2002).

Before these local elections the Legislature also wanted to limit the running of election coalitions. The Supreme Court stated: *"The re-allowing of election coalitions is probably the only tool that is able to ensure the timely organisation of the elections of local councils."* That judgment of the Supreme Court provided fuel for discussions

[20] Available in Estonian at: http://www.riigikohus.ee/vfs/988/PSJV_lahendite_taitmine_2010.pdf.

on the activism of the constitutional court and its involvement in politics.[21] Following the judgment of the Supreme Court in 2005 the Legislature has no longer tried to regulate the participation of election coalitions in local elections and election coalitions are still allowed in the elections of local councils. Thus, following the second confirmation the Legislature accepted the position of the Supreme Court and has not tried to question election coalitions anymore.

2. Case no. 3-3-1-59-07 (Non-payment of salary to a judge whose service relationship has been suspended pending a criminal procedure)

On 14 April 2009 the Supreme Court *en banc* found that the absence of such regulation (the failure to issue legislation of general application), which would allow for paying a salary or other benefits to a judge with whom the service relationship has been suspended pending a criminal procedure is in conflict with subsection 147 (4) of the Constitution in conjunction with § 146 and 15 of the Constitution. Taking into account the fact that the salary of a judge is the guarantee of the independence and that the salary paid to the judge must be in elementary correlation to their contribution, the Supreme Court en banc ordered that the Ministry of Justice pay A. Shuvalov 50% of his salary and additional remuneration for the entire period when the official functions of A. Shuvalov as a judge were suspended due to a criminal procedure.

3. Case no. 3-4-1-16-08 (Absence of the right of discretion upon refusal to grant a weapons permit)

On 26 March 2008 the Constitutional Review Chamber of the Supreme Court declared clause 43 (1) 2) of the Weapons Act to be unconstitutional and repealed it insofar as it does not allow a police prefecture to take into account the person of the suspect or the accused or the circumstances of the suspicion or charges upon suspension of the validity of the weapons acquisition permit or weapons permit of the suspect or the accused. In the event of a criminal procedure whose object is not a crime against life or health or where other circumstances posing a threat of the abuse of a weapon do not exist, the suspension of a weapons acquisition permit or weapons permit by way of a compulsory procedure is not a proportional measure for the protection of the life and health of other persons. The Chamber added: *"... that the best way to guarantee the protection of the life and health of people on the one hand, and the protection of the general fundamental freedom of a suspect or an accused at trial on the other hand, would be if those who apply the law could take into account, upon suspending a weapons permit or an acquisition permit, the circumstances serving as the ground for the suspicion or the charge, the personality of the suspect or the accused at trial, and other possible essential circumstances and legitimate*

[21] See the minutes of the *Riigikogu*. Second reading of the draft Local Councils Election Act Amendment Act (1135 SE). Special session of the *Riigikogu*, 30 July 2002. Available in Estonian: http://web.riigikogu.ee/ems/stenograms/2002/07/t02073000.html (5.02.2005).

interest. The discretion afforded upon restricting the general fundamental right to a freedom would prevent a person being turned into an object of state authority and would facilitate to guarantee human dignity." (point 39)

The Chamber considered it possible that the Legislature itself, exercising its freedom of decision-making, specifies, without giving police prefectures any greater right of discretion, the circumstances upon occurrence of which the validity of the weapons permit or the weapons acquisition permit must be suspended by way of compulsory procedure. The reference to the judgment of the Supreme Court has been inserted in the act next to the repealed provision of the Weapons Act. In addition, on 12 April 2010 the Government of the Republic initiated a draft Weapons Act Amendment Act for solving the said problems. The amendments of § 43 of the draft Weapons Act specify control measures regarding the circulation of weapons. According to the explanatory memorandum of the draft act, the amendments create a legal construction that complies with the judgment of the Supreme Court of 26 March 2009. The amendment creates the opportunity to take into account the person, their act and their association with the circumstances precluding the owning of a weapon when suspending a weapons permit. The amendment gives the chance to be flexible and to proceed from a possible objective threat arising from the person when suspending the validity of a weapons permit. Thus, the Legislature has shown the will to bring the provisions of law into compliance with the judgment of the Supreme Court[22].

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