Constitutional Review in Estonia – a Model for 30 Years?[1]

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1. Constitutional adjudication in Estonia: brief historical and theoretical overview

Although constitutional review in a sense similar to Kelsen's did not exist before the 1992 Constitution of the Republic of Estonia[3] came into force, some elements of a right to a judicial review similar to the US judicial review model existed during the interwar period. The first, extremely democratic, constitution of 1920[4] did not contain any explicit provision of constitutional adjudication.

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[1] Most of the following topics are at least to some extent covered by earlier publications of the author. The corresponding publications are indicated in the beginning of each topic. However, the very precise individual references have been omitted for reasons of space and time.

All links in this article were accessed 31 August 2024.

[2] The author is grateful to Andra Laurand for valuable help in preparation of the article.

[3] Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia) (PS) of 28 June 1992 [RT (Riigi Teataja = State Gazette) 1992, 26, 349; I, 15.05.2015, 2] <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530122020003/consolide>. Estonian Constitution consists of three acts. PS, as the main act was adopted via a referendum on 28 June 1992 and came into force on the following day, as follows from §1(1) of the Eesti Vabariigi põhiseaduse rakendamise seadus (The Constitution of the Republic of Estonia Implementation Act) (PSRS), (RT I 1992, 26, 350) <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530102013012/consolide>. PSRS was adopted together with the PS by a referendum on the same day. On 1 May 2004, Estonia, together with nine other European countries, joined the European Union. Before accession, the PS was amended via a referendum on 14 September 2003. The Eesti Vabariigi põhiseaduse täiendamise seadus (The Constitution of the Republic of Estonia Amendment Act) (PSTS) was added to the Constitution (RT I 2003, 64, 429; 2007, 43, 313) <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530102013005/consolide>. This act provides that Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected and that when Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty.

[4] Eesti Vabariigi Põhiseadus (The Constitution of the Republic of Estonia) (PS 1920) of 15 June 1920 (RT 1920, 113/114, 243).

Instead, it contained a rather vague provision,[5] which then was interpreted by the Riigikohus (the Supreme Court)[6] as the basis for judicial review.[7]

The difficulty in providing an adequate overview of the historical development of constitutional adjudication can be traced back to the two fundamental theoretical counterpositions regarding the definition of constitutional adjudication, i.e., whether the Estonian system corresponds to a diffuse (i.e. decentralised or dispersed) or rather a concentrated (i.e., centralised) model.[8]

According to a recent approach,[9] the judicial review in Estonia can be dated back to the 11th of May 1926. The case in question concerned a decision of the Minister of the Interior concerning the law on the election of the county councils. With this decision, the minister annulled the electoral list of a certain voters' association in the county council elections of 1923 and, consequently, terminated the mandates in the county council members obtained by the candidates on that list. Kaarel Baars was an attorney, a member of the voters' association in question and a member of one of the county councils. Together with several other members of county councils who had faced similar fate, he challenged this decision in court. One of their central arguments was that the change made in the composition of the county councils was unconstitutional. The case reached the Riigikohus, who declared inter alia:

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[5] §86 PS 1920 reads: "The Constitution is a steadfast guide to the activities of the Parliament, the courts and the government."

[6] Riigikohus (Supreme Court or, translated literally, State Court) was from1919–1940, and is again since 1992, the highest court instance. Riigikohus was foreseen in §9(2) and (3) of the Eesti Vabariigi valitsemise ajutine kord (Provisional Rules of Government of the Republic of Estonia) of 4 June 1919 (RT 1919, 44, 91) (which were later replaced by PS 1920) and then established by the Riigikohtu seadus (Act of the Supreme Court) of 20 October 1919 (RT 1919, 82/83, 164). The Soviet occupation regime liquidated the Riigikohus with point No. 4 of the Eesti NSV ajutise Ülemnõukogu Presiidiumi seadlus kohtute süsteemi ümberkujundamise kohta (Decree of the Provisional Presidium of the Supreme Soviet of the Estonian SSR on the reorganisation of the court system) of 16 November 1940 [ENSV Teataja (= State Gazette of the Estonian SSR) 1940, 45, 523]. The decree was enforced in December 1940 and the activities of the Riigikohus were discontinued at the end of the year. Some of the judges were arrested, deported to Russia and later perished during their captivity.

[7] Cf. Uno Lõhmus, Hannes Vallikivi, Lisandusi põhiseaduslikkuse järelevalve sünniloole Eestis, Juridica 2020, pp. 451–464 (462). Unfortunately, Uno Lõhmus and Hannes Vallikivi confuse the constitutional review and judicial review.

[8] Vello Pettai, Estonia's Constitutional Review Mechanisms: A Guarantor of Democratic Consolidation? in *The Road to the European Union*, Vello Pettai, Jan Zielonka (eds.), vol. 2: Estonia, Latvia and Lithuania (Manchester, New York 2003) p. 79 and 101 fn. 13 with further references to these concepts. Cf. Allan R. Brewer-Carias, Judicial Review in Comparative Law (Cambridge 1989) pp. 131–135, 185–194. In the present article, the term 'judicial review' is used when we speak of the diffuse model, the term 'constitutional review' when we speak of the concentrated model, and the term 'constitutional adjudication' when both are covered.

[9] Marelle Leppik, Esimesi märke põhiseaduslikkuse kohtulikust järelevalvest: Riigikohtu praktika 1920. aasta põhiseaduse kehtimisajal, Juridica 2012, pp. 185–192; Uno Lõhmus, Hannes Vallikivi, Lisandusi põhiseaduslikkuse järelevalve sünniloole Eestis, Juridica 2020, pp. 451-464 (451 fn. 7).

The Estonian courts must act in accordance with §86 PS 1920, and according to this, every court in which the question is raised that a certain piece of legislation does not comply with the Constitution is entitled and obliged to give an answer to this question. In deciding the question whether an ordinary piece of legislation is in accordance with the Constitution, the court must act in the same manner as in deciding whether a mandatory regulation is in accordance with the legislation. If the court finds that the mandatory regulation is contrary to the legislation, it must disapply it, and the court must also disapply the piece of legislation if the court finds that it is contrary to the Constitution.[10]

According to the current state of research, this judgment can be considered the beginning of judicial review in Estonia. More precisely, this early development forms the historical background for the partially represented opinion in the legal literature, according to which the Estonian constitutional adjudication mechanism is even today similar to that of the pre-war system.[11]

The practice of judicial review described above did not last long. From 1934 onwards, the Estonian constitution became authoritarian [12] and democratic elements, including the judicial review, were either abolished or, little by little, vanished on their own.[13] In 1940–1941 and 1944–1991, Estonia, like Latvia and Lithuania, was occupied by the Soviet Union, and 1941–1944 by National Socialist Germany. During this period of more than 50 years, constitutional review did not exist.

The present court system stems from a pre-constitutional law that was adopted in the transitional period.[14] The new Courts Act was drawn up at the end

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[10] Judgment of the Administrative Law Chamber of the Riigikohus, 11 May 1926, Estonian National Archive, ERA.1356.2.1004 (the file is unpaginated); cf. judgment of the Administrative Law Chamber of the Riigikohus, 1 and 8 February 1927, Estonian National Archive, ERA.1356.2.1005 (the file is unpaginated).

[11] Märt Rask, Tänu põhiseadusele, Riigikogu Toimetised 15 (2007), p. 21. Märt Rask was 2004–2013 the Chief Justice of the Riigikohus.

[12] E.g. Rait Maruste, Heinrich Schneider, Constitutional Review in Estonia – Its Principal Scheme, Practice and Evaluation, in *Constitutional Reform and International Law in Central and Eastern Europe*, Rein Müllerson, Malgosia Fitzmaurice, Mads Andenas (eds.) (The Hague, London, Boston: Kluwer Law International, 1998) pp. 91–104 (93 ff.).

[13] In the *travaux préparatoires* of Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia) (PS 1938) (RT 1937, 71, 590) which entered into force on 1 January 1938, the different modi of constitutional adjudication were debated, cf. Uno Lõhmus, Põhiseaduslikkuse järelevalve küsimus 1937. aasta põhiseaduse koostamisel: võitlus põhiseaduskohtu loomise eest, Riigiõiguse aastaraamat 2 (2021), pp. 105–138. However, PS 1938 merely modified the authoritarian regime and constitutional adjudication had no place in the new power architecture.

[14] Priit Pikamäe, Ääremärkusi Eesti põhiseaduslikkuse järelevalve korralduse ja menetluse kujunemisele ja võimalikule edasisele arengule, Riigiõiguse aastaraamat 2021, pp. 139-170. Cf. the reform of the court system in

of the 1980s and passed by the Supreme Council in 1991 after the formal restoration of independence, but before the adoption of the new constitution in 1992.[15] The model of this newly invented court system was based on the pre-war model, influenced strongly by the Courts Code of 1938.[16] The constitutional review part has been simply added to that. At the Constitutional Assembly neither the court system nor the constitutional adjudication model was profoundly debated. However, Klaus Berchtold, the Austrian expert invited to the Constitutional Assembly, commented on the draft constitution and pointed out some issues connected to the originally planned system of judicial review: "And if I am correct […] all these courts have the competence to decide whether there has been an infringement of human rights or not. If that is correct, […] this is the point that should probably be discussed. If this is correct, you may face difficulties if there are a great number of courts which may decide on human rights. […] It might be asked whether the Riigikohus [will] be in a position to guarantee, so to say, a certain unity of jurisprudence. This is the point which should be reconsidered and I have not found clear indication in your draft whether these courts could be competent in human rights cases which arise out of activities of administrative authorities."[17] In this way, Klaus Berchtold touched upon the central problem of the judicial review model put forward by the 1926 judgment of Riigikohus and addressed the main issue that is inherent to the Estonian constitutional review model: the incompatible dichotomy of diffuse and concentrated elements of review.

The Constitution of 1992 re-established the Riigikohus in §148(1) No. 3[18] and §149(3)[19]. In particular §149(3), second sentence, and §152(2)[20] can be seen as clear expressions of a concentrated constitutional review model because they

general Katre Luhamaa, Merike Ristikivi, Rebuilding the Court System of Estonia after the Communist Regime, Juridica International 31 (2022), pp. 81–89 <https://doi.org/10.12697/JI.2022.31.05>.

[15] Kohtute seadus (Courts Act) of 23 October 1991 (RT 1991, 38, 472). The Courts Act of 1991 was replaced by the Kohtute seadus (Courts Act) (KS) of 19 June 2002 (RT I 2002, 64, 390; 04.01.2024, 4) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/527022024006/consolide>.

[16] Priit Pikamäe, Ääremärkusi Eesti põhiseaduslikkuse järelevalve korralduse ja menetluse kujunemisele ja võimalikule edasisele arengule, Riigiõiguse aastaraamat 2021, p. 141 f.

[17] Klaus Berchtold, 29 October 1991 in *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 323.

[18] "The court system shall consist of: […] 3) the Supreme Court."

[19] "The Supreme Court shall be the highest court in the state and shall review court decisions by way of cassation proceedings. The Supreme Court shall also be the court of constitutional review."

[20] "The Supreme Court shall declare invalid any law or other legal act that is in conflict with the letter and spirit of the Constitution."

constitute monopolised competence of the Riigikohus to invalidate a piece of legislation. This is the central characteristic of the concentrated review model. However, the prevailing theoretical understanding of the constitutional adjudication and constitutional interpretation have so far, at least partly, remained on the level of the pre-war case law of the Riigikohus.

Constitutional procedural law is provided for in more detail by the Constitutional Review Court Procedure Act (PSJKS). The first PSJKS of 1993 was rather brief and simply structured, having only 27 articles.[21] The first hearing of the Riigikohus in a constitutional review case took place on 27 May 1993. Riigikohus rendered its first constitutional review judgement on 22 June 1993. The PSJKS 1993 was replaced by the new PSJKS[22] in 2002, which is far more detailed.

2. Institutional framework, composition and appointment of judges of the Riigikohus

Riigikohus is the highest court in Estonia and unifies the functions of the final instance of civil, criminal, and administrative jurisdictions. But Riigikohus is a constitutional court, too. Constitutional provision,[23] which places the highest ordinary and administrative jurisdiction above constitutional jurisdiction, seems to express the secondary nature of the latter.[24] Such a combination of different functions has been described with good reasons as unique,[25] as one of a kind,[26]

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[21] Põhiseaduslikkuse järelevalve kohtumenetluse seadus (Constitutional Review Court Procedure Act) (PSJKS 1993) of 5 May 1993 (RT I 1993, 25, 435).

[22] Põhiseaduslikkuse järelevalve kohtumenetluse seadus (Constitutional Review Court Procedure Act) (PSJKS) of 13 March 2002 (RT I 2002, 29, 174; 07.03.2019, 4) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/512122019006/consolide>.

[23] §149(3) PS reads: "The Supreme Court is the highest court of Estonia which reviews rulings of other courts pursuant to a quashing procedure. The Supreme Court is also the court of constitutional review."

[24] This has been pointed out by Rait Maruste, Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves, Juridica 2020, p. 467.

