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State Fees: Is the Legislator Free in Setting the Rates of State Fees?

An Estonian Example

1. Introduction

The fundamental principles of a fair trial that are largely accepted across national legal systems stipulate that everyone is entitled to a fair trial within reasonable time by means of an impartial tribunal that has been established by law.^{*1} The same principles are stipulated in the Constitution of the Republic of Estonia.^{*2} Effective access to justice constitutes a part of these fundamental rights. The right to a fair trial is worthless if one cannot access the judicial system; hence, one of the core obligations of a state is to provide a justice system that is available to those who need it. Constitutional rights, in German legal tradition and according to the European Court of Human Rights (ECtHR) itself, operate vertically, restricting a state's actions and obliging the state to ensure that individuals' basic human rights are honoured.^{*3}

The right to a fair trial and access to justice as a fundamental right can, however, be regulated or otherwise restricted by law. However, the legal boundaries must be reasonable, because the civil procedure has many functions. In the Nordic countries, it is seen mostly as a format for conflict resolution, but a fairly wide perspective is adopted, and the procedure has social aspects too.^{*4} It is not only used for conflicts between parties; it is applied also for wider legal disputes, and the aim of any proceedings is to strengthen substantive law, giving the parties and the whole of society a complete guide to behaving correctly in certain legal situations. In light of this approach, the right and opportunity for an individual to defend his or her own rights and freedoms in court have a much wider value.^{*5} Accordingly, the state has an even stronger obligation to provide legal options for obtaining access to justice.

Restrictions on exercising the right to be able to access the justice system may be administrative in nature. State fees are one of the ways in which the number of cases, and the workload of the courts, can be reduced.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 6.

² The Constitution of Estonia ['Eesti Vabariigi põhiseadus'], §§15, 24, and 146. – RT 1992, 26, 349; RT I, 2007, 43, 311 (in Estonian).

³ A. Barak. Constitutional rights and private law. – D. Friedman (ed.). *Human Rights in Private Law*. Oxford and Portland, Oregon: Hart Publishing 2001, p. 24.

⁴ B. Lindell. *Partsautonoms gränser*. Hallsberg: Iustus, 1988, p. 87.

⁵ L. Ervo (ed.). *The Europeanisation of Procedural Law and the New Challenge to Fair Trial*. Groningen: Europa Law Publishing 2009, p. 24.

Administrative restrictions such as state fees have several goals, one of these being to direct conflicting parties to compromise. Most private legal disputes can be resolved by means of a settlement^{*6}, so it is not seen as unfair to require those parties who are involved in civil litigation to pay for access to the courts. However, it should never lead to a situation wherein only private justice can be carried out for civil matters. The rule of law and access to one's constitutional rights have to be ensured through state justice,^{*7} and the fees should be only so great as is necessary for covering the direct costs of the conflict resolution and to avoid so-called empty cases. Both options—private justice and state justice—have to be free of charge for the parties involved. At the very least, the choice must not be made merely because one system is economically more accessible than the other. The state fee system can serve as a limit to unreasonable, empty cases wherein there is no right that must be defended, but the fees must not instead be a way of topping up the state budget. The ECtHR has clearly established in its judgments that a person's economic status shall not constitute an impediment to that person's access to the courts.^{*8} This is where the state has an obligation to provide assurance that court fees are at a reasonable level. The Supreme Court of Estonia has ruled^{*9} that the higher the rates of the state fees are, the more intensively a person's fundamental rights are restricted.

