YEARBOOK OF ESTONIAN COURTS 2016

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Foreword

Dear reader,

This time, the yearbook of Estonian courts focuses primarily on constitutional review. The need to address this topic is well demonstrated by the fact that over the recent years, there have been active debates about the constitutional review and the role of the judicial branch of power in the society, but also some opinions regarding the independence of the court system, which raise concerns. However, for the judiciary, the issues related to constitutional review have been a relevant subject of debates for a much longer time, and there have been heated disputes regarding the possibilities and dangers of tightening or loosening the Estonian constitutional review system.

In this edition, justices of the Supreme Court Ivo Pilving and Eerik Kergandberg dispute on the possibilities to turn directly to the Supreme Court for the protection of fundamental rights. In addition to the main debated question, the yearbook includes a more general insight into the issues related to constitutional review, which provides food for reflection: Berit Aaviksoo discusses the limits of judicial activism.

During philosophical disputes on major issues concerning constitutional review, it is fairly easy to lose sight of the *raison d'être* of this field – the need to protect personal fundamental rights. We are reminded of this obvious and simple fact by a sworn advocate Martin Triipan's poised take on court practice concerning the constitutional review in 2016.

The yearbook also provides an overview of the most important litigations in the Supreme Court, the subject of which was the administrative reform. Obviously, the yearbook also presents statistics of the work of courts.

A lot of people contributed to the publishing of the yearbook. I would like to thank all the authors, editorial staff, language editors, and the executive editor – without you this yearbook would not have been published. I would also like to thank the staff of the Public Relations Department of the Supreme Court, who had to handle all technical and organisational tasks related to the publishing of this compilation.

Enjoy the book!

Andres Parmas
Chief Editor of the Yearbook of Courts

CHAPTER 1
YEARLY SUMMARY

Development of the Legal and Court System

Report at the plenary meeting of judges on 10 February 2017 in Tartu

Dr. iur. **Priit Pikamäe**,
Chief Justice of the Supreme Court

Dear colleagues and guests!
Honourable members of the Riigikogu!
Honourable Minister of Justice!

I

On 7 June 2016, parliament adopted the Act Amending the Courts Act and the Associated Acts, which significantly reformed the terms for assuming the office of a judge. The Act entered into force on 1 August of last year, and it drew a line under the process which had lasted for three years, and the goal of which was to analyse the reasons for failure of competitions for the position of a judge. On the one hand, the fact that such a long period of time was required to process the draft act proves that points of view did not exactly form in a linear manner, but on the other hand, it ensures that the law which was eventually approved by the parliament was thoroughly thought-through. It was high time the system of competitions for the position of a judge was brought into order, since the change of generations within the judiciary is becoming more pressing an issue than ever. Statistics show that during the period of 2011–2016, a total of 38 judges retired[1], of whom 11 retired due to reaching the maximum age limit. At the time of today's plenary meeting, 22 of our colleagues have the right to the judge's pension, and the President of the Republic has already adopted a decision on release from office for 5 of them. Yet, it is important to note the fact that as early as in the years 2017–2022, 42 more judges will reach retirement age, while during the same period, 25 judges will reach the maximum age limit. The latter includes 6 members of the Supreme Court and 4 circuit court judges. It can be concluded that in a way we are approaching a situation similar to the one in 1993, when the Estonian court system required a large number of new judges at once.

According to the reformed legislation one is expected to have at least five years of work experience at a position requiring a legal qualification equivalent to that of

1 There are a total of 242 positions of judges in Estonia.

judges in order to become a judge themselves. The exception regarding previous length of service applies only to law clerks, who only need a minimum of three years of work experience. The aim of such exception is to motivate lawyers to already join the court system at the stage preceding the position of a judge. According to the new system, candidates are required to take a judge's examination which is separated from the competition. This means that passing the examination is a prerequisite for participating in the competition and must be met already before applying. The most important update to the act, however, is the fact that persons who have previously worked as sworn advocates or prosecutors for at least three years are now automatically exempt from the judge's examination. The Act Amending the Courts Act also revises the Bar Association Act so that a person who has worked as a judge for at least three years can be admitted to the Bar Association without having to take the bar exam. Since the Prosecutor's Office Act already includes a provision which allows nominating a person for the position of a district prosecutor without an examination provided that they have previously worked as a judge for at least three years, the principle of mutual recognition of legal examinations of different judicial professions became effective. Acceptance of a person who has already become a member of one legal profession into another legal profession without taking an examination presumably improves the horizontal mobility of lawyers and creates better conditions for practicing lawyers to join the court system.

Nevertheless, it is important to point out that mutual recognition of professional examinations does not mean that anyone must be accepted as a member of the judiciary. Even according to the new system all institutions still retain the right to independently establish specific standards for professional suitability. This way, the judge's examination committee will continue to have the competence to assess the suitability of a candidate's personal qualities for working as a judge. The court system shall continue to have the final say in deciding who should be nominated as a judge, in the same way that the Bar Association and the Prosecutor's Office shall retain their independence to decide who can become their members. Therefore, the principle of mutual recognition of professional examinations means the abolishment of an additional test of legal knowledge, but it does not mean giving up the right to have a say about professional suitability. I hope that the mutual recognition of professional examinations is the first step towards establishing a uniform lawyer's examination which would serve as a certificate for a person who wants to work in any legal field. I am glad that representatives of legal professions, including the Faculty of Law of the University of Tartu and the Association of Judges, who gathered on 6 December last year upon the initiative of the Minister of Justice, unanimously supported the plan to start drafting legislation required for establishing a uniform lawyer's examination.

The amendments to the Courts Act which entered into force on 1 August 2016 also concerned social guarantees of judges. In my report at the plenary meeting in

2014, I mentioned that when searching for alternatives for the previous system of social guarantees (such as judge's pension) provided by the Courts Act, it would be reasonable to match social guarantees that judges are eligible to, with their length of service. The provision of additional holiday for judges, as established by the amendments to the Courts Act, grants judges two additional days off after reaching a five-year, four days after reaching a ten-year, and seven days after reaching a fifteen-year service period. This is a small but necessary step in the right direction. Essentially, it ensures a 42-day holiday for judges who have been in service for fifteen years. I still believe that considering the state no longer ensures occupational pension for judges joining the judiciary after 1 July 2013, it will become increasingly important to try to keep judges at their positions for as long as possible. Therefore, steps must be taken immediately to assure new judges that their long-term service as a judge is valued. In this context, it is especially important that the legislative body started to revise the indexation mechanism for professional salaries established by the Salaries of Higher State Servants Act. The explanatory note to this piece of legislation can lead to the conclusion that the legislative body did not want to establish the indexation of civil servants' salaries in the way in which it turned out, and resulting from which judges' salaries decreased last year, and are predicted to further decrease this year. The decision of the Supreme Court *en banc* of 26 June 2014 included a valid remark that such regulation is unreasonable and may endanger the sustainability and independence of the court system. Today, nearly three years after this Supreme Court's decision, the indexation of judges' salaries remains a relevant issue, more so since salary is now almost the sole social guarantee for judges.

II

Dear guests!

Let us start with numbers. At the end of last year, the Ministry of Justice issued a brief analysis that compared change in the workload of courts during the period of 2001–2015. More specifically, it studied the number of cases submitted to courts of first instance during those years. According to the analysis, a total of 39,338 civil and criminal cases were initiated in county courts in 2001, and a total of 2,372 administrative cases in administrative courts. However, in 2015, a total of as many as 88,482 civil and criminal cases were initiated in county courts, and a total of 3,371 in administrative courts. This shows that the workload of county courts increased by 124.9%, and that of administrative courts by 42.1% during the given period. In courts of first instance, there was a particularly steep rise in the number of civil cases, i.e. by 182.6%, while the number of criminal cases increased by 58.3%. These numbers are very thought provoking, and their structure must be analysed in depth. From the social perspective, these numbers definitely reflect an increase in the number of conflicts in the society which are resolved as civil disputes, but also a more effective work of investigative bodies

and the Prosecutor's Office at a time when the overall crime rates in the country were in decline. From the perspective of administrative activities, these statistics confirm a continuous flow of applications originating from custodial institutions, resolution of which forms a large part of administrative courts' work. For example, statistics on judicial procedures of courts of first and second instance in 2015 demonstrate, among other things, that 53% of all applications submitted to the Tartu Administrative Court are complaints of imprisoned persons against the actions of the prison.

From the perspective of the court system, the above analysis demonstrates first and foremost the fact that the workload of courts of first instance has become unusually high. On the one hand, this is an inevitable result of the current interpretation of Article 149 of the Constitution. If all court proceedings have to start from a court of first instance, irrespective of whether this is necessarily reasonable considering the complexity and cost of the case, it is bound to lead to a very heavy workload of county and administrative courts. On the other hand, a continuous increase in the workload of courts of first instance raises the question whether and how efficiently the bodies formed for extrajudicial resolution of disputes function. The aim of delegating disputes for initial resolution by institutions working outside the court system was to optimise the workload of courts. Admittedly, the picture is extremely complex in this field due to the large number and different histories of such institutions. First, legislative bodies have entrusted the extrajudicial resolution of disputes to the executive branch in many cases. This is the case, for example, for the misdemeanour procedure and competition procedure. The same can also be said about internal challenge procedures of the executive branch, since these have become a prerequisite for turning to court. In addition to that, legislative bodies have also created numerous specific institutions for resolving very different disputes. The State Liability Act refers to these as "authorities created for extrajudicial adjudication of disputes by law". Examples of such authorities include the Labour Dispute Committee, the Lease Committee, and the Public Procurement Review Committee. In my report to the Parliament in 2014, I made a proposal to consider creating a uniform general regulation for the abovementioned authorities, given that the principles that they abide by are unjustifiably different. Considering the continuous increase of the workload of courts, one must also ask whether and how efficiently these bodies perform their central role, which is to reduce the number of cases submitted to courts. The efficiency with which such institutions achieve this goal is the pillar of their existence. Should the study lead to the conclusion that the majority of decisions of the extrajudicial dispute resolution authorities are appealed against in the court, a discussion should follow on what kinds of reforms the given system needs in order to achieve a significant increase in the number of final decisions by such authorities, or whether the existence of such authorities in their present form is justified at all. Since the resources provided for handling legal disputes are lim-

ited, it might, given the high number of appeals against extrajudicial decisions, be more practical to remove such institutions, and to redistribute the funds that become available throughout the court system. In any event, it appears to be a good time for a structural and comprehensive analysis of authorities responsible for the extrajudicial resolution of disputes because the drastic increase in the number of cases submitted to courts shows the system should no longer be left to its own devices.

Naturally, the surge in the number of court cases unavoidably affects other instances of the court system – circuit courts and the Supreme Court. An increase in the number of proceedings in courts of first instance presumably brings about an increase in the number of appeals against decisions of first instance courts, even if the percentage of appeals remains the same. Despite the above considerations, the heavy workload of courts of Estonian court system's higher instances also results from other more specific factors, the most significant of which is the fact that our legal acts concerning court procedure offer remarkably broad possibilities for appealing against court decisions. As the central principle of a state based on the rule of law, the Constitution guarantees everyone protection in the court of law. Among other things, this means that the workload of the court system cannot be reduced by creating unjustified barriers for judicial recourse. However, legislative bodies have much freer hands when it comes to introducing limits to the right to appeal. Yet, when choosing between the right to appeal and the principle of legal stability, our legislative bodies have generally leaned towards the first. Since judges are human and can err, the right to appeal, at least with regard to majority of final decisions, is an, unavoidable necessity. Still, it is questionable whether the same approach must also apply to less complicated court cases and individual decisions made during the proceedings. The latter can often be challenged not only in the appellate instance, but twice, i.e. all the way to the Supreme Court. Diversion from the principle that individual decisions made during a procedure can be challenged only together with the final decision can be justified only in case of the most detrimental actions, where a delay of the final decision can cause irreparable damage to a person's rights. On the other hand, if the right to appeal is applied beyond such individual decisions, this inevitably slows down the course of the main procedure and burdens the court system as a whole. Situations where the Supreme Court reviews a pending challenge regarding the lawfulness of some extrajudicial procedural action, while the case concerned has already been resolved by compromise procedure in the county court, do not exactly serve as indications of a well thought-through appeal mechanism. One can find even more paradoxes in our appeal system. For example, how is it possible to justify a situation where in a smaller misdemeanour case a decision of the county court can be appealed against directly in the Supreme Court, while a criminal case with a couple of hundred files and dozens of witnesses needs to go through all three court instances? A uniform approach would rather mean a complete removal

of the right to appeal in simple cases, and limit this right to one appeal in more complex ones. Our general organisation of appeal proceedings indirectly points at a general mistrust towards the work of courts of first instance – on the one hand, we believe that all cases must start from a court of first instance, but on the other hand, we want to avoid at all costs giving the first instance the right to make the final decision.

Having said that, it would be wrong to assume that our appeal system only offers the right to appeal twice. For example, our administrative law even has examples of the right to appeal five times. This is perfectly illustrated by the procedure for appealing against administrative acts and actions of prisons. One has the right to appeal to the prison director through the challenge procedure, then to the Ministry of Justice, then to the administrative court, and finally to the circuit court and the Supreme Court. Initially, the goal of such regulation could have been to prevent excessive burden on administrative courts resulting from complaints of imprisoned persons, but by now, the high number of judicial administration cases in our administrative courts should have convinced everybody of the inefficiency of such system. Instead such repeated appeals unjustifiably waste the procedural resources of both the executive and judicial branches.

The constantly growing workload of the Supreme Court is another issue. The number of applications and complaints submitted to the Supreme Court has been steadily increasing over the past six years, reaching a new record of 3,428 applications by the end of 2016. Proportions tend to be similar across the years, with most applications being submitted to the Civil and Criminal Chambers, and less to the Administrative Chamber. Such steadily increasing number of applications to the Supreme Court is extremely worrying since the Chambers are running out of resources to deal with this many applications. Although the percentage of cases accepted for procedure has been slightly decreasing, reaching 15 percent last year, it is still higher compared to supreme courts of countries whose systems were used as examples for Estonian legal reforms. The growing number of applications in our cassation instance not only threatens to become impossible for the Supreme Court to handle, but it also threatens the Supreme Court's ability to perform its primary tasks, i.e. the harmonisation and development of court practice. The way I see it, the Supreme Court's main attention has, over time, shifted to correcting the decisions of courts of lower instance, while the key question arising from the role of the Supreme Court, i.e. whether the given issue requires the Supreme Court's position at all, is becoming increasingly overshadowed. The inevitable by-product of such approach is a large number of decisions, which in turn makes it more difficult to understand the court practice. In many ways, we are facing a similar situation as the European Court of Human Rights which has spent years struggling with the ever-growing avalanche of complaints and the resulting high number of court decisions. An often-overlooked fact is that from

the year of its formation in 1959 until 1998, the European Court of Human Rights issued a mere 837 decisions. However, following the reform of 1998, the number of decisions issued by the Strasbourg court has been close to 1,000 per year. Given such number of decisions, it is only natural that it has become quite difficult to follow the daily practice of the European Court of Human Rights. We must not underestimate the Supreme Court's risk to end up in a similar situation, even if on a much smaller scale. If members of the Supreme Court themselves, while preparing a training for judges, complain that it takes them two weeks just to find out what the Chamber has established regarding a given legal question, we are facing what the European Court of Human Rights would refer to as a serious structural problem. The wish to get a word in everything is definitely not helping the Supreme Court to perform its tasks.

All in all, I believe that the time is ripe for a revision of our legal order's appeal system. Obviously, it must not downplay the roles of different court procedures, but instead take their individual particularities into consideration. We need a thorough analysis of the system and the necessity of the authorities responsible for extrajudicial resolution of disputes. The workload of the Supreme Court can only be normalised if we once again realise that its main task is to direct court practice, while the obligation to perform an initial check of court mistakes must be first and foremost the task of circuit courts. Appeal procedures can only be effective if they are based on a reasonable division of tasks between the appellate and cassation instances. Unfortunately, we are currently in a situation where circuit courts are indeed the institutions to which initial appeals are submitted, but the majority of cases reviewed in this appellate instance can be further challenged in the Supreme Court, which means that circuit courts are de-facto deprived of the right to independent court practice. I believe that we need an agreement that embraces all court procedures and establishes in which cases circuit courts make the final decision, and which cases can be reviewed once again in the cassation procedure. A reasonable solution would be to entrust circuit courts with the formation of an independent court practice with respect to individual decisions made in the course of a procedure.

All the above considerations do not mean that the flow of appeals against decisions and rulings accepted by circuit courts does not need to be separately controlled. Not just the cassation procedure, but all appeal procedures as a whole constitute a resource that must be used economically, and therefore it is necessary to favour the achievement of legal stability with the first decision delivered by the court system where possible. Some judicial procedures already grant circuit courts the right not to accept an appeal, for example when it is clearly unfounded or has no chance to succeed. Such grounds within individual procedures must be reviewed in order to identify how they can be applied more widely. The ever-increasing workload of appellate courts is not an exclusively Estonian problem, and

other countries have also dealt with the need to implement filtering mechanisms for appeals. Therefore, it is necessary to continue to address the subject of circuit courts' workload, but it is also important to keep in mind that due to significant particularities of our judicial procedures, a single solution is probably not possible. A motion of amendment that only foresees establishing filters and thus transfers the workload of circuit courts to the Supreme Court would not help to achieve the desired result.

III

Dear colleagues!

At the plenary meeting held last year, Tõnu Anton, the long-term chairman of the Administrative Chamber of the Supreme Court stressed in his report that the most important change that the court system will face in the near future is the reduction of resource spent on the administration of justice. Today, one has to admit that this issue is no longer an abstract danger, but a very unpleasant reality. Namely, when discussing the budgets of first and second instance courts for the present year, the Council for Administration of Courts had to face the fact that the budgets had a deficit of over one million Euros. It resulted from a constant increase in postal service expenses and so-called third person fees. The Ministry of Justice confirmed that this year's deficit would be covered using the reserve funds, but that preparing the budget for next year would be a real challenge. The Council for Administration of Courts unanimously supported the proposal by the Ministry of Justice to make expenses on judges' salaries and a part of operating expenses accounting-based in the state budget. Such decision is explained by the fact that the obligation to send procedural documents and to cover third persons' expenses arises from codes of procedure, and courts do not have any possibility to influence their formation or amount. At the same time, the increase of such expenses was constantly fostered by the general increase in the cost of living, while no additional funds to cover them have been allocated for the court system since the beginning of the economic decline.

Nevertheless, it is necessary to understand that on a general scale, there is no reason whatsoever to blame the Government or the Parliament for allegedly demonstrating systematic stringiness on the account of the court system during budgeting. Law clerks, as mentioned before, have only been engaged in the administration of justice thanks to additional funding of courts' activities. However, the above considerations cannot lead to the conclusion that in the future, the deficit of courts' operating expenses should be covered using funds saved from vacant positions of judges. Such castling with the budgets of courts of first and second instance does not match the idea of using funds allocated to the court system for their designated purpose. It is absolutely clear that every vacant

position of a judge reduces the justice system's ability to offer administration of justice at good quality within a reasonable time. Vacant positions of judges or any other reorganisations within staff responsible for administration of justice have a direct impact on the courts' ability to deliberate on cases. Based on this understanding, the Council for Administration of Courts adopted a principal decision during the same meeting. According to this, if the Ministry of Justice wishes to continue applying performance management to courts, it can only happen with the approval of the Council for Administration of Courts. The Council must be able to make sure that budget allocated to courts matches the expectations put on them.

Thank you for your attention! I wish everyone a successful plenary meeting!

CHAPTER 2
On Constitutional Review

Activism of the Supreme Court in the Light of the Doctrines of Relevance and the Legislator's Margin of Appreciation: *Vingt Ans Après, Dix Ans Plus Tard*.[1]

Berit Aaviksoo,
Adviser of the Constitutional Review Chamber of the Supreme Court

In Estonia, there has been very little research on the constitutional court's[2] role in policymaking.[3] If for an average researcher of constitutions, there is nothing unusual about grouping constitutional courts together with other policymakers, in Estonia, the idea (voiced by Donald Trump) that all courts are supposedly political makes headlines and receives public condemnation. The understanding that courts' activities are limited to administering justice which is strictly separated from policymaking recently resulted in a big scandal in Estonia, which, leaving aside the questions of political culture, freedom of speech of members of the parliament, and acceptability of *argumentum ad hominem*, hides under its surface a major controversy regarding the limits of the judicial power (which in fact has never been substantially addressed in Estonia).[4]

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1 In English: Twenty Years After, Ten Years Later. The article does not talk about the Count of Beaufort or Viscount of Bragelonne, but is rather a continuation of thoughts originating in a work written by the author of the present article which was published in the Juridica journal in 2005. See B. Aaviksoo. Judicial Activism as a Function of Constitutional Review. How Activistic is the Estonian Constitutional Court? – Juridica 2005/5, pages 295–307.

2 In this article, the constitutional court shall mean the Constitutional Review Chamber of the Supreme Court and the Supreme Court *en banc* performing the review function.

3 As one great exception, I could name an article published ten years ago, the "starting point" of which "is not legal science, but rather the part of politology that approaches courts as an empirical study object." See T. Annus. Courts as Political Institutions. – Juridica 2007/9, pages 599–607.

4 See for example Association of Judges Considers Helme's Statements Damaging to Authority of the Judicial Power. – http://www.err.ee/585932/kohtunike-uhing-pe-ab-helme-oeldut-kohtuvoimu-autoriteeti-kahjustavaks (31 March 2017).

In states where the discussion regarding legislators' and adjudicators' margin of appreciation has been held for a longer time (and thus in a more reserved manner), it has been held within the framework of the doctrine of judicial activism. The text[5] that briefly introduces this in Estonian jurisprudence as a doctrine belonging to the field of study of activity of constitutional courts, and which has tried to apply it to the practice of the Supreme Court, ends with a conclusion that based on the criteria of judicial activism suggested in the literature, the Supreme Court of the Republic of Estonia is a passive constitutional court. So, decisions adopted during the eleven years of constitutional review practice of the Supreme Court (1993–2004) apparently "did not have any special redistributing effect on state resources", the court "was rather careful when adopting decisions related to large-scale reforms", and did not "make decisions that formed economic policy", and at the same time, "we cannot find a single case where the Supreme Court started to instruct the legislator or another authority involved in policymaking on specific ways to eliminate non-conformities with the constitution".[6]

A bit more than ten years later and slightly over twenty years after the post-war Supreme Court's first decisions of constitutional review, it seems appropriate to ask whether there is a reason to adopt a position different from the one expressed in 2005. This article will try to answer these questions, providing an overview of the development of the Supreme Court's review practice by introducing some of its judgments that, in the author's opinion, are significant from the perspective of judicial activism. The author will leave it for the reader to give a fundamental assessment to the Supreme Court's current level of activism.

The present article does not present theoretical approaches towards the doctrine of judicial activism, or criticism towards them, either.[7] Due to numerous problems regarding the definitions of judicial activism, legal scholars generally avoid giving a single uniform definition when trying to assess the activism of constitutional courts, and rather use different criteria to measure how judges use "what is generally accepted as the quasi-legislative power". So, in contemporary debates, judicial activism is rather furnished in terms of the degree to which constitutional courts overstep procedural limits established for them by laws (procedural side of activism), and to which they act as policymakers (substantial side of activism).[8]

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5 B. Aaviksoo (reference no. 1).

6 Ibid., *passim*.

7 These can be found in the abovementioned article.

8 Although such limitations can be distinguished from each other, they are inseparably related to each other – just like a passive constitutional court points at procedural limitations, avoiding replying to uncomfortable or sensitive (respectively, political) questions, an active constitutional court tends to cross procedural limitations (or interpret them as reduced, and their own powers, respectively, as extended), in order to be able to adopt a (court) decision regarding questions of essentially political nature.

Two tools can be identified as instruments of limitation to the judicial power that the Supreme Court has: the doctrine of relevance as a procedural instrument, and the doctrine of the legislator's margin of appreciation as a substantial limitation on the exercise of judicial power. These two (self-)limitations[9] on the discretion (judicial margin of appreciation) of constitutional courts will be analysed below, based (critically) on the measurement criteria offered by jurisprudence.

1. The doctrine of relevance as a procedural (self-)limitation of the Supreme Court

According to the doctrine of case or controversy, the most widespread procedural limitation of constitutional courts, judges are only allowed to resolve real legal disputes, and they must refrain from answering hypothetical, academic, or abstract questions. In Estonia, this doctrine is not applicable to full extent, since in addition to situations where an actual legal dispute exists (concrete norm control), the country's legal order also allows to review the constitutionality of a legal provision in hypothetical cases, for the purpose of objectively establishing the constitutionality of a legal provision (abstract norm control).

In the context of Estonia, it is, however, possible to consider as a deviation from the doctrine of case or controversy such cases where the court starts (within the framework of both abstract and concrete norm control) to independently assess questions that parties to the procedure have not raised, or (within the framework of concrete norm control) questions that have been raised but are not relevant to the given legal dispute. When the court uses concrete norm control to assess a provision that is not related to the given case, or when it uses concrete or abstract norm control to assess a provision whose constitutionality has not been questioned by the person who initiated the review, the court essentially conducts a procedure upon its own initiative *(ex officio)*, being activist from the procedural point of view.[10]

In the Estonian legal order, the main procedural limitation of the constitutional court is Article 14(2) of the Constitutional Review Court Procedure Act, according

9 Since both tools represent doctrines that the judicial power developed for itself, they essentially reflect self-limitation of the judicial power.