[25] Rait Maruste, The Role of the Constitutional Court in Democratic Society, Juridica International 13 (2007), p. 12; Rait Maruste, Põhiseaduslikkuse kohtuliku järelevalve süsteem Eestis, in *Konstitutsioonikohtute organisatsioon ja tegevus*, H. Schneider (ed.) (Tartu 1995) p. 76; Priit Pikamäe, Ääremärkusi Eesti põhiseaduslikkuse järelevalve korralduse ja menetluse kujunemisele ja võimalikule edasisele arengule, Riigiõiguse aastaraamat 2 (2021), p. 167.

[26] Rait Maruste, in *Kohtute seadus*, Kommenteeritud väljaanne, Priit Pikamäe (ed.) (Tallinn 2018) §26 rec. 18; Rait Maruste, Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves, Juridica 2020, p. 467.

as exceptional,[27] as peculiar[28] or as an entirely unknown and untested institutional configuration.[29]

In line with the fact that Estonia is a small state, Riigikohus consists of only 19 judges.[30] The Administrative, Criminal and Civil Chambers are permanent chambers and 18 of the 19 judges are assigned to these chambers. Only the Chief Justice[31] of the Riigikohus is not assigned to any of these chambers.

The key elements of the appointment proceedings of the judges are provided for in the Constitution. Pursuant to the Constitution, the Chief Justice of the Riigikohus is appointed to office by the Parliament on a proposal of the President of the Republic.[32] His term, according to the Courts Act, is nine years,[33] but as an appointed judge and having not yet reached the maximum age of office for judges, he has the right to remain a member of the Riigikohus after the end of his term of office as the Chief Justice until he resigns or reaches the general maximum age of office for judges.[34]

The other 18 judges of the Riigikohus are appointed to office by the Parliament on a proposal of the Chief Justice of the Riigikohus.[35] In the selection process, the opinion of the Council for the Administration of the Courts must be heard[36] but the Chief Justice is not bound by the opinion. Although Parliament makes the final decision, it can only accept or reject the candidate put forward by the Chief Justice. Recruitment is therefore primarily the responsibility of the Chief Justice, who increasingly involves presiding judges of the permanent chambers and even all judges of the Supreme Court in the decision-making process.

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[27] Märt Rask, Tänu põhiseadusele, Riigikogu Toimetised 15 (2007), p. 21.

[28] Sergio Bartole, Konstitutsioonikohtu reform Eestis, 1997, p. 3 f. <https://www.just.ee/media/1095/download>; Märt Rask, Opening speech at the International Research Conference on the 15th Anniversary of the Constitution, Juridica International 13 (2007), p 2.

[29] Vello Pettai, Estonia's Constitutional Review Mechanisms: A Guarantor of Democratic Consolidation? in *The Road to the European Union*, Vello Pettai, Jan Zielonka (eds.), vol. 2: Estonia, Latvia and Lithuania (Manchester, New York 2003), p. 83.

[30] §25(3) KS.

[31] "Chief Justice" is the term used in the official translation of the Constitution <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530122020003/consolide>. An alternative and perhaps more precise translation would be "President of the Supreme Court".

[32] §150(1), §65 No. 7 and §78 No. 11 PS.

[33] §27(1) KS.

[34] §27(8) KS.

[35] §150(2) and §65 No. 8 of the Constitution.

[36] §41(3) No. 1 KS.

The power of constitutional review is exercised either by the Constitutional Review Chamber or, alternatively, by the Riigikohus *en banc*. The Riigikohus *en banc* is composed of all judges of the Riigikohus, i.e., of 19 judges,[37] and is chaired by the Chief Justice.[38] The Constitutional Review Chamber of the Riigikohus comprises of nine judges of the Riigikohus.[39] The Chief Justice of the Riigikohus shall chair the Constitutional Review Chamber[40] and is its only permanent member. Other members of the Constitutional Review Chamber shall be appointed by the Riigikohus *en banc* for four years, taking into consideration the opinion of the Administrative, Criminal and Civil Chambers, and having regard to the most equal possible representation of the permanent chambers in the Constitutional Review Chamber. Specialisation in constitutional law is not necessary. Thus, the Constitutional Review Chamber, unlike other chambers, is an *ad hoc* chamber on the basis of voluntary membership and with a regular term of four years. In a sense, it somewhat resembles a task force rather than a chamber in the proper sense.

Since there is no legal obligation for any judge of the Riigikohus to join the Constitutional Review Chamber and the work performed there is in addition to the main task of working in one of the permanent chambers, membership of the Constitutional Review Chamber must not necessarily rotate among all the judges of the Riigikohus. Therefore, presupposing that after the ending of the four-year term no other member of the home chamber is interested, the appointment to the Constitutional Review Chamber may be renewed.

To sum up, in Estonia, the sole difference between the highest ordinary and administrative judges and the constitutional judges is that the former have just volunteered for the Constitutional Review Chamber and were accepted for this task by their colleagues. This institutional framework reflects the secondary nature of constitutional review function in the Constitution. Although most cases of constitutional review will be decided by the Constitutional Review Chamber, the case is occasionally referred to the Riigikohus *en banc*. In these individual cases, all highest ordinary and administrative judges become constitutional judges on an

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[37] §30(1) and §25(3) KS.

[38] §30(3)1 KS.

[39] §29(1) and (2) KS.

[40] The last sentence of point 32 of the Internal Rules of the Riigikohus <https://www.riigikohus.ee/sites/default/files/elfinder/dokumendid/kodukord/Riigikohtu_kodukord_08-02-2022.pdf>. The internal rules of the Riigikohus are passed by the Riigikohus *en banc*, cf. §33(1) KS.

ad hoc basis. Again, this clearly expresses the secondary nature of constitutional adjudication.

3. *Where does the competence for constitutional review lie?*

a. Powers of the Riigikohus

The key norms that define the constitutional review powers of the Riigikohus are §149(3)2 of the Constitution, according to which the Riigikohus shall "also" be the court of constitutional review, and §152(2), which states that the Riigikohus shall declare invalid any law or other legal act that is in conflict with the letter and spirit of the Constitution.[41] According to the Constitution, the invalidation competence, that is constituted by the latter provision, lies exclusively with the Riigikohus. This is a clear constitutional indication in favour of the concentrated constitutional review model (please see above).

Inside the Riigikohus, the power of constitutional review is exercised either by the Constitutional Review Chamber or, alternatively, by the Riigikohus *en banc*.[42] As a rule, the proceedings are conducted before the Constitutional Review Chamber, which usually sits as a five-member panel.[43] The Constitutional Review Chamber decides by far the most constitutional review cases.

The Riigikohus *en banc* has two different kinds of competencies: jurisdiction-related and those not related to the jurisdiction. The latter catalogue

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[41] A few other constitutional articles give the Riigikohus a competence that is by nature a competence of the constitutional court. §64(2) No. 4 PS: "The mandate of a member of the Riigikogu shall terminate prematurely: […] 4) if the Riigikohus decides that he or she is permanently incapable of performing his or her duties […]"; §83(1) PS: "If the President of the Republic is permanently incapable of performing his or her duties as decided by the Riigikohus, or if he or she is temporarily unable to perform them in the cases specified by a law, or if his or her mandate has terminated prematurely, his or her duties shall temporarily transfer to the President of the Parliament."; §83(3) PS: "The President of the Parliament, acting as President of the Republic, shall not have the right, without the consent of the Riigikohus, to declare extraordinary elections to the Parliament or to refuse to promulgate laws."; §107(2) PS: "The President of the Republic may refrain from promulgating a law adopted by the Parliament and, within fourteen days after its receipt, return the law, together with his or her reasoned decision, to the Parliament for a new debate and decision. If the Parliament adopts the law which is returned to it by the President of the Republic again, unamended, the President of the Republic shall promulgate the law or shall propose to the Riigikohus to declare the law unconstitutional. If the Riigikohus declares the law to be in conformity with the Constitution, the President of the Republic shall promulgate the law." The meaning of the concept 'permanent capability' that occurs regarding members of Parliament and the President of the Republic is a bit unclear, especially with regard to the question of whether it can also refer to impeachment proceedings or whether it merely refers to the physical and mental abilities of the person concerned. The biggest legal riddle, however, is §83(3) PS, because it is not clear either from the wording or from the legislative history whether, as the wording seems to suggest, this also gives the Riigikohus the power of advisability examination or whether, which would be preferable, the review is merely to be limited to questions of law and, if so, to which ones.

[42] §3(1) PSJKS.

[43] §3(2) and (2^1) PSJKS. Electoral complaints are heard by a panel of three judges; in exceptional cases, the chamber may sit in a larger composition.

consists of competencies such as making a proposal to the President to appoint a judge to office or release a judge from office.[44] These cases are administrative activities to which administrative procedural law, not procedural law, is applicable. As far as jurisdiction-related powers are concerned, a case can come before the Riigikohus *en banc* in three different ways. First, there are special exclusive constitutional review competencies of the Riigikohus *en banc* that involve proceedings in order to declare a member of Parliament, the President of the Republic, the Chancellor of Justice or the Auditor General permanently incapable of performing their duties, to terminate the mandate of a member of the Parliament or to terminate the activities of a political party.[45] Second, a matter of constitutional review that was initially supposed to be heard by the Constitutional Review Chamber may be referred by the latter to the Riigikohus *en banc* because the chamber deems it necessary that the case be disposed of by the Riigikohus *en banc*.[46] The third possibility is that a permanent chamber, which actually has jurisdiction over the case, deems it necessary to refer the case to the Riigikohus *en banc*. In this case, there are again two options.

First, the permanent chamber may refer a question of constitutional review, i.e., a question of the constitutionality of a legislative act, to the Riigikohus *en banc*.[47] The precondition of such a reference is that the permanent chamber (or a special panel) holds a legislative act or omission to adopt such an act, which is relevant to the adjudication of the concrete case, for the status of being contrary to the Constitution. The second option is that the majority of the permanent chamber adopts a position that differs from a legal principle or opinion concerning the application of a law that the Riigikohus *en banc* has hitherto recognised, or in the view of the majority of the permanent chamber, disposition of the case by the Riigikohus *en banc* is important from the point of view of uniform application of

[44] §30(2) No. 2, 5 and 6 KS.

[45] §3(4) and §25 to §36 PSJKS.

[46] §3(3)1 PSJKS.

[47] §3(3)2 PSJKS, cf. §228(1) No. 3 of the halduskohtumenetluse seadustik (Code of Administrative Court Procedure) (HKMS) of 27 January 2011 (RT I, 23.02.2011, 3; 06.07.2023, 30) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/520122023003/consolide>, §19(4) No. 3 of the tsiviilkohtumenetluse seadustik (Code of Civil Procedure) (TsMS) of 20 April 2005 (RT I 2005, 26, 197; 22.03.2024, 8) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/529052024002/consolide>, §356 No. 3 of the kriminaalmenetluse seadustik (Code of Criminal Procedure) (KrMS) of 12 February 2003 (RT I 2003, 27, 166; 21.06.2024, 34) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/504072024003/consolide> and §169(2) of the väärteomenetluse seadustik (Code of Misdemeanour Procedure) (VTMS) of 22 May 2002 (RT I 2002, 50, 313; 22.03.2024, 11) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/515042024001/consolide>.

the law,[48] and the question of constitutional review arises during the proceedings of the Riigikohus *en banc*.

b. Constitutional review proceedings

There is a debate on how many types of proceedings the PSJKS of 2002 contains.[49] There is a catalogue of proceedings in §2 PSJKS which is not exhaustive and does not match the systematicity of the rest of the law. At this point, it is assumed that different procedures should not be combined with each other and all different constitutional review proceedings will be considered as separate proceedings. Accordingly, 14 different proceedings following from the Constitution and from the text of the PSJKS can be identified:

1) Proactive abstract norm control initiated by the President of the Republic;[50]
2) Reactive abstract norm control initiated by the Chancellor of Justice;[51]
3) Autonomy complaint of local governments;[52]
4) The concrete norm control;[53]
5) Complaint about a resolution of the Parliament;[54]
6) Complaint of a member of Parliament or of a faction about a decision of the Board of the Parliament;[55]

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[48] §228(1) No. 1 and 2 HKMS, §19(4) No. 1 and 2 TsMS, §356 No. 1 and 2 KrMS, §169(1) VTMS.

[49] E.g., according to the Constitutional Justice: Functions and relationship with the other public authorities. Answers by the Supreme Court of Estonia (p. 4) there are five different types of proceedings, cf. <https://www.riigikohus.ee/sites/default/files/elfinder/dokumendid/1_answers_by_the_estonian_supreme_court_bucharest_en.pdf>.

[50] §107(2) PS, §4(2)2, §5 PSJKS. E.g. under the PSJKS 1993: RKPJKo (Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus = judgment of the Constitutional Review Chamber of the Riigikohus) 14.04.1998, 3-4-1-3-98, and under the PSJKS: RKÜKo 20.10.2020, 5-20-3.