2. The legislative process: Radical changes in the rates of state fees in 2008

A new version of the Code of Civil Procedure entered into force on 1.1.2006^{*10}, and major changes were made after nearly three years of practice, in 2008. Amendments prepared by the Ministry of Justice were presented to Parliament on 11.2.2008. According to the explanatory letter^{*11}, the aim with the amended form of the regulation was to lower the costs of civil litigation for the state, reduce the average length of proceedings, and give economically disadvantaged people better options for access to civil litigation.^{*12} The explanatory letter stated that neither the increase in the national budget nor the rise in income for it were foreseen when the amendments were drawn up.^{*13}

The original version of the draft did not include provisions for changing the rates for state fees for the courts.^{*14} Amendments for the draft were presented to the parliamentary Legal Affairs Commission^{*15}, while the draft was being deliberated in Parliament. The leading commission, which was the Legal Affairs Commission, held three meetings in which the draft was discussed, and the minutes of those meetings^{*16} indicate that the matter of state fees was not discussed at all. An amended draft, which included the new Annex 1 to the State Fees Act, radically increasing the rates at which state fees were to be set^{*17}, was passed by Parliament on 18.11.2008 between its first and second reading. From the transcripts of the parliamentary

⁶ Under the principle of private autonomy.

⁷ L. Ervo (see Note 5), p. 24.

⁸ See, for example, the ECtHR judgment of 9 October 1979 on Application 6289/73, *Airey v. Ireland*; ECtHR judgment of 21 February 1975, Application 4451/70, *Golder v. Great Britain*.

⁹ Judgement of the constitutional review chamber, 15.12.2009, 3-4-1-25-09.

¹⁰ Tsiviilkohtumenetluse seadustik, adopted on 20.4.2005, as entering into force on 1.1.2006. – RT I 2005, 26,197 (in Estonian). Available in English at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilkohtu>.

¹¹ Tsiviilkohtumenetluse seadustiku ja sellega seotud seaduste muutmise seaduse eelnõu ['Draft Amending the Code of Civil Procedure and Related Acts'], 194 SE III. Available at <http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=240492&u=20130318132921> (in Estonian).

¹² *Ibid.*, p. 65.

¹³ *Ibid.*, p. 66.

¹⁴ The rates for the state fees in court depend on the value of the claim and are stipulated in the State Fees Act's §57 and Annex 1. The principles for the levying of state fees are identical to those stipulated in the current State Fees Act ['Riigilõivuseadus'], passed on 22.4.2010 and entering into force on 1.1.2011. – RT I 2011, 21, 23 (in Estonian). Available in English at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=2012X05K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=riigil%F5ivuseadus>.

¹⁵ The Legal Affairs Commission is one of the standing commissions of the Riigikogu. For information about the Legal Affairs Commission, see <http://riigikogu.ee/index.php?id=34639>.

¹⁶ Minutes are available at <http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=240492&u=20130808151013> (in Estonian).

¹⁷ Riigilõivuseadus, adopted on 7.12.2006, which entered into force on 1.1.2007. – RT I 2006, 58, 439 (in Estonian).

session on 3.12.2008¹⁸, a member of the opposition, Ain Seppik, pointed out that during discussions by the Legal Affairs Commission, the reasons cited in favour of any increase in state fees were the following: fees were unreasonably low, and civil litigation must be cost-based. Also, an increase is a way of reducing the quantity of malicious and unreasoned claims. According to the transcripts of the parliamentary session, the issue was thoroughly discussed by the Legal Affairs Commission, although neither the minutes of the sessions of said commission nor the explanatory letter accompanying the draft referred to this. The transcripts for the 9.4.2008 session of Parliament reveal that costs in *ex officio* proceedings or proceedings on petitions were under discussion.¹⁹ The bill was passed by Parliament on 10.12.2008 and was published in *Riigi Teataja* on 31.12.2008. It entered into force on 1.1.2009, thus standing out as a unique example of a new law that entered into force literally overnight. This is something of which a state should not be proud.

To give the reader the chance to compare the rates, an example may be of use: a claim with a value of 200,000 euros would have cost a party 4,761.42 euros in 2008 but 8,308.51 euros in 2010.

An impact assessment for the draft law was not included to the explanatory letter, nor was one supplied to Parliament later. A verbal discussion in a parliamentary commission or a 15-minute speech from the opposition just before voting in the Riigikogu cannot serve as a substitute for an impact assessment. The primary starting point for the bill—the fact that civil litigation must be cost-based and fully paid for by the parties to the litigation—is contrary to the fundamental principles of receiving a fair trial in general. Access to justice is a strong element of this fundamental principle. As has been explained above, the civil procedure has a social dimension; it does not just resolve the conflict between parties. Hence, the development of the case law cannot be placed only on the shoulders of private individuals.

