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4th Congress of the World Conference on Constitutional Justice

THE RULE OF LAW AND CONSTITUTIONAL JUSTICE

IN THE MODERN WORLD

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QUESTIONNAIRE

The 4th Congress of the World Conference on Constitutional Justice will be subdivided into five sessions. Four of them will deal with the main topic of the Congress, "The Rule of Law and Constitutional Justice in the Modern World" (Part A). A special session will be devoted to a stocktaking exercise on the independence of the members of the World Conference (Part B): Constitutional Courts, Councils, Chambers and Supreme Courts exercising constitutional justice (hereinafter all "Courts").

The Member Courts are kindly requested to reply to the questionnaire below by 30 November 2016 at the latest. The replies relating to the rule of law will be public, whereas the replies relating to the independence of the Courts will be available only to the Member Courts in the restricted Venice Forum.

A. The rule of law and constitutional justice in the modern world

Without attempting to give a definition, for the purpose of this questionnaire, rule of law shall refer to a state in which all persons, institutions and entities, public and private, including the state itself, are bound by and accountable to the law.

As a concept of universal validity, the rule of law is a characteristic of modern democratic legal systems. Even if some Member Courts of the World Conference on Constitutional Justice have very specific powers, they all ensure the supremacy of the Constitution, and thus they promote the rule of law.

The need for universal adherence to and implementation of the rule of law at both the national and international levels was endorsed by all Member States of the United Nations in the Outcome Document of the 2005 World Summit. In 2011, the United Nations published the Rule of Law Indicators and, in 2012, a high-level meeting of the General Assembly recognized that the rule of law applies to all states equally, and to international organizations.

At the regional level, the Inter-American Democratic Charter of the Organization of American States, the Constitutive Act of African Union and the Arab League refer to the rule of law. For the Council of Europe, the rule of law is one of the three principles which form the basis of all genuine democracy, together with individual freedom and political liberty.

While the scope of the rule of law is not always defined in the same manner in these instruments, the work of the Venice Commission may be able to provide some guidance for the 4th Congress and for the replies to this questionnaire.

Following its 2011 Report on the Rule of Law (CDL-AD(2011)003rev), the Venice Commission, in March 2016, adopted its detailed Rule of Law Checklist (CDL-AD(2016)007), which provides an overview of the wide scope of the rule of law, inter alia, covering legality (supremacy of the law, relationship between international law and domestic law, law-making procedures, law-making powers of the executive, emergency situations, private actors in charge of public tasks), legal certainty (accessibility of legislation and court decisions, foreseeability, stability and consistency, legitimate expectations, non-retroactivity, nulla poena sine lege, res judicata), prevention of abuse of powers, equality in and before the law and non-discrimination, access to justice (independence and impartiality of the judiciary and judges, fair trial, including effectiveness of judicial decisions, autonomy of the prosecution service). These topics can help in order to identify elements which are part of the rule of law, even when they are used without an explicit reference to this principle.

In your replies to the questions below, **please briefly present the case-law of your Court whenever applicable.**

I. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

The principle of the rule of law (that generally means the 'rule of law' for us) has been provided for in the Constitution of the Republic of Estonia (Constitution) (available in English: https://www.riigiteataia.ee/en/eli/521052015001/consolide). Subsections 3 (1) and (2) of the Constitution prescribe that governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith, and that generally recognised principles and rules of international law are an inseparable part of the Estonian legal system. According to § 4 of the Constitution, the activities of the *Riigikogu,* the President, the Government of the Republic and the courts are organised in accordance with the principles of separation and balance of powers. § 10 of the Constitution prescribes that the rights, freedoms and duties set out in the second chapter of the Constitution do not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and which are in conformity with the principles of human dignity, social justice and democratic government founded on the rule of law.

The Supreme Court is the highest court in the Republic of Estonia. The Supreme Court is also the constitutional review court. The Supreme Court has played a fundamental role in defining and providing substance to the rule of law. In its case-law, the Supreme Court has addressed the rule of law as one of the founding principles of the Constitution (judgment no. 3-4-1-17-08, p. 26, in English http://www.nc.ee/?id=1010; judgment no. 3-4-1-32-14, p. 28, not available in English; judgment no. 3-4-1-34-14, p. 33, not available in English). The founding principles of the Constitution form the core of the constitutional organisation of the Republic of Estonia and are the most important norms of the legal order (judgment no. 3-4-1-67-13, p. 49; not available in English).

