



Peeter Roosma

Assistant of Constitutional and Administrative Law,

Counsellor to the Constitutional Review Chamber of the Supreme Court

Protection of Fundamental Rights and Freedoms in Estonian Constitutional Jurisprudence

Introduction

In the continental legal tradition the task of a judge has been seen in application of abstract legal rules to a specific factual pattern to achieve the results foreseen by the legislature. This process of subsumption is not purely logical although such claims have been made. In reality, the process of application of law is more complicated, since any legal regulation cannot be absolutely comprehensive and coherent without gaps and contradictions. A question whether or how adequately the rationale of a law can be written down at all — because of the incompleteness of the human language — has been erected.¹ In any case, the common understanding seems to be that legal interpretation is inevitably necessary in the process of application of law.

One of the most influential theories of interpretation in the continental legal thought, recognised until today in German jurisprudence as "classical theory of interpretation" is the teaching of Friedrich Carl von Savigny which was first published in 1840 under the title "System des heutigen Römischen Rechts".² The aim of interpretation according to Savigny was reconstruction of the rationale in the law. Four elements of interpretation had to be applied simultaneously to achieve this purpose — grammatical, logical, historical and systematic. It is interesting to mention that different scholars have classified Savigny's theo-

ry of interpretation both as subjective and objective theories of interpretation, or as standing outside both of them.³

In principle, similar methods of interpretation are applicable in the process of interpretation, including constitutional interpretation, today, as well,⁴ although different authors offer slightly different classifications of the methods.⁵ On a more general level, the theories of interpretation can also be divided into the classes of subjective and objective theories, the basis of the distinction being the intent of the legislator while passing the relevant act, and the reasonable purpose of the law, respectively.⁶

Generally, the courts are free to use the methods of interpretation they deem proper in a specific case, there are only a few laws which stipulate how they should be interpreted. In Germany some older codifications contain such provisions.⁷ In the United States, however, many states have passed special laws, determining how statutes adopted by the legislature of the respective states must be interpreted.⁸ It has been mentioned that there is also difference between ordinary statutory interpretation and construction of the Constitution in the United States.⁹

The Estonian Constitution does not mention any specific methods of interpretation, but a few laws do.¹⁰ In the case of the General Part of the Civil Code Act, Professor Raul Narits has criticised the inclusion of ways of inter-

pretation into a law. He argues that by such legal enactment of specific techniques of interpretation the legislator has chosen some elements from a number of theories of interpretation and has made those selected legally binding. According to Narits the methods of interpretation belong rather to legal science than to the general provisions of a law.¹¹

Attempts have been made to find rules of interpretation also in the text of the Estonian Constitution. Professor Peter Häberle found that § 42 of the draft Constitution of December 1991 (§ 10 of the valid 1992 Constitution)¹² sets forth a rule of interpretation, quite similarly with the 1979 Peruvian or the 1985 Guatemalan Constitutions, and, in fact, with the Ninth Amendment to the Constitution of the United States.¹³ Häberle calls this provision a "fundamental rights development clause" and claims that the reference to the "spirit of the Constitution" and the clause "or are in accordance therewith", enable the Constitution to develop more freely and allows better to create new fundamental rights.¹⁴ Maybe it would be interesting to call attention to the fact that the section mentioned speaks about "duties" also. It could be called "constitutional duties development clause" as well, if the constitutional rights and legal obligations would not subject traditionally to different ways of interpretation — broad and narrow, respectively.

Generally, it is hard to fix the different methods of interpretation into a strict hierarchy. They can be applied in different degrees in one court decision, as well. There are, however, slight dissimilarities between the traditions in particular countries. For example, in Germany the intention of the framers of the Basic Law and the history of specific constitutional provisions is only of additional importance besides reasonings supported by textual, structural or teleological arguments.¹⁵ This may be a result of the originally provisional character of the German Basic Law,¹⁶ I guess. Concerning Estonia, there is no clarity in this question, no case law referring to the drafting of the Constitution is known to the author. This, of course, does not preclude the possibility that some courts have taken advantage of *travaux préparatoires* silently. It would, however, be interesting if a court had to apply a constitutional provision to which a clearly intentional interpretation of the drafters had been attached. A peculiar example of the kind is the interpretation of § 122 of the 1992 Constitution agreed upon by the members of the Constituent Assembly.¹⁷ Such interpretation is hardly binding for a court, but the court would not feel comfortable to construe the provision of the Constitution in a different way, as well.

In German Constitutional jurisprudence, under the concept of the objective value order, the principle of human dignity has been given a higher priority in comparison with other principles.¹⁸ One could ask if any similar principles of higher rank can be found also in the Estonian

Constitution.¹⁹ I am quite dubious in this respect. It has been mentioned in some scholarly works that the Preamble of a Constitution may contain "a *precis* of the essential contents of the constitution" or that the Preamble may include values and principles which can be useful for the interpretation of the whole Constitution.²⁰ In the practice of the Supreme Court of Estonia, we can meet some references to the Preamble. The Preamble is not, however, referred to separately, but together with application of other provisions of the Constitution.

