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IN COOPERATION WITH
THE CONSTITUTIONAL CHAMBER
OF KYRGYZSTAN

WORKSHOP
ON DRAFTING DECISIONS FOR JUDGES
OF THE CONSTITUTIONAL CHAMBER
OF THE KYRGYZ REPUBLIC

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REPORT

**“PRACTICE OF THE CONSTITUTIONAL CHAMBER OF ESTONIA
IN DRAFTING DECISIONS”**

by
Ms Ulrika Eesmaa
Advisor to the Constitutional Review Chamber
of the Supreme Court of Estonia

Practice of the Constitutional Chamber of Estonia in drafting decisions

The Estonian Constitutional Review Chamber is one of the chambers of the Estonian Supreme Court. There are nine members of the Chamber, but only one of them is permanent: the President of the Supreme Court. Every year, on the proposal of the Chief Justice, the general assembly of the Supreme Court appoints two new members to the Constitutional Review Chamber and releases the two most senior members of their duties as members, taking into account the opinions of and bearing in mind, as much as possible, the equal representation of the Administrative, Criminal and Civil Chambers within the Constitutional Review Chamber. As such, a judge usually works in the Constitutional Review Chamber for four years. For this period the judges are not freed from their 'home' chamber and fulfil double functions. The Chamber adjudicates constitutional review cases by five judges.

The drafting and the judgements themselves have changed over the last 21 years, since the re-establishment of the Supreme Court of Estonia. The first judgements were rather short and contained less reasoning; they were not as clearly structured, either. There have been no norms, either in the past or today, regulating how a decision should be drafted in detail. Nowadays, the Chamber uses an electronic template prepared by advisors in which the structure and format are already set out. This ensures that decisions are drafted in the same way.

The structure and content thereof are described as follows. Very generally, following the requisites at the top of the first page of the judgement, there are two parts: what has happened before and what the opinions of others are (which may be referred to as a description); and the opinion of the Court.

DESCRIPTION

1. Facts and course of proceedings

At the beginning of the judgement, basic facts relevant to the case are presented. Next, who turned to which court, when they did so and what their claim was are described in brief. The court's decision is also summarised.

2. Request

This might be headlined differently as there is no direct claim to the Constitutional Review Chamber in Estonia. For example, the Legal Chancellor and the President of the Republic may file a request. Most cases come from courts, so this part is then headlined 'Judgement of Court XY'. While the first part concerning the facts is rather short, the main arguments of the request are reflected here.

3. Opinions of participants in proceeding

All of the main arguments of the participants are presented here. Later, all of the arguments of the request and of the participants to the proceeding are usually reflected and dealt with in the opinion of the Court, even if this does not expressly refer to them.

4. Contested provisions

Prior to the opinion of the Court, contested provisions as provided by law or other acts and exact citations are given. This makes it clear which regulation is in question.

OPINION OF THE COURT

The Court usually introduces its opinion with a paragraph in which it outlines the questions that must be answered in order to solve the case. If there are numbered sections in the judgement, reference is made to them. Headlines within the opinion of the Court are rare but not unknown. Usually, before dealing with any question in detail, the Court declares what is to be evidenced next.

In very few cases, if a judgement is very long (more than 30 pages), a table of contents is included. In some cases conclusions have also been added in which the main arguments of the Court are repeated in brief. These cases can be considered to have a wider public interest – there can be more ‘regular’ readers (i.e. not lawyers), so the conclusion is useful in making it easier for them to understand the decision.

Although there are usually no headlines in this section, the Court tends to deliberate in a structured and systematic way. The elements of the control scheme used are set out hereunder.

1. Is the contested provision applicable in this case?

When a request comes from another court, the Supreme Court first checks whether the contested provision applies at all to the case. According to Estonian law, in cases that come from other courts, a provision's constitutionality can only be contested if the provision was of decisive importance in the resolution of the case. A provision is of decisive importance if, in the case of the unconstitutionality of the provision, a court should render a judgement different from that in the case of the constitutionality of the provision. As such, the Supreme Court checks whether the contested provision was actually applicable. If not, the request is dismissed.

