Constitutional judgment 3-4-1-3-06

OPINION
of the Constitutional review Chamber of the Supreme Court

ON THE INTERPRETATION OF THE CONSTITUTION

3-4-1-3-06

Introduction

1. On 12 September 2005 the draft Act Amending the Eesti Pank Act (720 SE), the objective of which was to enable the adoption of the euro – the single currency of the European Union – in Estonia, was introduced to the legislative proceeding of the Riigikogu. The draft Act provides for the withdrawal of Estonian currency from circulation when the Republic of Estonia becomes a full member of the economic and monetary union.

During the legislative proceeding of the draft Act the Riigikogu decided to avail itself of the right, arising from § 71 of the Constitutional Review Court Procedure Act (hereinafter "CRCPA"), to ask for the opinion of the Supreme Court on how to interpret the Constitution in conjunction with the European Union law, when the interpretation of the Constitution is decisive for the adoption of a draft Act necessary for the fulfilment of an obligation of a member of the European Union.

2. On 25 January 2006 the Riigikogu passed a resolution to request the opinion of the Supreme Court on the interpretation of § 111 of the Constitution of the Republic of Estonia (hereinafter "the Constitution") in conjunction with the Constitution of the Republic of Estonia Amendment Act (hereinafter "CAA") and the European Union law.

By its resolution of the Riigikogu is requesting the opinion of the Supreme Court on whether it would be possible, in conjunction with the Constitution of the Republic of Estonia Amendment Act and the European Union law, to interpret § 111 of the Constitution of the Republic of Estonia to the effect that:

(1) under the conditions of full membership of the economic and monetary union, Eesti Pank shall be the sole legal issuer of Estonian currency;

(2) under the conditions of full membership of the economic and monetary union Eesti Pank shall retain the right to issue the Estonian kroon.

The Riigikogu is of the opinion that it is of decisive importance for the adoption of the draft Act Amending the Eesti Pank Act (720 SE), which is in the legislative proceeding of the Riigikogu, to receive the opinion of the Supreme Court on the interpretation of § 111 of the Constitution in conjunction with the Constitution of the Republic of Estonia Amendment Act and the European Union law.

One of the obligations of a member of the European Union is the obligation established in Article 4 of the Accession Act and in Article 122(2) of the Treaty Establishing the European Community to adopt a single currency. Upon becoming a full member of the economic and monetary union the Estonian currency (kroon) will be withdrawn from circulation, and pursuant to Article 106(1) of the Treaty Establishing the European Community the European Central Bank shall have the exclusive right to authorise the issue of banknotes within the Community. At the same time § 111 of the Constitution establishes that the Eesti Pank has the sole right to issue Estonian currency, that Eesti Pank shall regulate currency circulation and shall uphold the stability of the national currency. § 2 of the Constitution of the Republic of Estonia Amendment Act establishes that as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty.

§ 2 of the draft Act Amending the Eesti Pank Act establishes the objective and functions of Eesti Pank under the conditions of full membership of the economic and monetary union, and § 13 establishes the regime for the issue of banknotes and coins.

3. The Supreme Court received the resolution of the Riigikogu of 25 January 2006 on 30 January 2006.

PERTINENT PROVISIONS

§ 111 of the Constitution of the Republic of Estonia reads as follows:
"The Bank of Estonia has the sole right to issue Estonian currency. The Bank of Estonia shall regulate currency circulation and shall uphold the stability of the national currency."

§ 2 of the Constitution of the Republic of Estonia Amendment Act reads as follows:
"As of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty."

The wording of the first reading of § 2 of the draft Act Amending the Eesti Pank Act (720 SE), which is in the legislative proceeding of the Riigikogu, is the following:

"Subsection 2 is amended and worded as follows:
§ 2. Objective and functions of Eesti Pank
(1) The primary objective of Eesti Pank is to maintain price stability. In accordance with the Treaty Establishing the European Community the Eesti Pank endorses the attainment of other objectives of economic policy.
(2) Eesti Pank has the following functions:
1) to support the definition of the monetary policy of the European Community and implement the monetary policy defined by the Governing Council of the European Central Bank;
2) to hold and manage the foreign currency reserves;
3) to promote the smooth operation of payment systems and the stability of the financial system;
4) to participate in the development of payment systems and the financial system;
5) to regulate currency circulation, to aid the issue of banknotes and to issue coins;
6) to compile the balance of payments of Estonia;
7) to collect and compile information necessary for the performance of its functions;
8) to fulfil other tasks provided by law which are not in conflict with the objectives established in subsection (1) of this section."."

