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Estonia's Constitutional Review Mechanisms:
A Guarantor of Democratic Consolidation?

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Erratum

Please note that pages 33-35 are not part of this publication
and should therefore not be considered.

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**Pettai: *Estonia's Constitutional Review Mechanisms:
A Guarantor of Democratic Consolidation?***

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**ROBERT SCHUMAN CENTRE
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**Estonia's Constitutional Review Mechanisms:
A Guarantor of Democratic Consolidation?**

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EUI Working Paper RSC No. 2000/59

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Introduction

In the European Commission's *Agenda 2000* report on Estonia, it was concluded that "Estonia presents the characteristics of a democracy, with stable institutions, guaranteeing the rule of law, human rights and respect for and protection of minorities."¹ In particular, the report noted that "In Estonia's institutions the Supreme Court plays an important role in upholding democracy and the rule of law." Yet, in the remainder of the over 100-page report there is little additional elaboration of this statement, except to say that "Petitions addressed to the Supreme Court are rising in number, even though most of them are groundless."²

What has been the real contribution of the Supreme Court to the upholding of Estonia's democracy and the rule of law? How has in particular the Court's Constitutional Review Chamber (the CRC, or the 5-justice sub-section of the Supreme Court, which is responsible for exercising constitutional review in Estonia) influenced the evolution of Estonia's democratic government as well as the provision of justice in the legal system? How does and will Estonia's constitutional review mechanism compare with other such institutions in the European Union once Estonia becomes an EU member? What are the broader European trends that this mechanism will be likely to encounter in the future? This paper will attempt to bring this critical, yet understudied dimension of Estonia's institutional framework closer into focus with particular reference to the issue of democratic consolidation and political stability in Estonia over the long term. It will approach the issue from a predominantly political science perspective, analyzing the Court's cases with this standpoint in mind. While other studies have been done of the Court's legal performance (Roosma, 1997; Maruste and Schneider, 1998; Schneider, 1998; Roosma, 1998), the approach taken here will be more interpretive and analytical.

This paper will address these issues by breaking them down into sections. I will begin with a conceptual discussion of the link between constitutional courts and democratic consolidation. Although so much has been written on democratic transition and consolidation, it is surprising to notice how little these studies have included the development of constitutional review mechanisms in post-authoritarian countries. Secondly I will review the history and structure of constitutional review mechanisms in Estonia. While Estonia had certain elements of a review mechanism in place before its annexation by the Soviet Union in 1940, its real experience with this kind of institutional process has developed only since 1993. Thirdly, I will analyze the case history of the current CRC (39 rulings through the end of 1999) based on five general categories: separation of powers, breach of powers, public policy making, fundamental rights and freedoms, and international treaties. (For a summary of the major cases in each category, see the

Appendix.) While these categories are somewhat arbitrary (and many cases of the CRC have straddled the different categories), they all address certain key principles of democracy, which must be safeguarded.³ To the extent that Estonia's Constitutional Review Chamber has been called upon to adjudicate these questions, I will argue, Estonia's emerging democracy has been strengthened. Lastly, I will outline certain plans for reform of the CRC in Estonia as well as its prospects for the future. While existing practice in the court has been very positive, a number of technical modifications have been proposed for the system as well as thoughts expressed about its role after EU accession.

Constitutional Review, Constitutionalism, and Democracy

The issue of constitutional review goes far beyond the fine points of judicial procedure or legal technicality. At heart, it concerns the stability and functionality of the democratic process itself. For at the national level a country's constitutional review mechanisms serve as the essential third pillar in the separation and regulation of powers of the legislative and executive branches. In most democracies (especially parliamentary ones) the legislative and executive branches naturally balance each other. Parliament approves the prime minister and cabinet, which the same parliament can easily remove through a no-confidence vote should disagreements emerge. Executives, meanwhile, have power over the actual machinery of government (including material resources as well as coercive powers) and can sometimes force their own policies on parliaments through the threat of confidence votes and/or deal-making.

Still, in order for democracy to work, it is the judiciary which must play the additional role of overseeing both of these institutions from the standpoint of what keeps the whole political system together—the constitution. The question of constitutional review thus reverts back to what is an even more important prerequisite for democracy: constitutionalism. Respect for and adherence to the one document that constitutes the basic rules of the political game (and thus personifies the entire essence of *democratic* management of power) can never be taken lightly or assumed, not only in consolidating democracies, but also in consolidated ones. On the contrary, such respect must be buttressed through effective monitoring and arbitration procedures, which must additionally have the legitimacy to make binding decisions. As Allan R. Brewer-Carías (1989:124) writes, "...if written constitutional systems pretend to have a supreme, obligatory and enforceable law, they must establish means for the defence and guarantee of the Constitution."

Constitutional review mechanisms have thus become a ubiquitous and inherent part of democratic governance, particularly from 1945 onwards. Yet, we

must also not forget that constitutional review mechanisms serve a second important function alongside resolving institutional disputes—namely, the protection of fundamental rights and freedoms in society. In contemporary constitutional practice, such rights and freedoms are also enshrined in basic law. However, their protection and realization is again never automatic, but must instead be continually monitored and safeguarded through judicial means. For it is by no means a rare occurrence that both the executive and the legislature will, for example, agree on some coercive measure to promote order or efficiency in society, but at the expense of one or more of the fundamental rights and freedoms declared sacrosanct by the Constitution. If such actions are allowed to stand, they can eventually lead to popular discontent or, at the very least, popular alienation. In these cases, the judiciary and its constitutional review mechanisms must be able to maintain a necessary balance. They must defend not only institutional stability, but also societal stability.

Lastly, it is worth noting how little attention constitutional review mechanisms have received within the vast scholarly literature on democratic transitions and consolidation.⁴ While many scholars speak of the need for ‘democratic political culture’, and others even stress the importance of constitutionalism for democratic viability, there has been scant interest paid to the actual institutional mechanisms that are supposed to bring about these results. In particular during the early years of a democratic regime, newly-created institutions (both legislative and executive) are likely to be highly sensitive about their mutual balance of powers and the practical operation of those prerogatives. Executives, who often face the need to implement decisive political, economic or social reform, may seek dominance in the new political system, while legislatures, acting as the newly-installed ‘body of the people’, may desire instead to limit governmental power. These are confrontations, which in consolidating democracies have quite frequently led to major institutional tensions or tugs-of-war, and which in some cases have led to democratic breakdown. Witness the struggles in Russia during 1993, Peru in the early 1990s or Venezuela in 1999.. Indeed, the Baltic states themselves have a legacy of institutional weakness from the pre-war period. Although admittedly these particular problems were not caused directly by an absence of constitutional review mechanisms, they might perhaps have been better managed had such procedures been in place.⁵ Thus, the issue is a topical one both from a theoretical as well as empirical standpoint.

Constitutional Review in Estonia

Having experienced just twenty years of independence between the two world wars and 50 years of Soviet domination thereafter, Estonia’s constitutional as well as judicial practice has been fairly limited. In 1920, the country adopted its

first constitution after convening a special Constituent Assembly in 1919. The regime that was chosen was a strongly parliamentary one, in which the executive branch had relatively few autonomous powers and was beholden to the legislature for constant support. Although members of the Constituent Assembly did consider one proposal for instituting a system of constitutional review through the Supreme Court, this idea was eventually dropped.⁶ Instead, the concept was subsumed under Estonia's basic administrative court procedure whereby the courts were given the right to rule on the legality of at least administrative acts with regard to the rights and complaints of plaintiffs. Yet, parliamentary acts were off-limits, which epitomized again the parliamentary bias of the regime.

Eventually, this general institutional weakness (along with growing political discord and economic hardship) led to the rise in the early 1930s of proto-authoritarian groups calling for decisive constitutional reform. A new constitution, sponsored by these groups and calling for a strong presidency, was put to a referendum in 1933. Although the measure passed by a significant margin, its implementation was preempted in March 1934 by the caretaker prime minister at the time, Konstantin Päts, who staged a coup d'état to prevent the new forces from taking power. Päts banned all political parties and installed an authoritarian regime for the next three years. In 1937, however, he allowed a constituent assembly to draft a new constitution, which installed a much more presidential system.

Under the new regime, begun in 1938, there was again no specific institution charged with binding constitutional review. However, the system did create the office of a legal chancellor (to be appointed and dismissed by the president), who was to be sent drafts of all major laws, regulations, decrees, and edicts drawn up by the executive branch of government with a view to exercising limited constitutional review over them. In this respect, the legal chancellor's job was preventive as opposed to judicial, however, his decisions were restricted to the executive. (Maruste and Schneider, 1998) Additionally, Article 121 of the 1938 Constitution stated that, "Initiation and procedures of the judicial control over the constitutionality of the exercise of the state power shall be determined by law." However, during the subsequent two years that the Constitution functioned until the Soviet takeover in 1940, agreement was not reached as to what this paragraph should mean in practice and whether full-scale constitutional review (including over parliament) could or should be created by a separate law.

The issue of protecting the constitution, monitoring institutional prerogatives, and strengthening democratic stability were all tasks, which Estonia's first era of independence ultimately did not succeed in accomplishing. While low levels of democratic culture as well as the prevailing authoritarian

mood in Europe as a whole at that time contributed greatly to this outcome, these factors could not outweigh the intrinsic advantages to be gained from an effective mechanism of constitutional review. In the fifty years of Soviet domination to follow, popular hopes often seemed lost as to whether another opportunity would ever arise for constructing an independent democratic state. In 1991, however, that chance did arise, and this time Estonia would work toward a more comprehensive political system.

Estonia's leap to freedom in the midst of the attempted putsch in Moscow in August 1991 was accompanied by a bold decision to immediately convene a new constitutional assembly for the drafting of a fresh constitution. This assembly met for 8 months through to the spring of 1992, by which time an initial draft was completed. (Pettai, 1997; Taagepera, 1994) The new basic law mandated a parliamentary system with a prime-ministerial government and cabinet. At the same time, a ceremonial president would be elected by the legislature (or in case of deadlock, an electoral college). Thus, the regime sought to avoid the 1920s dominance of parliament, while equally preventing an over-bearing executive. On June 28, 1992, the Constitution was adopted by a popular referendum.