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

The annotated edition of the Constitution has explained the rule of law applicable in Estonia as follows: "The concept of the rule of law has several meanings like most of the basic concepts of the organisation of state. The **formal and substantive** rule of law must be distinguished. The formal concept of the rule of law is divided into two. The rule of law in **a narrower formal sense** is a state of laws, i.e. a state that has legislation that is complied with. The rule of law in **a broader formal sense** is the organisation of state that, in addition to legislation that is complied with, has fundamental rights, separation of powers, independent courts and administration adhering to legislation. This concept overlaps with the concept of civil and liberal rule of law. The rule of law in **a substantive sense** presumes political and ideological value judgment. Within the framework of the concept of the substantive rule of law, the civil and liberal and the social rule of law can be differentiated. The **civil and liberal rule of law** is a state where the fundamental rights, separation of powers, independent courts and administration adhering to legislation constitute crucial values. The **social rule of law** is a state with the primary purpose of establishing social justice. /—/ The rule of law as a fundamental principle has a complicated structure. **The important substance** thereof **includes**:

1) limitation of governmental authority by individual freedom and the principle of proportionality arising therefrom,
2) separation of powers,

3) legal certainty,
4) lawfulness of administration, and
5) legal protection guaranteed by independent courts."

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

Chapter II of the Constitution, a part of which is also § 10 addressing the rule of law, primarily deals with relations between people and public authorities. The principle of the rule of law and subprinciples thereof have had a thorough and crucial effect on the judicial control of the legal order of Estonia that has regained its independence, e.g. in terms of **taxes and other public financial obligations**. In 1994 the Constitutional Review Chamber of the Supreme Court took the view in case no. **III-4/A-5/94** (in English http://www.nc.ee/?id=482) concerning the tax exemption applied to farm lands for five years, which was abolished by the legislator within that period, that "the validity of the principles of a state based on democracy, social justice and the rule of law means that in Estonia the general principles of law recognised within the European legal space are in force. Pursuant to the Preamble of the Constitution, the Estonian state is founded on liberty, justice and law. In a state founded on liberty, justice and law the general principles of law are in force." In case no. **3-4-1-27-13** (in English http://www.riigikohus.ee/?id=1495) concerning the rates of water abstraction charge and of charge for extraction of mineral resource reserves belonging to the state, the Constitutional Review Chamber repealed regulations that were established in conflict with the principle of legitimate expectation and infringed the freedom of entrepreneurial activity.

Thereafter the Supreme Court has also repeatedly addressed the principle of legal certainty arising from the rule of law, which in the most general sense should create certainty in regard to the current legal situation, **in matters concerning the ownership reform** (e.g. judgments in cases no. **3-4-1-6-98**, in English http://www.nc.ee/?id=459, which held that termination of payment of compensation for unlawfully expropriated property which was destroyed to persons who had already started to exercise their rights was in conflict with the principles of legal certainty and lawful expectation; no. **3-4-1-20-04**, in English http://www.nc.ee/?id=396, where the court considered the general *vacatio legis* of the amendment to the Dwelling Act and Principles of Ownership Reform Act sufficient; no. **3-4-1-16-05**, in English http://www.nc.ee/?id=581, which concerned the understandability of the transitional provision in the matter of the right of pre-emption upon transfer of structure as movable for charge). Within the framework of the ownership reform, the rule of law was also treated from the point of view of good administration and proportionality (judgment in case **3-4-1-1-03**, in English http://www.nc.ee/?id=418, which found that the requirement that it is always necessary to organise a new auction for the privatisation of free land if the results of an auction are not approved is not indispensable for the achievement of the objectives of privatisation of land by auction).

In matters of relations between local governments and the state the Supreme Court has also repeatedly referred to the principle of the rule of law and sub-principles thereof (e.g. judgments in case no. **3-4-1-17-08**, in English http://www.nc.ee/?id=1010, according to which a local government can invoke the principle of legal clarity as a part of the principle of a state based on the rule of law that gives rise to the principle of legal clarity that the legislator must consider when regulating the relations between local governments and the state; no. **3-4-1-7-09**, according to which the legislator must consider the principle of legal certainty that forms a part of the principle of a state based on the rule of law when regulating the relations between local governments and the state; no. **3-4-1-30-15** that found that arising from the principles of the democratic rule of law and unitary state, the legal framework of court proceedings must also apply to mayors or rural municipality mayors in a uniform manner and the criminal proceedings cannot be conducted depending on the discretion of a local government in granting a permission to exclude a mayor or rural municipality mayor from office).

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

The principle of the rule of law comprises several sub-principles - the general principles of law recognised at the international level, particularly within the European legal space. The Constitutional Review Chamber of the Supreme Court has mainly addressed the following as the substance of the principle of the rule of law:

- **the principle of legal certainty** (e.g. judgment in case no. **3-4-1-32-14**: the legal force of a court judgment guarantees legal certainty that forms an essential part of the rule of law that is one of the founding principles of the Constitution (§ 10 of the Constitution). Legal certainty protects the persistence of national decisions, guaranteeing that they cannot be arbitrarily changed on a retroactive basis, but only under reasoned exceptional circumstances; judgment in case **3-4-1-24-11:** § 10 of the Constitution gives rise to the rule of law that includes the principle of legal certainty. The principle of legal certainty, in turn, includes the principle of legitimate expectation and *vacatio legis;* judgment in case no. **3-4-1-7-09**: the legislator must consider the principle of a state based on the rule of law, a part of which is the principle of legal certainty, when regulating the relations between local governments and the state. Legal certainty demands, among other things, that the subjects of law could be certain of the standing of the enacted norms (principle of legitimate expectation); judgments in cases no. **3-4-1-33-05**, in English http://www.nc.ee/?id=583, and **3-4-1-16-05**, in English http://www.nc.ee/?id=581: § 10 of the Constitution gives rise to the principle of legal certainty. Legal certainty means the clarity as to the content of the valid norms (principle of legal clarity) as well as certainty as to the standing of the enacted norms (principle of legitimate expectation); judgment in case no. **3-4-1-20-04**, in English http://www.nc.ee/?id=396: the principle of legal certainty is based on § 10 of the Constitution. In the most general sense this principle should create certainty in regard to the current legal situation. Legal certainty means clarity in regard to the content of valid norms (principle of legal clarity) as well as certainty that the enforced norms shall remain in force (principle of legitimate expectation));
    - **the principle of legal clarity** (e.g. judgment in case no. **3-4-1-34-14**: legal clarity forms a part of the rule of law. Pursuant to the preamble of the Constitution the rule of law is one of the founding principles of the Estonian statehood; judgment in case **3-4-1-17-08**, in English http://www.nc.ee/?id=1010: legal clarity, i.e. the certainty about the content of valid law, constitutes one of the foundations of a state based on the rule of law. Pursuant to the preamble of the Constitution the principle of a state based on the rule of law is one of the founding principles of the Estonian statehood. A local government can invoke the principle of legal clarity as a part of the principle of a state based on the rule of law; judgment in case no. **3-4-1-33-05**, in English http://www.nc.ee/?id=583: pursuant to the principle of legal clarity a person must be able to predict with sufficient clarity the legal consequences of his or her acts. Besides, the principle of legal clarity constitutes a specification of the prohibition of arbitrariness of the state, established in § 13(2) of the Constitution; judgment in case no. **3-4-1-2-05**, in English http://www.nc.ee/?id=382: the principle of legal clarity arises from the requirement that a person must have a reasonable possibility to foresee the legal consequences in which his or her activity may result - a person must be able, on the basis of legal norms, to foresee the behaviour of public authority);
    - **the principle of legitimate expectation** (e.g. judgment in case no. **3-4-1-27-13**, in English http://www.riigikohus.ee/?id=1495: the principle of legitimate expectation is an important component of the principle of the state based on the rule of law; judgment in case no. **3-4-1-24-11**: the substantive scope of protection of the principle of legitimate expectation includes the reasonable expectation of a person that the rights granted to

and obligations imposed on him or her by the legal order shall remain stabile and shall not change dramatically in a direction unfavourable for him or her);

- **the *vacatio legis* principle** (e.g. judgment in case no. **3-4-1-27-13**, in English http://www.riigikohus.ee/?id=1495: the *vacatio legis* principle is not a part of the principle of legitimate expectation, although both of them are a part of the principle of legal certainty. The requirement arising from the *vacatio legis* principle is that, prior to entry into force of amendments, persons concerned must have sufficient time for examining the new legislation and taking it into account in their activities. Sufficient *vacatio legis* does not preclude, in itself, infringement or breach of legitimate expectation; judgment in case no. **3-4-1-20-04**, http://www.nc.ee/?id=396: under the principle of legal certainty, when creating a new legal order, the legislator must guarantee that the addressees of law have sufficient time for re-arranging their activities);
- **the *nullum crimen nulla poena sine lege (certa)* principle** (e.g. judgment in case no. **3-4-1-16-10**, in English http://www.riigikohus.ee/?id=1302: § 23(1) of the Constitution expresses the most important principle of the penal law of a state based on the rule of law which is *nullum crimen nulla poena sine lege* - an act cannot be considered an offence and a person cannot be punished for committing such an act if it does not constitute an offence under the law. From § 23(1) of the Constitution arises the requirement for specification applicable in penal law *(nullum crimen nulla poena sine lege certa).* According to that both the act for which the law prescribes a punishment and the punishment shall be clearly specified.)
- **the *ne bis in idem* principle** (e.g. judgment in case no. **3-4-1-10-04**, in English http://www.nc.ee/?id=399: the prohibition of repeated punishment is related to the principle of legal certainty, protecting a person from the arbitrariness of the state).

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

The concept of the rule of law has basically not changed very much over time. It may rather be said that the treatment of the principle of the rule of law and sub-principles covered by it has been modified and specified over time, depending on which part of the extensive content of the principle of the rule of law has been in need of unfolding in a specific court case. See also the reply to question no. 10 (Part A).

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

In drafting the Constitution passed in 1992, the former constitutions (1920, 1938) of the Republic of Estonia as well as international legislation, incl. the Convention for the Protection of Human Rights and Fundamental Freedoms, were followed. Subsection 3 (1) of the Constitution prescribes that generally recognised principles and rules of international law are an inseparable part of the Estonian legal system.

