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# An Early Decision with Far-reaching Consequences

## How the Parliamentary Prerogative, the Right to Good Administration and Judicial Activism Entered into the Estonian Legal Order

### 1. Introduction

Adoption of the Constitution at referendum on 28 June 1992 and its entry into force on the following day started the process of the formation of constitutional institutions in the country. In autumn 1992, the Riigikogu and the President of the Republic were elected and the Government of the Republic assumed office. Constitutional review in the Supreme Court began in 1993. This is the first time in the history of the Republic of Estonia that the substantive constitutional review was implemented. In 2008, fifteen years shall pass thereof, which is a good impetus for a short mid-term review.

The object of this article is to analyse critically the relevance of one early decision of the Supreme Court on its subsequent practice and on the constitutional debate in Estonia. The selected decision is that of 12 January 1994, which could be called Operative Technical Measures I<sup>2</sup> and which is one of the most important and influential decisions in the practice of the Supreme Court. The case arose from typical tense relations in the beginning of the 1990s. On the one hand, the legislator and the government were obliged to solve quickly a number of different issues after the restoration of independence of the Republic of Estonia, which were the result of a new societal structure and economic relations. On the other hand, one of the most important messages of the new Constitution is that every individual has (fundamental) rights arising from the Constitution that are directed against the state and the state has corresponding obligations to every individual pursuant to the Constitution. The implementation of the Constitution was necessary in order for it not to become a still-born baby as was the case with the Constitution of the Estonian SSR. Thus, the sacrifice that had to be made in this case was the young state's practical and urgent need to more effectively fight against organised crime in order to follow something more abstract and distant, the rightfulness or wrongfulness of which will only be revealed in the long term.

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<sup>1</sup> The paper expresses the author's personal opinions.

<sup>2</sup> CRCSd 12.01.1994, III-4/1-1/94. The decision Operative Technical Measures II also originates from the same date. Cf. CRCSd 12.01.1994, III-4/1-2/94. All decisions of the Supreme Court referred to in the article are available at [www.nc.ee](http://www.nc.ee).

## 2. The decision of the Supreme Court and its relevance

On 21 April 1993, the Riigikogu adopted the Republic of Estonia Police Act Amendment Act.<sup>3</sup> Part 2 subsection 4 thereof laid down:

To establish that until the adoption of an act laying down operative surveillance activity, the security police officers may temporarily use operative technical measures to perform their duties only at the written consent of a member of the Supreme Court appointed by the Chief Justice of the Supreme Court.

The Chancellor of Justice, who has the sole right to initiate reactive abstract constitutional review of an act of parliament in Estonian legal order, disputed this act in the Supreme Court. On 12 January 2004, the Constitutional Review Chamber of the Supreme Court passed a decision by which the given rule was repealed as of the entry into force of the decision.

In the reasons to the decision, the Chamber first defines the term operative technical measure: “In forensic science, the term ‘operative technical measures’, or ‘operative surveillance measures’ in the meaning of technical measures and operations, which enable to covertly interfere in the use of an individual’s rights and freedoms, i.e., without the individual’s knowledge, for the purposes of information collection.”

The Chamber further admits that surveillance measures restrict several fundamental rights: “By allowing the security police officers to implement operative technical measures, the act provides the possibility to limit the rights and freedoms listed in the Constitution, including the rights laid down in §§ 26, 33 and 43 regarding the inviolability of private and family life, the inviolability of the home and confidentiality of messages sent or received by other commonly used means.” The Chamber thereafter declares the fundamental rights subject to restrictions as a point of principle, thereby paving the way to its later practice where the principle of proportionality is decisive: “The possibility to limit the aforementioned rights and freedoms is prescribed both by the Constitution and international instruments of law.” This is followed by the reasons, the most important part of which follows: “According to lawfulness as the generally accepted principle of (international) law and the principle laid down in § 3 of the Republic of Estonia Constitution, fundamental rights and freedoms may only be restricted pursuant to law. The procedure for restricting the rights and freedoms determined and published by law and publicity enable discretion and ensure the possibility to avoid abuse of power. However, lack and obscurity of a thorough legislative regulation leaves a person without a right to informative self-determination to choose a line of conduct and protect oneself. [...] [T]he valid standards for implementing operative technical measures are insufficient and deficient from the point of view of the protection of fundamental rights and freedoms which in such an important field encompasses a danger of arbitrariness and distortion of use of fundamental rights and freedoms and restrictions contrary to the Constitution. It has not been specified what operative technical measures specifically mean. [...] The circle of subjects entitled to implement operative technical measures, cases, conditions, procedure, guarantees, control and supervision and liability remains unspecified. [...] Therefore, in adopting subsection 4 in part II of the Police Act Amendment Act, the Riigikogu has disregarded § 3 of the Constitution according to which state power shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith and violated § 14, which obliges the legislative power to ensure everyone’s rights and freedoms. [...] The Riigikogu should have established the specific cases and detailed procedure for the implementation of operative technical measures and the related possible restrictions of rights itself instead of delegating the latter to security police officers and the justice of the Supreme Court. What the legislator is entitled or obliged to do according to the Constitution cannot be delegated to the executive power, not even temporarily or on the condition of a possible judicial review. Thus, subsection 4 of part II of the Police Act Amendment Act is also contrary to § 13 (2) of the Constitution as insufficient regulation in establishing restrictions to fundamental rights and freedoms shall not protect everyone against arbitrary action by state power.”

This decision is important for three reasons. Firstly, the Supreme Court hereby formulates the principle of parliamentary prerogative. Secondly, in this decision the Supreme Court implements the general right to organisation and procedure for the first time (§ 14 of the Constitution), although not yet explicitly stating this. Thirdly, the decision by the Supreme Court entails that in addition to a limitation too intense, the legislator can also violate the Constitution by omission, whereby the constitutionality of both can be reviewed by the Supreme Court.

<sup>3</sup> Eesti Vabariigi politseiseaduse muutmise ja täiendamise seadus. – RT I 1993, 20, 355 (in Estonian).

## 2.1. The principle of parliamentary prerogative

The principle of parliamentary prerogative is vested in the first sentence of § 3 (1) of the Constitution, according to which state power shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. The principle of parliamentary prerogative is also expressed by § 104 (2) of the Constitution, which lays down a list of laws that can be passed only by a majority of the membership of the Riigikogu. If a law can be passed only by a majority of the membership of the Riigikogu, it can therefore be only passed by the Riigikogu and thus the decision is reserved to the parliament.

In its decision of 14 January 1994, the Supreme Court formulates the principle of parliamentary prerogative: “What the legislator is [...] obliged to do according to the Constitution cannot be delegated to the executive power, not even temporarily or on the condition of a possible judicial review.” In 1998, the same idea is repeated: “The Riigikogu may not delegate solving a matter, which must be solved by law pursuant to the Constitution to the Government of the Republic.”<sup>4</sup> In its later decision, the Supreme Court first explains the principle of parliamentary prerogative by the principle of separation and balance of powers and thereafter by the principle of legal certainty.

In the practice of the Supreme Court in the field of fundamental rights, the principle of parliamentary prerogative has been expressed in three ways: declaring unconstitutional a law that delegates power to the executive but lacks the essential substance of a delegating norm<sup>5</sup>, a government regulation that restricts fundamental rights passed without legal basis<sup>6</sup> as well as a government regulation that restricts fundamental rights exceeding the parliamentary delegation of power.<sup>7</sup> It is true that the separation of the latter two cases may prove to be difficult in case of a generally formulated parliamentary delegation of power.

In order to analyse how the principle of parliamentary prerogative operates, an answer must first be sought to the question what should be reserved to the parliament. The simple answer is that the most important questions shall be reserved to the parliament. But what is important? The Supreme Court primarily places relevance on matters important from the point of view of fundamental rights, which include cases and grounds for restricting fundamental rights: “The legislator must itself decide on all matters important from the point of view of fundamental rights and may not delegate the regulation thereof to the executive power. The executive power may only specify restrictions established on fundamental rights and freedoms, and not establish further restrictions compared to what has been provided by the law.”<sup>8</sup>

A detailed procedure for restricting rights<sup>9</sup> or the designation of a competent administrative body<sup>10</sup> may be important from the viewpoint of fundamental rights and thus the object of an act of parliament. The law must establish disciplinary action against officials: it is unlawful to establish disciplinary offences, disciplinary punishments and disciplinary proceedings by a government regulation.<sup>11</sup> A regulation cannot establish customs duty or customs tariff<sup>12</sup>, tax interest or fine for delay<sup>13</sup>, a participation fee in the privatisation of land by auction<sup>14</sup> or the rate of a bailiff.<sup>15</sup> The law itself must prescribe the purpose, content and scope of the regulation: “[T]he government may issue regulations pursuant to law and subject to enforcement, i.e., based on the delegation standard included in the law. The delegation standard indicates the purpose, content and scope of a regulative authorisation, in the framework of which the government has the right to issue regulations. A regulation which exceeds the purpose, content and scope of an authorisation issued by a delegation norm is unconstitutional.”<sup>16</sup>

<sup>4</sup> CRCSd 23.03.1998, 3-4-1-2-98, part VIII.

