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The Judicial System of Estonia and European Union Law

JULIA LAFFRANQUE*

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1. Estonian legal system and the role of judges

Estonia employs a civil law system and follows the legal traditions of continental Europe – there is a distinction between public and private law. The main source of law is written (statutory) law. Case law has no precedent value. However, the decisions of the Estonian Supreme Court are used as a subsidiary source of law in interpreting and founding the general principles of

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law. This follows *expressis verbis* from the Estonian Code of Criminal Procedure, which states in article 2 subsection 4 that the decisions of the Supreme Court in issues which are not regulated by other sources of criminal procedural law but which arise in the application of law are also sources of criminal procedure law.¹ And they are *de facto* in other areas of law: private law, in particular administrative law, as well. Thus one could say that step-by-step the judgments of the Supreme Court gain more and more importance in shaping the legal system and legal order of Estonia. The legal basis for Estonian judicial system and rules of court procedure are:

- Constitution of the Republic of Estonia (adopted by referendum on 28 June 1992)²
- Courts Act (in force since 29 July 2002)³
- Internal rules of the courts

Rules of court procedure are provided by:

- Code of Civil Procedure⁴
- Code of Criminal Procedure
- Code of Administrative Court Procedure⁵
- Code of Misdemeanour Procedure⁶
- Constitutional Review Proceedings Act⁷

2. Estonian judicial system and judges

Justice in Estonia is administered by:

¹ Estonian State Gazette – *Riigi Teataja* (RT) I 2003, 27, 166, consolidated text RT I 2004, 65, 456; amended as: RT I 2003, 83, 558; RT I 2003, 88, 590; RT I 2004, 46, 329; RT I 2004, 54, 387; entered into force 1 July 2004. In English see: www.legaltext.ee

² RT I 1992, 26, 349; amended as: RT I 2003, 29, 174 and RT I 2003, 64, 429.

³ RT I 2002, 64, 390; amended as: RT I 2003, 21, 121; RT I 2003, 90, 601; RT I 2004, 27, 176 ; RT I 2004, 46, 329; entered into force: 29 July 2002.

⁴ RT I 1998, 43-45, 666; amended as: RT I 1998, 108/109, 1783; RT I 1999, 16, 271; RT I 1999, 31, 425 ; RT I 2000, 51, 319; RT I 2000, 55, 365; RT I 2001, 21, 113; RT I 2001, 34, 186; RT I 2001, 53, 313; RT I 2001, 93, 565; RT I 2002, 29, 174; RT I 2002, 50, 313; RT I 2002, 53, 336; RT I 2002, 64, 390; RT I 2002, 92, 529; RT I 2003, 13, 64; RT I 2003, 13, 67; RT I 2003, 23, 140; RT I 2004, 30, 208; RT I 2004, 46, 329; entered into force : 1. September 1998.

⁵ RT I 1999, 31, 425; amended as: RT I 1999, 96, 846; RT I 2000, 51, 321; RT I 2001, 53, 313; RT I 2001, 58, 355; RT I 2002, 29, 174; RT I 2002, 50, 313; RT I 2002, 53, 336; RT I 2002, 62, 376; RT I 2003, 13, 67; RT I 2003, 23, 140; RT I 2004, 46, 329; entered into force: 1 January 2000.

⁶ RT I 2002, 50, 313; RT I 2002, 110, 654; RT I 2003, 26, 156; RT I 2003, 83, 557; RT I 2003, 88, 590; RT I 2004, 46, 329; RT I 2004, 54, 387; RT I 2004, 54, 390; entered into force: 1 September 2002.

⁷ RT I 2002, 29, 174; amended as: RT I 2003, 4, 22; RT I 2003, 24, 148; RT I 2004, 56, 405; entered into force: 1 July 2002.

- I instance - county (15), city (3) and administrative (4) courts,
- II instance - circuit courts (Tallinn, Tartu, Viru) and
- III instance - the Supreme Court.