The Supreme Court has already explained in its earlier case-law that in democratic states the laws and general principles of law developed in the course of history are observed in law-making as well as in implementation of law, including in the administration of justice. The Supreme Court added that when creating the general principles of Estonian law the general principles of law developed by the institutions of the Council of Europe and the European Union should be taken into consideration alongside the Constitution (judgment no. III-4/A-5/94; in English http://www.nc.ee/?id=482).

The frequency of applying the case-law of the European Court of Human Rights (ECHR) in the decisions of the Supreme Court allows for recognition that the Convention and practice in the application thereof has found a firm place in the case-law of the Supreme Court. The Supreme Court has applied the case-law of the ECHR in interpreting the Constitution as well as laws. The Supreme Court has also relied on the case-law of the ECHR in declaring several provisions of law unconstitutional. In constitutional review cases, the Supreme Court has relied on or considered the case-law of the ECHR in addressing, for instance, the obligation to notify of a covert surveillance operation (judgment no. 3-4-1-42-13; in English http://www.riigikohus.ee/?id=1496) and fundamental rights of prisoners (e.g. the right to receive long-term visits: judgment no. 3-4-1-9-10, in English http://www.riigikohus.ee/?id=1298; the size of the floor area provided to a prisoner: judgment no. 3-4-1-9-14, not available in English; the prisoners' right to vote: judgment no. 3-4-1-215, in English http://www.riigikohus.ee/?id=1601).

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

No major threats to the application of the rule of law have been experienced.

During the economic recession there were court cases related to the issue that the state decreased the financial benefits promised earlier (public sector pensions) or increased charges to a greater extent than promised earlier (in the field of the environment). In the event of the foregoing cases, the violation of the principle of legitimate expectation (along with the relevant fundamental rights - the right of ownership, fundamental right of equality, freedom to conduct business) was primarily under consideration.

The Supreme Court had four constitutional disputes in connection with the decrease in public sector pensions. Two of them concerned the benefits related to the office of judges - the principles of recalculating the judge's old-age pension were changed (judgment no. 3-4-1-1-14, in English: http://www.riigikohus.ee/?id=1516) and the payment of the survivor's pension to a judge's family member was limited (judgment no. 3-4-1-21-15; not available in English). In both cases the Supreme Court declared the provisions under dispute unconstitutional and invalid.

The Supreme Court also declared the provisions related to the recalculation of pensions of police officers and Border Guard officials unconstitutional (judgment no. 3-4-1-18-14; not available in English), but dismissed the request for recalculation of pensions of the officials of the National Audit Office (judgment no. 3-4-1-1-15, in English: http://www.riigikohus.ee/?id=1597).
The Supreme Court declared the increase in environmental charges - at a higher rate than set out in the previous law - unconstitutional due to the violation of the principle of legitimate expectation (judgment no. 3-4-1-27-13, in English: http://www.riigikohus.ee/?id=1495).

Cases related to prejudicing the right of recourse to the court can also be considered related to the rule of law. In order to alleviate the financially complicated situation, the state considerably increased state fees charged for having recourse to the court. The Supreme Court found that the state fee rates were so high that they unconstitutionally hindered having recourse to the court. Since 2011 the Supreme Court has addressed the constitutionality of state fee rates 74 times and in most of the cases the provision under dispute has been declared unconstitutional and invalid (first important judgment no. 3-2-1-62-10; in English: http://www.riigikohus.ee/?id=1297).

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

International events have not had a significant effect on the interpretation and application of the rule of law in Estonia, either. Up to now, migration to Estonia has not been so extensive that it would cause a pressure to make any concessions in application of the requirements arising from the rule of law. It is also impossible to point out that, for instance, the growth of terrorism in the world has had any effect on the consideration of the rule of law in the Estonian criminal procedure law.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

In constitutional review cases the Supreme Court primarily reviews whether national norms comply with the Constitution. Thereby, in interpreting the Constitution the Supreme Court considers - if necessary and possible - international legal norms, particularly the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the ECHR in applying the latter, but also other international instruments (e.g. the European Social Charter, Convention on the Rights of the Child, etc.). (The compliance of the national law with the European Union Law is primarily reviewed by instance courts). As the Supreme Court interprets the Constitution on the basis of international legal norms (substantially incorporating international legal norms into the Estonian legal order), no major conflicts have arisen in this field. This approach is also supported by subsection 123 (1) of the Constitution, pursuant to which the Republic of Estonia may not enter into international treaties which are in conflict with the Constitution.

In a situation where the ECHR establishes in its decision that the Estonian state has violated the Convention, the Estonian legislation prescribes a mechanism for the execution of the decision of the ECHR. In such event a petition for review can be filed with the Supreme Court for a new hearing of the court case. No such situation has emerged where in the course of the review procedure a national norm has been declared unconstitutional.

One of the recent examples of how the Supreme Court has applied the case-law of the ECHR in evaluating the constitutionality is the judgment of the Supreme Court of 20 June 2014 in case no. 34-1-9-14 (not available in English) where the court assessed the compliance of the norm regulating the size of the personal space of a prisoner with the Constitution (prohibition provided for in § 18 of the Constitution to subject someone to torture or to cruel or degrading treatment or punishment).
The Supreme Court did not find that the floor area prescribed for a prisoner in the prison was in conflict with the Constitution of the Republic of Estonia or the Convention.

