Strasbourg, 6 July 2009 **CDL-JU(2009)012**

Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**8th MEETING OF THE JOINT COUNCIL ON CONSTITUTIONAL JUSTICE**

**"Mini-conference"**
**on**
**Effects and execution of constitutional review decisions**

**Tallinn, 19 June 2009**

# REPORT

# "EXECUTION AND EFFECT OF CONSTITUTIONAL REVIEW JUDGMENTS THE SUPREME COURT PRACTICE IN 2004 – 2008"

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Table of contents

## Introduction

Honourable judges!
Members of the Venice Commission and fellow liaison officers!
Dear guests!

I would like to start with a few words as an introduction to our distinguished guests to give some background knowledge about the constitutional review system in Estonia.

The Supreme Court of Estonia is the highest court in the state, which reviews the appeals in cassation in civil, criminal and administrative law matters. The Supreme Court is also the court of constitutional review, resolving disputes of constitutionality, mainly on the basis of requests of the President of the Republic, the Chancellor of Justice, the courts or local governments. A Chamber of the Supreme Court may also pass a matter to the Supreme Court *en banc*, so that all of the 19 justices could adjudicate an appeal in cassation and the issue of constitutionality of a pertinent norm at the same time. We find that this model serves as one of the possibilities of bridging differences between a country's highest jurisdictions which, as a rule, are divided into separate institutions, but which in Estonia are all gathered together into a single authority.

But today I am going to talk about the efficiency of this system as seen from outside, more precisely – about the execution and effects of the constitutional review judgments in the society. I shall show how the legal framework and judicial practice have changed after the Supreme Court has declared a norm unconstitutional and invalid or has ascertained a legal gap. Thus, I shall examine the activities of the legislator as well as of the courts as the implementers of norms.

The analysis is based on the constitutional review judgments and rulings[1] of the past five years, i.e. from 1.01.2004 – 31.12.2008. The judgments and rulings in concrete as well as abstract norm control cases of both the Supreme Court *en banc* and the Constitutional Review Chamber shall be examined. In my presentation today I shall deal with the execution of judgments in three most problematic spheres: elections, judicial proceedings and ownership reform.

My analysis endeavoured to answer the following questions:

- have the norms, which were declared unconstitutional, been substantively amended;
- have the legal gaps been filled after the ascertainment of legislative omission;
- what has been the reaction to the so called alleviating judgments of the Supreme Court (e.g. setting a term for the execution of judgments; declaration of only unconstitutionality and not invalidity of a norm; declaration of partial invalidity of a norm) – has the legislator tried to give its best to find a suitable regulatory framework or has it abused the concession of the Supreme Court.

The analysis allows to draw conclusions about whether and how the legislator and the courts themselves have reacted and taken into account the interpretations given by the Supreme Court in constitutional review proceedings. On the basis of these conclusions I shall, in turn, try to find out whether there exists a need for additional legal guarantees to assist the better execution of the Supreme Court judgments, or whether the Estonian legal order is already functioning well as it is.

[1] The Supreme Court judgments in constitutional review proceedings are accessible by case number both in Estonian and English at http://www.riigikohus.ee

## (1) ELECTORAL PRINCIPLES

### *1. 3-4-1-1-05 (Election coalitions II)*

On 19 April 2005 the Supreme Court *en banc* declared invalid **§ 70[1] of the Local Government Council Election Act,** which prohibited, as of 1 January 2005, to submit election coalitions for registration by rural municipality or city electoral committees.

The Supreme Court came to the conclusion that the referred provision in conjunction with the requirement arising from the Political Parties Act that a political party must have at least 1000 members to be subject to registration, prevent the residents of a local government unit to independently submit lists in local government council elections and are unconstitutional in their conjunction. In this case the Supreme Court assumed a rather activist position admitting at first that "*in principle the legislator has several possibilities to eliminate the unconstitutional situation*", but adding at the same time that "*in the local government units with small number of residents allowing to set up candidates in the lists of political parties only would not be constitutional even if the requirement of 1 000 members, imposed on political parties, were decreased for example tenfold. In many local government units it would be impossible, even in the case of the requirement of 100 members, to found several local political parties*." The Court also emphasised the shortness of time remaining until elections and dictated to the legislator in fact the only possible action, which was the re-authorisation of election coalitions.

