

**Lessons Learnt During Crisis –
Limited Access to Justice and Unconstitutional Court Fees**

A speech on the 15th anniversary of the Constitutional Court of Latvia

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Esteemed President and Justices of the Constitutional Court of Latvia,
Ladies and Gentlemen,

It is my great honor to address you here in Riga.

First of all I want to congratulate the Constitutional Court of the Republic of Latvia on the 15th anniversary of your court and wish you, on behalf of the justices of the Supreme Court of Estonia, happiness and success in your work.

I wish to give you a short overview of the current situation in administration of justice in Estonia which forced the Chief Justice of the Supreme Court to voice in his annual speech before the parliament that the high state fees imposed in 2009 obstruct access to administration of justice. Virtually every court action begins with contestation of the constitutionality of state fees or with requests for state's procedural assistance.

In 2009 when the general economic crisis was at its peak, the Estonian legislator decided to significantly increase state fees. The average amount of state fees increased when the Code of Civil Procedure, which entered into force on **1 January 2009**, was amended. It is noteworthy that the initial draft act did not mention the amendment of state fees. It was only between the first and second reading that the increase of the rates of state fees was included in the draft act. No analysis was carried out to determine whether the rates of state fees under amendment are in conformity with the Constitution. Only a few members of the Riigikogu asked whether so high state fees ensure a person's right of recourse to the courts. Rein Lang, the Minister of Justice at the time colourfully described the pragmatic need to raise the fees "The conflict between wishes and reality exists also in the case of state fees. In 2009 the state fees were increased to make them cost-oriented, but also on pragmatic considerations to avoid extensive pay cuts and redundancies within the judicial system. Court proceedings are expensive because the judge's salary is high and everybody agrees that justice shall be administered in a dignified place and with proper work equipment. But someone has to pay for it. And the question is whether all taxpayers – including those who do not seek settlement of their civil disputes in court – have to pay or is it right to take the money from those who do?"¹ In other words, the fundamental right of recourse to the courts for the protection of rights was defeated by the need to guarantee a so-called self-financing court system.

Access to administration of justice is a fundamental right according to § 15 of the Constitution of the Republic of Estonia. Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms prescribes a right to a fair trial. Administration of justice may be however fair and just, but if it cannot be effectively accessed, the rights of persons are nonetheless unprotected.

¹ A speech by Rein Lang in the Court *en banc* in Pärnu in February 2011.

The too high rates of state fees as an obstruction upon having recourse to the courts has been addressed in many constitutional review decisions of the Supreme Court since 2009. At the beginning of the year 2011 the number of corresponding court cases increased substantially and as of today, several provisions of the State Fees Act and the Code of Civil Procedure have been declared to be in conflict with the Constitution.

Here are some examples.

Already in December 2009 the Constitutional Review Chamber of the Supreme Court declared the Code of Civil Procedure and the State Fees Act to be in conflict with the Constitution and invalid to the extent they prescribed an obligation to pay a state fee of approximately 4,793 euros (75,000 kroons) on an action for recognition of invalidity of a decision of the general meeting of a building association.² In its judgment of April 2011 the Supreme Court *en banc* declared unconstitutional and invalid the provisions of the State Fees Act to the extent they prescribed an obligation to pay for an appeal in a civil matter with the value exceeding 639,116 euros (10,000,000 kroons) a state fee of 3 per cent of the value of the civil matter but not more than 958,674 euros (1,500,000 kroons).³ In the said judgment the Supreme Court *en banc* emphasizes that the possible objective of court fees to earn additional income for the state and to finance other expenses of the state from it cannot be deemed legitimate. That is the case when the fee is higher than is necessary for ensuring procedural economy: in order to protect other participants in proceedings from "excessive" and "vexatious" appeals which could burden the courts with disputes to an unreasonable extent.

The principle that access to administration of justice may be restricted by proportional state fees where the procedural expenses are left for the parties to the litigation to bear is generally acknowledged in the European Judicial Area. The main objective of state fees is to cover expenses. The same objective has been repeated in the explanatory memorandums of all State Fees Acts. Cost-orientation is a general objective also in other countries but unfortunately no countries where associating state fees with costs of procedural acts would be covered by calculations were found in the course of a thorough comparative analysis prepared by analysts of the case-law of the Supreme Court. On the contrary, many international researches have come to the conclusion that charging fees often takes place based on rather random principles and it is unknown whether fee rates are associated with costs upon development of the rates. The same applies to Estonia.