III. The law and the state

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

At present the Supreme Court does not have to deal very often with the questions of whether the state follows the basic requirements arising from the rule of law - consideration of the fundamental rights and the principle of proportionality (in connection with passing laws and functioning of administration), compliance with parliamentary reservation, guarantee of judicial control. The Supreme Court had to

address such questions particularly after the Republic of Estonia regained its independence and after the change in the legal order in the 1990s, when the Supreme Court was also re-established. However, the legal order has developed over time and the need for such decisions has gradually decreased.

The decisions of the Supreme Court have definitively played a crucial role in developing the dogmatics of fundamental rights and especially the principle of proportionality (the Constitutional Review Chamber of the Supreme Court mentioned the principle of proportionality for the first time in judgment no. 3-4-1-3-97 made in 1997; in English http://www.nc.ee/?id=465). The case-law of the Supreme Court has also been decisive in providing substance to the parliamentary reservation (i.e. a question about the extent to which the legislator may authorise the executive power to decide on the matters pertaining to fundamental rights) (see, for instance, case no. III-4/A-1/94 where the legislator had left the decision on the application of special measures of the police to be made by the security police officers, in English: http://www.nc.ee/?id=379; or judgment no. 3-4-1-29-13 where the legislator had authorised a judicial clerk to determine procedural expenses instead of a judge, in English: www.riigikohus.ee/?id=1499).

However, the Supreme Court has also had to adjudicate a matter on how much the parliament may assign its sovereignty when participating in the activities of international organisations (judgment no. 3-4-1-6-12, in English: http://www.riigikohus.ee/?id=1347).

11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

The Supreme Court is the highest court in the Estonian court system (the court of cassation consisting of three relevant chambers - Criminal, Civil and Administrative Law Chamber). As Estonia does not have a separate constitutional court, the Supreme Court also performs the duties of the constitutional review court.

The Constitutional Review Chamber of the Supreme Court adjudicates constitutional review cases if a case is brought by an ordinary court (a court of first instance or circuit court). The chairman of the Constitutional Review Chamber is the Chief Justice of the Supreme Court who shall appoint the other members from among the members of the Criminal, Civil and Administrative Law Chambers (under the principle of rotation). If a constitutional review case is brought by any (Criminal, Civil or Administrative Law) Chamber of the Supreme Court, the case is adjudicated by the Supreme Court *en banc.*
The constitutional review judgments are binding on the courts of lower instances, because after the adjudication of a constitutional matter in the Supreme Court, the participants in the proceedings can contest the decision of the court of lower instance and the final stage is the Supreme Court (in cassation proceedings). If the position of the court of lower instance is in conflict with the view taken in the constitutional review decision of the Supreme Court, the (relevant Chamber of the) Supreme Court can annul the judgment of the court of lower instance (due to the improper application of substantive law). At the same time, if the relevant Chamber of the Supreme Court wants to change an earlier view taken by the Supreme Court in the constitutional review case, the case will be referred to the Supreme Court *en banc*.

No considerable conflicts have arisen between the Supreme Court (as the constitutional court) and ordinary courts. As the Supreme Court is the court of cassation as well as the constitutional court, the conflicts between courts of higher instances are precluded as a result of the peculiarity of the Estonian court system.

12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).

The Supreme Court has made a significant contribution to the development of standards for law-making and for the application of law. From the law-making perspective, the explanations of the Supreme Court given in providing substance to parliamentary reservation, i.e. the principle of importance, the obligation to guarantee fundamental rights, the principle of equal treatment and the principle of proportionality have been the most important.

Pursuant to subsection 4 (1) of the Constitutional Review Court Procedure Act (available in English: - https://www.riigiteataja.ee/en/eli/521012014004/consolide), the Supreme Court shall, *inter alia,* verify the conformity of a refusal to issue a legislative act with the Constitution. Thus, for instance, the judgments of the Supreme Court concerning the state liability served as a basis for the development of the respective regulatory framework. Namely, the Supreme Court declared the following unconstitutional: 1) the failure to pass such legislation that would allow to pay a salary or other equivalent compensation to a judge whose service relationship is suspended for the duration of criminal proceedings (judgment no. 3-3-1-59-07; in English http://www.nc.ee/?id=1013); 2) the lack of a regulatory framework of compensation to a fair extent for lawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings (judgment no. 3-3-1-15-10; in English http://www.riigikohus.ee/?id=1357); and 3) the lack of a regulatory framework of compensation for unlawful proprietary damage caused by exclusion from office in pre-trial criminal proceedings (judgment no. 3-3-1-35-10, in English http://www.riigikohus.ee/?id=1356).