[51] §142(2) PS, §4(2), §6 PSJKS, §17, §18 ÕKS. E.g. under the PSJKS of 1993: RKPJKo 12.01.1994, III-4/1-1/94 (cf. Madis Ernits, Constitution as a System (Tartu 2019) p. 105 ff.), and under the PSJKS of 2002: RKÜKo 12.07.2012, 3-4-1-6-12, cf. Garri Ginter, Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty, European Constitutional Law Review 9 (2013), p. 335–354. Cf. to the Chancellor of Justice in general Madis Ernits, The Use of Foreign Law by Estonian Supreme Court, in *Judicial Cosmopolitanism*, Giuseppe Franco Ferrari (ed.) (Leiden, Boston 2019) p. 501–527 (514 fn. 59) <https://doi.org/10.1163/9789004297593_021>.

[52] §4(2), §7 PSJKS. E.g. RKÜKo 16.03.2010, 3-4-1-8-09.

[53] §15(1)2 PS, §4(3), §9, §11(3), §14(2) PSJKS. E.g. under the PSJKS 1993: RKPJKo 30.09.1994, III-4/1-5/94; cf. Madis Ernits, The Use of Foreign Law by Estonian Supreme Court, in *Judicial Cosmopolitanism*, Giuseppe Franco Ferrari (ed.) (Leiden, Boston 2019) p. 501–527 (506 ff.). E.g. under the PSJKS: RKÜKo 07.06.2011, 3-4-1-12-10; cf. Madis Ernits, The Principle of Equality in the Estonian Constitution: A Systematic Perspective, European Constitutional Law Review 10 (2014), p. 444–480 (451 ff.).

[54] §16 PSJKS.

[55] §17 PSJKS. Cf. RKPJKo 02.05.2005, 3-4-1-3-05; 30.10.2009, 3-4-1-20-09.

7) Complaint about a resolution of the President of the Republic;[56]
8) Request to declare the President of the Republic, a member of the Parliament, the Chancellor of Justice or the Auditor General permanently incapable of performing his or her duties;[57]
9) Request to terminate the mandate of a member of the Parliament;[58]
10) Request to grant consent to the President of the Parliament acting as the President of the Republic to declare extraordinary elections of the Parliament or to refuse to promulgate an Act of the Parliament;[59]
11) Request to terminate the activities of a political party;[60]
12) Complaint against the actions of a body organising elections or a decision or actions of an electoral committee;[61]
13) Protest by the National Electoral Committee;[62]
14) Petition by the Parliament[63].

Not all of the listed proceedings are equally important. Proceedings of significant importance are the abstract norm control proceedings initiated by the President of the Republic or by the Chancellor of Justice and the right of local government councils to challenge a legislative act or regulation if it is contrary to the constitutional guarantees of local governments. The most important type of proceedings of the present review architecture is the concrete norm control, which may be initiated by any court that concludes that a piece of legislation, the validity of which its decision depends on, is unconstitutional.[64]

This procedure seems to be similar to Austrian, Belgian, French, German, Greek, Italian and Spanish concrete norm control proceedings. In all these jurisdictions, judges have the right to ask the Constitutional Court for an opinion

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[56] §18 PSJKS.

[57] §25 PSJKS.

[58] §26 PSJKS. E.g. RKÜKo 13/04/2007, 3-4-1-10-07.

[59] §83(3) PS, §27 PSJKS.

[60] §48(3) and (4) PS, §32–§36 PSJKS.

[61] §37–§40, §42(1) and (2), §43–§46 PSJKS.

[62] §41, §42(3), §43–§46 PSJKS.

[63] §7[1] PSJKS. This procedure was introduced to the PSJKS in 2005 in order to help to overcome the possible constitutional obstacles by adoption of the Euro. Ever since, pursuant to this provision, there was only one procedure, cf. RKPJKa (Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi arvamus = opinion of the Constitutional Review Chamber of the Riigikohus) 11.05.2006, 3-4-1-3-06. Two judges submitted their dissenting opinions questioning the constitutionality of the amendment of the PSJKS.

[64] Cf. Madis Ernits, The Courts and the Supreme Court in Concrete Norm Control, in *15 Years of Constitutional Review in the Supreme Court of Estonia*, Gea Suumann (ed.) (Tallinn 2009) p. 26–38.

on the constitutionality of the relevant legislative act if they deem it necessary before a final decision in the case is made. Thus, the review model is incidental and proactive. In Estonia, however, according to the prevailing interpretation of the Constitution (and similarly, for example, to Portugal) the constitutional review proceedings start when a court has made a decision in the case, i.e., as a rule, has delivered the judgement or – in procedural matters – the ruling. It is thus (not being principal), *ex post facto* and reactive. Thus, the main difference of the Estonian concrete norm control system is that in Estonia the start of constitutional review proceedings depends on the prevailing opinion on the prior final decision in the case.

The most important question related to the concrete norm control proceedings concerns the debate whether the Riigikohus' interpretation of the Constitution, according to which the lower-level court should always deliver a final decision prior to initiating the constitutional review,[65] is correct. This interpretation is the clearest expression of the diffuse theory of constitutional review (see above). As a supporting argument, a shorter duration of the proceedings could be put forward. Nevertheless, the present understanding of the initiation of the concrete norm control has been criticised in the literature.[66] The main argument of the critics is the possibility that when the Riigikohus does not follow the opinion of the lower-level court on the unconstitutionality of the legislative act left unapplied, the judgment of the lower-level court might stay in force if none of the parties appeals the decision. A court decision that leaves a valid legislative act unapplied is itself unconstitutional. This problem would not occur in a system of constitutional review that follows the concentrated theory, e.g., when the lower-level courts obtain a preliminary ruling from the Riigikohus and only after that render their final decision.

A constitutional review judgment shall be adopted by a simple majority vote under the principle of confidentiality of deliberations.[67] Judges shall resolve any differences that arise in the process of deciding the case by a vote. No judge has the right to abstain from voting or remain undecided. The presiding judge shall

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[65] Since the first CNC judgment: RKPJKo 30.09.1994, III-4/1-5/94.

[66] Madis Ernits, The Courts and the Supreme Court in Concrete Norm Control, in *15 Years of Constitutional Review in the Supreme Court of Estonia*, Gea Suumann (ed.) (Tallinn 2009) p. 26–38; Julia Vahing Laffranque, Põhiseaduse kohtu ja normikontrolli võimalikkusest Eestis Saksamaa näitel, Juridica 1999, p. 307 f.

[67] §57(2) PSJKS.

vote last. In the case of an equal division of votes, the vote of the presiding judge shall be decisive.

The publication of dissenting opinions to final judgments is permitted. The possibility of dissenting opinions is foreseen by the PSJKS, pursuant to which a judge, or several judges, who disagree with the judgment or the reasons, may append a (joint) dissenting opinion to the judgment.[68] This opinion shall be submitted by the time of pronouncement of the judgment and signed by all the judges concerned. Dissenting opinions will be published together with the judgment, both in the Official Journal and on the website of the Riigikohus.[69]

c. Diffuseness of and access to the constitutional adjudication

In the light of the above discussion, the fundamental question of sufficient access to the constitutional adjudication arises. The Riigikohus has recently explained:

> If a person considers that his or her rights have been infringed by a provision of a legislative act, he or she may request a review of the constitutionality of the provision, in particular in the case in which the provision is to be applied (§15(1)2 PS[70]). The constitutionality of a restriction on access to the courts may be challenged by the person in court proceedings, in which the disputed provision should be applied.[71]

Thus, the Riigikohus considers the right to concrete norm control as the primary right to constitutional review and the arguments regarding the alleged unconstitutionality of a legislative act must be presented before the ordinary courts. In another case, the Riigikohus has recently stated: "Pursuant to §15 and §152 PS[72], every court must, in deciding a case, assess the constitutionality of the

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[68] §57(5) PSJKS.

[69] Cf. Christoph Grabenwarter, Monika Hermanns, Kateřina Šimáčková, Report on Separate Opinions of Constitutional Courts, Venice Commission Opinion No. 932/2018, p. 21 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)030rev-e>.

[70] "Everyone has the right, while his or her case is before a court, to request for any relevant law, other legal act or action to be declared unconstitutional."

[71] RKPJKm (Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi määrus = ruling of the Constitutional Review Chamber of the Riigikohus) 13.12.2023, 5-23-36, para. 19.

[72] §15 PS: "[1] Everyone whose rights and freedoms are violated has the right of recourse to the courts. […] [2] The courts shall observe the Constitution and shall declare unconstitutional any law, other legal act or action that violates the rights and freedoms provided for in the Constitution or is otherwise in conflict with the Constitution." §152 PS: "[1] When adjudicating a matter, a court shall not apply any law or other legal act that is in conflict with the Constitution." [For §152(2), see fn. 19 above.]

applicable law."[73] This is an expression of the diffuseness of the system – not only the Riigikohus, but, according to the Riigikohus, all courts are competent to perform judicial review. While this in itself can be considered somewhat ineffective, it is not necessarily constitutionally problematic as long as the Riigikohus fulfils its function as a constitutional court. However, one would expect that courts or – as the court of last instance – the Riigikohus at least has the obligation to respond to the arguments put forward in the complaint regarding the constitutionality of the piece of legislation in its decision. Instead, however, the Riigikohus has repeated several times: "The mere fact that the Riigikohus does not state reasons in its ruling as to the constitutionality of the contested provisions does not mean that courts failed to assess all the pleas in law raised in the complaint."[74] This fiction applies regardless of whether a court has even explicitly considered the constitutionality of the legislative act in question. And this is where it becomes problematic.

In light of this, the claim to an effective legal remedy with regard to the review of constitutionality is reduced to a mere fiction and an irrefutable presumption that at least some judge in the court system has given some thought to the constitutional question. However, this does not fulfil the minimum constitutional requirements of a democratic constitutional state. Whether and how such an examination has been carried out must be evident and comprehensible. The complainant and the legal public must be informed of the reasons for rejecting the complaint. Moreover, the Riigikohus has the clear constitutional obligation to perform constitutional review, which means the duty to perform it explicitly. Not obeying this obligation comes close to the denial of justice.

As an interim conclusion, it should be noted that the diffuseness of the constitutional adjudication leads to a dispersion of responsibility. If several instances are simultaneously responsible for constitutional adjudication, it may end up that the question of constitutionality is passed on between the instances as a hot potato. Therefore, it ultimately comes down to the fact that it may happen that not one court really examines the most important question – the question of constitutionality. Historical experience teaches us that in case of a legal system that does not guarantee full legal protection of the constitutional rights, it is only

[73] RKPJKm 22.12.2020, 5-20-9, para. 12; 07.11.2022, 5-22-7, para. 30; 11.06.2024, 5-24-6, para. 24.

[74] RKPJKm 27.01.2017, 3-4-1-14-16, para. 26; cf. RKPJKm 01.11.2011, 3-4-1-21-11, para. 13; 15.05.2013, 3-4-1-4-13, para. 27.

a matter of time before the democratic system of government suffers serious damage.

4. *The main institutional issues*

a. Appointment procedure of judges

The different appointment proceedings for the Chief Justice and for the rest of the judges raises the problem of whether the Riigikohus is a fully-fledged collegial body. This has already been addressed elsewhere.[75] A further problem lies in the modus of how the judges of the Riigikohus are appointed. Although the Parliament has the final decision-making competence, the recruitment of judges is the constitutional responsibility of the Chief Justice, who may or may not involve all judges of the Riigikohus in his decision-making. Although the Parliament ultimately formalises the nomination, in reality the Chief Justice personally determines the composition of the Riigikohus.

The legitimisation procedure for judges of the Riigikohus corresponds to the indirect cooptation[76] model. In his influential work on cooptation, Karl Loewenstein based his analysis on the preliminary understanding of cooptation as the filling of vacant positions in a collegial body by the votes of the existing members of the body, as opposed to an election by an outside constituency.[77] If the actual election or nomination is not carried out by the body itself but just controlled by it, one could name it indirect cooptation.[78] The function of cooptation is frequently, according to Loewenstein, as a means "to protect the existence and future of a group in its present form".[79] Thus, in this model, it is more likely that the views of newly recruited members are in line with those of existing members, although the process can also be used to change the organisational profile.[80] This means that the cooptation process also becomes a venue for power struggles between those

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[75] Madis Ernits, Jolita Miliuvienė, Jānis Pleps, Vytautas Sinkevičius, Models of constitutional adjudication in the Baltic States, International Social Science Journal, Special Issue 2022, p. 1–19 (10 f.) <https://doi.org/10.1111/issj.12384>.

[76] Cf. to the cooptation in general Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 14 ff. and to the indirect cooptation p. 87.

[77] Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 18. It must be admitted that there is no commonly recognised definition of cooptation. For example, Michael G. Lacy distinguishes between the traditional elite recruitment model, the formal organisation model, the power-protest model and the political socialisation model of cooptation, cf. Michael G. Lacy, Cooptation: Analysis of a neglected social process (University of Kansas 1973) p. 10 <https://hdl.handle.net/1808/30584>. According to Lacy, Loewensteins approach corresponds to the traditional elite recruitment model.

[78] Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 87.