The Supreme Court had come to a similar conclusion already in 2002, in the so called first election coalition case (judgment no. 3-4-1-7-02 of the Constitutional Review Chamber of the Supreme Court of 15 July 2002). Then, too, the legislator wanted to restrict the possibilities of election coalitions to participate in local elections. The Supreme Court argued then that "*it is probable that to permit the election coalitions again is the only way capable of ensuring the conduct of local government council elections on the fixed date*."

After the Supreme Court judgment of 2005 the legislator has no longer substantively regulated the participation of election coalitions in local elections, and election coalitions are still allowed in local government council elections. Consequently, after having burned its fingers twice the legislator has accepted the opinion of the Supreme Court or – at least – has not tried to amend relevant regulatory framework at the supreme moment.

### *2. 3-4-1-11-05 (right of the Riigikogu[2] members to be members of local government councils)*

Previous history: on 27 March 2002 the Riigikogu passed the Local Government Council Election Act amending the Riigikogu Internal Rules Act and the Local Government Organisation Act to the effect that a member of the Riigikogu would not be allowed to simultaneously be a member of a local government council and vice versa; the election of a member of the Riigikogu a member of a rural municipality council or city council would have suspended his or her authority as a member of the rural municipality or city council. The amendment was to enter into force as of the following local elections, i.e. 17 October 2005.

But half a year before the referred elections, on 12 May 2005, the Riigikogu passed the Riigikogu Internal Rules Act Amendment Act. This Act deleted from the Riigikogu Internal Rules Act the referred provisions which were meant to take effect as of 17 October 2005. Thus, the reform Act once again made it possible to sit on two chairs simultaneously, i.e. working simultaneously in the Riigikogu and in a local government council.

[2] The parliament of Estonia.

The President of the Republic contested the amendment, and on 14 October 2005 the Constitutional Review Chamber of the Supreme Court declared **the Riigikogu Internal Rules Amendment Act, passed on 12 May 2005**, unconstitutional. The Chamber was of the opinion that an Act introducing substantial changes into electoral rules shortly before the local government council elections was in conflict with the requirements of democracy arising from § 10 of the Constitution.

The Status of Members of the Riigikogu Act, passed on 14 June 2007, too, prohibits the members of the Riigikogu during their mandate from being members of rural municipality or city councils. Consequently, in this so called two chairs' case, too, the legislator has respected the Supreme Court judgment.

Unfortunately, before the upcoming local elections of this year the electorate can not rely on the stability of electoral arrangements. The incessant aspirations of political forces to change the electoral procedures – probably in the hope of obtaining more votes in the next elections - can still be observed.

The following amendments to election laws, which in fact concern only the city of Tallinn, were made less than one year before the next local elections of 18 October 2009;

- On **10 December 2008** the Riigikogu passed the Act to Amend the Local Government Council Election Act and the Local Government Organisation Act, which entered into force on 17 December 2008. This Act established a special procedure for the formation of electoral districts and distribution of mandates in Tallinn as the only local government of more than 300 000 residents. Furthermore, the Act provided for the increase of the membership of the Tallinn City Council.

- On **5 February 2009** the Tallinn City Council contested the referred amendments in the Supreme Court. In its judgment no. 3-4-1-2-09 of **9 June 2009** the Supreme Court held that the provision changing the formation of electoral districts and distribution of mandates in the city of Tallinn did not infringe the constitutional guarantees of local governments. The Court held that the provision increasing the number of council members did not restrict the right of the council to have sufficient funding.

- On **19 February 2009**, subsequent to the law amendment, the Tallinn City Council itself amended the Statute of the City of Tallinn, eliminating the existing 8 city districts and substantively rendering the hole city a single electoral district. On **6 May 2009** the Chancellor of Justice contested the constitutionality of the amendment of the Statutes of the City of Tallinn in the Supreme Court. Case no. 3-4-1-12-09 is presently pending before the Supreme Court.