10 In this case, respective judgments can be positioned differently on the scale of judicial activism, for example, differentiating cases where the court only substitutes the provision challenged by a party to the procedure with a provision that actually violates constitutional rights (or some objective guarantees) of a person, or a situation where a constitutional result cannot be achieved without declaring unconstitutional not only the challenged provision, but a provision inseparably related to it, from cases where the court decides to assess a provision whose constitutionality has no effect on the decision of the case.

to which the Supreme Court may declare invalid or unconstitutional only such provision that is "relevant to the adjudication of the case". Generally speaking, relevance should ensure that the constitutional court declares unconstitutional (and/or invalid) only such provision that prevents the court from reaching a constitutional decision in the given court case. The respective doctrine that the Supreme Court has later consistently applied (although with some modifications), was perhaps most completely presented in a judgment of 2002:

"[Based on the Constitution and the Constitutional Review Court Procedure Act], a court, when it comes to the conclusion upon adjudicating a case, that an applicable Act or other legislation is in conflict with the Constitution, shall declare the Act unconstitutional and shall not apply it. Thus, the constitutional review court shall review, within concrete norm control, the constitutionality of the applicable, i.e. relevant Act only. The disputed provision must be of decisive importance for the resolution of a concrete case *(see judgment of the Supreme Court en banc from 22 December 2000 - RT III 2001, 1, 1, section 10)*. An Act is of a decisive importance when in the case of unconstitutionality of the Act a court should render a judgment different from that in the case of constitutionality of the Act."[11]

Even in this case which, to the knowledge of the author of this article, was the only example of the Supreme Court using the notion of activism in its judgment, it was in relation to control of non-relevant provisions.[12] Thus, Justice of the Supreme Court Jüri Ilvest writes the following (albeit in his dissenting opinion):

"The path chosen by the Supreme Court *en banc* in this case creates another dimension, which is not directly related to this administrative matter, namely the question of integrity of the three-level court system and non-permissibility of exceptions, and –as I see it – this amounts to excess activism. I find support to this argument in the fact that as a result of this construction the request for concrete norm control, submitted by the circuit court in the interest of the appellant, turned into a non-admissible one and was dismissed. Consequently, the recourse of the person to the administrative court was fruitless because the circuit court raised the issue of

11 RKÜKo 28.10.2002, 3-4-1-5-02: (Judgment of the Supreme Court *en banc*): *Ownership reform I*, section 15.

12 RKÜKo 08.06.2009, 3-4-1-7-08: *Public Procurement Act*. In this case, constitutional review was initiated by the Tallinn Circuit Court which, in the case that it had to adjudicate, did not apply paragraphs of the Public Procurement Act that did not provide for a compensation of expenses on legal aid incurred in the course of a procedure conducted by the public procurement review committee to the person whose challenge was satisfied. The Supreme Court *en banc* rejected the Circuit Court's application in this part, but declared as unconstitutional the very paragraph of the Public Procurement Act that left the review of appeals submitted against decisions of the public procurement review committee in the competence of circuit courts. Since according to the opinion of the *en banc*, such order was not in accordance with the constitutional status of the circuit court as the court of second instance, the *en banc* believed that the circuit court did not have the competence to submit an application for a constitutional review in the given case, and therefore it had to be rejected.

constitutionality of the legal provisions restricting the person's rights and the Supreme Court *en banc* exceeded the limits of the matter by undertaking to resolve more global issues."[13]

In this case, the Supreme Court (the majority of Justices) approached the relevance broadly, considering a provision that established the competence of the court initiating a constitutional review to adjudicate the respective dispute as also relevant to the given case, while in another later case, the Court unanimously decided to adopt a narrow interpretation of relevance.[14]

Thus, in a case concerning prisoners' right to vote where, quite remarkably, parties to the procedure, including the legislator itself that had established the prohibition, fully agreed that an absolute prohibition of prisoners' right to vote was contrary to the Constitution, the Supreme Court *en banc* pointed out that although it did not consider the provision according to which no imprisoned person serving their term had the right to vote in parliamentary elections, constitutional, neither did it consider it necessary to declare an absolute prohibition on prisoners' right to vote as unconstitutional within the framework of the case that it was adjudicating. The *en banc* used the following reasoning:

"Making a decision as to which offences or assessments of offences suffice for restricting the right to vote is within the competence of, above all, the legislature. The present case arises from the constitutional review proceedings initiated by a court and, thus, the matter in hand involves specific constitutional review. Under subsection 1 of § 15 and subsection 2 of § 152 of the Constitution and subsection 2 of § 14 of the JCRPA, the Supreme Court declares a legislative instrument or provision relevant to the court case to be unconstitutional. The Supreme Court has noted in its case law that the purpose of specific constitutional review is to serve the interests of, above all, parties to the proceedings [...] and that, within specific constitutional review, the Chamber assesses the constitutionality of a provision based on the facts of the specific case [...]. Thus, the present case involves specific constitutional review proceedings and

13 Dissenting opinion of Justice of the Supreme Court J. Ilvest regarding the Supreme Court *en banc*'s judgment of 8 June 2009 in case no. 3-4-1-7-08: *Public Procurement Act*. This position was shared by four other Justices who found the following: "[therefore,] when adjudicating a constitutional review case on the basis of a court judgment or ruling the Supreme Court can not go beyond the provisions that are relevant to the adjudication of the case. This procedural restriction is necessary for effective protection of persons' rights. In this constitutional review proceeding the relevant norm was the one which does not provide for the award of legal aid costs to the person, i.e. Article 126(6) of the PPrA. The admissibility of constitutional review of Article 126(6) of the PPrA does not depend on the validity of Article 129(1) of the PPrA. Consequently, by declaring Article 129(1) of the PPrA - as the norm regulating the competence of circuit courts - unconstitutional, the Supreme Court *en banc* ignored the requirement of relevance of provisions (which is procedurally non-permissible by way of concrete norm control)." – Dissenting opinions of Justices of the Supreme Court Lea Kivi, Peeter Jerofejev, Henn Jõks and Tambet Tampuu regarding the Supreme Court *en banc*'s judgment of 8 June 2009 in case no. 3-4-1-7-08: *Public Procurement Act*, sections 5–6.

14 Although these judgments refer to different aspects of relevance that cannot be elaborated on due to the restrictions of space, the author of this article considers them to be comparable on the scale of narrow and broad interpretation of relevance.

in the course thereof the Court *en banc* can only assess whether in the case of either applicant the legislature has proportionately exercised its right contained in § 58 of the Constitution."[15]

Therefore, the Court essentially concluded that a review of the prohibition to vote in the part that had no relation to the appellants would entail abstract norm control in a case where the issue of the dispute was only the constitutionality of the restriction on the right to vote with respect to persons in whose case the restriction on the right to vote was proportional. Namely, the Court found that since specific appellants whose court case brought about the constitutional review procedure would still not be able to vote if the absolute prohibition of the right to vote was declared unconstitutional, i.e. resolving the question of constitutionality (in favour of unconstitutionality) arising from the specific case would not have led to a different decision in their court case, the court could not answer the given essentially abstract question due to procedural limitations.[16]

2. The doctrine of the legislator's margin of appreciation as the Supreme Court substantial (self-) limitation

The Supreme Court, in a similar way as its European counterparts and the European Court of Human Rights, sets material borders to its competence using the principle of legislator's margin of appreciation. This includes questions in which the legislator has a broad (and the constitutional court, respectively, narrow) margin of appreciation.

The Supreme Court used the doctrine of the legislator's margin of appreciation for the first time in 2004 in a case that concerned students' subsistence benefit, though wording it slightly differently than it is used today, stating the following:

"The second sentence of Article 28 of the Constitution, according to which the types, extent, conditions, and order for the provision of aid are established by the law, leaves it for the legislator to decide to which extent the state will provide social aid to people in need. Legislator is given a broad decision-making right due to the fact that the economic and social policy and budgeting belong to its competence. [...] The constitutional review court must [...] avoid a situation where the formation of the budget policy is largely left in the hands of the court.

15 RKÜKo 01.07.2015, 3-4-1-2-15: *Prisoners' Right to Vote II*, section 53.

16 Controversially, the *en banc* concluded that the relevant provision of the Penal Code included several provisions limiting the right to vote, and that the provision applicable to the appellants was constitutional. A provision applicable to some other persons, on the other hand, can be unconstitutional, even though in an earlier similar case (Hirst vs. The United Kingdom 2 (74025/01, 6.10.2005)), the European Court of Human Rights found that absolute prohibition constituted a single provision that also applied to the appellant whose specific circumstances are irrelevant. The Court used the same approach in a later case concerning long-term visits to persons held in custody. See RKPJKo 16.11.2016, 3-4-1-2-16 (Judgment of the Constitutional Review Chamber of the Supreme Court): *Long-term visits to persons held in custody.*

Therefore, when performing social policy functions, the court must not replace the legislative or executive branch."[17]

In addition to the economic, social and budget policy that were already mentioned in this judgment, the court later declared that the legislator's margin of appreciation also included the penal policy and the system of local government.[18]

Beautiful in its simplicity, such fields-based division is not overly useful for the researchers of constitutional courts. Namely, any decision of the constitutional court which, for example, repeals the legislator's respective decision regarding the extent of social protection, appealing to social fundamental rights or the principle of legitimate expectation, causes at least a need to relocate public means (or increase tax load), i.e. it constitutes a decision affecting budget policy. Similarly, a decision declaring that a sanction established by the legislator excessively violates a person's right to freedom, inevitably, i.e., by belonging to the legislator's margin of appreciation, forms the state's penal policy under this approach, being activist by definition every time it is made. In other words, if we agree that in some situations, (another) policymaker must step back due to a constitutional claim (to the extent to which the Supreme Court directs such retreat), the person assessing the Supreme Court's activism must still face the question as to where the border lies between policymaking (in the competence of the legislator) and adjudication of justice within the court's power (giving effect to a constitutional claim). This, however, seems to be a question concerning not the type (political vs. legal), but the degree (how political?). This is probably the very reason why the Supreme Court has also considered it necessary to simply "avoid a situation where **a big part** of [budget] policy making is left in the hands of the court [bold by B.A.]."

Since the answer to the question as to which extent is excessive will inevitably be subjective, the following section simply aims to give an overview of the Supreme Court's work over the past twelve years in the context of policy-making in different fields, using the criteria for measuring judicial activism presented in literature, but remaining critical in their regard. Differentiating decisions based on fields of policy is also subjective: a decision classified as forming the entrepreneurship policy may affect the healthcare policy, just like a decision planned as an environmental policy instrument may affect the budget policy.

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17 RKPJKo 21.01.2004, 3-4-1-7-03: *Social Welfare Act II*, sections 15–16. In this case, where the central question was whether the provisions of the Social Welfare Act that did not allow to establish subsistence benefit for persons who used a residential space not mentioned in the law (a dormitory room in the given case), were in accordance with the right to receive aid from the state in case of need, the Chamber declared the disputed provisions invalid due to their contradiction with the right of every person to receive aid from the state in case of need, established in Article 28(2) of the Constitution, together with the general right of equality stated in Article 12(1) of the Constitution.

18 See RKPJKo 20.12.2016, 3-4-1-3-16: *Administrative Reform Act*, section 89.

2.1. Supreme Court as maker of social policy

The first judgment of the Supreme Court that influenced social policy is probably the judgment in the case *Social Welfare Act II*, where the Court broadened the circle of people eligible for the subsistence benefit by persons who used dormitory rooms as their housing. The given judgment included a textbook remark by the Supreme Court, according to which the legislator's margin of appreciation in forming social policy ends where the courts' constitutional obligation to ensure the satisfaction of persons' basic needs starts. Namely, the Court noted the following:

"The Constitution provides for the right to state assistance in the case of need. Arising from this the court has a duty to intervene when the assistance falls below the minimum level. The Constitution empowers the constitutional court to prevent the violation of human dignity. The understanding that the principles of a state based on social justice and human dignity are guaranteed when the state guarantees the satisfaction of primary needs of needy persons, helps to delimit and balance the competencies of branches of power."[19]

One cannot, however, claim on the basis of any objective criteria that the right to receive aid in case of need established in the Estonian Constitution is limited to the satisfaction of basic needs. Namely, one could reasonably argue that the standard of constitutional social protection in Estonia is not limited to the satisfaction of basic needs, and is actually higher, due to the supplementary constitutional requirements deriving from the principles of welfare state and that of human dignity. In this light, using the satisfaction of basic needs as the basis can be considered as an expression of the liberal world view dominating over welfare state-oriented opportunities provided for by the Constitution.

Additionally, the concept of basic needs is also sufficiently flexible, allowing to form judicial (social) policy by furnishing the seemingly legal category. Although due to procedural limitations, the Supreme Court has not yet provided an assessment of the constitutionality of the current social protection system, most importantly of the constitutionality of the size of the subsistence benefit, more recent statements of the Supreme Court provide grounds to believe that the Supreme Court's understanding of basic needs may differ from the legislator's one. Thus, in 2014, the Constitutional Review Chamber noted (on the grounds that the court that initiated the constitutional review procedure did not apply for a review of constitutionality of the effective subsistence level) in the form of *obiter dictum* that it "still believed that it was necessary to address the topic of subsistence level", stating that:

"The fundamental right to state aid in case of need established in Article 28(2) of the Constitution confirms the validity of the principle of human dignity and welfare state, and provides

19 *Social Welfare Act II*, section 16.

everyone with the confidence of being able to cope even in case of financial difficulties. The principles of human dignity and welfare state constitute fundamental principles stated in Article 10 of the Constitution, which form the core of the constitutional order of the Republic of Estonia and serve as the most important provisions of the legal order. Therefore, legal limitations that create gaps in the fundamental right to receive state aid in case of need or make it unreasonably difficult to apply for aid or receive it, must be assessed as a question concerning the core of the constitutional order of the Republic of Estonia. [...]. It follows from the first sentence of Article 28(2) and the basic principles of the Constitution that the state is obliged to provide help to its citizens, which ensures basic means for a dignified existence. For the purpose of interpreting such obligation of the state, it is necessary to also consider international agreements that the Republic of Estonia has joined. [...] The European Committee of Social Rights which is the body controlling compliance with the European Social Charter [...] stated that the situation in Estonia is not in accordance with Article 13(1) of the Charter since persons without means of subsistence are not provided with sufficient social aid. [...] In the years 2011–2013, the subsistence level was 76 euros and 70 cents […]. According to the data of the Statistical Office, however, the estimated subsistence level of a household with one member was 186 euros per month in 2011."[20]

In a recent case where the issue was consistency between the limits on providing procedural aid and the right to recourse to the court to protect one's rights, to be more precise, a provision of the code of procedure according to which procedural aid was not provided to a person whose estimated procedural expenses did not exceed his or her average two-month income calculated on the basis of the last four months' income, the Supreme Court *en banc* found that the abovementioned rule was unconstitutional in that it did not allow for deducting unavoidable expenses, such as expenses on food, medicine, clothes, and hygiene items from the income calculated in this manner. The Supreme Court *en banc* specified:

"It does not follow from the present decision that the court must consider any expenses on food, clothes, etc. as justified. The Supreme Court *en banc* [declares the disputed provision] invalid only with respect to impossibility to deduct unavoidable expenses. In case of [such] expenses, one can assume that they are generally inevitable for every person every month in the amount of approximately one half of the minimum salary, i.e. 200 euros at present. [...] According to the Statistical Office's data, in 2014, the cost of the minimum food basket for a household with one member was 91 euros and 96 cents, and it presumably remained in the same range in 2015. Various other unavoidable expenses, such as expenses on medicine, hygiene items and clothes, as well as possible single-time emergency expenses are also added to them. It follows from the above considerations that the subsistence level of 90 euros [...] effective in 2015 does not cover such unavoidable expenses, and it does not even fully cover the cost of the minimum food basket for one person [...]. However, such unavoidable expenses can presumably be covered by one half of the the lower salary limit (which amounted to 195 euros in 2015). This is merely a guide that does not preclude such expenses being justified also in a slightly lower or higher amount. [...] If, however, a person has monthly expenses which exceed one half of the lower salary limit, their deduction from income must be explained."[21]

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20 RKPJKo 05.05.2015, 3-4-1-67-13: *Subsistence benefit of persons living together (person with a serious disability under care)*: sections 49–51.

21 RKÜKo 12.04.2016, 3-3-1-35-15: *Deduction of unavoidable expenses*, section 49–50.

Building its argument primarily on the fact that the effective subsistence level does not even fully cover the cost of the minimum food basket for one month, the Supreme Court indirectly expressed its assessment regarding the constitutionality of the subsistence benefit[22], demonstrating a readiness to replace the legislator's assessment regarding the size of subsistence benefit with its own. This understanding is further supported by the fact that the Supreme Court has classified the question regarding the suitable amount of aid for people in need as one that"concerns the core of the constitutional order of the Republic of Estonia."

2.2. Supreme Court as maker of penal policy

The Supreme Court started to participate in the formation of the penal policy in 2003, when the Supreme Court *en banc* found in its judgment (probably the most famous and widely-discussed one in Estonian jurisprudence) that the Penal Code Implementation Act did not comply with the requirement for retroactive application of a lighter penalty arising from the second sentence of Article 23(2) of the Constitution, since it did not allow reducing the punishment of an imprisoned person serving the term of his or her sentence on the basis of the previously valid Criminal Code to the degree established in the Penal Code.[23]

Among other things, the Justices dissenting in this case pointed at a possible violation of the separation of powers by an (intentional) failure to respect the legislator's choice. Justice of the Supreme Court Anton writes:

"I am of the opinion that it is possible to set forth justifications for both interpretations of the Constitution – for that of the Riigikogu as well as the one of the Supreme Court *en banc*. Ultimately, the opinion of the Supreme Court *en banc* would be correct if the interpretation suggested by the Riigikogu were in conflict with generally recognised principles of law or unreasonable or would yield an unconstitutional result. The reasoning of the Supreme Court *en banc* does not allow any of the referred conclusions. In the face of the lack of clear and weighty arguments I am of the opinion that the Supreme Court *en banc* has not sufficiently observed the principle of separate powers. This error is further aggravated by the fact that there was no basis under criminal procedural law for adjudicating the matter in the Supreme Court [...]. The interpretation of the Supreme Court *en banc* will fetter the legislator in the future, should

22 It is only logical to conclude that if certain monthly expenses in the amount of approximately 200 euros are unavoidable for every person, this is also the case for people for whom the Government of the Republic has established the subsistence level of 90 euros per month. It is also important to note that in addition to unavoidable expenses established in such way, the procedural aid regulation also allows deducting"reasonable expenses on transport", which in case of persons receiving subsistence benefit must be covered on the account of the 90-euro subsistence benefit.

23 RKÜKo 17.03.2003, 3-1-3-10-02: *Brusilov*. See for example L. Feldmanis, T. Ploom. Is an enforced court decision truly an ENFORCED court decision? Supreme Court's role in enforcing the penal policy reform. – Supreme Court's judgments in the Estonian legal order: meaning and criticism. Compilation of the Supreme Court Research Competition. Supreme Court of the Republic of Estonia: Tartu 2005.

there be a political will to mitigate punishments. Due to the Supreme Court's interpretation, a less stringent law would lead to a lighter punishment for the persons who are serving a term of the punishment under the previous law. The legislator might not necessarily like such side effect. Therefore the interpretation of the Supreme Court may prove an obstacle to the development of penal law and, in the end, run counter to the objectives that the Supreme Court *en banc* bore in mind".[24]

In his argumentation, Justice of the Supreme Court Anton also uses a criterion widely used in the jurisprudence of judicial activism, according to which there is no reason to claim that a court has exceeded the limits of its power in terms of activism if the annulment of the legislator's choice is required by a universally accepted fundamental right or legal principle. The fact that extending the requirement of retroactive application of a lighter punishment to the time of serving a punishment is not universal, and that penal laws of many states establish an opposite principle, and that the practice of the European Court of Human Rights does not require such extension, was emphasised by other remaining Justices of the Supreme Court who expressed dissenting opinions in this case.[25]

Later in the same year, when the Supreme Court had another opportunity to have a say in the formation of penal policy in a case where, due to unconstitutionality, a county court had not applied a provision of the Penal Code that provided for a two-year imprisonment for an unauthorised use of an object as the minimum sanction rate, the Chamber refused to perform a review of constitutionality of the minimum sanction rate on the basis of procedural limitation[26], but it mentioned the following in the form of *obiter dictum*:

"[The Constitutional Review Chamber notes, that] the legislator has wide discretion in determining a punishment corresponding to necessary elements of an offence. Terms and rates of punishments are based on value judgments accepted by society, which the legislator is competent to express. Also, this way the parliament can form the penal policy of state and influence criminal behaviour."[27]

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24 Dissenting opinion of Justice of the Supreme Court T. Anton regarding the Supreme Court *en banc*'s judgment of 17 March 2003 in case no. 3-1-3-10-02: *Brusilov*, which has been joined by Justices of the Supreme Court H. Salmann and V. Kõve.

25 Dissenting opinion of Justice of the Supreme Court E. Kergandberg regarding the Supreme Court *en banc*'s judgment of 17 March 2003 in case no. 3-1-3-10-02: *Brusilov*, which has been joined by Justices of the Supreme Court J. Luik and H.-K. Remmel, section 10.

26 In this case, the Chamber did not satisfy the county court's application to declare the challenged provision invalid on the basis of the fact that it was not in its competence to establish the existence of exceptional circumstances, resulting from the emergence of which the given provision in conjunction with the so-called mitigations of the general part of the Penal Code would be given substance according to the Constitution. In subsequent practice of the Supreme Court, applications in such cases were rejected.

27 RKPJKo 25.11.2003, 3-4-1-9-03: *Minimum sanction rate I (unauthorised use of an object)*, section 21.

Still, in later practice, the Supreme Court has slightly corrected its position that legislative power is the only institution competent to express values conditioning the terms of punishment. In a 2005 court case where the subject of the dispute was the constitutionality of the absence of the right of discretion during a suspension of the right to drive, the Supreme Court *en banc* did refer to the principles expressed in the above case, but also added the following:

"The gravity of punishment is determined by the extent of guilt, and by the special and general needs of prevention. In other words, a punishment must be in correlation with the injustice of the act committed, it must affect the person to avoid further violations, and it has to protect the legal order. [...] It proceeds from the above that the punishments established by Acts meet the requirement of proportionality, arising from Article 11 of the Constitution, if a punishment is not manifestly excessive for the achievement of the aims referred to above."[28]

This way, the Supreme Count *en banc* laid down the control standard for assessing the proportionality of a punishment in the constitutional review procedure, according to which the severity of a punishment (its excessiveness) must be assessed in the light of three criteria – the extent of guilt (unlawfulness of the committed act), specific preventive needs (influencing a person so that he or she refrains from subsequent violations), and general preventive needs (protection of the legal order). In addition to that, the *en banc* confirmed the possibility to verify sanctions established in the Penal Code not only with respect to their correspondence to the abovementioned standard, but also by comparing them to other sanctions established in the Penal Code, i.e. on the basis of the general right to equality arising from Article 12(1) of the Constitution.

The given standard for controlling the terms of punishment created by the *en banc* was further developed ten years later in the case adjudicated by the Constitutional Review Chamber, where the central issue was the minimum sanction rate of six years provided for committing a non-violent act of a sexual nature against a child aged below ten years. More specifically, the Chamber stated the main question as follows:

"Therefore, in the given constitutional review case, within the framework of concrete norm control, we must find an answer to the question whether the minimum sanction rate established in Article 141(2) of the Penal Code allows imposing a punishment on X that is not clearly excessive, considering X's guilt (degree of unlawfulness of the act)."[29]

The Chamber agreed with the Supreme Court's position that sexual offenses against children are always serious due to their substance, and that differentiation in terms of punishment established for them could also be based on the age of

28 RKÜKo 27.06.2005, 3-4-1-2-05: *Suspension of driver's licence*, section 57.

29 RKPJKo 23.09.2015, 4-1-13-15: *Minimum sanction rate II (rape)*, section 41.

the victim. The Chamber also pointed out that sexual offenses committed against close persons, especially children, constitute a social problem, in case of which stringent terms of punishment aimed at the protection of fundamental rights and freedoms of persons are justified. Respectively, the Chamber answered the above question affirmatively:

"The Chamber finds that joining unlawful acts of Article 141(2) of the Penal Code, the degrees of which are different in their substance, under one sanction, by which the minimum sanction rate for X's crime essentially equalises its degree of unlawfulness with that of taking a person's life (manslaughter), clearly constitutes a disproportional adverse effect on the fundamental right to freedom."

Therefore, in this particular case, the Chamber came to the conclusion that limiting the legislator's margin of appreciation in regard to establishing a minimum sanction rate and forming the penal policy based on it was a constitutional requirement, (apparently) due to the absence of a suitable correlation between the act and the punishment (disproportionality), as well as the excessive severity of the punishment compared to punishments provided for crimes of different types (inequality).

2.3. Supreme Court as maker of economic policy

In recent years, the role of the Supreme Court as the maker of the economic policy has also increased. The most famous example is probably the case where the Supreme Court replaced the legislator's choice with its own one in the judgment concerning restrictions on the establishment of pharmacies, in which the court called upon the legislator to reorganise the pharmacies' market in Estonia.[30] In this case, where the central issue was the prohibition on establishing new pharmacies in densely populated areas, the *en banc* expressed its position that such restriction on the freedom of entrepreneurship was disproportional, because "the appropriateness of the restriction is questionable and the restriction is definitely not necessary for achieving the objective".[31]

In order to reach such conclusion, the *en banc* first analysed whether the goal that the restriction on establishment was supposed to reach, i.e. assuring the availability of the pharmacy service in the entire country, was in principle achievable by this measure. In order to do that, the *en banc* first reviewed the effect of restricting the availability of the pharmacy service in areas with a strong competition by

30 RKÜKo 09.12.2013, 3-4-1-2-13: *Restrictions on the establishment of pharmacies I*. In order to give the legislator time to prepare a new constitutional regulation, the *en banc* postponed the decision's entry into force by six months (the maximum period permitted by the law).