Estonia recognizes the separation of administrative jurisdiction from ordinary jurisdiction. Administrative courts of first instance are in Tallinn, Tartu, Pärnu and Jõhvi. All together, they seat 26 judges. But there are no specialized courts such as courts for dealing with family matters or tax matters. The ordinary courts hear civil and criminal cases in a broad sense. In the composition of county and city courts are land registries, registry departments, and probation supervision departments. Courts of the first instance and courts of appeal are administered in co-operation between the Council for Administration of Courts and the Ministry of Justice.

In 2003 there were 220 judges of the first and second instance in Estonia and six vacancies. Sixty-nine, or 1 % of them, were women in the first instance and 60 % in the second instance.⁸ About half of them have worked as judges for at least 10 years. In addition to these 220 there are 19 justices at the Supreme Court, three of them women. In Estonia, this makes 18 judges per 100 000 people. There are also lay judges who participate in the administration of justice in county and city courts.

The training of judges is coordinated by the Training Council. The Training Council is comprised of two judges of a court of the first instance, two Appeals Court judges, two Supreme Court justices, and a representative from the Prosecutor's Office, the Minister of Justice, and the University of Tartu. Support for the Training Council is provided by a foundation established for the training of judges (Estonian Law Centre).

Judges in Estonia are usually appointed to office on the basis of a public competition. A candidate for judicial office undergoes preparatory service (the regular duration is two years) and takes a judge's examination consisting of oral and written parts. The candidates are interviewed by a judge's examination committee, consisting of two judges of the court of first instance and the circuit court, two justices of the Supreme Court, one jurist from the Law Faculty of the University of Tartu, a member from the Ministry of Justice, a sworn advocate and a public prosecutor. If necessary the Supreme Court sitting *en banc* will also interview candidates.

A person who is an experienced and recognised lawyer may be appointed as a justice of the Supreme Court. A candidate for judicial office must pass a security check by the Security Police Board before being

⁸ For the statistics, see the homepage of the Ministry of Justice:
<http://www.just.ee>

appointed as a judge. Judges are appointed for life (however, the maximum age of a judge is 67 years). They are appointed by the President of the Republic, on proposal by the Supreme Court. Justices of the Supreme Court are appointed by the Estonian parliament (*Riigikogu*) on the proposal of the Chief Justice of the Supreme Court. The Riigikogu, on proposal by the President of the Republic, appoints the Chief Justice of the Supreme Court.

In the last two years the amount of new cases coming in the courts of first instance has grown about 25 %. The number of judges has however remained the same. In Tallinn City Court, the average number of cases per judge in one year in civil matters was as high as 400. Due to the heavy workload of judges, the number of appeals has grown. In criminal matters, 67% of the judgments of the court of first instance that were appealed were left unchanged by the court of second instance. Whereas the number of appealed judgments that were unchanged in the Court of Appeal in civil matters was only 44 %.⁹ There is a need for more additional help for judges – the number of law clerks also has to grow. There is also a need for experts on EU law to advise the judges.

3. *The Supreme Court of Estonia*

The Supreme Court of Estonia is quite unique in its structure, as it is at the same time the court of cassation – the highest adjudicator of disputes involving administrative matters – and it also functions as a constitutional court. Over time, there have been two major issues regarding the Supreme Court that have caused lively discussions:

- The location of the Supreme Court, and
- the functions of the Supreme Court as a constitutional court.