§ 13 of the same draft Act reads as follows:

" The Act is amended by adding § 141 worded as follows:
"§ 141. Banknotes and coins
(1) Eesti Pank has the right to issue euro banknotes and coins with the authorisation of the European Central Bank.

(2) Eesti bank has the sole right to issue coins in the Republic of Estonia. The volume of the issue of euro coins shall be subject to prior approval by the European Central Bank.
(3) Mutilated or damaged euro banknotes and coins are accepted and exchanged by the Eesti Pank and credit institutions authorised by it pursuant to the procedure established by the legislation of the European Union. More specific rules for the handling of mutilated or damaged euro banknotes may be established by a regulation of the President of the Eesti Pank.”.”

Article 1 (1) and (2) of the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (Accession Treaty) reads as follows:

“1. The Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic hereby become members of the European Union and Parties to the Treaties on which the Union is founded as amended or supplemented.

2. The conditions of admission and the adjustments to the Treaties on which the Union is founded, entailed by such admission, are set out in the Act annexed to this Treaty. The provisions of that Act shall form an integral part of this Treaty.“

Article 4 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union (Accession Act) is founded reads as follows:

“Each of the new Member States shall participate in Economic and Monetary Union from the date of accession as a Member State with a derogation within the meaning of Article 122 of the EC Treaty.”

Article 106 of the Treaty Establishing the European Community reads as follows:

“1. The European Central Bank (ECB) shall have the exclusive right to authorise the issue of banknotes within the Community. The ECB and the national central banks may issue such notes. The banknotes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Community.

2. Member States may issue coins subject to approval by the ECB of the volume of the issue. The Council may, acting in accordance with the procedure referred to in Article 252 and after consulting the ECB, adopt measures to harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Community.”

Article 109 of the Treaty Establishing the European Community reads as follows:

“Each Member State shall ensure, at the latest at the date of the establishment of the ESCB, that its national legislation including the statutes of its national central bank is compatible with this Treaty and the Statute of the ESCB.”

Article 122 (1) to (3) of the Treaty Establishing the European Community reads as follows:

“1. If the decision has been taken to set the date in accordance with Article 121(3), the Council shall, on the basis of its recommendations referred to in Article 121(2), acting by a qualified majority on a recommendation from the Commission, decide whether any, and if so which, Member States shall have a derogation as defined in paragraph 3 of this Article. Such Member States shall in this Treaty be referred to as 'Member States with a derogation'.
If the Council has confirmed which Member States fulfil the necessary conditions for the adoption of a single currency, in accordance with Article 121(4), those Member States which do not fulfil the conditions shall have a derogation as defined in paragraph 3 of this Article. Such Member States shall in this Treaty be referred to as 'Member States with a derogation'.

2. At least once every two years, or at the request of a Member State with a derogation, the Commission and the ECB shall report to the Council in accordance with the procedure laid down in Article 121(1). After consulting the European Parliament and after discussion in the Council, meeting in the composition of the Heads of State or Government, the Council shall, acting by a qualified majority on a proposal from the Commission, decide which Member States with a derogation fulfil the necessary conditions on the basis of the criteria set out in Article 121(1), and abrogate the derogations of the Member States concerned.

3. A derogation referred to in paragraph 1 shall entail that the following Articles do not apply to the Member State concerned: Articles 104(9) and (11), 105(1), (2), (3) and (5), 106, 110, 111, and 112(2)(b). The exclusion of such a Member State and its national central bank from rights and obligations within the ESCB is laid down in Chapter IX of the Statute of the ESCB.”

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING

4. The Constitutional Committee and the Finance Committee of the Riigikogu as well as Eesti Pank are of the opinion that under the conditions of a full membership of the economic and monetary union, when interpreting § 111 of the Constitution in conjunction with the Constitution Amendment Act and the European Union law, the Eesti Pank shall not have the sole right to issue Estonian currency. Neither shall Eesti Pank retain the right to issue Estonian kroons under the conditions of full membership of the economic and monetary union.

The Constitutional Committee and the Finance Committee of the Riigikogu are of the opinion that the Constitution of the Republic of Estonia Amendment Act, together with the Constitution and the Constitution of the Republic of Estonia Implementation Act, form a system of constitutional acts, wherein the Constitution of the Republic of Estonia Amendment Act amends the Constitution in its entirety. If a provision of the Constitution does not enable to fulfil an obligation of a member of the European Union, the European Union law shall be complied with.