While the Constitutional Assembly's deliberations were often protracted over such things as the election of the president, the need for some kind of constitutional review was never disputed. Instead, according to the protocols of the assembly, the only concerns raised were in regard to the mechanics. (Roosma, 1997;15-27; Peep, 1997) In the end, Estonia's new constitutional review mechanism came to stand on three channels of judicial appeal—the president, the legal chancellor, and the lower courts—all leading to the 5-member Constitutional Review Chamber of the Supreme Court, which has final decision-making authority.⁷ The CRC is elected from among the full 17-member Supreme Court, but its chairman must be the Chief Justice. The system is thus a concentrated one (as opposed to a diffuse one), along the lines of those adopted in Germany, France or Italy.⁸ However, being a judicial body the CRC can not take up cases on its own, but rather must rely on appeals from other designated institutions. Moreover, as we will see below, the court is restricted in its rulings only to those points of law brought before it.

The Legal Chancellor

The creation of a post of legal chancellor for the new constitutional system was an idea derived from the 1938 Constitution. However, the profile of the office was significantly modified in that henceforth it was to be an independent institution, elected by the parliament for a seven-year term. More importantly, the legal chancellor's responsibilities would now include the monitoring of all legal

acts in the country (from the parliament to the government all the way down to local municipalities) from the express point of view of their constitutionality. The job is specifically defined in Article 139 of the Constitution as “an independent official who shall review the legislation of the legislative and executive powers and of local governments for conformity with the Constitution and the laws.”⁹ Although the Constitution uses merely the verb “review”, the legal chancellor’s actual oversight activities take place on several levels. At a preemptive level, the legal chancellor has the right by law to attend all sessions of both the government as well as parliament. In this capacity he is also sent copies of all draft laws and decrees from both institutions, which he then has an opportunity to screen before their adoption.¹⁰ According to the current legal chancellor, Eerik-Juhan Truuväli, this type of review has, in fact, been one of the most important, since most questionable issues have been resolved precisely at this stage.¹¹ At a second level, the legal chancellor may be called upon to interpret an existing law not only by members of parliament or government officials, but also by average individuals. Such requests may therefore also serve to review the constitutionality of a legal act, at whatever level of authority.¹² Finally, the Legal Chancellor’s Act requires that a copy of any legal act passed by an executive or legislative body at either the national or local level must be sent to the legal chancellor’s office within ten days of its passage.¹³ Although this means that literally hundreds of acts are forwarded to the legal chancellor per year and it is physically impossible for him to review each and every one, it does provide a formal mechanism for him to keep abreast of legal regulations in the country.¹⁴

Procedurally, if the legal chancellor believes some legislative act is in violation of the Constitution,

“he or she shall propose to the body which passed the legislation to bring the legislation into conformity with the Constitution or the law within twenty days. If the legislation is not brought into conformity with the Constitution or the law within twenty days, the Legal Chancellor shall propose to the Supreme Court to declare the legislation invalid.” (Constitution, 1996:Article 142)

Thus, at this most peremptory level the legal chancellor performs an *ex post* review function, whereby the legislative or executive body under question is initially given a chance to amend its act, but it may thereafter be taken to the CRC if the legal chancellor is not satisfied with its response.

As of 1 April 1999, Eerik-Juhan Truuväli had protested a total of 233 legislative acts passed by the government, the *Riigikogu* or individual local authorities.¹⁵ Of these, the lion’s share concerned local governments (161), although a large number involved acts of the government (30) or individual ministers (26). Only 16 arose in connection with laws passed by the *Riigikogu*.

Moreover, in only 12 instances was Truuväli unable to resolve his protests through consultations; these cases he eventually appealed to the CRC, where he lost only once.

The Courts

The role of the lower courts in initiating constitutional review procedures is quite standard and straight-forward. If during the process of hearing a case the court comes to the conclusion that a particular legislative act is unconstitutional, it must dismiss the law from consideration in the case and rule without it. Thereafter, an appeal is filed immediately with the CRC, who must review the case within two months. Thus, the appeal is made on behalf of the lower court and does not involve in any way the original parties to the case. It is the court which argues (usually simply in writing) its case against the respective executive or legislative authority that originally adopted the legal act. If the court is found to be right, then the act is rescinded. However, if the court is wrong (and this has happened in 2 cases), then current procedure does not allow the previous court case to be re-opened. This is a flaw that must still be remedied.

The President

Under Estonia's constitutional review procedure, the president is the only institution, which has the right to appeal laws passed by the *Riigikogu* to the CRC before they take effect. Thus, he or she is the only one, who can exercise official preventative or *ex ante* constitutional review. Under Article 107 of the Constitution, the president has the responsibility for promulgating laws adopted by parliament. However, if the president is opposed to a law, he or she may refuse to promulgate it and return it to parliament for reconsideration. If the parliament passes the law again in its identical form, then the president must sign the legislation or he or she may appeal to the CRC for a ruling on the law's constitutionality. Thus the president can exercise a suspensive veto over parliamentary legislation, but he or she can not completely override the parliament. Moreover, the fact that any dispute between the parliament and president can ultimately lead to the CRC means that any objections to a law that the president has are obliged from the very beginning to center on mostly legal (instead of political) arguments, since the president knows that if he or she is to be assured of victory, the case will have to stand up to the potential scrutiny of the CRC, where only constitutional arguments prevail. If the president opposes a law on openly partisan grounds, the parliament is likely to re-adopt its legislation and then force the president into a legal fight, which he or she may well lose. Thus, the rules have an objectifying effect on disputes. Yet, by the same token, the president may also be prevented from opposing legislation, which may be

divisive in its political consequences, although sound from a constitutional point of view. In this case, the president is unable to perform a stabilizing role in the political system, where he might be able to protect a minority from being overruled by a majority. Thus, the system cuts both ways, although it is clear that where a minority's interests or rights are seriously in danger, certain legal arguments can still be attempted as part of an appeal to the CRC.

Interactions

As the procedural rules and norms of these three constitutional oversight channels have developed, it is not surprising that the three players themselves frequently are in touch about their activities. For example, to the extent that both the legal chancellor as well as the president receive copies of all government as well as parliamentary drafts, they are at liberty to express their preliminary views on controversial constitutional issues to either institution concerned, albeit in a strictly private and unofficial way. Moreover, Estonia's small size inevitably means that advisors to both the legal chancellor and the president are also in frequent contact and can coordinate their strategies vis-à-vis particular acts. As a result of all these factors, there is a great deal of constitutional 'semi-review' which takes place long before an official appeal is launched, and which consequently serves to reduce the actual number of formal CRC cases.

The CRC in Practice

In addition to the Constitution, the work of the CRC is more precisely regulated by a separate law, the Constitutional Review Court Procedure Act, which was adopted in 1993. (Põhiseaduslikkuse, 1993) The act specifies the deadlines, requirements and rules for reviewing appeals to the CRC. The CRC may issue rulings based on a simple majority of its 5 members. Every justice is obliged to vote, and in case of ties the fifth and deciding vote is cast by the chief or presiding justice. If one or more justices is in dissent over the ruling, he or she may request that the case be handed over to the full 17-member Supreme Court. To date, this has not happened.


In terms of precise actions, the CRC may issue essentially two kinds of rulings. (Põhiseaduslikkuse, 1993:§19) The first is to rule against the appeal based on insufficient arguments, and the second is to declare the appeal valid either fully or partially. In the latter case, the legislative act in question is struck down based on the degree to which the CRC finds in favor of the applicant as well as the degree to which the applicant him- or herself has sought the act to be declared unconstitutional. For Paragraph 4.3 of the Constitutional Review Court Procedure Act limits the CRC to exercising judicial review only in relation to

those points of law specifically brought before it. Thus, the CRC can not take up separate points, which it believes are unconstitutional. However, it can and often has raised arguments in relation to the given points, which were not brought out by the parties involved.¹⁶ Although this system has functioned satisfactorily since its establishment, there have been a number of suggestions made for its improvements, which will be discussed below.

Since its inception in May 1993 through to November 1999, the CRC had heard a total of 39 cases.¹⁷ As indicated in Table 1, the most active year for the CRC was 1994, when 11 cases were considered. Although initially the President as well as the Legal Chancellor took the lead in submitting cases, the lower courts began in 1995 to be more active in using their constitutional review prerogatives, and by 1997 they had moved ahead of the other two institutions. The *Riigikogu* was challenged the most by these actions, as a total of 21 laws were contested. The executive (both government and individual ministers) has been challenged 12 times and local governments 6.

TABLE 1: Appeals heard by the Constitutional Review Chamber, 1993-1999

		YEAR							
		1993	1994	1995	1996	1997	1998	1999	Total
Appeals made by:	President	2	3	-	1	-	2	-	8
	Legal Chancellor	2	6	-	1	-	3	-	12
	Lower courts	-	2	4	2	3	5	3	18
Total rulings		4	11	4	4	3	10	3	39
Type of legal act contested	Law	2	7	3	2	-	6	2	22
	Government decree	-	2	-	2	2	2	1	9
	Ministerial decree	-	1	1	-	-	1	-	3
	Local government legislation	2	2	-	-	1	1	-	6
Ruling of the Constitutional Review Chamber	Act declared unconstitutional	3	9	2	3	2	8	2	29
	Act was already repealed by the time of the CRC's ruling	-	2	-	1	-	2	1	6
	Act declared constitutional	1	1	2	1	1	-	1	7



In a few cases, appeals to the CRC have involved more than one government decree or point of law. As a result, the CRC has been obliged to make more than one ruling, sometimes upholding one aspect of an appeal, but dismissing another.

In terms of the five categories to be discussed below (separation of powers, breach of powers, rights and freedoms, public policy making), cases involving breach of powers have predominated. (See Appendix.) This is understandable, since four possible institutional actors (the parliament, the government, individual ministers, and local governments) and their legal acts can all come under this category. International treaties, meanwhile, have been raised more rarely, although here the number was likely to grow as Estonia came closer to joining the European Union and its legal acts were subject to greater scrutiny vis-à-vis EU norms.