When the court was first founded on 14 January 1920, the city of Tartu was chosen as the seat of the highest court of the newly established state. The second largest town of Estonia – mainly known for its famous university, founded in 1632 by Gustav II Adolph, king of Sweden – was selected to host the Supreme Court because of its relatively distant location from the capital of Estonia, Tallinn (around 190 km), where the two other branches of power: legislative and executive are situated.¹⁰ Thus, being far from political influence, the justices could concentrate on their work and think

⁹ See the speech delivered by the president of the Administrative Law Chamber fulfilling the functions of the president of the Supreme Court in front of the parliament 18 June 2004 at the homepage of the Supreme Court of Estonia: <http://www.nc.ee/uudised/>

¹⁰ See Toomas Anepaio, "The Supreme Court of the Republic of Estonia," in: THE HISTORY OF THE SUPREME COURTS OF EUROPE AND THE DEVELOPMENT OF HUMAN RIGHTS, (Eds.) Pál Solt, János Zsath, Tibor Zinner, Budapest (1999). 109–120.

about developing the legal system rather than giving advice to politicians. The other reasons in favour of Tartu were the close link to the faculty of law of the oldest – and for a long time the only – university offering higher legal education, contacts to the professors of law who could at the same time serve as advisers to justices, and the excellent library at the University of Tartu. In 1934-35, the Supreme Court was, however, moved to Tallinn. It was dissolved in 1940 as a consequence of the Soviet occupation. In 1993, the re-established Supreme Court held its first session, symbolically held at the town hall of Tartu, and for historical as well as regional policy reasons the court was moved to Tartu again.

As for constitutional review, there have been many ideas to create a separate constitutional court. But so far, the fourth chamber of the Supreme Court has been considered less costly and more practical to a small country like Estonia. There have even been some foreign authors who have suggested that the European Court of Justice should re-think its functions and competence in the framework of the developments introduced by the constitutional treaty for Europe, and to use the Estonian example in being at the same time the highest ordinary, administrative, and constitutional court.¹¹

As of today, the Supreme Court is competent to:

- Review appeals in cassation and protests;
- correct court errors;
- hear petitions for review filed against court judgments;
- hear petitions for constitutional review;
- resolve certain matters pertaining to court administration.

The Supreme Court of Estonia consists of:

- The Chief Justice;
- Administrative Law Chamber (5 justices);
- Criminal Chamber (6 justices);
- Civil Chamber (7 justices). At least three judges must participate in the hearing of matters in Chambers;
- Constitutional Review Chamber (7 members who are at the same time justices in other chambers of the Supreme Court, president of the chamber is the chief justice).

Cases may also be heard by Special (*ad hoc*) Panels composed of the members of different Chambers or by the Supreme Court *en banc*. Matters pertaining to the administration are managed by the director of the Supreme

¹¹ The speech: "Die Erweiterung der EU-Kompetenzen im Rahmen der Verfassungsgebung" of prof dr Joachim Sanden at the third German-Estonian Lawyers Association (*Deutsch-Estnische Juristenvereinigung e. V. = DEJV*) meeting in Tartu on 25 September 2004.

Court. The Supreme Court has an independent budget and is independent in its activities.

There is a system of leave to appeal at the Supreme Court. The Supreme Court decides on granting leave to appeal in the composition of at least three justices one of whom changes every three months on the principle of rotation. Therefore not all of the requests for proceedings are adjudicated.

The Supreme Court accepts an appeal if:

- 1) The appeal contests the correctness of application of a provision of substantive law, or
- 2) requests annulment of a court decision due to violation of a provision of court procedure which has or may have resulted in an incorrect court decision;
- 3) a judgment of the Supreme Court is essential for the uniform application of the law.

An appeal shall not be accepted if the Supreme Court is convinced that the appeal is obviously unjustified. In the near future, the Supreme Court must assess whether or not there are important issues of European law in stake that matter to the case when it grants an appeal.

Statistics of the Supreme Court in administrative matters:¹²

Year	Requests for proceeding	Matters adjudicated
2001	401	76
2002	445	69

Statistics of the Supreme Court in criminal offence and misdemeanour matters

Year	Requests for proceeding	Appeals adjudicated	Matters adjudicated
2001	771	211	147
2002	682	185	149

Statistics of the Supreme Court in civil matters

Year	Requests for proceeding	Matters adjudicated
2001	896	163
2002	956	155

Statistics of the Supreme Court in constitutional review matters:

Year	Matters adjudicated
2001	7
2002	18

¹² For all the statistics see the homepage of the Supreme Court:
<http://www.nc.ee/riigikohus/>

All judgments of the Supreme Court are published in Part III of the *Riigi Teataja* (Official Gazette). Up until 1999, all judgments of the Supreme Court were published in a yearly collection entitled "Judgements of Supreme Court." Since 2000, the collection contains a selection of judgments, together with commentaries (generalisation of judicial practice). Supreme Court judgments are also accessible at the Court's homepage (some constitutional judgments are also available in English) at <http://www.nc.ee/lahendid>.