<sup>5</sup> CRCSd 12.01.1994, III-4/1-1/94; 5.02.1998, 3-4-1-1-98, parts III and IV; 23.03.1998, 3-4-1-2-98; 4.11.1998, 3-4-1-7-98, part II; 5.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, paragraph 25; 19.12.2003, 3-4-1-22-03.

<sup>6</sup> CRCSd 2.11.1994, III-4/1-8/94; 11.01.1995, III-4/A-12/94; 6.10.1997, 3-4-1-3-97; 17.06.1998, 3-4-1-5-98; 23.11.1998, 3-4-1-8-98; 9.02.2000, 3-4-1-2-00; 10.04.2002, 3-4-1-4-02.

<sup>7</sup> SCebd 22.12.2000, 3-4-1-10-00; CRCSd 20.12.1996, 3-4-1-3-96; 22.12.1998, 3-4-1-11-98; 17.03.1999, 3-4-1-1-99; 12.05.2000, 3-4-1-5-00, paragraph 42; 8.02.2001, 3-4-1-1-01; 22.03.2001, 3-4-1-5-01; 17.02.2003, 3-4-1-1-03; 18.11.2004, 3-4-1-14-04; 13.06.2005, 3-4-1-5-05; 13.02.2007, 3-4-1-16-06; 2.05.2007, 3-4-1-2-07.

<sup>8</sup> CRCSd 24.12.2002, 3-4-1-10-02, paragraph 24.

<sup>9</sup> CRCSd 12.01.1994, III-4/1-1/94. In case of an intensive limitation, which wire tapping and covert surveillance included under operative technical measures undoubtedly are, the Supreme Court considers the order or procedure so important that it must be established by law and not by an act subordinate to a law.

<sup>10</sup> ALCSCr 22.12.2003, 3-3-1-77-03, paragraph 24.

<sup>11</sup> CRCSd 11.06.1997, 3-4-1-1-97.

<sup>12</sup> CRCSd 23.03.98, 3-4-1-2-98.

<sup>13</sup> CRCSd 5.11.2002, 3-4-1-8-02.

<sup>14</sup> SCebd 22.12.2000, 3-4-1-10-00.

<sup>15</sup> CRCSd 19.12.2003, 3-4-1-22-03.

<sup>16</sup> CRCSd 8.02.2001, 3-4-1-1-01, paragraph 13. Cf. also CRCSd 20.12.1996, 3-4-1-3-96, part III; 5.02.1998, 3-4-1-1-98, part V; 13.02.2007, 3-4-1-16-06, paragraph 21; 2.05.2007, 3-4-1-2-07, paragraph 20.

The relationship between a law and a regulation is also specified by the so-called framework theory: “[T]he law need not [...] describe all restrictions in detail. The law must, however, establish the framework within which the executive power specifies the relevant provisions of the law.”<sup>17</sup> In this context, the Supreme Court further discusses the transfer of technical specification to the government.<sup>18</sup>

In defining borders between the powers of the legislator and the issuer of regulations it is unclear, where the line between sufficient and therefore constitutional delegation norm and unconstitutional delegation norm is. Namely, in 1998 the Supreme Court established that a generally formulated delegation is not unconstitutional due to its general formulation: “If the legislator’s authorisation is general but not directly unconstitutional, the assumption or possibility that the government’s activity may be unconstitutional following this authorisation does not in itself necessarily cause the unconstitutionality of the authorisation. In the course of delegated norm establishment the Government of the Republic must follow the Constitution and interpret the law as well as the delegation norm in compliance with the Constitution. Therefore, the fact that an indefinite delegation would for instance enable the government to establish requirements that are unnecessary in a democratic society does not render the delegation itself unconstitutional.”<sup>19</sup>

On the face of it, this seems to be contrary to the rest of the practice of the Supreme Court. For example, in its decision of 12 January 1994, the Supreme Court declared the authorisation norm unconstitutional, blaming the legislator, among other things, in the following: “The circle of subjects entitled to implement operative technical measures, cases, conditions, procedure, guarantees, control and supervision and liability remain unspecified.”<sup>20</sup>

It is also difficult to imagine how the purpose, content and scope of a regulation can simultaneously be laid down in a delegation norm when it is formulated ambiguously. The cited decision of 1998 must probably be interpreted as mitigating the requirements presented to the legislator that were caused by the necessity of the transitional period to quickly modernise the majority of the legal system. The Supreme Court might have feared that the consistent implementation of the principle of parliamentary prerogative in the transformation period may prove to be overly difficult.<sup>21</sup> Indeed, a number of delegation norms contradict the standards set in 1994 even today and the current legal order includes numerous government regulations issued pursuant to such delegation norms. These regulations regulate matters important from the viewpoint of fundamental rights, which should be in the exclusive competence of the legislator, for example: The traffic regulation<sup>22</sup> or the border regime rules<sup>23</sup> approved by the Government of the Republic or the internal rules of prisons<sup>24</sup> or regulation of an armed unit<sup>25</sup> approved by regulations of the Minister of Justice. Precisely the decision of 1994, in which the Supreme Court declared a delegation norm unconstitutional and invalid, which does not include a circle of subjects, cases, conditions, procedural rules, guarantees, control, supervision or liability, must be considered an important motivator of the legislator in increasing the quality of the laws of the transitional

<sup>17</sup> CRCSd 17.03.1999, 3-4-1-1-99, paragraph 14.

<sup>18</sup> CRCSd 20.12.1996, 3-4-1-3-96, part II.

<sup>19</sup> CRCSd 5.02.1998, 3-4-1-1-98, part V.

<sup>20</sup> The Supreme Court has declared in a later decision a delegation norm in a law in the sense of § 104 (2) of the Constitution unconstitutional for formal reasons (CRCSd 4.11.1998, 3-4-1-7-98, part II). Among other things, the object of this decision was the delegation given to the Government of the Republic by the legislator to establish the procedure for the level of Estonian language skills necessary for working in a local government council. The Supreme Court proceeded from § 104 (2) 4) of the Constitution, according to which the Local Government Council Election Act may only be adopted and amended by a majority of the membership of the Riigikogu (i.e., 51 votes of 101) although the delegation not declared unconstitutional and invalid was included in the Language Act.

<sup>21</sup> In the same decision, the Supreme Court declared the unconstitutionality of two delegation norms violating the principle of parliamentary prerogative. See CRCSd 5.02.1998, 3-4-1-1-98, parts III and IV.

<sup>22</sup> The regulation is called Traffic Code (Liikluseeskiri. – RT I 2001, 15, 66; 2003, 22, 131; 2005, 41, 336 (in Estonian)). English translation available at <http://www.legaltext.ee/text/en/X50043K1.htm>. The Traffic Code establishes important traffic and movement restrictions, the violations of which are subject to a punishment. However, the authorisation norm that the Traffic Code is based on, is rather brief. Subsection 3 (Determination of road traffic rules) (2) of the Traffic Act (RT I 2001, 3, 6; 2007, 4, 19; in Estonian) lays down: The Government of the Republic shall determine the road traffic rules with the Traffic Code.

<sup>23</sup> Piirirežiimi eeskiri. – RT I 1997, 69, 1126; 2004, 77, 529 (in Estonian). Subsection 8 (Border regime) (3) is a problematic authorisation norm: The rights, obligations and restrictions arising from the border regime, unless provided by law or international agreements, shall be established by the Government of the Republic or an agency authorised thereby, unless otherwise provided by law.