The following treatise attempts to present a short overview of the constitutional jurisdiction of Estonia in the field of fundamental rights and freedoms. A few introductory remarks must be made, first. The most authoritative source of constitutional jurisdiction is, of course, the body of decisions of the Constitutional Review Chamber of the Supreme Court. True, the decisions of the Plenary Session of the Supreme Court would have even greater judicial value, but until 1999 the Plenary Session has made only five decisions. In one of the decisions both the opinion of the Court and a dissenting opinion referred to the Constitution,²¹ and in two more decisions dissenting opinions dealt with constitutional issues.²²

The decisions of other Chambers of the Supreme Court — Criminal, Civil and Administrative Law Chambers — are also of some interest. Constitutional questions are not concerned very frequently in these cases, but since the decisions of all Chambers are published, they have still influence of general importance. All the Chambers of the Supreme Court are normally the last judicial bodies hearing a case, thus, although the decisions do not have a formal force of precedent, they are guiding interpretations of law.²³

The case law of neither the Constitutional Review Chamber nor of the other Chambers of the Supreme Court is too voluminous. The first has made 38 decisions, the latter taken together refer to constitutional norms more often than not over the six years of their existence, but in most cases the interpretations of the Constitution by the other Chambers are rather superficial. Thus, the insight into the principles applied by the Supreme Court in the process of protection of fundamental rights and freedoms, cannot go very deep yet. The structure of the present paper below follows an attempt to group the relevant decisions of the Constitutional Review Chamber according to the rights and freedoms mainly concerned. The case law developed by the other Chambers is used as supplementary material.

Fundamental Rights

A. PRIVACY

There are three decisions of the Constitutional Review Chamber where the privacy issue is among the key questions of the case. The first case was initiated by the President,²⁴ the other two — by the Legal Chancellor.²⁵

The President proposed the Supreme Court to declare the Taxation Act, passed by the Riigikogu²⁶ unconstitutional. The President had already refused to proclaim it once, but the parliament adopted it, unamended, again. The President turned to the Supreme Court, contesting the constitutionality of the law.

Among the grounds for declaring the Taxation Act unconstitutional were the powers given by it to officers of the tax administrator, irrespective of the fundamental rights of everyone. Sections 33 and 43 of the Constitution guarantee inviolability of everyone's dwelling, property and place of employment, and confidentiality of correspondence. These rights extend also to legal persons.²⁷ The Taxation Act empowered officers of the tax administrator to install cameras and devices of measurement on the property of a taxpayer without the taxpayer's consent and without any proper legal procedure to be observed, violating, thus, the principle of privacy in the private life and in one's business.

Pursuant to the opinion of the tax administration officer himself, he could enter and control the buildings and territories of a legal person. He needed the permission of a judge, but that was deemed by the Supreme Court to be insufficient for considering the activities of a tax administration officer constitutional. The permission of the judge would be formal, if there were no grounds for the control, based on objective criteria. The opinion of the tax administration officer that the taxpayer may avoid paying the taxes could not be treated as a constitutional ground for the restriction of fundamental privacy rights and the constitutional principle of inviolability of property.

The proceedings in the two other cases were initiated upon proposals of the Legal Chancellor, thus, abstract *a posteriori* review was exercised. The legislation contested by the Legal Chancellor, included a law amending the Police Act and a governmental regulation by which the Statute of the Defence Police and the Regulation on the Use of Special Technical Means were enacted.

The Constitutional Review Chamber reproached the law amending the Police Act with superficiality. The right of a person to informed self-determination means that she can choose her way of conduct and protect herself.²⁸ Absent or hidden legal regulation does not enable the person to exercise this right. Thus, an important principle of the requirement of sufficiently detailed legal regulation in the areas where fundamental rights may be infringed, was pronounced by the Court. The amendment law under scrutiny did not specify what exactly was meant by the "special technical means".

The law enabled officers of the Defence Police to restrict by the use of special technical means the freedoms guaranteed by the Constitution, for example, the right to inviolability of private and family life, inviolability of home and confidentiality of correspondence.²⁹ All the pro-

visions of the Constitution guaranteeing the rights named above, include certain restriction clauses, allowing, inter alia, limitation of the rights in order to prevent a criminal offence or to ascertain the truth in a criminal proceeding³⁰. Under the Constitution such restrictions can be made in the cases and pursuant to procedure provided by law, but the amendment law did not specify either the cases or the procedure in a satisfactory manner. The cases were actually not specified at all, being limited only to the general competencies of the Defence Police. The permission for the use of the "special means" under the amendment law had to be given by a justice of the Supreme Court appointed by the Chief Justice. However, due to the vagueness of the terminology, insufficient regulation and incompleteness of the procedures, the justice of the Supreme Court would not have had any substantial power of control. Besides, the Constitution empowers the legislature to determine cases and procedures of permissible restrictions of rights. Due to the vagueness of the regulation, this power was essentially delegated to the officers of the Defence Police and a Supreme Court justice. The lack of proper criteria for the use of the "special means" could result in arbitrary exercise of state power, whereas according to the Constitution, the law shall protect everyone from that. Delegation of the legislative powers in the field of restriction of the fundamental rights is not permissible under the Constitution. Legislative powers cannot be delegated to the executive, not even under the supervision of the judiciary. Also, lack of control mechanisms and provisions concerning the responsibility of the officials involved in the contested activities, leaves the fundamental rights too vulnerable.

In the second case, the one concerning the governmental regulation named above, the Constitutional Review Chamber pointed out that the Government has issued rules under which fundamental rights can be restricted. According to the Constitution rights and freedoms can be restricted only pursuant to law, not in accordance with inferior legal acts. Furthermore, the governmental regulation under discussion was a *praeter legem* regulation, whereas under § 87(6) of the Constitution, the Government is empowered to issue regulations and orders on the basis of and for the implementation of law.