Separation of Powers

Estonia's adoption of a new constitution in 1992 was a decisive step toward building a new and comprehensive democratic order. It was in contrast to a number of other ex-communist countries (such as Poland and Hungary), who had initially simply amended their old constitutions as a way of institutionalizing democracy. Still, the Estonian decision also created an entirely unknown and untested institutional configuration. Not only were the parliament, government and courts all expected to now become truly serious institutions (in contrast to the old Soviet ones), but in addition the 1992 Constitution had created several new offices, including a presidency, a legal chancellor, and an auditor general. Although the Constitution did set forth a fairly comprehensive system of separation of powers among these different institutions, it was clear that many details would still have to be settled, both through additional legislation as well as simple precedent. Where agreement could not be reached as to these details, the CRC was frequently called upon to arbitrate.

The President

In any political system an essential axis of power is that which exists between the president and parliament. During the work of the Constitutional Assembly of 1991-1992, there were great debates as to whether Estonia needed a president at all, and if so what prerogatives he or she should have. In the event, the new constitution created a largely ceremonial presidency, but which included a limited power of veto in the area of legislation. In September 1992, a special presidential election was held, at the end of which Lennart Meri, a writer, film-maker and former foreign minister, was elected to office.¹⁸ Meri was an excellent choice for his stately demeanor and strong commitment to democracy; however, he was also

well-known for his independent-mindedness and political self-assurance. As a result, he was likely to have a keen awareness of institutional prerogative as well as of institutional precedent, sitting as the first president. Indeed, Meri was the first of Estonia's three constitutional oversight institutions to appeal a case to the CRC, just two months after the latter was formed. Although Meri lost that case, he has since won all 7 of the cases he has subsequently appealed.

Through 1999 the CRC had heard four major cases concerning the president's institutional powers. In each case, the issue involved laws which the *Riigikogu* had attempted to pass in order to flesh out practical procedures and relations involving the president. Meri, however, sought to block what was to his mind over-regulation of these matters and in general was victorious. The only exception was the very first law which Meri appealed and which was simultaneously the CRC's very first case. (*Riigikohtu...*, 1993a) Specifically, Meri had vetoed a law, which mandated that the official state seal (to be used for confirming the credentials of ambassadors as well as letters regarding the ratification or denunciation of international treaties) was to be kept in the office of the state secretary, and not in the president's office. Meri claimed that since it was his job to appoint and recall ambassadors as well as to sign necessary treaty letters (based on Articles 78.2 and 78.6 of the Constitution), the entrusting of the state seal with an official of the executive branch would *de facto* mean his subordination to the executive branch. In turn, Meri asserted that this was a violation of the principle of separation of powers, as enshrined in Article 4 of the Constitution.

In some sense, the question seemed a pedantic one; but in the context of evolving institutions, it was the first test of strength between the parliament and the president. In its ruling, the CRC sided with the parliament, arguing that although the president is responsible for appointing and recalling ambassadors as well as signing treaty notices, the government is equally responsible (under Articles 87.1 and 87.7 of the Constitution) for the execution of foreign policy. As a result, the CRC claimed the state seal was essentially a technical matter and that its location in the state secretary's office could not prevent the president from fulfilling his constitutional duties. Meri's appeal was denied.

In February 1994, however, the president challenged the parliament on a new issue, this time involving his right to bestow state medals and awards. In the Constitution, only a general reference is made to this right: the president shall "confer state awards, and military and diplomatic ranks" (Article 78.15). The *Riigikogu* therefore had to pass supplementary legislation, spelling out this procedure in more detail. In its law adopted in December 1993 the *Riigikogu* called for the establishment of a special commission, which would review and

present to the president a list of candidates for the range of state awards conferred each year on Estonia's independence day (February 24). President Meri objected to this provision, arguing that the committee (whose membership was also mandated by the law) would be able to pre-select candidates and therefore restrict his formal institutional prerogative. In this case, the CRC ruled that the president had to have full autonomy in both drawing up as well as selecting his award recipients. Any commission forced upon him by the parliament was interference in the president's constitutional duties and therefore unconstitutional. (*Riigikohtu...*, 1994b)

This was an important message to the parliament in that where the constitution had left such discretionary powers to the president, the head-of-state was to have wide-ranging autonomy in establishing the exact modalities of its execution. In April 1998, the CRC reiterated this point, when President Meri appealed a similar case involving his right to grant clemency or reduce criminal sentences (Article 78.19). In this instance, the *Riigikogu* had again attempted to establish a commission for reviewing all such applications before they reached the president. In an attempt to get around the previous controversies, the parliament this time stipulated that the president was not bound by the recommendations of the commission. Still, in one aspect of procedure the commission was given the right to decide whether a convict, who was applying for clemency or a reduced sentence for a second time, had sufficient new evidence or basis to warrant another review. It was this, albeit very limited, range of cases, which the CRC found was once again a restriction on the president's institutional prerogative, and as a result unconstitutional. (*Riigikohtu...*, 1998b) The president, the CRC ruled, must have full authority to review all applications. In addition, the CRC found objectionable that the commission was to have only one member appointed directly by the president. This would mean that president would not have full control over its composition. The CRC did temper its ruling by stressing that the president could not have complete *carte blanche* to establish clemency procedures merely on the basis of some internal regulation. Rather, in such domains the *Riigikogu* had an obligation to pass supplementary and detailed legislation. However, the parliament could not infringe on the president's essential sovereignty in the matter; it had to leave the president with the widest possible margin of authority.

A fourth defense and most consequential of the presidential institution came in June 1994, when Meri vetoed the *Riigikogu's* attempt to regulate the presidency in general through a Presidential Procedure Act. Specifically, the law sought to lay down the procedure (mentioned in Article 109 of the Constitution) whereby the president would be authorized to issue decrees with the force of law in special situations where the parliament was prevented from coming together.

The law stated that first the speaker of parliament would have to certify that the parliament was unable to come together, and that second the prime minister would have to confirm that there was a “matter of urgent state need” at hand, which needed legislation by presidential decree. President Meri argued that these two specific modalities (not mentioned in the Constitution) infringed on his constitutional rights and duties as head-of-state in such situations, and were thereby unconstitutional. The CRC agreed with the president and struck down the law. Subsequently, the Riigikogu was so deterred from touching the issue again, that a presidential procedure act was never re-drafted again.

In sum, during his first seven years in office President Meri was generally successful in stemming various attempts by parliament to codify more precisely his albeit limited powers. On the one hand, he was cognizant of these limited powers and therefore never sought to over-stretch these bounds nor push the country toward presidentialism. At the same time, neither did he allow his office to be placed in a straitjacket by procedural rules regarding his constitutional prerogatives. He remained keen to establish the presidency as an essential player in the institutional game and the Constitutional Review Chamber was a weapon for him in that effort. For its part, the CRC confirmed this role, in some cases emphatically.¹⁹

The Parliament

A second separation of powers concerns the relations between parliament and government. This issue was first raised in November 1994 based on a case brought by the Legal Chancellor. The Legal Chancellor protested the *Riigikogu* Procedural Act (or basic rules of order in parliament), which allowed MPs to serve concurrently on the executive boards of major state-owned firms. The boards were intended to supervise general management at the few key enterprises still left in state hands both during and after large-scale privatization. Having MPs in particular serve on the boards was seen as a way of providing political consensus for managing state assets. Yet, the Legal Chancellor saw the issue as a conflict of interest between the legislative and executive branches. He argued that because the MPs were receiving remuneration for their work and were viewed on a par with board members drawn directly from the executive, they were in fact working simultaneously as members of both the legislative and executive branches, and were therefore in violation of the Constitution’s Article 4. In its ruling, the CRC agreed with the Legal Chancellor’s case, saying that,

“Any situation of conflict of interest, in which a state employee simultaneously fulfills essentially contradictory tasks as well as seeks contradictory objectives, can precipitate deficiencies in the execution of his official responsibilities as well as create the pre-

conditions for corruption. Conflicts of interest must be avoided in all state institutions.”
(*Riigikohtu...*, 1994g:2275)

Still, the issue was a delicate one, since it contained important practical implications. According to Article 64.2 of the Constitution, if a member of parliament assumes a position in any other branch of government, he or she automatically forfeits their seat in parliament. Thus, if this provision were strictly adhered to and the CRC decided to rule against the parliament, the result would have been to automatically throw out a large number of MPs from the parliament and bring chaos to the legislature’s work. Instead, the CRC set an important precedent by granting the MPs one month, in which to make their choice between the parliament and the executive boards. Although the Constitutional Review Chamber Procedure Act does not expressly allow for such time-delays, it was clearly warranted in this case. Subsequently, the CRC has never had further recourse to this measure, although in one 1998 case it was called for by one justice.²⁰

Breach of Powers

The Estonian Constitution contains important principles about how questions of policy are to be legislated and by whom. Firstly, Article 104 lists a total of 17 specific laws or domains in relation to which the *Riigikogu* can pass laws only with an absolute majority of its members. These include the state budget, various electoral laws, laws relating to the structure of the Estonian government as well as other state institutions. Any law pertaining to these areas, which is passed without such a majority, is unconstitutional. Secondly, if a particular aspect of any one of these domains is by chance legislated within the context of some other basic law (needing a simple majority to pass), such an act can also be found unconstitutional.²¹ Thirdly, the Constitution contains several paragraphs on fundamental rights and freedoms as well as other institutions’ rights, which stipulate that restrictions on these rights can only be legislated by law.²² Any attempt to regulate these areas by mere governmental, ministerial, or local government decree is equally unconstitutional. Fourthly, Article 87.6 states explicitly that the government of the republic shall “issue regulations and orders on the basis of and for the implementation of law”. This means that the government can issue decrees only on the basis of specific paragraphs in law authorizing it to do so. Moreover, these paragraphs must be explicitly cited in the text of the decree. As will be seen below, this has been a particular area of focus for the CRC, as many government decrees during the early years of Estonia’s new constitution were sloppily drafted and thus unconstitutional. Lastly, local authorities are also bound by national law when adopting their own regulatory ordinances, despite the fact that the Constitution’s Chapter 14 on local

government equally makes reference to their autonomy in deciding their own affairs. Where municipalities have overstepped these boundaries or adopted regulations not sanctioned by law, the CRC has struck them down. In this section, therefore, I will review four types of breach of power, involving the parliament, the government, individual ministers, and local governments.