4. Estonian lawyers, in particular Estonian judiciary and EU law

One of the first consequences for the Estonian judiciary of the accession of Estonia to the European Union was that the former president of the Supreme Court of Estonia, Mr. Uno Lõhmus, became a judge at the European Court of Justice (ECJ) in Luxembourg. The Supreme Court of Estonia can be proud since another former president of the court, Mr. Rait Maruste, is already a member of the European Court of Human Rights in Strasbourg. The Estonian judge at the Court of First Instance of the European Communities (CFI) is Mrs. Küllike Jürimäe, previously a judge at the Tallinn circuit court.

At the same time, starting with the accession of Estonia to the EU on 1 May 2004, all Estonian judges became European judges, thus the Estonian judges will from now on also adjudicate matters of EU law. If necessary, they will ask the ECJ for preliminary references and hopefully there will be a constant dialogue between the Estonian courts and the ECJ in the nearest future.¹³ If there is a case in the Estonian court, involving an EU regulation or an Estonian law harmonizing a EU directive, the Estonian court must solve the case in accordance with the previous case law of the ECJ. Therefore the Estonian judges must constantly follow the newest developments in EU law in order to keep up to date with the recent case law of the ECJ.

Most of the Estonian judges have had training in EU law, although in previous times there was no such course on EU law in the curricula of Estonian law schools. However, among Estonian lawyers, profound knowledge of EU law is rather an exception. Hopefully this will change, as we are no longer only harmonizing but also starting to apply EU law. Furthermore, since a court cannot apply and interpret EU law unless there is a relevant dispute, the knowledge of the parties and their agents about EU law is clearly very important.

Unfortunately, lawyers did not receive a systematic education in EU law prior to Estonia's accession to the EU. Most of their training was provided for the civil servants and also judges and prosecutors. Unfortunately, there

¹³ Article 234 Treaty Establishing the European Community.

were no free courses in EU law for private lawyers. At the same time, lawyers were not willing to pay for the training themselves because they considered EU law (at that time) too abstract. Now the situation has changed and EU law is no longer just a theory or a privilege for the civil service; it is an everyday fact of life for all Estonian lawyers. Therefore further training in EU law and an exchange of information also between the lawyers of private law firms and enterprises at the national as well as the international level would be very useful.

5. Access to the documents and literature about EU law in Estonia

One of the main sources for the Estonian judges to find out the recent developments in EU law is next to the Official Journal of the EU and the CELEX and EUR-Lex databases the homepage of the ECJ: <http://curia.eu.int>

The National Library of Estonia as well as the Library of the University of Tartu (European documentation centre: <http://www.euroinfo.ee/>) have a complete set of all EU legal documents in English. In 1992 the National Library was nominated the depositary library of the EU. There is a very well equipped European Union Information Centre at the National Library: <http://elik.nlib.ee>

Since 1 May 2004 the judgments of ECJ will also be available in Estonian. This is unfortunately not the case with the previous decisions of the ECJ. However, the Ministry of Justice together with the Estonian Legal Translation Centre, the PHARE programme, the British Embassy in Estonia and the AS Juura Publishing House published in the years 2001 and 2003 two volumes of case book of the most important cases of the ECJ together with an introduction about the structure and work of the ECJ.¹⁴

Further action is needed in order to keep up with the developments of EU law. Although for example the library of the Supreme Court has a quite good collection of the most important EU law books and commentaries of the EU founding treaties, in order to keep up with the rapid changes in EU law a regular up date in form of EU law journals is needed. There is also a need for special librarians and experts in EU law as a supporting staff to the judges. Analyses of the EU law and in particular of the case law of ECJ are important in order to find out the influence of a particular case on the legal policy and legal system of Estonia.