Thus, the Constitutional Review Chamber outlined in these early decisions some important principles it has elaborated later. Among them, the inadmissibility of the *praeter legem* governmental regulations in the areas which under the Constitution should be covered by laws, is one of importance. Principles concerning specifically permissible limitations of fundamental rights, privacy rights in particular, could be summarised as follows:

(1) the term "law" used in the restriction clauses of the Fundamental Rights and Freedoms Chapter of the Constitution has to be interpreted as an act of the Riigikogu;

(2) the Riigikogu cannot delegate the legislative powers vested in it by the Constitution;

(3) the restrictions to the fundamental rights and freedoms are unconstitutional if they are not provided for in a way detailed enough to enable the subjects of law to determine their conduct on the basis of informed choice;

(4) the requirement of the permission of a judge does not conform the limitations of fundamental rights with the Constitution per se, especially if the judge cannot evaluate the need for the restrictions substantially. The grounds provided in the restriction clauses of the Constitution must be satisfied for the application of the restrictions to be constitutional.

Most of the principles are, in one way or another, characteristic to the German Constitutional Court practice, as well.³¹

Several interpretative methods have been used in these rulings. Firstly, the term "law" has been construed, on one hand, purely textually — the main meaning of it is an act of parliament. On the other hand, construction of "law" as an act of the Riigikogu, ensures the best possible protection for the fundamental rights, thus the elements of purposive interpretation can be seen, as well. Secondly, a general rule of contemporary interpretation in the field of fundamental rights has been applied — the rule of construing the fundamental rights in a broad manner. Thirdly, although we cannot speak about a system of strict separation of powers in a parliamentary system, some dividing lines between the branches of power have been sketched by the assertion that the Riigikogu should create rules exact enough for proper application and not delegate almost unlimited powers to the executive under no proper control of the judiciary.

The way of determining influences by identification of the sources which were available may be a rather slippery one, since it is still mainly based on some guesswork. However, certain examples may be rather inviting. For example, during the time a law on special measures of prosecution was drafted, Professor Eerik Kergandberg published an article³² concerning this subject and briefly commenting the draft, as well. He also refers to a problem arisen in Germany, namely the absence of a specific fundamental right in the Basic Law which would have been violated by the application of the special measures.³³ Kergandberg refers to a decision of the German Constitutional Court where this fundamental right was identified as "the right to informational self-determination". The German case was rather different from the Estonian cases concerning the special measures. However, in the decision of the Constitutional Review Chamber the right to informational self-determination was mentioned also. The common principle behind these arguments seems to be the person's right to determine what kinds of information concerning himself can be collected by the powers-that-be. In case it cannot be left to him to decide upon, he

has at least the right to be aware of the possibilities, cases and procedure of the non-consensual data collection, to have an ability of determining his conduct, based on this knowledge. Perhaps such construction of the influence of German jurisprudence is artificial, but it is an appealing coincidence, at least.

B. PROPERTY

The right to property has been a central or an additional issue in several cases before the Constitutional Review Chamber. One could explain this fact by the legacy of the times gone — the principle of inviolability of property was often and in several forms not respected. This resulted, perhaps, in an "over-reaction" — perception that property is something almost divine. Other sources generating constitutional controversies are, of course, the property restitution and privatisation processes.

The inviolability of property is guaranteed by § 32 of the Constitution. This guarantee is not absolute, under certain conditions private property may be expropriated or the use of the property may be restricted. The first property cases the Supreme Court confronted, concerned limitations on the use of property.

A resolution of the Tallinn City Council³⁴ and two regulations of the Tallinn City Government³⁵ arranging paid car parking in Tallinn were protested by the Legal Chancellor. The resolution of the City Council empowered the City Government to regulate on the matter, thus, most of the motives of the two decisions of the Supreme Court apply equally to all three acts contested.

The Court argued that under the Constitution everyone has the right to freely possess, use, and dispose his or her property, whereas limitations to the right can be set by law.³⁶ Although the local governments are entitled to manage all local issues independently pursuant to law,³⁷ the acts under discussion were found unconstitutional. The local authorities — when mandating locking of the wheels of cars parked without proper certificate or in a place not designated for parking — were really regulating an issue of local character, but at the same time the use of property — a car — was restricted. No law — in the meaning of an act of parliament — granted local authorities the power to restrict the use of property in this way. Thus, the acts of the City Council and City Government conflicted the constitutional right to freely use one's property.

In another ruling concerning the right to freely use one's property,³⁸ the Supreme Court held a governmental regulation restricting the use of constitutional property, since that regulation concerned state property. The right and duty to manage the possession, use, and disposal of the state property lies with the Government. Since the title to the property in the original civil case was disputable, the court also explained that the property protection clauses of § 32 of the Constitution apply only to property obtained in a legal way. The property which had been in the possession

of the armed forces of the Soviet Union was deemed to belong to the state, due to several legal acts enacted during the transition period, and mainly with reference to the IV Hague Convention under which the occupying country cannot obtain real property of the occupied country.

However, a remarkable decision concerning the right to use property has been issued by the Administrative Law Chamber of the Supreme Court. It differs greatly from the usual practice, since restrictions to the use of property, imposed by an act of lower rank than law were considered to be lawful.³⁹ Rules concerning fire arms, enacted by a governmental regulation were held valid because unrestricted carrying of fire arms would have endangered everyone's life. Thus, the application of a balancing test led the Court to the conclusion that particular restrictions, although they were not imposed by a formal law, were necessary in a democratic society and were not distorting the nature of the freedom restricted. The primary constitutional value endangered otherwise — everyone's life — was considered to outweigh the right to use the property.

In a recent decision concerning a governmental regulation allegedly restricting the right to dispose of one's property, the requirement imposed on market sellers to keep in the marketplace the documents concerning consignment, purchase, origin and quality of the goods sold was at stake.⁴⁰ According to the administrative court which initiated the constitutional review proceedings, the restriction was set forth by an administrative act and was unlawfully restricting the right to dispose of property. The Constitutional Review Chamber established that the regulation was merely repeating provisions of the Consumer Protection Act which imposed essentially the same requirements. Moreover, the Chamber ruled that the requirement of keeping the said documents in the selling place did not restrict the constitutional right to dispose of one's property, and that absence of the documents did not hinder selling the goods.