The Parliament

An important principle that the CRC repeatedly sought to enforce during its first six years concerned the *Riigikogu's* constitutional responsibility to fulfill its legislative duties. This refers to the parliament's obligation to adopt laws and decide matters delegated to it by the Constitution, instead of passing them off to the executive to decide. In one of the CRC's earliest decisions, it made this argument very clear. In November 1993, President Meri challenged the *Riigikogu's* adoption of the Tax Regulation Act. (*Riigikohtu...*, 1993d) In the original law, the *Riigikogu* had authorized the Minister of Finance to scrutinize and define the nature of taxes levied by local governments on their territory. While the CRC struck down the law on the principle of local government autonomy, it also noted that the law was an attempt by the parliament to delegate to the executive a job (defining local taxes), which the Constitution had specifically assigned to the legislature (Articles 113 and 157.2). Thus, the CRC did not shy away from admonishing the parliament based on the latter's obligation to fulfill its legislative functions. Moreover, in 1994 the CRC reiterated this stance in connection with an appeal by the Legal Chancellor concerning a law regulating surveillance activities by the police. (*Riigikohtu...*, 1994a) Again, the *Riigikogu* had attempted to pass on the modalities of authorizing such surveillance to the Defence Police, although it included within those modalities a requirement that the consent of a justice of Supreme Court also must be obtained. Still, the CRC ruled that such circumstances had to be spelled out specifically in law, otherwise they would violate basic rights and freedoms. *Inter alia*, the CRC stated,

That, which the legislature has been authorized or obligated to do by the Constitution, can not be delegated to the executive branch, even temporarily or under the possibility of control by the judiciary. (*Riigikohtu...*, 1994a, 228)

The Government

A second institution, which has been caught more than all others breaching its constitutional powers, has been the government and its individual ministers. Of the CRC's 39 cases through 1999, executive-branch breach of power was at issue in 12 of them. Most notably, the issue was raised in December 1996 when a 1994

government decree regulating the import of vodka was challenged by a lower court in a criminal case. (*Riigikohtu...*, 1996c, 1996d) At issue was the fact that although the decree referred to Estonia's Consumer Protection Act of 1993 as its basis in law, the text itself did not actually cite a specific paragraph from the law. Thus, the decree was formally unconstitutional. Although in the months that followed the decrees adoption, the *Riigikogu* amended the Act to authorize the government to take action in the specific sphere of vodka importing, the CRC ruled that such initial violations of constitutional law could not be legalized *post hoc* and were in any case a dangerous sign of legal arbitrariness. The justices argued that on the one hand,

The objective of the right given to the Government of the Republic to issue decrees is to reduce the burden on the legislature and to hand the technical specification of norms over to the government, so as to guarantee flexible administrative activity as well as to avoid the overburdening of laws with useless individual regulations. At the same time, the circumscription of executive power by law is necessary for maintaining control over the democratic nature of exercising state power, and for preserving general legal order as well as protecting constitutional rights and freedoms. (*Riigikohtu...*, 1996c:147)

Thus, while the two aspects were significant, the latter was constitutionally more important.

Likewise, in March 1999 the CRC clipped the government's wings after the latter had attempted to restrict the right to free enterprise by banning the sale of brand-new consumer appliances at municipal markets. (*Riigikohtu...*, 1999a) The regulations had been part of a general government endeavor to channel the sale of consumer appliances into licensed retail stores. However, ruling on two separate cases brought by lower courts (in which the defendants had been fined by local authorities for violating the government decree), the CRC found that following Article 31 of the Constitution²³ such restrictions can only be legislated by law. The relevant point in the decree was therefore declared unconstitutional.

Government Ministers

The issue of government ministers overstepping their legal prerogatives arose in the CRC only 3 times during its first 6 years. In all of these cases, the respective decrees were declared unconstitutional, although in one case the decree was rescinded before the CRC handed down its ruling. For example, in January 1995 the CRC heard a lower court appeal involving a 1994 decree issued by the Interior Minister concerning residency permits for non-citizens. (*Riigikohtu...*, 1995a) Although the lower court had ruled that the decree was unconstitutional

because a section of it violated the principle of rule of law (Article 10), the CRC ruled instead that the decree was actually unconstitutional because Estonia's respective law on aliens did not explicitly authorize the Interior Minister to issue such decrees; only the full government had actually been authorized. Thus the ruling was an important case, where the CRC sought to correct an error, which had slipped by not only the lower court, but also the legal chancellor.

Local Governments

Lastly, the CRC has also been called upon to adjudicate alleged breaches of power by local authorities. Indeed, in mid-1993 the CRC was instrumental in resolving one of Estonia's most serious ethnopolitical conflicts after the mostly-Russian towns of Narva and Sillamäe in Estonia's northeast held local referendums on whether to demand territorial autonomy from Tallinn. The conflict was ignited by minority Russian opposition to a new and controversial Aliens Act, which threatened to revoke many Russians' right to residency in the republic.²⁴ In their opposition to the new legislation, the local authorities in Narva and Sillamäe decided to play one of their last remaining cards, which was to call a referendum on territorial autonomy. The move was a challenge to Tallinn's central authority, but it also raised the specter of secessionism in the northeast, since many feared that territorial autonomy would become the basis for a future move to join the Russian Federation. After some intense political mediation by moderate Russian leaders from Tallinn as well as officials from the OSCE, a compromise was struck in which the Estonian government agreed not to interfere with the balloting, while the local Narva and Sillamäe authorities agreed to accept a future ruling from the Constitutional Review Chamber as to the referendums' constitutionality. The deal eventually held, since the referendums took place in mid-July without major incident, while immediately thereafter the Legal Chancellor submitted an appeal to the CRC to declare the referendums unconstitutional.

For the CRC, the autonomy issue was clearly one with important ethnopolitical consequences, which it could not easily overlook. Although the referendums themselves had already been somewhat discredited by news reports indicating widespread procedural errors during the poll, the Estonian government was still keenly interested in having the actions themselves struck down by the CRC. This was made easier by the fact that both the Narva and Sillamäe authorities had themselves formulated their decisions in a contradictory legal matter, leaving the way open for the CRC to dismiss the referendums on essentially technical grounds. (*Riigikohtu...*, 1993b, 1993 c) More specifically, the Narva and Sillamäe local councils had inappropriately used in their original resolutions the formal term of 'referendum', which according to the

Constitution's Article 105.1 can be initiated only by the *Riigikogu*. Although the Sillamäe City Council had also included the term "resident poll" in its phraseology, the CRC maintained that the essential misuse of terms meant that the two referendums were legally speaking unconstitutional. Additionally, the CRC noted that although the Constitution (Paragraph 154) as well as Estonia's Local Government Organization Act both give municipalities the right to decide matters of local importance, the question of territorial autonomy is fundamentally a national one, which local governments can not raise unilaterally. Thus, based on these two arguments, the CRC threw out the Narva and Sillamäe referendums, and in turn the rulings were accepted by the two local governments.

In terms of the full range of cases concerning local government breaches of power it is interesting to note that all of these appeals have been raised so far by the Legal Chancellor, and not for instance by the local courts.²⁵ Eerik-Juhan Truuväli has in particular had to deal with the Tallinn authorities, appealing first a case in 1994 regarding the city's decision to begin booting illegally parked cars, and again in late 1998 after the city began charging a fee for cars entering the old town. (*Riigikohtu...*, 1994e, 1994f, 1998h) In both cases, Truuväli argued that Tallinn had overstepped its legal bounds, since neither the booting of cars nor the charging of what he alleged was a tax on vehicles entering the old town had been authorized by national legislation. (In the first case, the reason being that the booting of cars did not exist among the range of punishments allowed by Estonia's Administrative Code, while in the second the charging of entrance fees for vehicles was not included within the list of taxes local governments were permitted to levy according to Estonia's tax code.) These two Tallinn decisions therefore constituted a breach of power. Although both practices were viewed by many people as important measures for controlling traffic in and around the city center, the legal issues predominated for the CRC, which ruled in the Legal Chancellor's favor and struck down the Tallinn decisions on both occasions. Indeed, in the latter instance, the effect was immediate in that as soon as the ruling was announced, newspaper reporters in cars tried to force their way into the old town for free, and the city authorities were left pondering as to what measures they could still take to nevertheless curb the new traffic.

Rights and Freedoms

In a number of instances, the legislative acts, which the CRC has struck down on legal-technical grounds, have also concerned various rights and freedoms. As a result, the CRC's action has been in favor of not only legal propriety, but also the defense of constitutional rights. For example, the CRC's ruling in January 1994 striking down the *Riigikogu*'s attempt to authorize the Defense Police to engage in surveillance activities was based on the grounds that such activities must be

spelled out in law and not delegated *carte blanche* to a part of the executive. This was in part a technical argument; however, as one Estonian scholar of the CRC has written, the decision also established important principles in regards to rights protection, since:

[1]. the term “law” used in the restriction clauses of the Fundamental Rights and Freedoms Chapter of the Constitution has to be interpreted as an act of the *Riigikogu*, and

[2]. the restrictions to the fundamental rights and freedoms are unconstitutional if they are not provided for in a way detailed enough to enable the subjects of law to determine their conduct on the basis of informed choice (Roosma, 1997:60)

Likewise, the CRC applied this principle in its March 1999 ruling concerning the right of individuals to sell brand-new goods at local markets, for in that decision the CRC said that the Constitution allowed for such restrictions to be placed, but that these had to be legislated by law, not government decree. (*Riigikohtu...*, 1999a)

A more serious case of fundamental rights, however, arose with the passage of the Police Service Act by the *Riigikogu* in May 1998. The law allowed police commanders to transfer a rank-and-file officer to another department or precinct without the officer’s consent even if that entailed an additional change in residence for the officer. President Meri promulgated the law in early June. However, in mid-September the Legal Chancellor launched an appeal to the CRC charging that the provision regarding officer transfers violated Article 34 of the Constitution, which guarantees the right of legal residents to “choice of residence.”²⁶ According to the Legal Chancellor, this principle was completely inviolable, since the Constitution does not state (as it does regarding, for example, the right to free enterprise) that this right can be circumscribed by the law. Thus, even though the *Riigikogu* had attempted to legislate the flexible transfer of police officers via a full-fledged law, the CRC agreed with the Legal Chancellor that this was not enough and that such a restriction of rights was unconstitutional in whatever form. (*Riigikohtu...*, 1998g)