- On the same day, i.e. **19 February 2009**, the Riigikogu passed a law amendment the purpose of which was to maintain the *status quo* in the elections, irrespective of the amendment of the Statute of the City of Tallinn. Had the amendment entered into force, it would have established that if no city districts were established in Tallinn, the electoral districts would be formed according to the distribution and boundaries of electoral districts at the last local government council elections. Furthermore, the Act would have prohibited local councils from eliminating rural municipality or city districts during the year of local government council elections. **On 3 March 2009** the President of the Republic refused to promulgate the Act due to non-compliance with democratic decision-making procedure.

- On **16 April 2009** the Riigikogu passed again the Act to Amend the Local Government Council Election Act. This Act establishes that in a local government unit with more than

300 000 residents the council shall form eight electoral districts, and that in Tallinn these districts are to be formed by city districts. Despite the promises made in the press to contest this law amendment by way of constitutional review procedure, too, the Tallinn City Council has not done this yet.

On the basis of cases concerning elections it can be concluded that it is most probable that the legislator does not want to circumvent the opinion of the Supreme Court that amending electoral laws shortly before elections is in conflict with the principle of democracy. Rather, the tensions in political circles cumulate before elections to such an extent that it becomes inevitable to request a constitution-based opinion of a neutral observer. One could find fault with the people's representatives and say that they themselves should come to an agreement and do this on time, yet – if necessary – the court of constitutional review must give its helping hand. What is negative in this context is the fact that the ongoing rivalry of politicians damages the legislator's reputation in the eyes of the electorate to such an extent that people desist from voting. Nevertheless, it is not appropriate to accuse the constitutional court of interfering with the politics, because the court can not select only the cases that are congenial to it – the court must adjudicate the disputes that are brought before it. To avoid painting the overall picture in too dark colours it can be stated that – at least on the basis of the referred cases – that the legislator can not be directly reproached for having failed to execute the Supreme Court judgments.

## (2) JUDICIAL PROCEEDINGS

### *1. 3-1-3-13-03 and 3-3-2-1-04 (re-opening of proceedings subsequent to judgments of European Court of Human Rights)*

On 6 January 2004 the Supreme Court *en banc* held in two cases that if the European Court of Human Rights has found that upon conviction of a person in Estonia the rights guaranteed by the European Convention on Human Rights have been violated, a new hearing of the person's case is to be allowed upon the person's request. The Court also pointed out that "*the best guarantee of the rights and freedoms included in the European Convention for the Protection of Human Rights and Fundamental Freedoms 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, paragraph 31).

It was two years later, on 1 January 2006, that a new Code of Civil Procedure entered into force, which included a provision establishing, among others, the following ground for review: 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 the making of the court judgment, and the violation cannot be reasonably eliminated or compensated in any other manner than by review (§ 702(2)8) of the Code). According to the explanatory letter to the draft Code the provision was introduced taking into consideration the Council of Europe Committee of Ministers recommendation R (2000) 2, recommending the Members States to guarantee possibilities of re-examination of cases when the European Court of Human Rights has found, on the basis of an individual complaint, that a state has violated the Human Rights Convention or the protocols thereto.

It took even longer to introduce similar grounds for full execution of similar judgments into other laws regulating judicial proceedings. In the Code of Administrative Court Procedure the old catalogue of grounds for review was replaced by a blank reference to the grounds for review established in the Code of Civil Procedure (the provision entered into force on 1 September 2006). Later still, after nearly two years of legislative proceedings in the parliament, on 18 November 2006 the provisions of the Code of Criminal Procedure and of the Code of Misdemeanour Procedure entered into force, providing – among others – for the following

ground for review: satisfaction of individual complaints filed with the European Court of Human Rights against a court judgment or ruling in a case subject to review due to a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or a Protocol thereto; with the additional requirement that such violation could have influenced the decision in the matter and it is not possible to eliminate the violation or compensate for the damage caused thereby in any other manner but by review.

