

If You Dislike a Court Judgment, No Explanation Will Do

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In an opinion piece (in the newspaper *Postimees*, 15.11.2017), member of the *Riigikogu* (Estonian Parliament) Artur Talvik called for a discussion of Supreme Court judgments. More specifically, he had in mind the Supreme Court's decisions on the constitutionality of the local government reform. I have always welcomed the idea of discussing court judgments that enter into force, even more so when talking about the decisions made by higher courts that close the legal dispute and the motives for which are not subject to further criticism by another court.

It is worth recalling the exact legal setup of the recent administrative-territorial reform of local government. First, it is difficult to get rid of the feeling that the way the reform was carried out, at least from a legal perspective, was one of the most complicated.

Article 2(2) of the Constitution clearly states that the administrative division of Estonia's territory is must be provided by law. In essence, this provision unambiguously allows the *Riigikogu* to establish the borders of the administrative divisions without the need to involve any other institutions in the making of these decisions. With that in mind, the *Riigikogu* could have chosen, for example, to establish by law the existing counties as the new administrative divisions with local governments.

This law would also have been subject to constitutional review by the Supreme Court, but in any case it would have meant implementing the local government reform in one stage. Instead, a multi-stage approach was chosen, whereby the local authorities would first merge voluntarily and then those that failed to meet the criteria provided by law would be coercively merged by the government. However, the decisions made in both stages could be contested in court.

On the plus side for local authorities, this approach gave them a great say in choosing which municipality to merge with and limited the central government's decision-making power in the coercive merger stage by not allowing the government to separate municipalities that had already merged voluntarily.

On the other hand, a definite downside to this choice was the unpredictability of the outcome. As the voluntary merger was quite literally voluntary, meaning that the local authorities were able to decide according to their own sympathies, the nationwide outcome might not end up being the most reasonable one.

Because subsequent adjustments of the outcome are probably inevitable, the question that Artur Talvik posed in the title of his opinion piece, whether the administrative reform was completed, has also been answered. The disadvantages also include the length of the process, as the emergence of court disputes was inevitably written into the scenario.

The fact that the Supreme Court had to make 12 decisions on the local government reform shows that this is what in fact happened. The first court judgment, pronounced on 20 December 2016, decided on the

constitutionality of the Administrative Reform Act itself and the 11 judicial decisions made in autumn 2017, based on the applications of 17 local authorities, assessed the legality of the regulations on coercive mergers issued by the Government of the Republic. I will refer to the latter as subsequent judgments.

In what follows, I will once more summarise what and why the Supreme Court decided in settling these disputes.

Fundamental rights are held by people

The basic approach to solving the local government reform cases was developed with the first judgment. First, the court did not question the legitimacy of the administrative reform's goal. Even without a long explanation, it is obvious that having 213 local authorities in a country with fewer residents than a suburb in Paris is too much.

Another important question was whether fundamental rights extend to local authorities. According to the Supreme Court, they do not. Article 14 of the Constitution states that it is the duty of local governments, as well as the legislature, the executive and the judiciary, to guarantee rights and freedoms; however, it is clear that a guarantor of the rights of others cannot at the same time be a holder of those rights.

For this reason, the Supreme Court did not implement a proportionality test, as proposed by the parties to the proceedings, when evaluating the constitutionality of the Administrative Reform Act, as this is an instrument used to control the restriction of fundamental rights.

In other words, and a substantial simplification: fundamental rights are held by people and the aim of a proportionality check is to protect their freedoms. For this purpose, the proportionality test prescribes a very clear step-by-step procedure, which involves asking whether it would have been possible to achieve a given goal via another, less restrictive method. Therefore, the Supreme Court also did not have to evaluate to what extent methods other than merging local authorities could have been used to achieve the objectives of the administrative reform.

Or to put it differently: the alteration of the state organisation cannot be held to the same standards as the protection of the fundamental rights of individuals. It would be arbitrary to lump the principle of democracy and the right to vote together with the organisation of local government.

When reorganising local authorities, the *Riigikogu* is given much more room for making decisions than when imposing restrictions on fundamental rights. Third, the Supreme Court held that although the *Riigikogu* could have established a new administrative division, it is not unconstitutional to entrust the government with solving the more decisive questions related to the reform.

In making all these fundamental points, the court also took into consideration the fact that according to the Administrative Reform Act, the coercive merger was to take place only after the voluntary merger stage was completed. Or as mentioned above, from among all the legally possible approaches to implementing the administrative reform, the *Riigikogu* had chosen the most favourable for the local authorities.

For these reasons, the Supreme Court established in the first case that, while unconstitutional in its attempt to limit the compensation to the local authorities for expenses incurred during the reform, the Administrative Reform Act in itself was constitutional.

***Riigikogu* and government mandate**

In the subsequent judgments pronounced this fall, the Supreme Court maintained all the above views. The request from some parties that the Supreme Court apply a proportionality test in the proceedings to determine whether local life will in fact improve as a result of the local government reform in no way falls within the cognitive scope of the judicial system.

Therefore, in these cases, the court could only assess whether the government had considered all the pros and cons that it was required to by law when applying coercive merging. In doing so, the court did



Chief Justice of the Supreme Court Priit Pikamäe explaining to the journalists the Supreme Court decision to declare the Administrative Reform Act constitutional.
Source: Delfi

not limit itself to the explanatory memoranda accompanying the government's decisions but, where appropriate, also assessed the entire procedure.

There is no conflict between these various judgments by the Supreme Court. Whether the local quality of life will improve as a result of the reform will still be up to the leaders of the new local authorities. In other words, as with any other important reform, only the future can

tell whether it was successful but predicting the future cannot be the function of the constitutional review procedure. Finally, we should also note that even if some of the Supreme Court's subsequent judgements had identified an abuse of discretion by the government, this would not have amounted to a ban on coercively merging those specific municipalities, but instead would have meant that the government would have to review the merger in question. And that is simply because it is the *Riigikogu* and the government, rather than the judicial system, that have the mandate to carry out an administrative reform. The courts cannot start making decisions instead of the political power on how and in what way the administrative reform should be carried out but can only review its constitutionality.

To conclude, I have to recall an old truth that someone who does not like a court judgment will never be content with the court's reasoning, no matter how extensive. It is worth noting that the administrative reform court cases were heard by two different panels of the Supreme Court and both supported the same approach.

And as for the more general question of the Supreme Court's role in protecting the constitution, laying down the appropriate judicial proceedings, as in adopting the Administrative Reform Act, is up to the *Riigikogu*. While seeing no need to establish a separate constitutional court in Estonia, I have shared my thoughts on the possible directions for constitutional review with the representatives of the people on at least two occasions in my addresses to the *Riigikogu*.

The continued discussion on these matters is still welcome.

Published in the newspaper *Postimees*, 17.11.2017.