3. The judicial process: The results of the changes

Have the new legal conditions created an impediment to access to justice? It is difficult to assess the indirect impact of the above-mentioned amendments. All possible effects should have been assessed during the legislative process. Let us point out some facts and figures for determination of the results and formulate the hypothesis that raised state fees became a serious impediment to access to justice. No research has come to any conclusion on the question of how many claims, on account of lack of monetary resources, were not put before the courts or whether the reliability of the judicial system diminished because of the issue. The number of civil claims and payment orders sent to the courts increased from 2008 to 2010 and has fallen since then.²⁰ For the true picture, one has to dig more deeply into the statistics. The total number of claims has grown, but the statistics show²¹ that it has done so because the number of maintenance cases and labour cases has grown considerably, and so has the number of consumer credit claims. Both labour and maintenance claims are free of state fees, and with consumer credit claims the claimant is the person who has given the loan. It can be concluded here that even if the general number of claims has increased, the number of cases of claims in which one has had to pay a state fee has decreased.

To balance the potential obstacle to access to justice created by economic status, the law provides for asking the state to grant procedural assistance when bearing procedural costs is an issue.²² Statistics help a little here.²³ It is possible to apply for state assistance either before or after a claim has been filed with the courts. Before filing, an application for state assistance is considered to be a separate procedure, and it qualifies as a 'procedure' on the petition.²⁴ There are no specific statistics on how much the rate of application for such grants grew after the adoption of the amendments. In the statistics that have been collected, the procedure for granting procedural assistance before filing a claim is mentioned as 'other proceedings'

¹⁸ Transcript of the session of the Riigikogu of 3.12.2008: <http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=240492&u=20130318132921> (in Estonian).

¹⁹ Again, Ain Seppik, member of the opposition, in the first reading of the draft in the parliamentary session of 9.4.2008. Available at <http://www.riigikogu.ee/?op=steno&stcommand=stenoqramm&pkpkaupa=1&toimetatud=1&toimetamata=0&date=1207752870&paevakord=1908#pk1908> (in Estonian).

²⁰ Judicial statistics at <http://www.kohus.ee/10925> (in Estonian).

²¹ Here the comparison is between statistics for 2008 and 2009.

²² Code of Civil Procedure, §180.

²³ Judicial statistics at <http://www.kohus.ee/10925> (in Estonian).

²⁴ The Ministry of Justice, responsible for the administration of the court system, has only general statistics for the various proceedings that take place within its purview. For more details, see <http://www.just.ee/7729>.

on the petition. In 2008, the number of non-specific petitions was 2,536; in 2009, it was higher, at 4,216; and there were 6,070 cases in 2011. The growth factor in 2009 was 66.5%. More applications means more proceedings, court clerks, manpower, and time and money spent by the parties involved. Though the average length of proceedings has diminished^{*25}, this is due to other changes in procedural law.^{*26} On the other hand, these cases are resolved by assistant judges and the duration of processing of all civil matters that have been resolved by assistant judges grew at the same time.^{*27} There are no statistics collected on the amount of procedural assistance given by the state over the years.

It can be concluded that the state fees became an impediment to justice because the number of claims entailing payment of the state fee has gone down and the number and length of the various proceedings one must go through before one may present one's case before the court have grown. That is a direct impact of the changes.