2. Fundamental right or constitutional principle interfered with

Here the Court searches for the relevant constitutional articles. Usually the requester and the participants claim the contested provisions to be in conflict with certain articles of the Constitution. The Court is not bound to the articles noted by the participants: sometimes it deals with many articles, but it usually finds the most relevant article and deals with it alone. The relevant article of the Constitution tends to be one of its fundamental rights or freedoms. The first question asked is whether the person can rely on this article. For example, there are certain fundamental rights that solely protect Estonian citizens. Therefore, it must be determined whether the applicant is an Estonian citizen. Also, not all fundamental rights apply to legal entities. If the applicant is a legal entity, the Court checks whether the relevant constitutional right extends to legal entities. For example, with entrepreneurial freedom there is no doubt. Firstly, then, the Court has to clarify whether the claiming person can rely on this constitutional article.

Secondly, the scope of the constitutional article must be interpreted. In some cases this is obvious and the Court notes it in just one sentence, stating that the situation regulated by the contested provision falls within the protection of the article. For example, if someone's car is confiscated, it is quite clear that this falls within the scope of the right of ownership. In other cases, fundamental rights are interpreted broadly. For example, when the constitutionality of the amount of court fees was contested, there was no specific constitutional right relating to court fees. In this case, other fundamental rights were interpreted and it was explained, *inter alia*, that court fees are an obstacle to filing lawsuits and therefore interfere with the constitutional right of recourse to the courts.¹ As such, here

¹ For example, Judgement of the Supreme Court *en banc* of 12.04.2011, no. 3-2-1-62-10. Available in English at <http://www.riigikohus.ee/?id=1297>.

the Court considers whether the measure foreseen by the contested provision interferes with any fundamental right or freedom.

In some cases, there are no fundamental rights in question, but constitutional principles. This tends to happen in cases where the Legal Chancellor or the President of the Republic files the request and no specific person's rights are interfered with. In any case, even if there are principles in question, not fundamental rights, the procedure is the same – the Court interprets the constitutional principle and checks whether the measure foreseen by the contested provision falls within the scope of the principle.

Sometimes the principles are also applied in cases where a person's constitutional rights are involved. Here a fundamental right is interpreted in conjunction with a principle. For example, the Court has deduced from the principle of the rule of law the principle of legitimate expectation, which can be applied in conjunction with a constitutional right or freedom. Such a case occurred recently.² The background was that an act stipulated mining fees using exact amounts for certain periods. This was then reconsidered and the act amended prior to the dates stipulated previously, resulting in entrepreneurs having to start paying higher fees than the act had provided for that period. The court found that paying a mining fee interferes with entrepreneurial freedom. Usually a moderate mining fee is justified and constitutional. But in this case too early an amendment was not justified. The Court therefore found the provisions to be unconstitutional and to violate entrepreneurial freedom in conjunction with the principle of legitimate expectation.

3. Aim of interference

Once the Court has clarified that a fundamental right or constitutional principle is being interfered with, it further identifies the aim of such interference. Often this can be found in the explanatory memorandum to the bill of the act. Also, the body which adopted the contested act provides its explanations in the proceedings. In any event, the Court is free to identify the aim of the contested provision based on any indication or on common sense.

The aim of the contested provision is primarily important because fundamental rights are stipulated differently. The aim is also considered when assessing the proportionality of the measure foreseen by the contested provision. Constitutional rights are stipulated differently in the sense that they may be interfered with on different grounds: some may be interfered with as simply 'provided by law'; some only on certain grounds. As such, when the aim is determined, it is checked whether the fundamental right in question could be interfered with to achieve the aim that was determined.

4. Proportionality

Further, the Court checks the proportionality of the interference so as to observe its aim. The principle of proportionality springs from an article of the Constitution pursuant to which restrictions on rights and freedoms must be necessary in a democratic society. Proportionality is tested on three levels: appropriateness; necessity; and reasonableness.

4.1. Appropriateness

At the level of appropriateness the question that is asked is: Does the measure foreseen by the contested provision foster the achievement of its aim? The requirement of appropriateness is designed to protect a person against unnecessary interference by the

² Judgement of the Constitutional Review Chamber of the Supreme Court of 16.12.2013, no. 3-4-1-27-13. Not available in English at the time of publication of this article, but due to be translated: <http://www.riigikohus.ee/?id=823>.

public power. A measure which in no way fosters the achievement of an aim is indisputably disproportional.

In most cases, the measures prove to be appropriate. An example: the law provides that a car may be confiscated if it is used for contraband. The aim could be to motivate people to refrain from contraband, as they may lose their cars if they do not. Although it is clear that this will not completely prevent this kind of crime, the fear of confiscation helps to counteract it. The measure therefore fosters the achievement of the aim and is appropriate in the sense of proportionality. Whether it is truly constitutional is further checked at the levels of necessity and reasonableness.