6. The Supreme Court and EU law

¹⁴ Compiled by *Julia Laffranque*, Euroopa Kohtu Lahendid I, Tallinn: AS Juura, 2001; Euroopa Kohtu Lahendid II Tallinn: AS Juura, 2003.

So far the Supreme Court of Estonia has used EU law in a more abstract way, mostly by creating general principles of law. Naturally, as a party to the European Convention on Human Rights, Estonia and its courts have paid more attention to the Convention and the practice of the European Court of Human Rights.

The first time EU law was mentioned in an Estonian court judgment was as early as 10 years before the EU accession. The decision of the Constitutional Review Chamber of the Supreme Court in the case III-4/A-5/94 of 30 September 1994 stated:

“In creating the general principles of law for Estonia the general principles of law developed by the institutions of the Council of Europe and the European Union should be considered. These principles have their origin in the general principles of law of the highly developed legal systems of the Member States.”¹⁵

Most of the references to the EU law have however been in the dissenting opinions of the judges of the Supreme Court.

The more recent judgments of the Supreme Court have nevertheless even referred to the European Charter of Fundamental Rights, which is so far not legally binding (for details see below).

Until now however no complaints dealing directly with the interpretation of the EU law or the Estonian law approximating and/or implementing the EU law have been discussed at the Supreme Court. Even if the parties use EU law this does not automatically mean that there is a need to apply EU legislation or case law and *vice versa* if the parties do not pay attention to the EU law this does not mean that the court can not use the EU law *ex officio*, especially in the administrative jurisdiction where the principle of inquisitorial procedure is used. Sometimes however there is a danger that the EU law is used as an argument by the parties because it has become popular to speak about EU but in reality there is no EU relevance.

At this point it is too early to state how many cases will have a direct contact with EU law. From a professional point of view the justices of the Supreme Court are anxiously waiting for cases dealing with the EU law. For instance in the Federal Administrative Court of Germany the amount of the cases dealing with EU law is between 5 and 20 % of all cases depending on the chamber.¹⁶

¹⁵ RT I 1994, 80, 1159.

¹⁶ See General report on the colloquium in Helsinki, 20 and 21 May 2002, subject: "The preliminary reference to the Court of Justice of the European Communities", drawn up by Heikki Kanninen, assisted by Irma Telivuo, in the publication of the Association of the Councils of State and Supreme Administrative

From the four chambers of the Supreme Court the Administrative Law Chamber will have most contacts with EU law. Especially in the framework of deciding the cases concerning for example environment law, competition law, state liability if Estonia is in breach with EU law, but also more generally the principles of fundamental rights and freedoms.

According to the case law of the ECJ (case *Köbler* from the end of 2003) under certain conditions if the highest court of a Member State of the EU (intentionally) fails to ask for a preliminary reference the Member State will be held liable for the damages caused by the failure of the national court.¹⁷

7. Concrete example of applying EU law Implications of the Charter of Fundamental Rights of the European Union (the Charter) for Estonia based on experiences of the Supreme Court of Estonia

Estonia did not participate at the creation of the Charter by the Drafting Body (later known as Convention of the Charter). Estonia was not yet Member of the European Union when the Charter was proclaimed as a declaration at European Council Nice summit in December 2000.