[79] Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 191.

[80] Cf. Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 192.

who favour the change and those who would prefer to leave everything as it is.[81] But there is another dimension causing the most concern. To describe the essence of the problem, the words of Karl Loewenstein express it best:

> It [i.e. the cooptation] may be superior to popular election in terms of expediency, but it offers no guarantee that only the most capable will actually reach the top positions. Patronage and nepotism can creep in with every appointment to office, but are easier to detect and, if necessary, correct with all other investiture techniques than with cooptation.[82]

Karl Loewenstein's thorough analysis of cooptation thus points to its fundamental systemic risk.

It must be emphasised that the cooptation procedure for the composition of the Riigikohus was not entirely wrong, at least for the transition period, because it probably accelerated the reform of the court system and its necessary personal renewal, and with that the transformation of the whole legal system. The first composition of the Riigikohus selected by the first Chief Justice Rait Maruste turned many fundamental principles of the democratic constitutional state into constitutional reality. For this, they deserve sincere recognition.

However, the cooptation model might not appear equally successful in the long run. Even if cooptation might not have been a bad choice for a short period of time, over a longer period human imperfection, accumulating error rate and deficit of democracy may sooner or later lead to a creeping downfall. This insight could motivate a forward-thinking constitutional legislator to address this issue sooner rather than later. Historically, under the democratic Constitution of 1920,[83] all judges of the Riigikohus were equally appointed (or elected) by the Parliament and this historical model could serve as the model for a possible future legitimisation procedure for judges of the court that carries out the constitutional review function. A qualified majority, e.g., a two-thirds majority of all members of Parliament, could be used as a possible amendment in order to minimise the risk of politicisation.[84]

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[81] Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 192 ff.

[82] Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 212. Although Loewenstein explicitly addresses this to the cooptation procedures associated with multinational corporations, these insights are nevertheless transferable to other cooptation models as well.

[83] §69 PS 1920.

[84] §151(1) of the final report of the Government Commission for Legal Expertise of the Constitution of 16 March 1998 "Muudatusettepanekud" <https://www.just.ee/era-ja-avalik-oigus/pohiseadus-ja-pohioigused/pohiseadus>

b. Lifelong term of office of the judges of the Riigikohus

The reason for the limited term of office is the need to find a reasonable balance between the democratic legitimacy of constitutional judges and their independence.[85] The Government Commission for Legal Expertise of the Constitution argued in its final report: "A fixed term of office and a periodic change of the membership will avoid the "petrification" of the Court and ensure the continuous renewal of its legitimacy."[86] On the other hand, opponents of the time-limited term of office for constitutional judges insist on the absoluteness of the principle of lifelong tenure.[87]

Currently, the judges of the Riigikohus are, equally to all other judges, appointed to office for life[88] which means in practice that they will be released as a rule at 68 years of age, but their term of office can theoretically be prolonged by the Riigikohus *en banc* up to 72 years.[89] Combined with the cooptation model, the lifelong tenure of judges of the Riigikohus reinforces both good and incorrect personnel decisions. If someone is appointed to the Riigikohus in his or her early 30s, as it has happened, the effective term of office may theoretically last even 40 years. In a democratic constitutional state, which derives its ongoing power from the change of personalities and their views at the top of the decision-making chain, this is simply too long.

The term of office of constitutional judges varies internationally. Other than in Estonia, the undetermined duration of the term of office of constitutional judges applies in the following member states of the European Union: Austria, Belgium, Cyprus, Denmark, Finland, Ireland, Malta and Sweden.[90] However, the tendency

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proposed a the two-thirds majority of the members of the Parliament for the appointment of the judges of a future Constitutional Court.

[85] Cf. Dian Schefold, Zur Problematik der beschränkten Amtszeit von Verfassungsrichtern, Juristenzeitung 43 (1988), pp. 291–296 (292 ff.).

[86] Explanatory memorandum to §151 of the final report of the Government Commission for Legal Expertise of the Constitution of 16 March 1998 "Muudatusettepanekud" <https://www.just.ee/era-ja-avalik-oigus/pohiseadus-ja-pohioigused/pohiseadus>.

[87] Tõnu Anton, Kas kohtu asemele kvaasikohus on samm edasi või tagasi? in *Konstitutsioonikohtute probleemid ja arengukavad*, Heinrich Schneider, Peeter Roosma (eds.) (Tartu 1999) pp. 82–84. Tõnu Anton who was the President of the Constitutional Assembly and at that time judge of the Riigikohus mocked constitutional judges appointed to office for a fixed term as 'non-judges' because of their lack of lifelong tenure and a constitutional court correspondingly as a 'non-court'.

[88] §147(1) PS.

[89] §48 and §99[1] KS.

[90] The information quoted here is from the Report of the Venice Commission, "The Composition of Constitutional Courts", No. CDL-STD(1997)020, December 1997, p. 13 ff., 65 ff. <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e>.

seems to point towards a non-renewable term of 9 to 12 years, which would meet both requirements: the independence of the judges and the necessary change of personnel and views. In Latvia and Lithuania, as the closest neighbours, the not (directly) renewable term of office of constitutional judges is, respectively, 10 and 9 years. In other member states of the European Union, for example, a not (directly) renewable 9-year term of office applies for constitutional judges in Bulgaria, France, Italy, Poland, Portugal, Romania, Slovenia and Spain and a 12-year non-renewable term in Germany. Furthermore, a non-renewable 9-year term of office also applies for constitutional judges in Ukraine. Thus, Estonia is the only member state of the European Union which, in its relatively new Constitution, made the decision for a lifelong term of office of constitutional judges. Perhaps, in order to minimise the risk of negative effects on the democratic constitutional state, it could be advisable to consider limiting the term of office of constitutional judges *de lege ferenda* to a non-renewable term of office of between 9 and 12 years.[91]

c. Secondary nature of the constitutional review

§149(3) of the Constitution reads: "The Riigikohus is the highest court of Estonia and reviews rulings of other courts pursuant to a quashing procedure. The Riigikohus is also the court of constitutional review." The systematicity of the two sentences of this paragraph forms the basis of the critique, mainly expressed by the first Chief Justice after the regaining of independence Rait Maruste, according to whose interpretation this constitutional provision means that the Riigikohus is in the first place the highest court of Estonia and only secondarily the court of constitutional review.[92] Indeed, since the Riigikohus deals with administrative, civil, criminal and misdemeanour cases – apart from constitutional review cases – and above that with cases concerning court administration, it has to apply case by case a total of five different codes of procedure, plus rules for court administration matters. With such a complex structure of competences and procedures, it is crucial that the judges carrying out constitutional review tasks stay on track and

[91] §151(3) of the final report of the Government Commission for Legal Expertise of the Constitution of 16 March 1998 "Muudatusettepanekud" <https://www.just.ee/era-ja-avalik-oigus/pohiseadus-ja-pohioigused/pohiseadus> and §151(5) of the Eesti Vabariigi põhiseaduse muutmise seadus (Amendment Law of the Constitution of the Republic of Estonia), 864 SE of 08 October 2001 <https://www.riigikogu.ee/download/07ee86bd-3ac6-3969-a2d7-3d5176b74ccf>, presented to the Parliament by the President Lennart Meri, proposed a non-renewable 12-year term of office for the judges of a future Constitutional Court.

[92] Rait Maruste, Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves, Juridica 2020, p. 467; Rait Maruste, in *Kohtute seadus*, Kommenteeritud väljaanne, Priit Pikamäe (ed.) (Tallinn 2018) §26 rec. 18.1.

do not lose sight of their main objective – to carry out an effective substantive constitutional review. Constitutional guardianship, as Hans Kelsen has put it, in the style of Carl Schmitt, [93] is a fundamental function of democratic constitutionalism, separate from ordinary jurisdiction, and deserves corresponding treatment by the Constitution. The cited constitutional article does not meet this requirement.

5. *Reform efforts*

There are numerous issues that could be raised.[94] In the following, the article focuses on the two most important critical aspects: the lack of a separate constitutional court and the debate about the individual constitutional complaint.

a. Constitutional Court

It was only a matter of time before a debate would break out about the justification of the configuration of the institutional framework for constitutional review. There are four important issues of the present system that need to be addressed: incomplete access to constitutional adjudication for the protection of constitutional rights; the cooptation model of appointing the judges; the lifelong term of office of the constitutional judges; and the secondary nature of the constitutional review. All of these could be solved, or at least significantly mitigated, if a standalone constitutional court were established consisting of judges who are all appointed to office through an equal procedure for a non-renewable fixed term of reasonable duration.

The debate about a separate constitutional court started as early as in the *travaux preparatoires* of the Constitution, although none of the draft versions contained an explicit provision for this. Austrian expert Klaus Berchtold was – as far as can be seen – the first to propose a constitutional court for Estonia under the Constitution of 1992. He argued in his speech to the Constitutional Assembly:

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[93] Hans Kelsen, Who Ought to Be the Guardian of the Constitution? in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Lars Vinx (transl.) (Cambridge 2015) pp. 174–221; cf. Carl Schmitt, The Guardian of the Constitution in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Lars Vinx (transl.) (Cambridge 2015) pp. 79–124, 125–173; Lars Vinx, Introduction in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Lars Vinx (transl.) (Cambridge 2015) p. 5; Lars Vinx, Democratic Constitutionalism – Kelsen's Theory of Constitutional Review in Lars Vinx, *Hans Kelsen's Pure Theory of Law* (Oxford 2007) p. 163.

[94] For example, Rait Maruste points out the lack of the following necessary aspects of constitutional review: a separate constitutional court; an individual constitutional complaint dispute settlement between public authorities; a right of a parliamentary minority to challenge a decision of the majority; and impeachment proceedings, cf. Rait Maruste, Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves, Juridica 2020, p. 472 f.

> But you may consider establishing a constitutional court which is a specialised court and has the advantage of concentrating the competence concerning protection of human rights to one court for the whole of Estonia. I may say that our [i.e. Austrian] experiences has shown that such a concentration of competence in this field before a constitutional court has a lot of advantages. Especially the advantage that there is no differing jurisprudence between several courts.[95]

The constitutional review questions were discussed in the Constitutional Assembly,[96] but according to the transcript, either the idea was not properly discussed, or it was left aside for reasons not disclosed. Thus, the idea of a separate constitutional court was set aside without transparent reasoning and, instead, the present configuration was introduced.

The debate about establishing a separate constitutional court continued among the public in the second half of the nineties with the work and the final report of the Government Commission for Legal Expertise of the Constitution, which was established in 1996. First, foreign experts Robert Alexy[97] and Sergio Bartole[98] recommended a constitutional court for Estonia. Subsequently, in its final report, the commission presented a well elaborated proposal to amend the Constitution and to establish a constitutional court.[99] The essential arguments presented by the commission were: (1) an individual constitutional complaint leads to the establishment of a separate specialised court; (2) the constitutional court better ensures the development of constitutional law; (3) the constitutional court more effectively keeps state bodies within the limits of the powers assigned

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[95] Klaus Berchtold, 29 October 1991 in *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 328 f.

[96] Peet Kask, 1 November 1991 in *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 385; Liia Hänni, 22 November 1991 and 10 April 1992 *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 531, 1044, 1046; Kaido Kama, 16 January 1992 in *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 726; Jüri Rätsep, 10 April 1992 in *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 1045.

[97] Robert Alexy, Põhiõigused Eesti põhiseaduses, Juridica special issue 2001, p. 94. The manuscript of the monograph was essentially ready and presented to the members of the Government Commission for Legal Expertise of the Constitution already in 1997.

[98] Sergio Bartole, Konstitutsioonikohtu reform Eestis, 1997, p. 5; cf. Sergio Bartole, Helmut Steinberger, Opinion on the Reform of Constitutional Justice in Estonia, Venice Commission Opinion No. CDL(1998)059-e, p. 7 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(1998)059-e>.

[99] Cf. the final report of the commission of 16 March 1998 "Muudatusettepanekud" <https://www.just.ee/era-ja-avalik-oigus/pohiseadus-ja-pohioigused/pohiseadus>. Cf. Paul Varul, Põhiseaduse juriidiline ekspertiis: eesmärgid, töökorraldus ja tulemused, Riigikogu Toimetised 1 (2000), pp. 65–76 (74 f.) <https://rito.riigikogu.ee/eelmised-numbrid/nr-1/pohiseaduse-juriidiline-ekspertiis-eesmargid-tookorraldus-ja-tulemused/>; Maige Prööm, Intervjuu justiitsminister Paul Varuliga, Juridica 1998, p. 110 f.

to them by the Constitution; (4) the constitutional court better ensures the protection of constitutional rights; and (5) the constitutional court helps to prevent Estonia being defeated in the European Court of Human Rights. The Minister of Justice at that time, Paul Varul, was of the opinion that the establishment of the constitutional court was, although not strictly necessary for the development of the state, important and recommendable.[100] Subsequently, several authors – some of them involved in the work of the government commission themselves as staff of the commission – supported a constitutional reform and the establishment of a separate constitutional court.[101]

In 2001, the departing President of the Republic Lennart Meri initiated constitutional amendment proceedings in order to establish a separate constitutional court.[102] President Meri formulated reasons for the reform of the constitutional court in the explanatory memorandum to the draft and in his speech to the Parliament on 7 October 2001.[103] The explanatory memorandum was essentially based on a critique of the present system. The further arguments raised by President Meri were: (1) Estonia needs a body that has the right to the final interpretation of the Constitution in order to be able to settle disputes between constitutional bodies; (2) such an institution would prevent the risk that some powerful prime minister, parliamentary leader or president will usurp the powers of the other institutions; (3) the constitutional court in this way would create the balance that the state needs to function. The proposed constitutional amendment did not find the necessary political majority and with the next election the draft dropped out of the proceedings of the Parliament. In the following period,

[100] Paul Varul, Põhiseaduse juriidiline ekspertiis: eesmärgid, töökorraldus ja tulemused, Riigikogu Toimetised 1 (2000), p. 75 <https://rito.riigikogu.ee/eelmised-numbrid/nr-1/pohiseaduse-juriidiline-ekspertiis-eesmargid-tookorraldus-ja-tulemused/>; Maige Prööm, Intervjuu justiitsminister Paul Varuliga, Juridica 1998, p. 110 f.

