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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

ON THE REFORM OF CONSTITUTIONAL JUSTICE IN ESTONIA

on the basis of the opinion by
Prof. Sergio BARTOLE (Italy)

and comments by
Prof. Helmut STEINBERGER (Germany)

The Estonian Minister of Justice, in a letter dated 15 October 1997, asked the Commission to give an opinion on the revision of the Estonian Constitution with a view to the possibility of instituting a separate Constitutional Court, as opposed to the existing system of a Supreme Court with a Constitutional Review Chamber, in the context of proposals to allow individual complaints to be heard by the body of constitutional review.

Wtih the primary goal of preparing for accession to the European Union, the Estonian Government set up a Commission to review the Constitution and to propose necessay amendments. According to information provided by the Estonian Ministry of Justice, in its report this Commission proposed the establishment of a Constitutional Court with competence to examine individual complaints. The government report is to serve as a basis for further discussion in Parliament on amending the Constitution.

In parallel, the Estonian Supreme Court also informed the Commission that it was preparing a draft bill to replace the current Constitutional Review Court Procedure Act. This draft bill is available from the Venice Commission as document CDL (98) 48.

At its 32nd plenary meeting the Commission appointed Mssrs Bartole and Steinberger as rapporteurs to examine the question of the reform of constitutional justice in Estonia. During the 33rd meeting a written opinion by Mr Bartole (CDL (97) 53) was discussed also in the light of oral comments made by Mr Steinberger. The present text consolidates the written opinion, the oral comments and the discussion that ensued.

I. FORMS OF CONSTITUTIONAL REVIEW IN ESTONIA

According to the Estonian Constitutional Review Court Procedure Act, the Supreme Court is the court of constitutional review. Constitutional review is undertaken by a chamber consisting of five members of the Supreme Court (Article 2.1). The Constitutional Review Chamber examines petitions directly in accordance with Article 6.1 of the Constitutional Review Court Procedure Act.

Under this article, abstract review of laws which have not yet come into force may be undertaken in two cases:

(a) When the *Riigikogu* (Parliament) approves for a second time, without amendments, a law which the President has returned to it, the President may directly petition the Supreme Court requesting that it declare the law to be in conflict with the Constitution. If, however, the Court declares the law to be in accordance with the Constitution, the President must then proclaim the law (Article 107 of the Constitution).

(b) According to Article 142 of the Constitution, the Legal Chancellor shall apply to the Constitutional Court requesting a declaration that a legal act is invalid if the State legislative or executive power or local government which issued the act fail to comply with the Chancellor's request that the legislation be brought into line with the Constitution within 20 days.

A third form of constitutional review – resulting from the concrete application of a law – is

possible on the basis of Article 5.2 of the Constitutional Review Court Procedure Act. In this case, a court which "has declared a law or other legal act to be in contradiction with the Constitution and has refused to apply it [...] shall so inform the Supreme Court and the Legal Chancellor, by which constitutional review proceedings in the Supreme Court shall be initiated".

It is not entirely clear from this article whether the Legal Chancellor must initiate proceedings or whether they are initiated *ex officio*, although the jurisprudence of the Court leans toward this second construction: see judgments III-4/A-12/94 and III-4/A-1/95 (reported in the Venice Commission's *Bulletin on Constitutional Case-Law* and CODICES database, with the identification EST-1995-1-001 and EST-1995-1-002 respectively). In any case it is this third form of constitutional review which gives rise to most commentary and which is discussed in more detail in section III below.

Currently, no provision is made in Estonian law for individual complaints to the Constitutional Review Chamber of the Supreme Court. However, the Supreme Court's draft bill (§7) proposes widening the Chamber's competence to include this possibility as well as that of hearing petitions, in certain specified cases, from the majority of a local government, the Board or the Chairman of the *Riigikogu* or at least 21 members of the parliamentary minority. The draft also proposes widening the Court's jurisdiction to include *ex post facto* review of the constitutionality not only of legislation but also of electoral questions and referenda (§3).

II. COMPARISON WITH OTHER PROCEDURES OF CONSTITUTIONAL REVIEW

In so far as any court of justice is entrusted with the power of refusing to apply a law which it declares to be "in contradiction with the Constitution", the system of judicial review of legislation is reminiscent of the system adopted in the United States of America. Under the Estonian system, however, such a decision by a court automatically initiates constitutional review proceedings, and decisions of the Supreme Court have binding force for all State and government bodies, local governments, courts, officials, legal persons and natural persons (Article 23 of the Constitutional Review Court Procedure Act). The American Supreme Court, in contrast, is an appellate jurisdiction, and constitutional review proceedings can only be instigated on the initiative of one of the parties to the case. Furthermore, its decisions are binding only on the parties to the case, while their general effects flow from the principle of *stare decisis.*

Constitutional review may also be instigated in Italy when the courts consider a norm to be in conflict with the Constitution. Italian courts do not rule on the matter themselves (as is the case in Estonia and the United States of America) but rather may implement a stay in proceedings and refer the matter to the Constitutional Court to be decided before making any ruling in the case before them. Nevertheless, in both the Estonian and the Italian systems, the starting point for constitutional review proceedings is a decision by a judge or a court in the context of the concrete application of a law: refusal to apply a law declared to be in contradiction with the Constitution (Estonia), or referral of the question to the Constitutional Court before making a ruling in the case (Italy). In both countries, there is no provision for individual applications to the body of constitutional review.