Eesti Pank is of the opinion that according to the principle of supremacy of the European Union law, incorporated into the constitutional acts by § 2 of the Constitution of the Republic of Estonia Amendment Act, § 111 of the Constitution will no longer be applicable as of the abrogation of the derogation of Estonia.

5. The Chancellor of Justice and the Minister of Justice are of the opinion that it is possible to interpret § 111 of the Constitution, in conjunction with the Constitution of the Republic of Estonia Amendment Act and the European Union law, to the effect that under the conditions of full membership of the economic and monetary union Eesti Pank will not have the sole right to issue Estonian currency. Neither can the possible right of Eesti Pank to issue the Estonian kroon be based on § 111 of the Constitution when under the conditions of full membership of the economic and monetary union.

While the Chancellor of Justice considers it possible to furnish the provisions of the Constitution with a new meaning, compatible with the European Union law, through interpretation, the Minister of Justice holds that depending on a constitutional provision it could either be interpreted in a manner conforming to the European Union law or the European Union law should be accorded priority and the constitutional provision

not be applied.

The Chancellor of Justice considers that the situation wherein the grammatical provision of the Constitution and the actual substance thereof have gown apart is a regrettable one. The best solution for ensuring the applicability of the Constitution, whereas proceeding from the principle of legal clarity, would be a Constitution wherein the amendments arising from the Accession Treaty and following from the transposition of European Union law were introduced to.

The Minister of Justice points out that § 2 of the Constitution of the Republic of Estonia Amendment Act excludes the possibility of a conflict between the Constitution and the European Union law, because as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty. Only a grammatical (formal) conflict is possible. Pursuant to the principles of supremacy and direct applicability of European Union law, proceeding from the case-law of the European Court of Justice, a provision of a national legislation, including that of a Constitution, which is in conflict with the European Union law, is not applicable. Nevertheless, the national provision not compatible with the European Union law shall remain in force.

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

6. The Riigikogu has posed two questions to the Supreme Court concerning the interpretation of § 111 of the Constitution in conjunction with the Constitution of the Republic of Estonia Amendment Act and the European Union law, holding that the issues are important for the adoption of the draft Act Amending the Eesti Pank Act. First, the Supreme Court shall assess the admissibility of the petition of the Riigikogu (I). Thereafter the Chamber shall examine the meaning of the Constitution of the Republic of Estonia Amendment Act (II), the questions of the Riigikogu in the order they were posed (III) and shall present its summary opinion (IV).

I.

7. § 71 of the Constitutional Review Court Procedure Act provides that the Riigikogu is entitled to petition the Supreme Court that it gave an opinion on the interpretation of the Constitution in conjunction with the European Union law, if the interpretation of the Constitution is decisive for the adoption of a draft Act necessary for the fulfilment of an obligation of a member of the European Union.

Next, the Chamber shall examine whether this draft Act amounts to one which is important for the fulfilment of the obligations of a member of the European Union and whether the interpretation of the Constitution in conjunction with the European Union law is decisive for the adoption of this draft.

8. In its resolution of 25 January 2006 the Riigikogu refers to §§ 2 and 13 of the draft Act Amending the Eesti Pank Act. § 2 of the draft Act sets out the objective and functions of the Eesti Pank under the conditions of full membership of the economic and monetary union, and § 13 establishes the regime for the issue of banknotes and coins. It appears from the explanatory letter to the draft Act that both provisions have been worded on the basis of the obligation of an European Union Member State to adopt, under the conditions of being a full member of the economic and monetary union, the single currency of the European Union – the euro. Thus, the first condition prescribed by § 71 of the CRCPA is fulfilled.

9. The Chamber is of the opinion that for the interpretation of the Constitution in conjunction with the European Union law to be of decisive importance for the adoption of a draft Act, the draft Act or a part thereof must be directly related to a constitutional provision or principle referred to by the Riigikogu. Also, the interpretation of the constitutional provision or principle, referred to by the Riigikogu, in conjunction with the Constitution of the Republic of Estonia Amendment Act and the European Union law must not be obvious. The Constitutional Review Chamber of the Supreme Court holds that it is justified to give the Riigikogu an opinion only in a situation where the meaning of a constitutional provision or principle, when

interpreted in conjunction with the Constitution of the Republic of Estonia Amendment Act and the European Union law, is unclear or disputable, thus rendering the legislative proceeding in the Riigikogu of a draft Act related thereto more difficult. When analysing the problem the Supreme Court shall confine itself to the limits necessary for answering the questions posed by the Riigikogu.