<sup>24</sup> Vangla sisekorraeeskiri. – RTL 2000, 134, 2139; 2007, 13, 192 (in Estonian). Among other things, the internal rules of prisons establish restrictions on the use of personal items, meetings and correspondence by imprisoned persons. Subsection 105 (Prison) (2) of the Imprisonment Act forms a problematic authorisation norm: “[...] the Minister of Justice shall establish internal rules of prisons.” (It is true that numerous other provisions of the Imprisonment Act also refer to internal rules in prisons, but this kind of “spreading” of authorisations across the law renders the regulation difficult to survey and in turn raises issues in connection with legal clarity.)

<sup>25</sup> Relvastatud üksuse tegevuse kord. – RTL 2002, 144, 2107 (in Estonian). An armed unit, i.e., the so-called prison commando organises searches in prisons among other things; its members have the right to carry weapons and use these against people. The legal regulation is limited by an authorisation norm in § 109 (Prison escort guards) (3) of the Imprisonment Act: If necessary, an armed unit may be formed for the performance of special duties at a prison. The duties and operating procedure of prison escort guards shall be provided for pursuant to the procedure established by the Minister of Justice.

period. Today, as the end of the transitional period is jointly recognised, the Supreme Court could even more clearly turn to the goal set in 1994 stating that the obligation of the legislator pursuant to the Constitution to regulate important matters by itself cannot be delegated to the executive. This back-to-the-roots tendency is confirmed by several decisions from 2002 and 2003.<sup>\*26</sup>

## 2.2. General fundamental right to organisation and procedure

The second development, to which the basis was laid by Operative Technical Measures I, is the procedural dimension of fundamental rights. The Supreme Court discusses the elements of the implementation procedure of special measures and the procedural order in the explanation of the decision and establishes that the law which does not regulate the mentioned elements violates § 14 of the Constitution. The Supreme Court adds: “The Riigikogu should have established the specific cases and **detailed procedure** for the implementation of operative technical measures and the related possible restrictions of rights.”<sup>\*27</sup> The Supreme Court shall later name § 14 of the Constitution the general fundamental right to organisation and procedure.<sup>\*28</sup>

In this context, there are two important developments. Firstly, the right to organisation and procedure has expanded into a comprehensive right to effective procedure in the practice of the Supreme Court. Secondly, the Supreme Court has also developed the specific direction of an administrative procedure by developing the general right to organisation and procedure into a right to good administration.

The first development is marked by an interpretation of § 14 of the Constitution: “According to § 14 of the Constitution, the state is obliged to guarantee the rights and freedoms of individuals. Guarantee of rights and freedoms does not mean that the state avoids interference with fundamental rights. According to § 14 of the Constitution, the state is obliged to establish appropriate procedures for protecting fundamental rights. Both judicial and administrative proceedings must be fair. This means, among other things, that the state must enforce a procedure that ensures effective protection of the rights of an individual.”<sup>\*29</sup> The sequence of thoughts continues: “[I]f the legislator has not established an effective mechanism without gaps for the protection of fundamental rights, the judicial power must ensure protection of fundamental rights pursuant to § 14 of the Constitution.”<sup>\*30</sup>

Since 2000, the Supreme Court has repeatedly derived the right to effective procedure from § 13, 14 and 15 of the Constitution and article 13 of the ECHR.<sup>\*31</sup> In order for the right to effective procedure to be implemented, it must be considered sufficient if a person complains that his rights have been violated. A person shall have a remedy before a national administrative authority as well as before a national court in order both to have his claim decided and, if appropriate, to obtain redress.<sup>\*32</sup> An effective remedy means a remedy that is as effective as can be.<sup>\*33</sup>

The second development appears in the good administration precedents. The Supreme Court names § 14 of the Constitution a fundamental right to good administration<sup>\*34</sup>, thereby emphasising that § 14 of the Constitution applies primarily to administrative proceedings regardless of its general character. § 14 of the Constitution, which among other things obliges the executive power and local governments to ensure fundamental rights, is a fundamental right to an effective administrative procedure.<sup>\*35</sup> A fundamental right to good administration or

<sup>26</sup> CRCSd 5.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, paragraph 25; 19.12.2003, 3-4-1-22-03.

<sup>27</sup> Author’s emphasis.

<sup>28</sup> SCebd 28.10.2002, 3-4-1-5-02, paragraph 30, 35; 12-04-2006, 3-1-63-05, paragraph 24; CRCSd 17.02.2003, 3-4-1-1-03, paragraph 12; 31.01.2007, 3-4-1-14-06, paragraph 22, 34.

<sup>29</sup> CRCSd 14.04.2003, 3-4-1-4-03, paragraph 16. The obligation to guarantee rights also expands to the rights arising from European Convention on Human Rights. See SCebd 6.01.2004, 3-1-3-13-03, paragraph 31: “The European Convention for the Protection of Human Rights and Fundamental Freedoms is [...] an inseparable part of the Estonian legal order and the guarantee of the rights and freedoms provided therein is also the obligation of the judicial power pursuant to § 14 of the Constitution.”

<sup>30</sup> SCebd 6.01.2004, 3-3-2-1-04, paragraph 27.

<sup>31</sup> SCEbr 22.12.2000, 3-3-1-38-00, paragraph 19; 28.04.2004, 3-3-1-69-03, paragraph 24; SCebd 17.03.2003, 3-1-3-10-02, paragraph 17. Cf. CRCSd 22.02.2001, 3-4-1-4-01, paragraph 9–11; U. Lõhmus. Õigus õiglasele kohtulikule arutamisele (The Right to a Fair Court Hearing). – U. Lõhmus (comp.). Inimõigused ja nende kaitse Euroopas (Human Rights and their Protection in Europe). Tartu 2003, paragraph 152 ff. (in Estonian).

<sup>32</sup> European Court of Human Rights uses the concept “redress” in *Klass et c. v. Germany*, judgment of 6.09.1978, 5029/71, paragraph 64. In later cases it uses instead of redress the broader concept of “relief” (*Kudla v. Poland*, 26.10.2000, 30210/96, No. 157; 26.10.2000, 30985/96, *Hasan and Chaush v. Bulgaria*, paragraph 96): “a remedy must allow the competent domestic authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.”

<sup>33</sup> SCEbr 22.12.2000, 3-3-1-38-00, paragraph 19 with a reference to the European Court of Human Rights *Klass et c. v. Germany*, judgment of 6.09.1978, 5029/71, paragraphs 64, 69.

<sup>34</sup> CRCSd 17.02.2003, 3-4-1-1-03, paragraph 23.

<sup>35</sup> Naturally, § 14 of the Constitution as the general fundamental right to organisation and procedure also has other aspects, which are unrelated to administrative proceedings, e.g., the right to private law powers. Cf. R. Alexy. *A Theory of Constitutional Rights*. Oxford/New York 2002, pp. 324 ff.

the principle of good administration as the Administrative Law Chamber of the Supreme Court calls it, subjects the administrative procedure to heightened requirements: “The principles of good administration among other things also presume that a person must be provided information regarding the course of procedure of the case that concerns him within a reasonable amount of time and the administrative acts that influence solving the case and other relevant information. For this purpose, a person must first be included in a procedure to hear his viewpoint, he must have the opportunity to present objections, provide relevant explanations, circumstances must be examined, evidence must be collected, different options weighed etc.”<sup>36</sup> Shortly, the principle of good administration means that “an administrative procedure must also be fair”.<sup>37</sup>

### 2.2.1. So-called Traffic Act saga

If the practice of the Supreme Court in general complies with the requirements established by the committees and panels of the Supreme Court, four recent decisions regarding the assessment of the constitutionality of the suspension of the right to drive proceeding laid down in the Traffic Act deviate therefrom.<sup>38</sup> Namely, the administrative authority issuing the right to drive, which is the Estonian Motor Vehicle Registration Centre (MVRC), has the legal obligation to suspend the right to drive for a period of one to 24 months pursuant to § 41<sup>3</sup> (1)–(8) of the Traffic Act. The proceeding that led to the suspension of the right to drive is the following. A person driving a vehicle without a state registration plate, who caused a traffic accident causing damage to another person who was driving a motor vehicle while drunk or avoided the state of intoxication to be ascertained or used alcohol after the traffic accident, who exceeded the permitted speed limit, who ignored the stop signal for vehicle and failed to give notification of the traffic accident, was punished for the misdemeanour committed pursuant to the Traffic Act. If the decision on punishment entered into force, the body conducting misdemeanour proceedings who was not MVRC, sent it to MVRC. Since the acquisition of the enforced decision on punishment, the latter was obliged to make a decision pursuant to § 41<sup>3</sup> (10), i.e., to suspend the right to drive of the persons punished within three days. The only condition of suspension in various subsections was the enforced decision on punishment made in the misdemeanour procedure. In the selection of legal consequences, there was no right of discretion.