The requirements for the expropriation of property to be constitutional are considerably higher than those necessary to be met when restrictions to the use of property are imposed. Under the Constitution, property can be expropriated only in the public interest, in the cases and pursuant to procedure provided by law, and for fair and immediate compensation.⁴¹ The Constitutional Review Chamber has issued two decisions concerning expropriation of property, both of the cases were connected with the ownership reform, or, to be more exact, with privatisation of dwelling rooms.

The background necessary for understanding the cases was, in brief, as follows. The dwelling rooms were privatised under the Dwelling Rooms Privatisation Act for vouchers to persons renting the rooms. Most of the houses were state-owned and were either municipalised first with the obligation of the local governments to privatise the dwelling rooms for vouchers, or the state property was

privatised directly, without intermediate municipalisation, the local governments acting only as agents of privatisation. In the course of the ownership reform, property of some private legal persons was also re-nationalised. This concerned some property transferred by the state to some consumers' co-operatives, free of charge. The dwelling rooms among such property had to be privatised to their tenants for the vouchers similarly to the rest of the dwelling rooms. (Formally the dwelling rooms were not re-nationalised, but the co-operatives were legally obliged to privatise this property under the conditions set forth by the law). The problem arose, since not all of the houses possessed by the co-operatives were transferred to them by the state, free of charge — building of some was financed by the co-operatives themselves. The Dwelling Rooms Privatisation Act overlooked this fact.

The Constitutional Review Chamber ruled⁴² that such obligation of privatisation amounted to expropriation of the property which had to comply with the requirements of § 32(1) of the Constitution.⁴³ The Court analysed adherence to the constitutional criteria of permissible expropriation. It found that the requirement of public interest was not met, since imposition of one private law subject to transfer its property to another private law subject does not stem from any public interest. Although the lack of public interest would have been enough for the act to be unconstitutional, the Court also considered the compensation to be unfair. According to the Property Act, property is to be evaluated on the basis of its usual value, the latter being local average market value. The amount of the vouchers under the regulation of the Dwelling Rooms Privatisation Act and their market value did not cover the actual market price of the property.

In the other ownership reform case⁴⁴ (differently from the first case which was initiated by an ordinary court, the second petition was submitted by the Legal Chancellor and, thus, abstract norm control was carried out by the Supreme Court) the Constitutional Review Chamber interpreted the conditions of expropriation in a more detailed manner. It asserted its previous standpoint that, in general, expropriation of the property of one private law subject in the benefit of another cannot be justified with public interest. In the course of the privatisation of the dwelling rooms, however, the Court specified, public and private interests are interwoven with each other. The public interest has been expressed repeatedly by the parliament in the necessities of the ownership reform. The Riigikogu has passed legislation for the privatisation of dwelling rooms twice — this refers to a weighty public interest. Thus, the Constitutional Review Chamber concluded that it is not possible to contest the public interest in this case in the procedure of abstract norm control.

In regard to the fairness of the compensation the Supreme Court concluded that the Riigikogu had acted in

accordance with the Court's previous decision, since under the Dwelling Rooms Privatisation Act, as amended, the vouchers obtained as a compensation for expropriation of the property could be used further, e.g., for privatisation of land. The Court pointed out that by this the value of the vouchers was enhanced, so that the compensation could be just, if the parties would consider it to be. Again, the Court mentioned that it is not possible to determine in abstracto, if a concrete compensation in a specific case would be just and the parties satisfied with it.

The Supreme Court construed the requirement of the compensation to be immediate, meaning that the compensation should be received at the end of the expropriation procedure, at the latest. In case of disagreement of the parties, the expropriation can be exercised only after a court decision has been issued, and a compensation determined by the decision delivered.

Principles pronounced by the Supreme Court in the area of property protection are somewhat different from those concerning, for example, privacy. Generally, the level of its protection is lower than in case of some other rights. Firstly, although the restrictions to the constitutionally protected rights can be imposed only by a law (a parliamentary statute), the only decision of the Supreme Court accepting limitation of a constitutional right by a governmental regulation, concerns use of property.⁴⁵ Secondly, only property obtained legally is constitutionally protected. Thirdly, the existence of public interest and fair compensation is to be determined by a court taking into account particular circumstances. In abstract review proceedings the Supreme Court took a rather deferential stance. As it can be concluded from the above, the Supreme Court has interpreted the scope of the property rights in a more narrow way compared to the other rights.

C. OTHER RIGHTS

Some other constitutional rights, in addition to the privacy and property rights treated above, have been at stake in the Supreme Court cases. Since the case-law covering the topics is too thin to enable dedication of separate subdivisions of this paper to the other cases concerning distinct fundamental rights, they are dealt with all together hereinafter.

The Supreme Court has asserted everyone's right of recourse to the courts. In the Taxation Act case⁴⁶ the Court determined that regulation under which decisions of an administrative body had to be protested first inside that body itself, and only after going through the pre-court procedure of dispute settlement, a person could turn to the courts, conflicted with the Constitution. The pre-court dispute settlement procedure was not unconstitutional *per se*; the Court determined, however, that under § 15(1) of the Constitution everyone had the right of recourse to the courts. In the opinion of the Court the procedure of the pre-court dispute settlement and the procedural guarantees

for the taxpayer had been regulated insufficiently. It is not clear from the Supreme Court's argument, if the obligatory pre-court dispute settlement procedure would have been unconstitutional also in the case when the procedure and the guarantees had been elaborated precisely enough, or should the complainant always have a choice whether to appeal inside the administration or to turn to the courts.

