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Judicial Activism in Constitutional Review Decisions of the Supreme Court of Estonia^{*1}

The choice of the subject of the international conference organised by the Supreme Court of the Republic of Estonia and dedicated to the 15th anniversary of the Constitution of the Republic of Estonia — Political Questions in Constitutional Review: What is the Dividing Line between Interference in Policy-Making and Routine Constitutional Review? — implies that the highest court in Estonia seems to feel somewhat uncomfortable about its task of constitutional review.² The Estonian Supreme Court is by no means exceptional in this regard. All over the world, constitutional courts or their counterparts entrusted with the review of the constitutionality of the decisions adopted by a democratically legitimised legislator must test the bases and the limits of their existence from time to time.

In the course of such fight for the right of existence of constitutional courts (and sometimes against it), a number of scientific works have been born. These can be broadly divided into three categories. Some researchers are dedicated, in line with their understanding of the substance and limits of the modern concept of the separation of powers, to advocating or criticising the interference of the constitutional courts in policy-making. A second school attempts to rank the constitutional courts of the world by the degree of their interference in policy-making. The third, predominantly social science approach, declares the search for the proper boundaries of the power of the courts and the relevant classification utterly useless.³ Regardless of the approach taken, the discussion upon the appropriate limits of constitutional adjudication employs the notion of judicial activism, which has become one of the key concepts of modern constitutional law.⁴ This article enters the discussion mentioned above, trying to answer the question about the degree of activism of the constitutional court closest to the author — the Supreme Court of Estonia (hereinafter the Supreme Court).

¹ The author would like to thank Dr. Taavi Annus for his comments on the text of the presentation on which this paper is based.

² There is no separate constitutional court in Estonia. Instead, the Supreme Court has been vested with the powers of constitutional review. The Supreme Court adjudicates constitutional review cases either in the sessions of the Constitutional Review Chamber, consisting of the members of the administrative law, criminal, and civil chambers or sitting *en banc*. For further information, see K. Merusk. The Republic of Estonia. — C. Kortmann et al. (eds.). *Constitutional Law of 10 Member States: The 2004 Enlargement*. Deventer: Kluwer 2006, pp. III-59–III-60. Hereinafter, unless indicated otherwise, the Supreme Court is considered in the context of performance of its duty of constitutional review.

³ For the latter, see further the article by Taavi Annus in this publication, pp. 22–30.

⁴ The author regards judicial activism and interference in policy-making as parallel notions: each time a court goes beyond the framework of ‘ordinary’ constitutional review, it involves in interference in policy-making — i.e., judicial activism. The legal literature still speaks mostly of judicial activism, which is why the author as well opts for the latter term.

Since there are practically as many definitions of judicial activism as there are commentators⁵, everyone taking up this task — to say something rational about the degree of judicial activism of a particular constitutional court — must first of all state what he or she means by judicial activism. In the light of the above, this paper aims to serve two goals. The first is to present different approaches to judicial activism and assess them from the perspective of their explanatory power. Secondly, the paper sets out to apply the explanations of judicial activism thus analysed for assessing the degree of judicial activism in the constitutional review decisions of the Supreme Court.

In presenting the different approaches to judicial activism, I have taken as the basis for the discussion the fact that the majority of the definitions of judicial activism are centred around three relatively distinguishable axes. I have referred to the dimensions thus created as methodological, procedural, and substantial activism. Further to that, I will introduce the classical concept of judicial activism standing outside this proposed division in three.

1. Judicial activism as conflict with classical policymakers — an approach past its prime

Although defining judicial activism as a mere conflict with other policymakers is not too prevalent in modern scholarly discussion upon constitutional courts, it should be mentioned in the interests of completeness. This is particularly the case because the only international study thus far on the activism of the Estonian Supreme Court, although proceeding from the perspective of political science, makes use of this approach.