During the referred couple of years the Supreme Court had to stand by its earlier judgment irrespective of the lack of relevant legislative provisions. On 22 November 2004, in case no. 3-1-3-5-04, the Criminal Chamber of the Supreme Court decided to re-open a criminal proceeding in a case where a person had been convicted in Estonia, but the conviction was condemned by the Human Rights Court on the basis of Article 7(1) of the Convention (*nullum crimen nulla poena*). The Criminal Chamber acquitted the person in those acts the proceedings concerning which had been re-opened.

Consequently, the referred cases of 2004 exemplify how sometimes the legislator needs a small reminder that certain regulatory framework is necessary. Although Estonia acceded to the Human Rights Convention as early as in 1996, it took 10 years to enact the procedural guarantees ensuring the full observance of the Convention. A positive aspect to be pointed out in this context is that the legislator took to the resolution of the issue after the Supreme Court had called the parliament's attention to it.

*2. 3-4-1-1-04 (right to submit appeals against rulings on dismissal of complaints in misdemeanour proceedings)*

On 25 March 2004 the Constitutional Review Chamber of the Supreme Court declared **§ 191(10) of the Code of Misdemeanour Procedure** unconstitutional to the extent that it excluded the filing of an appeal against a ruling on refusal to accept or hear an appeal in the complaint proceedings in a county or city court. The regulatory framework which was declared unconstitutional had been in force from 1 September 2002 until 31 December 2003.

§ 191 of the Code of Misdemeanour Proceedings concerns court rulings not subject to contestation pursuant to procedure for adjudication of appeals against court rulings. Pursuant to subsection (10) such rulings included rulings on refusal to accept an appeal in appeal proceedings in a county or circuit court.

It was already before the Supreme Court judgment, i.e. during the proceedings in this case, that the legislator amended the contested provision of the Code of Misdemeanour Procedure (the amendment entered into force on 1 January 2004), thus enabling subsequently to contest rulings on refusal to accept an appeal. According to the explanatory letter to the draft the amendment was introduced in order to guarantee the persons' right of appeal, as there had been cases in the judicial practice where the courts have, without basis, refused to hear appeals.

Although the legislator did not - either during the adjudication of the case or in the explanatory letter to the draft - directly admit the deficiency of the earlier regulatory framework, it can still be assumed that the amendment was in fact induced by the referred constitutional review proceeding. The Code of Misdemeanour Procedure and the Penal Code entered into force on 1 September 2002, constituting an extensive reform of penal law. It is most probable that it was a mere mistake that the referred norm, restricting the right of appeal, slipped into the Code of Misdemeanour procedure. Perhaps the legislator itself understood that there was a deficiency, predicted the possible decision of the Supreme Court, and wanted to antedate it.

*3. 3-4-1-20-07 (right of appeal in civil proceedings against a ruling on dismissal of an application for securing an action)*

On 9 April 2008 the Constitutional Review Chamber of the Supreme Court declared **the first sentence of § 390(1) and § 660(1) of the Code of Civil Procedure** unconstitutional and invalid to the extent that they do not permit an appeal against a ruling on dismissal of an application for securing an action, by which the security paid is transferred into the public revenues.

Under the referred provisions a party was entitled to file an appeal against a ruling by which a county court or circuit court *satisfies* an application for securing an action, *substitutes* one measure for the securing of an action with another, or *cancels* the measures to secure an action. Yet, the norm did not give rise to the right of appeal against a ruling by which a court *dismisses* an application for securing an action.

On 1 October 2008, when adjudicating case no. 3-2-1-71-08, the Civil Chamber of the Supreme Court could only rely on the referred judgment of the Supreme Court. The Chamber argued that the provision - pursuant to which, when a ruling is made on dismissal of an application for securing an action the security paid is transferred into the public revenues - is still valid, the person who has paid the security must be allowed to file an appeal with a circuit court against a ruling of a county court on dismissal of an application for securing of an action.