[101] Julia Vahing Laffranque, Põhiseaduse kohtu ja normikontrolli võimalikkusest Eestis Saksamaa näitel. Juridica 1999, p. 304 f.; Madis Ernits, Põhiseaduse Riigikogu peatüki probleemid, Juridica 1999, p. 478; Virgo Saarmets, Konstitutsioonikohus ja individuaalne konstitutsiooniline kaebus, Üldiseloomustus ja Eesti perspektiivid (Tartu Ülikool 2000) p. 25 f., 70 f. Rather ambiguous Rait Maruste, Põhiseadus ja justiitsorganite süsteem, Juridica 1998, p. 327; Thilo Marauhn, Supreme Court or Separate Constitutional Court: The Case of Estonia, European Public Law 5 (1999), pp. 301–314 <https://doi.org/10.54648/euro1999023>.

[102] Draft of 7 October 2002 "Eesti Vabariigi põhiseaduse muutmise seadus Vabariigi Presidendi pädevuse ja tema valimiskorra muutmiseks 1182 SE" <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/8aa6f95d-a36c-38ab-abb4-e26248735110/Eesti%20Vabariigi%20p%C3%B5hiseaduse%20muutmise%20seadus%20%20Vabariigi%20Presidendi%20p%C3%A4devuse%20ja%20tema%20valimiskorra%20muutmiseks>.

[103] Lennart Meri, Vabariigi Presidendi Lennart Meri kõne, Verbatim record, IX Riigikogu, VI Istungjärk, Täiskogu korraline istung, Monday, 08.10.2001, 15:00 <http://stenogrammid.riigikogu.ee/en/200110081500>.

several authors here and there supported the idea of establishing a separate constitutional court.[104]

On the other hand, several authors have opposed the idea of the separate constitutional court. The most prominent opponents have been the former Presidents of the Riigikohus Märt Rask[105] and Priit Pikamäe,[106] judges or former judges of the Riigikohus Tõnu Anton,[107] Jüri Põld,[108] Indrek Koolmeister[109] and Ivo Pilving,[110] one of the leading authors of the draft of the Constitution of 1992 Jüri Adams,[111] and Chancellor of Justice Ülle Madise.[112] In summary, they have brought up the following main arguments: (1) there is no need for a separate constitutional court because there are no separate civil, criminal and administrative high courts that would cause the need for harmonising differing case laws but only a single integrated Riigikohus; (2) the cost factor would be too

[104] Particularly Rait Maruste, former President of the Riigikohus and justice of the European Court of Human Rights, endorsed in several newspaper articles a separate Constitutional Court: Rait Maruste, Eesti vajaks uut põhiseadust, Eesti Päevaleht, 26 March 2004 <https://epl.delfi.ee/artikkel/50980005/rait-maruste-eesti-vajaks-uut-pohiseadust>; Rait Maruste, Käes on aeg uue põhiseaduse teksti koostamiseks, Postimees, 21 April 2005 <https://www.postimees.ee/1471661/kaes-on-aeg-uue-pohiseaduse-teksti-koostamiseks>; Rait Maruste, Eesti vajab veel üht kohut, Postimees, 14 September 2010 <https://www.postimees.ee/312719/maruste-eesti-vajab-veel-uht-kohut>; Rait Maruste, Kaubamaja on kaubamaja ja laev on laev, Postimees, 13 September 2017 <https://arvamus.postimees.ee/4242121/rait-maruste-kaubamaja-on-kaubamaja-ja-laev-on-laev>; Rait Maruste, Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves, Juridica 2020, p. 472. Cf. Anne Raiste, Maruste sõnul tuleks asutada konstitutsioonikohus, Reinsalu seda vajalikuks ei pea, ERR, 11 October 2016 <https://www.err.ee/575364/maruste-sonul-tuleks-asutada-konstitutsioonikohus-reinsalu-seda-vajalikuks-ei-pea> and Rait Maruste's proposals to the Constitutional Experts' Commission <https://www.just.ee/media/903/download>. As for other endorsing opinions, see Allar Jõks, Austatud lugeja! Juridica 2007, p. 1; Lauri Mälksoo, Eesti suveräänsus 1988–2008 in *Iganenud või igavene?* Tekste kaasaegsest suveräänsusest, Hent Kalmo, Marju Luts-Sootak (eds.) (Tartu 2010) p. 156.

[105] Märt Rask, Põhiseaduse kohus suurendab presidendi võimu, Eesti Päevaleht, 30 October 2001 <https://epl.delfi.ee/artikkel/50899906/rask-pohiseaduse-kohus-suurendab-presidendi-voimu>.

[106] Priit Pikamäe, Kui kohtuotsus ei meeldi, ei sobi mistahes selgitus, Postimees 17 November 2017 <https://arvamus.postimees.ee/4312991/priit-pikamae-kui-kohtuotsus-ei-meeldi-ei-sobi-mistahes-selgitus>; Priit Pikamäe, Tants põhiseaduskohtu ümber, Sirp, 31 May 2019 <https://www.sirp.ee/s1-artiklid/c9-sotsiaalia/tants-pohiseaduskohtu-umber/>; Priit Pikamäe, Ülevaade kohtukorralduse, õigusemõistmise ja seaduste ühetaolise kohaldamise kotha, Verbatim record, XIII Riigikogu, V Istungjärk, Täiskogu korraline istung, Thursday, 08.06.2017, 10:00 <http://stenogrammid.riigikogu.ee/en/201706081000>.

[107] Tõnu Anton, Kas kohtu asemele kvaasikohus on samm edasi või tagasi? *Konstitutsioonikohtute probleemid ja arengukavad*, Heinrich Schneider, Peeter Roosma (eds.) (Tartu 1999) pp. 82–84.

[108] Jüri Põld, Kas Eestis on vaja eraldiseisvat konstitutsioonikohut? in *Kohtute sõltumatus ja kohtusüsteemi toimimise efektiivsus Eestis* (Tartu 2002) pp. 73–84.

[109] Indrek Koolmeister, Poliitika ja õigus, Juridica 2020, p. 161.

[110] Ivo Pilving, Kas Eestis on vaja individuaalkaebust? Kohtute aastaraamat 2016, pp. 85, 89.

[111] Jüri Adams, Kuidas ja kuhu oleks võimalik põhiseadusega edasi minna, Riigikogu Toimetised 22 (2010), p. 35.

[112] Ülle Madise, Koalitsioonipresidenti meil tarvis pole, Eesti Päevaleht, 2 November 2016 <https://epl.delfi.ee/artikkel/76089649/ulle-madise-koalitsioonipresidenti-meil-tarvis-pole>; Ülle Madise, Otsekaebuse petukaup ehk kuidas rohkem on tegelikult vähem, Postimees 16 March 2017 <https://arvamus.postimees.ee/4048205/ulle-madise-otsekaebuse-petukaup-ehk-kuidas-rohkem-on-tegelikult-vahem>. Ülle Madise is the daughter of Tõnu Anton.

high and the anticipated workload would be too low in a small country like Estonia; (3) the position of the Riigikohus would be damaged and the role of the Chancellor of Justice would be marginalised; (4) since the appointment of the judges of a separate Riigikohus and their term of office would differ from the appointment procedure of other judges and their lifetime term of office, they would not be real judges and thus, the constitutional court would not be a real court; (5) as a consequence, a separate constitutional court would jeopardise the balance of powers and democracy; (6) last but not least, the present system guarantees a sufficient level of protection of constitutional rights and stability is a value in itself.

This debate reveals that any proposal for a reasonable constitutional reform cannot succeed without a broad political consensus, which is extremely difficult to reach. The recurring argument of too high costs has been brought up without any closer analysis and simply anticipating the high salaries of judges. However, if one included the advantages offered by a better protection of constitutional rights, which protection in certain respects does not currently meet the constitutional standard (see above), and the increase of legal certainty, the calculation might not be so simple. These wins could be translated into a better economic climate and increased foreign investments and thus into real money. Furthermore, the institutional arguments illustrate the general reluctance of institutions towards reforms, with the institutions concerned tending to protect their powers and to ignore the broader picture. Therefore, it is now extremely difficult to correct institutional shortcomings created during the drafting of the Constitution, more than 30 years later.

b. Individual constitutional complaint

The main shortcoming of the constitutional review proceedings is the lack of a procedure for an individual constitutional complaint or, to be more precise, the lack of sufficiently clear and predictable criteria for the admissibility of an individual constitutional complaint. In Estonian constitutional law theory, the dispute is still ongoing as to whether the Constitution establishes a right to an individual constitutional complaint to the Riigikohus or if all courts have a direct constitutional obligation to enforce constitutional rights and to perform constitutional review.[113] The author of this paper is of the opinion that there are

[113] Cf., e.g., the materials of the 2013 conference on the Brusilov case (RKÜKo 17.03.2003, 3-1-3-10-02), <http://www.oigus-selts.ee/konverentsid/kumme-aastat-brusiloviga-kuidas-edasi>. Cf. Madis Ernits, The Use of

far better arguments that support the necessity of the individual constitutional complaint.[114] It is indispensable in order to meet the requirements of the constitutional guarantee of access to justice.[115] Without the right of individual complaint, the constitutional review system cannot be considered to be exhaustive and the bearers of constitutional rights would still lack the ultimate remedy to enforce such rights.

(1) Foundation and development of the individual constitutional complaint

The right of individual complaint was discussed but rejected in the legislative process of the new PSJKS.[116] However, it was recognised approximately a year later in the case law of the Riigikohus.[117] In 2003 the Riigikohus heard an appeal brought by S.B.[118] who had been sentenced to six years' imprisonment under the old Criminal Code, which had its roots in Soviet law. The new Penal Code, which entered into force on 1 September 2002, laid down a maximum term of imprisonment of five years for Brusilov's sentence for criminalised acts. After having completed five years, Brusilov brought an appeal before the Riigikohus for the correction of judicial errors and requested that he be exempted from continuing to serve his sentence. The Riigikohus *en banc* upheld the appeal and declared the Implementation Act of the Penal Code unconstitutional in so far as it did not provide for any reduction of the sentence of imprisonment imposed pursuant to the Criminal Code up to the maximum limit on deprivation of liberty laid down in the corresponding paragraph of the Penal Code. The main argument

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Foreign Law by Estonian Supreme Court in *Judicial Cosmopolitanism*, Giuseppe Franco Ferrari (ed.) (Leiden, Boston 2019) p. 504 fn. 25 with further references.

[114] Madis Ernits, Põhiõigused, demokraatia, õigusriik (Tartu 2011) p. 259;

[115] §15(1) PS.

[116] Märt Rask, the acting Minister of Justice opposed from the lectern in Parliament an amendment proposal to add an explicit regulation of the individual constitutional complaint into the new PSJKS:

> Providing for so-called individual complaints will only seem to guarantee better protection of people's rights. In practice, individual complaints only reach constitutional review after they have passed through other instances of litigation. However, in the practice of other countries, high courts have begun to review political decisions of parliaments under the guise of protecting constitutional rights. Is this what we want? Probably not. Today's governing coalition does not consider such a constitutional change to be right, as it would shift the balance of power between the branches. Therefore, the initiator cannot support the aforementioned amendments.

Märt Rask, Põhiseaduslikkuse järelevalve kohtumenetluse seaduse eelnõu (895 SE) kolmas lugemine, Verbatim Record, IX Riigikogu, VII Istungjärk, Infotund, Wednesday, 13.03.2002, 13:00 <https://stenogrammid.riigikogu.ee/en/200203131300>.

[117] RKÜKo 17.03.2003, 3-1-3-10-02.