Several administrative courts<sup>39</sup> and the Administrative Law Chamber of the Supreme Court<sup>40</sup> expressed doubt about the constitutionality of § 41<sup>3</sup> (1)–(8) and (10) of the Traffic Act and initiated a concrete norm control in the Supreme Court for the review of constitutionality thereof. One of the main arguments was the non-existent procedure in making the decision to suspend the right to drive. However, the Supreme Court *en banc*<sup>41</sup> declared on three and the Constitutional Review Chamber<sup>42</sup> on one occasion the compliance of the Traffic Act with the Constitution. Nevertheless, the Estonian parliament Riigikogu declared § 41<sup>3</sup> of the Traffic Act invalid on 16 June 2005, i.e., eleven days before the announcement of two latest decisions by the Supreme Court *en banc*.<sup>43</sup> We are thus dealing with cases that conceal a certain element of drama as the divide between the two opposing viewpoints did not only permeate legal publicity, but also the judiciary and even the Supreme Court itself. It remains unclear why the legislator amended the law, the constitutionality of which the Supreme Court declared on several occasions. This justifies the more detailed critical analysis of the prevailing point of view in the Supreme Court.

The Supreme Court *en banc* admits that the regulation in the Traffic Act is a limitation of the scope of the right to organisation and procedure.<sup>44</sup> However, in the opinion of the majority of the Supreme Court judges the limitation is constitutional. The reasons of the court may be reconstructed as follows. First, the prior misdemeanour procedure outside MVRC and the procedure for suspension of a driving licence in MVRC constitute a single procedure in the opinion of the Court: “[A]lthough the misdemeanour procedure and suspension of the right to drive as an administrative procedure in MVRC constitute separate procedures, they can be regarded as

<sup>36</sup> ALCSd 5.03.2007, 3-3-1-102-06, paragraph 21. Cf. also ALCSd 27.03.2002, 3-3-1-17-02, paragraph 18; 20.06.2003, 3-3-1-49-03, paragraph 16; 25.10.2004, 3-3-1-47-04, paragraph 18; 18.11.2004, 3-3-1-33-04, paragraph 16; 23.02.2004, 3-3-1-1-04, paragraph 20; 9.05.2006, 3-3-1-6-06, paragraph 29; 11.12.2006, 3-3-1-61-06, paragraph 20; 19.12.2006, 3-3-1-80-06, paragraph 18–22; 10.01.2007, 3-3-1-85-06, paragraph 12; 10.05.2007, 3-3-1-100-06, 15; ALCSr 8.10.2002, 3-3-1-56-02, paragraph 9; 20.05.2003, 3-3-1-37-03, paragraph 13; 3.03.2005, 3-3-1-1-05, paragraph 18–22; 27.09.2005, 3-3-1-47-05, paragraph 13; 22.12.2005, 3-3-1-73-05, paragraph 14.

<sup>37</sup> ALCSd 11.12.2006, 3-3-1-61-06, paragraph 20.

<sup>38</sup> SCebd 25.10.2004, 3-4-1-10-04; 27.06.2005, 3-4-1-2-05; 27.06.2005, 3-3-1-1-05; CRCSd 10.12.2004, 3-4-1-24-04.

<sup>39</sup> Tallinn Administrative Court decision 5.03.2004, 3-799/2004; 19.05.2004, 3-1298/2004; 25.06.2004, 3-1473/2004; 1.09.2004, 3-1763/2004; 8.02.2005, 3-1368/2004; Tartu Administrative Court decision 22.12.2004, 3-480/04 and 3-509/04; 28.12.2004, 3-461/04; Jõhvi Administrative Court decision 28.12.2004, 3-249/2004; 30.12.2004, 3-254/2004 and 3-255/2004; 10.02.2005, 3-309/2004.

<sup>40</sup> ALCSr 3.03.2005, 3-3-1-1-05, paragraph 18–22; cf. also ALCSd 23.02.2004, 3-3-1-1-04, paragraph 20.

<sup>41</sup> SCebd 25.10.2004, 3-4-1-10-04; 27.06.2005, 3-4-1-2-05; 27.06.2005, 3-3-1-1-05.

<sup>42</sup> CRCSd 10.12.2004, 3-4-1-24-04.

<sup>43</sup> RT I 2005, 40, 311 (in Estonian).

<sup>44</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 36: “[T]he right to a fair and effective procedure stemmed from § 14 of the Constitution has been restricted”. Cf. also SCebd 27.06.2005, 3-3-1-1-05, paragraph 20.

a single whole. Thus, whether a person is ensured a right to a procedure arising from § 14 of the Constitution must also be assessed in the light of the set of procedures.”<sup>45</sup>

Secondly, the Supreme Court *en banc* states that in this single procedure, the right to a hearing of the person whose right to drive is suspended is ensured in the misdemeanour procedure. In this procedure the law provides a basis for immediate withdrawal of a driving licence. In immediate withdrawal of a driving licence, the administrative body conducting extra-judicial proceedings is obliged to explain the reason for the withdrawal.<sup>46</sup> Based on this, the Supreme Court *en banc* concludes that a person knows what awaits him and can thus also protect himself.<sup>47</sup> In addition, the Supreme Court is of the opinion that the misdemeanour procedure includes a hearing in the matter whether a violation occurred and if the person is guilty of the violation.<sup>48</sup>

Thirdly, the Supreme Court is of the opinion that a hearing is ensured in MVRC in the following matters: whether a person holds a valid right to drive; whether the person has been subjected to an enforced decision on punishment in a misdemeanour matter that may form the basis for suspension of the right to drive pursuant to § 41<sup>3</sup> of the Traffic Act; whether there is a legal basis for the suspension of the right to drive; whether prior decisions on punishment that the person has been subjected to are applicable according to the punishment register; whether the person uses a vehicle in connection with disability; whether a prior decision on suspension of the right to drive that the person has been subjected to has been fulfilled.<sup>49</sup> The Supreme Court also states: “After the enforcement of the decision on punishment made in the misdemeanour procedure, a person has [...] the right to turn to the MVRC for presentation of circumstances which preclude suspension of the right to drive pursuant to the law.”<sup>50</sup>

Fourthly, according to the Supreme Court “pursuant to subsection 10 of § 41<sup>3</sup> of the Traffic Act, a person has the possibility to lodge a complaint against the suspension of the right to drive to a higher official or dispute it in the court, which also ensures his right to a hearing and at the same time enables to explain his views and submit applications and objections.”<sup>51</sup>

Fifthly, the Supreme Court is of the opinion that the limitation is not intensive<sup>52</sup>, and the result of the consideration thereof is that the general effectiveness of the proceedings weighs up the unfairness that may arise in single cases: “The Supreme Court *en banc* is of the opinion that this restriction is the result of a legitimate goal to economise on resources spent on the proceedings and ensure effective procedure of a large amount of similar cases [...]. The statistics show that the number of more serious traffic violations on which the prescribed punishment is the suspension of the right to drive is high. According to the Estonian Motor Vehicle Registration Centre (MVRC), the right to drive was suspended in 13,295 cases in total in 2004. It is obvious that hearing of persons in MVRC in all these cases would be resource-consuming. At the same time, the circumstances needed for the formalisation of suspension of the right to drive are generally correctly identifiable also without hearing the person (e.g., determination of applicable punishments must be based on the data in the punishment register) and failure to hear a person results in incorrect decisions in rare cases. There is no measure for the achievement of the goal that would interfere with the rights of the persons concerned less intensively. A limitation is proportional as the failure to hear does not necessarily bring about an incorrect decision.”<sup>53</sup>

In the end, the Supreme Court also refers to the fact that the European Court of Human Rights has also given its blessing to the suspension of the right to drive as an automatic consequence of conviction in a case *Malige v. France*.<sup>54</sup>

In this light, it seems paradoxical that the Supreme Court, on the other hand, does not deny the absence of the procedure: “In the suspension of the right to drive, no substantive proceedings are carried out in the MVRC upon suspension of the right to drive, but the role of the agency is only to formalise suspension of the right to drive.”<sup>55</sup>

<sup>45</sup> SCebd 27.06.2005, 3-3-1-1-05, paragraph 19. Cf. also SCebd 25.10.2004, 3-4-1-10-04, paragraph 23; 27.06.2005, 3-4-1-2-05, paragraph 28–29.