Namely, Shannon Ishiyama Smithey and John Ishiyama published in 2002 their article ‘Judicial Activism in Post-Communist Politics’⁶ in *Law and Society Review*, in which they examined how the structure of the society influenced the occurrence of judicial activism in post-Communist countries. The percentage of the judicial activism of each country was calculated by dividing the number of cases where the court nullified a law or policy by the total number of nullification opportunities that the court had.⁷ By doing so, the authors proceeded from the most classical definition of judicial activism, according to which a constitutional court is considered activist each time its decisions come into conflict with those of any other political policymakers.⁸ Such an approach, directly rooted in the theory of democracy, considers illegitimate any change in public policy that does not stem from democratically elected legislature.⁹

According to this approach, whichever constitutional court is unavoidably activist each time it uses its powers to strike down laws assigned to it for review (in Estonia, on the basis of the Constitution itself). Such an approach is contradicted by the contemporary understanding of constitutional democracy with the human rights concept inherent in it as well as of its control mechanism, constitutional review.¹⁰

In the Estonian context, it is obligatory to refer also to the nature of the first constitutional decisions of the Supreme Court. For example, in the 1990s, the Supreme Court invalidated the provision that enabled security police officers to use operational and technical special measures without any legal basis if given the written

⁵ B. C. Canon. A Framework for the Analysis of Judicial Activism. – S. C. Halpern, C. M. Lamb (eds.). *Supreme Court Activism and Restraint*. Lexington, MA: Lexington Press 1982, p. 385. According to one of the most renowned constitutional law experts of the United States of America, Harvard University professor Mark Tushnet, the notion of judicial activism is in itself quite unhelpful, as it refers to too many things. See M. V. Tushnet. Comment: The Role of the Supreme Court: Judicial Activism or Self-Restraint? – *Maryland Law Review* 1987 (47), pp. 147–154, p. 147. Judicial activism has been considered to mean, for example, invalidation of legislation, abandonment of neutral principles of decision-making, decision on substantially political issues, resolution of questions not raised by the parties, use of teleological arguments, etc.

⁶ See S. I. Smithey, J. Ishiyama. *Judicial Activism in Post-Communist Politics*. – *Law and Society Review* 2002 (36) 4, pp. 719–742.

⁷ In “order” of judicial activism, calculated in this manner, Estonia came second after Latvia with 79% of activist decisions as a proportion of all constitutional review cases. Applying a similar metric today, the proportion of activist decisions appears to have dropped to 74% of the total number of cases.

⁸ See, e.g., G. Schubert. *Judicial Policy Making: The Political Role of the Courts*, revised ed. Glenview 1974, p. 213. Cited in: J. B. Board. *Judicial Activism in Sweden*. – K. M. Holland (ed.). *Judicial Activism in Comparative Perspective*. London: Macmillan 1991, p. 175.

⁹ The right of judges who have not been elected democratically to nullify the decisions of democratically legitimised bodies is classically described as the ‘countermajoritarian difficulty’, illuminated by Alexander Bickel in 1961: “[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.” – A. M. Bickel. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. 2nd ed. London & New Haven, CN: Yale University Press 1986, p. 17.

¹⁰ The classical argument to justify constitutional review is that, instead of being undemocratic, the constitutional limits to the political process promote democracy, as they were adopted by people in the ‘era of heightened democratic awareness’ and, as such, preside over the decisions made by ‘temporary majorities’. When viewed from this angle, the power of review signifies not the supremacy of the will of the judiciary over the legislator but the supremacy of the fundamental will of the people over both of them. See, e.g., C. Wolfe. *Judicial Activism: Bulwark of Freedom or Precarious Security?* Pacific Grove, CA: Brooks/Cole Publishing Company 1991, p. 14.

consent of the Justice of the Supreme Court appointed by the Chief Justice of the Supreme Court.^{*11} In such cases and similar ones that have now become virtually extinct among the constitutional decisions of the Supreme Court, the Supreme Court rather played the role of a reminder of basic principles of law that were not familiar in the previous legal formation, and it does not appear to be justified to speak about particular judicial activism.

Having said this, one has to move on to approaches that take more account of the modern context when substantiating judicial activism.