31 *Restrictions on the establishment of pharmacies I*, section 162.

analysing the data of the State Agency of Medicines concerning the number of pharmacies and their relative number per one resident, demand for the pharmacy service, and the total turnover of the sale of medicines over years. On the basis of this data, the *en banc* concluded that "provided that the entry into the market is not hindered, there are always providers of the pharmacy service in regions of high demand",[32] due to which the restriction on establishment was not a suitable measure for assuring the availability of pharmacy services in areas with a big demand. The Supreme Court also noted:

"Those who support the restrictions on the freedom of establishment as a suitable measure submit that the pharmacy market is a specific market where the general market principles are not valid. The argument to be agreed with is that the provision of the pharmacy service is considerably more regulated than conventional trade, since the state has established certain rules for the price and handling of the goods, for premises, the staff, etc. It is also a fact that, particularly due to the small territory of Estonia, the Estonian pharmacy market is different from the pharmacy markets of other countries. However, these arguments indicate by no means as if, due to the unique characteristics of the (Estonian) pharmacy market, the demand would not spark the supply. Thus, the general market rule that if there is a demand there are also suppliers works also on the pharmacy market."[33]

Having reviewed the suitability of the restrictions on establishment with the view of assuring the availability of the pharmacies' service in areas with low demand, having analysed for this purpose statistics concerning the number of country pharmacies, different supporting measures used by local governments for the benefit of local pharmacies, and data regarding dispensing chemists, chemists (pharmacists) registered in Estonia and their relative number in Estonian pharmacies, average business hours of pharmacies and work indicators of pharmacists, as well as the population's migration trends, the *en banc* came to a conclusion (or rather "agreed that it was not impossible") that the restriction was suitable for achieving the goal. When further reviewing the need for restrictions on establishment, the *en banc* considered two possible alternative measures to the restriction on establishment, the obligation of operators of pharmacies in areas with big demand to also provide the pharmacy service in areas with low demand, and support to pharmacies in areas with low demand, concluding as follows:

"In previous sections the Court *en banc* discussed two alternative measures that restrict the freedom to conduct a business less and contribute more to achieving the purpose than the restrictions on the freedom of establishment do. There may be more measures or combinations thereof. However, since relevant alternative measures have been found, it is not necessary to look for any additional possibilities in the constitutional review procedure. The Court *en banc* holds that restrictions on the freedom of establishment are not necessary for ensuring the availability of the pharmacy service in the whole state."[34]

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32 *Restrictions on the establishment of pharmacies I*, section 133.

33 *Restrictions on the establishment of pharmacies I*, section 135.

34 *Restrictions on the establishment of pharmacies I*, section 161.

By giving the legislator time to prepare a new constitutional regulation, the *en banc* postponed the decision's entry into force by six months (the maximum period permitted by the law). Since Riigikogu did not correct the unconstitutional situation within the given period, but simply replaced the provisions that were declared unconstitutional with new regulations as a formality, the effect of which was similar to the previous ones, the *en banc* also declared the new set of regulations contrary to the constitution, and reaffirmed its previously expressed position that the legislator is in the position of establishing regulations that allow achieving the availability of pharmacy services in areas with low demand in a way that has an adverse effect on the freedom of entrepreneurship of persons who want to enter the market. The *en banc*'s argument that there was a softer and just as effective measure available for achieving the goal (i.e. that the disputed restriction was not necessary) was based among other things on a 2014 report of the Centre for Applied Social Sciences (CASS) titled "Assessing the impact of state support measures on pharmacies in rural areas and on the retention of pharmacy services", which analysed four possible measures for achieving the goal: financial support for pharmacies in rural areas, establishing an ancillary condition for the activity license of a pharmacy, creating the state pharmacy and establishing a restriction on ownership.[35]

As such, this is decision whose reasoning was largely based on "general market rules" and their application in the (specific) pharmacy market, opinions and statistics presented by state institutions (including the National Audit Office, Estonian Competition Authority, and State Agency of Medicines), as well as social science studies, such as the 2014 report by the Centre for Applied Social Sciences on impact assessment.

In literature, such extensive reliance on an analysis of aspects outside the given field has often been associated with activism of the court. While a regular judge of the constitutional court has a thorough preparation regarding the use of methods of legal

35 See *Restrictions on the establishment of pharmacies II*, section 86: "According to the conclusion of the report, the most suitable measure was using the state budget to financially support pharmacies in rural areas in the form of support for opening and support for operation. Imposing the obligation to run a pharmacy in a rural region as an ancillary condition for issuing the activity license to a pharmacy was considered possible, but also likely to require an application of disproportionate coercive measures by the state. The creation of state pharmacies was also considered a possibility, though one that would impose too high expenses for the state since it would entail big one-off investments, as well as a constant need for subsidies in areas with low demand. Creating one state pharmacy that would subsequently organise the provision of a state-supported pharmacy bus service or distant sale of medicines, was also suggested as an alternative. Establishing restrictions on the ownership of pharmacies was considered the least suitable measure in the report because even if only dispensing chemists are allowed to own pharmacies, sufficient availability of the service is not ensured in areas where operating a pharmacy is economically unprofitable." - Ibid.

science, and knowledge of the given field, then for the purpose of decision-making on more complex questions, it is often necessary to know both mechanisms and methods of operation of a specific field (for example, economic or competition policy).[36] There is also another argument against the resolution of such complex social questions by judges of the constitutional court, i.e. the polycentricity. Namely, in such cases, courts usually have to adopt a decision regarding the constitutionality of a legal rule that is a part of a complex system. However, a decision adopted regarding a specific rule without due regard to the general context can lead to unexpected impact on the system as a whole, and unpredictable consequences.[37]

Another criterion of activism mentioned in the literature is the existence of (detailed) rules for the legislator aimed at eliminating a unconstitutional situation. Justices of the Supreme Court who expressed dissenting opinions in the cases regarding restrictions on establishment also pointed at this problem of a binding nature of the decision with respect to the legislator, which appeared in the case of establishing pharmacies, resulting from the alternative (and more effective) measures developed by the *en banc*. For example, Justice of the Supreme Court Pilving notes:

"In my opinion, the alternative measures discussed in the judgment [...] (additional obligation of the operator of the pharmacy and a support fund for pharmacies) cannot be considered as having a less adverse effect on entrepreneurship and at the same time being at least as effective compared to the disputed provisions without a more detailed analysis. I believe the question whether a preferred solution to the problem of pharmacies in rural areas should entail restrictions on establishment or, for example, a support fund, belong in the legislator's

36 Although the court can obviously engage experts in the decision-making in such cases (just like it did in the case regarding restrictions on the establishment of pharmacies), the common issue of the experts' power emerges, i.e. the judges are not necessarily competent to assess the reliability of the expert examination.

37 One famous example of that is a situation where, in a socialist system, courts should be entrusted with the establishment of state-approved prices for all product groups. The main reason why the court is, by nature, an unsuitable institution for performing such tasks, is believed to be the fact that the court exercising its judiciary powers is unable to take into account all the complex consequences that every single price change can cause for the economic system. For example, the court is not able to foresee the impact that changing the price of aluminium can have on an increased demand for plastic, or predict a new balanced situation. – See L. L. Fuller. Forms and Limits of Adjudication. 92 *Harv. L. Rev.* 395 (1978), page 400. The executive power also points at the complexity of this question, providing the following justification for its non-performance of the court decision: "a six-month period was not sufficient for preparing a new appropriate set of regulations. This is a complex issue of the societal life, where changes that have not been well thought through can lead to unpredictable consequences. Measures that have been developed so far do not ensure the availability of the pharmacy service in rural areas sufficiently." – RKÜKo 22.12.2014, 3-4-1-30-14: *Restrictions on the establishment of pharmacies II*, section 24.

political margin of appreciation, and in the given case, Riigikogu has not made a discretion error when choosing the suitable measure."[38]

Justices of the Supreme Court Jerofejev and Tampuu add:

"We believe it is not in the competence of the Supreme Court to confirm to Riigikogu as the legislator (even indirectly) that a legal regulation that has an adverse effect on a person's fundamental rights could be acceptable. Another reason why providing such approval would not be reasonable is that even if Riigikogu established a measure recommended by the *en banc*, it would probably result in another constitutional review procedure, and the Supreme Court would conclude (after a thorough review of the case) that such measure still cannot be established in a constitutional way."[39]

These were probably the reasons that made the Supreme Court admit in its later practice its worse position compared to that of the legislator and the executive power in case of adjudication of complex questions. For example, in a 2015 judgment where the question was whether the renewable energy fee collected from consumers was in accordance with the fundamental right of ownership, the *en banc* stated the following:

"As the legislator has exclusive competence to establish public financial obligations, and the extent of judicial review over it within constitutional review proceedings is limited, the Court *en banc* can assess the justifiability of the rates of support only in general terms. As arising from the purpose of establishing the renewable energy charge setting the rate of the charge requires complex calculations, taking account of various preconditions, including future estimates, within constitutional review proceedings the justifiability of rates of renewable energy support in the light of the aims of establishing the support can also be assessed only based on generic data. [...]. The legislator's broad discretion in setting the rate of renewable energy support can also be justified by the fact that the price of necessary investments depends on a combination of several indicators. Their precise value may only become clear in the future. For example, creation of a renewable energy installation or a farm from the inception of planning to the beginning of operation takes several years, as a rule. During this period, the prices of planning and construction, loan costs, or the interests and opportunities of investors, change. The price of raw materials, wage costs, (market) price of electricity also change. Somebody undertaking such a project will inevitably run various commercial risks. The legislator can revise the rates of support at any time but cannot be required to deal with it constantly and react to each market change."[40]

As follows, assessing whether, in the light of such criteria, the renewable energy support rate (paid to companies) might be clearly too high (control of obvi-

38 Dissenting opinion of Justice of the Supreme Court Ivo Pilving regarding the Supreme Court *en banc*'s judgment of 9 December 2013 in case no. 3-4-1-2-13: *Restrictions on the establishment of pharmacies I*.

39 Dissenting opinion of Justice of the Supreme Court Ivo Pilving regarding the Supreme Court *en banc*'s judgment of 9 December 2013 in case no. 3-4-1-2-13: *Restrictions on the establishment of pharmacies I*.

40 RKÜKo 15.12.2015, 3-2-1-71-14: *Renewable energy fee*, section 117.

ousness instead of control of proportionality), the *en banc* took as the basis for such generalised data the decision of the European Commission regarding the correspondence of support rates for renewable energy and combined heat and power generation stations in Estonia to the guidelines for state aid provided for environmental protection, which required Estonia's renewable energy fee system to comply with the guidelines for state aid of the European Union. It concluded the following:

"Therefore, according to the opinion of the European Commission, the amounts of renewable energy support were not higher than the amount necessary to cover the difference between renewable energy production costs and electricity market price, as well as the standard return on capital. The *en banc* has no reason to adopt a different position."[41]

In this case, the Court essentially reached a conclusion that in an area that implies complex calculations and, among other things, consideration of future forecasts, the Court cannot perform such specific analysis because it would mean entering a field that requires specific expert knowledge, means and methods, and the constitutional court might lack such professional preparation.[42]

2.4. The Supreme Court's role in executing reforms

The subject that probably causes most debates in specialist literature is the role of constitutional courts in the execution of state reforms. This is mainly because the core of large-scale reforms in any field is, by definition, a change of *status quo* due to changes in values and thus also new expectations to the legislator. Yet, the execution of reforms is impossible without changing the state of persons who are influenced by the reform, and therefore, a conflict with the principle of legitimate expectation (of preserving *status quo*) is inherent in any intent for a reform.

The Supreme Court first expressed its position regarding its own powers in a reform situation in 2002, in a case where the subject of the debate was the legislator's lack of action with respect to a decision on the question of return of and/or compensation on property of the persons who relocated to Germany in 1941. In this case, the Supreme Court *en banc* noted the following:

41 *Renewable energy fee*, section 118.

42 In the given case, the Court built its arguments supporting the legislator's choice upon an expert opinion of the European Commission, seeming to have reached a position according to which the correspondence of state aid to the competition rules of the European Union can lead to a conclusion that such transfer of the obligation to provide state aid to consumers corresponds to their fundamental right of ownership, given that the support is not excessive in light of standard return on capital.

"The consequence of the declaration of invalidity [of the disputed provision] is that the unlawfully expropriated property should be returned or compensated for to some persons who resettled pursuant to procedure established by the PORA. This would be a political decision a court has no competence to take. The question of whether and on what conditions the property will be returned or compensated for to these persons, can only be determined by the legislator, observing the procedural rules established by law."[43]

Due to the above reasons, the Court did not declare the disputed provision invalid, but only admitted its unconstitutionality, imposing on the legislator an obligation to correct the unconstitutional situation. Since the legislator did not fulfil the Supreme Court's "order" in four years, in 2006 the Supreme Court *en banc* declared the disputed provision invalid, however it postponed the decision's entry into force for six months, partly explaining it as follows:

"The choice regarding the options of solving the questions concerning the return of, compensation for, or privatisation of property that was unlawfully alienated from the persons who relocated to Germany on the basis of the agreement concluded with Germany in 1941 must, first and foremost, be made by the executive power and the legislator. [...] The Supreme Court *en banc* cannot assume the role of the legislator, or make choices between different solution options, or develop respective legal regulations instead of the parliament. It is reasonable to provide the legislator with some time to resolve these questions. [...] The *en banc* takes into account the complexity of the problem that is currently being dealt with by Riigikogu, and the time it may take to prepare a legal regulation required for executing a resolution option selected as a result of the parliamentary decision-making process."[44]

Since by the time the decision of the Supreme Court entered into force, Riigikogu had not amended the disputed provision or declared it invalid, the result of the Supreme Court's decisions in this context was the following. Applications for return of or compensation for the property that was unlawfully alienated from the persons who relocated to Germany, as well as applications for privatisation of the flats and land received from lessees of the buildings that belonged to the relocated persons and were unlawfully alienated from them, must be reviewed according to the general bases and procedure established in the Principles of Ownership Reform Act.[45]

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43 RKÜKo 28.10.2002, 3-4-1-5-02: *Ownership reform I*, section 37.

44 RKÜKo 12.04.2006, 3-3-1-63-05: *Ownership reform II*, sections 28–32.

45 In other words, the legislator "resolved" this sensitive political problem through the Supreme Court that, due to exceptional circumstances of the case (due to the legislator's lack of activity, the Supreme Court's decision would have been a political one, i.e. addressing the question as to who should be given preference in the reform, both if the norm had been declared invalid or remained in force), was forced to start forming the ownership reform policy due to the circumstances. Namely, Article 7(3) of the Principles of Ownership Reform Act, which was declared invalid (former owners of unlawfully alienated property as legitimate subjects of the ownership reform) read as follows: *"Applications for return of or compensation for property that was owned by persons who left Estonia on the basis of agreements concluded with the German state, and property that was unlawfully alienated in the Republic of Estonia, are resolved by an agreement between the states."*

The Supreme Court's role in the reformation of the system of special pensions has also been important. For example, in 2014, the Supreme Court *en banc* found that the law which, in regard to the so-called reform of special pensions, declared invalid the provisions of the Courts Act that provided for recalculation of the judges' pension, considering the change in judges' salary starting from 1 July 2013, was not in conformity with the fundamental right to property of the appellants in conjunction with the legitimate expectation and fundamental right of equality. According to the court's reasoning, the appellants had to be able to rely on the legislator's promise that was valid for over twenty years, according to which their pension would be recalculated in case of a change in their salary, while the judges who retired before the disputed provisions entered into force were treated differently in an arbitrary manner compared to the judges who retired later.[46] The Supreme Court *en banc* confirmed the vertical effect of the principle of legitimate expectation and right of equality (in a case concerning right of equality) in a reform situation. The dissenting Justices stated the following in this regard:

"Application of the principle of legitimate expectation and equal treatment in the practice of the Supreme Court must not result in a situation where structural reforms, such as the performance of structural changes in the administration of salaries, become impossible or very difficult to execute. We believe that if the model of thinking that was applied by the *en banc* in the present case was also used in other fields, it would inevitably lead us to a situation where the execution of structural reforms becomes impossible or complicated in many cases."[47]

On the other hand, in a decision adopted a year later in a case where the question was about the constitutionality of a different treatment of retiring officials of the National Audit Office depending on their time retirement, the Constitutional Review Commission found that in their case, the principle of legitimate expectation was not adversely affected since the pension of such officials had to remain exactly the same as in case of officials of the National Audit Office retiring after the given date, and therefore different treatment was justified due to the difference between the groups. Among other things, the Court used the following reasoning:

"If the legislature has broad discretion in resolving an issue, unequal treatment is arbitrary if the treatment is clearly irrelevant [...]. The economic and social policy and budgeting is within the competence of the legislature (the 26 June 2014 judgment of the Supreme Court *en banc* in case no. 3-4-1-1-14, para. 127). According to the Chamber, the legislature has broad discretion upon implementing the civil service salary reform as well as upon shaping the office-related pension system."[48]

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46 RKÜKo 26.06.2014, 3-4-1-1-14: *Recalculation of the judges' pension*. The Court also expressed a similar position in a similar case concerned the special pension of police officers: RKÜKo 06.01.2015, 3-4-1-18-14: *Special pension of police officers*.

47 Dissenting opinion of Justices of the Supreme Court Priit Pikamäe and Jüri Põld on the Supreme Court *en banc*'s judgment in case 3-4-1-1-14, section 5.

48 RKPJKo 29.05.2015, 3-4-1-1-15: *Special pension of officials of the National Audit Office*, sections 57-58.

In the most recent court case related to special pensions, which concerned the cancellation of pensions for judges' widows, the Chamber found that the regulations of the Courts Act which left without the survivor's pension family members of judges who took office before the date the reform entered into force, and whose maintenance provider who was a judge who died after 30 June 2013 as an old-age pensioner, had a disproportionally adverse effect on the right of ownership of such member of the judge's family in conjunction with the legitimate expectation and principle of equality in a situation where the survivor's pension for family members of judges remained intact in cases where judges died or will die while holding the office.[49]

49 RKPJKo 22.10.2015, 3-4-1-21-15: *Survivor's pension for widow of a judge.*

Introductory Note to the Articles of Mr. Ivo Pilving, Chairman of the Administrative Chamber of the Supreme Court and Mr. Eerik Kergandberg, Justice of the Criminal Chamber of the Supreme Court

The legislation of the Republic of Estonia does not expressis verbis recognise the right of an individual to file a constitutional complaint with the Supreme Court (which also fulfils the functions of a constitutional court). According to the Constitutional Review Court Procedure Act only the President of the Republic, the Chancellor of Justice, a local government council and courts may submit constitutional review requests to the Supreme Court.

However, a precedent was set in 2003 when the Supreme Court accepted for proceedings an individual constitutional complaint. The case (Brusilov case) concerned retroactive force of a Legislative Act. Namely, S. Brusilov who was sentenced to imprisonment for six years in 1997 on the basis of the Criminal Code that was in force at the time, submitted a complaint to the Supreme Court in autumn 2002, when the new Penal Code entered into force. The new Penal Code provided a shorter term of imprisonment (five years) for the same act that S. Brusilov was sentenced for. By the time of submitting the complaint, Brusilov had already served five years in prison, and he applied for his release.

During the review of S. Brusilov's complaint, the Supreme Court *en banc* was of the opinion that, resulting from Paragraph 15 of the Constitution, the Supreme Court may leave a complaint unreviewed only if the complainant has other effective means to use the right to judicial protection that is set out in the above paragraph of the Constitution. As the complainant in the Brusilov case had no other means to apply for his release and thereby use his right to judicial protection in a court of first instance and a court of appeal, the Supreme Court *en banc* accepted the complainant's request, and after examining the conformity of the relevant provisions with the Constitution declared that the Penal Code Implementation Act contravened the Constitution and the complainant was released. The Supreme Court *en banc* reaffirmed this view – i.e. resulting from Paragraph 15 of the Constitution, the Supreme Court may leave a complaint submitted by an individual unresolved only if the relevant person has other effective means to use the right to judicial protection afforded to him by that paragraph of the Constitution – in its decision of 6 January 2004. The Supreme Court *en banc* is of the opinion that if the legislator has not established an efficient and robust mechanism for the protection of fundamental rights, the judiciary must ensure the protection of those

fundamental rights in conformity with Paragraph 14 of the Constitution. In the decision in question, the constitutionality of the legislative act was not verified, but a decision was reached on the reopening of the administrative court procedure. As of today, by adhering to the main standpoints of the pioneering decisions of the Supreme Court *en banc*, the Constitutional Review Chamber of the Supreme Court has made decisions on 36 complaints submitted directly to the Supreme Court by individuals. Nevertheless, the Supreme Court has not heard the appeal in any of the abovementioned decisions, because the applicants have had other judicial means at their disposal (generally, the possibility to defend their subjective rights in a court of first instance).

In March 2017, the Ministry of Justice sent to the coordinating circle its declaration of intent to establish a legal basis for the submission of individual complaints in the constitutional review court procedure, i.e. to allow persons whose fundamental rights have been violated by a legal act and who have no other possibility to defend their rights in court to turn directly to the Supreme Court. The plan of the Ministry of Justice sparked off a vivid public debate on whether the Constitutional Review Court Procedure Act should be amended to also allow individuals to file constitutional complaints with the Supreme Court.

Does Estonia Need an Individual Complaint?[1]

Ivo Pilving,
Justice of the Supreme Court, Chairman of the Administrative Chamber

Recently, an opinion has been voiced again, both in relation to the state reform and not, that Estonia needs either an independent constitutional court, or at least an expansion of constitutional review in the Supreme Court with new possibilities for appeal, especially when it comes to individual complaints. Such an important reform should be preceded by an analysis in order to define if there are any actual issues. Changes of such calibre must not be made simply based on resounding slogans.

1. Nature of an individual complaint.

An individual complaint (also individual application, constitutional complaint) is an individual application to initiate the constitutional review procedure. An individual complaint can essentially be submitted against the activities of any public body, including an action, an individual instrument or a legislative act (general provision).[2] In Estonia, the right to submit an individual complaint is, by the law, only provided in case of decisions of certain state bodies (Articles 16, 18 and 37 of the Constitutional Review Court Procedure Act).

Despite the above fact, in 2003, during the adjudication of the case of the imprisoned person S. Brusilov, the Supreme Court reached a decision that a person can refer to Article 15 of the Constitution as the basis for submitting an individual complaint to the Supreme Court if there is no other effective means to protect the person's allegedly violated right.[3] If we take a closer look at the case, we see that S. Brusilov's application was not for norm control regarding a law, but an individual complaint regarding a continuing deprivation of freedom, i.e. an executive

1 This article expresses personal views of the author, is based on the report presented at the conference "Ten years with Brusilov – how do we go on?" held by the Estonian Academic Legal Science Society in March 2013, and has been complemented with the practice of the interim years.

2 See V. Saarmets, Individual Constitutional Complaint in the Constitutional Review Court – Juridica 2001/6, p. 376; H. Maurer, Staatsrecht, 1999, Article 20 No. 119 jj.

3 RKÜKo 3-1-3-10-02, p 17; most recently RKPJKm 3-4-1-14-16, section 22.

action[4] of the state.[5] The Constitutional Review Court Procedure Act does not say anything about an individual complaint submitted regarding an action, therefore the Supreme Court *en banc* could form its judgment, directly using Article 15(1) of the Constitution as the basis. The Supreme Court *en banc* reviewed the constitutionality of the Penal Code Implementation Act as the relevant law for the purpose of assessing the lawfulness of imprisonment. It is confirmed by the fact that neither the resolution nor the reasoning **declared unconstitutionality of Article 4(2) of the Constitutional Review Court Procedure Act**, which provides an exhaustive list of persons who have the right to submit applications for norm control to the Supreme Court.[6] The Supreme Court must not start to adjudicate an individual complaint submitted regarding a legislative act without applying Article 4(2) of the Review Court Procedure Act by default and arbitrarily. The prerequisite for not applying a procedural provision that imperatively precludes the right of appeal is the completion of the constitutional review procedure with respect to this provision. Below (Chapter 4) I will also explain why Article 4(2) of the Constitutional Review Court Procedure Act is constitutional.

2. Previous practice

During the subsequent 14 years, the judgment made in 2003 has inspired the submission of 36 applications to the Supreme Court, each of which can be considered as individual complaints not established in the Constitutional Review Court Procedure Act.[7] That is an average of 2.6 applications per year. These cases include challenges against legal provisions, their application, and often both. All the applications were refused by the Constitutional Review Chamber without review since the Chamber found that the persons concerned had or had had access to another effective means of legal protection, or that the dispute did not even concern the applicant's rights. The cases can be grouped as follows.

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4 By action I mean any activity of any public body that does not have a regulative substance, i.e. in addition to administrative actions also offense procedure actions, executive actions, etc.

5 The Supreme Court *en banc* stressed that the reason for the appellant's application was his wish to be released from the punishment, and the convicted offender had no other effective possibility to apply for a decision to release him from punishment, RKÜKo 3-1-3-10-02, sections 16–18 (Judgment of the Supreme Court *en banc*).

6 See also RKPJKm 3-4-1-6-04, section 5 (Regulation of the Constitutional Review Chamber of the Supreme Court).

7 The list does not include complaints submitted in public interest, where the court did not start to review in detail whether they matched the other so-called Brusilov criteria (For example, RKPJKm 3-4-1-12-05, 3-4-1-8-05 and 3-4-1-6-04).

– Dissatisfaction with a decision of a county, administrative or circuit court, e.g. a conviction or custody. For this group, a sufficient means of legal protection is the right to appeal to a court of higher instance.[8]

– Dissatisfaction with a judgment of the Supreme Court. The protection of rights is ensured by the rights of the party to the procedure during a procedure in the Supreme Court. The Constitutional Review Chamber is not an instance positioned higher than other chambers.[9] The right to submit an individual complaint does not exist despite the fact that the Supreme Court does not state the grounds for refusing to accept an appeal in cassation to the procedure. This also applies to cases where the subject of cassation is a claim that the respective law is unconstitutional.[10]

– Appeal against a provision of material law. In case of restrictions on retail sale and advertising of alcohol established by a local government's regulation, the Supreme Court considered that initiating a dispute for the compensation of lost profit was a sufficient possibility. The Chamber in its obiter dictum stated that under some conditions, an individual complaint regarding a legislative act is possible, but it did not explain whether Article 4(2) of the Constitutional Review Court Procedure Act must first be declared invalid in order to start a substantial resolution of the complaint.[11]

– Complaint regarding a procedural provision (e.g. limitations on procedural aid, limited access to evidence, compulsory use of an advocate, absence of the right to appeal or grounds for review). The Constitutional Review Chamber explained that if a person believes that the procedural law unconstitutionally precludes the submission and satisfaction of an application to the court, such application should still be submitted, and the person concerned must demand a constitutional review and non-application of the prohibiting procedural provision.[12]

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8 For example, RKPJKm 3-4-1-21-11; 3-4-1-8-07; 3-4-1-17-06; 3-4-1-10-05.

9 RKPJKm 3-4-1-8-13; 3-4-1-4-13; 3-4-1-21-11; 3-4-1-5-11; 3-4-1-19-08; 3-4-1-4-06.

10 RKPJKm 3-4-1-14-16, section 26 together with additional references. T. Kolk has another opinion, Effective and just procedure for adjudication of the claim regarding unconstitutionality of a legal instrument. – Juridica 2012/10, pages 739, 749. See also Chapter 3 below.