On 10 December 2008 the Riigikogu passed a voluminous package of laws, amending the Code of Civil Procedure and other related Acts. The amendments entered into force on 1 January 2009. At the first reading of the draft, presenting a report on behalf of the initiators of the draft, the Minister of Justice Rein Lang pointed out that the purpose of the amendments was to specify and improve the provisions of the procedural code that had entered into force on 1 January 2006. He argued that the drafters had also taken into account the considerable judicial practice of the Supreme Court which had evolved on the basis of the law within two years.

Despite numerous other amendments, §§ 390(1) and 660, which the Supreme Court had declared partly unconstitutional and invalid, remained essentially unamended. The legislator picked for execution only that part of the Supreme Court judgment which pointed out that the rights of participants in proceedings did not enjoy effective protection because a security is to be paid every time an application for securing an action is submitted, whereas persons can not contest the transfer of the security into public revenues. The initiator of the draft, i.e. the Minister of Justice, had agreed with this opinion during the judicial proceeding of the case. The Minister of Justice added, with reference to the Code of Civil Procedure Amendment Act which was then in the legislative proceeding of the parliament, that in the future the applicants will incur no negative property consequences when submitting application for securing an action and when these applications are dismissed. In this respect the Minister has indeed kept his word - § 149(5) of the Code of Civil Procedure has been amended and security is no longer payable upon submitting an application for securing an action.

Nevertheless, it is disputable whether the Supreme Court judgment can be deemed executed in this manner. The opinion of the Supreme Court regarding this issue can only be guessed from a relevant note and reference to the Supreme Court judgment in the opening of the Act. As security is no longer payable upon applying for securing of an action, the repeated filing of such applications is not precluded and the participants in proceedings can effectively protect their rights. Consequently, one could pick flaws in the manner of execution of the judgment and in the legal clarity of the chosen solution, but in principle the legislator has executed the judgment. The desired aim of the Supreme Court judgment has been achieved, and the regulatory framework ensuring persons' right of appeal has been brought into conformity with the Constitution.

*4. 3-1-1-88-07 (right of appeal in misdemeanour proceedings against decisions on confiscation)*

On 16 May 2008 the Supreme Court *en banc* declared **§ 114(1)2) of the Code of Misdemeanour Procedure** unconstitutional and invalid to the extent that it does not allow a person who is not a participant in the proceedings to file an appeal with the court against a decision of a body conducting extra-judicial proceedings, made by way of general procedure, by which a transport vehicle belonging to the person not participating in the proceeding is confiscated. The provision allowed only participants in the proceedings to file appeals against such decisions of the bodies conducting extra-judicial proceedings.

It is true that the conclusion of the Supreme Court's judgment has been introduced into the opening as well as to the relevant provision of the Code of Misdemeanour Procedure. Nevertheless, it would be more correct if the legislator prescribed a concrete regulatory framework specifying the grounds and procedure pursuant to which a person not participating in the proceedings could protect his or her rights and property upon confiscation.

So far, during almost a year, neither the Supreme Court nor the lower courts have had to implement this norm.

*5. 3-1-1-86-07 (prohibition to delegate the penal power of the state)*

On 16 May 2008 the Supreme Court declared unconstitutional and invalid **§ $54^{11}$(3) of the Public Transport Act and §§ 9(3) and 10(5) of the Code of Misdemeanour Procedure,** pursuant to which the body conducting extra-judicial proceedings of the misdemeanour consisting in riding in a bus without a document certifying the right to use public transport, is a legal person in private law on the basis of a contract under public law. The Supreme Court was of the opinion that the delegation of proceedings of offences and the relating penal powers to a legal person in private law is unconstitutional, because the penal function is one of the core functions of a state.

Subsequent to the declaration of invalidity of the referred norm the legislator has failed to pass new regulatory framework, neither has it initiated a new draft. This does not prevent the judgment of the Supreme Court from being implemented to full extent. On the contrary, the fact that the legislator is not trying to establish new similar regulatory framework shows that the Supreme Court judgment is deemed authoritative. It was but one alternative possibility of who can be a body conducting extra-judicial proceedings that was declared invalid; all other regular bodies conducting extra-judicial proceedings maintained all their rights. The practice of Estonia's biggest cities exemplifies that the law can be fully implemented in the light of the Supreme Court judgment, without a need for the creation of new regulatory framework.