[118] Only a few years ago, this case was subsequently anonymised on the Supreme Court's website without any further explanation. The Estonian legal community generally refers to this case as "the Brusilov case". For this reason, this name will also be used hereafter.

for the admissibility of these proceedings was the requirement under §15(1) PS that the protection of constitutional rights must be free from gaps.[119]

The Riigikohus has stressed several times subsequently that: "The aim of the constitutional right enshrined in the first sentence of §15 PS[120] is to effectively ensure access to courts without any gaps through appropriate court procedure."[121] A gap arises, in particular, when there is no procedural possibility of enforcing a substantive claim. This interpretation must be upheld, since the cited provision, taken in isolation and in conjunction with certain other constitutional provisions,[122] implies the existence of the right to an individual constitutional complaint.[123]

In the subsequent period, the Riigikohus further developed its reasoning, implicitly recognising the individual constitutional complaint and stressing repeatedly:

> The Constitutional Review Court Procedure Act does not contain an *expressis verbis* provision enabling the filing of individual complaints for review of the constitutionality of legislation of general application. At the same time, the Riigikohus *en banc* has repeatedly pointed out, on the basis of §13, §14 and §15 PS and the application practice of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the Riigikohus may refuse to hear a complaint of a person on its merits only if the person has other effective possibilities for exercising the right of recourse to the courts, guaranteed by §15 PS.[124]

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[119] RKÜKo 17.03.2003, 3-1-3-10-02, para. 17 and 26; cf. also former RKÜKo 22.12.2000 3-3-1-38-00, para. 15 (Divec) and subsequently RKÜKo 29.11.2011, 3-3-1-22-11, para. 23; 06.03.2012, 3-2-1-67-11, para. 21; 21.01.2014, 3-4-1-17-13, para. 27; RKÜKm (Riigikohtu üldkogu määrus = ruling of the Riigikohus *en banc*) 21.04.2015, 3-2-1-75-14, para. 58; RKPJKo 09.04.2008, 3-4-1-20-07, para. 18; 17.07.2009, 3-4-1-6-09, para. 15; 15.12.2009, 3-4-1-25-09, para. 20; 01.11.2011, 3-4-1-19-11, para. 22; 11.12.2012, 3-4-1-11-12, para. 38; 11.12.2012, 3-4-1-20-12, para. 29; 10.12.2013, 3-4-1-20-13, para. 48; 21.01.2014, 3-4-1-17-13, para. 27; 20.03.2014, 3-4-1-42-13, para. 48.

[120] §15(1) PS reads: "Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before a court, to request for any relevant law, other legal act or action to be declared unconstitutional."

[121] RKÜKo 12.04.2016, 3-3-1-35-15, p 25; RKÜKm 05.06.2017, 3-1-1-62-16, p 31.

[122] In particular in conjunction with §14, §146 and §149(3)2 PS.

[123] Cf. Robert Alexy, Põhiõigused Eesti põhiseaduses, Juridica Special Issue 2001, p. 13 f., 94.

[124] RKPJKm 23.03.2005, 3-4-1-6-05, para. 4; 09.05.2006, 3-4-1-4-06, para. 8; 17.01.2007, 3-4-1-17-06, para. 4; 04.04.2007, 3-4-1-8-07, para. 5 f.; 17.05.2007, 3-4-1-11-07, para. 3 f.; 05.02.2008, 3-4-1-1-08, para. 4 f.; 03.04.2008, 3-4-1-3-08, para. 3 f.; 17.09.2008, 3-4-1-13-08, para. 2 f.; 30.12.2008, 3-4-1-12-08, para. 17 f.; 11.03.2009, 3-4-1-19-08, para. 10 f.; 20.05.2009, 3-4-1-11-09, para. 5 f.; 27.11.2009, 3-4-1-26-09, para. 7 f. Cf. already RKÜKo 17.03.2003, 3-1-3-10-02, para. 17: "On the basis of §15 of the Constitution the Riigikohus may refuse to hear S. Brusilov's complaint only if S. Brusilov has other effective ways to obtain judicial protection of the right established in this provision."

Moreover, the Riigikohus has explicitly recognised the right of every person if direct recourse to the Riigikohus: "If a person is of the opinion that he has no other effective possibility to exercise the right of judicial protection, guaranteed by §15 PS, the person himself can have recourse to the Riigikohus."[125] Simultaneously, the Riigikohus has always highlighted the subsidiary nature of the individual complaint: where there is another effective remedy, an individual complaint is inadmissible.[126]

On the other hand, the Riigikohus has partly limited the possibility of filing an individual complaint in a way that would make it practically impossible:

> Even if a person has no other effective means of exercising the right to access to courts guaranteed by §15 of the Constitution, he or she can only appeal directly to the Riigikohus in defence of his or her constitutional rights if his or her rights have been violated by the application of certain provisions to him or her. The question of the constitutionality of these norms must arise from their specific application to the person, not from their unspecified application in the past or their possible application in the future. There must be a genuine dispute as to whether constitutional rights and freedoms have been infringed.[127]

This extremely restrictive view cannot be accepted. The function of an individual complaint is to fill a gap in legal protection in cases where, for factual or legal reasons, a person cannot be required to await the specific application of the rule or cannot reasonably be expected to be subject to the rule in advance. Since an infringement of a constitutional right may also consist of a failure on the part of the legislature to act, it is legally impossible, at least in those cases, to require the prior specific application of a rule. A similar structure existed, for example, in the Brusilov case, in which the person had no procedural opportunity to challenge the non-reduction of his sentence and the infringement consisted

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Although the Riigikohus also cited, in that context, §13 PS, it is important to mention it and this can systematically mark the triangular effect of constitutional procedural rights (*Drittwirkung*), since the protection of constitutional rights within the meaning of §13 PS is to be understood as protection by the State against attacks by a third party and not as protection against the State or against another addressee of constitutional rights. As regards the ECHR, it would be even more precise to refer to the case law under Articles 6 and 13.

[125] RKPJKo 09.06.2009, 3-4-1-2-09, para. 36.

[126] Cf. RKPJKm 20.06.2024, 5-24-4, para. 11.

[127] RKPJKm 10.06.2010, 3-4-1-3-10, para. 14; similarly: RKPJKm 23.01.2014, 3-4-1-43-13, para. 10. Riigikohus has later relativised this extremely restrictive view, cf. RKPJKm 03.03.2015, 3-4-1-60-14, para. 17, 18.

quite simply in the absence of the necessary rule.[128] However, even if there is a rule, it may be impossible to have to wait for the specific application of the rule. For example, in the case of challenging an international treaty or a rule of an international treaty that modifies the rights or duties of persons, the requirement of a specific application of the rule would render the legal remedy practically meaningless, since it is very difficult for a state to get rid of an unconstitutional treaty in force and the treaty cannot logically be applied before it is enforced. Moreover, the function of the individual complaint is to help secure rights where a person may not even be aware that a norm has been applied to him. This is the case, for example, with provision of surveillance measures. If a person does not know, it is impossible to require him or her to wait for the specific application of the rule. It is also doubtful whether a person can reasonably be expected to wait for the sanction to apply. If the legislature were to reintroduce, for example, the death penalty, a person could not reasonably be expected to wait until the sanction norm would apply to him. The same is obviously true for sanctions that would constitute torture, cruel or degrading treatment. Where exactly the line is drawn is a matter of interpretation.[129] So, the Riigikohus later retracted this extremely restrictive view:

> A person may file a complaint to the Riigikohus for review of constitutionality against a legislative act prohibiting certain conduct in order to protect his or her fundamental rights even before the imposition of the sentence or the alleged violation of subjective rights, if the person refers to the possibility of an actual violation of his or her rights. Such an individual complaint is admissible if the violation of the person's rights is probable, serious and irreversible and the person has no other effective means of exercising the right to judicial protection guaranteed by §15 of the Constitution.[130]

It is to be hoped that the extremely restrictive view on the admissibility is merely an unfortunate isolated case.

[128] RKÜKo 17.03.2003, 3-1-3-10-02.

[129] It is advisable to allow an individual complaint against all sanctioning norms for which a person cannot reasonably be expected to wait for the norm to apply in a specific case. In such cases, where the person has no difficulty in challenging the application of the rule when it is applied, an individual complaint will not be admissible merely because there is another effective remedy available.

[130] Cf. RKPJKm 03.03.2015, 3-4-1-60-14, para. 18.

(2) Possibility of a constitutional complaint against a court decision (judicial constitutional complaint)

The aforementioned, however, only concerns the norm control complaint. Interestingly, in the period subsequent to the Brusilov judgment, the Riigikohus also initially appeared to be willing to recognise the judicial constitutional complaint, i.e., the constitutional complaint against the decision of the court of the last instance. This has been vaguely pointed out in particular in two judgments delivered by the Riigikohus *en banc*.

In a so-called special appeal brought by Ronald Tsoi, the Riigikohus *en banc* heard an administrative case. The two main issues in the case were, first, whether the law which precluded the revocation of withdrawal of the right to drive imposed before the entry into force of the new Penal Code, even though the new law did not know the corresponding additional punishment was constitutional and, secondly, whether the failure to waive the penalty had to be challenged before the administrative or ordinary courts.[131] In the first place, the Riigikohus allocated the jurisdiction of the administrative court because it was a public-law dispute for which no special regime had been provided for. Secondly, the Riigikohus found that the law at issue was in line with the Constitution. This was a constitutional dispute which arose in the context of a dispute concerning the jurisdiction of a court.

In another so-called special appeal, brought by Peeter Ludvig, the Riigikohus *en banc* also examined a case transferred to it by the Administrative Chamber. The main issue in this case was, like the previous case, the question of the jurisdiction, i.e., whether the administrative court or the ordinary court had jurisdiction to hear an appeal against a decision establishing the intoxication status of a person who had been brought to a health care institution.[132] The Riigikohus held that the jurisdiction in this case belonged to the ordinary courts.

The link between the two cases was that the Riigikohus gave a broad interpretation to the right of individuals to bring a so-called special appeal before the Riigikohus in order to ensure that the general constitutional right to address a court was not unprotected. These decisions have been interpreted as a step towards the recognition of judicial constitutional complaint.

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[131] RKHKm (Riigikohtu halduskolleegiumi määrus = ruling of the Administrative Chamber of the Riigikohus) 10.11.2003, 3-3-1-69-03 and RKÜKm 28.04.2004, 3-3-1-69-03

[132] RKHKm 22.12.2003, 3-3-1-77-03 and RKÜKo 30.04.2004, 3-3-1-77-03.

In the following period, however, the Riigikohus expressly ruled out the judicial constitutional complaint in the case of Murat Kilic. A Turkish sea captain for long-distance ferries was married to an Estonian national and held a long-term residence permit for Estonia. He applied for Estonian citizenship. This was refused on the grounds that the applicant had not stayed in Estonia for at least 183 days per year in the last five years. The administrative courts dismissed the appeals and did not initiate constitutional review proceedings, despite repeated explicit requests.[133] The applicant lodged an individual complaint against the judgment of the Administrative Chamber of the Riigikohus before the Riigikohus, which was dismissed by the Constitutional Review Chamber. The latter stated succinctly: "Pursuant to the Constitutional Review Court Procedure Act, the Constitutional Review Chamber is not a higher court than the other chambers of the Riigikohus, to which appeals can be lodged against decisions of the Administrative, Civil or Criminal Chamber."[134]

This precedent has been followed by a number of unsuccessful attempts to directly or indirectly challenge a Riigikohus's decision before the Riigikohus with a constitutional reasoning.[135] As a consequence, according to the unequivocal case law of the Riigikohus, there is *de lege lata* no judicial constitutional complaint in Estonia. Such a solution may not sufficiently guarantee the constitutional right to loophole-free access to justice.

(3) Amendment attempt

The fundamental importance of the individual complaint for legal protection and the legal uncertainty described above prompted the Minister of Justice in 2017 to present a plan to add provisions on individual constitutional complaint to the PSJKS.[136] The subsequent debate about this plan was mainly conducted in the press.

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[133] RKHKo (Riigikohtu halduskolleegiumi otsus = judgment of the Administrative Chamber of the Riigikohus) 20.10.2008, 3-3-1-42-08.

[134] RKPJKm 11.03.2009, 3-4-1-19-08, para. 14.

[135] See RKPJKm 11.04.2013, 3-4-1-8-13; 07.07.2015, 3-4-1-24-15; 19.04.2016, 3-4-1-34-15; 27.01.2017, 3-4-1-14-16; 11.05.2017, 3-4-1-4-17. More recently: RKPJKm 22.12.2020, 5-20-9, para. 11-12; 07.11.2022, 5-22-7, para. 29-30; 13.12.2023, 5-23-36, para. 18-19; 11.06.2024, 5-24-6, para. 24; 20.06.2024, 5-24-4, para. 12, 14.

[136] Põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise seadus, Väljatöötamiskavatsus, compiled by Katri Jaanimägi, Ulrika Paavle, Mirjam Rannula, Justiitsministeerium, 1 March 2017, 17-0304; Põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise seadus, Seaduseelnõu, Justiitsministeerium, 21 May 2018, 17-0304, both available at: <http://eelnoud.valitsus.ee>.