<sup>46</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 32.

<sup>47</sup> SCebd 25.10.2004, 3-4-1-10-04, paragraph 24: “It is easy for a driver of a power-driven vehicle to foresee the consequences accompanied by his unlawful activity and protect himself therefrom in the course of the misdemeanour procedure.”

<sup>48</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 34.

<sup>49</sup> *Ibid.*, paragraph 35.

<sup>50</sup> *Ibid.*, paragraph 36.

<sup>51</sup> *Ibid.*, paragraph 37.

<sup>52</sup> SCebd 27.06.2005, 3-3-1-1-05, paragraph 20; 27.06.2005, 3-4-1-2-05, paragraph 37.

<sup>53</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 37. Cf. also SCebd 27.06.2005, 3-3-1-1-05, paragraph 20.

<sup>54</sup> SCebd 25.10.2004, 3-4-1-10-04, paragraph 19.

<sup>55</sup> *Ibid.*

### 2.2.2. Criticism

On a closer look it becomes clear that most of the prerequisites that the decisions of the Supreme Court are based on do not really match and the concluding value judgment is also questionable.

Firstly, it is impossible to agree with the statement that misdemeanour procedure followed by the procedure of suspension of the right to drive would constitute a single whole. The purpose of the misdemeanour procedure is to prove the guilt of the offender and to penalise the person who committed the offence. The presumption of innocence is in force here according to § 22 (1) of the Constitution. A misdemeanour procedure may either be conducted in court or by the administrative body conducting extra-judicial proceedings (MVRC is neither of them by law) and ends with the enforcement of a ruling on penalty or a ruling on the termination of a procedure. Once the procedure has ended, it cannot be continued any longer. An administrative procedure is conducted by the administrative authority and it ends with the delivery of an administrative act, administrative conduct or the conclusion of an administrative contract. Both the duty to cooperate and the right to a hearing remain in force. The proceedings of the suspension of right to drive taken in MVRC are administrative proceedings because the MVRC is an administrative body and the Traffic Act includes substantive administrative law, a reference to the Administrative Procedure Act<sup>56</sup> as well as special regulations of the administrative procedure (e.g., § 41<sup>3</sup> (10) of the Traffic Act). Two procedures, misdemeanour procedure and (administrative) procedure of the suspension of the right to drive follow to one another and in temporal order but they can and should nevertheless be differentiated. Two procedures existed instead of a single whole.<sup>57</sup>

In case of properly conducted proceedings, the administrative authority should indeed have notified the person that the committed offence may be accompanied with the suspension of the right to drive. However, even in case of a notification there were no remedies against the possible suspension. The allegation that beside the matter of fact and guilt of the misdemeanour, the person in the misdemeanour procedure was ensured with the right to be heard in the impending suspension of the right to drive, is misguided. The Traffic Act required the police to withdraw the driving licence and issue a temporary driving licence.<sup>58</sup> However, during the misdemeanour procedure conducted by the police or by the court, the suspension of the right to drive was not deliberated and was not allowed to be discussed. Suspension of the right to drive was neither a penalty for the misdemeanour nor a supplementary punishment. According to the first sentence of § 56 (1) of the Penal Code<sup>59</sup>, punishment shall be based on the guilt of the person. According to the second sentence of § 56 (1) of the Penal Code, in imposition of a punishment, a court or an extra-judicial body shall take into consideration the mitigating and aggravating circumstances, the possibility to influence the offender not to commit offences in the future, and the interests of the protection of public order. Other considerations, including the suspension of the right to drive following the penalty could and ought not to have been taken into consideration.<sup>60</sup>

It remains unclear what the Supreme Court *en banc* means with the questions regarding which the person can be heard in proceedings before the MVRC.<sup>61</sup> The person in this situation was mainly interested in whether and for how long his right to drive would be suspended. The questions like whether a person holds a valid right to drive or whether there is a legal basis for the suspension of the right to drive can be interesting too but only if and as much they concern the main question which remains unanswered by the Supreme Court *en banc*. The opinion of the Supreme Court that after the enforcement of the penalty of the misdemeanour procedure the person has the opportunity to address the MVRC to present statements concerning the circumstances that by law prevent the suspension of the right to drive, is inappropriate. Disability excluded<sup>62</sup>, the Traffic Act prescribed no single basis that would prevent the suspension of the right to drive. Moreover, the right to be heard during the administrative procedure following the decision in the misdemeanour proceedings could not be exercised solely for the lack of information the person received. "The person has no knowledge when

<sup>56</sup> Traffic Act § 1 (Scope of application of Act) (2): "The provisions of the Administrative Procedure Act [...] apply to administrative proceedings prescribed in this Act, taking account of the specifications provided for in this Act."

<sup>57</sup> Cf. ALCSCr 3.03.2005, 3-3-1-1-05, paragraph 18 ff.; dissenting opinion of judge Indrek Koolmeister, SCebd 25.10.2004, 4-1-10-04, paragraphs 1 and 3; dissenting opinion of judge Indrek Koolmeister, which is joined by judges Tõnu Anton, Julia Laffranque, Jüri Põld and Harri Salmann, SCebd 25.10.2004, 3-3-1-29-04, paragraph 1.

<sup>58</sup> Traffic Act § 41<sup>1</sup> (Issue of temporary driving licences) (1): "Upon the commission of a misdemeanour for which suspension of the right to drive is prescribed pursuant to § 41<sup>3</sup> of this Act, the driving licence of the person shall be immediately withdrawn and a temporary driving licence shall be issued in place of the confiscated driving licence."

<sup>59</sup> RT I 2001, 61, 364; 2004, 88, 600 (in Estonian). English translation available at <http://www.legaltext.ee/text/en/X30068K7.htm>.

<sup>60</sup> Cf. ALCSCr 3.03.2005, 3-3-1-1-05, paragraph 20; dissenting opinion of judges Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann SCebd 27.06.2005, 3-4-1-2-05, paragraph 1.

<sup>61</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 35 (see above).

<sup>62</sup> Traffic Act § 41 (Bases of and procedure for suspension of right to drive) (3) sentence 2: "Suspension of the right to drive shall not be applied in respect of a person who uses a power-driven vehicle due to disability, unless he or she drives the power-driven vehicle in a state of intoxication."

and where his documents are being sent, who and when the hearing regarding his matter on suspension of the right to drive takes place. The procedure pursuant to Traffic Act (incl. § 41<sup>3</sup> (10)) precludes the notification of a person even on the initiative of MVRC.<sup>\*\*63</sup> In addition, practical incompatibility of the legally set three days term for the suspension with the minimum standards of the administrative procedure excluded a hearing before the MVRC.<sup>\*\*64</sup> “Even as a formality, it must be considered that this kind of hearing would take place by violating either the term provided in § 41<sup>3</sup> (10) of the Traffic Act or the principles provided by the Administrative Procedure Act.”<sup>\*\*65</sup> The argument that the person could contest the suspension of the right to drive in court is unconvincing too. Taking into account the repeated confirmation of the Supreme Court, this case in court could only have resulted in a loss for the person.

It is hard to agree that the limitation of the scope of the right to organisation and procedure was not intensive. The total lack of the opportunity to be heard annuls the right to be heard in this instance. “By providing such a short term to make the ruling about the suspension of the right to drive, the legislator has substantively precluded the possibility to involve the person in the procedure and exercise his rights in procedural law, including the right to be heard.”<sup>\*\*66</sup> The right to be heard is an important part of the right to organisation and procedure (§ 14 of the Constitution) and therefore a fundamental right.<sup>\*\*67</sup> Total lack of the opportunity to be heard is therefore an intensive limitation of an important fundamental right.