The case-law of the Supreme Court includes several examples of how the Supreme Court has given a signal to the legislator of the need to amend a legal norm, even if the unconstitutionality of the norm has not been established in a specific case. For instance, in verifying the constitutionality of the Notary Fees Act, the Supreme Court *en banc* drew the attention of the legislator to the fact that although the norm verified was in compliance with the Constitution in the case adjudicated, in another context the application of § 30 of the Notary Fees Act might not lead to a constitutional result and, thus, it is reasonable to amend the provision (judgment no. 3-2-1-169-12, p. 67; not available in English). When verifying the constitutionality of the Code of Enforcement Procedure, the Supreme Court *en banc* was of an opinion that the enforcement officer's right to impose a coercive payment on a parent who impedes enforcement in a case concerning access to a child is not unconstitutional. Thereby, the Court *en banc* drew attention to the fact that the procedure for the enforcement of a specific judicial decision that regulates a parent's access to a child as a whole has not been regulated clearly enough in the Code of Enforcement Procedure, due to which these provisions would need supplementation or amendment in order to ensure clear procedure for enforcement of a judicial decision that regulates a parent's access to a child and effective and fast enforcement of such a judicial decision (judgment 3-2-1-4-13, p. 55; in English http://www.riigikohus.ee/?id=1490).

See also the reply to question no. 10 (Part A).

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

The Supreme Court has verified whether the enforcement officer's right to impose a coercive payment on a parent who impedes enforcement in a case concerning access to a child is constitutional (judgment no. 3-2-1-4-13 of the Court *en banc*; in English http://www.riigikohus.ee/?id=1490).

The Supreme Court explained that an enforcement officer is a person in private law who performs public duties. Therefore, the binding obligation of the entire governmental authority to guarantee fundamental rights and freedoms also extends to an enforcement officer (§ 14 of the Constitution).

Under § 11 of the Constitution, rights and freedoms may only be circumscribed in accordance with the Constitution and the infringement of fundamental rights must be in compliance with the principle of proportionality. As a part of the public authority, an enforcement officer must in their activities take into account the Constitution and laws (p. 51 of the judgment).

The Supreme Court indicated that by transferring the function of enforcing judicial decisions to enforcement officers as persons in private law, the Legislature has extensively regulated, by the Enforcement Officers Act, the status and organisation of the work of the enforcement officer. An enforcement officer shall be impartial in the performance of professional activities and appear trustworthy to all persons for whose benefit or with regard to whom they take steps. An enforcement officer must follow the oath of office and also act in a dignified manner outside of their professional activities. The Enforcement Officers Act sets out the grounds for the professional activities of enforcement officers, the competence of the Ministry of Justice to exercise supervision over enforcement officers, and the procedure for disciplinary liability, as well as the procedure for remuneration of enforcement officers and the grounds for the activity of a common professional association of enforcement officers and bankruptcy trustees. The act establishes restrictions on enforcement officers related to their office, liability for damage wrongfully caused, compulsory professional liability insurance, an obligation of professional confidentiality and an obligation of professional development. The Enforcement Officers Act also regulates enforcement officers' appointment to office, incl. the verification of trustworthiness of applicants for the position of enforcement officer, release from office and suspension of authority.

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

The liability of public officials is guaranteed by law.

The Supreme Court has explained in a case of exclusion of a mayor from office for the time of the pre-trial proceedings that arising from the principles of the democratic rule of law and unitary state, the legal framework of court proceedings must also apply to mayors or rural municipality mayors in a uniform manner. The criminal proceedings cannot be conducted depending on the discretion of a local government in granting a permission to exclude a mayor or rural municipality mayor from office. Local governments do exist in the interests of the decentralisation of public authority and limitation and balancing of state powers, but on the basis of the Constitution they are not intended to be "a state within a state" (judgment no. 3-4-1-30-15, p. 29; not available in English).

In case no. 3-4-1-54-13 (in English http://www.riigikohus.ee/?id=1500) the Supreme Court reviewed on the basis of the request of the Chancellor of Justice whether it is in conflict with the Constitution that preliminary examination of taking the procedural steps set out in subsection 1 of § 377 of the Code of Criminal Procedure in respect of a member of the *Riigikogu* has been granted to the sole competence of the Chancellor of Justice. The Supreme Court also reviewed whether parliamentary privilege of a member of the *Riigikogu* is violated by the fact that the law does not provide for any preliminary examination by an impartial decision-maker of searches to be conducted on the premises of a member of the *Riigikogu.*

Pursuant to § 76 of the Constitution, a member of the *Riigikogu* enjoys parliamentary privilege. They may be prosecuted only on a proposal of the Chancellor of Justice and with the consent of a majority of the members of the *Riigikogu.* The Supreme Court clarified that the Constitution does not explain the substance of general parliamentary privilege in greater detail, leaving the Legislature with a wide, but not unlimited discretion when it comes to the issue of which coercive measures and according to which procedure may be imposed in respect of a member of the *Riigikogu.* On one hand, the first sentence of

§ 76 of the Constitution does not allow establishing parliamentary privilege of a member of the *Riigikogu* in so strict or inefficient terms that this would distort the nature of parliamentary privilege, leaving the core of the institute unprotected. On the other hand, the principles and fundamental rights of a state with democratic rule of law and state authority do not allow making members of the *Riigikogu* immune with the help of the institute of parliamentary privilege or granting them rights that disproportionately harm the public order or the rights and interests of other persons (p. 39 of the judgment).