The indirect impact and the real economic outcome for society are difficult to measure in any real way. Has the justice system maintained its reputation? Has the workload for the police grown on account of complaints that would normally fall within the sphere of civil litigation? How has the country's civil turnover decreased because of it? These questions cannot be answered here. Through work to even out the activities of the constitutional review chamber of the Supreme Court, the radical changes that were put in place have greatly increased the workload for the judicial system. A quick look at the Supreme Court's Web site shows that in 2008 the Supreme Court's constitutional review chamber dealt with no cases that were related to the matter of state fees. In 2009, that chamber issued two judgements declaring that state fees that were too high were unconstitutional, while in 2011 five judgements were handed down and for 2012 the number grew to 11 cases. In just the first three months of 2013, six judgements were issued on state fees and state assistance.^{*28}

4. The judicial process: The solution from the judicial system

One of the purposes for the separation of powers is the judicial review of legislative activities. In cases wherein the legislative power has failed to keep secure the fundamental rights of the parties involved, the Constitution provides a safety net for an individual in its §15, stipulating that the judiciary has an obligation to declare unconstitutional an act, legislative instrument, or measure that violates fundamental rights or freedoms provided for in the Constitution or that contravenes the Constitution.

The separation of powers as a limitation to constitutional legislature protects the decision-making independence of the judiciary, and this is a common foundation for democracy in the modern world. Here we are talking about decision-making^{*29} and not institutional independence.^{*30} The principle behind the separation of powers—namely, one of judicial power—is to protect judicial independence with regard to decision-making.^{*31} While the principle is of great constitutional value, the limitations to it are vague. There would seem to be a limit somewhere, and this may be defined through the definition of judicial power itself. It is the conclusive adjudication of any controversy between the parties who are involved in litigation that results in an authoritative and binding declaration of their respective rights and obligations according to

²⁵ According to the judicial statistics, the average length of processing of a civil case in 2009 and 2011 was 206 days and in 2012 was 197 days. Judicial statistics are available in Estonian at <http://www.kohus.ee/orb.aw/class=file/action=preview/id=58463/Kohtute+menetlusstatistika.2012.a.pdf>.

²⁶ Primarily because of the electronic filing system and other electronic and technical changes that regulate the service for procedural documents. See Chapter 33 of the Code of Civil Procedure.

²⁷ Statistics are not available, and the source of this information is the court information system.

²⁸ The total number of constitutional review cases in 2008 is 23. The figure for 2009 is 36, for 2010 is 14, for 2011 is 29, and for 2012 is 21. See <http://www.riigikohus.ee/?id=79> (in Estonian).

²⁹ P. Gerangelos. *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations*. Oxford and Portland, Oregon: Hart Publishing 2009, p. 16.

³⁰ For more details, see M.H. Redish. Federal judicial independence: Constitutional and political perspectives. – *Mercer Law Review* 1995/46, p. 697.

³¹ P. Gerangelos (see Note 29), p. 311.

existing law.^{*32} It also has to ensure the decision-making independence of judicial power in any pending case, with protection from intervention by the legislative power. The judiciary has an obligation to resolve a pending case, and for just such a reason judicial activism is widely accepted in the European Union legal system. Judicial law-making in the European court context is something to which we are all accustomed.^{*33} Nonetheless, it is not always clear what the definition and substance of judicial activism should be^{*34}, and this article does not delve deeply into the various theories behind judicial activism.^{*35} Continental judges especially, who are seen for the most part as civil servants, rarely tend to strike down legislation that has been adopted by the national parliament. The judicial system is very conservative in character and tends to maintain stability and traditions.^{*36} Thanks to this, the law-making process that is a judge's purview and the outcome of this process can also be described with reference to these values.

The Constitution stipulates the separation of powers, so when a judge has to act as a legislator it is a matter of last resort. The problem of judicial law-making is that it has never been subjected to any democratic control in the way that the law-making process of a legislator usually is.^{*37}