Also, the value judgment that saving the resources justifies the failure in hearing is disputable. The Supreme Court *en banc* itself admits that its position may, in an individual case, result in a false ruling: “[C]ircumstances necessary to formalise the suspension of the right to drive can be in general correctly established also without hearing the person [...] and **failure to undertake a hearing leads in rare occasions to false rulings.** [...] A limitation is proportional, since **failure to hear a person does not in general bring about an erroneous decision.**”<sup>\*\*68</sup> In addition the Supreme Court *en banc* concedes that: “In suspending the right to drive **no substantive proceedings take place** but the sole role of the administrative body lies in formalising the suspension of the right to drive.”<sup>\*\*69</sup> Apart from that, the Supreme Court *en banc* disregards the opportunity to analyze alternative procedures that ensure better the rights in individual cases.<sup>\*\*70</sup> A suspicion arises whether the decision of the Supreme Court *en banc* is in accordance with the principle of human dignity. “[H]uman dignity is the basis of all fundamental rights and the aim of protecting fundamental rights and freedoms.”<sup>\*\*71</sup> According to the prevalent negative definition, human dignity means that a person ought not to be turned into an object of the state power, he shall always remain the subject thereof.<sup>\*\*72</sup> When the state knowingly waives from procedure, thereby withdrawing from the person the opportunity to be heard and at the same time concedes that saving money outweighs violations of rights of some people, this state denies the elementary requirements of the state based on the rule of law and fundamental rights and turns a person into a mere object of state authority. In essence, this means sacrificing an individual for the greater good. The theoretical basis

<sup>63</sup> Dissenting opinion of judges Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann SCebd 27.06.2005, 3-4-1-2-05, paragraph 1 subitem 3. Cf. ALCSCd 23.02.2004, 3-3-1-1-04, paragraph 20: “[P]roceeding from the principles of good administration, the minimum requirement (is) notification of a person concerning the procedure he is subjected to and providing a person with the possibility present objections.”

<sup>64</sup> Administrative Procedure Act § 40 (Hearing of opinions and objections of participants in proceedings) (1): “An administrative authority shall, before issue of an administrative act, grant a participant in a proceeding a possibility to provide his or her opinion and objections in a written, oral or any other suitable form.” (2): “Before taking any measures which may damage the rights of a participant in a proceeding, he or she shall be granted a possibility to provide his or her opinion and objections.” The derogations regarding when the administrative procedure may be conducted without hearing the opinion and objections of the parties to a proceeding, are laid down in § 40 (3) of the Administrative Procedure Act. The Administrative Law Chamber of the Supreme Court adopted the position that no prerogative laid down in § 40 (3) of the Administrative Procedure Act is applicable in case of a suspension of the right to drive. See ALCSCr 3.03.2005, 3-3-1-1-05m, paragraph 21.

<sup>65</sup> Dissenting opinion of judges Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann SCebd 27.06.2005, 3-4-1-2-05, paragraph 1 subitem 3.

<sup>66</sup> ALCSCr 3.03.2005, 3-3-1-1-05, paragraph 19.

<sup>67</sup> *Ibid.*

<sup>68</sup> SCebd 27.06.2005, 3-4-1-2-05, paragraph 37 (author’s emphasis).

<sup>69</sup> SCebd 25.10.2004, 3-4-1-10-04, paragraph 19 (author’s emphasis).

<sup>70</sup> Dissenting opinion of judges Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann SCebd 27.06.2005, 3-4-1-2-05, paragraph 1 subitem 4: “One of the possibilities is informing the person of the procedure commenced regarding the suspension of the right to drive and the possibility to present written objections. It is also possible to prepare a conditional suspension notice, which acquires the force of a decision if the person does not present objections or apply for the case to be discussed. The use of all such possibilities ensures sufficient right to be heard in a relatively sustainable way. Making the decision on the suspension of the right to drive immediately after the entry into force of the misdemeanour decision is not necessary as the period of time between the commission of the latest offence and the suspension of the right to drive is usually long, during which a person practices the right to drive.”

<sup>71</sup> ALCSCd 22.03.2006, 3-3-1-2-06, paragraph 10.

<sup>72</sup> In Estonian literature R. Maruste. Põhiseadus ja selle järelevalve (Constitution and Its Review). Tallinn 1997, p. 113 (in Estonian). This object formula originates from a German state lawyer Günter Dürig: G. Dürig. – Maunz/Dürig et al. Grundgesetz – Kommentar. Vol. 1. München 1958, Art. 1 Abs. 1 marginal 28: “Die Menschenwürde ist getroffen, wenn der konkrete Mensch zum Objekt, zu einem bloßen Mittel, zur vertretbaren Größe herabgewürdigt wird.”

for this appears to be the utilitarianism of Jeremy Bentham<sup>\*73</sup> and John Stuart Mill.<sup>\*74</sup> The task of the Supreme Court is nevertheless to protect the fundamental rights, not to sacrifice them. The court admits itself recently: “The procedure must be aimed at the protection of rights of a person, otherwise it might be impossible for the person to exercise his rights.”<sup>\*75</sup> It is precisely the procedural dimension that serves human dignity<sup>\*76</sup> in the first order and a procedure that fails to consider this cannot be compatible with the constitution.

Finally, it is doubtful whether the Supreme Court accurately proceeded from the decision of the European Court of Human Rights in the case *Malige v. France*.<sup>\*77</sup> The object thereof was the French point system in which several recorded misdemeanours may have finally brought about the suspension of the right to drive. The account of a driving licence had twelve points on it and each violation provided burdened the account with a certain number of points that were once again added to the account after the expiry of the punishment. When the account reached zero points the competent authority suspended the right to drive.<sup>\*78</sup> Without scrutiny of the details of the French point system, it is important to mention its differences with the Estonian system pointed out by the European Court of Human Rights: “At the time when the details of an offence are recorded, the driver is informed by the administrative authority that he is liable to lose points on account of the offence he has committed and that there is an automatic system for the deduction and restoration of points [...]. He is thus given the opportunity to contest the constituent elements of the offence which might be used as the basis for a deduction of points.”<sup>\*79</sup> It was this type of obligation to notify and opportunity to contest that the Estonian system lacked.

### 2.2.3. Conclusions of the Traffic Act saga

Previous analysis only concerned one out of many complicated matters dealt within the Traffic Act cases. The answer to the question raised whether the addressee of the suspension of the right to drive was ensured with an effective and just procedure is, contrary to the majority of the Supreme Court *en banc* and like the Administrative Law Chamber of the Supreme Court, negative: “The Supreme Court *en banc* has found that the suspension of the right to drive pursuant to § 41<sup>3</sup> of the Traffic Act is constitutional, the right to a procedure arising from § 14 of the Constitution is ensured, and the principle of proportionality is not violated. We find that the abovementioned statements are misleading. In the opinion of the signatories, the procedure of the suspension of the right to drive provided by the Traffic Act does not conform with the right to a procedure arising from § 14 of the Constitution. In addition, the regulation in force fails to ensure the consideration of the principle of proportionality in applying the suspension of the right to drive.”<sup>\*80</sup>

It must be hoped that the result of the Traffic Act saga and the majority arguments of the Supreme Court *en banc* will not turn into the future case law and that the Supreme Court will find its way back to the developments started on 12 January in 1994. The fundamental right to organisation and procedure is of central importance for the principle of human dignity and for the rule of law. It is the procedural dimension that makes a state based on the rule of law what it is.

## 2.3. Judicial activism<sup>\*81</sup>

The third development based on the decision of Operative Technical Measures I, is supervision of the legislator’s omission by the Supreme Court. The Supreme Court conceded in this ruling: “[T]he valid standards for implementing operative technical measures are **insufficient** and **deficient** from the point of view of the protection of fundamental rights and freedoms. [...] **It has not been specified** what operative technical measures specifically mean [...] The circle of subjects entitled to implement operative technical measures, cases, conditions, procedure, guarantees, control and supervision and liability remains unspecified. [...] **The Riigikogu should have established** the specific cases and detailed procedure for the implementation of operative technical measures

<sup>73</sup> J. Bentham. *An Introduction to the Principles of Morals and Legislation*. J. H. Burns, H. L. A. Hart (eds.). London 1970.

<sup>74</sup> J. S. Mill. *Utilitarianism*. 7<sup>th</sup> ed. London 1879.

<sup>75</sup> CRCSd 31.01.07, 3-4-1-14-06, paragraph 28.

<sup>76</sup> The famous German state lawyer and the author of the object formula Günter Dürig even considers making a person an object of a national procedure an example of a violation of human dignity. G. Dürig (Note 73), Art. 1 Abs. 1 marginal 34: “Es verstößt gegen die Menschenwürde, wenn der Mensch zum Objekt eines staatlichen Verfahrens gemacht wird.”

<sup>77</sup> Cf. SCebd 25.10.2004, 3-4-1-10-04, paragraph 19.