11 RKPJKm 3-4-1-60-14: Statoil, p 18.

12 RKPJKm 3-4-1-56-13: Kevadkuu; 3-4-1-14-16; 3-4-1-8-13; 3-4-1-4-13; 3-4-1-18-10; 3-4-1-4-10; 3-4-1-22-09; 3-4-1-11-09; 3-4-1-3-08; 3-4-1-11-07; 3-4-1-6-05. See also RKÜKo 3-4-1-19-07, p 32 (Judgment of the Constitutional Review Chamber of the Supreme Court). AS Giga's application for a review relating to case 3-3-2-1-04 can also be provisionally listed in this category. In that case, law did not provide grounds for a review, but Supreme Court *en banc* sent the case to be reviewed again in court as per Article 15. I still see this as a case of review in the material sense, and procedural codes have subsequently been updated with respective grounds.

– Unreasonably long judicial procedure does not require an individual complaint because the person concerned can submit an application to conduct a procedural action or to accelerate the procedure in general (Article 333[1] of the Code of Civil Procedure, Article 274[1] of the Code of Criminal Procedure and Article 100 of the Code of Administrative Court Procedure). In extreme cases, an unreasonable period of procedure can be compensated with money or taken into consideration during the imposition of the punishment or termination of the offence procedure (Article 274[2] of the Code of Criminal Procedure).[13]

– Pre-trial actions in the criminal procedure and offence procedure. Until the preparation of the statement of charges, the lawfulness of actions and rulings in the criminal procedure is verified by the preliminary investigation judge who uses the procedure for appeal against activities of investigative bodies or prosecutor's office (Articles 228-230 of the Code of Criminal Procedure).[14] The person does not have to be able to submit an individual complaint regarding the termination of the offence procedure in a competition dispute. It is possible to file a civil action against the person who committed the offence.[15]

– Administrative act or action, as well as a failure to act (e.g. a demand for information during tax procedure, failure to enter a person to the list of voters) can be challenged in the three-instance administrative court procedure, and a claim can be submitted even if the obligation to act is not established by law in breach of the Constitution.[16]

– Civil legal relationships. If a person believes that a certain provision regulating private legal relationships is contrary to the Constitution, he or she must submit a respective claim or objection in the civil court procedure, or challenge the decision that prevents the exercise of rights (e.g. a ruling to secure an action), asking the court to initiate concrete norm control.[17]

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13 RKPJKm 3-4-1-12-08.

14 RKPJKm 3-4-1-30-13. A person must not be able to challenge agreements of law enforcement authorities to extradite such person to a foreign state in any procedure, due to the absence of adverse effect on his or her rights, as both the lawfulness of such extradition and the extradition decision of the Government of the Republic can be challenged in a county or administrative court, RKPJKm 3-4-1-10-13.

15 RKPJKm 3-4-1-10-08.

16 RKPJKm 3-4-1-26-12; 3-4-1-3-10.

17 RKPJKm 3-4-1-34-15: Minority shareholders; 3-4-1-26-09. Although a court of arbitration does not have the right to initiate a review of a provision, the parties to the arbitration court procedure have no right to submit an individual complaint as a compensation, seeing that concluding a court of arbitration agreement is the decision of the person concerned, RKPJKm 3-4-1-25-13; 3-4-1-1-08.

3. Individual complaint regarding a final court decision

As mentioned above, the Supreme Court has not accepted the review of court decisions on the basis of individual complaints, although the judgments of the Supreme Court cannot be challenged in any other way.

In the Kevadkuu case, a party to the procedure submitted an individual complaint resulting from a resolution decision made by the Civil Chamber according to Article 689(6) of the Code of Civil Procedure, asking to declare the given provision unconstitutional. The Constitutional Review Chamber explained that in such cases, the protection of fundamental rights is ensured by the Supreme Court's obligation to follow the Constitution (Article 15(2) of the Constitution), and by the possibility to pre-emptively present in the appeal in cassation the person's position regarding the unconstitutionality of the law that is subject to application.[18] In his dissenting opinion, justice of the Supreme Court E. Kergandberg stated three troubling problems relating to the submission of preventive objections regarding a law in an appeal in cassation: 1) an appeal in cassation does not allow to challenge any issue that was not raised in the circuit court (Article 344(1)(1) of the Code of Criminal Procedure; 2) if an appeal in cassation is not accepted to the procedure, the claim of unconstitutionality will not reach the attention of the Supreme Court; 3) when questions related to constitutionality are reviewed in the Supreme Court, the respective cases must be resolved by the Supreme Court *en banc*, but such resolution requires a lot of resources.[19]

These arguments do not overturn the position of the majority of the Constitutional Review Chamber. Article 344(1)(1) of the Code of Criminal Procedure regulates the right of appeal, and it is not an exception provision relating to the second sentence of Article 15(1), Article 15(2) and Article 152(1) of the Constitution.[20] If the Supreme Court does not accept an appeal in cassation to the procedure, the allegedly unconstitutional procedural provision regulating the subsequent procedural stages cannot adversely affect the rights of the person concerned either. Without a doubt, reviewing a case by *en banc* requires a lot of resources, but from the perspective of procedure it is still a more economical way than first starting a discussion on the issue of constitutional review, and then, depending on the result of the review, starting to review the decision of the main case that has already entered into force. Rather than being forwarded all disputes where parties to the procedure have put the constitutionality of the respective provision in doubt, *en banc* should only receive cases where the "home chamber" has found it justified

18 RKPJKm 3-4-1-56-13, p 9–10.

19 Section 4 of the dissenting opinion.

20 See also in relation to the misdemeanour procedure, RKPJKm 3-4-1-4-13, section 25.

to doubt the constitutionality of the provision. Admittedly, it may be difficult for the parties to the procedure to pre-emptively form a position regarding all the provisions of the cassation procedure. Yet, this measure still only aims to support legal protection. The main means for the protection of rights is the Supreme Court's obligation to follow the Constitution *ex officio*.

First and foremost, the possibility to submit individual complaints regarding court decisions would mean the creation of a four-instance court system. This would not be in accordance with the principle of res judicata and the first sentence of Article 149(3) of the Constitution, according to which the Supreme Court is Estonia's court of highest instance. This provision also narrows the scope of Article 15 of the Constitution, i.e. the right of recourse to the court cannot exist in regard to decisions of a court of higher instance. Having three instances is more than enough to protect persons' fundamental rights. Objections to court decisions on the basis of fundamental rights can always be constructed, but any court dispute must eventually end. The Supreme Court may, of course, make mistakes in resolving appeals in cassation, but this is also the case for the Supreme Court and any other institution when it comes to resolving individual complaints.[21]

Such individual complaint regarding a court decision would:

– extend the duration of the procedure before reaching **legal stability** (an offender who deserves the punishment would be able to postpone it, an injured person would have to wait for the compensation even after a three-stage procedure, etc.);

– require **additional resources** both from the state and parties to the procedure;

– complicate the daily work of the Criminal, Civil, and Administrative Chambers of the Supreme Court in regard to a **uniform application of the law**, given that their work would be controlled by a superior instance.

Therefore, an individual complaint regarding a court decision would not just be useless, but also harmful.

4. Individual complaint for norm control

Let us now address the question of whether it should be possible to submit an individual complaint regarding laws and regulations.

21 J. Põld, Does Estonia need a separate constitutional court? in: Open Estonia Foundation, Independence of Courts and Effectiveness of the Court System in Estonia, 2002, page 78.

It is true that some laws can have a significant and direct adverse effect on a person's rights, i.e. without implementing acts or actions. This is possible if the law imposes an obligation or prohibition on a person, compliance with which is sanctioned with a significant punishment or another instrument of coercion (e.g. prohibition on the sale of certain goods or on the publication of advertising certain content under a threat of a large monetary fine).[22] From the position of legal obedience, it would not be pedagogical to incite people to ignore enforced laws, even if they consider them unconstitutional. Furthermore, by breach of an obligation they consider unconstitutional, a person would take an excessive risk, considering that the court may not necessarily share their views on constitutionality. A civilised way to assess the constitutionality of a "directly applicable" obligation (prohibition) would require a pre-emptive clarification by the court.

Article 15(1) does not give a person whose rights have been intruded the right to directly challenge the respective law or regulation. The legislator has a lot of leeway when it comes to forming means of legal protection. The important thing is that at the final stage, the court makes the decision regarding the permissibility of intrusion into rights, and that legal protection is effective. In the Statoil case, the chamber considered that it would be sufficiently effective to submit a claim for **compensation of damage** in relation to profits that would have been lost resulting from the prohibition on sale. It should be further noted here that in similar cases, the person does not have to wait until actual damage occurs, and compensation can also be requested for damage that may occur in the future (Article 7(4) of the State Liability Act, Article 127(6) of the Law of Obligations Act). In addition to that, in case of justified interest (i.e. an acute case where there is an actual, rather than just a theoretical problem), the person can address the court with a dispute as to whether the person has the right to act in a specific way in the legal relationship (e.g. publish the prohibited advertising or sell the prohibited goods). In order to do that, there is an option of submitting a **claim for establishment** in both private and public legal disputes (Article 368(1) of the Code of Civil Procedure and Article 37(2)(6) of the Code of Administrative Court Procedure). Legal circumstances can also be the object of a claim for establishment.[23] When assessing the question whether a person has the right to act in one way or another, the county or administrative court must also review the constitutionality of other relevant provisions.[24] There is absolutely no reason why a claim for establishment should not be an effective means of legal protection in such situations. In case of urgent cases, it is also possible to use initial legal protection or to execute the court decision immediately. Finally, if breach of an

22 Regarding regulations, see RKPJKm 3-4-1-60-14, section 17.

23 RKEKm 3-3-4-2-13, section 15.

24 J. Põld (reference 21), page 76.

obligation or prohibition can result in an administrative sanction, or if the law provides the state authority with the right to perform actions that can damage the person, they can be prevented with a **prohibition action**.[25] Therefore, in the legal order currently in force, a situation where there are no means of legal protection against a direct adverse effect arising from the law, is purely hypothetical.

The Court of Justice has considered a similar system of indirect means of protection as sufficiently effective for the protection of fundamental freedoms of the European Union. In one case in Sweden, also concerning a prohibition on advertising, the principle of effective judicial protection was interpreted in the way that it does not require the legal order of the state to have independent legal means to review the lawfulness of legal provisions.[26] It is a known fact that such instruments are absent in Scandinavia. Nothing is obviously stopping Estonia from creating more forceful procedures in its courts, but it is also necessary to consider the undesirable side effects of such means. Legal protection does not have to be as fast and effective as possible. It must be optimal. An individual complaint for norm control would be a shortcut to the country's highest instance court, but it would also:

– damage **the legal stability and uniform application of the law** in the same way as individual complaints submitted regarding court decisions, since after a court decision enters into force, it is possible to at least initiate norm control regarding provisions applied in the court decision. It would cause additional expenses for parties to the procedure and extend the duration of the procedure;[27]

– **burden the Supreme Court** with a massive number of cases in which legal protection is not necessary or adjudication of which is actually down to county and administrative courts. The Supreme Court would also have to start assessing evidence and identifying factual circumstances regarding breach of fundamental rights. In the model of a claim for establishment that I recommended, such preliminary work would be done by a county or administrative court. In countries where laws allow individual complaints, their large number causes serious problems.[28] The small number of individual complaints today is due to the Brusilov doctrine being in a "frozen state", which is expressed in a consistent and strict practice of rejection adopted by the Civil Review Chamber, as well as the continued application of Article 4(2) of the Constitutional Review Court Procedure Act.

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25 Article 37(2)(3) of the Code of Administrative Court Procedure; Articles 4 and 5 of the State Liability Act.

26 EKo C-432/05: Unibet, section 56–65.

27 See Chapter 3 above.

28 H. Maurer (reference 2), Article 20 no. 124.

Giving everyone the right to initiate norm control by law would probably lead to numerous cases of abuse of procedural rights. It would create a new attractive channel for those imprisoned persons who are currently flooding administrative courts with clearly unjustified complaints. Such individual complaints would burden the Supreme Court even if they did not correspond to the conditions for admissibility established by the law, since the court would have to return them with a reasoned ruling;

– politicise the Supreme Court. Forces opposed to democratically adopted laws in the parliament could easily find people who would use the protection of their rights as an excuse to take disputes directly to the Supreme Court. However, in case of laws that polarise the society, the court often has no mandate to interfere, since the legislator has a significant leeway regarding the disputed questions. In such situations, it does not matter whether the Supreme Court does not satisfy or accept the complaint. The Supreme Court would have to repeatedly face the same dilemma whether to be viewed by the public as responsible for the parliament's political choices, or to make a popular decision and taking the role of the legislator. Individual complaints would inevitably provide the Supreme Court with additional power, thus creating a fertile ground for proposals for an even broader reorganisation. This, however, would have a rather negative effect on independence (creating a separate constitutional court, nominating judges for a fixed term);

– remove necessary filters. Today as well, the Supreme Court has to resolve disputes that have a strong political charge, and this is inevitable for a court that performs the function of constitutional review. Yet, it makes quite a difference whether the resolution of such cases (or their rejection without review) becomes a daily job for Justices of the Supreme Court or arises a few times a year. Today, the prevention of politically motivated complaints, as well as a general overburdening of the Supreme Court is possible thanks to the model according to which applications can only be submitted by a court, the Chancellor of Justice, or the President of the Republic. Concrete norm control can be initiated by a court provided that the disputed law is relevant to the case, i.e. the substance of the court decision adopted in regard to a person would directly depend on it. Moreover, the court resolving the main case performs a substantial preliminary review. Nevertheless, if a conclusion is reached that the present understanding of the provision's relevance is too narrow[29] and does not let the Supreme Court deal with societally important topics, the criteria of the test of relevance must be eased with so-called fine tuning.

29 See for example dissenting opinion in RKPJKm 3-4-1-22-15: Estonian Authors' Society et al.

It is reasonable to organise judicial protection against adverse effect arising directly from a legislative act by way of indirect means of legal protection. Such approach takes the logic of a three-instance court system into account and prevents disputes regarding evidence in the Supreme Court. Nevertheless, it should be considered that the Constitution clearly guarantees a person the right to apply for concrete norm control (the second sentence of Article 15(1)), and not a direct right to appeal against laws.

5. Individual complaint regarding other acts of authorities

The fact that the Supreme Court did not see the need for an individual complaint regarding other acts of authorities in 36 cases does not guarantee that no legal gaps will be discovered in the future. We should also not ignore the fact that the *en banc* admitted that there was such gap in the Brusilov case.

First, it is a fact that given the present procedural laws, a situation where no court is able to resolve a case is practically impossible in Estonia.[30] Unless the law provides otherwise, all private legal disputes belong to the jurisdiction of county courts, and all public legal disputes belong to the jurisdiction of administrative courts (Article 1(1) of the Code of Civil Procedure and Article 4(1) of the Code of Administrative Court Procedure). These courts have a so-called **intercepting competence** when it comes to the abovementioned cases.[31] This is why the need for a subsidiary individual complaint is essentially determined by one question, i.e. whether the procedure in the competent court is **effective**: whether the person has the possibility to initiate a case in a competent court, whether the court has sufficient powers, whether the procedure is conducted in a sufficiently fast manner and is not too expensive, etc. Even in the Brusilov judgment, the Supreme Court *en banc* noted that the appellant could basically have submitted his complaint to the administrative court in order for the prosecutor to submit the application to the county court. The Supreme Court *en banc* considered it likely that such procedures would have lasted for too long given the nature of the situation. In later cases, the Supreme Court has found that if the procedure in a competent court is not effective, it must be made effective by assessing the constitutionality of procedural norms, rather than directing the case to be resolved elsewhere than the competent court, e.g. to the Supreme Court. Such approach is justified because in the given situations, the actual constitutional problem is the organisation of the procedure, not the division of competences of courts. In its practice, the Supreme

30 J. Põld (reference 21), page 75.

31 M. Ernits in: Ü. Madise, Constitution of the Republic of Estonia. Commented edition, 2012, Article 15 no. 2.1.1.

Court has repeatedly eliminated shortcomings of procedures in competent courts through constitutional review.[32]

It should also be noted that today, S. Brusilov's complaint would have to be resolved by a judge in charge of the execution of court judgments as per Article 431(1) of the Code of Criminal Procedure.

Conclusion

The practice of the Supreme Court confirms that Estonia's current legal protection system has no gap that individual complaints could fill. The problem that occurred in the only example of an individual complaint with a "success story" through the entire history of the Supreme Court has been eliminated by the legislator a long time ago. However, attempts to turn something that was once an emergency judgment into a law can lead to massive consequences that can damage the parliamentary public order, as well as the effectiveness and independence of the judicial branch of power. Individual complaints regarding court decisions would result in the creation of an unnecessary court instance and prolong disputes. With respect to individual complaints submitted regarding legislative acts, Article 4(2) of the Constitutional Review Court Procedure Act currently in effect justifiably says: not allowed. Legal protection without gaps must be ensured by adding necessary means of legal protection in county and administrative courts.

32 For example, in cases RKÜKo 3-3-1-35-15; 3-1-2-2-11.

Individual Complaint as a State Secret

Eerik Kergandberg,
Justice of the Supreme Court

A glance to the future

It is March 2103, beginning of the first quarter of the 22nd century. The sun is getting closer and closer to the horizon, hanging so low that it makes you wonder if it can still illuminate anything important. Still. As the ascent of the Lossi street ends, the last rays of the sun light up the face of B jr. jr., the woman's sad eyes, and the yoked head of the horse, with its ears pricked up.

"There it is, Toomemägi and the Supreme Court, and the bas relief on its wall which was opened yesterday in honour of the grandfather", says the man and points towards the facade of the Supreme Court. "No-no, not this hand with the scalpel. Jesus! Our grandfather's deed was something else. Look slightly to the right of the hand with the knife! There, where it says in golden letters: **"Brusilov 100"**."

The film continues. The camera briefly turns to the Kuradisild Bridge, then to the Inglisild Bridge just to make sure that everything is right, and finally it calms down, focusing on the interior of the building. Everything inside is solemn and festive. The Chairwoman of the Supreme Court is presenting her speech to the guests of the anniversary conference. She thanks Brusilov, the Lord, and fate, whose creative joint work led to the creation of a true gem in the system of protection of fundamental rights in Estonia, shining with the light of a binding clause: A Very Big, Extremely Individual, Absolutely Constitutional Road of Judicial Complaint Perfectly Possible Through Decades. At the end of the speech, the Chairwoman thanks the diligent advisers of the Constitutional Review Chamber who, after a long time, managed to put together something that was called a real book a century ago. It even consists of two volumes. The first volume contains a compact and substantial overview of all those 9865 Very Big, Extremely Individual and Absolutely Constitutional Complaints that have been submitted to the Supreme Court over the century, all of which the Supreme Court has managed to successfully fend. The second volume is a commented edition of the 457 new bases for review created by the Supreme Court during a century.

Morning Star of the Supreme Court

In a few minutes, the time machine takes us back to the joys and worries of today. The Brusilov judgment is approaching adulthood: next year will mark the passing of 15 years since its adoption. Five years ago, when this cult judgment's 10-year anniversary was celebrated, it was still in its early puberty: the abstract joy brought by an undoubtedly cool mischief still managed to suppress the feeling of responsibility, the ability to see the global picture, and other serious thoughts. A fifteen-year-old, though, slowly starts to see reason.

Yet, it seems to me that today we are even further from erecting a bas relief or a monument in honour of Brusilov than we were five years ago. In fact, the situation today is rather typical for the modern so-called post-truth world: some justices of the Supreme Court and other lawyers study the problem with a microscope, and others with a telescope. One part (I believe it includes my good colleague Ivo Pilving) wants to remove the Brusilov judgment using a simple technical method typical of administrative courts and simply reducing the judgment to zero (essentially casting a spell of invisibility on it). On the other hand, "the astronomers" value and praise the given judgment as the morning star, a thing in itself, which, as a borderline case[1], supposedly does not even need to have a realistically perceivable connection with the mundane reality. The most famous representative and vocal supporter of such approach on our legal landscape is probably Madis Ernits. He has noted that although the Constitutional Review Court Procedure Act does not provide for a so-called big individual complaint, i.e. a possibility for a person possessing fundamental rights to apply with a complaint regarding breach of his or her fundamental rights to the constitutional review court in order for the court to declare the respective law or regulation unconstitutional, supposedly Article 15(1), in conjunction with Article 14, must be interpreted in the way as if such complaint existed in Estonia's legal order. To support his claim, M. Ernits lists a number of Supreme Court's judgments, obviously starting with the same Brusilov judgment.[2] Unfortunately, however, this list misleads the reader, seeing that in fact, the Supreme Court has not accepted a single other individual complaint for procedure after the Brusilov judgment. It is also not a big state secret that for the most part, the position of Justices of the Supreme Court regarding the issue of individual complaint has been its rejection. More specifically, the action of rejection has in most cases been justified with a presumed availability

1 I must say, getting a little ahead of the main issue, that today's discussion positions us in a borderline case situation, where we ask whether the possibility for a big individual constitutional complaint should be affirmed (established by the law), or whether we should absolutely refuse it and simply declare the Brusilov judgment erroneous post factum.

2 Constitution of the Republic of Estonia. Commented edition. Ü. Madise et al (rev.). 3., updated edition. Juura 2012, 219, Article 15 commentary 3.

of another judicial way for protecting the person's rights, either in the past, in the present, or in the future. It is unfortunate that, in his commentaries regarding the Constitution, M. Ernits did not consider it necessary to check whether and to what extent another judicial way actually existed in case of the persons whose individual complaints were rejected by the Supreme Court. I believe that I got into details a bit too early. I will now try to return to the main road.

As a person who respects the beauty of a game, I perfectly understand those who value the Brusilov judgment highly, including my colleagues and state law theorists who will probably include the majority of advisors of the Constitutional Review Chamber that have worked in the Supreme Court over the years. Indeed, from the position of constitutional law, the Brusilov judgment was something fantastic, the purest embodiment of judicial activism. Just think how many disputes and troubles, not to mentioning money, some countries have spent on creating constitutional courts for handling individual complaints! One big country even had to start and then lose a world war, only to end up wearing sackcloth and ashes and establishing a constitutional court. And just how simple it is here in Estonia, with its innovations and e-residency (I nearly made a mistake and wrote e-resistance), a new big castle is built with the flick of a finger. Who cares that it is contra legem and, figuratively speaking, just for one night.

A critical approach to the success story

It is a known fact that I voiced a dissenting opinion, and I can confirm that I remain rather critical (to put it mildly) regarding the Brusilov judgment. Even more so. Especially now, looking back at this judgment and its so-called legacy, I believe it is difficult, if at all possible, to assess and identify any valuable matter in it which concerns penal and constitutional law. Is it indeed true that on one hand, since this judgment supposedly gave us the only possible means to eliminate the evils of the penal law, the lawfulness and constitutionality of the means themselves (i.e. the procedure created by the Supreme Court), as well as their clear perspectives, are unimportant or secondary? On the other hand, where must one derive powers from, in order to constantly repeat to oneself and explain to guests that it is completely normal for the individual constitutional right to judicial complaint as the highlight of the general right to judicial complaint to only "flash" once in a successful democratic state due to a reason that no-one could or wanted to recall exactly later, and that at the same time (NB!), we must, at all costs, prevent the wording of a law that would make another flash possible.

For me, from the position of the penal law, this judgment continues to be of very questionable value, now even more so due to the legislator's "revisionist" developments based on the given judgment regarding the respective fundamental right. It was primarily with the Brusilov judgment and its subsequent interpre-

tations that the legislator made the time scope of the field of application of the universal and constitutional principle of retroactive effect of a less stringent penal law dependent on the type of punishment, which makes me wonder whether to laugh or cry. Indeed, metaphorically speaking, the second sentence of Article 5(2) of the Penal Code says that if the court has been far-sighted enough and punished someone with imprisonment, a new less stringent penal law would shine on such person like a ray of the sun even in prison. In other words, in case of persons punished with imprisonment, the retroactive effect of a less stringent penal law exceptionally also applies to the period of execution of a court order. If the accused person has been unlucky in this respect, and has been punished not with imprisonment, but with a lighter, i.e. monetary punishment, such person can no longer hope for a "procedural aid" provided by a less stringent penal law after the court decision has entered into force. In my opinion, there is no doubt that at least in some cases, the difference in the scope of the field of application of the principle of retroactive effect of a less stringent penal law, which depends on the type of punishment, might very well be contrary to provisions of Article 12 of the Constitution. Indeed, it looks like no-one has pointed out this issue so far, at least not to the Supreme Court. For the sake of a mind game, let us add another discussion to this topic. Our existing penal law paradigm no longer considers life imprisonment as a regular imprisonment but instead, as Hegel himself would probably have said in his time, as something in case of which quantity changes into quality. It means that life imprisonment can indeed be considered a stand-alone and currently the most severe type of punishment. However, in the second and third sentences of Article 5(2) of the Penal Code, and in commentaries to those provisions, the special nature of life imprisonment has not been considered worthy to be addressed separately in the context of the field of application of the principle of retroactive effect of a less stringent penal law. Hopefully, it is clear that according to Article 5(2) of the Penal Code, in case of persons punished with life imprisonment, the principles of a less stringent penal law's retroactive effect must apply to the entire time of service of the term of the punishment. However, what should be the new and lighter punishment should in their case? In my opinion, the Penal Code does not give a very specific answer to this question. In an interesting manner, the current interpretation paradigm regarding a less stringent penal law's retroactive effect leads to post-factum creation of another argument in favour of abandoning the death sentence. While the field of the above principle extends to the entire time of service of the term of imprisonment or life imprisonment, for some reason this logic refuses to work in case of death sentence. Alright, let us leave these absolutely hypothetical disputes over non-existent types of punishment. Nevertheless, as we return to the issue of imprisonment, I definitely do not want to leave my own old so-called "steppes question" unasked: "If in case of imprisoned persons, the retroactive effect of a less stringent penal law also extends to the time of service of the term of imprisonment, why should it not extend even further?" I have never heard a single rational explanation as

to why the persons whose imprisonment could unfortunately not be eased on the basis of a subsequent less stringent penal law due to the fact that they had already been released before the new law became effective, should not be able to demand a post-factum compensation from the state based on the argument that "[their] younger colleague spent two months less in prison than [them] for stealing the exact same thing". Indeed, extending the field of application of the retroactive effect of a less stringent penal law to distant "steppes", including the time following the service of the term of imprisonment, should still be separately applied for in the Supreme Court.