The Administrative Law Chamber of the Supreme Court has also made a decision of constitutional character in this field. With reference to § 24(5) of the Constitution which guarantees everyone the right of appeal to a higher court against the judgement in his or her case, the Court introduced a new participant to the administrative court procedure — an interested person.⁴⁷ The Court argued that a person whose rights may be affected by a court decision must be a participant of the proceedings although an administrative act had been contested by someone else. In principle, it would have been suitable to initiate constitutional review proceedings, but there was no provision in the Administrative Court Procedure Act which could have been declared unconstitutional.⁴⁸ Legislative omission is not an object of constitutional review in Estonia.

In a decision concerning the Non-profit Associations Act⁴⁹ the Supreme Court pronounced several principles concerning the freedom of association guaranteed by § 48(1) of the Constitution. According to the Constitution the right to form non-profit associations belongs to everyone, but the Non-profit Associations Act, contested by the President, stipulated that individuals of full legal competence could form non-profit associations (the latter being private legal persons). Thus, the Act unconstitutionally restricted the right of children (under 18 years of age) to associate, since the word "everyone" in the Constitution means every individual, and the Constitution does not limit the right to associate, depending on the private law full legal competence of the individuals.

In addition, according to the Supreme Court the freedom of association was regulated insufficiently by the Non-profit Associations Act, since the Constitution presupposed plurality of legal forms of associations, while the Act prescribed only the private legal person as a relevant legal form. True, the Act additionally referred to the provisions of the Civil Code concerning society contract, but the purposes of the latter were limited and did not cover the whole scope of conceivable purposes under § 48(1) of the Constitution. Such contracts could not be concluded by minors, either.

The freedom of association has to be legally protected, the Supreme Court declared. A clause under which a member of an association could be expelled from the association, disregarding the provisions of the association's statute, was considered not to be in conformity with the duty of the legislative power to guarantee the rights and freedoms of everyone.⁵⁰ This clause distorted the nature of

the freedom of association and the freedom to belong to religious societies.⁵¹

Under the Non-profit Associations Act the organisations which possessed weapons, were militarily organised or performed military exercises, could be established only by law, whereas the Constitution requires merely prior permission, issued in accordance with the conditions and procedure provided by law.⁵²

An important principle concerning international law was proclaimed by the Supreme Court in the context of the Non-profit Associations Case. The Non-profit Associations Act was held to contradict also the UN Convention on the Rights of the Child. Estonia is a party to the Convention, but the text of the Convention was not published in the State Gazette. The Court's position was that the binding nature of the Convention to Estonia does not depend on the publication of it. It remains, however, unclear if such an unpublished instrument is binding only to the state or also to the citizens, since under § 3(2) of the Constitution only published laws have obligatory force. I interpret the position of the Supreme Court in a way that unpublished international instruments are binding to the State, and both the international community and the individuals of the State can require adherence to the international norms by the State, but the State itself cannot demand observance of the norms of unpublished international conventions by the individuals. This is probably not the only possible way of interpretation. One could argue that "[g]enerally recognised principles and rules of international law are an inseparable part of the Estonian legal system"⁵³ and, thus, these international norms are binding to everyone. However, there is no consensus on the meaning of the provision of the Constitution quoted, while some authors support the opinion that the meaning of the word "law" in § 3(2) of the Constitution is broader than only "acts of parliament", extending to all normative acts.⁵⁴

In two successive decisions the Constitutional Review Chamber treated the right to choose freely one's sphere of activity, profession and place of work.⁵⁵ In both cases⁵⁶ courts referred to the Supreme Court an issue that questions which had to be determined by laws under the Constitution were regulated by legal acts of lower rank in the hierarchy of normative acts — by regulations (of police service and of service of custodial officials, respectively). The Court ruled that the constitutional right to choose one's sphere of activity, profession and place of work does not extend to already existing working or service relations, or to the conditions of termination thereof. The same interpretation of § 29(1) of the Constitution was repeated by the Court in another decision next year.⁵⁷

Concerning the freedom of movement,⁵⁸ the Constitutional Review Chamber has ruled⁵⁹ that prohibition imposed on minors not to stay in public places from 11 p.m. till 6 a.m. unless accompanied by a grown-up, is to be

construed as a restriction of the freedom of movement. The restriction of the freedom of movement must be interpreted to include restrictions to individuals to stay in certain places in certain time. Otherwise, for example, enactment of official closing hours in the time of martial or police law in force could not be legally evaluated through § 34 of the Constitution.

With both the non-profit associations case and the freedom of movement case the question of the age of the subject of fundamental rights arises. The court did not answer the question in either of the cases. It really seems that it has to be decided in specific cases separately.⁶⁰ The acts under scrutiny in these cases were held to be unconstitutional because restrictions imposed by them were of absolute character and did not foresee any exceptions.

The last case concerning freedom of movement⁶¹ was initiated by the Legal Chancellor. He proposed that the Supreme Court declare a regulation of a local government, imposing a charge on motor vehicles for driving into the old town, invalid. The Court did not share the opinion of the Legal Chancellor that such a charge would have been restricting the right to freedom of movement. The Constitutional Review Chamber ruled that the conflict between imposition of such charge and the right to freedom of movement is seeming, since the right to freedom of movement is above all a right to reach the destination, and the disputed charge does not violate that right.