The solution that was put force by the Supreme Court was conservative, and, as the boundaries for constitutional review are strict, it had little choice or option enabling it to assess the outcome. A recent case brought to resolution by the Supreme Court's *en banc* panel illustrates the problems related to limited assessment and the faults that are inherent in judicial law-making.^{*38} In declaring that the unconstitutional element was the rates rather than the principle that the parties have to cover the direct costs of the litigation by paying a state fee, the Supreme Court had to replace those unconstitutional rates. Limited time and resources played their part, and the Supreme Court decided to plug the gap in the applicable law by turning the clock back to 2006, to the previous redaction of the State Fees Act.^{*39} Within the process of judicial law-making, it is not possible to draft enforcement provisions, which is what would happen in the usual legislative procedure. In its judgements the Supreme Court was not able to explain that no retroactive power was given to the decisions. A direct consequence of this was the referred case wherein a party that had lost its case wanted to claim state fees back from the state, fees that had been paid by said party during the appeal. The Supreme Court stated that, as the party had been able to pay the state fee during the course of the action, the state fee's rate had not been an impediment and the party had missed its opportunity when the final judgement came into force.^{*40}

In brief conclusion, the judicial law-making process is not designed to replace the legislative law-making procedure; rather, it is only intended to repair its mistakes by declaring an act unconstitutional and fill in the gaps in the legal system. This kind of law-making process resolves only that individual issue that is being argued before the panel, not the systematic unconstitutional approach itself. According to the law,^{*41} the Supreme Court may decide only on the relevant provision of the act at hand. The Supreme Court has to declare the State Fees Act and its Annex 1 unconstitutional only provision by provision.

³² *Ibid.*, p. 314.

³³ A. Grimm. Judicial interpretation or judicial activism?: The legacy of rationalism in the studies of the European Court of Justice. – *European Law Journal* 2012 (18)/4, p. 520.

³⁴ G. Green. An intellectual history of judicial activism. – *Emory Law Journal* 2009 (58)/5, p. 1197.

³⁵ See also the debate between Hart and Dworkin.

³⁶ A. Tsaoussi, E. Zervogianni. Judges as satisficers: A law and economics perspectives on judicial liability. – *European Journal of Law and Economics* 2010 (29), p. 335.

³⁷ A. Grimm (see Note 33), p. 523.

³⁸ Order of the Supreme Court *en banc*, 2.4.2013, case 3-2-1-140-12.

³⁹ The State Fees Act was changed in conjunction with the passage of the new Code of Civil Procedure in 2006.

⁴⁰ In its judgement of 28.2.2013, No. 3-4-1-13-12, the Supreme Court *en banc* stated that a party is allowed to claim back paid state fees but that the claim must be applied for with the court before the end of the process.

⁴¹ Põhiseaduslikkuse järelevalve kohtumenetluse seadus [‘Constitutional Review Court Procedure Act’], §14 (2), adopted on 13.3.2002 and entering into force on 1.7.2002. – RT I 2002, 29, 174 (in Estonian).

5. The reaction: Lowering state fees and raising the value of the claim

In reaction to the rulings, the Ministry of Justice prepared a draft for a new version of the State Fees Act, along with provisions for addition to the Code of Civil Procedure that stipulated the value of an action, all of which were introduced in July 2012.^{*42} According to the explanatory letter^{*43}, the Ministry of Justice had compiled information and analysed state fee rates from EU countries that operate a similar system of state fees.^{*44} The final outcome was predictably depressing. For small claims, the difference in state fees between Estonia and other EU countries was minimal. For example, when it came to state fees for a claim of up to 639.11 euros, the average difference was nine per cent. The greater the amount being claimed, the greater was the difference. In the case of a claim for 28,760.24 euros, the state fee in Estonia was 2,876.02 euros, and the average rate of state fees for those countries analysed was 745.10 euros.^{*45} The greatest difference between the state fees in Estonia and those of other countries was a whopping 413%, and the average difference was a still hefty 334.93%. The question of how it had not been possible to perform a study or read one three years earlier remains.^{*46} The Supreme Court reached its first judgement on the matter in December 2009, and the draft had only reached the point of being submitted to Parliament in April 2012.

With a rare spirit of near-unanimity, Parliament voted to support the draft.^{*47} The amendments to the State Fees Act and the Code of Civil Procedure were adopted on 6.6.2012, and the bill entered into force on 1.7.2012. The draft changed §133 of the Code of Civil Procedure, specifically a provision stipulating that the value of an action shall be calculated with respect to the principal claim, with collateral claims not being taken into account in determination of the value of an action. The new regulation imposed through the draft calculates collateral claims as part of the value of an action, and surely one has to pay the state fee for that.