<sup>78</sup> European Court of Human Rights, *Malige v. France*, judgment of 23.09.1998, application No. 68/1997/852/1059, paragraphs 17–20.

<sup>79</sup> *Ibid.*, paragraph 47.

<sup>80</sup> Dissenting opinion of judges Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Pöld and Harri Salmann SCebd 27.06.2005, 3-3-1-1-05, paragraph 1.

<sup>81</sup> The meaning of the term “judicial activism” is anything but clear. Cf. K. Kmiec. The origin and current meanings of “judicial activism”. – *California Law Review* 2004 (92), pp. 1442 ff., 1463 ff. See also an excellent analytical approach in Estonian: B. Aaviksoo. Kohtulik aktivism põhiseaduslikkuse järelevalve funktsioonina (Judicial Activism as a Function of Constitutional Review). – *Juridica* 2005, pp. 295 ff. There seems to be consensus only regarding the fact that the term is related to the concept of constitutional review and its opposite is the term “judicial restraint”. In this article, the nature of the constitutional review is activist, which may declare the legislator’s omission unconstitutional.

and the related possible restrictions of rights **itself** instead of delegating the latter to security police officers and the justice of the Supreme Court. Thus, subsection 4 of part II of the Police Act Amendment Act is also contrary to § 13 (2) of the Constitution as **insufficient regulation** in establishing restrictions to fundamental rights and freedoms shall not protect everyone against arbitrary action by the state power.<sup>82</sup>

The Supreme Court talks about insufficient and deficient standards or about things that the Riigikogu has left unspecified or which itself should have established. All this refers to the omission on the part of the legislator. In conclusion, in 1994 the Supreme Court declared the insufficient Act of Parliament invalid, thereby founding yet another important development in the constitutional review. There is a connection with the principle of parliamentary prerogative here. What the legislator is obliged to do by the Constitution may not be delegated to the executive power, but ought to be decided by the legislator itself. By not deciding on its own, the legislator fails to fulfil its constitutional obligations. Therefore, the delivery of an insufficient delegation norm is the legislator's unconstitutional omission. The Supreme Court has later summarised the idea as follows: "The legislator's failure to act or insufficient activity may be unconstitutional and the Supreme Court shall have the opportunity to also determine the unconstitutionality of the legislator's omission in the constitutional review proceedings."<sup>83</sup>

The cases regarding the constitutional review of legislator's omission may be classified in several ways. Classification according to various procedural types is possible as well as material principles of the Constitution, from which the legislator's positive obligations arise. The author hereby proceeds from the latter. In this context, it is still important to refer to the fact that to the unconstitutionality of the legislator's omission corresponds the positive obligation to eliminate the unconstitutional situation.

### 2.3.1. Positive obligations proceeding from the underlying principle of the rule of law

In its decision Operative Technical Measures I, the Supreme Court declared the delegation norm invalid due to the violation of the principle of parliamentary prerogative.<sup>84</sup> The positive obligation that derives from the parliamentary prerogative is included under the obligations based on the underlying principle of the separation and balance of powers and thus, more broadly, the underlying principle of the rule of law. The Supreme Court has since declared insufficient delegation norms invalid on several occasions.<sup>85</sup>

The legislator's positive obligation to establish effective procedure in order to ensure fundamental rights is also based on the underlying principle of the rule of law.<sup>86</sup> The Supreme Court specifies this obligation, for instance, in connection with the obligation to guarantee the rights of the European Convention on Human Rights: "The European Convention for the Protection of Human Rights and Fundamental Freedoms is [...] an inseparable part of the Estonian legal order and the guarantee of the rights and freedoms provided therein is also the obligation of the judicial power pursuant to § 14 of the Constitution. The Supreme Court *en banc* is of the opinion that the performance of this obligation in the best possible way would assume supplementation of the Court Procedure Act so that this would unambiguously indicate whether, in which cases and how the review of a criminal matter should take place after the decision of the European Court of Human Rights."<sup>87</sup>

The Supreme Court has also declared the unconstitutionality of the provision of the Code of Misdemeanour Procedure that did not guarantee sufficient remedies: "The wording of the Code of Misdemeanour Procedure [...] did not guarantee judicial protection of rights, because it did not allow appeals against refusals to hear an appeal."<sup>88</sup>

Also, due to the violation of the principle of proportionality proceeding from the underlying principle of the rule of law, the Supreme Court has repeatedly complained to the legislator about the establishment of administrative laws that have not provided the administrative body with the right of discretion.<sup>89</sup> The object of a decision from 2004 was a provision of the Aliens Act that did not enable to issue a residence permit to a person who submitted false data.<sup>90</sup> In a concrete norm control case discussed in the Supreme Court a complaint had been lodged to an administrative court by a person who had served in the armed forces of the USSR as a professional member in 1973–1988, but hidden this from the Citizenship and Migration Board. At the same time, the person was linked to Estonia by personal connections. The law did not enable to issue him a residence

<sup>82</sup> CRCSd 12.01.1994, III-4/1-1/94.

<sup>83</sup> CRCSd 2.12.2004, 3-4-1-20-04, paragraph 42.

<sup>84</sup> CRCSd 12.01.1994, III-4/1-1/94.

<sup>85</sup> CRCSd 5.02.1998, 3-4-1-1-98, parts III and IV; 23.03.1998, 3-4-1-2-98; 4.11.1998, 3-4-1-7-98, part II; 5.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, paragraph 25; 19.12.2003, 3-4-1-22-03.

<sup>86</sup> See above CRCSd 14.04.2003, 3-4-1-4-03, paragraph 16.

<sup>87</sup> SCebd 6.01.2004, 3-1-3-13-03, paragraph 31. To date, the indicated procedure for the review of a criminal matter has been adopted and enforced (RT I 2006, 48, 360.)

<sup>88</sup> CRCSd 25.03.2004, 3-4-1-1-04, paragraph 22, cf. also paragraph 17.

<sup>89</sup> SCebd 11.10.2001, 3-4-1-7-01; CRCSd 28.04.2000, 3-4-1-6-2000; 5.03.2001, 3-4-1-2-01; 3.05.2001, 3-4-1-6-01; 21.06.2004, 3-4-1-9-04.

<sup>90</sup> CRCSd 21.06.2004, 3-4-1-9-04.

permit. The Supreme Court considered its traditional practice and specific circumstances and declared those provisions of the Aliens Act “unconstitutional with regard to the part that does not provide a competent state authority with a right of discretion in case of a refusal to issue a residence permit due to presentation of false data”. The unconstitutionality arose from the disproportion of the regulation as the court admitted in a similar case: “The Aliens Act is disproportionate with regard to not allowing the provider or extender of a residence permit to choose legal consequences against a person who has been or regarding whom there are legitimate grounds to speculate that he has been a member of an intelligence or security service of a foreign state. The provider or extender of a residence permit lacks the opportunity to consider whether the restriction of rights and freedoms in a specific case is necessary in a democratic society.”<sup>91</sup>

In the opinion of the Supreme Court, the positive obligation from the underlying principle of the rule of law was also violated by the legislator in the course of the reform of the penal law. Namely, the legislator did not sufficiently account for what is provided in the second sentence of § 23 (2) of the Constitution: if the law prescribes a lesser punishment after the commission of an offence, the lesser penalty has to be applied. For instance, the Penal Code significantly lessened the length of imprisonment for criminal offences against property. Thus, a person imprisoned for six years complained that according to the term of punishment laid down in the new Penal Code<sup>92</sup> he could only be imposed a punishment of up to five years. His complaint received the following reply from the Supreme Court: “The law is unconstitutional as it does not prescribe a decrease in the punishment of a person in imprisonment to the upper limit of imprisonment laid down in the relevant provision of the special part of the Penal Code.”<sup>93</sup>

Finally, the underlying principle of the rule of law may be associated with the principle of legal clarity, a violation for which occurred when, for instance, if the legislator did not determine the rights of persons in the implementation of the ownership reform clearly enough: “[T]he disputed provision is in conflict with the Constitution because the legislator failed to fulfil its duty to sufficiently comprehensively establish the rights of persons who resettled and of the users of the property which had belonged to them.”<sup>94</sup>

### 2.3.2. Positive obligations proceeding from the underlying principle of democracy

In two cases, the Supreme Court had to review the conformity of the legislator’s omission with the underlying principle of democracy. The object of both decisions was the exclusion of election coalitions from the local government council elections. The legislator did not allow the election coalitions that had so far participated in local elections to register for the next elections. Here, the legislator did not explicitly forbid the participation of election coalitions but simply abolished the law that enabled this. The Supreme Court declared the legislator’s omission unconstitutional: “However, the Chamber deems the prohibition of citizens’ election coalitions unconstitutional [...]”<sup>95</sup> If the prohibition of election coalitions is unconstitutional, the underlying principle of democracy thus obliges the legislator to enact a law that also allows election coalitions to participate in local elections.