2. Methodological activism — what counts as an argument?

One of the most attractive approaches, probably because of its simplicity, to judicial activism analyses activism through the lens of the methods and arguments used in constitutional interpretation, relying on the assumption that it is possible to distinguish between legal and non-legal arguments, and the premise that some arguments and interpretive theories are more suitable than others for avoiding interference in policy-making.

In this vein, the notion of judicial activism has been used in many comments to signify judicial argumentation that does not entirely rely on the text of the Constitution^{*12}, or which diverges from the intention of the authors of the Constitution, i.e., the will of the ‘fathers of the Constitution’.^{*13} Reliance on allegedly non-legal arguments, such as value arguments, consequential reasoning, and references to history and traditions^{*14}, or on ambiguous and abstract principles that require a value-oriented assessment (such as human dignity, equality, and a state based on the rule of law) is also considered activist under this approach.^{*15}

As Keenan D. Kmiec has critically noted, “Although judicial activism is often equated with the failure to use ‘proper’ interpretive tools, divergences of opinion over what constitutes an appropriate interpretive tool make it difficult to distinguish principled but unorthodox methodologies from ‘activist’ interpretation”.^{*16} In addition to this, it is impossible to declare the orthodox interpretation methodologies, such as loyalty to the original intentions of the authors of the Constitution — commonly referred to as “originalism” — apolitical.^{*17} Moreover, those who study the US Supreme Court have described the attempt to implement the will of the ‘fathers of the Constitution’ as one of the manifestations of conservative judicial activism.^{*18} By the same token, teleological interpretation, which is often described as a stronghold of judicial activism for not meeting the requirements of objectivity and mechanical applicability^{*19}, and contemporaneous interpretation (i.e., interpretation taking into account the principles and values prevalent in a given society at a given time) are becoming more and more established also in the Romano-Germanic legal tradition, which has traditionally been considered positivist.^{*20}

¹¹ The decision of the Constitutional Review Chamber of the Supreme Court of 12 January 1994 in matter III-4/1-1/94. Available in English at <http://www.nc.ee/?id=486> (28.11.2007).

¹² D. Smilov. *The Character and Legitimacy of Constitutional Review: Eastern European Perspectives*. A Review of: Wojciech Sadurski (ed.). *Constitutional Justice, East, and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague, London, & New York: Kluwer Law International 2003, 450 pp.). R. Prochazka. *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe*. (Budapest & New York: Central European University Press 2002, 358 pp.) – *International Journal of Constitutional Law* 2004 (2) 1, pp. 177–194, p. 184.

¹³ See, e.g., M. J. Perry. *Judicial Activism*. – *Harvard Journal of Law and Public Policy* 1984 (7), pp. 69–75, p. 69.

¹⁴ R. Uitz. *Constitutional Activism and Deference through Judicial Reasoning: Confirming an Indeterminacy Thesis*. – *Juridica International* 2002 (7), pp. 65–75, p. 66.

¹⁵ See D. Smilov (Note 12), p. 185.

¹⁶ K. D. Kmiec. *The Origin and Current Meanings of ‘Judicial Activism’*. – *California Law Review* 2004 (92), pp. 1441–1474, pp. 1473–1474.

¹⁷ For an excellent overview of the originalism debates, see M. J. Gerhardt et al. *Constitutional Theory: Arguments and Perspectives*. 2nd ed. New York: Lexis Publishing 2000, pp. 119–131.

¹⁸ As Wildhaber & Diggelmann wittily point out, those who were entitled to be counted as ‘fathers of the Constitution’ were exclusively white property-owners, a category constituting some five per cent of the total population. There were no ‘mothers of the Constitution’, no blacks, Indians, Jews, Hispanics, or Asian-Americans. According to these authors, it is difficult to see why one would consider the will of selected white-property owners living in the 18th century to be binding in the name of democracy in the 21st century. See further, L. Wildhaber, O. Diggelmann. *The European Convention on Human Rights and the Protection of the Private Sphere: Recent Developments and Trends*, amended text of the public lecture held in the Office of the Chancellor of Justice of Estonia on 6 July 2006 (in the author’s possession), p. 4.