A further comparison may be made with the Portuguese system of constitutional review. Here, the President of the Republic and Ministers may request the Constitutional Court to undertake preliminary review of the constitutionality of a legislative provision (Article 278 of the Portuguese Constitution) but the Court also has jursidiction to hear appeals against decisions of lower courts which have refused to apply a legal rule on the grounds of its unconstitutionality or have applied a legal rule whose constitutionality was challenged during proceedings (Article 280 of the Portuguese Constitution). In the latter situation, the Portuguese Constitutional Court acts as an appellate jurisdiction in which, as is the case in the United States of America, proceedings may begin only at the initiative of one of the parties to the case before the lower court, whereas in Estonia, constitutional review commences automatically in such cases. A further distinction may be made between the two systems in that the Portuguese system is rounded out by the possibility of a general review of constitutionality in accordance with Article 281 of the Constitution.

Finally, in other countries where a separate Constitutional Court/Council exists, for example France and Germany, these bodies are competent to examine such questions as the conformity with the Constitution of procedures followed in elections and referenda (in France), the relations between and functioning of the constitutional bodies of the State, the distribution of powers between State organs and guaranteeing more directly the protection of human rights and fundamental freedoms within the State (in Germany). Constitutional criminal trials and questions of impeachment are further examples of matters that may fall within the jurisdiction of the body of constitutional review.

III. THE POSSIBILITY OF EXTENDING THE COMPETENCE OF THE ESTONIAN CONSTITUTIONAL REVIEW CHAMBER

The Estonian system, as the above comparison shows, contains certain distinctive features, and it has already been noted (section II) that the competence of the Constitutional Review Chamber of the Supreme Court is limited to the judicial review (whether abstract preliminary review or concrete review of the application of laws) of the conformity of legislation with the Constitution.

Estonia is not alone, however, in providing for judicial review of legislation without establishing a separate Constitutional Court: this is a feature common to many Commonwealth and Nordic countries, and it has its own rationale. First, the preliminary review of constitutionality is aimed at avoiding the entry into force of legal acts which are not in conformity with the Constitution. In addition, constitutional review proceedings initiated under Article 5.2 of the Constitutional Review Court Procedure Act allow for the review of judgments by lower courts, as well as for the possible extension *erga omnes* of the effects of the declaration of unconstitutionality of a law which the lower court refused to apply on the grounds of its being in contradiction with the constitution.

In the context of reforming the system of constitutional justice, the possibility of allowing lower courts to address preliminary questions to the court undertaking constitutional review might also be considered. This would eliminate the need to annul decisions by lower courts, as their proceedings would be stayed pending the decision of the consitutional review body to which the question is referred.

As mentioned above (section II), there is currently no possibility of lodging an individual complaint with the Supreme Court for review of the constitutionality of a law. However, there appears to be a general consensus within the country that this possibility should be introduced, and it is true that individual complaints are possible in a large number of European countries. In the majority of countries where this is the case, there is a separate Constitutional Court (Albania, Croatia, the Czech Republic, Germany, Hungary, Malta, Portugal, Russia, Slovakia, Slovenia, Spain and "the former Yugoslav Republic of Macedonia"). In some countries, however, individual constitutional complaints are possible even though there is no separate Constitutional Court (Cyprus, Liechtenstein, Switzerland).[1]

Thus, clearly, the creation of a separate Constitutional Court is not a legal requirement for the introduction of the individual constitutional complaint. There is no technical or legal reason why individual complaints could not be made possible under the existing system: the chamber of the Supreme Court which is competent to deal with constitutional review proceedings could also be entrusted with jurisdiction over individual complaints, although this would be an unusual solution in the European context. In order to streamline such an arrangement the Legal Chancellor might be allowed to act as a filter for individual complaints. From a strictly logical and technical point of view, then, allowing the lodging of individual constitutional complaints would not of itself require the establishment of a separate Constitutional Court.

Granting wider powers to the Constitutional Review Chamber would lead to an increased workload for that body. The existing Chamber may have difficulty dealing with such an increase in its caseload, especially if its powers were to be extended to include not only individual complaints but also some of the powers of review exercised by other constitutional review bodies (see section II) and proposed in the Supreme Court's draft bill (see section I). Again, there are no legal or technical reasons which would prevent its having competence to examine all these matters; the question is more one of the logistical difficulties involved for an appellate court to resolve questions of constitutionality within a reasonable time, even if a separate chamber deals with these matters. From this point of view, the establishment of a separate Constitutional Court may be desirable.