The plan was endorsed by the Chief Justice of the Riigikohus at the time, Priit Pikamäe, and by some of the judges[137], who found that the problem of introducing an individual complaint in the PSJKS was appropriate and that regardless of the specific solution, the issue must be dealt with through legislation.[138] Eerik Kergandberg also expressed cautious support for the institution of the individual complaint in the literature.[139] In the press, Rait Maruste[140] and, slightly more cautiously, Uno Lõhmus[141] also expressed clear support for the idea of introducing individual complaints in the PSJKS.

However, on the other side, the plan triggered exceptionally harsh critique.[142] In particular, the draft was attacked as dangerous for democracy,[143] as an act of deception[144] and as an attempt to silence the Chancellor of Justice.[145]

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[137] Judges Henn Jõks, Eerik Kergandberg, Ants Kull, Villu Kõve and Peeter Roosma.

[138] Riigikohtunike P. Pikamäe, H. Jõksi, E. Kergandbergi, A. Kulli, V. Kõve ja P. Roosma täiendav arvamus põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise väljatöötamise kavatsuse kotha, 29 March 2017, nr 6-6/17-15, available at: <http://eelnoud.valitsus.ee>.

[139] Eerik Kergandberg, Individuaalkaebus kui riigisaladus, Kohtute aastaraamat 2016, pp. 91–97.

[140] Rait Maruste, Õiguskantsler püüab eksitada seadusandjat ja avalikkust, Postimees, 14 March 2017 <https://arvamus.postimees.ee/4045813/rait-maruste-oiguskantsler-puuab-eksitada-seadusandjat-ja-avalikkust>.

[141] Uno Lõhmus was in 1998–2004 the Chief Justice of the Riigikohus, before that 1994–1998 judge of the European Court of Human Rights and after that 2004–2013 judge at the Court of Justice of the European Union. Cf. Uno Lõhmus, Võimalus pöörduda otse riigikohtusse väärib arutelu, ERR, 16 March 2017 <https://www.err.ee/584528/uno-lohmus-voimalus-poorduda-otse-riigikohtusse-vaarib-rutelu>.

[142] Ivo Pilving, Kas Eestis on vaja individuaalkaebust? Kohtute aastaraamat 2016, pp. 81–89 <https://www.riigikohus.ee/sites/default/files/elfinder/%C3%B5igusalased%20materjalid/Riigikohtu%20tr%C3%BCkised/Kohtute_raamat_2016.pdf>; Liis Velsker, Reinsalu plaanitav seaduseelnõu on õiguskantsleri hinnangul arusaamatu ja ohustab demokraatiat, Postimees, 10 March 2017 <https://www.postimees.ee/4041463/reinsalu-plaanitav-seaduseelnou-on-oiguskantsleri-hinnangul-arusaamatu-ja-ohustab-demokraatiat>; Karin Kangro, Rask näeb otsekaebuste lubamise plaanis katset õiguskantsler tasalülitada, Postimees, 15 March 2017 <https://www.postimees.ee/4046031/rask-naeb-otsekaebuste-lubamise-plaanis-katset-oiguskantsler-tasalulitada>; Ülle Madise, Otsekaebuse petukaup ehk kuidas rohkem on tegelikult vähem, Postimees, 16 March 2017 <https://arvamus.postimees.ee/4048205/ulle-madise-otsekaebuse-petukaup-ehk-kuidas-rohkem-on-tegelikult-vahem>; Helen Mihelson, Riigikohus ei toeta otsekaebuste lubamise plaani, kuid soovib arutelu jätkata, Postimees, 29 March 2017 <https://www.postimees.ee/4062357/riigikohus-ei-toeta-otsekaebuste-lubamise-plaani-kuid-soovib-arutelu-jatkata>; Ivo Pilving, Põhiõiguste kaitset tuleb alustada õigest otsast, Postimees, 2 April 2017 <https://arvamus.postimees.ee/4066569/ivo-pilving-pohioiguste-kaitset-tuleb-alustada-oigest-otsast>.

[143] Liis Velsker, Reinsalu plaanitav seaduseelnõu on õiguskantsleri hinnangul arusaamatu ja ohustab demokraatiat, Postimees, 10 March 2017 <https://www.postimees.ee/4041463/reinsalu-plaanitav-seaduseelnou-on-oiguskantsleri-hinnangul-arusaamatu-ja-ohustab-demokraatiat>.

[144] Ülle Madise, Otsekaebuse petukaup ehk kuidas rohkem on tegelikult vähem, Postimees, 16 March 2017 <https://arvamus.postimees.ee/4048205/ulle-madise-otsekaebuse-petukaup-ehk-kuidas-rohkem-on-tegelikult-vahem>.

[145] Karin Kangro, Rask näeb otsekaebuste lubamise plaanis katset õiguskantsler tasalülitada, Postimees, 15 March 2017 <https://www.postimees.ee/4046031/rask-naeb-otsekaebuste-lubamise-plaanis-katset-oiguskantsler-tasalulitada>.

Even the majority of the Riigikohus did not support the draft law "as proposed".[146] Furthermore, judge Ivo Pilving publicly criticised the plan.[147] Other prominent opponents were the Chancellor of Justice Ülle Madise[148] and former Minister of Justice and former Chief Justice of the Supreme Court Märt Rask.[149] The main argument of the opponents was the assumption that there is no gap in the judicial protection, the assertion that the introduction of individual complaints would lead to an unnecessary increase in the workload of the Riigikohus, that it would create a risk of politicisation of the Riigikohus and the apprehension that it would undermine the competences of the Chancellor of Justice.

The strong negative reaction was somewhat surprising and regrettable. The Riigikohus, in its case law, has already accepted the right of individual complaint. Despite this, no excessive increase of the workload or politicisation of the Riigikohus has so far been observed. However, if the individual constitutional complaint were removed from the legal order, there would appear an unconstitutional gap in the right to access to courts.

In the following, the Minister of Justice withdrew his plan and the individual constitutional complaint continues its shadowy existence based on the case law of the Riigikohus, which itself did not have a majority in support of the idea.

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[146] Riigikohtu arvamus põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise väljatöötamise kavatsuse kotha, 29 March 2017, 6-6/17-15, available at: <http://eelnoud.valitsus.ee>.

[147] Ivo Pilving is the current President of the Administrative Chamber of the Riigikohus. Cf. Ivo Pilving, Riigikohtu halduskolleegiumi arvamus PSJKS muutmise seaduse eelnõu VTK-le, 28 March 2017, 6-6/17-15, available at: <http://eelnoud.valitsus.ee>; Ivo Pilving, Põhiõiguste kaitset tuleb alustada õigest otsast, Postimees 2 April 2017 <https://arvamus.postimees.ee/4066569/ivo-pilving-pohioiguste-kaitset-tuleb-alustada-oigest-otsast>; Ivo Pilving, Kas Eestis on vaja individuaalkaebust? Kohtute aastaraamat 2016, p. 81 ff.

[148] Ülle Madise is the Chancellor of Justice since March 2015. Cf. Ülle Madise, Arvamus põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise seaduse eelnõu väljatöötamise kavatsusele, 10 March 2017, 9-2/170305/1701102, available at: <https://www.oiguskantsler.ee/et/seisukohad>; Ülle Madise, Otsekaebuse petukaup ehk kuidas rohkem on tegelikult vähem, Postimees, 16 March 2017 <https://arvamus.postimees.ee/4048205/ulle-madise-otsekaebuse-petukaup-ehk-kuidas-rohkem-on-tegelikult-vahem>; Liis Velsker, Reinsalu plaanitav seaduseelnõu on õiguskantsleri hinnangul arusaamatu ja ohustab demokraatiat, Postimees, 10 March 2017 <https://www.postimees.ee/4041463/reinsalu-plaanitav-seaduseelnou-on-oiguskantsleri-hinnangul-arusaamatu-ja-ohustab-demokraatiat>. Since the principal function of the Chancellor of Justice is to help to guarantee constitutional rights, it would only be consistent if she or he were the first proponent of the individual complaint.

[149] Cf. Karin Kangro, Rask näeb otsekaebuste lubamise plaanis katset õiguskantsler tasalülitada, Postimees, 15 March 2017 <https://www.postimees.ee/4046031/rask-naeb-otsekaebuste-lubamise-plaanis-katset-oiguskantsler-tasalulitada>.

6. A case study on the case law of the Supreme Court

One of the most famous cases of the Riigikohus, the Brusilov case,[150] has already been touched upon above. Another judgement that is undoubtedly one of the landmark judgements of the Riigikohus is called "Operative technical measures I".[151] The Parliament adopted the Police Act of the Republic of Estonia Amendment Act,[152] which provided, among other things, for the following:

> To establish that until the adoption of an act laying down operative surveillance activity, the security police officers may temporarily use operative technical measures to perform their duties only at the written consent of a member of the Riigikohus appointed by the Chief Justice of the Riigikohus.

The Chancellor of Justice challenged this article in the Riigikohus. The Riigikohus repealed the article in question as of the entry into force of the judgment.[153]

The reasoning of this early judgement was rather brief and simply structured. The following parts are of importance:

> The law establishes the possibility to employ special operative surveillance measures, and the general grounds for the restriction of fundamental rights and freedoms. […] Nevertheless, the Court is of the opinion that the valid normative framework for the implementation of special operative surveillance measures is insufficient from the aspect of universal protection of fundamental rights and freedoms, and hides in itself the danger of arbitrariness, distortions and unconstitutional restrictions of the exercise of fundamental rights and freedoms. It has not been provided what exactly is to be understood under these special operative surveillance measures. […] The circle of subjects entitled to apply special operative measures, the cases, conditions, procedures, guarantees, control and supervision, and responsibility pertaining to the use of special measures have not been

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[150] RKÜKo 17.03.2003, 3-1-3-10-02.

[151] RKPJKo 12.01.1994, III-4/1-1/94. Cf. Madis Ernits, An Early Decision with Far-reaching Consequences, Juridica International 12 (2007), pp. 23–35 (24–28, 32–35); Madis Ernits, §3. [Põhiseaduse ülimuslikkus ja reservatsioon ning seaduslikkus ja üldine seadusereservatsioon; rahvusvahelise õiguse üldtunnustatud normid; avaldamiskohustus ja salajase õiguse keeld] in *Eesti Vabariigi põhiseaduse kommentaarid*, Uno Lõhmus (ed.), 2023, rec. 101 ff. <https://pohiseadus.riigioigus.ee/v1/eesti-vabariigi-pohiseadus/i-uldsatted-ss-1-7/ss-3-pohiseaduse-ulimuslikkus-ja-reservatsioon>.

[152] Eesti Vabariigi politseiseaduse muutmise ja täiendamise seadus (Act amending and supplementing the Police Act of the Republic of Estonia) of 21 March 1993 (RT I 1993, 20, 355).

[153] RKPJKo 12.01.1994, III-4/1-1/94, resolutive part of the judgment.

specified. […] Thus, upon passing […] the Police Act Amendment Act, the Riigikogu has ignored §3 of the Constitution, according to which the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith, and has violated §14, which obliges the executive to guarantee the rights and freedoms of every person. […] The Riigikogu itself ought to have established the concrete cases and a detailed procedure for the use of special operative surveillance measures, as well as possible restrictions of rights related to the use of such measures, instead of delegating all this to the officers of the Security Police and a judge of the Riigikohus. What the legislator is justified or obliged to do under the Constitution cannot be delegated to the executive, not even temporarily and under the condition of court supervision. Thus, […] the Police Act Amendment Act is also in conflict with §13(2) of the Constitution, as insufficient regulation upon establishing restrictions on fundamental rights and freedoms does not protect everyone from the arbitrary treatment of state power.

The significance of this judgment arises from three aspects: first, the Riigikohus recognises the general principle of the reservation of the law; second, it introduces the general right to organisation and procedure, and third, it accepts that the legislature can not only violate the Constitution by going too far but also by doing not enough, i.e. by omission.[154] Only the first aspect, which is the most important one, is of a closer interest here. The general principle of the reservation of the law has its roots in the Enlightenment and in the idea that, since everyone is equally entitled to human rights, everyone must also be entitled to have a say, at least indirectly through a vote in elections, in the limitation of these rights.[155] The Riigikohus has repeated the idea of the general principle of the reservation of the law several times after its first recognition, in a different wording but always in a very clear manner, e.g.: "The Parliament may not delegate to the Government

[154] Madis Ernits, An Early Decision with Far-reaching Consequences, Juridica International 12 (2007), pp. 23–35 (24–28, 32–35).