¹⁹ See, e.g., D. P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 2nd ed. Durham & London: Duke University Press 1997, p. 43.

²⁰ For addressing of this point in the German context, see, e.g., J. Sanden. *Methods of Interpreting the Constitution: Estonia’s Way in an Increasingly Integrated Europe*. – *Juridica International* 2003 (8), pp. 128–139, pp. 131–134. Sanden cites Beatty thus: “Not only does the text

The use of abstract principles of law and value arguments in reasoning as a manifestation of judicial activism has also been severely criticised. Firstly, it is not possible to claim that the ‘ambiguity’ of the principle of legal certainty outweighs the ‘ambiguity’ of a provision of the Constitution prescribing a fundamental right. As Christopher Wolfe has elegantly pointed out, “Ambiguity is the *raison d’être* of modern judicial review”.^{*21} Secondly, one could argue the shift from the traditional perception of law as a set of rules to the understanding of law as a set of values and principles.^{*22} The importance of constitutional values and principles is particularly evident in Estonian legal doctrine, where the second sentence of § 152 of the Constitution provides thus: “The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and **spirit** of the Constitution” (emphasis added).

However, there is a category of arguments, in the ‘non-legalness’ of which there seems to exist a more uniform agreement. This pertains to arguments from substantive reasons^{*23} — that is, the most abstract level of objective-teleological interpretation, which takes account of the values prevalent in society, relying, inter alia, on social science findings. For instance, even in Germany, where the constitutional court is relatively well known for the use of novel interpretation methods, the question of whether interpretation of the constitution should consider not only the legal interpretation principles but also political and economic evaluations, is partly answered in the negative.^{*24} There are no cases in the practice of the Supreme Court in which the court’s reasoning has explicitly relied on the values prevailing in society, and where social science studies have been used to substantiate the court’s position.^{*25}

In a situation in which the entire problem of constitutional law is considered to lie in the fact that nobody knows what counts as an argument^{*26}, and where the arguments used or methods applied are not reflected at least in full in the decision, substantiating judicial activism through them does not seem very helpful.

There is another classification proposed in the debate over the proper limits of the constitutional adjudication that may provisionally be placed under methodological activism. Namely, those activities of the constitutional court in which the court does not confine itself to the invalidation of a law or a part thereof (negative policy-making) but imposes detailed rules for restoring a situation that is in conformity with the Constitution on the legislator (positive policy-making), instead, have also been considered to be ‘political’ in nature.^{*27} The more detailed the precepts are, the more reason we have to speak of judicial activism. The so-called *numerous clausus* cases^{*28} serve as notorious examples of positive policy-making of the German Federal Constitutional Court, while in the United States, the determining of the temperature of showers in prisons or the inmate release rates by the courts has been referred to.^{*29} No similar example can be brought from the practice of the Supreme Court of Estonia.

of the Constitution figure less prominently in the judgments of the German Court, its method of interpretation is quite different as well. More emphasis is put on the words and structure of the document and especially on the purposes and values they express. Rather than looking to history and case law to give meaning to the text, the German Court proceeds in a more purposeful and logical way.” *Ibid.*, p. 134.

²¹ As cited in Note 10 *supra*, C. Wolfe. *Judicial Activism: Bulwark of Freedom or Precarious Security?* Pacific Grove, CA: Brooks/Cole Publishing Company 1991, p. 29.

²² M. L. F. Esteban. *The Rule of Law in the European Constitution*. The Hague 1999, p. 38. Cited in: M. Linntam. *Building a Just Society: The Role of the Constitutional Judge — Idea of Justice in the Contemporary Value Jurisprudence and the Process of Argumentation*. – *Juridica International* 2002 (7), pp. 49–57, p. 49.