On a serious note, I remain convinced that in case of reasonable interpretation and by making no distinction between types of punishment,[3] the retroactive effect of a less stringent penal law must expire immediately after the court decision has entered into force. However, if during some bright moments filled with the spirit of human rights, and when elections are still far away, politicians start to drastically establish lighter punishments, then in my opinion, it should not be difficult for them to instead apply amnesty as a balancing measure serving the interest of the fundamental right to equality with respect to persons who are serving a punishment.

So, is it or is it not – that is the question

It seems that in case of the Brusilov judgment, our legal public is no longer interested in all these matters related to penal law. The primary subject of interest is the other component, the other question: "Does the possibility of a big individual constitutional complaint exist is today's Estonian law or not?" This question is so simple and yet so important from the perspective of protection of fundamental rights. I hope none of the readers of this article were too inspired by the fantasy picture described at the beginning of it. I truly cannot fully understand how the legislator can completely avoid taking a very clear position regarding the Brusilov judgment, given that on one hand, in the legal theory, this judgment is considered as the Supreme Court's most important judgment concerning the guarantee of fundamental rights, and therefore an integral part of our present legal order. On the other hand, nobody can say on which criteria such great possibility for a court complaint is based. Finally, it has to be pointed out that the Supreme Court is determined to forget this judgment. In light of the latter, I must say that in my opinion, I. Pilving is still mistaken in his article published in the present compilation, where he claims that the Brusilov case was only about adjudicating a dispute

3 For a moment, I wondered whether today, our legislator should also think about limiting imprisonment as a type of punishment in light of the threat arising from the second sentence of Article 5(2) of the Penal Code.

over an action (without a doubt, this claim paves the road towards forgetting the Brusilov judgment). Brusilov was serving a just punishment for theft when the legislator started to mitigate punishments for theft. Brusilov did not turn to the court system due to any supposed new action committed against him. Absolutely not! He had been serving the punishment for a long time, and this "action" was completely usual for him. However, the question is not so much about what exactly the person applied for, but what the Supreme Court did. Obviously, one cannot doubt that the Supreme Court declared unconstitutional not the action, but the law – the Penal Code Implementation Act. To be fair, I quite agree with I. Pilving's claim that the Supreme Court should not have demonstrated judicial activism with the Brusilov judgment, without declaring unconstitutional Article 4(2) of the Constitutional Review Court Procedure Act, which provides an exhaustive list of persons who have the right to submit applications for norm control to the Supreme Court. Indeed, it should not have, but it still did. It is my understanding that I. Pilving also does not claim that the Brusilov judgment does not exist. Essentially, though, he still believes that with time, this judgment will simply subside until it is reduced to zero.

So, what should we do

What can be done in the present situation? As we know, in case of legislative intents for preparation, instead of finding a suitable regulation, one possible option is always "not doing anything". In my opinion, such approach is out of the question once we say out loud what the current problem is: "The Republic of Estonia has no elementary legal clarity whatsoever regarding issues concerning the admissibility of the individual constitutional complaint procedure, i.e. regarding the question of substantial area of protection provided by Article 15(1) of the Constitution which is considered as a binding clause ensuring the protection of all fundamental rights."

In my opinion today, since the topic has already been "brought to the table", there are two principle solutions possible.

1. Clear rejection of the Brusilov judgment. It should probably still be reflected in the text of the Constitutional Review Court Procedure Act, since I cannot imagine how the Supreme Court *en banc* itself could manage to "push the toothpaste back into the tube", even if it dared take such step. Of course, one can claim that after such step by the Supreme Court, nothing would prevent it from creating another Brusilov case. I would still leave this option aside for now.

2. Legitimation of the Brusilov judgment (or its consequences, to be more precise) in the text of the Constitutional Review Court Procedure Act. It should definitely be thoroughly considered how to do this, which is not an easy task. In theory,

there is clearly no need to implement a comprehensive individual complaint, and the actual human resources of the Supreme Court also set certain limits. Also, in the light of the present state reform (mainly the need to save resources!), the idea of creating a separate constitutional court should probably be set aside.

All this being said, I would still like to direct attention to one "place" where the individual complaint could work and be permitted.

As I have already mentioned above, in the commented edition of the Constitution, M. Ernits generally praises the Supreme Court for all court cases following the Brusilov judgment, including those where the individual complaint was actually not accepted for procedure. However, M. Ernits demonstrates a certain reserved dissatisfaction regarding the judgment of the Constitutional Review Chamber of the Supreme Court 3-4-1-19-08. He writes that "although according to the Constitution, an individual complaint against a decision of a regular court of the highest instance is not necessarily precluded if such decision can infringe a fundamental right, **accepting such application for procedure is complicated by the organisation of courts according to which the highest instance of a regular court as an institution is united with the constitutional review court (Article 149(3))**" (underlined by me – E.K.). So, the Constitutional Review Chamber of the Supreme Court decided to preclude the possibility for submitting an individual complaint regarding a court decision: "According to the Constitutional Review Court Procedure Act, the Constitutional Review Chamber of the Supreme Court is not a court instance positioned above other Chambers of the Supreme Court to which it is possible to submit complaints against judgments of the Civil, Criminal and Administrative Chambers.[4]

At first glance, there is little doubt that if the individual complaint against a decision of a regular court of the highest instance (e.g., the Administrative Chamber of the Supreme Court) which infringes a fundamental right is indeed considered vital, and as a barrier arising from the organisation of courts is identified, the only solution is indeed a separate constitutional court. However, let us take a close look at whether the given judgment of the Supreme Court (to which M. Ernits refers in his discussions) provides an adequate reflection of reality. In my opinion, it is not quite so, seeing that some parts of the story remain untold. Indeed, different chambers of the Supreme Court cannot be positioned in a way that they are subordinate to each other, and therefore, it cannot be considered possible, for example, to submit an individual complaint regarding a judgment of the Administrative Chamber of the Supreme Court to the Constitutional Review

4 RKPJKm 11.03.2009, 3-4-1-19-08, section 14 (Regulation of the Constitutional Review Chamber of the Supreme Court).

Chamber of the Supreme Court. However, the Supreme Court also has *en banc*, and despite certain nuances, it generally cannot be denied that chambers of the Supreme Court are subordinate to the *en banc*. For example, the second sentence of Article 3(3) of the Constitutional Review Court Procedure Act states that if the Administrative, Civil, or Criminal Chamber, or the Special Panel of the Supreme Court has justified doubts that a legislative act relevant to the adjudication of the case is not in conformity with the Constitution, the given case must be adjudicated by the Supreme Court *en banc*. Let us imagine that parties to the procedure had claimed the existence of such justified doubt in all lower court instances. And let us say that the existence of such doubt is also clear to everybody except for the Supreme Court (would anyone dare to exclude such possibility 100%?). And then let us assume that some chamber of the Supreme Court refuses to notice that. To be honest, there can be many different reasons for that (extreme complexity of the problem and its correct resolution; unwillingness to change one's own previous judgment and... damage one's reputation, etc.). Why, in such situation, could the question not be resolved by the *en banc* on the basis of an individual complaint submitted regarding a judgment of a chamber of the Supreme Court? What would be the difference compared to the situation described in the second sentence of Article 3(3) of the Constitutional Review Court Procedure Act? Is it really all about fear regarding one's own reputation if the chamber did not notice the problem with unconstitutionality, and the *en banc* did? It has repeatedly happened in practice of the Supreme Court that the *en banc* did not agree with the position of a chamber which addressed the problem to the *en banc* on the basis of Article 3(3) of the Constitutional Review Court Procedure Act. However, in case of different court panels that are in a subordination relationships, this is all part of the work (and included in a justice's salary).

Bearing that in mind, it should probably be expected that my position is still different from that of I. Pilving, also regarding problems that emerged in the so-called Kevadkuu case[5]. I am absolutely convinced that the rhetoric that followed the Brusilov judgment ("to raise the problem of constitutionality in a regular judicial procedure!") does not work in a situation where after the Supreme Court adopts a judgment, a person finds that it is a provision concerning some procedure of the Supreme Court (for example, the cassation procedure) that is contrary to the Constitution. I would not see any problem if in such specific situations, it was allowed to submit an individual complaint against a judgment of the Criminal Chamber also to the *en banc*. I find that any pragmatic arguments to preclude such possibility for complaint, presented by I. Pilving in his article, simply do not have a standing in the context of effective protection of fundamental rights. And as for the claim that a person should actually apply for some provisions of the

5 RKPJKm 16.12.2013, 3-4-1-56-13.

cassation procedure to be declared as invalid as early as in the cassation, I find it simply cynical. In the end, what we see in today's paradigm of procedural law, appeals are submitted against what has happened in a court of earlier instance, rather than provisions of a future procedure. However, to give a quick conclusion to this article, I would agree with a compromise as the last resort, i.e. to introduce a provision (which in my opinion would be completely unprecedented) that provides for such possibility of challenge in all branches of our judicial procedure in the future. If the legislator indeed establishes such provision, the problem can be considered as resolved, at least in a way. Not before.

Practice of Constitutional Review 2016 – Viewpoint of an Advocate?

Martin Triipan,
sworn advocate

I would like to begin by explaining why there is a question mark at the end of the title. When I was asked to discuss the topic of constitutional review from the viewpoint of an advocate, I was struck by the question whether an advocate should represent some clearly special or even extreme view. In criminal procedure, the accusation and defence functions are clearly opposed to each other, and this is probably the reason why in case of an advocate or prosecutor's written work concerning criminal procedure, even I have certain stereotypical assumptions of what they might include. However, when it comes to this topic, even those legal professionals who normally stick to their established beliefs should be able to find a common ground, given that constitutional review is a so-called horizontal topic that touches on all legal branches and all types of judicial procedures. Views can be changeable in this question, since based on a procedural position, the same person might on one occasion talk about the need for a deeper constitutional review with regard to a specific dispute, while on another occasion the same person might try to convince the court that the opposing party's claims regarding the unconstitutional nature of the matter are merely an exaggerated procedural ploy. Therefore, I doubt constitutional review being a topic where the writer's profession, be it a judge, a prosecutor, or an advocate, needs to be emphasised. I will let the reader be the judge and assess to what extent an advocate's viewpoint still shows in this piece.

A coin and its two sides

In order to justify the title, I considered which topic should definitely be raised from the viewpoint of an advocate. Due to its relevance, such topic would definitely be **the payment for state legal aid**, and more generally, **the compensation of procedural expenses**. The Bar Association has repeatedly pointed out that with the present funding, the state legal aid system is not sustainable. As a practitioner, I strongly doubt whether fixed payment rates can sufficiently ensure comprehen-

sive protection for persons in complex criminal cases.[1] Since the system has such problem, I would expect a more serious control of the constitutionality of the way state legal aid is organised. In fact, the issue of state legal aid was discussed in 2016 by the Supreme Court *en banc* itself, which adopted a judgment to cover an advocate's expenses on travel to a court hearing on route Tallinn-Tartu-Tallinn in the amount of 36 euros.[2] When assessing the constitutionality of this matter, the Supreme Court *en banc* found that the Bar Association must not be tasked with establishing the rates of payment for the provision of state legal aid. Now, the payment rates are established by the Minister of Justice but the problem of insufficient funding has not been resolved. The other side of the coin representing the compensation of state legal aid expenses and the payment for legal aid has always been the protection of the rights of the person who requires legal aid, including protection of constitutional rights. One side of the coin is rarely brighter than the other.

The format of this article does not allow discussing the problem of payment for legal aid in more detail, however, I must note that procedural expenses were addressed in several other judgments in 2016. In addition to the state fee issues[3], one civil procedure gave rise to a new issue concerning constitutional review, resulting from which the Supreme Court *en banc* declared invalid Article 178(3) of the Code of Civil Procedure, which allowed the circuit court to issue a ruling without stating reasons during the adjudication of an appeal submitted against a court ruling on the designation of procedural expenses.[4] In this judgment, the Supreme Court reasoned, among other things, that the designation of procedural expenses has an adverse effect on the fundamental right to ownership of parties to the procedure, which is guaranteed by Article 32 of the Constitution, since it imposes a proprietary obligation on one party to the procedure, which benefits the other party to the procedure, or this is done partially, or not done at all.[5] On the one hand, the claim for compensation of procedural expenses belongs in the field of the fundamental right of ownership, but on the other hand, the reduction of the amounts ordered to be paid for legal aid is quite usual in practice. There have also been cases where the amount ordered to be paid was actually several times smaller than the amount of expenses. Unfortunately, this means that a person

1 It is questionable whether the payment of 240 euros for a criminal case consisting, for instance, of 10,000 pages of files provided for preparing a defence instrument ensures comprehensive and effective defence (see Article 6(3) of Regulation of Minister of Justice No. 16 of 26 July 2016).

2 RKÜKo 26.04.2016, 3-2-1-40-15 (Judgment of the Supreme Court *en banc*).

3 RKPJKo 09.02.2016, 3-4-1-31-15 (Judgment of the Constitutional Review Chamber of the Supreme Court);

4 RKÜKo 01.02.2016, 3-2-1-146-15.

5 ibid., section 66.

who goes to court cannot hope for their expenses to be compensated in case of a win. This may constitute a barrier preventing a person from going to court to protect their rights.[6] It must be noted that disputes concerning constitutionality imply a heavier than average workload for counsels, among other things due to the fact that this is not a daily issue for counsels.

I dare say that if the reality in the market of legal services (the level of advocates' rates, time required for work) and the amount of work and expenses considered reasonable by the court differ too much, it can eventually lead to more harm to the people for whose protection the payable procedural expenses are reduced in individual cases. If one cannot for that expenses on legal aid to be eventually fully compensated, it can lead to choosing not to go to court, not to use legal aid, or to try and limit it. However, such judgments may significantly harm the person's position, especially in an adversarial procedure. For the party that is able to withstand a partial or complete lack of compensation of procedural expenses, there will be no limitations on legal aid.

Towards a more effective judicial protection?

At the time of publishing of this article, one of the most relevant and topical issues related to constitutional review is probably the so-called"big" **individual complaints**, especially their admissibility.[7] It is a known fact that in 2003, the Supreme Court *en banc*[8] found in the so-called Brusilov case that in order to protect one's own fundamental rights, a person can turn directly to the Supreme Court if the person has no other effective possibilities to protect their right to go to court in order to protect their rights, as guaranteed by Article 15 of the Constitution.

Such complaints have been regularly submitted to the Supreme Court, and the year 2016 was no exception. The Supreme Court adjudicated the case which concerned means of legal protection and claims for dividends of minority shareholders.[9] Several civil procedures had already been conducted as parts of the main dispute. The judgment made in this case confirmed the principle that an

6 In a real situation, significant reduction of payable procedural expenses can have an effect similar to limitations on procedural aid, and this issue was discussed, for example, in RKÜKo 12.04.2016, 3-3-1-35-15 (section 26).

7 The so-called small individual complaint is considered to mean the right, arising from Article 15(1) of the Constitution, to demand constitutional review of a relevant law or other legal instrument, and the court has a respective obligation to initiate a specific review of such provision if the judge is convinced that the provision is contrary to the Constitution. See Constitution of the Republic of Estonia. Commented Edition. § 15 commentary 1.2.

8 RKÜKo 17.03.2003, 3-1-3-10-02.

9 RKPJKm 19.04.2016, 3-4-1-34-15.

individual complaint submitted to the Supreme Court is inadmissible as soon as it is established in the case that the appellant had another effective means of legal protection for protecting their rights in the judicial procedure, irrespective of whether the appellant used it or not. Since the appellant could apply for a review of constitutionality of the contested regulation together with the individual complaint during judicial deliberations of the given civil case, the Supreme Court predictably considered the complaint to be inadmissible. However, the appellant pointed out that in the civil procedure, courts had interpreted legal instruments as conforming with the Constitution, which the appellant believed to be wrong, and the Civil Chamber of the Supreme Court had not directly reviewed these disputed provisions. The Supreme Court's current position is that if court judgments do not include an analysis of constitutionality (at least not in case of the Supreme Court's judgments), it does not necessarily imply that such analysis was not performed, and this cannot be a basis for accepting the individual complaint.[10]

The Supreme Court repeated its position that had already been expressed before, i.e. that the Constitutional Review Chamber of the Supreme Court is not a court instance standing above other Chambers of the Supreme Court, and to which it is possible to submit complaints against judgments of the Civil, Criminal, and Administrative Chambers. This confirms that even if the appellant believes that a Chamber of the Supreme Court made a mistake, it is not possible to identify and correct the mistake at the national level after the Supreme Court has adopted a judgment of the case (except for possibilities related to the performance of judgments of the European Court of Human Rights).

These positions lead to the conclusion that according to the present practice (if one adjudication on the substance of the issue can be considered"practice"), the area of application of an individual complaint is indeed limited to cases where there is no other possibility to address the issue of constitutionality in another (judicial) procedure.[11] If such possibility exists or existed, then irrespective of whether the appellant used this possibility or not, and irrespective of whether courts actually analysed the issue of constitutionality in their judgments (upon an application of the appellant or upon their own initiative), an individual complaint cannot be submitted. Former practice included a case there the possibility to submit an individual complaint was denied also in a situation where it was actually impossible to apply for a constitutional review in any other procedure.[12]

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10 See also RKPJKm 27.01.2017, 3-4-1-14-16, section 26. Apparently, the position of Mr T. Kolk is different. Effective and just procedure for adjudication of a claim regarding unconstitutionality of a legal instrument. – Juridica 2012/10, page 750.

11 At times, a missed opportunity can be restored by reinstating the deadline. See RKKKo 28.02.2017, 3-1-2-4-16.

12 RKPJKm 05.02.2008, 3-4-1-1-08, concerning the possibility of a constitutional review in the arbitration procedure.

In March 2017, the Ministry of Justice submitted a legislative intent to prepare a draft of the Act Amending the Constitutional Review Court Procedure Act to the coordinating circle.[13] It is stated in the legislative intent that so far, Brusilov's complaint has been the only individual complaint whose substance was adjudicated by the Supreme Court, and a large number of applications (according to the legislative intent's data, a total of 34) have been left unexamined for years since they were considered inadmissible. The legislative intent quite reasonably argues that the organisation of judicial procedures and possibilities, as well as grounds for submission of different appeals and complaints must arise directly from the laws, not from the practice of the Supreme Court. The right to address the Supreme Court with such individual complaints must also be a part of the respective judicial procedure created by laws. Yet, if the goal is not to make fundamental changes regarding the submission of applications to the Supreme Court compared to the wording of the court practice, it is unlikely to be possible to make the wording of the grounds for submitting a complaint in the form of an abstract legal provision much clearer than it is currently expressed and specified in many aspects in the judgments of the Supreme Court. It would probably still be up to the Supreme Court to specify more specific limits. It is also not quite clear from the legislative intent to what extent the right to submit a complaint to the Supreme Court would be expanded. On the one hand, it notes that the changes would not lead to significant influences, but on the other hand it points out that the number of applications might increase due to the expansion of the grounds for submitting applications.

In order to ensure comprehensive protection of a person's rights, clearer and perhaps even slightly wider acceptance of individual complaints might seem positive at first glance. Indeed, there may be very unusual situations where the present system provides no possibilities for judicial protection of rights.[14] Nevertheless, the creation of new possibilities for appeals and complaints is also problematic, which is why such judgments must be considered very carefully.

The Chancellor of Justice has also referred to a few problematic issues.[15] If we take into account the expansion of possibilities to submit individual complaints, whilst looking at the development form a more general perspective, without forgetting that the resources of the court system are limited, there is definitely a lot to discuss. Another aspect to bear in mind is that according to the Constitution, the Estonian

13 Legislative Intent for Preparation of a Draft of the Act Amending the Constitutional Review Court Procedure Act. – in the computer network: https://eelnoud.valitsus.ee/main/mount/docList/08abb8f2-5ab4-4c80-ad32-3ad9b8bc8b5a

14 In practice, turning to the Chancellor of Justice can also contribute to protecting one's rights.

15 The opinion of the Chancellor of Justice regarding the legislative intent for preparing a draft of the Act Amending the Constitutional Review Court Procedure Act.

court system consists of three instances (Article 148 of the Constitution). Without changing the Constitution, it is not possible to create a new court instance. When adjudicating individual complaints, the Constitutional Review Chamber of the Supreme Court could neither become a chamber positioned higher than other chambers, nor revise the judgments of other chambers. Therefore, the area of application of individual complaints could probably not include situations where the appellant could or could have protected his or her rights in a civil, criminal, or administrative judicial procedure. This area should also provide constitutional limits on possibilities to submit individual complaints.

In the light of such limits, general and administrative courts must aim, first and foremost, for the respective judicial procedures to provide comprehensive protection of rights. It means that a party's claims regarding the unconstitutionality of a certain provision must receive sufficient attention in the judicial procedure. Moreover, courts of every instance should demonstrate initiative for the review of constitutionality. Without a doubt, preparing a court judgment that declares a certain provision unconstitutional would require a significant amount of time from the court. Therefore, one can assume that reorganisation of the court system using measures which allow a judge to spend more time on the administration of justice would directly contribute to a better assurance of constitutionality.

The possibility to submit a so-called big individual complaint should be the last resort, because it should still be a civil, criminal or administrative court that is in charge of protecting a person's rights, including fundamental rights, and that holds the responsibility. There should also be discussions on how the possibility to submit individual complaints influences the work of general courts in situations where in order to protect a person's rights, some basis for the right to appeal would have to be interpreted in a broader way. The main question is whether a broader possibility to submit individual complaints can reduce courts' initiative of assuring rights with no exceptions during the formation and development of legal practice. It is also important to ensure that responsibility for constitutional review is not blurred. According to the Constitution, this is the duty of every court, not just that of the Supreme Court.

Establishing a clearly worded possibility to submit individual complaints, especially Establishing a clearly worded possibility to submit individual complaints, especially expanding the bases for such complaints would presumably, at least at the beginning, cause an increase in the number of complaints. Advocates are obliged to use all means and methods which are in conformity with the law in the interests of a client, while preserving their own professional honour and dignity (Article 44(1)(1) of the Bar Association Act). An advocate must explain the availability of such possibility to the client, and most probably, the client will attempt to use it. Judging by daily legal practice, I would predict that certain persons might

try to use the new situation to get a more beneficial end result. If practice shows that possibilities for such complaints to be accepted for procedure are narrow, the number of complaints may start to decrease. In the end, everything depends on the exact grounds for the submission of an individual complaint.

When expanding the possibilities for submitting individual complaints, it is also necessary to carefully consider how individual complaints can influence the possibility to turn to the European Court of Human Rights (ECHR). On the one hand, it would, indeed, be good if individual complaints allowed to reduce the number of applications submitted to ECHR from Estonia, provided that such complaints are accepted and the appellant receives a favourable judgment, which is rather exceptional. On the other hand, the condition for applying to ECHR is that all domestic means of legal protection are exhausted. Although ECHR approaches this criterion in a flexible manner, expanding the grounds for individual complaints could turn an individual complaint into one of the means of legal protection that needs to be exhausted.[16] This would mean that if a person wanted to apply to ECHR, he or she would first have to submit an individual complaint in order to comply with the acceptance criteria of ECHR. However, this would, in turn, lead to a higher number of individual complaints.

I would like to go back briefly to note that in order to ensure comprehensive protection of persons' rights, a possibility to receive legal aid must also be ensured in addition to possibilities for appeals established by laws. Therefore, expanding the possibilities for submitting individual complaints should definitely include the possibility to receive legal aid provided by the state for a comprehensive analysis of the situation related to the possible breach of fundamental rights, as well as for preparing the appeal. This entails an expansion of grounds for receiving state legal aid, but also imply an allocation of additional funds. Situations that might require the submission of an individual complaint are probably very unique and complex, implying a certain level of qualification from the provider of legal aid, and increasing the amount of time spent. This means that funds allocated by the state for legal aid must be sufficient in order to ensure competent legal consulting under presumably very complicated and singular situations, where other means of legal protection do not allow protecting the person's position. One measure that could perhaps have a positive impact on the situation is to increase the amount of funds allocated for the provision of state legal aid at the so-called first level, i.e. in a regular court procedure.

16 See for example ECHR case Grisankova *vs.* Latvia.

Further in form, closer in substance

Expanding legal protection has many facets and possibilities, if only we could find the right way for it. One case concerning constitutional review, adjudicated in 2016, made the author wonder whether a court judgment which at first glance seems to be leading the judicial branch of power away from the appellant could transform into a guideline that brings parties to the procedure closer to the court, this time not from the position of the right to appeal, but from the position of communication with the court.

The given case concerned provisions regarding the Code of Administrative Court Procedure (CoACP) and the **jurisdiction of administrative courts**.[17] In particular, the Tartu Administrative Court found that certain provisions of the CoACP were unconstitutional in the part in which they established the obligation of appellants residing in the work area of the Tartu Administrative Court to submit appeals against the actions of the Estonian National Social Insurance Board (ENSIB) to the Tallinn Administrative Court. The disputed matter involved the ENSIB's judgment to terminate the payment of family support to a person (father) residing in the work area of the Tartu Administrative Court. The judgment stated that it was made in Jõgeva. The Tartu Administrative Court denied the ENSIB's application to transfer the case to the Tallinn Administrative Court, declaring the respective provisions of the CoACP invalid in the part in which they provided for the obligation of appellants residing in the work area of the Tartu Administrative Court to submit appeals against the actions of the ENSIB to the Tallinn Administrative Court. Although a number of parties to the procedure, such as the Minister of Social Affairs and the Minister of Justice found that such court jurisdiction order where all appeals submitted against the judgments of the ENSIB are subordinate to the Tallinn Administrative Court is contrary to the Constitution, the Supreme Court did not satisfy the application of the Tartu Administrative Court. The Supreme Court also did not agree with the interpretation suggested by the Chancellor of Justice which would have retained the jurisdiction with the Tartu Administrative Court.

The Supreme Court mentioned that such order where the judgments of the ENSIB cannot be appealed against in the court at the place of residence, but only in the Tallinn Administrative Court, has an adverse effect on the fundamental right to equality established in Article 15(1) (the right of recourse to the courts), Article 24(2) (the right to attend any hearing held by a court in this person's case), as well as Article 12(1) of the Constitution. The question of adverse effect on the fundamental right to equality arose from the fact that although similarly to the ENSIB, the location of the Estonian Tax and Customs Board within the legal

17 RKPJKo 10.05.2016, 3-4-1-31-15.

meaning is in Tallinn, a special rule was established for the Tax and Customs Board, according to which applications can still be submitted to the administrative court at the place of residence or location (Article 8(6) of CoACP).