## (3) OWNERSHIP REFORM

*1. 3-3-1-63-05 and 3-4-1-14-06 (the Principles of the Ownership Reform Act and the rights of persons who had left Estonia on the basis of agreements entered into with the German state)*

On 12 April 2006 the Supreme Court *en banc* declared invalid **§ 7(3) of the Republic of Estonia Principles of Ownership Reform Act**, which provided that the property which was unlawfully expropriated from the persons who left Estonia on the basis of agreements entered into with the German state shall be returned or compensated for on the basis of an international agreement. As no such agreement has been entered into during almost 15 years, there was uncertainty as to the resettlers' property – whether it should be returned or compensation be paid to the resettlers or whether the lessees who reside on those premises should be allowed

to privatise these. The Supreme Court postponed the entering into force of the judgment for 6 months, to give the legislator time to draft new legal regulation. The Supreme Court judgment was to enter into force if by 12 October 2006 an Act amending or repealing § 7(3) of the Republic of Estonia Principles of Ownership Reform Act (hereinafter "the PORA") had not entered into force.

The Supreme Court had already declared the referred provision unconstitutional four years ago (judgment of the Supreme Court *en banc* of 28 October 2002 in case no. 3-4-1-5-02). Back then the Supreme Court did not declare § 7(3) of the PORA invalid, because the Court did not want to render a political decision. The Supreme Court underlined that it was the legislator who should draft a clear regulatory framework concerning the return of or compensation for the property which had belonged to the resettlers. Despite repeated reminders[3] the Supreme Court judgment of 2002 was not executed.

That is why the Supreme Court emphasised in its judgment of 2006 that if the court again confined itself to the finding of unconstitutionality of § 7(3) of the PORA without declaration of invalidity thereof, this would not help to solve the situation. The Supreme Court held that to put an end to the unconstitutional situation which had been dragging for years § 7(3) of the PORA was to be declared invalid.

The parliament made an attempt to execute the Supreme Court judgment of 12 April 2006. To that end it passed, on 14 September 2006, the Act to repeal § 7(3) of the Republic of Estonia Principles of Ownership Reform Act. The President of the Republic refused to promulgate the Act because he was of the opinion that the amendment was not in conformity with the constitutional principle of legal clarity and legal protection. On 27 September 2006 the Riigikogu passed the same Act again, unamended. Thereafter the President of the Republic submitted a petition to the Supreme Court for the declaration of unconstitutionality of the referred Act.

On 31 January 2007 the Constitutional Review Chamber of the Supreme Court satisfied the petition of the President of the Republic and declared the Act, which was not promulgated, unconstitutional. The Chamber was of the opinion that the Act guaranteed the right to a procedure only to those resettlers whose applications for the return of or compensation for the unlawfully expropriated property had been dismissed. The Act lacked effective regulatory framework to enable both the resettlers and the persons entitled to privatise the unlawfully expropriated dwellings to exercise their rights. The Chamber argued that the Act failed to constitutionally resolve the legal issues relating to the repeal of § 7(3) of the PORA, and instead created more problems by unequal treatment of different groups of resettlers.

As an Act amending or repealing § 7(3) of the PORA had not entered into force by the term set out in the Supreme Court judgment of 12 April 2006, the Supreme Court declared that on the basis of the referred judgment § 7(3) of the PORA was invalid as of 12 October 2006. The Court held that the consequence of the invalidity of § 7(3) of the PORA was that the unlawfully expropriated property of the persons who resettled to Germany on the basis of agreements entered into with the German state is subject to return, compensation or to privatisation to lessees pursuant to the general principles and the general procedure established by the

[3] „ During more than two and a half years the Riigikogu has failed to muster up the resolve to put an end to the unconstitutional situation and to pass a regulatory framework for the execution of the Supreme Court judgment, eliminating the uncertainty concerning the return of or compensation for the resettlers' property or the privatisation thereof." – Chief Justice Märt Rask's report in the parliament on 9 June 2005.