²³ When operating with practical reasons, the moral, social, economic, and political values prevailing in the given society are taken as the basis. To identify such values, social surveys can be used. The governing idea in using practical reasons consists in the understanding that if there is some goal considered to be of value or some conception of rightness that is considered fundamentally important to the given legal order, then the provision ought to be interpreted in the manner that upholds this value or conception of rightness. See D. N. MacCormick, R. S. Summers. *Interpretation and Justification*. – D. N. MacCormick, R. S. Summers (eds.). *Interpreting Statutes: A Comparative Study*. Dartmouth: Aldershot 1991, pp. 514–515.

²⁴ J. Sanden (Note 20), p. 134.

²⁵ Provisionally. *Compulsory portion* can be regarded as a case the adjudication of which proceeds from the values prevailing in society. The Supreme Court *en banc* adjudicated the matter, giving preference, to use the words of Justice Ants Kull, to ‘postmodernist assessments of life values related to family law and law of succession, based on personal freedom of decision and unlimited liberty, which is avanguardist in Continental Europe’. See Justice Ants Kull’s dissenting opinion in SCeb 22.02.2005, 3-2-1-73-04, available at <http://www.riigikohus.ee/?id=11&tekst=222478593> (in Estonian) (28.11.2007). Attribution of such application of practical reasons to the Supreme Court in this case is still relatively indirect; that is why I will analyse this case in greater detail under the category of substantial activism. See below, section 4.2.

²⁶ M. J. Gerhardt et al. (Note 17), p. 1.

²⁷ See, e.g., B. C. Canon (Note 5), p. 400.

²⁸ In order to assess the compliance of the admission criteria of institutions of higher education with the constitutional right to choose an occupation, the Federal Constitutional Court of Germany, inter alia, created a formula to assess the capacity of each ‘teaching unit’, which included variables such as the number of full-time teachers, demand for the course, the volume of classrooms, and teaching equipment. For greater detail, see R. Merritt. *The Courts, the Universities and the Right of Admission in the Federal Republic of Germany*. *Minerva* 1979 (17) 1, Spring, pp. 1–32 (pages 20–21 in particular).

²⁹ See, e.g., M. Shapiro. *The United States*. – C. N. Tate, T. Vallinder (eds.). *The Global Expansion of Judicial Power*. New York: NY University Press 1995, p. 50.

3. Procedural activism — choosing form over content

The procedural approaches to judicial activism identify judicial activism according to procedural criteria without considering the substance of the matter. In this approach, judicial activism is defined as disregard for procedural limits or the interpretation of theirs that allows for more extensive intervention of the judiciary. The main procedural limits that are tackled within the framework of that dimension are the doctrine of standing, the case and controversy doctrine, and the doctrine of political question.

The political question doctrine serves particularly in the United States as an important lever to try to avoid intervention in politics by the US Supreme Court. The doctrine that David Beatty calls “by far the bluntest device that judges have developed [...] to mark off broad areas of law which are declared to be immune to an attack on the basis that they violate people’s constitutional rights”, defined by the US Supreme Court in *Baker v. Carr*³⁰ in 1962, holds in essence that courts should abstain from resolving constitutional issues that are better left to other departments of government, mainly the national political branches. As one of the justiciability doctrines present in the US constitutional jurisprudence, it has, over the years, excluded from the scope of judicial review questions concerning foreign policy, national security, and the operational structures of government.

Estonian jurisprudence does not recognise the political question doctrine. Estonian procedural laws do not allow for rejecting an appeal in the stage of establishing its admissibility with a reference to non-justiciability, either. It seems that the idea that none of the areas of state activity is exempt from constitutional review as an obligatory requisite of a state based on the rule of law seems to have been taken over from the German legal doctrine.³¹ This assumption also appears to apply to such areas as foreign and security policy, which have classically been regarded as ‘political’.³²