If follows from the positions of the Supreme Court, among other things, that the reorganisation of the court system and the development of modern means of communication resulted in a situation where distance between courts and people is increasing, and within reasonable limits, this is unavoidable and permissible. I would agree with the Supreme Court in that codes of procedure provide for numerous possibilities for "the court to reach the person". For instance, the Supreme Court mentioned the option of holding a court session in a location other than the courthouse in which the procedure is conducted (Article 129(2) of CoACP), the possibility to carry out the inspection of the file outside the courthouse and probably rather in a courthouse at the place of residence or location of the applicant (Article 88(6) of CoACP), as well as the possibility to organise a procedural conference (Article 129(3) of CoACP and Article 350 of the Code of Civil Procedure). However, the use of such possibilities requires a timely submission of relevant applications which the court can, but does not necessarily have to satisfy. For example, while the representative of the respondent may start to examine a court file on a short notice, the complainant needs more time and planning. Without a doubt, such procedure is more troublesome for the complainant, and the complainant's possibilities depend on the court's readiness to meet his or her needs. Moreover, the use and provision of such possibilities implies expenses. Therefore, increasing the distance between the court and the appellant also causes expenses for the courts.

On the other hand, if the Supreme Court considered the availability of such possibilities as an argument to say the adverse effect on significant fundamental rights was small, such possibilities must also be reasonably and realistically available for complainants. Hopefully, this will be achieved in the course of court practice, but also through cooperation between different county and administrative courts, if necessary. A number of parties to the procedure and the dissenting Justices of the Supreme Court I. Koolmeister and J. Luik pointed out that typical users of the services of the ENSIB are socially vulnerable persons, mostly natural persons who experience difficulties in coping with everyday life. In such cases, it is especially important to ensure that different modem possibilities for communication with courts are effectively available for the persons, since the availability of such possibilities is a prerequisite for the provisions of court jurisdiction to be considered constitutional. Therefore, even if the Supreme Court has not seen a problem in the fact that the court (courthouse) has physically moved further from the complainant in several cases, such judgment indicates that in terms of possibilities to organise work processes, the court must gradually move closer to parties to the procedure. This is a very reasonable approach.

Where to consider the matter, near or far?

In continuation of the topic of closeness, it is relevant to mention that in 2016, another chapter was added to the discussion on **long-term visits to persons in custody.**[18] While prisoners have the right to long-term (normally 24-hour) visits from their close ones, then according to Article 94(5) of the Imprisonment Act, long-term visits from close ones are not allowed for persons in custody. In 2011, the permissibility of this limitation was already reviewed by the Constitutional Review Chamber in the form of concrete norm control, and the Chamber found that the limitation was constitutional.[19] However, the Tallinn Administrative Court and the Tallinn Circuit Court have referred to newer judgments of the European Court of Human Rights[20], claiming that the state cannot deny the possibility of long-term visits to persons in custody solely on the basis of prohibiting legal provisions. An explanation is required as to why such limitation is necessary and justified in case of the specific individual. Despite the fact that various parties to the procedure considered the absence of the right of discretion with respect to allowing long-term visits to be a problem, the Supreme Court did not declare the disputed part of the Imprisonment Act to be unconstitutional within the framework of concrete norm control.

In its 2011 and 2016 judgments, The Supreme Court stated has that questions related to adverse effects on family life are considered both when the person is taken into custody as a restricting measure, and when the custody is subsequently extended. Defence lawyers often use circumstances related to private life, i.e. family life, as the reason to object custody or its extension, and the combination of such circumstances can be an argument that supports the person's release from custody. The complexity of this question was pointed out by E. Kergandberg and S. Laos in their dissenting opinions. They believe that there are grounds to assume that in court practice, public interest is a priori assessed as wider and more solid in case of long-term custody, and that in general, it always outweighs the intensity of adverse effect on the family life of the person in custody. However, a counter-argument is that if the intensity of adverse effect on the family life of the person in custody is reduced, the weight of arguments against extending the custody is somewhat reduced, and it can even lead to a longer period of custody. The primary goal of the person is still to become free, rather than "enjoy" long-term visits while being held in custody.

18 RKPJKo 16.11.2016, 3-4-1-2-16.

19 RKPJKo 04.04.2011, 3-4-1-9-10.

20 ECHR Varnas *vs.* Lithuania and ECHR Costel Gaciu *vs.* Romania.

Another issue subject to debate is whether the need to limit the communication of the person held in custody, i.e. long-term visits, decreases over time. One must agree with the Supreme Court in that in some cases, the risk of influencing the criminal procedure remains until the stage of the cassation procedure.[21] However, such risk decreases with time, which must be and is considered. Otherwise, usual short-term custody at the beginning of the pre-trial procedure could be considered needless. It is definitely debatable how far we can go with a pragmatic approach, but the claim that a case can be sent from a court of higher instance back to the county court (Article 341 of the Code of Criminal Procedure), which was voiced in a court judgment, is a problematic one. This can indeed happen, but it is important to remember that such situation is only possible if courts have significantly infringed the criminal procedure law. It is doubtful that a situation where the grounds for limiting a person's rights were not considered (consideration was deemed unnecessary) can be justified with the possibility that courts might significantly breach procedural requirements. The general problem is that the longer the court procedure lasts, the harder it is to establish the truth. In general, when assessing balance of a person's rights, it must be assumed that a court procedure is mostly conducted according to the requirements.

In the judgment, the Supreme Court points out that Article 11 of the Constitution, according to which limitations to the fundamental rights are necessary in a democratic society, does not include the person's fundamental right of discretion. It merely requires discretion to result in a proportionate outcome from the position of limiting the person's fundamental right (section 119). According to the Chamber's assessment, such constitutional right of discretion does not arise from any other provision of the Constitution. Adverse effect on the integrity of family life of a person can also be a proportionate measure if it has been considered during the creation of the law by the legislator whose legitimacy is based on democratic principles. Such approach can be disputed, as just like the Supreme Court itself pointed out, it is not possible to abandon the discretion stage completely. In order to identify the proportions of an adverse effect on a person's fundamental rights, the adverse effect and the interest justifying it must be balanced against each other. The subject of the question is rather whether the discretion stage can take place further away, i.e. at the level of the legislator, or whether it must necessarily take place closer, i.e. considering the circumstances of the individual case. For comparison purposes, it is interesting to note that in cases concerning weapons permits[22], the Supreme Court has considered the absence of a general

21 Apparently there have also been cases where a person committed a very serious crime, but taking this person into custody was related not to the risk of influencing the criminal procedure, but to the risk of the person fleeing from prosecution.

22 For example, 26.04.2011, 3-4-1-2-11.

case-based right of discretion as contrary to the Constitution, however, it has stated that it is permissible to limit certain persons' rights without applying the right of discretion.[23]

The decisive factor in the given case was probably the Supreme Court's judgment to very clearly limit the constitutional review with the specific circumstances of the applications submitted by persons concerned. The Court found that under these specific circumstances (charges against the person, including extortion and belonging to a criminal organisation), forbidding long-term visits with the aim of crime prevention cannot be considered as a disproportionate measure. The Court reached such conclusion despite the fact that there is no separate individual case-based right of discretion regarding the permission or prohibition of long-term visits. Nevertheless, the Supreme Court stressed that under different circumstances, applying an absolute prohibition of long-term visits to a person held in custody can lead to an unconstitutional result. In their dissenting opinions, justices of the Supreme Court E. Kergandberg and S. Laos also refer to the need to address the given topic more thoroughly in the future than it was done in the given case.[24] This problem definitely deserves more attention, also from the position of the rights of children, taking into account legitimate goals that could be achieved by limiting communication with children.[25]

The possibility to consider specific circumstances of an individual case may in turn constitute a serious argument to be taken into consideration during the assessment of constitutionality. The argument regarding the existence of the right of discretion was at the centre of the last and probably most widely discussed dispute regarding the constitutionality of **the administrative reform**.[26] Numerous observations can be made with regard to this dispute, especially considering that colleagues of the author of this article from the law office represented the Government of the Republic in this case. However, I will mention a few.

Although in order to increase the capabilities of local governments, the legislator had issued a regulation for changing the administrative and territorial organisation, which generally requires a local government with at least 5000 residents to be formed, the Supreme Court granted the Government of the Republic the

23 For example, 14.12.2010, 3-4-1-10-10, section 60.

24 Dissenting opinion of Justices of the Supreme Court E. Kergandberg and S. Laos in case 3-4-1-2-16.

25 See also K. Žurakovskaja-Aru. The Right *vs.* Possibility of a Child to Communicate with an Imprisoned Parent – Reversed from Communication Outside Prison. – Juridica 2015/6, pp. 405–417.

26 RKPJKo 20.12.2016, 3-4-1-3-16.

right of discretion regarding the adoption of the final judgment on changing the administrative and territorial organisation. The possibility to assess the actual capabilities of a local government served as the argument to justify the constitutionality of the regulation.

From the academic point of view, it is interesting to note that when assessing the constitutionality of the Administrative Reform Act, the Supreme Court did not consider it possible to fulfil the requirements of the **proportionality review**. Arguing that the Constitution gives Riigikogu a lot of leeway on establishing the administrative division of the country's territory, the Supreme Court only assessed whether the legislator had complied with the conditions of prohibition of arbitrariness by establishing the given law. There have been numerous situations where Riigikogu has had a lot of leeway, but apparently no reason to depart from the principle of proportionality and its subprinciples (suitability, necessity, moderateness) as a condition for material constitutionality of legal instruments. Proportionality control has also been used for the discretion of adverse effects on different constitutional principles. For example, the Supreme Court *en banc* has even used proportionality review to assess the permissibility of adverse effects that the Treaty Establishing the European Stability Mechanism has on the financial competence of Riigikogu, as well as the respective financial sovereignty of the state and the principle of a democratic state based on the rule of law.[27] Admittedly, there are areas in which numerous different judgment-making possibilities exist, and in such cases, a convulsive justification of suitability, necessity, and moderateness gives an artificial impression of a thorough analysis. Hopefully, further practice of the Supreme Court will make it clear which cases require a proportionality review, and which ones need a more general assessment of compliance with the prohibition of arbitrariness.

That case left one more issue to be resolved in further practice. Namely, the question as to which procedure should be used to contest a regulation of the Government of the Republic, the result of which is that a local government unit ceases to exist as a subject? In his competing opinion, justice of the Supreme Court J. Põld pointed out that in order to contest such judgment, one could consider an administrative court procedure or a constitutional review court procedure, but there is no clarity as to the exact procedure of such contestation. J. Põld notes that judicial protection of a local government unit can be illusory if it is unclear which court procedure should be used to contest the given regulation on the basis of Article 13(1) of the Administrative Reform Act.

27 RKÜKo 12.07.2012, 3-4-1-6-12.

Whether the possibility to defend rights in such an unclear situation is illusory or just complicated, is the question of taste. It is, however, clear that a situation where a possibility for legal defence exists in principle but it is not clear in which procedural form such protection of rights can be applied for, is very unfavourable and eventually also very costly for parties to the procedure. A good example of such problem is a case adjudicated by the Special Panel. As a result of its judgment, a dispute that had already reached the Supreme Court was sent back to the county court and also to the administrative court.[28] Aside from dealing with the substance of the case, both parties to the procedure and courts have to dedicate a lot of attention on whether the chosen procedural order is correct.

As it is clear from the above, different procedural topics are very interesting for lawyers (including the author) from the professional viewpoint. In the end, a procedure is the very framework within which a dispute is adjudicated, which is why it cannot be underestimated. On the other hand, an excessive focus on the procedure, as well as a very strict division between court branches, do not always help to work in a reasonable way to achieve legal stability regarding the question that made the person turn to court. However, at times, it is important not to stop halfway, and to ensure sufficient clarity for the parties to the procedure about the procedure for the adjudication of the dispute, so that the procedure used for the final resolution of the substance of the problem can be headed in the right direction from the very beginning. I mentioned the topic of closeness a number of times. If everyday administration of justice is available and close to a person, their constitutional rights are also be better protected.

28 See RKEKo 28.03.2016, 3-2-1-178-15 (Judgment of the Special Panel of the Supreme Court) together with the dissenting opinion of P. Pikamäe (joined by V. Kõve).

Administrative Reform in Focus of the Constitutional Review

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On 7 June 2016, Riigikogu adopted the **Administrative Reform Act**. The Act entered into force on 1 July 2016. On 30 June 2016, the council of Kõpu Rural Municipality submitted an application to the Supreme Court to review the constitutionality of the Administrative Reform Act. By the end of September, the Supreme Court received applications from another 25 councils of local governments: councils of rural municipalities of Abja, Emmaste, Haaslava, Illuka, Juuru, Järvakandi, Kambja, Karksi, Kullamaa, Kõo, Käina, Leisi, Luunja, Lüganuse, Mäetaguse, Nõo, Pala, Pöide, Pühalepa, Rakke, Tudulinna, Tõstamaa, Vaivara, and Ülenurme, as well as the Loksa City Council.

The councils challenged the change of the administrative territorial organisation, its funding, and the constitutionality of provisions which concerned the 2017 elections to councils of local governments. The councils asked to declare invalid Article 3, Article 7(4) and (5), Article 8, and Articles 9–13, as well as Article 20(1), Article 24, and Article 28(2) of the Administrative Reform Act. In an alternative application, the councils of rural municipalities of Juuru and Tõstamaa asked to declare the Administrative Reform Act as a whole unconstitutional and invalid. The Constitutional Review Chamber of the Supreme Court reviewed the applications on 4 October 2016 during an open court hearing. The Chamber made its long-awaited decision in the constitutional review case no. 3-4-1-3-16 on 20 December. The Supreme Court partly satisfied the petitions of councils of rural municipalities of Kõpu, Juuru, and Tõstamaa, and **declared the limit for covering merger costs (100,000 euros) stated in the second sentence of Article 24(1) of the Administrative Reform Act unconstitutional and invalid**. The Supreme Court did not satisfy the rest of the applications.

This article takes a closer look at questions raised regarding the minimum size of local governments and the funding of changes in the administrative-territorial organisation.

Prohibition of arbitrariness

All applicants found that provisions of the Administrative Reform Act breached the guarantees established in the Constitution for local governments: guarantee of local governments' individual legal status and financial guarantee.

Article 154(1) of the Constitution states that all local matters are determined and administered by local authorities, which discharge their duties autonomously in accordance with the law. According to Article 158 of the Constitution, the administrative area of a local authority must not be changed without first hearing the local authority's opinion. The Chamber found that the given provisions in conjunction with each other are the basis that prohibit the state authority to act arbitrarily towards an individual local government by changing the administrative-territorial organisation of the local government. This prohibition constitutes a specific expression of a general prohibition of arbitrary exercise of the state authority established in the first sentence of Article 3(1) of the Constitution regarding a local government. The prohibition of arbitrariness assumes that change of the administrative-territorial organisation of a local government formally and materially corresponds to the Constitution, however, it is necessary to take into consideration Article 158 of the Constitution, according to which borders of local governments cannot be changed without hearing the opinion of the authority.[1]

Article 2(2) of the Constitution states that in terms of the organisation of its government, Estonia is a unitary state whose administrative division is provided by law. The Chamber found that it follows from the given provision that **the legislator has a broad decision-making space for establishing and changing the administrative-territorial organisation of the local government**. Given the legislator's big decision-making space, the Chamber did not consider it possible to follow the requirements of control of proportionality, and it only assessed whether by enacting the Administrative Reform Act, the legislator complied with the conditions of prohibition of arbitrariness.[2]

Aim of the administrative reform

During the review of material constitutionality of the provisions regulating the change of administrative-territorial organisation, the Chamber assessed whether the provisions had a constitutional aim and helped to achieve the aim.

1 RKPJKo 20.12.2016, 3-4-1-3-16, section 87 and 88 (Decision of the Constitutional Review Chamber of the Supreme Court).

2 Sections 89 and 91 of the decision.

According to Article 1(2) of the Administrative Reform Act, the purpose of the administrative reform is to support the increase of local governments' capacity in offering high quality public services, using regional prerequisites for development, increasing competitiveness, and ensuring more consistent regional development. In order to achieve this purpose, this Act provides for the alteration of administrative-territorial organisation of rural municipalities and cities, as a result of which local governments must be able to independently organise and manage local life and perform functions arising from law. The implementation of the administrative reform also takes into account the aims of the state governance reform in the context of organising public administration, which include ensuring a good quality and availability of public services, and cost savings.

The letter of explanation of the Administrative Reform Act lists the fragmented organisation of local governments, and local governments's difficulties in guaranteeing fundamental rights as the main problems that need to be resolved.[3] According to the explanations, the need for an administrative reform resulted from local governments' capacity problems that did not allow them to duly perform their tasks arising from the law.[4]

The Chamber found that the goal of improving local governments' capacity to provide public services, as established by the legislator, is constitutional. Public services that must be provided by local governments are related to fundamental rights and freedoms, guarantee of which is also the obligation of local governments according to Article 14 of the Constitution. If local governments are unable to provide such services at a sufficient level, fundamental rights may be left unprotected.[5] The Chamber referred to an earlier position of the Supreme Court *en banc*, according to which the state cannot allow a situation where the availability of basic public services largely depends on the degree of economic sustainability of the local government at a person's place of residence or location.[6]

At least 5,000 residents

The central category of the administrative reform is **the capacity of a local government**. Local governments must be able to independently organise and manage local life and perform functions arising from law. According to the **criterion**

3 Letter of explanation of the Draft Administrative Reform Act (200 SE). Available online at https://www.riigikogu.ee/tegevus/eelnoud/eelnou/fec18826-0e43-4435-9ba8-598b6ed4ea40/Haldusreformi%20seadus

4 Ibid, section 11.

5 Sections 116 and 118 of the decision.

6 RKÜKo 16.03.2010, 3-4-1-8-09, section 67 (Decision of the Supreme Court *en banc*).

for the minimum size of a local government established in Article 3 of the Administrative Reform Act, a local government is able to guarantee the professional capacity necessary for organising tasks arising from the law, and provide quality services to all residents of the local government according to the aim of the administrative reform stated in Article 1(2) of the Administrative Reform Act, if the local government has **at least 5,000** residents.

According to the letter of explanation of the Draft Administrative Reform Act, the numerical value of the criterion for the minimum size of a local government is based on the professional capacity of officials, as well as the justifications related to the potential of providing public services. According to an opinion shared by many experts, 5,000 residents is the minimum number that allows a local government to effectively and sustainably provide obligatory services established by the law, and develop itself.[7]

The administrative reform is based on the understanding that higher capacity can be achieved by the economies of scale effect. A bigger local government provides a possibility to specialise in aspects that enhance competence, and optimised workload also results in more competitive salaries. Increase in the number of residents allows to spend more funds on a substantial development of different fields, provision of public services, and investments.[8]

Article 9(3) of the Administrative Reform Act provides for four exceptions where the Government of the Republic does not have to initiate change in the administrative-territorial organisation of a local government that does not meet the criterion for the minimum size of a local government. The exceptions are based on the following: low density area; local governments related to each other historically, culturally and geographically; island local municipalities; decrease in population. In case of the first two exceptions, the condition is that a newly formed local government must have **at least 3,500** residents. The condition for applying the exception is that retention of the local government must not lead to negative impact on the circumstances listed in Article 7(5) of the Territory of Estonia Administrative Division Act. According to Article 7(5) of the Territory of Estonia Administrative Division Act, the following circumstances shall be considered upon initiating an alteration of the administrative-territorial organisation: 1) historical justification; 2) effect on residents' living conditions; 3) residents' sense of cohesion; 4) effect on the quality of providing public services; 5) effect on administrative efficiency; 6) effect on the demographic situation; 7) effect on the organisation of transport and communications; 8) effect on business environment;

7 Letter of explanation of the Draft Administrative Reform Act, page 12.

8 Ibid, page 22.

9) effect on the educational situation; 10) organisational functioning of the local government as a common service area.

The requirement of having at least 5,000 residents as the main basis for the administrative reform resulted in an opposition from local governments and deserved a lot of criticism from the media. The applicants claimed that compulsory mergers of local governments initiated by the Government of the Republic and based on the minimum local government criteria were not in accordance with the Constitution. The reasons presented by the legislator were not convincing. The applicants claimed that the legislator had not explained why such criterion provided for the specific number of 5,000 residents, whereas other criteria that would allow to assess the capacity of local governments (e.g., the circumstances stated in Article 7(5) of the Territory of Estonia Administrative Division Act) were disregarded.

Right of discretion of the Government of the Republic

In relation to the minimum number of residents, the central question of the dispute was whether the Government of the Republic is obliged to change the administrative-territorial organisation of local governments with less than 5,000 residents with respect to which no exception can be made on the basis of Article 9(3) of the Administrative Reform Act.

The answer given to this question has a defining importance, especially for those local governments that did not voluntarily comply with the administrative-territorial reform. However, this is not the only reason. Namely, according to Article 9(2), the proposal of the Government of the Republic may also include local governments that meet the criterion or that do not meet the criterion for the minimum size of a local government, regarding which the Government of the Republic has adopted a regulation for changing the administrative-territorial organisation, and changing the administrative-territorial organisation of which would have a positive effect, on the basis of circumstances provided for in Article 7(5) of the Territory of Estonia Administrative Division Act. Such "inclusion" is provided for in a situation where change is necessary or expedient for assuring the capacity of a local government that does not meet the criterion for the minimum size of a local government according to Articles 1(2) and 2(3) of the Administrative Reform Act. The applicants claimed that the criterion for the minimum size of a local government stated in Article 3 of the Administrative Reform Act is binding with regard to decision-making on a change of the administrative-territorial organisation initiated by the Government of the Republic, and that the Government of the Republic must adopt a decision regarding a change of a local government that does not meet the criterion for the minimum size, if there are no grounds to apply the exceptions stated in Article 9(3) of the Administrative Reform Act. However,

the Chamber found that **the criterion for the minimum size of a local government is binding with respect to the Government of the Republic only when the procedure is initiated, and not when the final decision is adopted**, since the Administrative Reform Act also states the conditions based on which the Government of the Republic can leave the administrative-territorial organisation of a local government that does not meet the criterion for the minimum size unchanged by terminating the procedure.[9]

The Chamber emphasised that according to Article 9(9) of the Administrative Reform Act, when the Government of the Republic decides to change the administrative-territorial organisation, it must assess the justification of the local government's negative opinion, and therefore, the law imposes the **obligation of discretion** on the Government of the Republic. According to Article 9(9) of the Administrative Act, the Government of the Republic must make its decision, taking into consideration the circumstances stated in Article 9(2) and (3), which is why the space for consideration of the Government of the Republic and the circumstances to be identified are mainly established in these provisions.[10]

According to the opinion of the Chamber, it follows from Article 9(9) and (2) that if a local government that does not meet the criterion for the minimum size of a local government and to which no exception can be applied on the basis of Article 9(3), is able to ensure professional capacity required for performing tasks arising from the law, and provide quality public services to all residents of the local government in accordance with the aim of the administrative reform stated in Article 1(2) of the Administrative Reform Act, the Government of the Republic **does not have to** complete the reform of the administrative-territorial organisation with respect to such local government. Thus, the Government of the Republic can also terminate the procedure for a change of the administrative-territorial organisation on the basis of Article 9(9)(1) of the Administrative Reform Act in case of a local government that concludes in its reasoned opinion that it is able to perform its tasks even if such local government has fewer than 5,000 residents. The Chamber also explained that if the Government of the Republic has decided to change the administrative-territorial organisation of a local government on the basis of Article 9(2) of the Administrative Reform Act, in case of a dispute, the court can check whether the Government of the Republic has correctly identified factual circumstances and correctly exercised its right of discretion when enacting its regulation on the basis of Article 9(9)(2).[11]

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9 Section 100 of the decision.

10 Section 103 of the decision.

11 Sections 104 and 105 of the decision.

Does bigger equal more powerful?

The applicants believed that impact of the number of residents on the capacity of local governments is different, and that there is no general optimum size of a local government. According to the applicants' opinion, it is not possible to justifiably claim that a forced merger of local governments would help to improve their ability to provide public services.

According to the assessment of the Chamber, the measure chosen by the legislator for achieving the aim was not clearly inappropriate. In its assessment, the Chamber considered the broad right of discretion given to the Government of the Republic, as well as the fact that before establishing the minimum number of residents, the legislator tried to stimulate the creation of larger local government units using another method, namely by establishing the Promotion of Local Government Merger Act already in 2004.[12]

The Chamber found that there is no reason to doubt the legislator's assumption that forming larger local governments can improve the capacity of local governments to provide public services. The Chamber admitted that abstractly, the capacity of local governments can be assessed using criteria other than the number of residents, however it emphasised that **the judicial power cannot replace the legislator in offering other approaches**. According to Article 2(2) and 3(1) of the Constitution, **establishing the basic principles of local governments' capacity is such an important national issue that only Riigikogu is competent to decide upon it**. Therefore, the Chamber did not see any reason to doubt the constitutionality of forming local governments with at least 5,000 residents.[13]

The dispute that erupted over the minimum size obscured a bigger goal of the reform – the formation of local governments with **at least 11,000** residents. Thus, according to Article 1(3) of the Administrative Reform Act, in order to achieve the goal of the administrative reform, the formation of local governments with at least 11,000 (criterion of a local government's recommended size) residents **must be preferred** in the course of changing the administrative-territorial organisation.

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12 Sections 104 and 105 of the decision.
In the opinion issued as part of the court case, the Government of the Republic noted that although the Territory of Estonia Administrative Division Act that provides for the grounds for the merger of local governments has been in force for 21 years, and the Promotion of Local Government Merger Act that provides for paying a merger grant and offering other concessions to local governments that merge upon their own initiative has already been in force for 12 years, the number of residents is still below 5,000 in 80% of local governments, and below 2,000 in more than half of local governments (section 50 of the decision).