The Chancellor of Justice was of the opinion that subsections 1, 3, 5 and 6 of § 377 of the Code of Criminal Procedure are unconstitutional to the extent that these provisions do not provide for the prior consent of an impartial decision-maker, who is independent of the Executive, for searching on the premises of a member of the *Riigikogu.* The Chancellor of Justice submitted that the conduct of a search may be one of the most effective means for harming the reputation of a political opponent and for influencing their activities therethrough. The Supreme Court did not agree to such an opinion of the Chancellor of Justice, but found that parliamentary privilege does not protect, at least in general, a member of the *Riigikogu* against harm to reputation. According to the Supreme Court, an opposite interpretation would make parliamentary privilege of a member of the *Riigikogu* too wide.

In summary, the Supreme Court held that the first sentence of § 76 of the Constitution does not impose any obligation on the Legislature to provide for a special procedure (preliminary examination by an impartial decision-maker) for all the searches conducted at sites related to a member of the *Riigikogu.* However, the Supreme Court added that taking into account the Legislature's wide discretion upon the provision of substance to parliamentary privilege of a member of the *Riigikogu,* it would not be unconstitutional if the law provided for an independent preliminary examination for searching at least some of the sites related to a member of the *Riigikogu.* The Supreme Court held that although the core of parliamentary privilege of a member of the *Riigikogu* does not cover protection against a search, a search may still affect the fulfilment of the functions of a member of the *Riigikogu* (p. 56 of the judgment).

IV. The law and the individual

15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.

Pursuant to § 15 of the Constitution, everyone is entitled to petition the court that hears his or her case to declare unconstitutional any law, other legislative instrument, administrative decision, or measure which is relevant in the case. The Constitutional Review Court Procedure Act does not provide for the possibility to lodge an individual complaint with the Supreme Court. Nevertheless, the Supreme Court *en banc* has, under exceptional circumstances, recognised in its case-law - arising from § 13, 14 and 15 of the Constitution - the right of a person of direct recourse to the Supreme Court in order to have their fundamental rights protected. However, this only applies if the person has no other effective possibility to exercise the right guaranteed under § 15 of the Constitution to have their rights protected by the court. Such a possibility is primarily absent if the state has failed to perform the obligation to establish proper court proceedings for the protection of fundamental rights, which would be fair and ensure the effective protection of the person's rights (see the judgment of the Supreme Court *en banc* of 17 March 2003 in case no. 3-1-3-10-02, p. 17; ruling of the Constitutional Review Chamber of 23 January 2014 in case no. 3-4-1-43-13, p. 9). Thus, the foregoing case-law of the Supreme Court also indicates that an individual complaint is not allowed if the person has had a possibility to protect their subjective rights in the course of the proper court proceedings established therefor (ruling no. 3-4-1-34-15 of the Constitutional Review Chamber of the Supreme Court of 19 April 2016, p. 26).

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

In the course of constitutional review proceedings the Supreme Court has addressed the matters of absence of the right of appeal, high state fee rates, procedural assistance and jurisdiction in connection with the fundamental right of access to courts.

In case no. 3-1-1-5-13, the Supreme Court *en banc* reviewed the constitutionality of the norm precluding the contestation of the ruling for the enforcement of the sentence of imprisonment substituted by community service. The Supreme Court explained that pursuant to subsection 24 (5) of the Constitution, in accordance with the procedure provided by law, everyone is entitled to appeal a judgment rendered in his or her case to a higher court. Subsection 24 (5) of the Constitution forms a part of the fundamental right to judicial protection, the objective of which is to ensure the review of a court decision in order to avoid errors and mistakes in court decisions. The Supreme Court took a view that the restriction on the right of appeal provided for in clause 385 26) of the Code of Criminal Procedure is not a proportional measure to achieve the efficiency of the court system and disproportionately infringes the fundamental right guaranteed by subsection 24 (5) of the Constitution. Taking into account the effect caused by the ruling for the enforcement of the sentence of imprisonment on the fundamental rights (incl. the fundamental right to liberty) of a convicted offender and the extensive discretion of a judge in charge of enforcement of the court judgment, a court of higher instance must have a possibility to review the correctness of the decision of the judge in charge of enforcement of the court judgment.

The Supreme Court *en banc* has clarified that the right to judicial protection and right of appeal are important fundamental rights and, in accordance with subsections 15 (1) and 24 (5) of the Constitution, these rights must be guaranteed for everyone and not only to persons who are able to participate in covering expenses. If the provision of procedural assistance is precluded, but the person actually does not have any funds to pay the state fee prescribed, the recourse to the court is not only aggravated, but the person has been completely deprived of such a possibility. As a consequence, the rights for the protection of which the person wants to have recourse to the court will not be protected, either. To ensure that the state fee is not killing the judicial protection, the procedural assistance shall preclude a situation where the rights of a person having recourse to the court with a hope of success will not be judicially protected only due to his or her financial situation (judgment no. 3-3-1-35-15, points 41-42; not available in English).