One more case involving § 34 of the Constitution has been decided by the Constitutional Review Chamber.⁶² This decision concerned the right to choice of residence. The Police Service Act enabling transferral of a police officer to another permanent place of service without his or her consent also in such cases when the transferral caused the need to change the residence was considered to restrict the officer's right to choice of residence. Under the wording of the Police Service Act it could be concluded that both transferral and change of residence would have been mandatory for a police officer. The Court noted also that such transferral could cause harm to the officer's and his or her family members' right to family life.⁶³

In one of its latest decisions,⁶⁴ the Constitutional Review Chamber made an allusion to a new, probably inevitable, but still interesting development in its jurisprudence. The right to engage in enterprise and to form commercial undertakings and unions⁶⁵ was at stake. According to the Constitution, "[c]onditions and procedure for the exercise of this right may be provided by law."⁶⁶ The Court concluded that since the law may provide relevant conditions and procedure, the law may also restrict that freedom. The Court held that the law (parliamentary legislation) need not describe in detail all the restrictions; it is enough for a law to determine the boundaries within which the executive may specify the provisions of the law.

The idea that norms of lower rank than formal laws

may be still relevant and can be utilised for determination of the scope of restrictions of the fundamental rights and freedoms seems to be a new development in the until that decision quite conservative stance of the Constitutional Review Chamber. It is clear that especially the rules concerning engaging in enterprise and commercial undertakings cannot be provided solely by laws. Probably the Supreme Court would be more reluctant to accept regulation or limitation of some other (some "more fundamental") freedom by executive regulations. It is feasible that every single right or group of rights would have its own minimal rank of norms (law, governmental regulation, etc.) required for limitation of it to be considered legitimate. But the door seems to be open and it is to be seen if and to what extent executive regulations will be tolerated in the field of fundamental rights and freedoms.

Two decisions of the Constitutional Review Chamber deal with enactment of requirements of knowledge of the Estonian language for candidates to the Riigikogu and to the local government councils.⁶⁷ The Supreme Court ruled that the Preamble of the Constitution and several relevant sections of the Constitution provide that one of the duties of the state is to preserve the Estonian nation and culture through the ages. Preservation of the Estonian nation and culture is not possible without the Estonian language. Thus, the Court ruled that §§ 6, 52(1) and 51(1) of the Constitution⁶⁸ justify the enactment of requirements of knowledge of the Estonian language for the candidates to the Riigikogu and to the local government councils as an electoral qualification. Compliance of this restriction to the right to be elected with Article 25 of the International Covenant on Civil and Political Rights has been contested, but it seems that the possible controversy has to reach a political rather than a legal solution.

From a purely legal point of view, the Supreme Court ruled in these decisions that references to ordinary laws or delegation for enactment of executive regulations in constitutional laws are not permitted in matters which essentially belong to the sphere of relevant constitutional laws. It remains to be seen how puristically this principle can be carried out. It cannot be excluded that a qualification similar to the one concerning the requirement that fundamental rights and freedoms may be restricted solely by laws, has to be made.

In decisions concerning several of the "other" fundamental rights the Supreme Court has referred to the principle that the state has to take certain legislative measures to ensure some specific rights. In one case the Administrative Law Chamber itself virtually created a new norm. The Supreme Court has not declared legislative omissions *expressis verbis* unconstitutional, however, it has pointed out that certain rights cannot be effectively guaranteed without the positive action of the state.

Notes:

¹ Q.v. e.g.: Meris Sillaots. Kohtunikuõiguse võimalikkusest ja vajalikkusest kontinentaal-euroopalikus õiguskorras. (On Possibility and Necessity for Judge Made Law in the Continental European Legal Order.) at 18-19 (1997).

² Marju Luts. Friedrich Carl von Savigny meetodi ja süsteemiõpetus. (Friedrich Carl von Savigny's Theory on Method and System.) at 57 (1994).

³ *Ibid.* at 58-59.

⁴ Q.v. e.g.: Matthias Hartwig. Konstitutsioonikohtute roll ja areng põhiõiguste ja vabaduste tagamisel. Põhiõiguste ja vabaduste tõlgendamine. (The Role and Position of Constitutional Courts in Securing Fundamental Rights and Freedoms. Interpretation of Fundamental Rights and Freedoms), in: Konstitutsioonikohtud põhiõiguste ja vabaduste kaitsel. (Constitutional Courts Protecting Fundamental Rights and Freedoms.) 25, 34 (Heinrich Schneider ed., 1997). Hartwig mentions three ways of understanding legal text applied in the last century: grammatical, historical and systematic interpretation, and adds teleological interpretation as one which has emerged later.

⁵ Q.v. e.g.: Robert Alexy & Ralf Dreier. Statutory Interpretation in the Federal Republic of Germany, in *Interpreting Statutes: A Comparative Study* 73, 82-89 (D. Neil MacCormick & Robert S. Summers eds., 1991). Alexy and Dreier distinguish semiotic, genetic, historical, comparative, systematic and teleological ways of interpretation.

⁶ *Ibid.* at 77.

⁷ *Ibid.* at 109.

⁸ Robert S. Summers. Statutory Interpretation in the United States, in *Interpreting Statutes: A Comparative Study* 407, 451-452 (D. Neil MacCormick & Robert S. Summers eds., 1991).

⁹ Zenon Bankowski et al. On Method and Methodology, in *Interpreting Statutes: A Comparative Study* 9, 11 (D. Neil MacCormick & Robert S. Summers eds., 1991).

¹⁰ E.g. §§ 2-4 of the General Part of the Civil Code Act provide particular rules of interpretation to be applied. Some elements of grammatical, teleological and systematic methods, relationship between general norms and provisos, analogies of statute and law are mentioned. Q.v. The General Part of the Civil Code Act. (Tsiviilseadustiku üldosa seadus.) RT (Riigi Teataja = State Gazette) I 1993, No.53, Article 889.