13 Section 120 of the decision.

Substantive part of the administrative reform

Another reason for criticism addressed against the administrative reform of local governments was the fact that services provided by local governments and their standard of quality are not established in more detail until the second stage of the reform.
Article 38 of the Administrative Reform Act provides for changes of laws of the area for the purpose of implementing the administrative reform. On the basis of this article, ministries have an obligation to analyse laws of the area of responsibility based on the area of government, in order to identify tasks that are performed by the state, but should be handled by local governments due to their nature, which could hence be assigned to local governments. In relation to that, the aspects of forming the revenue base allocated to local governments for performing their tasks will also be reviewed. According to the plan, changes in the tasks and organisation of local governments should enter into force on 1 January 2018.
The applicants found that the goal of ensuring that the administrative reform results in the formation of local governments whose sufficient capacity would be able to perform all tasks assigned to them by the law and ensure quality public services, in general corresponds to the Constitution, however, it is not sufficiently specified. The present reform is just an administrative-territorial reform, which cannot be implemented without a substantial administrative reform. The applicants believed that forced merger has an adverse effect both on the principle of legal clarity and the principle of legitimate expectation (Article 10 of the Constitution), as it is **not clear which public services and with which quality must be provided by local governments**. The applicants found that in the interest of legal clarity, the legal set of rules concerning the administrative reform should have been adopted at the same time.

The Chancellor of Justice also agreed that together with the norm regulating administrative and territorial changes, it would have been appropriate to adopt an implementation act and standards for the provision of public services, which would allow to better assess the administrative sustainability of a local government. However, as opposed to the applicants, the Chancellor of Justice found that failure to do that does not cause unconstitutionality.

According to assessment of the Constitutional Review Chamber of the Supreme Court, provisions of the Administrative Reform Act cannot be deemed unconstitutional on the basis of a claim that due to the absence of relevant laws, it is not clear which tasks must be performed by local governments after the implementation of the administrative-territorial reform, what requirements will be applied to the provision of public services in the future, and what funds will be available for performing such tasks. The Chamber came to a conclusion that future changes made in laws and possible problems regarding the funding of local governments do not constitute a legal barrier to the execution of the administrative-territorial reform

initiated by the Government of the Republic, and that application of Article 9(9) of the Administrative Reform Act must be based on local governments' capacity to perform tasks established according to the law presently in force.[14]

Merger grant or compensation of costs

According to the second sentence of Article 154(2) of the Constitution, the costs related to national obligations assigned to a local government by law are covered from the state budget. It was not disputed in the case that the change of the administrative-territorial organisation undertaken under the initiative of either a local government or the Government of the Republic is a national task assigned to the local government, the costs related to which must be compensated from the state budget.

According to Article 20 of the Administrative Reform Act, if the change of the administrative-territorial organisation is initiated by the council of a local government, a new local government formed resulting from the change is paid the **merger grant**. The rate of the merger grant is 50 euros per resident of the merged government unit. The minimum amount of the merger grant to which a unified local government is entitled is 150,000 euros, and the maximum amount is 400,000 euros. According to Article 23 of the Administrative Reform Act, the merger grant allocated from the state budget can be used for covering the cost of actions listed in Article 6(2) of the Promotion of Local Government Merger Act, and also for paying a one-off compensation for the chairman of the council, mayor of a rural municipality, or mayor of a city of the respective local government upon the expiry of their powers.

If the change of the administrative-territorial organisation is initiated by the Government of the Republic, the merger grant is not paid. In such case, according to the second sentence of Article 24(1) of the Administrative Reform Act, the costs stated in Article 6(2)(1)(4[1]) of the Promotion of Local Government Merger Act or in Article 12(2)(4) of the Administrative Reform Act resulting from the change of the administrative-territorial organisation are **compensated** to the local government from the state budget on the basis of **expenditure documents**.

The applicants claimed that Article 24 of the Administrative Reform Act is contrary to the financial guarantee stated in the second sentence of Article 154(2) of the Constitution in conjunction with the **principle of equal treatment** arising from Article 12(1) of the Constitution, as it precludes the payment of the merger grant to most local governments in whose case the change of the administrative and territorial order is initiated by the Government of the Republic.

14 Sections 123 and 130 of the decision.

The Chamber noted that different treatment is manifested in that in case of a merger initiated by the council, local governments do not have to give proof of the actual expenses related to the merger, and they are paid the merger grant according to a calculation basis (number of residents) established by the law. In addition to that, there are more actions for whose funding the merger grant can be used. However, if a merger was initiated by the government, in order to have its costs compensated, the local government undertakes to submit expenditure documents, and there will be fewer actions whose related costs are compensated.

The Chamber found that **different treatment of local governments was not arbitrary**. The goal of different compensation of expenses related to the change of administrative-territorial organisation was to encourage local government units to merge upon an initiative of the councils of local government units. If the administrative-territorial organisation is changed upon an initiative of the councils of local governments, the state interferes in the right of self-organisation of local governments to a lesser extent, local governments have better possibilities for making their choices, and have more time to complete the merger. The legislator has established exceptions for cases where the Government of the Republic changes the administrative-territorial organisation of a local government in a situation where councils have already merged upon their own initiative or could not merge upon their own initiative due to factual obstacles.[15]

Maximum limit of merger costs

According to the second sentence of Article 24(1) of the Administrative Reform Act, costs related to changes in the administrative-territorial organisation initiated by the Government of the Republic are compensated on the basis of expenditure documents, however, in the extent not exceeding 100,000 euros. The councils of rural municipalities of Kõpu, Juuru, and Tõstamaa were of the opinion that the maximum limit of compensating the costs was contrary to the Constitution.

In the letter of explanation of the Draft Administrative Reform Act, the establishment of the maximum limit was explained by the need to prevent local governments from spending unreasonable amounts before the merger. The Chamber found that **this could not be a legitimate reason for deviating from the requirement stated in the second sentence of Article 154(2) of the Constitution**. The requirement stated in the second sentence of Article 24(1) of the Administrative Reform Act, according to which costs are compensated on the basis of expenditure documents, must be sufficient for preventing unjustified costs. In addition to that, the minister responsible for the given field can establish more

15 Section 203 of the decision.

specific conditions and procedures for the compensation of costs (Article 24(2) of the Administrative Reform Act).[16]

The Draft Administrative Reform Act does not include an explanation as to why the amount of 100,000 was chosen as the maximum limit of costs. A representative of the Government of the Republic confirmed that so far, local governments' merger-related costs have usually remained below 70,000. The examples presented by the Government of the Republic concerned voluntary mergers of two, three, or four local governments. It is possible that in case of the administrative-territorial change initiated by the Government of the Republic, the number of merging local governments will be higher. Therefore, according to the assessment of the Chamber, it is not possible to rule out the possibility that the costs will exceed 100,000 euros in case of a change of the administrative-territorial organisation initiated by the Government of the Republic. The Chamber found that the financial guarantee arising from the second sentence of Article 154(2) of the Constitution is established as a rule, which is breached if the costs related to the performance of national tasks assigned to a local government by the law are not covered from the state budget, or are covered only in part. **Therefore, the law that partly precludes the compensation of costs breaches the Constitution and must be declared invalid in this part**.[17]

Language of the law

Although the Supreme Court declared that the Administrative Reform Act was formally in accordance with the Constitution, the legislator should not ignore the criticism regarding legal clarity arising from this Act.

The Chamber noted among other things that the Administrative Reform Act expresses the legislator's intention using complex sentence constructions (extremely long complex sentences), which makes reading and understanding the law a time-consuming process and may lead to different ways of understanding it. Understanding the provisions of the Act is made even more difficult due to a large number of references to other laws and legal acts contained in them. The Chamber added that it considers it a condemnable situation when the wording of laws is chosen without sufficient regard to the language and style requirements of a draft act, and that the language of a draft act must be clear, unambiguous, and precise.[18]

16 Section 193 of the decision.

17 Sections 194–195 of the decision.

18 Section 113 of the decision.

In its decision of 23 February 2011, Riigikogu approved the "Development Trends of the Legal Policy until 2018". In this decision, among other things, Riigikogu emphasised that in a democratic state based on the rule of law, the law is and will remain the primary instrument of implementing political decisions, and that preparing clear, simple, and precise legal instruments is important in order to assure their applicability in practice. The **standard of legal quality** stated in the annex to the decision provides that in order to comply with the requirement of legal clarity, Estonian draft acts must be prepared using as simple language as possible, clearly and precisely, taking primarily into account the persons who are assumed to be the target group of the legal act both as implementers and addressees (section 9.1). Although this basic principle is just one part of the arsenal of legislative drafting, its observance reduces possibilities for disputes, and therefore also helps to save resources.[19]

The normative and technical quality of the Administrative Reform Act is the reason why the language of this Act is difficult (if not impossible) to understand. The councils decided to turn to the Supreme Court in order to protect local governments' constitutional guarantees, and to obtain clarity. The Supreme Court's interpretations and clarifications made the Act that had caused the confusion a lot clearer. If the Supreme Court found the law to contain possibilities that the legislator had not actually aimed for, this is also a lesson to learn for the legislator.

Conclusion

Given the broadness of the legislator's decision-making space, the political choices disputed in the given constitutional review case remained in force. Time will tell whether and to what extent the legislator's choices are justified.[20]

While establishing the sizes and borders of local governments is just a prerequisite for executing a substantial administrative reform, there is still no clarity regarding the latter at the time of writing this article. Neither the Government of the Republic nor Riigikogu have decided on the local governments' exact tasks, or how they would be financed in the future.[21]

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19 For example, let us think about which costs related to the court case regarding the Administrative Reform Act were actually paid by the state.

20 The progress of the administrative reform can be followed via the specialists of the State Reform Radar. The State Reform Radar is a joint initiative of the Estonian Employers' Confederation and the Praxis Centre for Policy Studies, which monitors the progress of the state reform and gives recommendations to policymakers. For more information, see https://www.reformiradar.ee/

21 Press release of the National Audit Office "The model of funding local governments needs changes", 03.04.2017. See also the overview of the National Audit Office "Funding of local governments", Tallinn 31.03.2017. Available on the website of the National Audit Office.

More than six years before the enactment of the Administrative Reform Act, the Supreme Court *en banc* declared as unconstitutional the failure to enact such legislative acts that: 1) establish which obligations assigned to a local government must be performed by the local government and which by the state; 2) allocate funds for deciding on questions regarding local life and its organisation by a local government from the funds intended for the performance of the state's obligations, and provide for funding the state's obligations assigned to a local government from the state budget.[22] Since 2010, attempts have been made to distinguish the state's tasks that are performed by local governments, in order to ensure the availability of means required for their funding in the budget, and to distinguish them from other allocated funds.

During the compilation of the overview of funding of local governments, the National Audit Office organised a survey among local governments in order to obtain their opinion regarding the problems and expectations concerning the funding of local governments. The results demonstrated that the majority of local governments were not satisfied with the progress of negotiations regarding the funding of local governments held between the state and representatives of local governments.[23] Given the communication difficulties and the complexity of the questions that needed to be resolved, the next stage of the administrative reform is a big challenge both for the legislator and the implementers of the reform.

The near future will show how the changes of the administrative-territorial organisation initiated by the Government of the Republic will play out, and what impact the decision made as part of to the constitutional review procedure, which served as the basis of this article, will have on such changes. If the Government of the Republic adopts a merger regulation despite local governments' negative opinions, we can probably expect new disputes in court.

22 RKÜKo 16.03.2010, 3-4-1-8-09.

23 Overview of the National Audit Office (reference 21).

CHAPTER 3
STATISTICS

Overview of Procedural Statistics of County, Administrative, and Circuit Courts in 2016.

Adjudicated Cases and Average Annual Workload of Judges in Detail

Külli Luha, Analyst of the Courts' Service of the Ministry of Justice

In 2016, county courts received the following total numbers of cases for adjudication: 30,452 civil cases (0.8% less than in 2015), 29,980 expedited payment order procedures (3.8% more than in 2015), 16,694 criminal procedure cases (2.9% less than in 2015), including 7,628 criminal cases and 10,032 misdemeanour procedure cases (14.2% less than in 2015).

The following charts demonstrate changes in the number of criminal and misdemeanour cases (Figure 1), and civil cases (Figure 2)[1] that were submitted to county courts during the past five years. The trend line in the charts shows changes in the workload of courts during these five years.

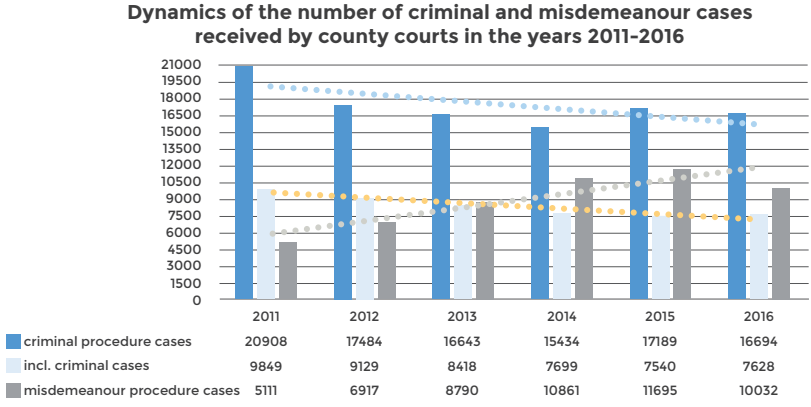


Figure 1

1 The chart shows the total number of cases submitted to courts of first instance in the civil procedure, including the expedited procedures for e-payment order submitted to the Pärnu County Court and the Haapsalu Courthouse, and excluding supervision procedures.

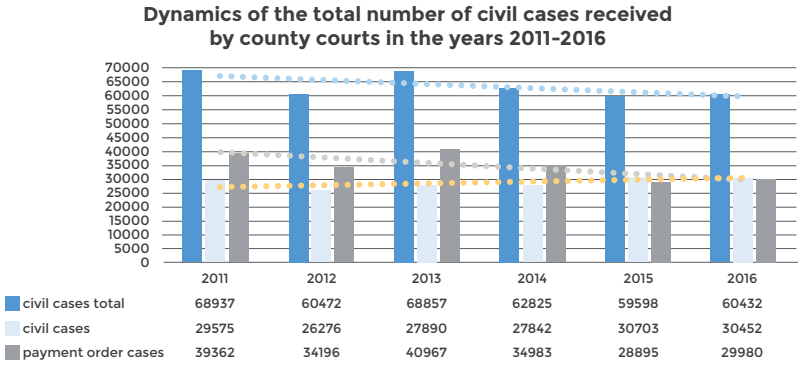


Figure 2

Administrative courts received 2,956 complaints for adjudication (12.3% less than in 2015), of which a total of 3,123 administrative cases were adjudicated. The following chart (Figure 3) demonstrates changes in the number of administrative cases submitted to courts during the past five years. The trend line in the chart shows changes in the workload of administrative courts during these five years.

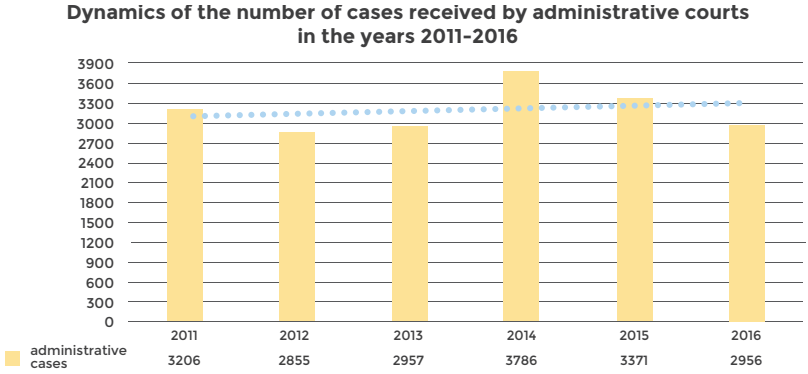


Figure 3

Circuit courts received the following total numbers of cases in appeal procedures and appeal against a court ruling procedures: 2,772 civil cases (6.0% less than in 2015), 1,638 administrative cases (8.5% less than in 2015), 2,252 criminal procedure cases (6.1% less than in 2015), and 208 misdemeanour procedure cases (5.6% more than in 2015). The following chart (Figure 4) demonstrates changes in the number of cases in all types of procedures submitted to circuit courts during the past five years. The trend line in the chart shows changes in the workload of circuit courts during these five years.

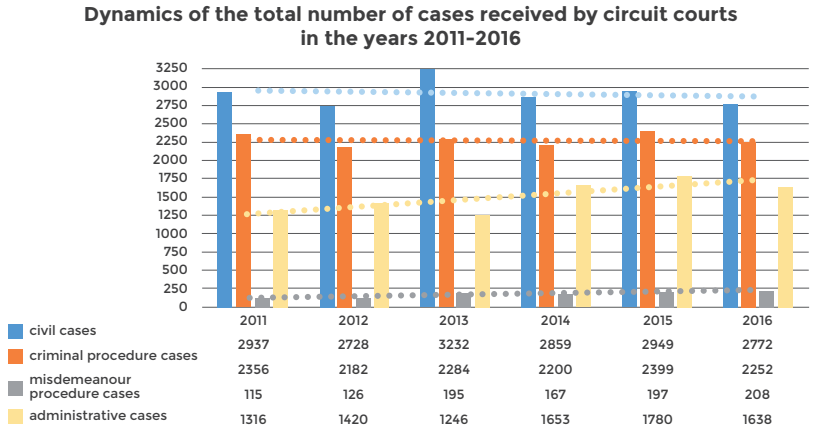


Figure 4

More detailed data regarding procedural statistics of courts of 1st and 2nd instance in 2016, organised by types of procedure, is published on the website of courts http://www.kohus.ee.

Adjudication of cases in county courts: criminal and misdemeanour cases

In county courts, a total of 16,635 criminal procedure cases were adjudicated, which can be divided by the type of procedure as follows: 43% of the adjudicated cases were criminal cases (24% of the criminal cases were submitted for adjudication in the expedited procedure), 30% were cases of judges in charge of execution of court judgements, 19% were cases of preliminary investigation judges, 4% were international cooperation cases, and 2% were other criminal procedure cases (Figure 5).

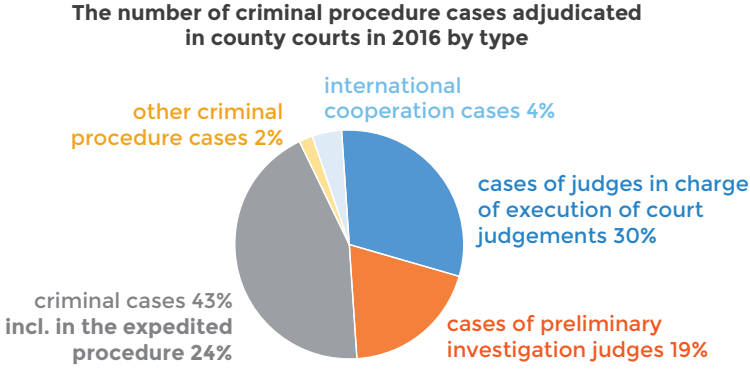


Figure 5

The total number of criminal cases adjudicated in county courts was 7,463, which included 3,081 cases adjudicated in the Harju County Court, 1,254 in the Pärnu County Court, 1,709 in the Tartu County Court, and 1,419 in the Viru County Court. Two thirds of the criminal cases (i.e. 5,146 cases) were adjudicated in the compromise procedure (incl. 890 in the expedited procedure), 1,757 in the alternative procedure (incl. 833 in the expedited procedure), 173 in the summary procedure (incl. 61 in the expedited procedure), and 387 in the general procedure of the case. On average, the adjudication of general procedure cases took county courts 181 days.

The following table shows the number of criminal cases adjudicated on the merits in the general procedure, and the time of procedure required for their adjudication:

Court	**Number of criminal cases adjudicated in general procedure on the merits**	**Average time of procedure (in days)**	**Number of criminal cases adjudicated in simplified procedure on the merits**	**Average time of procedure (in days)**
Harju County Court	99	171	2667	23
Pärnu County Court	88	134	1113	14
Tartu County Court	75	184	1525	31
Viru County Court	41	274	1180	38
Total and average for county courts	**301**	**177**	**6485**	**26**

Based on the workload points (WP) used by courts in 2016, all criminal procedure cases can be divided into four bigger categories[2]. The following chart shows the number of adjudicated court cases by court:

2 Very time-consuming and complex cases (WP 139.73–559.8): from general procedure cases with one person accused at trial and over 15 criminal episodes to general procedure cases with 15 persons accused at trial and over 15 criminal episodes; time-consuming cases (WP 31.05–108.85): from general procedure cases with one person accused at trial and up to 5 criminal episodes to general procedure cases with one person accused at trial and 5 to 15 criminal episodes, and cases for administration of coercive psychiatric treatment in general procedure; moderately time-consuming cases (WP 6.04–20.70): alternative procedure cases and cases for administration of coercive psychiatric treatment in alternative procedure, and compromise procedure cases with up to 5 persons accused at trial and over 5 persons accused at trial and over 15 criminal episodes, summary procedure cases with over 5 persons accused at trial and over 15 criminal episodes, and appeals against rulings of the Office of the Prosecutor General; less time-consuming and fast cases (WP 1.15–4.5): all remaining criminal procedure cases.

Court	Very time-consuming and complex cases		Time-consuming cases		Moderately time-consuming cases		Less time-consuming and fast cases	
	Number of cases	Percentage of adjudicated cases	Number of cases	Percentage of adjudicated cases	Number of cases	Percentage of adjudicated cases	Number of cases	Percentage of adjudicated cases
Harju County Court	5	0,1%	129	1,8%	1469	20,4%	5591	77,7%
Pärnu County Court	2	0,1%	110	5,2%	93	4,4%	1908	90,3%
Tartu County Court	4	0,1%	97	2,5%	204	5,3%	3525	92,0%
Viru County Court	5	0,1%	59	1,7%	310	8,9%	3124	89,3%
Total and average for county courts	**16**	**0,1%**	**395**	**2,4%**	**2076**	**12,5%**	**14148**	**85,0%**

The most time-consuming general procedure cases adjudicated in county courts in 2016 were a criminal case with 7 persons accused at trial and 107 criminal episodes (crimes against property and public order); a criminal case with 15 persons accused at trial and 106 criminal episodes (mostly crimes against property) and a case with 12 persons accused at trial and 84 crime episodes (mostly crimes related to drugs).

The total number of misdemeanour cases adjudicated in county courts was 10,628, which included 5,351 cases adjudicated in the Harju County Court, 1,875 in the Pärnu County Court, 1,810 in the Tartu County Court, and 1,592 in the Viru County Court. On average, the adjudication of misdemeanour cases took a court 40 days, and the adjudication of appeals against a decision in a misdemeanour case took 58 days.

Based on the workload points (WP) used by courts in 2016, all misdemeanour procedure cases can be divided into three bigger categories.[3] The following chart shows the number of adjudicated court cases by court:

Court	Time-consuming cases		Moderately time-consuming cases		Less time-consuming cases	
	Number of cases	Percentage of adjudicated cases	Number of cases	Percentage of adjudicated cases	Number of cases	Percentage of adjudicated casest
Harju County Court	889	16,6%	143	2,7%	4319	80,7%
Pärnu County Court	144	7,7%	53	2,8%	1678	89,5%
Tartu County Court	241	13,3%	49	2,7%	1520	84,0%
Viru County Court	201	12,6%	70	4,4%	1321	83,0%
Total and average for county courts	**1475**	**13,9%**	**315**	**3,0%**	**8838**	**83,2%**

In county courts, criminal and misdemeanour cases were adjudicated by a total of 59 judges, including 22.2 in the Harju County Court, 9.8 in the Pärnu County Court, 15 in the Tartu County Court, and 11.5 in the Viru County Court.[4] In 2016, every judge of the Harju County Court adjudicated an average of 324.1 criminal procedure cases and 241 misdemeanour procedure cases, every judge of the Pärnu County Court adjudicated an average of 215.6 criminal procedure cases and 191.3 misdemeanour procedure cases, every judge of the Tartu County Court adjudicated an average of 255.3 criminal procedure cases and 120.7 misdemeanour procedure cases, and every judge of the Viru County Court adjudicated an average of 304.2 criminal procedure cases and 138.4 misdemeanour procedure cases.

Adjudication of cases in county courts: civil cases

The total number of civil cases adjudicated in county courts was 30,048, which included 14,362 cases adjudicated in the Harju County Court, 3,824 in the Pärnu

3 Time-consuming cases (WP 7–14): appeals against decisions of a body conducting extra-judicial proceedings, and economic and environmental misdemeanour cases; moderately time-consuming cases (WP 3–3.7): administration of confiscation of property and appeals against a body conducting extra-judicial proceedings; less time-consuming cases (WP 1–2): cases of judges in charge of execution of court judgements, applications for state aid.

4 This calculation is based on the specialisation and vacant positions of judges, as well as long-term (over 3 months in a row) absences from work.

County Court, 6,629 in the Tartu County Court, and 5,233 in the Viru County Court. Within the given type of procedure, the cases can be divided according to their substance as follows (Figure 6): over a half, i.e. 53% of the adjudicated cases were procedure on action cases, 39% were procedure on petition cases, 6% were international legal assistance cases, and 2% are equally divided between securing of action / preliminary legal protection cases, and other cases submitted to the court. In the expedited payment order procedure, a total of 30,300 payment order applications were adjudicated (the average time of procedure was 61 days).

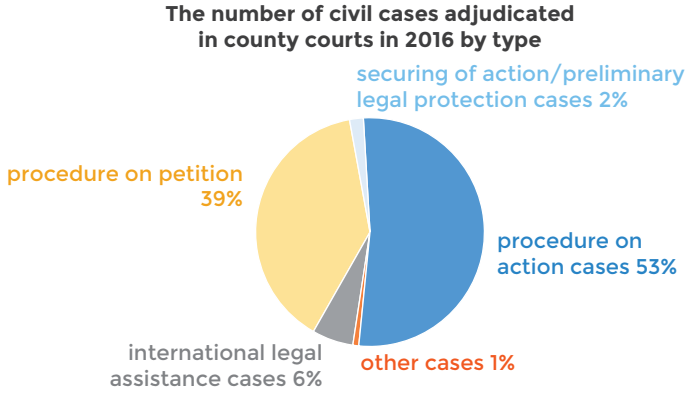


Figure 6

General average time of procedure of cases adjudicated in county courts in 2016 was 101 days, including 108 days in the Harju County Court, 91 days in the Pärnu County Court, 86 days in the Tartu County Court, and 110 days in the Viru County Court. The most time-consuming cases were civil cases adjudicated on the merits in the procedure on action. The following chart shows the time required for the adjudication of the abovementioned civil cases by court.