Measures are very rarely proven to be inappropriate, but recently there was such a case³. In this instance a restriction on establishing a pharmacy was contested. According to law, opening a new pharmacy was restricted in both cities and rural areas. The aim of this restriction was to prevent the closure of pharmacies in rural areas. In this case, the Court doubted whether the restriction on opening a new pharmacy would help stop the closure of pharmacies in rural areas, as the reason for closure was that there were too few customers. In any event, in this case the Court further checked necessity and found there to be other, less burdensome measures to prevent the closure of too many pharmacies in rural areas.

4.2. Necessity

At the level of necessity the question that is asked is: Is it possible to achieve the aim by some other measure which is less burdensome on a person but which is at least as effective?

There are two criteria. Firstly, it must be less burdensome on the person. For example, the obligation to inform is less burdensome than the obligation to apply for and get permission. Secondly, the alternative measure may not be less effective. For example, the obligation to inform of firearms is less burdensome than the obligation to obtain official permission for them, but for the aim of ensuring safe use of firearms it is less effective. As a result, this is not a suitable alternative measure. If there is any alternative measure which is less burdensome but at least as effective as the contested provision then the provision is not proportional and is therefore unconstitutional.

At the level of necessity the extent to which different measures burden third persons is also considered, as are the differences in expenditure for the state. If a measure burdens the person less and is more effective but means higher costs for the public power, it is not an alternative measure and the contested measure is considered necessary.

The fundamental right in question is not dealt with at the level of appropriateness and necessity: it is simply about the aim of the contested provision and the possibilities to achieve it.

4.3. Reasonableness

Finally, the Court deals with the reasonableness of the measure. In Estonia this is also called 'proportionality in the narrower sense'. In order to determine the reasonableness of a measure the extent and intensity of interference with a fundamental right on the one hand and the importance of the aim on the other must be weighed up. Under extent and intensity of interference, consideration is given to how much the measure affects the right of a person or, respectively, how much inconvenience it causes. For example, if an obligation to register can be fulfilled in two minutes online then the intensity of interference is low. Besides the importance of the aim and the intensity and extent of interference, consideration can also be given to how much the measure fosters the achievement of the aim. The aim may be very important, but if the measure promotes the aim only a little and the interference is rather intense, the provision may be unreasonable and therefore unconstitutional. At the level of reasonableness all aspects of the aim, the fundamental right and the interference with it must be considered. Reasonableness or unreasonableness are harder to justify than

³ Judgement of the Supreme Court *en banc* of 09.12.2013, no. 3-4-1-2-13. Not available in English at the time of publication of this article, but due to be translated: <http://www.riigikohus.ee/?id=823>.

appropriateness and necessity, so a judgement is more convincing the more arguments it contains.

5. Equality cases

The approach is slightly different when equality rights are in question. There is interference with an equality right if persons who are in an analogous situation are treated unequally.

As such, to determine interference with an equality right, comparable groups must first be formed. Groups are comparable if they have many characteristics in common. Secondly, it must be shown that the group of the applicant is treated less favourably than the comparable group. It is useful to find as comparable a group to that of the applicant as possible. If the different treatment of these two groups proves to be justified it is very unlikely that there will be unjustified different treatment in comparison with a second comparable group. This is because the second comparable group would differ more, and the more differences there are, the more reasons there are to apply different treatment.

When a comparable group is found and less favourable treatment of the applicant is proven, the rest of the control scheme of constitutionality is the same as for other constitutional rights and freedoms. This means that the aim of the interference must be determined and the proportionality of the different treatment checked. At the level of reasonableness, however, beyond the usual arguments there is another: consideration must be given as to whether the unequal treatment is based on a characteristic the person cannot personally change. For example, age, gender or skin colour cannot be changed by the person themselves. If it is a characteristic the person can affect – behaving differently, applying for benefits earlier etc. – different treatment may be less justified.

6. Closing remarks

The judgement may contain an *obiter dictum*. Sometimes this is a clearly marked part of the judgement in which the Court explains something related to the case but which is not necessary for the deliberation of the case. Sometimes this can be just one sentence starting “The Court adds...”.

There may be a dissenting opinion of one or more judges. This or these are not integrated into the text of the judgement, but added as an annex.

All of the judgements of the Estonian Supreme Court can be found on its website. All key judgements are translated into English, albeit with a certain delay (<http://www.riigikohus.ee/?id=823>).

Ulrika Eesmaa, LL.M.

Advisor to the Constitutional Review Chamber of the Supreme Court of Estonia

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