"During the years passed the legislator has failed to pass legal regulation to terminate the unconstitutional situation. / --- / The failure to pass any regulation by the term set out in the court judgment, too, is the legislator's decision, whereas – in my opinion – it is the worst decision the parliament could have made." Chief Justice Märt Rask's report in the parliament on 8 June 2006.

Republic of Estonia Principles of Ownership Reform Act. The Supreme Court argued that "*this legal clarity enables the Supreme Court en banc to continue the proceeding of the appeal in cassation* /…/". On 6 December 2006 the Supreme Court satisfied the appeal in cassation of persons who had left Estonia.

The court saga of § 7(3) of the PORA could be summed up by a conclusion: as the legislator was unable to reach a political compromise sufficiently satisfying all parties, the judicial power had to solve the problem according to its best discretion and on the basis of constitutional values.

*2. 3-4-1-3-04 (the obligation to tolerate utility works)*

On 30 April 2004 the Constitutional Review Chamber of the Supreme Court found that although the regulatory framework of the obligation to tolerate utility works as provided in **§ $15^2$(1) and § $15^4$(2) of Law of Property Act Implementation Act** is constitutional in general, the law should provide for more guarantees to land owners and allow to weigh different interests. The Chamber was of the opinion that that the regulatory framework was unconstitutional to the extent that it did not allow for the removal of utility works on any other ground but the fact that the utility works are no longer used for the intended purpose. The Court did not consider the release of owners of utility works from payment for the performance of the obligation to tolerate to be an ownership restriction proportional in the narrow sense, and declared § $15^4$(2) of the LPAIA, which released the owners of utility networks from the payment, invalid. In regard to the declaration of invalidity the Court postponed the entering into force of the judgment by six months, i.e. until 30 October 2004. The Chamber pointed out that it might have proved necessary to revise the regulatory framework pertaining to utility works in its entirety.

The Civil Chamber of the Supreme Court had to apply the provisions, which had been declared unconstitutional and invalid, in several cases before the legislator passed a new regulatory framework.

On 29 October 2004, in case no. 3-2-1-108-04, the Civil Chamber of the Supreme Court argued that as § $15^4$(2) of the LPAIA had been declared unconstitutional, the provision could not be applied and therefore the plaintiff was under no obligation to tolerate a network operator's utility works free of charge. Upon determining the amount payable to the plaintiff the Court used analogy, establishing a reasonable compensation for the immovable property ownership restriction. The case was referred back to circuit court for a new hearing.

Also, in the judgment of 15 May 2006, in case no. 3-2-1-43-06, the Civil Chamber had to admit that despite the lapse of two years since the referred Supreme Court judgment in the constitutional matter the legislator had failed to bring the regulatory framework into conformity with the Constitution. The Civil Chamber instructed the circuit court as to how the case should be heard again. "*Should the court find that the unloading terminal is a utility works and if other prerequisites of the obligation to tolerate are fulfilled (e.g. the relevance of the provisions concerning the obligation to tolerate utility works has been ascertained) and meanwhile the relevant provisions have not been brought into conformity with the Constitution, upon new hearing of the case the non-application of relevant provisions in their entirety and initiation of a constitutional review proceeding should be considered*" (paragraph 17 of the judgment).

It was only in the third year after the judgment of the Constitutional Review Chamber of the Supreme Court, i.e. on 26 March 2007, that the Act to Amend the General Part of the Civil Code, the Law of property Act, the Law of Property Act Implementation Act, the Building Act, the Planning Act and the Immovables Expropriation Act entered into force. The explanatory letter to the draft pointed out the objective of the Act to be the creation of a clear and consistent regulatory framework concerning the construction, tolerating and payment for the tolerating of utility networks and utility works, coherent with the general context of civil law, as the obligation

to tolerate utility works constitutes a restriction of ownership. In the new wording of the LPAIA the obligation to tolerate of the owner of an immovable is restricted and if the obligation to tolerate does not exist it is possible to demand the removal of utility works. Also, a charge is established for the toleration of ownership restrictions, which is calculated retroactively as of 1 November 2004, i.e. the day after the entry into force of the Supreme Court judgment. Consequently, by the law amendment the Supreme Court judgment was fully executed.