In May 1996, President Meri also raised the issue of fundamental rights when he challenged the *Riigikogu*’s passage of the Non-Profit Organizations Act. The law as originally passed by parliament excluded the right of minors to register non-profit organizations. This decision, however, was according to the President in violation of the Constitution’s Article 48, which states that “Everyone has the right to form non-profit undertakings and unions.” More

specifically, since the Constitution does not expressly restrict this right to adults or allow it to be circumscribed in any way by law, the *Riigikogu*'s action had no legal basis. On this score again, the argument was about basic rights, and the CRC concurred with the President. (*Riigikohtu...*, 1996a)

Public Policy Making

As was argued above, two of the most important domains of constitutional review involve institutional prerogatives and the protection of fundamental rights and freedoms. In recent debates over constitutional theory, however, a third area of judicial influence has emerged in relation to public policy making. With the evolution of judicial activism in many countries, supreme and constitutional courts have often become involved in adjudicating (and essentially deciding) important public policy issues hitherto determined solely by the executive and legislative. This trend has raised concerns, however, that the courts are "distorting" policy by removing it from the domain of direct public control (within the executive and legislature) and transferring it to the judicial arena, where the public has less check. The issue is a significant one for post-communist countries, since as a rule these states have been faced with important, and oftentimes controversial socio-economic reforms. In the event of adroit manipulation by political actors or simple activism by the courts, such policies can easily become "distorted".

With regard to this danger, the Estonian constitutional review mechanism offers few worries in the sense that cases may be brought to the CRC by only three particular institutions. The consequence of such a system is to limit the type and range of cases brought to the CRC, in addition to focusing them more on legal, rather than political arguments. In other constitutional systems (such as in Estonia's Baltic neighbor Lithuania), access to the constitutional court is broader, including the right to appeal for a certain number of parliamentary deputies or in some cases individual plaintiffs. The result here is that such parties may be able to use their access for political purposes by challenging, for instance, public policy on certain constitutional grounds. In particular, this may be the case for an opposition minority in parliament angered by some government decision. Constitutional appeals may be used as a delaying tactic or as a publicity stunt in order to put pressure on the government to back down.

Thus, while the hypothetical danger of policy distortion exists, in Estonia it has generally been ruled-out because of the currently narrow structure of the constitutional review mechanism. Indeed, in the CRC's first six years of existence there were only four instances, in which government-initiated and parliament-approved public policies were overturned by the CRC. (*Riigikohtu...*, 1994d,

1995b, 1998e, 1999b) Moreover, in three of these four cases the CRC interpreted the issue as one of “rightful expectations”, since the state had attempted to reverse policies and procedures, which individuals had come to expect would continue and were therefore placed at a disadvantage when the state suddenly changed its rules. Only in one celebrated case involving housing privatization (to be discussed below) did the CRC alter an entire dimension of the *Riigikogu*’s basic policy scheme, eventually resulting in the re-drafting of these provisions.

The Constitutional Review Chamber first addressed the issue of public policy in 1994, when a lower court challenged a 1993 amendment to Estonia’s farming legislation, in which tax breaks for new farmers established in 1989 and set to last for 5 years were prematurely abolished. The issue emerged from a lower court case in which a farmer in the northern county of Harjumaa had sued the local tax authorities for property taxes levied upon him under the new tax amendments. The lower court sided with the farmer and in the process declared the new taxes unconstitutional.

The CRC’s ruling turned out to be important, since in it the CRC made one of its first attempts to flesh out the meaning of the Constitution’s Article 10 concerning the sanctity of rule of law. Specifically, Article 10 states that,

The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law.

For the CRC, this paragraph symbolized the Constitution’s commitment to general European legal norms and standards, which includes the principle that legal acts can not have retroactive effects. As the CRC’s ruling declared,

The Constitution along with laws and other legal acts adopted in compliance with it are intended to establish regularity and stability in society. It is through this that a solid foundation for the legal enjoyment of fundamental rights and freedoms is established and that legal security as a social value develops. (*Riigikohtu...*, 1994d:1868)

In ruling in favor of the lower court (and indirectly the Harjumaa farmer), the CRC affirmed that individuals had a right to expect the continuation of a government policy as long as the particulars of that policy were in still operation. In the case of the Harjumaa farmer, he had a right to expect his tax break would last for five years, if that is how the state had originally promised. The state had no right to reverse its promise no matter how expensive it might have become for the state or regardless of government or policy shifts.

In later court practice, this interpretation of Article 10 would become a mainstay of judicial principle. For in 1998 the issue arose again, this time in relation to property restitution. In all post-communist countries, a major element of economic restructuring has been property reform. Moreover, in most countries of Central and Eastern Europe this issue has broken down into two parts, privatization and property restitution. The latter concerns the return or compensation of property to owners, from whom it was confiscated or nationalized following the original communist seizure of power. Depending on the timing and modalities of that seizure, a number of post-communist parliaments approved elaborate schemes for owners to reclaim their property and/or receive compensation from the state for property since destroyed or lost. In Estonia, a comprehensive Property Reform Foundations Act was adopted in June 1991 under pressure from right-wing forces calling for a full-scale restitution policy. As a result, the new law established wide-ranging procedures, whereby former owners as well as their individual relatives or inheritors could apply either for the return of their former property (e.g. farms, houses, land, industrial buildings) or for appropriate compensation from the state if this property was lost or declared a state asset (e.g. stocks and bonds).

Although the policy as a whole was not widely contested, many of the specific rules were criticized by more moderate politicians for their liberality, especially in relation to the number of relatives and inheritors or former owners, who were declared eligible to reclaim property, as well as the amount of compensation possible for each claimant. As a consequence, in 1996 the centrist government of Prime Minister Tiit Vähi began drafting a new law to amend these two provisions as well as reform other aspects of the entire policy. The Property-Reform-Related Legislation Amendment Act of January 1997 decided to remove one category of relatives (the wives of children of former owners) from being eligible to reclaim property, while also abolishing the right to compensation for those claimants whose property had been physically destroyed since nationalization.

These amendments had been agreed in political terms by the government and parliament and indeed were promulgated into law by President Meri. Yet, fundamentally they were in violation of the principle of rightful expectations, as the rules of the restitution policy had now been altered before the full term of claims-processing had been completed. Specifically, in the case of both modifications, the Amendment Act specified that anyone belonging to these two categories and whose restitution application had been processed by their respective local government *before* the Act took effect (in February 1997) could maintain their rights as claimants. Anyone, whose claim, however, had not been processed by then, would lose their rights and either have their claim denied (as in the case of wives of the children of former owners) or see their compensation

denied (as in the case of those with destroyed property). The amendments thus had quite an arbitrary effect, since in some counties local commissions had been able to process their restitution applications more quickly, while in others they had not. An individual may have submitted his or her claim in full compliance with the law before the original deadline (in December 1991), but now would potentially see it denied for reasons beyond his or her control.

This contradiction was not raised by either the President (in promulgating the law) or the Legal Chancellor (in ostensibly reviewing all legal acts in Estonia); however, within two months the issue reached the courts and a decision would soon follow from the CRC in September 1998. (Riigikohtu, 1998e) In April 1997, the government of the small parish of Pühalepa on the Estonian island of Hiiumaa, had approved a pair of property compensation claims after the Amendment Act had taken effect. The local county governor protested these settlements in the local court, claiming that the Pühalepa authorities had to follow the new law and deny any future compensation requests. Yet, the local court overruled the governor and declared instead the compensation clause of the Amendment Act to be in violation of the Constitution's Article 10. In its appeal to the CRC, the Hiiumaa County Court specifically cited the CRC's 1994 ruling on farming policy and claimed that this was an analogous violation of the principle of rightful expectations. In its ruling on the issue, the CRC agreed with the applicability of Article 10 in this case, and in addition noted the relevance of Article 12 on the equality of individuals before the law. The CRC said that even if the government and parliament had wanted to avoid further social injustices by abolishing the right to compensation, the reversal of policy to the detriment of those still within the policy implementation process was itself a larger social injustice. (Riigikohtu..., 1998e)

This decision, therefore, set a precedent with regard to the second major policy change engendered by the Amendment act—namely, the claimant rights of wives of children of legal owners. In January 1999, the Tallinn Administrative Court received a case involving one such plaintiff, and in due fashion proceeded to throw out the provision of the Amendment Act relating to her restriction. Although later in the CRC, representatives from both the Estonian government as well as the *Riigikogu* again attempted to claim that the law was in accordance with the Constitution, the CRC repeated its arguments from the previous two policy instances and struck down the second policy amendment. (Riigikohtu..., 1999b) In both cases, therefore, all individuals with claims for property were returned to their original equal status in order to allow all of their requests to be processed equally. Although officials in charge of restitution policy were disappointed by their defeat as well as fearful that the CRC's decisions would reopen claims processed in the meantime on the basis of the new amendments,

there was nothing they could do but to follow the rulings and deal with the new situation.

Essentially, the issue in these cases was one of consistency in policy, and not the policy itself. A more serious challenge to policy-making by the government and parliament came, however, in 1995 when a lower-court case reached the CRC involving housing privatization. (*Riigikohtu...*, 1995b) At issue here was a provision in the Housing Privatization Act of 1993, which mandated that all Soviet-built apartments were to be subject to privatization by their occupants regardless of whether the apartment had been built by the state, a municipality, a state enterprise or certain semi-state cooperatives, which also frequently provided housing for their workers. The law was in contradiction to a previous law from 1992, which had sought to prepare the ground for privatization by formally “re-nationalizing” the property of semi-state cooperatives in order to bring all property under state control. Nevertheless, this original law renationalized only that property which had originally been given to the cooperatives free of charge by the state. Anything that the cooperatives had built with their own resources (including apartment buildings) would continue to belong to the cooperatives, who were now viewed as essentially private enterprises. Yet, in course of developing its full-scale housing privatization policy in 1992-93 the government and parliament became increasingly concerned that because the number of such cooperative-built apartments was fairly large, their continued possession by the cooperatives and exclusion from the general state policy of housing privatization would deprive the tenants living in these apartments from the privileges of voucher-based privatization and instead subject them to market prices that the cooperatives would be able to charge for their ostensible private ownership of the apartments.