However, Estonia, still being a candidate country, participated actively both at governmental and parliamentary level at the other, more famous Convention that drafted the Treaty Establishing a Constitution for Europe. In June the Convention presented the draft Constitutional Treaty. On 14 September 2003 Estonian people voted for constitutional amendments and Estonia's accession to the European Union, the accession followed as already mentioned, on 1 May 2004. The Treaty Establishing a Constitution for Europe including the Charter, which is meant to be legally binding, was signed on 29 October 2004.¹⁸

But what does the Charter mean for Estonia: will it give a stronger protection of fundamental rights or is it just another fundamental rights protection system to get used to? The Charter fits in the desire to give Europe its own constitution - it was something important that was missing to call the founding treaties 100 % constitutional acts. There is a certain fear for European Constitution among the population in Estonia and a lot of

Jurisdictions of the European Union, especially Annex II: "Proportion of Community law cases in judicial proceedings" at page 47.

¹⁷ Judgment of the ECJ from 30 September 2003, in the case C-224/01, *Köbler v. Republik Österreich*, EUROPEAN COURT REPORTS (ECR) 2003 page I-10239.

¹⁸ Official Journal of the European Union of 16 December 2004, C 310, p 1.

scepticism. But in fact the constitutional acts already exist and the Constitutional Treaty does not create a new super state. As a consequence the European Union will be given its own autonomous human rights jurisdiction. What will be the interplay between ECJ, the Strasbourg Court and Estonian courts remains still to be seen. Furthermore, at the same time the European Union will be given the possibility to join the ECHR. Estonia is party to the ECHR since 1996 and thus very well familiar with the ECHR protection system and jurisdiction. No major problems have occurred so far, I guess one could say that the Estonian people are used to turn to the Strasbourg Court if necessary. On the other hand the Estonian courts, especially the Supreme Court of Estonia are used to follow the Strasbourg Court case law and that even despite of the fact that there are no remedies to turn to the national jurisdiction regulated by statutory law if the European Human Rights Court has decided contrary to the Estonian courts. The Supreme Court has with its jurisprudence opened the possibility to review its earlier judgments, which have been "corrected" by the Strasbourg Court.¹⁹

In general, Estonia respects more or less the fundamental rights of the Charter by the virtue of its membership to international conventions and Council of Europe human rights instruments. Therefore the rights of the Charter are granted in Estonia. The Estonian Constitution has its Bill of Rights in the second chapter. The Constitution has been drafted based among others on the example of the ECHR.

To some extent however, there are some articles of the Charter that are not explicitly expressed in Estonian Constitution such as: right to asylum, prohibition of eugenic practices, prohibition of making the human body and its parts of financial gain and of the reproductive cloning of human beings - the Estonian Constitution knows only the prohibition of medical or scientific experiments against free will (Article 18, subsection 2 of Estonian Constitution). Some rights of the chapter of the Charter on equality and on solidarity are also not as well elaborated in the Estonian constitution as they are in the Charter. Nevertheless Estonian laws such as Gender Equalities Act, in force since 1 May 2004,²⁰ have recently covered these rights. The rights of the Charter that Estonian Constitution does not recognize explicitly are however all justified and important and therefore necessary to be respected in Estonia. Although this has been considered as a good excuse to modify the Estonian constitution,²¹ most of these rights can be interpreted based on the existing constitution and on the general principles of Estonian constitution

¹⁹ Judgment of the Supreme Court of Estonia *en banc* from 6 January 2004, in the case 3-1-3-13-03, *Tiit Veeber*, RT III 2004, 4, 36.

²⁰ RT I, 2004, 27, 181.

²¹ See *Rait Maruste*, *Põhiõiguste harta Euroopa põhiseaduslikus lepingus*, JURIDICA 2004, No 10, pp. 655-660.

such as integrity, equality, freedom, rule of law. Estonian Constitution has namely a clause in article 10 according to which the rights, freedoms and duties set out in Estonian constitution 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. This stipulation enables the development of further principles and fundamental rights generally accepted in Europe to be implicitly included to the constitutional values of Estonia. The Supreme Court of Estonia has many times in its practice, especially in earlier years used article 10 of Estonian Constitution to apply the general principles.²² At the other hand Estonian constitution is familiar with protection of certain rights more intensively as foreseen in the Charter, for instance the protection of national minorities' rights that has been supported by additional legal acts.