¹¹ Raul Narits. Tõlgendamine: teadus või seadus. (Interpreting: Science or Law.), *Juridica* 228, 229-230 (1994).

¹² Section 10: "The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy and the rule of law."

¹³ Peter Häberle. Constitutional Developments in Eastern Europe from the Point of View of Jurisprudence and Constitutional Theory, 46 *Law and State* 64, 78-79 (1992).

¹⁴ *Ibid.* at 78. Walter F. Murphy et al present twelve rights unlisted in the Constitution which the United States Supreme Court has recognised as fundamental. Q.v. Walter F. Murphy et al., *American Constitutional Interpretation* 1083-1084 (1986).

¹⁵ Donald P. Kommers. The Constitutional Jurisprudence of the Federal Republic of Germany 49 (1989).

¹⁶ About the adoption of the Basic Law, q.v. e.g.: Karlheinz Niclauss. Political Reconstruction at Bonn, in *From Dictatorship to democracy* 39, 39-40 & 55 (John H. Herz ed.), and Nevil Johnson. Territory and Power: Some Historical Determinants of the Constitutional Structure of the Federal Republic of Germany, in: *German Federalism Today* 8, 13-14 (Charlie Jeffery & Peter Savigear eds., 1991).

¹⁷ After the voting of the redaction of § 124 (§ 122 in the valid 1992 Constitution), the Chairman noted that "the Assembly agreed that it interprets § 124(1) not hindering a relevant commission to hold border negotiations with

Russia, in order to change the border determined by the Tartu Peace Treaty of 2 February 1920." Q.v. the Record of the 28th Session of the Constituent Assembly on 27 March 1992, in: Põhiseadus ja Põhiseaduse Assamblee. (The Constitution and the Constituent Assembly.) 924, 975 (Viljar Peep ed., 1997).

¹⁸ Q.v. e.g., Kommers, note 15, at 53-54.

¹⁹ Häberle, note 13, at 76.

²⁰ Heinrich Schneider. Põhiseaduse preambula: tema tähtsus ja õiguslik loomus. (Preamble of a Constitution: Its Legal Nature and Implications.) *Juridica* 442, 446 (1996).

²¹ The Court derived from the presumption of innocence (§ 22 of the Constitution) the principle that all unresolved suspicions should always and indisputably be interpreted in favour of the accused. Justice Kalm noted in her dissent that according to § 149(3) of the Constitution and according to the system of administration of justice and court procedure of Estonia, the Plenary Session of the Supreme Court, while reviewing a concrete case in the cassation proceedings, cannot ignore previous decisions of the Criminal Chamber of the Supreme Court in the same case. Q.v. Decision of the Plenary Session of the Supreme Court, 3-1-1-123-97, 22 January 1998. RT III 1998, No. 23, Article 228.

²² A dissenting opinion of Chief Justice Maruste was delivered in a criminal case before the Plenary Session, urging that death penalty conflicts the principles of the Constitution. Maruste mentioned that a judge, a justice of the Supreme Court, in particular, cannot reduce himself to a technical machine of norm application. "These are value judgements which are binding on the legislature and which it cannot change. These value judgements are included in the principles of the Constitution." Maruste referred to human dignity as a value protected by the Constitution (§ 10) and to the principle of proportionality. The opinion of the Court, however, was limited merely to criminal issues; constitutional values or principles were not mentioned at all. Q.v. Decision of the Plenary Session of the Supreme Court, 3-1-1-97-96, 25 September 1996. RT III 1996, No. 28, Article 369. The other dissenting opinion of Chief Justice Maruste concerned freedom of expression in a criminal charge against a journalist. Q.v. Decision of the Plenary Session of the Supreme Court, 3-1-2-1-98, 9 April 1998. RT III 1998, No. 19, Article 190.

²³ As the Administrative Law Chamber pointed out with a reference to one of its earlier decisions, it "does not include court precedent, but a judicial interpretation of a law." Q.v. Decision of the Administrative Law Chamber of the Supreme Court, 3-3-1-13-97, 25 April 1997. RT III 1997, No. 17, Article 182. It is disputable if the Supreme Court creates law and to which extent are the decisions binding (except for the decisions in the constitutional review procedure - these decisions are binding to everyone under § 23 of the Constitutional Review Court Procedure Act; the binding force is clear also in cases when a lower court re-examines a case referred back to it by a higher court), but, in fact, in some decisions the legislation is treated quite freely. Q.v. e.g.: Decision of the Administrative Law Chamber of the Supreme Court, III-3/1-11/94, 25 November 1994. Riigikohtu lahendid 1993/1994. (Decisions of the Supreme Court 1993/1994.) 100 (1995). By this decision, an interested person ("third person") was introduced into the administrative law court procedure, in addition to the participants of the proceedings named in the Administrative Court Procedure Act. Q.v.: p. 13. Justice Salmann in his dissent admitted the need for such change, but he criticised the Court doing that by a court precedent, instead of the Riigikogu through an amendment to the law.

²⁴ Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-4/93, 4 November 1993. RT I 1993, No. 72/73, Article 1052.

²⁵ Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-1/94, 12 January 1994. RT I 1994, No. 8, Article 129, and Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-2/94, 12 January 1994. RT I 1994, No. 8, Article 130.

²⁶ Riigikogu = the parliament of Estonia.

²⁷ The Constitution § 9(2).

²⁸ This is a right not mentioned *expressis verbis* in the text of the Constitution and can, thus, be treated as an application of the "fundamental rights development clause". Q.v. p. 2.

²⁹ The Constitution §§ 26, 33 and 43.

³⁰ There are some differences in the lists of permissible grounds for restriction of different rights (e.g., § 26 of the Constitution does not mention "ascertaining the truth in a criminal proceeding", but "to apprehend a criminal offender") which, in principle, must be taken into account when limiting the rights, but which are not crucially important for the present analysis.