A final matter to be borne in mind is the extra cost involved in running a separate court. The advantages which may be gained by the creation of a separate body of constitutional review, in particular the greater efficiency which could thus be achieved, need to be weighed against the extra cost to the State which such a body may create.

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[1] *Arne Mav_i_, "The Citizen as Applicant before the Constitutional Court", in the Proceedings of the Seminar on Contemporary Problems of Constitutional Justice" organised by the Venice Commission in conjunction with the Constitutional Court of Georgia, Tbilissi, 1-3 December 1996. (Document CDL-INF (97) 7, pp. 26-39, at pp. 29-30.) See also the Special Editions of the Venice Commission's Bulletin on Constitutional Case-Law.*

IV. COMPOSITION OF THE CONSTITUTIONAL REVIEW BODY

In the context of reforming the system of constitutional review, the composition of the body exercising this function must also be considered. The methods of appointment and criteria for selection of constitutional judges are of considerable importance in guaranteeing the independence of the body.

It should be borne in mind that in countries which have experienced a revolution, the appointment as constitutional judges and guarantors of the constitution of judges connected with the previous régime "would seem contradictory".[2] Therefore the criteria for selection of members of a body charged with the constitutional review of legislation should be determined with great care. This is consistent with the comments of H. Kelsen about the links between constitutional justice and the politics of a State.[3] The necessary professional requirements of constitutional judges should be combined with political considerations.

According to the Estonian Constitution, the requirements for members of the Constitutional Review Chamber do not differ from those of the other members of the Supreme Court. All are elected by the Parliament upon nomination by the Chairman of the Supreme Court (Article 150). The general assembly of the Supreme Court elects the members of the Chamber in such a way that it includes one member from each of the civil, criminal and administrative panels of the Court; in addition, one member is elected from amongst the jurists in the Republic of Estonia (Article 26.3 of the Courts Act). The President of the Supreme Court is the fifth, *ex officio* member of the Constitutional Review Chamber.

This system does not provide for the direct influence of political parties for which Kelsen argued: it is true that constitutional review is conducted by judges elected by the Parliament, but the parliamentary choice is conditioned and restricted by the nominations submitted by the President of the Supreme Court.

Moreover, the law does not stipulate a need for any professional competencies other than those required for the election of all Supreme Court judges (Article 24.2 of the Courts Act).[4] It is a generally accepted idea that constitutional judges, faced as they are with special responsibilities and cases unlike those dealt with by other judges, need particular professional experience and capabilities. Thus in most countries there are selection criteria for constitutional judges including a minimum (and sometimes maximum) age and also legal experience requirements.[5]

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[2] *Helmut Steinberger, Models of constitutional jurisdiction, no. 2 in the collection Science and technique of democracy, Venice Commission, at p.42.*

[3] *H. Kelsen, "La garantie juridictionnelle de la Constitution" in Rev. dr. publ. et sc. pol. 1928, 197, and Ann. Inst. inter. dr. publ. 1929.*

[4] *"The Chairman of the Supreme Court shall be appointed by the Riigikogu, on proposal by the President of the Republic. Members of the Supreme Court shall be appointed by the Riigikogu, on proposal by the Chairman of the Supreme Court."*

[5] *A comprehensive survey of the composition of constitutional courts in Europe is given in vol. 20 of the collection Science and technique of democracy, "The composition of constitutional courts".*

These issues, relevant in any case, would merit closer attention if it were decided to reform the Estonian system so as to create a separate Constitutional Court in the context of widening the possibilities of constitutional review to include (amongst other possibilities) the competence to examine individual complaints.

V. CONCLUSIONS

In comparison with the full range of activities available to constitutional courts, the current jurisdiction of the Constitutional Review Chamber of the Supreme Court of Estonia can be seen to be quite limited, in that it is confined to the judicial review of legislation (although this includes both abstract preliminary review and concrete review of the application of legislation in specific cases). Indeed, its jurisdiction could be increased to include any or all of the competencies discussed above (section II).

It must be borne in mind that any widening of the scope of review of the Constitutional Review Chamber will be likely to create an increased workload for this body. In view of this expansion, and the need for cases to be dealt with in a reasonable time, the establishment of a separate Constitutional Court dealing exclusively with proceedings of a constitutional nature may be the preferable solution. This Court could also be charged with the power to decide individual constitutional complaints.

Granting the body of constitutional review the power to review individual complaints would not prevent lower courts from undertaking judicial review of legislation as provided for by Article 5.2 of the current Constitutional Review Court Procedure Act, as the Portuguese experience suggests. Decisions adopted by lower courts could be submitted to the appellate jurisdiction of the Constitutional Court under a system similar to the existing one, thus preserving what could be seen as a characteristic feature of the Estonian system of law.