As mentioned above, the Supreme Court has already used the Charter in its decisions. This in spite the facts that all of the three judgments were rendered at the time Estonia was not even a Member State of the EU and that the Charter is not yet legally binding and even the ECJ has not used the Charter as a source of law (the advocates general in their opinions have however referred to the Charter).

In the judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003 (case 3-4-1-1-03)²³, the Supreme Court referred to the article of the Charter which stipulates the right to good administration - right which exists in Estonian law (not directly in the Constitution, but in the Administrative Procedure Act) and which exists also already in article 255 of the EC Treaty as well as in the established case law of the ECJ.

In the second judgment, the judgment of the Supreme Court *en banc* of 17 March 2003 (case 3-1-3-10-02)²⁴ about the application of the Penal Code, the Supreme Court used the Charter not to find new fundamental rights but rather to interpret the existing principle - article 23 of Estonian Constitution. The Supreme Court did not refer to any particular article of the Charter or any case law of the ECJ but had in mind the principles of legality and proportionality of criminal offences and penalties according to which a heavier penalty shall not be imposed than that which was applicable at the time the criminal offence was committed.

²² See for example, the judgment of the Constitutional review Chamber of the Supreme Court of Estonia from 5 March 2001, in the case 3-4-1-2-01, RT III 2001, 7, 75.

²³ RT III 2003, 5, 48.

²⁴ RT III 2003, 10, 95.

In the judgment of the Constitutional Review Chamber of the Supreme Court of 21 January 2004 (case 3-4-1-7-03)²⁵ the Supreme court examined the constitutionality of the article 22¹ of the Act on Social welfare and noted that even though the Charter is as of today not legally binding to Estonia (as it were to any other Member States!), the EU recognizes the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.

To sum up the practice of the Supreme Court relating to the Charter of the European Union of Fundamental rights, one could conclude that the Supreme Court has used the Charter in « domestic cases » thus applied the Charter (however not as the only source/argument) in matters which do not have a direct link to the EU law, in cases where EU law is neither applied nor interpreted. The Supreme Court has used the rights of the Charter concerning the rights of the EU citizens (good administration), justice (procedural fundamental rights) and solidarity. The latter is one of the possible areas where the Charter could be needed to improve interpretation of Estonian legislation. Thus these areas followed by many others such as environmental protection could indicate in which fields the Charter could be necessary as a supplementary source of law in Estonian legislation.

The practice of the Supreme Court shows however, that in reality it is very difficult to distinct in what circumstances the Charter will be applied by the Member States including national courts. In what circumstances will the Charter restrict the activities of the Member States? What is the borderline: when are the Member States “implementing” EU law as says the Charter itself?²⁶ For some Estonian lawyers the Charter means a primacy over even Estonian Constitution even in purely national cases.²⁷

²⁵ RT III 2004, 5, 45.

²⁶ See article Article II-111 of the Treaty Establishing a Constitution for Europe: Field of application (*of the Charter*):

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.

2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.

²⁷ So for example the speech: "Consequences of Violation of procedural Requirements" of justice *Indrek Koolmeister* at the conference of the Ministry of Justice of the Republic of Estonia and Center for International Legal Cooperation: "Principle of Good Administration in Estonia" in Tallinn on 23 April 2004.

Another problem that the Charter will cause in practice is the question, how to distinct between the rights and principles of the Charter, can the principles in practice be implemented directly and used in courts as direct bases for action or do they need some additional legislative basis? The Charter states that the provisions of the Charter, which contain principles, may be implemented by legislative and executive acts taken by institutions, etc of the Union but also by Member States.²⁸ But who decides what a principle is and what is a right?