In case no. 3-4-1-31-15, the obligation of the applicant residing within the jurisdictional district of Tartu Administrative Court to file a complaint against the Social Insurance Board with Tallinn Administrative Court was contested. The Supreme Court explained in this case that the substantive scope of protection of the fundamental right of recourse to the courts under § 15 (1) of the Constitution covers all aspects of initiating judicial proceedings for protection of subjective rights the protection of which cannot be deduced from another fundamental right. *Inter alia,* the fundamental right of recourse to the courts under § 15 (1) of the Constitution, in combination with § 104 (2) clause 14 and § 148 of the Constitution, gives rise to the duty of the legislator to establish a judicial system that ensures access to the administration of justice for everyone without unreasonable effort. Norms of procedural law on jurisdiction restrict the opportunity of individuals to have recourse to a court of their choice, including the right to bring a complaint in the administrative court closest to their residence, and, thereby, interfere with the fundamental right guaranteed under § 15 (1) of the Constitution (judgment 3-4-1-31-15, p. 36; in English http://www.riigikohus.ee/?id=1640).

The Supreme Court has extensive case-law in the matter of constitutionality of the state fee rates. See the reply to question no. 7 (Part A).

17. Has your Court developed case-law on other individual rights related to the rule of law?

The Supreme Court assesses the adherence to the rule of law in all constitutional review cases concerning the protection of fundamental rights (different elements of the rule of law form a part of the review scheme of fundamental rights).

The Supreme Court *en banc* has, for example, addressed the rule of law in case no. **3-1-2-2-11** (in English: http://www.riigikohus.ee/?id=1346), where it was found that § 366 of the Code of Criminal Procedure infringes disproportionately the fundamental rights guaranteed in § 20(1) and in § 14 and § 15(1) of the Constitution to the extent it does not prescribe as a ground for review the entry into force of a judgment made in a general procedure whereby the lack of a criminal act is established if in the criminal matter under review imprisonment has been imposed on a person as punishment for participation in that criminal act by a judgment made in a general procedure. The lack of an option for review was considered as an appropriate and necessary measure for guaranteeing legal certainty arising from the rule of law, which would justify the infringement as a significant constitutional principle, but, at the same time, the **fundamental right to liberty** is one of the most significant fundamental rights and imprisonment infringes the fundamental right to liberty very intensely. Respect for and protection of fundamental rights and fair proceedings for the protection of one's rights (§§ 14 and 15 of the Constitution) are important constitutional values which also underlie the principle of a state based on the rule of law.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

This is possible because § 10 of the Constitution is the so-called development clause of fundamental rights, the main function of which is to demonstrate that fundamental rights are not stagnant and closed, but they are developing and open. This is a unique provision at the international level: it has a pretty laconic wording, mentioning only that other rights are not precluded. If other rights are not precluded, this means that the fundamental rights have not been exhaustively listed in the Constitution. Thereby, § 10 provides for the openness of the catalogue of fundamental rights. § 10 establishes two prerequisites for the fundamental right to be created: this must either arise from the spirit of the Constitution or be in conformity therewith.
However, it must be noted that the Constitution of the Republic of Estonia includes § 19 that provides for the general freedom of action. This provision is the so-called capturing right in a situation where the norm under dispute does not infringe the scope of protection of any specific fundamental right. However, the Supreme Court has sometimes made decisions where the infringement of fundamental rights is not treated (although this would be possible), but only the rule of law is addressed.

The situation is different if the dispute is substantially held between the state authorities and the level of the fundamental rights is not primary for the adjudication of the case.

In terms of significant decisions, where the Supreme Court has dealt with the rule of law without fundamental rights, the constitutional review of the Courts Act treating the general application of the rule of law can be mentioned from among the recent case-law. The question was who may administer justice and subsection 146 (1) of the Constitution was substantially considered as the specification of the rule of law (judgment no. 3-4-1-29-13 of the Supreme Court *en banc,* in English http://www.riigikohus.ee/?id=1499). In the case concerning the immunity of a member of the *Riigikogu,* the matter mainly focused on the principle of democracy (judgment no. 3-4-1-54-13 of the Constitutional Review Chamber of the Supreme Court, in English http://www.riigikohus.ee/?id=1500).

In the context of the European Union, the principle of a democratic state subject to the rule of law and

Estonia's sovereignty has been addressed in the case, in which the Supreme Court *en banc* dismissed the request of the Chancellor of Justice to declare Article 4(4) of the Treaty establishing the European Stability Mechanism to be in conflict with the Constitution. The Supreme Court found that the disputed article restricts the financial competence of the *Riigikogu,* the principle of a democratic state subject to the rule of law and Estonia's sovereignty, but the restriction is justified (judgment no. 3-4-1-6-12; in English: http://www.riigikohus.ee/?id=1347).