[155] Cf. Madis Ernits, §3. [Põhiseaduse ülimuslikkus ja reservatsioon ning seaduslikkus ja üldine seadusereservatsioon; rahvusvahelise õiguse üldtunnustatud normid; avaldamiskohustus ja salajase õiguse keeld] in *Eesti Vabariigi põhiseaduse kommentaarid*, Uno Lõhmus (ed.), 2023, rec. 103 <https://pohiseadus.riigioigus.ee/v1/eesti-vabariigi-pohiseadus/i-uldsatted-ss-1-7/ss-3-pohiseaduse-ulimuslikkus-ja-reservatsioon>.

of the Republic the resolution of a matter which, according to the Constitution, must be resolved by legislation."[156]

The principle of general reservation of the law has two elements: first, the requirement of a legal base or legislative authorisation for every infringement of rights which specifically concerns constitutional rights, and second, a slightly broader materiality principle or parliamentary reservation which requires that material, or most important, questions must be decided by the Parliament itself and cannot be delegated to the executive power.[157] The most prominent formulation of the first principle by the Riigikohus is the following:

> The delegation of a matter that falls within the competence of the legislature to the executive and the interference of the executive in constitutional rights is permitted only on the basis of an authority-delegating provision that is provided for by legislation and in accordance with the Constitution.[158]

The materiality principle has been repeated in a similar wording several times by the Riigikohus:

> The requirement of parliamentary reservation derives from the principles of the rule of law and democracy, and it means that in regard to issues concerning constitutional rights all material decisions from the point of view of exercise of constitutional rights must be taken by the legislator.[159]

The following requirement is a particularly important addition to this principle:

> The executive may only specify the restrictions on constitutional rights and freedoms laid down by legislation, but is not allowed to impose additional restrictions to those provided for by legislation.[160]

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[156] RKPJKo 23.03.1998, 3-4-1-2-98, para. VIII. Cf. RKPJKo 26.11.2007, 3-4-1-18-07, para. 36; 20.10.2009, 3-4-1-14-09, para. 32; 20.03.2014, 3-4-1-42-13, para. 41; RKÜKo 26.04.2016, 3-2-1-40-15, para. 53.

[157] Madis Ernits, §3. [Põhiseaduse ülimuslikkus ja reservatsioon ning seaduslikkus ja üldine seadusereservatsioon; rahvusvahelise õiguse üldtunnustatud normid; avaldamiskohustus ja salajase õiguse keeld] in *Eesti Vabariigi põhiseaduse kommentaarid*, Uno Lõhmus (ed.), 2023, rec. 101 ff. <https://pohiseadus.riigioigus.ee/v1/eesti-vabariigi-pohiseadus/i-uldsatted-ss-1-7/ss-3-pohiseaduse-ulimuslikkus-ja-reservatsioon>.

[158] RKPJKo 18.05.2015, 3-4-1-55-14, para. 46.

[159] RKÜKo 03.12.2007, 3-3-1-41-06, para. 21; 02.06.2008, 3-4-1-19-07, para. 25. Cf. RKÜKo 21.02.2017, 3-3-1-48-16, para. 38; RKPJKo 24.12.2002, 3-4-1-10-02, para. 24; 06.01.2015, 3-4-1-34-14, para. 44; 18.05.2015, 3-4-1-55-14, para. 46.

[160] RKPJKo 24.12.2002, 3-4-1-10-02, para. 24; RKTKm (Riigikohtu tsiviilkolleegiumi määrus = ruling of the Civil Chamber of the Riigikohus) 26.02.2014, 3-2-1-153-13, para. 17.

When it comes to infringements of constitutional rights, both requirements, i.e. the requirement of a legal base or legislative authorisation and the materiality principle or parliamentary reservation must be met.

The most interesting question in this context is what is material. Unfortunately, there is neither a simple nor an exhaustive answer to that question. In subsequent case law, the Riigikohus has ruled in particular that a detailed procedure for limitation of rights[161] and the designation of the competent administrative body[162] are material from the perspective of constitutional rights and thus objects of legislation. What is more, e.g., disciplinary sanctions against civil servants,[163] the object and amount of a customs duty,[164] interest duty on a tax payment in arrears,[165] a participation fee of an auction for privatisation of land,[166] fees for bailiffs[167] and a limit on the reimbursement of the costs of a contractual representation fee[168] must be provided for by legislation and are, thus, material. However, this list is not exhaustive and is therefore only indicative.

At this point, it is important to note that the judgment "Operative technical measures I" laid the foundation for a long chain of case law, some of which continues to this day. Unfortunately, in a more recent case law, the Riigikohus seems to have partially abandoned the materiality principle in declaring that "some material matters can be decided by the government".[169] This statement has also found expression in some judgements.[170]

The Riigikohus *en banc* had to assess the constitutionality of a set of provisions providing for the qualification requirements for construction

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[161] RKPJKo 12.01.1994, III-4/1-1/94. In case of an intensive limitation, which undoubtedly includes wire-tapping and covert surveillance under operative technical special measures, the Riigikohus considers the order or procedure so important that it must be established by law and not by an act subordinate to a law.

[162] RKHKm 22.12.2003, 3-3-1-77-03, para. 24.

[163] RKPJKo 11.06.1997, 3-4-1-1-97.

[164] RKPJKo 23.03.98, 3-4-1-2-98.

[165] RKPJKo 05.11.2002, 3-4-1-8-02.

[166] RKÜKo 22.12.2000, 3-4-1-10-00.

[167] RKPJKo 19.12.2003, 3-4-1-22-03.

[168] RKÜKm 26.06.2014, 3-2-1-153-13, para. 73.

[169] RKPJKo 31.10.2022, 5-22-4, para. 71.

[170] Cf. M. Ernits, §3. [Põhiseaduse ülimuslikkus ja reservatsioon ning seaduslikkus ja üldine seadusereservatsioon; rahvusvahelise õiguse üldtunnustatud normid; avaldamiskohustus ja salajase õiguse keeld] in *Eesti Vabariigi põhiseaduse kommentaarid*, Uno Lõhmus (ed.), 2023, rec. 159 f. <https://pohiseadus.riigioigus.ee/v1/eesti-vabariigi-pohiseadus/i-uldsatted-ss-1-7/ss-3-pohiseaduse-ulimuslikkus-ja-reservatsioon>.

engineers.[171] The obligation to prove the existence of qualifications for a certain profession is an intense infringement of the constitutional freedom of choice of profession. Since without proof of qualification, a person cannot work in the chosen profession, this is a restriction on access to the profession. This, in turn, means that a person who does not have a professional certificate cannot freely earn a living in his chosen profession. As the Riigikohus pointed out: "The law precludes the exercise of certain activities without a certificate of professional qualification or competence."[172]

The legislature had delegated the setting of those qualification requirements in their entirety to the regulatory power of the Minister for Enterprise and Information Technology, without any limitations or substantive requirements. The Riigikohus held, in breach of its earlier case law, that this legislation constitutes the authorisation "under which the minister will establish, among other things, as qualification requirements, the education and work experience requirements that a person must meet in order to qualify [as a construction engineer]"[173]. In short, the Riigikohus accepted in this case a mere allocation of competence as the basis for authorisation to issue the regulation establishing the qualification requirements. The Riigikohus did not examine whether, in accordance with the principle of materiality, at least the most important qualification requirements should not be laid down in the legislation itself. However, from the earlier case law of the Riigikohus, it can be clearly concluded that the legislator cannot, in the case of an intensive infringement of a constitutional right, expressly delegate the power to enact all important conditions to the executive.

A further problematic development has emerged in the assessment of the lawfulness of vaccination orders. The Commander of the Defence Forces imposed on all employees of the Defence Forces the obligation to undergo vaccination against coronavirus. The consequence of non-compliance to this order was dismissal from service. The Riigikohus was of the opinion that a general provision of the labour law was a sufficient legal basis for this order. According to this general provision, every employer shall have the right to impose on the undertaking stricter occupational health and safety requirements than those provided for by legislation. This provision has a double meaning. In so far as the

[171] RKÜKo 17.05.2021, 3-18-1432. Cf. RKHKo 28.12.2021, 3-17-1994, p 14–17.
[172] RKÜKo 17.05.2021, 3-18-1432, p 31.
[173] RKÜKo 17.05.2021, 3-18-1432, p 23.

employer is a private person and the relationship between the parties is governed by a labour contract, this power must be exercised in accordance with the principles of private law. However, when it is relied upon by the State itself or by a subordinate public legal person in relation to a private individual, the rule is subject to constitutional principles, including the principle of materiality. According to the principle of materiality, however, the important questions, i.e., in particular, the restrictions of constitutional rights, must be laid down in the legislation itself. This condition was clearly not met by the provision in question. It is therefore highly doubtful whether the provision in question can be applied at all in public law. However, the Riigikohus stated, without seeing any problem: "[The particular provision] expressly permits the imposition of stricter requirements than those provided for in the legislation, and neither the Military Service Act[174] nor its implementing acts provide for an exception to the right to impose stricter requirements."[175]

In a more recent similar case concerning the compulsory vaccination of police officers, which was imposed by a general order of the Director General of Police based on the same legal basis, the Riigikohus reaffirmed the latter position.[176] Hereby, the Riigikohus simply stated that the general labour law basis was constitutional.[177] In short, the Riigikohus suddenly allows, despite its earlier strict case law, the imposition of further obligations by the executive on the basis of a legal basis devoid of any substance. This opens the floodgates to the arbitrariness of the executive.

It remains to be seen whether these decisions are going to be corrected in later case law or whether a larger and more serious problem has occurred for the rule of law and the basic democratic order.

7. Constitutional Review in Estonia – a Model for 30 Years?

Speaking of the overall trends, the rapid development of the Riigikohus' case law in the initial period seems to have been slowed down over time. In some cases, tendencies have appeared to roll back some of the central achievements of

[174] Kaitseväeteenistuse seadus (Military Service Act) of 13 June 2012 (RT I, 10.07.2012, 1) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/505082024006/consolide>.

[175] RKHKm 25.11.2021, 3-21-2241, para. 24.

[176] RKHKo 21.06.2024, 3-22-157.

[177] RKHKo 21.06.2024, 3-22-157, para. 12.1.

the democratic constitutional state already achieved in the early case law, and in some recent important cases the case law has not taken the best path from the perspective of the constitutional principles. Some key judgments bring out important points. However, the reasoning tends too often to be fragmentary or methodologically poorly comprehensible and at times the consistency of the case law is somewhat lacking. Nevertheless, the withdrawn control over the decision-making powers of the executive is a cause for concern from the point of view of constitutional rights because the rule of constitution is not always guaranteed by the case law of the Riigikohus in this respect. Furthermore, the difficult or in some cases even impossible access to justice in the matters of constitutional review causes serious concerns from the constitutional point of view.

The Estonian constitutional review system appears only at the first glance as simple. Although performed by a single court, in reality, it is quite complex and does not constitute a good model. The incompatible dichotomy of diffuse and concentrated elements of review and the misleading constitutional article which stipulates the secondary nature of constitutional review blur competences and accountabilities. Furthermore, the formation of the Constitutional Review Chamber also raises questions related to the rule of law. Insofar as the institutional aspect is concerned, an improvement is not in sight because it would require far-reaching institutional reforms for which there is no consensus, and which cannot be achieved in the foreseeable future by democratic means. In particular, the reluctance of Riigikohus itself for any change will block every reform effort of the Riigikohus. And to go against a powerful unified highest, and at the same time constitutional, court would be a tricky task in every democratic constitutional state, which no mainstream political party would agree to because of suspicion of undemocratic ulterior motives.

As regards the appointment procedure for judges, which corresponds to the indirect cooptation model, it seems that the solution that has proven to be successful in the transformation period might not be the best solution for a stable democratic society in the long run.[178] The lifelong term of office is an amplifier of the consequences of a possible unlucky appointment and an accumulation of unsuccessful personnel decisions combined with poor substantive decisions can

[178] To prevent these risks, it might be recommendable to appoint all justices of the Riigikohus to office in an equal way, e.g. by the Parliament on a proposal of the President, and to let them elect the Chief Justice by and from among the justices themselves. This solution would respect the principle collegiality and in this case the Chief Justice would rather be a *primus inter pares*.

even, in an extreme case, jeopardise the existence of the democratic constitutional state. In an ideal world, a stand-alone constitutional court would indeed, if configured without major errors, very likely be a far better solution in the long term.[179]

[179] Realistically, there are neither economic reasons nor sufficient political support for the plan to establish an additional stand-alone constitutional court. Theoretically, there are essentially two strategies to establish a constitutional court. The first is to transform the current Riigikohus into a genuine constitutional court eliminating its competences as the highest court of appeal. At the moment, there is a three-tier court system in which a single judge regularly decides at the first level and a three-judge panel decides at the second level – at the level of the appeal courts. A decision by a Court of Appeal may then be appealed again to the Riigikohus. This could prove to be too cost-intensive for a small state in the long term. The strategy would include a reorganisation of the two existing courts of appeal into an ordinary appeal court of last instance and an administrative appeal court of last instance. Although this would eliminate the problem of the secondary nature of constitutional adjudication, it would retain particularly the problems caused by the cooptation model and by the lifelong term of office. Furthermore, in this case the constitutional court would have too much influence to the legitimisation of the rest of the court system as provided for in §78 No. 13 and §150(3) PS according to which all other judges shall be appointed to office by the President of the Republic on the proposal of the Riigikohus.

The second, more radical strategy, would essentially be to abolish the Riigikohus and establish a new, stand-alone constitutional court, free from all the problems listed above. The reorganisation of the two courts of appeal would then follow the path already described and the current judges of the Riigikohus should become the opportunity to become judges at the two courts of appeal due to their lifelong term of office.