The idea to extend the scope of state control over these apartments thus arose from a fear of a socio-political tensions if this cooperative property was not re-nationalized. Yet, within a few months of this decision a former-Soviet retail agricultural cooperative, the ETKVL, refused to privatize some choice apartments it had built in downtown Tallinn, claiming that such state-imposed privatization terms constituted a violation of its property rights according to Article 32 of the Constitution.²⁷ In a case brought by some tenants living in the ETKVL apartments and against the cooperative’s ownership rights, the Tallinn City Court ruled that the ETKVL was indeed not obliged to privatize its apartments on general terms, but rather that if the state placed such demands upon it, it could demand just compensation for such expropriation of property.

After hearing the case in April 1995, the CRC sided with the lower court (and the ETKVL) and struck down the disputed provisions of the Housing Privatization Act. In its decision, the Chamber noted that,

To force one subject of private law to hand over its property to another subject of private law can not be considered [a legitimate] pursuit of public interest. (*Riigikohtu...*, 1995b:1405)

The ruling thus vindicated the ETKVL's position, while the state's scheme for housing privatization was dealt an important setback. For the ETKVL, it had successfully used the courts to reverse a political decision by the government and parliament, even though these institutions had sought to defend the broader interest of thousands of apartment tenants. In resolving the dispute, the CRC took a legal stance, denying the state's prerogative to freehandedly reorganize property relations despite the fact that just a few years beforehand all property had essentially belonged to the state. Moreover, the CRC was unmoved by arguments in favor of allowing property reform to be quick and decisive so that the country would have a faster transition to a market economy. On the contrary, it refused to allow the property rights of these cooperatives to be fudged, since such enterprises (and in particular the apartments they had built with their own resources) were now essentially private and therefore protected by the 1992 Constitution.

In response to its setback, the *Riigikogu* returned to the drawing board and in December 1995 adopted a new law mandating the same privatization of apartments, but this time offering cooperatives such as the ETKVL the chance to take the state privatization vouchers they were set to receive and use them to privatize in turn other land belonging to them. In this way, some sort of meaningful compensation would be offered to the enterprises involved, while also allowing for the privatization process to encompass the initially left-out tenants. The issue reflected a deep commitment on the part of several members of the *Riigikogu* to find a just solution to the privatization problem and to not be deterred by the CRC's earlier ruling. Yet, for the Legal Chancellor, who was now following the matter closely, the new law did not appear to solve the problem, and as result in June 1996 he launched his own appeal to the CRC, seeking the annulment of the new privatization amendments.

In his arguments, the Legal Chancellor repeated the points cited by the CRC in its previous ruling, as well as stressed the fact that the new compensation scheme still fell far short of the market value of these apartments and therefore was unjust. (*Riigikohtu...*, 1996b) In addition, the Legal Chancellor cited the European Convention on Human Rights and its provisions concerning the sanctity

of private property. Although Estonia in ratifying the ECHR had adopted certain reservations with regard to these particular property provisions (citing the need to enact necessary socio-economic reforms as part of the transition to a market economy), the Legal Chancellor argued that the Property Reform Foundations Act (and by implication all laws relating to property reform) had been left out of the specific laws Estonia had cited in connection with its treaty reservation and therefore Estonia was also bound by the ECHR in this case.

In resolving this second round of debate concerning housing privatization, the CRC was obliged to approach the issue from a different angle, since in this case the appeal came from the Legal Chancellor and was therefore an instance of abstract judicial review. This fact altered, in particular, the CRC's standpoint toward the Legal Chancellor's claim that the compensation being offered by the new privatization scheme was unjust. On the contrary, ruled the CRC, only the cooperatives themselves could contest through the regular courts the amount of compensation being offered. Abstract judicial review could not be used in this case. Moreover, the CRC noted the fact that since the *Riigikogu* had now tried twice to resolve this privatization question, there seemed to be a legitimate public interest at stake, which the Chamber was not in a position to dispute, especially under conditions of abstract review. As a result, the CRC backed away from challenging the *Riigikogu* again, and instead denied the Legal Chancellor's appeal.

International Treaties

Article 123 of Estonia's Constitution states that in cases where national legislation conflicts with international treaties duly ratified by parliament, the provisions of the international treaty shall apply. As a young state with few international commitments (and even less public awareness of such agreements), this provision was rarely raised in the CRC during its first several years. Still, in the few cases in which it did arise, controversy arose as to how its practical effect should be interpreted. In a major case from 1998, the Constitutional Review Chamber appeared in fact to overlook the relevance of certain international covenants binding on Estonia and instead privileged narrow domestic political imperatives.

One of the first CRC's references to Estonia's international treaty obligations was made in connection with President Meri's appeal of the Non-Profit Organizations Act in 1996. (*Riigikohtu...*, 1996a) In that decision, the CRC concurred with another of the President's arguments which stated that the restriction on the right to establish non-profit organizations to adults was also in violation of Article 15.1 of the UN Convention on the Rights of the Child, which

Estonia had ratified in 1992. In its ruling, the CRC made explicit reference to Article 123 of the Constitution as a further basis for its finding in favor of the President.

Similarly, the CRC was swayed by international arguments in a May 1998 decision concerning a government decree regulating the validity of seamen's passports for citizens and non-citizens. The government's decree differentiated between the two status categories by allowing citizen seamen full rights to enter and exit Estonia regardless of the national registry of the ship on which they were working, while non-citizen seamen would have this travel right only if they were working on an Estonian-registered vessel. The CRC, hearing the case on appeal from a lower court (which had in turn ruled on a specific case brought by a non-citizen seaman), ruled that the government's decree was in violation of Article 5 of the International Labor Organization's Convention No. 108, which governs the issuing of seamen's passports. (*Riigikohtu...*, 1998c) The Chamber again made specific reference to Article 123, while Chief Justice Rait Maruste submitted a concurrent opinion recalling Estonia's political decision to join the EU and the responsibility that this increasingly places on the country to respect *inter alia* the free movement of persons.

Yet, arguably the CRC faltered with regard to international law in February 1998 when it implicitly sanctioned the imposition of Estonian language requirements for candidates running in parliamentary and local government elections in contradiction to Article 25 of the International Covenant on Civil and Political Rights.²⁸ The measures were originally passed by parliament in November 1997 through amendments made to the Language Act. The amendments included two dimensions, the first concerning language requirements for electoral candidates, and the second mandating a tightening of Estonian language proficiency requirements for non-Estonian employees in both the public and private sectors. In vetoing the bill the first time around, President Meri cited two considerations. First, he argued that the language requirements for state- and private-sector employees had been worded too vaguely, that they therefore violated the Constitution's Article 11, which states that "Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted." In this respect, the President maintained that the ambiguously-worded language requirements would distort the right of individuals to non-discrimination in employment. Secondly, the President claimed that because the task of controlling an electoral candidate's knowledge of Estonian would according to the law be assigned to the executive branch (specifically the Minister of Education), this provision would constitute a serious violation of the separation of powers (Article 4 of the Constitution) since then the executive

would be able to harass these candidates later on if they were elected members of parliament.

Admittedly, the President, too, did not cite the ICCPR in arguing against the electoral language requirements nor did he invoke the supremacy of international treaties. Politically, it was easier for him to stress the legal technicalities, instead of seeming to defend minority Russian interests. However, for the Constitutional Review Chamber the situation appeared to be different, since it had by this time set a precedent of frequently adjudicating cases based on arguments not expressly raised by the applicants themselves. In this instance, therefore, the CRC could have argued persuasively that language requirements for electoral candidates run counter to the ICCPR's Article 25.²⁹ The argument behind this logic would have been that the democratic electoral process must be completely free and that voters must be allowed to choose whomever they wish to represent them without the pre-selection or restriction of candidates based on discriminatory rules (such as gender, education, property ownership, and also language). To be sure, an elected body can mandate just one language as its operating language. However, in this case the 'electoral market'—and not the state—must be the one to force candidates to know enough of the state language in order to be a credible candidate and do an effective job once in office.

In adopting its original law, the *Riigikogu* had clearly been motivated by nationalist desires to make sure that no non-Estonian-speaking person was elected to parliament or a local council, where he or she would not be able to perform their duties because of insufficient language skills. This was particularly the fear regarding municipalities in heavily-Russian northeast Estonia, since in local elections non-citizens have the right to vote (Article 156 of the Constitution) and in these municipalities Russian-speaking candidates were more likely to be elected. Admittedly, the Constitution's Article 6, which enshrines Estonian as the state language, also requires by implication that the local councils be run in Estonian (whatever their ethnic composition). However, if several of the council members were to turn out to be non-Estonian-speaking, then the councils would effectively become Russian-speaking and illegal. As a result, the sponsors of the bill in parliament (mostly from the nationalist Pro Patria party) were looking for a way to nip the non-Estonian-speaking candidate problem in the bud.

In its ruling, the CRC was ultimately swayed by these nationalist arguments, for although the CRC struck down the amendments to the Language Act, it did so precisely on the basis of legal-technical arguments, and indeed rejected most of the rights-based considerations. (*Riigikohtu...*, 1998a) In addition to recognizing the President's argument that allowing the executive branch to enforce the level of language knowledge of elected MPs would be a violation of

the separation of powers, the CRC also raised a second technical argument, which was that the restrictions had been incorrectly legislated. Namely, because the new requirements were a matter of electoral procedure, the CRC noted that such changes had to be legislated through the respective laws governing *Riigikogu* and local elections and not through the Language Act as such. What's more, these two electoral laws are among those acts required by Article 104 of the Constitution to be passed by an absolute majority of the parliament, which was not the case with amending the Language Act. Thus, the CRC stuck wholly to technical arguments.