³¹ Q.v. e.g., Dieter Grimm. Human Rights and Judicial Review in Germany, in: Human Rights And Judicial Review: A Comparative Perspective 267, 289-290 (David M. Beatty ed., 1994).

³² Erik Kergandberg. Organiseeritud kuritegevus ja jälituslikud erimeetmed: Operatiiv- ja jälitustegevuse seaduse eelnõust ajendatud kirjutis. (Organized Crime and Special Measures of Prosecution: A Writing Provoked by the Draft Law on Special Measures of Prosecution.), *Juridica* 132 (1993).

³³ Freedom of an individual to determine the data he discloses for a census was under question in this case. Q.v. Kergandberg, supra note 32, at 134.

³⁴ Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-7/94, 2 November 1994. RT I 1994, No. 80, Article 1377.

³⁵ Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-8/94, 2 November 1994. RT I 1994, No. 80, Article 1378.

³⁶ The Constitution § 32(3).

³⁷ Ibid. § 154(1).

³⁸ Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-10/94, 21 December 1994. RT I 1995, No. 2, Article 34.

³⁹ Decision of the Administrative Law Chamber of the Supreme Court, 3-3-1-14-97, 30 May 1997. RT III 1997, No. 21/22, Article 234.

⁴⁰ Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-1-99, 17 March 1999. RT III 1999, No. 9, Article 89.

⁴¹ The Constitution § 32(1).

⁴² Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-1/95, 12 April 1995. RT I 1995, No. 42, Article 655.

⁴³ This conclusion is similar to the interpretation of Article 14(3) of the German Basic Law. If the rights protected under that provision are transferred to someone else, it is a question of expropriation. The Constitutional Court has also treated measures which are equivalent to expropriation. Q.v. Jochen Abr. Frowein, Vara kaitse Saksa põhiseaduses. (Protection of Property under the German Basic Law.) in: Konstitutsioonikohtud põhiõiguste ja vabaduste kaitse. (Constitutional Courts Protecting the Fundamental Rights and Freedoms.) 70, 74-75 (Heinrich Schneider ed., 1997).

⁴⁴ Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-2-96, 8 November 1996. RT I 1996, No. 87, Article 1558.

⁴⁵ It must be reminded that this decision was made by the Administrative Law Chamber of the Supreme Court. There can be no certainty that the Constitutional Review Chamber would have decided the case in the same way, although it seems highly probable to the author.

⁴⁶ Q.v. supra note 24.

⁴⁷ Q.v. supra note 23.

⁴⁸ Jüri Pöld. Eesti kohtupraktikat põhiõiguste ja vabaduste kaitsmisel. (Estonian Court Practice in Protection of Fundamental Rights and Freedoms) in: Konstitutsioonikohtud põhiõiguste ja vabaduste kaitse. (Constitutional Courts Protecting the Fundamental Rights and Freedoms.) 55, 60-62 (Heinrich Schneider ed., 1997). Pöld mentions that an analogous problem in administrative court proceedings arose also in the beginning of the 1920s. Although based on different motives, the Administrative Law Chamber of the Supreme Court also applied analogy with the civil law proceedings and passed a decision legalising the interested person's participation in the proceedings in 1922.

⁴⁹ Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-1-96, 10 May 1996. RT I 1996, No. 35, Article 737.

⁵⁰ The Constitution § 14.

⁵¹ Ibid. § 40(2).

⁵² Ibid. § 48(2).

⁵³ Ibid. § 3(1).

⁵⁴ Rait Maruste and Eerik-Juhan Truuväli, Teoria ja praktika probleeme seonduvalt põhiseaduslikkuse järelevalvega. (Problems of Theory and Practice in Connection with Constitutional Review.), *Juridica*, 304, 306 (1995).

⁵⁵ The Constitution § 29(1): "An Estonian citizen has the right to freely choose his or her sphere of activity, profession and place of work. Conditions and procedure for the exercise of this right may be provided by law. Citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law."

⁵⁶ Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-1-97, 11 June 1997. RT I 1997, No. 50, Article 821, and Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-2-97, 6 October 1997. RT I 1997, No. 74, Article 1267.

⁵⁷ Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-4-98, 27 May 1998. RT I 1998, No. 49, Article 752.

⁵⁸ The Constitution § 34.

⁵⁹ Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-3-97, 6 October 1997. RT I 1997, No. 74, Article 1268.

⁶⁰ Q.v. e.g., Madis Ernits. Eesti Vabariigi põhiseaduse põhiõigused: Üldosa. (Fundamental Rights of the Constitution of the Republic of Estonia: General Part.) 31 (1996) (unpublished manuscript, on file with the Ministry of Justice of the Republic of Estonia, Tallinn).

⁶¹ Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-11-98, 22 December 1998. RT I 1998, No. 113/114, Article 1887.

⁶² Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-9-98, 25 November 1998. RT I 1998, No. 104, Article 1742.

⁶³ The right to family life is not mentioned *expressis verbis* in the Constitution, and can also be considered an outcome of the "fundamental rights development clause". Q.v. *supra*, p. 2.

⁶⁴ Q.v. *supra*, note 40.

⁶⁵ The Constitution § 31.

⁶⁶ Ibid.

⁶⁷ Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-1-98, 5 February 1998. RT I 1998, No. 14, Article 230, and Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-7-98, 4 November 1998. RT I 1998, No.98/99, Article 1618.

⁶⁸ These sections concern Estonian as the official (state) language, the official language of state agencies and local governments, and everyone's right to address state agencies, local governments, and their officials in Estonian and to receive responses in Estonian.

⁶⁹ Q.v. *supra* p. 16.