The best intentions may end up with a mess, and this is just what happened to the new regulation, as it was contrary to the EU regulation on small claims.^{*48} The preamble to the latter regulation clearly stipulates that, for the purpose of facilitating calculation of the value of a claim, all interest, expenses, and disbursements should be disregarded.^{*49}

The *jura novit curia* principle applies here, but the truth is that the majority of judges do not take European elements into consideration when they are judging a case. In their role as European judges, Estonian judges find themselves overruling legislation once again. The only possible outcome is not to apply the Civil Procedure Act's §133 and to decide on the value of an action against the main claim itself in cases involving the European small-claims procedure. The legislator has put the citizens of other EU member states in a better position than Estonian citizens, and this may constitute unfair treatment. A difference in the value of an action may be justified, and any cross-border element may constitute justification for claims of unfair treatment. Besides unequal treatment and the infringement of legal clarity, the consequences of the regulation may include forum-hunting. The model for the Estonian small-claims procedure was European regulation, which makes it hard for the author to see the justification for the new regulation in the Code of Civil Procedure. The European court has indicated, in its case law^{*50}, that even in purely internal cases a preliminary ruling may be issued and the opinion of the European court may be used in implementation of

⁴² The Ministry of Justice presented the draft act to the Riigikogu on 2.4.2012.

⁴³ Explanatory letter associated with Draft Law 206 SE. Available at <http://www.riigikogu.ee/?op=ems&page=eelnou&eid=66ff74e2-679c-4088-9d57-f404ba313b4a&> (in Estonian).

⁴⁴ In Estonia, the rate for state fees depends on the value associated with the action in question. The situation is similar in other EU states: Poland, Portugal, Austria, Great Britain, Latvia, Italy, and Slovenia.

⁴⁵ The difference is 285.99%.

⁴⁶ A6-0387/2006 final.

⁴⁷ According to the transcript of the Riigikogu session, 83 members voted for this. See <http://www.riigikogu.ee/?op=steno&stcommand=stenoqramm&date=1338980700#pk10558> (in Estonian).

⁴⁸ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007, establishing a European Small Claims Procedure. – OJ L 199, 31.7.2007.

⁴⁹ Recital 10.

⁵⁰ C-448/98, *Guimont*, para. 23. – ECR 2000, p. I-10663; Case C-451/03, *Servizi Ausiliari Dottori Commercialisti*, para. 29. – ECR 2006, p. I-2941; Joined Cases C-94/04 and C-202/04, *Cipolla and Others*, para. 30. – ECR 2006, p. I-11421; Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, para. 36. – ECR 2010, p. I-0000.

national law. In particular, if the rights granted by national law to a national of a given Member State differ from those that a national of another Member State who is in the same situation may enjoy, those rights derive from European Union law.

6. Conclusions

The subject of state fees seems to be a source of constant and never-ending discussion for lawyers and a valuable stage for politicians. It is also a huge burden for the average person on the street who has a difficult problem that could be solved very easily through the courts if only he or she were able to pass through the doors of justice in the first place. Lack of a general impact assessment and the miscalculation of the state's obligations can lead to years of disputes and violations of basic rights. The Estonian courts have shown their ability to adjudicate fairly in cases in which the legislator has failed to fulfil its own duties. This article, in explaining the extent of the latter process and the consequences that may be involved therein, also advocates strongly for the legislator's attention to the primary meaning of state fees in civil procedures. They are meant not to satisfy the needs of the state (or the state budget) but to provide balanced access to justice. Non-existent or incorrectly focused impact assessment and an incorrect understanding of the state's obligations can lead to a greater administrative burden for all parties involved, including the state itself. Although the judiciary may act as a legislator in order that the fundamental rights of an individual may be protected, the space for manoeuvring is limited and in the long run judicial law-making is not meant to act as a substitute for the legislative process.