The third problem of the implementation of the Charter concerns the restrictions and the limits of the rights provided by the Charter. Normally in constitutions such as in Estonian constitution the restrictions of each fundamental right follows either from the constitution itself, from the law or from the other principles of the constitution. The Charter suggests in general to all the rights, that limitations must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet « objectives of general interest recognized by the Union » or the need to protect the rights and freedoms of others.²⁹ When will the limitations on rights be actually permitted? It is difficult to find solutions to the above mentioned problems in a short term, therefore it is vital to analyse more in depth the impact of the Charter on Estonian legislation, hopefully this will be done also by the Supreme Court of Estonia in one of its future decisions.

8. Co-operation between Estonian courts and the European Court of Justice (ECJ)

If an Estonian court needs help how to apply and interpret EU law the national court can turn to ECJ and ask for a preliminary ruling.

So far no Estonian court has asked for a preliminary reference but it will surely come soon. At the beginning it will be quite unusual for Estonian judges because a possibility to freeze the proceedings and ask for help did not exist in national law.

Right after the accession to the EU a “competition” between the courts of the 10 new Member States of the EU started – which one of them will ask the first preliminary reference! The Hungarian courts and the Polish

²⁸ See article II-112 subsection 5 of the Treaty Establishing a Constitution for Europe.

²⁹ See article II-112 subsection 1 of the Treaty Establishing a Constitution for Europe.

courts have opened the score and already asked questions from the ECJ.³⁰ It is good to seek for help and healthy to have formal as well as informal contacts with the ECJ. The Estonian judges must realize that the judges of the ECJ are not their teachers or bosses but rather good colleagues. At the same time one must not abuse the system of preliminary references because the ECJ is already suffering under a heavy workload.

For Greek courts it took almost 10 years after Greece accession to the EU to ask their first preliminary reference.³¹ Austria, Finland and Sweden (all three joined the EU in 1995) have by the end of 2003 asked the ECJ for preliminary rulings respectively 249, 34 and 45 times.³²

9. Co-operation between Estonian courts and courts of other Member States of the European Union

A good co-operation and an exchange of information between the Estonian courts will help the Estonian judges to fulfil their tasks and responsibilities derived from the EU law. So far no special network has been created to exchange information on EU law, but in the end of 2004 the Estonian national association of the International Federation of European Law (*FIDE – Fédération Internationale de Droit Européen*) – European Law Society of Estonia (European Law Section of Estonian Lawyers' Union) has been created which among other activities will help its members and others who are interested to tackle with the EU law and provide relevant information by arranging conferences and other educational events on the recent developments in EU law.

But in unified Europe not only co-operation between Estonian courts, but also good working relations with mutual assistance between Estonian courts and the courts of other Member States of the EU are of vital importance.

³⁰ See for example the Case C-328/04: Reference for a preliminary ruling by the *Fővárosi Bíróság* (Hungary) by order of that court of 24 June 2004 in the criminal proceedings against Attila Vajnai, Official Journal of the European Union, C 262 , 23 October 2004, p. 15.

³¹ *A. Calogeropoulos*, The Greek Courts and the preliminary Reference procedure according to the Article 177 of the EEC Treaty: some remarks, in: Article 177 EEC: Experiences and Problems, (Eds.) Henry G. Schermers, Christiaan W.A. Timmermans, Alfred E. Kellermann, J. Stewart Watson, North-Holland, 1987, pp 122-127.

³² See Statistics concerning the judicial activity of the Court of Justice, for example in the Annual Report of the ECJ 2003, p. 230, also available in Internet: <http://curia.eu.int/en/instit/presentationfr/rapport/stat/st03cr.pdf>

In order to improve such Europe-wide co-operation various associations have been formed, such as an Association of European Administrative Judges (<http://www.verwaltungsrichter.org/>), EU Forum of Judges for the Environment, etc. The Supreme Court of Estonia is for example member of the Conference of the Presidents of the Supreme Courts of the EU Member States and of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union.

The latter association organizes every second year fruitful colloquia on different topics in EU law. There is also an exchange of information via e-mail. In addition, the association has a website (http://193.191.217.21/en/home_en.html) as well as different information networks and data bases about EU law and decisions of national courts concerning EU law and references for preliminary rulings.