Court	Number of civil cases adjudicated on the merits in procedure on action	Average time of procedure (in days)
Harju County Court	4098	183
Pärnu County Court	1019	143
Tartu County Court	1593	155
Viru County Court	1834	147
Total and average for county courts	**8544**	**165**

The highest number of cases adjudicated on the merits in county courts were law of obligations cases (33% of the adjudicated cases) and family law cases (24% of the adjudicated cases), as well as cases based on the General Part of the Civil Code Act (14% of the adjudicated cases). The remaining 29% includes in relatively

equal shares execution, association law, labour law, property law, international legal assistance, and other civil cases (Figure 7).

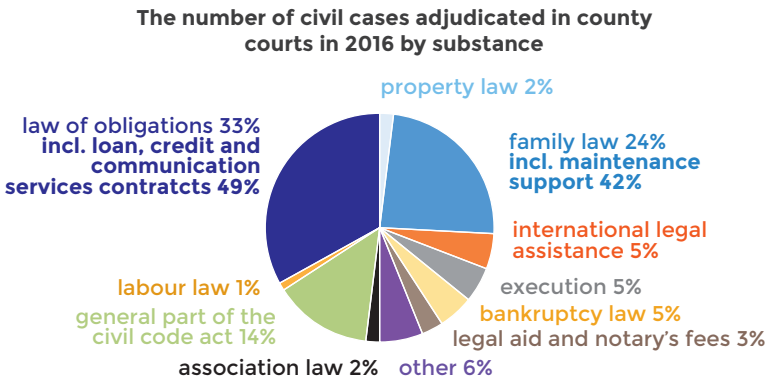


Figure 7

Based on the workload points (WP) used by courts in 2016, all civil cases can be divided into four bigger categories[5]. The following chart shows the number of adjudicated court cases by court:

5 Very time-consuming and complex cases (WP 30–40): property law in procedure on action, intellectual property cases, association law in procedure on petition cases, unjustified enrichment in procedure on action cases, action against an insurer, contracts for provision of medical treatment services, reorganisation cases, securities cases, restructure of debts cases, bankruptcy cases in procedure on action, etc.; time-consuming cases (WP 20–28): maritime law cases in procedure on action (CMR), labour law cases, family cases / division of property, inheritance cases, family cases in procedure on action (regulation of communication with a child), declarations of bankruptcy, execution in procedure on action, civil law partnership contracts, other contracts for use, etc.; moderately time-consuming cases (WP 5–15): utility services cases in procedure on action, maintenance support cases, designation of a guardian for an adult with limited active legal capacity, administration of estate management measures, ruling on procedural expenses, loan and credit contracts and contracts for provision of communication services in procedure on action, preliminary evidence procedure, land register cases in procedure on petition, preliminary legal protection, etc.; less time-consuming cases WP (1–5): adoption, international private law cases, placement of a person to hospital, divorce cases, preliminary security cases.

Court	Very time-consuming and complex cases		Time-consuming cases		Moderately time-consuming cases		Less time-consuming and fast cases	
	Number of cases	Percentage of adjudicated cases	Number of cases	Percentage of adjudicated cases	Number of cases	Percentage of adjudicated cases	Number of cases	Percentage of adjudicated cases
Harju County Court	334	9,3%	3014	21,0%	6794	47,3%	3220	22,4%
Pärnu County Court	261	6,8%	681	17,8%	2268	59,3%	614	16,1%
Tartu County Court	425	6,4%	994	15,0%	3444	52,0%	1766	26,6%
Viru County Court	337	6,4%	658	12,6%	3308	63,2%	930	17,8%
Total and average for county courts	**2357**	**7,8%**	**5347**	**17,8%**	**15814**	**52,6%**	**6530**	**21,7%**

In county courts, civil cases were adjudicated by a total of 81 judges, including 39.5 in the Harju County Court, 10.6 in the Pärnu County Court, 18.9 in the Tartu County Court, and 12 in the Viru County Court.[6] In 2016, every judge who adjudicated civil cases adjudicated an average of 363.6 civil cases in the Harju County Court, 360.8 in the Pärnu County Court, 350.7 in the Tartu County Court, and 436.1 in the Viru County Court.

Adjudication of cases in administrative courts

In 2016, a total of 3,123 administrative cases were adjudicated in administrative courts, 1,865 of which were adjudicated in the Tallinn Administrative Court, and 1,258 in the Tartu Administrative Court. The cases adjudicated on the merits included protection of public order cases (38% of the adjudicated cases), tax law cases (14% of the adjudicated cases), population cases 13%, and other adjudicated

6 This calculation is based on the specialisation and vacant positions of judges, as well as long-term (over 3 months in a row) absences from work.

administrative cases (22% of the adjudicated cases), as well as environmental law, planning and construction cases, economy and administrative law cases, and public procurement cases (13% of the adjudicated cases) (Figure 8).

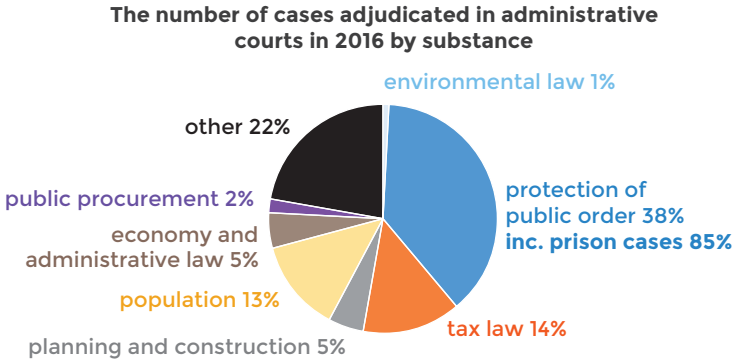


Figure 8

The biggest number of adjudicated cases were prison complaints (1,011 in total), 399 of which were adjudicated in the Tallinn Administrative Court, and 612 in the Tartu Administrative Court.

The average time of procedure in 2016 was 152 days in the Tallinn Administrative Court and 111 in the Tartu Administrative Court. The average time of procedure of administrative cases adjudicated on the merits was as follows:

Court	Number of administrative cases adjudicated on the merits	Average time of procedure (in days)
Tallinn Administrative Court	720	284
Tartu Administrative Court	531	191
Total and average for administrative courts	**1251**	**244**

Based on the workload points (WP) used by courts in 2016, all administrative cases can be divided into four bigger categories.[7] The following chart shows the number of adjudicated court cases by court:

7 Very time-consuming and complex cases (WP 30–40): tax decision cases, tax law / customs cases, public procurement cases, planning and construction cases, environmental law cases, property reform cases, medical law cases etc.; moderately time-consuming cases (WP 12–24): data protection and public information cases, cases regarding issues of local life, protection of public order / prison cases, service relationships cases; lesser time-consuming cases (WP 2–10): parking cases, applications for permission for an administrative action, applications for state legal aid for preparation of an appeal, applications for preliminary legal protection.

Court	Very time-consuming and complex cases		Moderately time-consuming cases		Less time-consuming cases	
	Number of cases	Percentage of adjudicated cases	Number of cases	Percentage of adjudicated cases	Number of cases	Percentage of adjudicated cases
Tallinn Administrative Court	468	25,1%	1046	56,1%	351	18,8%
Tartu Administrative Court	230	18,3%	874	69,5%	154	12,2%
Total and average for administrative courts	**698**	**22,4%**	**1920**	**61,5%**	**505**	**16,2%**

In administrative courts, administrative cases were adjudicated by a total of 25.4 judges, including 16.3 judges in the Tallinn Administrative Court and 9.1 judges in the Tartu Administrative Court. In 2016, every judge of the Tallinn Administrative Court adjudicated an average of 114.4 administrative cases, and every judge of the Tartu Administrative Court adjudicated an average of 138.2 administrative cases.

Adjudication of cases in circuit courts: civil cases

During 2016, a total of 2,896 civil cases were adjudicated in circuit courts (2,025 in the Tallinn Circuit Court and 871 in the Tartu Circuit Court), including 1,348 civil cases in the appeal procedure and 1,524 civil cases in the appeal against a ruling procedure.

The biggest part of the cases adjudicated on the merits included law of obligations and family law cases (respectively 36% and 15% of the adjudicated cases), and other bigger groups included execution cases (9% of the adjudicated cases) and property law cases (7% of the adjudicated cases). The share of other civil cases in the adjudicated cases did not exceed 5% of the total amount of adjudicated cases (Figure 9).

The number of civil cases adjudicated in circuit courts in 2016 by substance

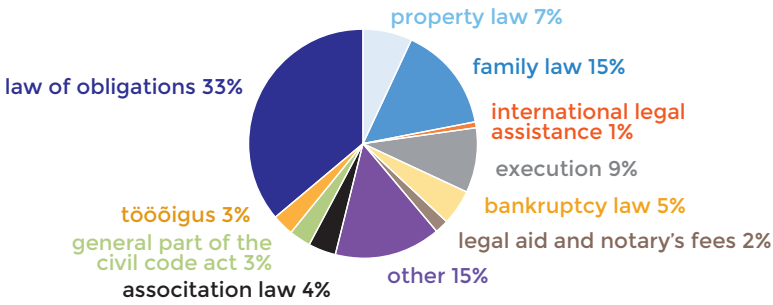


Figure 9

In circuit courts, civil cases in the appeal procedure were adjudicated in an average of 158 days (148 days in the Tallinn Circuit Court and 180 days in the Tartu Circuit Court), and in the appeal against a ruling procedure in 36 days (35 in the Tallinn Circuit Court and 39 in the Tartu Circuit Court).

In civil chambers of circuit courts, cases were adjudicated by 18.9 judges, including 12.9 judges in the civil chamber in Tallinn and 6 judges in the civil chamber in Tartu. In 2016, every judge of the Tallinn Circuit Court adjudicated an average of 70.8 civil cases in the appeal procedure and 86.2 cases in the appeal against a ruling procedure. Every judge of the criminal chamber of the Tartu Circuit Court adjudicated an average of 72.5 civil cases in the appeal procedure and 85 cases in the appeal against a ruling procedure.

Adjudication of cases in circuit courts: criminal and misdemeanour cases

During 2016, a total of 2,273 criminal cases were adjudicated in circuit courts (1,220 in the Tallinn Circuit Court and 1,053 in the Tartu Circuit Court), including 519 criminal cases in the appeal procedure and 1,533 cases in the appeal against a ruling procedure, as well as 221 cases initiated in a circuit court.

The biggest share of cases adjudicated in circuit courts were cases of judges in charge of execution of court judgements and criminal cases (respectively 31% and 30% of the adjudicated cases). Other groups include cases of preliminary investigation judges (26% of the adjudicated cases), other criminal procedure cases that constituted 12% of the adjudicated cases (including 129 appeals against rulings of the Office of the Prosecutor General), and a small share (1% of the adjudicated cases) of international cooperation cases (Figure 10).

The number of criminal procedure cases adjudicated in circuit courts in 2016 by substance

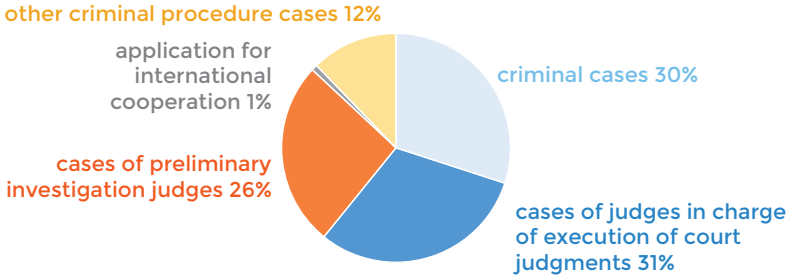


Figure 10

Criminal cases in the appeal procedure were adjudicated in an average of 33 days (33 days in the Tallinn Circuit Court and 47 days in the Tartu Circuit Court). Other cases in the appeal against a ruling procedure were adjudicated in an average of 13 days (14 days in the Tallinn Circuit Court and 13 days in the Tartu Circuit Court).

A total of 214 misdemeanour procedure cases were adjudicated, 127 of which were adjudicated in the Tallinn Circuit Court and 87 in the Tartu Circuit Court.

Criminal and misdemeanour cases were adjudicated in criminal chambers of circuit courts by a total of 13 judges, including 8 judges in the criminal chamber in Tallinn and 5 judges in the criminal chamber in Tartu. In 2016, every judge of the Tallinn Circuit Court adjudicated an average of 43.3 criminal cases in the appeal procedure and 109.3 cases in the appeal against a ruling procedure. Every judge of the criminal chamber of the Tartu Circuit Court adjudicated an average of 34.8 criminal cases in the appeal procedure and 175.8 cases in the appeal against a ruling procedure.

Adjudication of cases in circuit courts: administrative cases

During 2016, a total of 1,731 administrative cases were adjudicated in circuit courts (1,000 in the Tallinn Circuit Court and 731 in the Tartu Circuit Court), including 872 administrative cases in the appeal procedure and 859 cases in the appeal against a ruling procedure.

The biggest share of cases adjudicated on the merits in circuit courts were cases regarding protection of public order, the majority of which were prison cases (a total of 864 prison complaints were adjudicated). Other than that, the biggest shares included tax law (14% of the adjudicated cases) and population (12% of the adjudicated cases) cases. Environmental law, public procurement, economy and administrative law, and planning and construction cases in total constituted

15% of the adjudicated cases, and the remaining 15% of cases included other administrative cases (Figure 11).

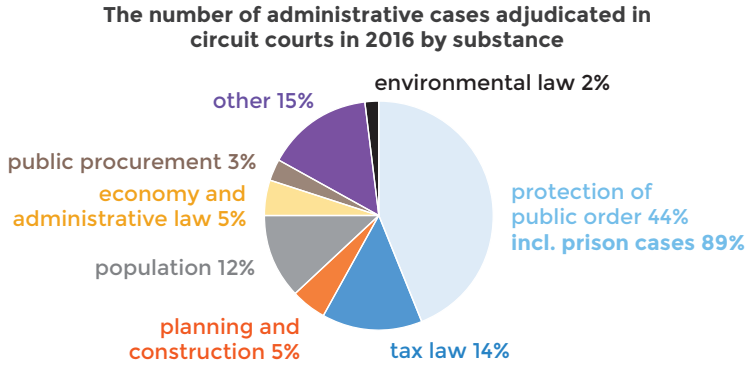


Figure 11

In circuit courts, administrative cases in the appeal procedure were adjudicated in an average of 265 days (236 days in the Tallinn Circuit Court and 293 days in the Tartu Circuit Court), and in the appeal against a ruling procedure in 31 days (33 in the Tallinn Circuit Court and 27 in the Tartu Circuit Court).

In administrative chambers of circuit courts, cases were adjudicated by 11.9 judges, including 6 judges in the administrative chamber in Tallinn and 5.9 judges in the administrative chamber in Tartu. In 2016, every judge of the Tallinn Circuit Court adjudicated an average of 72 administrative cases in the appeal procedure and 94.7 cases in the appeal against a ruling procedure. Every judge of the administrative chamber of the Tartu Circuit Court adjudicated an average of 74.6 administrative cases in the appeal procedure and 49.3 cases in the appeal against a ruling procedure.

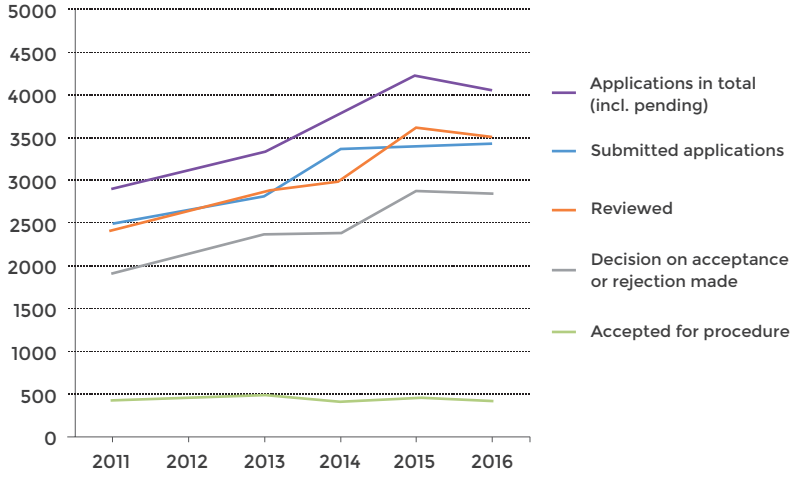
Adjudication of Court Cases in the Supreme Court in 2016

Signe Rätsep,
Chief Specialist of the Legal Information Department of the Supreme Court

Statistical data characterising the work of the Supreme Court is collected on the basis of applications for procedure submitted to the Supreme Court and reviewed court cases. Data regarding reviewed court cases and applications for procedure is collected by three types of judicial procedure: civil court procedure, administrative court procedure, and offence procedure. In the constitutional review procedure, data is collected only regarding cases that have been reviewed. In case of applications for procedure, only appeals and applications (for example, appeals in cassation, appeals against a court ruling, and applications for review) are considered. Reviewed cases are accounted on the basis of individual cases. It is important to consider that one court case may include a review of several complaints or applications.[1]

Review of applications for procedure in chambers of the Supreme Court

Figure 1. *Review of applications for procedure in the Supreme Court 2011–2016*



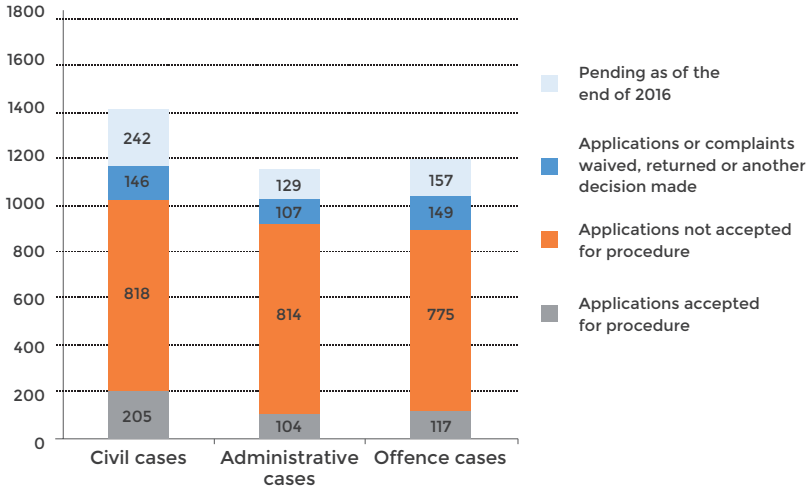
1 More specific data regarding the review of applications for procedure and court cases in the Supreme Court since 1993 is available at the website of the Supreme Court https://www.riigikohus.ee/en.

According to the law, the Supreme Court has the right to decide whether to accept an application for procedure with the aim of assuring the lawfulness of a decision made by a court of lower instance, harmonising court practice, or developing the procedural law.

Out of the 2,839 applications which the Supreme Court decided to accept or reject, 432 applications, i.e. 15% were accepted in 2016. In 2015, 16% of applications were accepted (457 applications out of 2,877). In 2014, the share of accepted applications was 18% (422 applications out of 2,391 were accepted). A year before, this indicator was two percent higher, i.e. 20% (478 applications out of 2,361 were accepted). The share of applications accepted for procedure in reviewed applications has been constantly decreasing in 2012–2016.

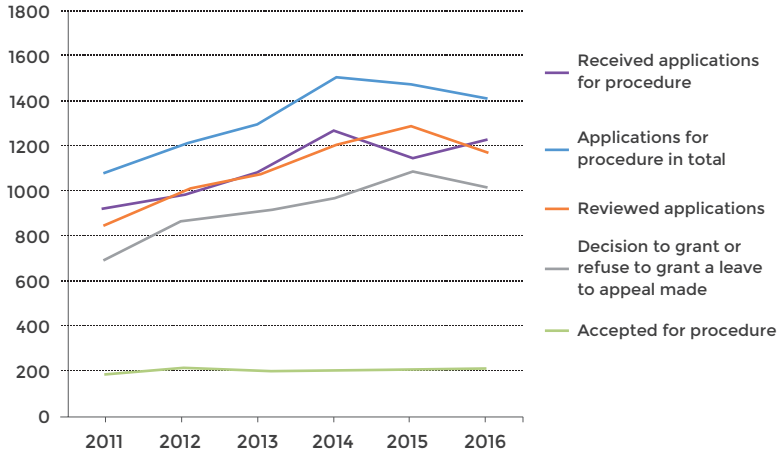
The work of the Civil, Administrative and Criminal Chambers of the Supreme Court was characterised by a heavy workload in 2016, just like in the previous years (see Figure 2).

Figure 2. *Review of applications for procedure by types of procedure in 2016.*



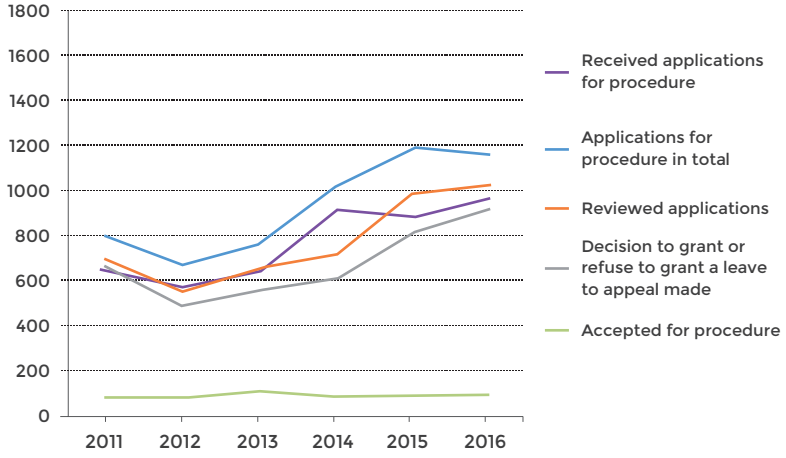
The Civil Chamber accepted for procedure a total of 1,414 applications for procedure (1,477 in 2015), 1,221 of which were submitted in 2016. The Chamber reviewed 1,172 applications (1,284 in 2015). A decision to accept or reject an application was made in case of 1,023 applications (1,079 in 2015), 205 of which (213 in 2015) were accepted for procedure.

Figure 3. *Review of applications for procedure in the Civil Chamber*



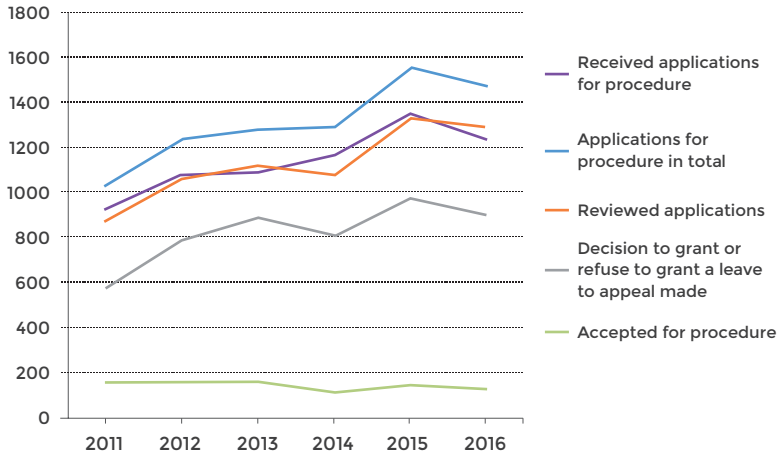
The Administrative Chamber accepted for procedure a total of 1,116 applications for procedure (1,192 in 2015), 971 of which were submitted in 2016. The Administrative Chamber reviewed 1,031 (997 in 2015) applications, a decision to accept or reject an application was made in case of 918 applications (819 in 2015), 104 of which (104 in 2015) were accepted for procedure.

Figure 4. *Review of applications for procedure in the Administrative Chamber*



The Criminal Chamber accepted for procedure a total of 1,476 applications for procedure (1,556 in 2015), 1,236 of which were submitted in 2016. The Chamber reviewed 1,294 applications (1,332 in 2015). A decision to accept or reject an application was made in case of 898 applications (979 in 2015), 123 of which (140 in 2015) were accepted for procedure.

Figure 5. *Review of applications for procedure in the Criminal Chamber*



Results of the review of court cases in chambers of the Supreme Court

Constitutional Review

In 2016, the Supreme Court reviewed 15 court cases in the constitutional review procedure. The following Table 1 shows the results of the court cases reviewed in the constitutional review procedure in more detail. In cases reviewed by the Constitutional Review Chamber or by the Supreme Court *en banc*, a respective application or complaint was satisfied in 7 cases. The challenged provision of a legal act was declared unconstitutional in 7 court cases. 5 complaints or applications were not satisfied, and 3 complaints were returned without review.

Table 1. *Results of the court cases reviewed in the constitutional review procedure in 2016.*

		Total	Law	Act of a local government	Decision or action of the National Electoral Committee
	Constitutional review cases reviewed in 2016	**15**	**11**	**1**	**3**
	Court	**9**	8	1	
	Council of a local government	**2**	2		
	Other person	**4**	1		3
Result	Confirmation of the application or declaration of the provision being unconstitutional	**7**	6	1	
	Application not satisfied; declaration of the provision being unconstitutional denied	**5**	3		2
	Return of the application without review	**3**	2		1

The Criminal Chamber adjudicated 102 offence cases, including 73 crime cases and 29 misdemeanour cases. The challenged court decision was left unchanged in 17 crime cases and in 5 misdemeanour cases. The decision of a court of lower instance was annulled with respect to 45 criminal cases and 15 misdemeanour cases, i.e. with respect to court decisions in 62% of criminal cases and 52% of misdemeanour cases. Justifications regarding a challenged court decision were changed in case of eight decisions.

The Civil Chamber adjudicated 172 court cases in 2016. The Civil Chamber annulled 66% (113) of the challenged court decisions, 33 decisions were left unchanged, and justifications regarding a court decision were changed in 16 cases.

The Administrative Chamber reviewed 97 administrative cases. The Supreme Court annulled approximately 66% of decisions of courts of lower instance in administrative cases (a total of 64). Court decisions were left unchanged in 16 cases, and justifications were changed in 12 cases.

Figure 6. *Review of court cases in the Criminal, Administrative, and Civil Chamber in 2016*