Indeed, in responding to the rights-based issues, the CRC dismissed these, citing both the Constitution's Article 6 as well as, more interestingly, the Constitution's Preamble as justifying language requirements. In particular, the Preamble's fifth paragraph declares that the Estonian state shall be one which guarantees "the preservation of the Estonian nation and culture through the ages." For the justices of the CRC, this was an important principle, based on which the state had the right to take measures, which protect the Estonian language, to the extent that language is viewed as an essential element of Estonian nationhood. Moreover, the CRC attempted to link the issue to effective democracy by arguing that,

Article 1 of the Constitution declares that Estonia is a democratic republic. Democracy fulfills its objective only when it functions. One pre-condition for the functioning of democracy is that those individuals who exercise power understand wholly what is happening in Estonia and use in their dealings one [single] communicative system. Thus, in a representative democracy as well as in the business of the state the establishment in Estonia of a requirement to use Estonian language is in harmony with the public interest, as well as justified from the perspective of historical-derived circumstances. (*Riigikohtu...*, 1998a:409)

While this argument would seem entirely valid for requiring the use of Estonian in local council or *Riigikogu* business, it does not address in any way the issue of restricting candidate rights during elections themselves. In its ruling, the CRC left out any mention of the ICCPR and thus gave general sanction to official language enforcement measures beyond what international covenants allow.

Moreover, the CRC reiterated its stance in November 1998 after the issue came up again via a lower court and in relation to the specific case of a local government deputy. (*Riigikohtu...*, 1998f) This time the CRC struck down provisions of the original Language Act, which had established (in general terms) language requirements for local deputies as well as delegated the enforcement of

those requirements to the government.³⁰ The CRC again said that any language requirements had to be legislated via the local government electoral law and that such restrictions had to be specific. Admittedly, in this new ruling the CRC acknowledged the argument that any restrictions of rights have to comply with the Constitution's Article 11 on democratic norms. However, it also implied that the goal of protecting the Estonian nation and culture (as stated in the Constitution's Preamble) was an overriding concern and that language requirements had merely to avoid being too excessive. Ultimately, the *Riigikogu* did pass amendments to both electoral laws establishing language requirements for electoral candidates, and the laws were promulgated by President Meri despite protests from Russian community leaders. The Legal Chancellor was also opposed to challenging the laws.³¹

Future Prospects and Reform

In its first six years of operation, Estonia's constitutional review mechanism has served to lay down several important principles of constitutional procedure as well as political balance. Through appeals launched by the President, the Legal Chancellor as well as the lower courts, the Constitutional Review Chamber has had to deal with a wide range of issues relating to the separation of powers, the breach of powers, fundamental rights and freedoms, public policy making, and international treaties. In its rulings on these five issue-areas, the CRC has in particular taken a hard line in relation to 1) the requirement that rights and freedoms can only be restricted by law, and 2) that state institutions must not overstep their authority in adopting legal acts. Indeed, the numerous cases, which have emerged in these domains, would seem to attest to some of the growing pains of Estonian democracy as the parliament, government, individual ministers, and local governments all learn to play their roles and fulfill their constitutional responsibilities. While none of these cases could necessarily be characterized as monumental, each of them has contributed a stone to building up the constitutional edifice and its defense.

Still, the structure of this system (according to many observers and indeed in the opinion of justices of the CRC itself) is not yet complete. In April 1998 a new version of the Constitutional Review Court Procedure Act was drafted by lawyers linked to the CRC, in which a number of modifications were proposed. Over a year later, the draft was still being considered by the new Estonian government (elected in March 1999), however, many of the suggestions had been agreed. Among the more technical modifications, the draft spells out many specific procedures which have developed through practice, such as avoiding conflicts of interest among justices, issuing court writs, and suspending lower court cases while their appeals are being heard. More significant, however, are

the proposals to expand the circle of institutions eligible to submit appeals to the CRC as well as broaden the CRC's own powers to make judgments. The first issue concerns the extent to which the current system is too narrow to ensure adequate protection of constitutionalism and basic rights. Following practice in other countries, the draft law proposes giving the right to constitutional appeal also to

- 1) a majority of members in a local council as pertains to matters of local government rights and to disputes with central authorities;
- 2) to individual applicants in relation to legal acts which violate certain articles of the Constitution referring to fundamental rights and freedoms; and
- 3) to 21 members of the *Riigikogu* for the review of legislation passed but not yet promulgated by the President.

These amendments would radically enlarge the scope of the CRC's work and probably increase substantially its case-load. It would also open the door to politically-motivated challenges (especially from the *Riigikogu*), which could clog the CRC over time. At the same time, such cases would be important for allowing groups and interests in society to defend their rights fully and not be dependent on intermediary institutions (as the current system obliges). In particular, it would allow private individuals to challenge the constitutionality of acts affecting their rights in cases where the President and Legal Chancellor have decided not to contest these acts themselves. Under the current system, the only recourse left for an individual in such a situation would be to violate the law him- or herself in order to get it into the courts and argue the constitutionality issue there. Such a requirement, however, seems fundamentally undemocratic.

Additionally, the draft law proposes an expansion of the CRC's rights to issue rulings, namely the right to go beyond the points of law raised by an applicant's appeal "if this is necessary for the defense of fundamental rights and freedoms, legal order or the public interest." How such a prerogative would work in practice is left unspecified, however, it would appear to lift some of the straitjacket off of the CRC, while still insisting that the CRC in general be confined to the specific points of appeal. Moreover, in cases where the CRC finds a legal act to be constitutional, the draft law allows the chamber to issue a "legally binding interpretation of the Constitution" for the future application of the act.

While many of the proposed technical changes to the CRC's procedures can easily be adopted through amendment of the Constitutional Review Court Procedure Act, it is clear that the expansion of the right to appeal to other institutions and private individuals will require a change in the Constitution. In

1997-98, the Estonian government formed a commission to study possible amendments to the Constitution, given that the document was now over 5 years old. Although a number of proposals were drawn up, reforming the constitutional review mechanism was not among them. Indeed, by the end of 1999 none of the proposals had actually been taken up and their momentum as a whole appeared to have been lost.

Still, in getting at least the initial system to work, Estonia's current Constitutional Review Chamber has clearly contributed its share. It has proven the value of such mechanisms not only for constitutionalism, but also for democratic consolidation. For in such budding democracies, the powers and prerogatives of state institutions must be monitored, both to settle political disputes between institutions as well as to prevent the abuse of power. On many occasions in Estonia such controversies have been over legal-technical matters; however, the rulings that they have produced have had the ultimate effect of safeguarding the system as a whole. Both the danger of policy distortion as well as the narrow accessibility of the current review process remain issues to watch for the future. However, the initial practice of the Constitutional Review Chamber in Estonia has been both effective and promising.

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APPENDIX

Contingency	Rate of benefit (%) for standard beneficiary prescribed by the Code ¹	Respective percentage in Estonia
Sickness	45	60/65/80 ²
Unemployment	45	12.1 ³
Old age	40	40.0 ³
Employment injury		
<u>Incapacity to work</u>	50	100.0
<i>Invalidity</i>	50	38.4
<i>Survivors</i>	40	79.8
Family benefits	1.5 ⁴	114.7
Maternity	45	100.0
Invalidity	40	38.4
Survivors	40	79.8

Table 1. Levels of social security benefits in Estonia compared with the requirements of the European Code of Social Security.

Contingency	Standard of the Code on number of protected persons	Respective percentage in Estonia
Medical care	50 ⁵	97.5
Sickness	20 ⁶	43.0
Unemployment	50 ⁷	100.0
Old age	20 ⁶	43.0
Employment injury	50 ⁷	100.0

¹ Contracting Parties are free to choose whether this rate (percentage) relates to the previous earnings of the beneficiary (possibly subject to a ceiling) or to the wage of an adult male labourer or is determined according to a prescribed scale subject to a means-test.

² of the previous earnings of the beneficiary: 60% in case of in-patient treatment; 65% in case of sanatorium treatment; 80% in case of out-patient treatment.

³ of the wage of an ordinary adult male labourer.

⁴ Total value of all benefits shall represent 1.5% of the wage of an ordinary adult male labourer multiplied with the total number of children of all residents

⁵ Prescribed classes of residents constituting not less than 50% of all residents

⁶ Prescribed classes of economically active population constituting not less than 20% of all residents

⁷ Prescribed classes of employees constituting not less than 50% of all employees

<u>Incapacity to work</u>		
<i>Total loss of earning capacity</i>		
<i>Survivors</i>		
Family benefits	20 ⁶	100.0
Maternity	50 ⁷	100.0
Invalidity	20 ⁶	100.0
Survivors	20 ⁶	100.0

Table 2. Classes of protected persons in Estonia compared with the requirements of the European Code of Social Security.

	Total	Employee	Employer	Comments
Austria	40.4	17.2	23.2	The rates in case of workers; 39.3 (16.65e+22.65r) in case of employees
Belgium	39.68	13.07	26.61	Employers' rate is 24.92 % for smaller enterprises
Denmark				Flat rate contributions for employment pensions and unemployment benefits + work accident insurance premiums
Germany	40.2	20.1	20.1	+ work accident premiums by employers, varying with the risk
Greece	35.06	11.65	23.41	+ 4.6 % (2.2e+2.4r) in case of hard and risky work; + 13.8 % contribution by state
Finland	30.7	7.7	23.0	The rate for private sector; 34.35 % (and up) in the public sector
France	48.75	15.87	32.88	Incl. average contribution for work accident; + 0,55 % by employees in case of high wages
Ireland	16.25	7.75	8.5	+ 3.5 % by employer in case of high wages
Italy	55.54	10.19	45.35	The rates for industry; 50.9 % (10.19e+40.71r) in commerce; + work accident (0.5-16%)
Luxembourg	26.7	12.5	14.2	+ work accident premiums by employer (0.5-6%)
Netherlands	53.8	42.85	10.95	
Portugal	34.75	11.50	23.25	+ work accident premiums by employers
Spain	37.2	6.4	30.8	
Sweden	35.89	3.95	31.94	
UK	20.2	10.0	10.2	The rate on higher earnings; (2.0e+3r) in case of low earnings
Estonia	33	0	33	

Table 3. The rates of social contributions in the Member States and in Estonia.