10. The resolution of the Riigikogu makes a reference to §§ 2 and 13 of the draft Act Amending the Eesti Pank Act. Yet, it is only § 13 o the draft that is directly related to the questions referred to the Supreme Court. Consequently, the Supreme Court shall deal only with the problems of the right to issue currency, arising from the fact that § 13 of the draft Act amends the Eesti Pank Act by adding § 141.

11. It is § 111 of the Constitution that regulates the right to issue currency, establishing that Eesti Pank has the sole right to issue Estonian currency. § 2 of the Constitution of the Republic of Estonia Amendment Act requires that as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty.

Pursuant to Article 1(2) of the Accession Treaty the conditions of admission of the Republic of Estonia and the adjustments to the Treaties on which the Union is founded, entailed by such admission, are set out in the Act annexed to the Treaty, which is an integral part of the Treaty. Pursuant to Article 4 of the Accession Act the Republic of Estonia shall participate in economic and monetary union from the date of accession as a Member State with a derogation within the meaning of Article 122 of the EC Treaty. Thus, pursuant to Article 122(3) of the Treaty Establishing the European Community, certain provisions of that Treaty shall not be applied in regard to the Republic of Estonia until it becomes a full member of the economic and monetary union, including Article 106, which establishes that the euro shall be the sole legal tender within the Community and provides for the exclusive right of the ECB to authorise the issue of banknotes. Pursuant to the same Article the ECB shall also approve the volume of the issue of coins.

It proceeds from Article 122(2) of the Treaty Establishing the European Community that the Republic of Estonia may become a full member of the economic and monetary union either on its own initiative or on that of the Council or the European Central Bank, if the state fulfils the necessary conditions for the adoption of the euro.

The draft Act under discussion relates to the rights and obligations of the Eesti Pank under the conditions where the Republic of Estonia is a full member of the economic and monetary union. Thus, the Supreme Court, too, shall have to analyse from the future perspective the situation which will arise when the derogation of Estonia is abrogated and the Republic will become a full member of the economic and monetary union.

12. When comparing the text of § 111 of the Constitution with that of Article 106 of the Treaty Establishing the European Community, the Supreme Court considers it possible that the consequences of interpreting these provisions in their conjunction according to § 2 of the CAA remained unclear for the Riigikogu. Consequently, the hearing of the petition of the Riigikogu is permissible under § 71 of the CRCPA.

II.

13. Before answering the questions of the Riigikogu the Chamber considers it necessary to clarify the implications of the adoption of the Constitution of the Republic of Estonia Amendment Act at a referendum for the Estonian constitutional order.

14. The Constitution was amended by a referendum of 14 September 2003, resorting to the model of constitutional amendment in which the amendments to the Constitution are enacted as separate constitutional acts and the provisions of the Constitution are not formally changed. At the same time the text of the Constitution must always be read with the amendments and only that part of the constitutional text shall be applied which is not in conflict with the amendments.

Thus, the Constitution of the Republic of Estonia must be read together with the Constitution of the Republic

of Estonia Amendment Act, applying only the part of the Constitution that is not amended by the CAA.

15. Pursuant to § 2 of the Constitution of the Republic of Estonia Amendment Act the Constitution applies taking account of the rights and obligations arising from the Accession Treaty. As a result of the adoption of the Constitution of the Republic of Estonia Amendment Act the European Union law became one of the grounds for the interpretation and application of the Constitution.

16. In the substantive sense this amounted to a material amendment of the entirety of the Constitution to the extent that it is not compatible with the European Union law. To find out, which part of the Constitution is applicable, it has to be interpreted in conjunction with the European Union law, which became binding for Estonia through the Accession Treaty. At that, only that part of the Constitution is applicable, which is in conformity with the European Union law or which regulates the relationships that are not regulated by the European Union law. The effect of those provisions of the Constitution that are not compatible with the European Union law and thus inapplicable, is suspended. This means that within the spheres ,which are within the exclusive competence of the European Union or where there is a shared competence with the European Union, the European Union law shall apply in the case of a conflict between Estonian legislation, including the Constitution, with the European Union law.

III.

17. The Riigikogu is requesting the opinion of the Supreme Court on whether it would be possible to interpret § 111 of the Constitution, in conjunction with the Constitution of the Republic of Estonia Amendment Act and the European Union law, to the effect that under the conditions of full membership of the economic and monetary union the Eesti Pank has the sole right to issue Estonian currency or the right to issue the Estonian kroon.