The Supreme Court deemed it necessary to add a specification: “The execution of the Supreme Court’s decision requires the amendment of a valid law in order to constitutionally hold local elections. Hereby, the legislator shall have the freedom to weigh different solutions.”<sup>96</sup>

### 2.3.3. Positive obligations proceeding from the underlying principle of the social state

The Supreme Court has given meaning to the underlying principle of the social state in its pioneering decision of 2004: “A social state and the protection of social rights incorporate the idea of aid and care for those who are unable to ensure themselves independently and sufficiently. The human dignity of these people would be degraded if they were left without aid that they need to satisfy their primary needs.”<sup>97</sup>

The object of this decision was the new wording of the Social Welfare Act, which did not enable students living in dormitories to receive housing allowance while students privately renting apartments were left with the opportunity to receive housing allowance. The Supreme Court established that the “Social Welfare Act [...] was unconstitutional to the extent that expenses connected with dwelling of needy people and families who were using dwellings not referred to in [...] Social Welfare Act were not taken into account [...]”

<sup>91</sup> CRCSd 5.03.2001, 3-4-1-2-01, paragraph 20. Cf. also CRCSd 28.04.2000, 3-4-1-6-2000, paragraph 17: “§ 19 (1) 2) of the Alcohol Act is disproportional regarding the inability of the issuer of the activity licence to choose legal consequences.”

<sup>92</sup> Karistusseadustik. Adopted 6.06.2001, entry into force 1.09.2002. – RT I 2001, 61, 364 (in Estonian). English translation available at <http://www.legaltext.ee/text/en/X30068K7.htm>.

<sup>93</sup> SCebd 17.03.2003, 3-1-3-10-02, paragraph 40.

<sup>94</sup> SCebd 28.10.2002, 3-4-1-5-02, paragraph 37. Cf. also SCebd 12.04.2006, 3-3-1-63-05; CRCSd 31.01.2007, 3-4-1-14-06.

<sup>95</sup> CRCSd 15.07.2002, 3-4-1-7-02, paragraph 15. Cf. also SCebd 19.04.2005, 3-4-1-1-05.

<sup>96</sup> CRCSd 15.07.2002, 3-4-1-7-02, paragraph 34.

<sup>97</sup> CRCSd 21.01.2004, 3-4-1-7-03, paragraph 33.

There was another case in which the criticism of the Supreme Court was based on the underlying principle of the social state, although this was not explicitly mentioned by the Supreme Court. This case started from a refund claim of overpaid pension filed by the state, which was contested by the person. Namely, it was laid down in the State Pension Insurance Act that an early-retirement pension shall not be paid if the person continues working, but failed to lay down that when a person reaches pensionable age, the person receiving early-retirement pension must be paid equally to the persons receiving “common” retirement pension, the reception of which is not directly related to working. The Supreme Court established that the “State Pension Insurance Act [...] was in conflict with § 12 of the Constitution”<sup>98</sup> to the extent that the provisions did not allow to pay early-retirement pension to those employed persons who had attained pensionable age.”<sup>99</sup>

### 2.3.4. Matters of procedural law

Contestation of the legislator’s omission by the Supreme Court is permitted in the form of a concrete norm control initiated by a court<sup>100</sup>, in the form of a proactive abstract norm control initiated by the President of the Republic<sup>101</sup>, in the form of a retrospective abstract norm control initiated by the Chancellor of Justice<sup>102</sup> as well as in the form of an individual constitutional complaint, which so far remains the only successful precedent.<sup>103</sup> The Supreme Court itself has discussed the different initiators at length in an *obiter dictum*.<sup>104</sup> Therein the Supreme Court recognises the competence of every court, the President of the Republic as well as the Chancellor of Justice to contest the legislator’s omission in the Supreme Court.<sup>105</sup>

Whenever the legislator’s omission is declared unconstitutional, also its consequences ought to be taken into account. The legal order should stay clear of unconstitutional, yet formally valid “ghost” norms.<sup>106</sup> In order to avoid such a situation, it might be reasonable, depending on the specific case, to formulate in the resolution of the court’s decision an explicit positive obligation of the legislator and/or set to the legislator a term for elimination of deficiencies.<sup>107</sup>

In view of the underlying principle of the social state, an activist court must also take into account the parliament’s financial prerogative: “The court of constitutional review must [...] avoid a situation in which the development of the budgetary policy is mostly the liability of the court.”<sup>108</sup>

## 3. Conclusions

This brief analysis has thus come to an end. The constitutional review in the Supreme Court has undergone an impressive development without however completely avoiding some peregrinations. It remains to be recognised that the choice made by the Supreme Court on 12 January 1994 to follow something more abstract and distant than the unambiguous pragmatic desire of those in the position of power to prosecute criminals was justified. Let us hope that the Supreme Court will continue to possess enough courage to pass forward-looking decisions in the future.

<sup>98</sup> The Supreme Court hereby indicates to the first sentence in § 12 (1) of the Constitution: Everyone is equal before the law.

<sup>99</sup> CRCSd 21.06.2005, 3-4-1-9-05, resolution, cf. also paragraph 24.

<sup>100</sup> SCEbd 11.10.2001, 3-4-1-7-01; 28.10.2002, 3-4-1-5-02; 12.04.2006, 3-3-1-63-05; CRCSd 4.11.1998, 3-4-1-7-98, part II; 28.04.2000, 3-4-1-6-2000; 5.03.2001, 3-4-1-2-01; 3.05.2001, 3-4-1-6-01; 5.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, paragraph 25; 19.12.2003, 3-4-1-22-03; 25.03.2004, 3-4-1-1-04; 21.06.2004, 3-4-1-9-04; 21.06.2005, 3-4-1-9-05.

<sup>101</sup> CRCSd 5.02.1998, 3-4-1-1-98, parts III and IV; 31.01.2007, 3-4-1-14-06. Cf. CRCSd 2.12.2004, 3-4-1-20-04, paragraph 41–46.

<sup>102</sup> SCEbd 19.04.2005, 3-4-1-1-05; CRCSd 12.01.1994, III-4/1-1/94; 23.03.1998, 3-4-1-2-98; 15.07.2002, 3-4-1-7-02; 21.01.2004, 3-4-1-7-03.

<sup>103</sup> SCEbd 17.03.2003, 3-1-3-10-02.

<sup>104</sup> Cf. CRCSd 2.12.2004, 3-4-1-20-04, paragraph 41–46.

<sup>105</sup> The Supreme Court sets a supplementary procedural condition to the President of the Republic and the Chancellor of Justice and deems the contestation of the legislator’s failure to act by them permitted if “the unprovided norm would be included in the contested legislation or it is by nature related to the contested legislation.” (CRCSd 2.12.2004, No. 3-4-1-20-04, paragraph 45, cf. also paragraph 46; 31.01.2007, No. 3-4-1-14-06, paragraph 18.) Such norms include, for instance, procedural rules or transitional provisions. Cf. CRCSd 31.01.2007, No. 3-4-1-14-06, paragraph 21. One can hope that in the future, the Supreme Court shall explain this relatively new criterion in more detail.

<sup>106</sup> This happened as a consequence of a decision of the Supreme Court *en banc* from autumn 2002 (SCEbd 28.10.2002, 3-4-1-5-02), in the resolution of which the Supreme Court declared the unclear norm unconstitutional, yet not invalid. The result of this decision was in essence the continuance of lack of legal clarity. The Supreme Court *en banc* received the opportunity to correct the mistake only in spring 2006. Cf. SCEbd 12.04.2006, 3-3-1-63-05.

<sup>107</sup> The Supreme Court has also formulated this idea: “The Supreme Court *en banc* cannot assume the legislator’s role or make the parliament’s decision between possible solutions and develop relevant legal regulations. It is reasonable to give the legislator time to solve these matters.” (SCEbd 12.04.2006, 3-3-1-63-05, paragraph 31.)

<sup>108</sup> CRCSd 21.01.2004, 3-4-1-7-03, paragraph 16.