Source: MISSOC 1996

References

- Brewer-Carías, Allan R. (1989), *Judicial Review in Comparative Law*, Cambridge: Cambridge University Press.
- Constitution of the Republic of Estonia (1996), published in *Estonian Legislation in Translation, Legal Acts of Estonia*, No. 1.
- Di Palma, Giuseppe (1990), *To Craft Democracies*, Berkeley: University of California Press.
- Elster, Jon and Rune Slagstad (1988), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press.
- Mainwaring, Scott, Guillermo O'Donnell, and J. Samuel Valenzuela (1992), *Issues in Democratic Consolidation*, Notre Dame: University of Notre Dame Press.
- Maruste, Rait and Heinrich Schneider (1998), "Constitutional Review in Estonia—Its Principal Scheme, Practice and Evaluation," in Rein Müllerson, Magosia Fitzmaurice and Mads Andenas, eds., *Constitutional Reform and International Law in Central and Eastern Europe*, The Hague: Kluwer Law International.
- McWhinney, Edward (1986), *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review*, Dordrecht: Martinus Nijhoff Publishers.
- Pettai, Vello (1993), "Estonia: Old Maps and New Roads," *Journal of Democracy*, vol. 4, no. 1 (January), pp. 81-90.
- (1997), "Estonia: Positive and Negative Institutional Engineering", Paper presented at international conference "Institutional Engineering in Eastern Europe", European University Institute, Florence, Italy, January 24-25.
- "Põhiseaduslikkuse järelevalve kohtumenetluse seadus," (1993) [The Constitutional Review Court Procedure Act], RT I, No. 25, Art. 435.
- "Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus," (1993a), RT I, 43, 636, 10 juuli.
- "Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus," (1993b), RT I, 59,

841, 8. september.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1993c), RT I, 61, 890, 24. september.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1993d), RT I, 72/73, 1052, 24. november.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1994a), RT I, 8, 129, 27. jaanuar.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1994b), RT I, 12, 229, 1 märts.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1994c), RT I

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1994d), RT I, 66, 1159, 7. oktoober.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1994e), RT I, 80, 1377, 15. november.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1994f), RT I, 80, 1378, 15. november.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1994g), RT I, 80, 1379, 15. november.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1995a), RT I, 9, 112, 24. jaanuar.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1995b), RT I, 42, 655, 27. aprill.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1996a), RT I, 35, 737, 27. mai.

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1996b), RT I, 87, 1558, 17. detsember

“Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1996c), RT I 1997, 4, 28, 10. jaanuar.

- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1996d), RT I 1997, 4, 29, 10. jaanuar.
- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1998a), RT I, 14, 230, 16. veebruar
- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1998b), RT I, 36/37, 558, 23 aprill
- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1998c), RT I, 49, 752, 3. juuni.
- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1998d), RT I, 58, 939, 1. juuli.
- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1998e), RT I, 86/87, 1434, 8. oktoober.
- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1998f), RT I, 98/99, 1618, 12. november
- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1998g), RT I, 104, 1742, 4. detsember.
- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1998h), RT I, 113/114, 1887, 30. detsember.
- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1999a), RT III, 9, 89, 25. märts.
- “Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus,” (1999b), RT III, 9, 90, 25. märts.
- Roosma, Peeter (1997), “Methods of Constitutional Interpretation in the System of Checks and Balances: Development and Practice of Constitutional Review in Estonia,” A Thesis on Comparative Constitutional Law, Legal Studies Department, Central European University.
- , (1998), “Constitutional Review under 1992 Constitution,” *Juridica International*, III, pp. 35-42.

---, (1999), "Protection of Fundamental Rights and Freedoms in Estonian Constitutional Jurisprudence," *Juridica International*, IV, 35-44.

Schneider, Heinrich (1998), "Relations Between State Bodies in Implementing Constitution," *Juridica International*, III, pp. 10-24.

Schwartz, Herman (1993), "The New East European Constitutional Courts," in A. E. Dick Howard, ed., *Constitution Making in Eastern Europe*, Washington, D.C.: The Woodrow Wilson Center Press.

Taagepera, Rein (1994), "Estonia's Constitutional Assembly, 1991-1992", *Journal of Baltic Studies*, vol. 25, no. 3 (Fall), pp. 211-232.

von Rauch, Georg (1974), *The Baltic States: The Years of Independence, Estonia, Latvia, Lithuania, 1917-1940*, New York: St. Martin's Press.

Endnotes

¹ “Conclusion”, Agenda 2000—Commission Opinion on Estonia’s Application for Membership of the European Union. Released 15 July 1997.

² *Ibid.*, Section I.1, “Functioning of the Judiciary”.

³ For similar categorizations, see Schneider (1998), Roosma (1999).

⁴ See, for example, Mainwaring, O’Donnell, and Valenzuela (1992), Di Palma (1990), Linz and Stepan (1996), but also even Elster and Slagstad (1988).

⁵ For background, see von Rauch (1974).

⁶ The proposal was to have the Supreme Court be the institution, which would promulgate all laws, and thereby serve as an instance of constitutional review over all legislation. However, this was dropped because of the obvious complexity such a system would entail. (Roosma, 1997:7-8)

⁷ The full 17-member Supreme Court can also hear constitutional review cases, if one member of the CRC requests it.

⁸ For more on the difference between diffuse and concentrated systems, see Brewer-Carias (1989), McWinney (1986), Schwartz (1993).

⁹ All English-language quotations of the Estonian Constitution are taken from the translation issued by the Estonian Translation and Legislative Support Centre (Constitution, 1996), which has been officially sanctioned for informational purposes.

¹⁰ *Õiguskantsleri seadus* (1999:§2).

¹¹ Interview, 3 September 1999, Tallinn.

¹² In recent years, many politicians have indeed used this provision in order to get an immediate opinion on particular political disputes. For example, in November 1999 opposition members of the Tallinn City Council called the legal chancellor by phone when controversy arose over procedural rules for electing a new mayor. The legal chancellor was obliged to give an initial opinion on the matter.

¹³ *Õiguskantsleri seadus* (1999:§16).

¹⁴ In addition, Estonia’s 15 county governors are also responsible for reviewing the legality of local government acts. See, for example, the case of Pühalepa township described in section 3.4. on public policy making.

¹⁵ Office of the Legal Chancellor.

¹⁶ For instance, in a November 1994 ruling nullifying a Tallinn City Council decision to begin booting illegally parked cars in the city, the CRC cited its own arguments concerning procedural violations by the Council, which were in addition to the Legal Chancellor’s arguments concerning property rights. See *Riigikohtu...* (1994e).

¹⁷ One 1998 appeal by the Legal Chancellor concerning a local municipality was submitted, but later withdrawn.

¹⁸ Meri was elected by the *Riigikogu* on October 7 after the first round of popular voting on September 20 did not yield an outright winner. See Pettai (1993).

¹⁹ For example, in the April 1998 case on procedures for according clemency, Justice Jüri Põld submitted an additional opinion, arguing that the parliament did not even have an automatic right to adopt a law on the issue, since the Constitution did not state that the president shall grant clemency on the basis of law. It simply says the president shall grant clemency. Thus, Põld argued it should be left completely to the president’s discretion. (*Riigikohtu...*, 1998b)

²⁰ In June 1998, the CRC declared unconstitutional (on the basis of a legal technicality) a government decree regulating the timber industry. In response to that ruling, Chief Justice Rait Maruste wrote a dissenting opinion, saying that the Chamber would have done well to repeat its earlier precedent of a delayed ruling in order to prevent immediate chaos in this active

sphere of the economy and to allow the government to fix its mistake. This seemed to make additional sense given the technical nature of the original fault, which lay in the fact that the government had adopted two separate decrees in December 1992 and in March 1995 without formal authority in law. Although in May 1995 the parliament had adopted new legislation granting the government the right to regulate these particular areas, it did not explicitly sanction or legalize the earlier decrees. As a result, the CRC ruled that the decrees remained formally unconstitutional. (*Riigikohtu...*, 1998d)

²¹This was the formal argumentation used in February 1998 to strike down initially the establishment of Estonian language requirements for candidates running in national and local elections. The requirements were said to be incorrectly legislated. Later, they were re-adopted via formal electoral law. See section "International Treaties" below.

²²See Chapter 2 of the Constitution (1996).

²³ Article 31: "Estonian citizens have the right to engage in enterprise and to form commercial undertakings and unions. Conditions and procedure for the exercise of this right may be provided by law."

²⁴ This was on top of Estonia's exclusionary 1992 citizenship law, which denied automatic citizenship to most Russians in the country because they were Soviet-era occupation immigrants and thus considered non-citizens.

²⁵ The President, obviously, can not touch local government decisions, as his powers pertain only to parliamentary acts.

²⁶ § 34: Everyone who is legally in Estonia has the right to freedom of movement and to choice of residence.

²⁷ § 32.1, "The property of every person is inviolable and equally protected. Property may be expropriated without the consent of the owner in the public interest, in the cases and pursuant to the procedure provided by law, and for fair and immediate compensation. Everyone whose property is expropriated without his or her consent has the right of recourse to the courts and to contest the expropriation, the compensation, or the amount thereof."

²⁸Estonia ratified the ICCPR on 21 January 1991.

²⁹ "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

1.To take part in the conduct of public affairs, directly or through freely chosen representatives;

2.To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

3.To have access, on general terms of equality, to public service in his country. "

³⁰ The reason for this additional case stemmed from the fact that in the previous appeal brought by the President only *amendments* to the Language Act were considered. In the Language Act itself, however, there were general provisions that the CRC also found unconstitutional, but could not consider because the original appeal by the President did not concern them. Indeed, since the Language Act was a law which had already been passed, objections to it could not even be appealed by the President, but only by the Legal Chancellor or via the lower courts. In this case, the Electoral Commission of Estonia had attempted to remove a Russian deputy from the town of Maardu for not knowing enough Estonian, but the district court ruled that the case's basis in the Language Act was unconstitutional.

³¹ Interview, 3 September 1999, Tallinn.



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