## SUMMARY AND CONCLUSIONS

It has to be born in mind that a constitutional court can have but a limited impact in the society. The court can only assume the role of a so called negative legislator, i.e. it can only declare unconstitutional norms invalid and can not create new norms or make political choices. Nevertheless, the preventive influence of a constitutional court can not be denied. The legislator considers already in the course of norm-creation which regulation would be upheld in constitutional review proceedings. The so called proportionality test has by now spread and is recognised also in political circles. This in turn ensures that the fundamental rights and freedoms are not restricted unless on reasonable grounds and to reasonable extent. The preventive influence is also exemplified by those cases where the creator of norms has, without waiting for the Supreme Court judgment, on its own initiative and during judicial proceedings amended the contested regulatory framework.

The constitutional review judgments do not only affect the activities of the parliament, but also those of the official authorities and the courts. In other words, it is not only how the legislator reacts that shows whether the referred judgments are executed, but also how the executive and the courts take into account the interpretations given by the constitutional court. Consequently, all three branches of power are the addressees of the constitutional review judgments.

Thus, the sphere of influence of constitutional review judgments extends much further than the field of sight of the legislator. The members of the parliament are well aware that the ignoring of the Supreme Court judgments does not do away with constitutional problems; on the contrary – it may very well happen that the same issues arise again in subsequent constitutional disputes. If the legislator fails to review a certain regulatory framework in the light of interpretations by the Supreme Court, it is highly probable that the executive and the judicial power shall no longer make their decisions on the basis of the unconstitutional law and instead regard the Supreme Court interpretation as their guidance. Otherwise, if the latter do not do this, they have to recon with the possibility that their decisions will be overturned if appealed. Consequently, in the end of the day the parliament is under constraint, because if the legislator fails to act and the officials and the courts proceed from the interpretation given by the Supreme Court and not from the law, it is the authority of the parliament and not that of the court that will deteriorate. Furthermore, it should not be forgotten that it is of utmost importance for a politician to retain his or her good name in the eyes of the electorate.

Consequently, a Supreme Court judgment, by which an unconstitutional norm is declared invalid or a legislative omission is ascertained together with possible interpretations for bridging the gap, can be directly enforceable, without any need for the legislator to create a new norm of positive law. The positive and negative implications of such “self-regulation” are a different topic. On the one hand, in a country which belongs to the continental legal space the primary importance should be attached to the positive, written law. On the other hand, the actual and functioning constitutional review forces the legislator, upon passing laws, to base these on constitutional values.

Thus, I find that in constitutional review court procedure there is no need for direct coercive measures, comparable to those of civil or criminal procedure, to help to ensure the execution of judgments of the constitutional court. It is unthinkable that it would be possible, in a democratic state, to directly force the legislator – the peoples' representation – to pass certain laws. The execution of constitutional review judgments is guaranteed through the public pressure. This is enough to motivate the legislator to act voluntarily and there can be no other – forced – execution. The public in its turn is influenced by how well-reasoned the constitutional court judgments are, how strong is the argumentation of judgments and rulings.

Consequently, it can be stated that it is the authority of the Supreme Court that determines how widely recognised its judgments are on the level of the powers of the state and the society.

Finally, let me quote the sitting Chief Justice of the Supreme Court Märt Rask: "It is impossible to set up a legally binding mechanism of forced execution of judgments and rulings rendered in constitutional review proceedings. These judgments are executed because of respect for the Constitution, because of awareness of one's mission and responsibility, in order to ensure the balanced and democratic development of the society. For this I wish you, distinguished members of the Riigikogu, resolve!"[4]

[4] Chief Justice Märt Rask's report in the parliament on 9 June 2005, available at http://www.riigikohus.ee/?id=113