18. To answer the question of the Riigikogu its is necessary, according to § 2 of the CAA, to interpret § 111 of the Constitution in the conjunction thereof with pertinent European Union law (as related to a draft in the legislative proceeding with the aim of fulfilling an obligation of a member of the European Union), that is in conjunction with Article 106 of the Treaty Establishing the European Community. The Supreme Court is of the opinion that in addition to the referred Article also Article 109 of the Treaty Establishing the European Community is relevant, pursuant to which each Member State shall ensure, at the latest at the date of the establishment of the European System of Central Banks, that its national legislation including the statutes of its national central bank is compatible with this Treaty and the Statute of the ESCB.

As § 111 of the Constitution establishes the sole right of the Eesti Pank to issue Estonian currency, and according to Article 106 of the Treaty Establishing the European Community it is the European Central Bank that shall have the exclusive right to authorise the issue of the euro, which has the status of the only legal tender within the Community, it follows that § 111 of the Constitution is not compatible with the European Union law, which means that § 111 of the Constitution and the European Union law can not be applied simultaneously. Thus, proceeding from § 2 of the Constitution of the Republic of Estonia Amendment Act, § 111 of the Constitution shall not be applied and Article 106 of the Treaty establishing the European Community shall be observed. Thus, after the Republic of Estonia has become a full member of the economic and monetary union, the situation will be created where the Eesti Pank may issue euro banknotes with the authorisation of the European Central Bank and euro coins in the volume prescribed by the European Central Bank, whereas the euro shall be the sole legal tender on the territory of the Republic of Estonia.

The Chamber is of the opinion that the requirements of Article 109 of the Treaty Establishing the European Union are fulfilled, too, as the Constitution of the Republic of Estonia Amendment Act allows to read the Constitution in conformity with the European Union law.

IV.

19. On the basis of the above reasoning the answer of the Constitutional Review Chamber to both questions of the Riigikogu is in the negative.

The Constitutional Review Chamber of the Supreme Court is of the opinion that under the conditions of full membership of the economic and monetary union the Eesti Pank shall neither have the sole right to issue Estonian currency nor the right to issue the Estonian kroon.

Tartu, 11 May 2006

Märt Rask, Tõnu Anton, Eerik Kergandberg,
Hannes Kiris, Lea Kivi, Indrek Koolmeister,
Ants Kull, Villu Kõve, Jüri Põld

Dissenting opinion of Justice Villu Kõve

I maintain an opinion dissenting from the one given in the name of the Constitutional Review Chamber of the Supreme Court on the interpretation of § 111 of the Constitution of the Republic of Estonia, for the following reasons:

1. I fail to understand the significance and legal effect of such an opinion. The general principles of constitutional review and, thus, the so called review model, have been established in the Constitution itself. More specifically, it is first and foremost manifested in the obligation of the courts, arising from §§ 15 and 152 of the Constitution, to administer justice solely on the basis of legal acts which are in conformity with the Constitution, and in the right of the Supreme Court to declare invalid any legislation that is in conflict with the Constitution. The possibilities of initiating abstract norm control have also been provided for by the Constitution, inter alia, pursuant to § 107 of the Constitution as the right of the President of the Republic, and pursuant to § 142 of the Constitution as the right of the Chancellor of Justice. The Constitution does not provide for the so called preventive norm control of draft Acts before the adoption thereof by the Riigikogu. Consequently, in the present case, it would have been necessary at least to consider the issue of constitutionality of the amendments to the Constitutional Review Court Procedure Act, which entered into force on 23 December 2005. Furthermore, it remains unclear whether an opinion of the Supreme Court has, for example, a meaning that is binding to the Supreme Court itself, analogously with its judgments, and whether such an "opinion" shall exclude, for example, subsequent abstract or concrete norm control concerning the same matter.

2. When analysing the implications of § 2 of the Constitution of the Republic of Estonia Amendment Act (hereinafter "CAA"), the Chamber should have analysed also § 1 of the same Act, which refers to the accordance with the fundamental principles of the Constitution of the Republic of Estonia as a condition under which Estonia may belong to the European Union. For the time being, the relationship between §§ 1 and 2 of CCA as well as e.g. the meaning of Chapter I of the Constitution in its entirety, after accession to the European Union, remain unclear.