When comparing the dynamics of the forming of court fees with other countries it must be noted that already in the year 2007 the state fees in Estonia were high and comparable to those countries whose level of fees is generally deemed high (Germany, Austria). In 2009 the rates of state fees were not raised in percentage but were multiplied, and we can state that the maximum amount of a state fee in Estonia and also the proportional level of fees regarding material claims are the highest in the European Union, forming ca. 12.3 per cent of the claim.

² The Constitutional Review Chamber judgment of 15 December 2009 in matter no. 3-4-1-25-09, available in English <http://www.riigikohus.ee/?id=823>. At the time the dispute was at issue, § 131(2) and (3) of the Code of Civil Procedure were applicable in a wording, pursuant to which in the case of an action for declaration of invalidity of a decision of a body of a legal person (save private limited company and public limited company) and for recognition of the invalidity of the decision, the value of the action was one tenth of the net assets of the legal person according to the last annual report, but not lower than 25,000 kroons and not higher than 1,000,000 kroons. At present, subsection 3 of the section referred to has been repealed and a uniform value of the action in the amount of 1,595 euros (25,000 kroons) is applicable to the said entities.

³ The Supreme Court *en banc* judgment of 12 April 2011 in matter no. 3-2-1-62-10 (Wipestrex v the Republic of Estonia). Available in English <http://www.riigikohus.ee/?id=823>

If the state fees applicable in Estonia are the highest in the European Union, then the court fees in Finland can be found at the bottom of the ranking, not to say in the last place. The average wages in Finland in 2010 were a little over 3,000 euros.⁴ The average wages in Estonia recently reached 800 euros.⁵ By comparing those figures it must be stated that having recourse to the courts in Estonia is a luxury, not exercise of a fundamental right.

To this date, the public and the legal community tend to think that high rates of state fees are in conformity with the Constitution and the principles of the rule of law as long as the Supreme Court has not declared unconstitutional a fee required in a specific court case. By autumn 2011 when the extremely high state fees have been applicable for two and a half years, the Supreme Court has done so repeatedly and the end of such judgments is nowhere at sight as long as the legislator fails to bring the rates of state fees into conformity with the Constitution. The situation is extraordinarily serious and it may have wide legal and social consequences. It must be noted that extremely high state fees have not decreased the number of persons having recourse to the courts but court proceedings have become significantly slower and more complicated.

For the comprehension of the seriousness of the subject I shall construct an example from the field of health care. Waiting lists would definitely become shorter or would disappear all together if we would impose, for instance, a fee in the amount of one thousand euros for a visit with a family physician. It can be guessed where and to who the state should in this case allocate money in a couple of years, but such obstruction of access to medical care by means of a visit fee would definitely not be constitutional nor in conformity with the principles of a social state arising from the Constitution. The situation with state fees is similar. In our rapidly changing and still developing legal order the state cannot risk that legal disputes are not settled in court due to high state fees or other circumstances obstructing access to administration of justice. Without the option to have recourse to the courts for the protection of rights, the "stronger" contracting parties, whether banks or service monopolies, will start to dominate under the conditions of freedom to contract. Without litigation, i.e. without judicial control we will establish a strong starting point for the creation of the "right of the strongest" which may not coincide with the intention of the legislator.

Standing in front of you today I cannot say when the parliament of Estonia will lower the rates of state fees. In its judgment of 12 April 2011 the Supreme Court has stressed that in order to prevent future disputes and normalise judicial procedural expenses, the legislator should, as soon as possible, generally and systematically lower the state fee rates. From the entry into force of the Constitution of Estonia in 1992 and placement of the constitutional review court competence on the Supreme Court, the legislator has unfoundedly immediately in the light of the Supreme Court judgment reviewed the regulatory frameworks which have been declared unconstitutional. It is unknown when the legislator will start to discuss the lowering of extremely high state fees because the state fees are the state budget's income items which are hard to waive in terms of fiscal policy.

Thank you for your attention and I wish you many meaningful discussions!

⁴ The average wages in Finland in the first quarter of 2011 were 3,073 euros, in 2010 they were 3,032 euros. http://www.stat.fi/til/ati/2011/01/ati_2011_01_2011-05-31_tau_012_en.html

⁵ According to the Statistics Estonia, the average gross wages in March 2011 were 843 euros. <http://www.stat.ee/pohinaitajad>