3. I hold that the Chamber "overestimated" the principle of supremacy of the European Union law over Estonian legal order when it found that as a result of the CAA the Constitution in its entirety has been changed and that that the Constitution continues to have an effect only to the extent that it regulates the issues not regulated by the European Union law or to the extent that it is in conformity with the European Union law. I agree that according to § 2 of CCA the Accession Treaty has priority upon application over the Constitution; what is problematic for me is how this priority is substantiated. In my opinion the Chamber has, unfoundedly, concluded that the requirement -- deriving from the case-law of the European Court of Justice -- that upon application the European Union law should have supremacy over a Member State law, amounts to the amendment of the Constitution. In the judgment of 19 April 2005 in constitutional review matter No 3-4-1-1-05 (RT III 2005, 13, 128, § 49) the general assembly of the Supreme Court has found that: "The European Union law has indeed supremacy over Estonian law, but taking into account the case-

law of the European Court of Justice, this means the supremacy upon application. The supremacy of application means that the national act which is in conflict with the European Union law should be set aside in a concrete dispute (see also joint cases C-10/97 until C-22/97, Ministero delle Finanze v IN.CO.GE.'90 [1998] ECR I-6307). Pursuant to Article 226 of the Treaty Establishing the European Community, the Commission, if it considers that a Member State has failed to fulfil an obligation under this Treaty, including not bringing national law into conformity with the European Union law, may bring the matter before the Court of Justice. This does not mean that such abstract review procedure over national law should exist on the national level." I argue that the Constitutional Review Chamber, when deriving from the principle of supremacy upon application in conjunction with CAA that the Constitution has been amended in its entirety, has treated the principle of supremacy upon application of the European Union law in a substantively much broader sense than the general assembly of the Supreme Court has done.

Neither does the case-law of the European Court of Justice require the unconditional application of all European Union legislation within a Member State. In its judgment of 30 March 2006 in civil matter No 3-2-1-4-06 (RT III 2006, 12, 118; §§ 30 and 58) the Supreme Court has referred to the case-law of the European Court of Justice, pursuant to which e.g. a directive can not impose obligations on citizens and in the case of a conflict between such a directive and a national law the directive can not be directly invoked (see judgment of the ECJ of 16 July 1998, C-255/96; Silhouette International Schmied CmbH & Co. KG v Hartlauer Handelsgesellschaft mbH (OJEC L 299, 26.09.1998, pp 9-10)). This is not affected even by the fact that state may be liable for the failure to transpose a directive (see e.g. judgment of the European Court of Justice of 19 November 1991 in joint cases C-6/90 and C-9/90; Andrea Francovich, Danila Bonifaci et all v Republic of Italy (ECR 1991, p 5357) and judgment of 14 July 1994, C-91/92; Paola Faccini Dori v REKLeb Srl (ECR 1994, p 3325)). A directive can be directly invoked only against a state (see e.g. judgment of the European Court of Justice of 26 February 1986, C-152/84; M. H. Marshall v Southampton And South West Hampshire Area Health Authority (Teaching) (ECR 1986, p 723)).

Villu Kõve

Dissenting opinion of justice Eerik Kergandberg

I maintain an opinion dissenting from the one given in the name of the Constitutional Review Chamber of the Supreme Court on the interpretation of § 111 of the Constitution of the Republic of Estonia, for the following reasons:

1. The Riigikogu has requested the opinion of the Supreme Court on the interpretation of § 111 of the Constitution of the Republic of Estonia ("the Constitution") in its conjunction with the Constitution of the Republic of Estonia Amendment Act ("CAA") and the European Union law. I am of the opinion that there is no ground, without a long and thorough justification, to argue that for the time being only the second section of the Act has a regulative effect and that the other sections thereof could or even should be discarded.

2. It is regrettable that the opinion of the Supreme Court contains no explanation as to why it has not considered necessary to include the provisions of § 1 of CAA into the analysis of constitutionality. I find that such an analysis, one related also to the fundamental principles of the Constitution of the Republic of Estonia, would have been imperative for the reason that the second part of the opinion has, in fact, tried to explain the actual implications of the adoption of the Constitution of the Republic of Estonia Amendment Act at a referendum for the entire Estonian constitutional order. Yet, this explanation is and will remain incomplete without taking a stand as to the present status of § 1 of CAA.

3. Finally, I share the procedural concern of my colleague Villu Kõve, expressed in the first paragraph of his dissenting opinion. Even if the concern proved unfounded, I am still of the opinion that bearing in mind the guiding nature of a Supreme Court opinion (one could not probably refer to a judges' opinion as a precedent) it would have been necessary to explain the legal meaning thereof and to take a stand as to the possible binding effect of opinions of the kind both on the legislator and the subsequent constitutional review practice.

Eerik Kergandberg