However, in the Estonian context, we can speak about the doctrine of standing, which as a general principle requires that the individual’s right of recourse to the courts be established in the legal system of the relevant country in order for the judicial control mechanism to be initiated, and of the case and controversy doctrine, according to which judges must settle only actual disputes, and refrain from settling hypothetical disputes, to objectively establish the constitutionality of a legal provision. In countries such as Estonia, where abstract constitutional review is recognised, the case and controversy doctrine is not fully applicable.³³ Yet one could consider as relevant also in the Estonian context the facet of the case and controversy doctrine that prohibits the settlement of issues not raised by the participants in the proceedings at the initiative of the courts. Namely, the Constitutional Review Proceedings Act prescribes that the matter before the court shall be settled only to the extent requested³⁴, and that only the provision relevant to the settlement of the case shall be reviewed.³⁵

Thus, the constitutional court may adjudicate cases brought to it by persons having the right of recourse in the case, and do so to the extent requested from it. If the court adjudicates the request of a person who did not have the right to bring the matter before it, settles more or broader issues than those raised in the request, or verifies the constitutionality of irrelevant provisions, its action functions as procedural judicial activism.

The Supreme Court has unambiguously ignored the procedural limits in at least two instances. In *Brusilov*³⁶, a person who considered himself to have developed the right to benefit from a more lenient penal code in

³⁰ 369 U.S. 186 (1962).

³¹ However, many scholars argue that, although it is often claimed that German constitutional law contains no political question doctrine, which would withdraw certain areas of inquiry from scrutiny of the German Constitutional Court, as a practical matter, the Constitutional Court has been extremely cautious in the exercise of any actual power relating to national security, by adopting a form of political question doctrine in practice. See, for example, P. E. Quint. ‘The most extraordinarily powerful court of law the world has ever known?’ – Judicial Review in the United States and Germany. *Maryland Law Review* 2006 (65), pp 152–170, p. 166.

³² Yet it has not been possible to verify that the assumption holds in practice. In its 15 years of jurisprudence, the Supreme Court has not had to settle disputes with a significant foreign or security policy dimension. Thus, it is difficult to predict what the course of action of the court might be if a problem belonging to the domain of the classical political question doctrine were to appear.

³³ The substantive nature of the abstract review of legal acts is to identify potential cases of unconstitutionality before they become a reality. The *ex ante* review of the constitutionality of legal acts that have not entered into force yet by the President of the Republic and the *ex post* review of legislation of general application by the Chancellor of Justice of the Republic of Estonia as prescribed in the Constitutional Review Proceedings Act do not preclude but facilitate the objective establishment of the constitutionality of a legal provision.

³⁴ Subsection 4 (1) of the Constitutional Review Proceedings Act stipulates: “The Supreme Court shall verify the conformity of legislation of general application, the refusal to issue an instrument of legislation of general application or the conformity of an international agreement with the Constitution on the basis of a reasoned request, court judgment or ruling.”

³⁵ Subsection 14 (2) of the Constitutional Review Proceedings Act stipulates: “In the adjudication of the matter on the basis of a court judgment or court ruling the Supreme Court may repeal or declare to be in conflict with the Constitution legislation of general application, an international agreement or a provision thereof or the refusal to issue an instrument of legislation of general application which is relevant to the adjudication of the matter.”

³⁶ The decision of the Supreme Court *en banc* of 17 March 2003 in matter 3-1-3-10-02 (*Brusilov*). Available in English at <http://www.nc.ee/?id=419> (28.11.2007).

relation to the terms of punishment reviewed during the penal law reform submitted a petition to the Supreme Court. Although according to the Code of Court Procedure Mr. Brusilov lacked procedural basis for a request to the Supreme Court^{*37}, the Supreme Court accepted the request on the grounds that Mr. Brusilov did not have access to effective procedure to protect his fundamental rights. The Supreme Court acted in a relatively similar manner in *Veeber*^{*38}, in which it recognised the right of recourse to the Supreme Court belonging to an individual with regard to whom a judgment of the European Court of Human Rights had entered into force in a situation in which the national procedural law did not allow for reopening his criminal matter on that basis. Insofar as these decisions admitted in principle an individual constitutional complaint not recognised by the Constitutional Review Proceedings Act, the relevant conduct of the Supreme Court may be considered highly activist under a procedure-based criterion.

At the same time, the Supreme Court has in several instances used the argument of procedural limits to avoid answering to sensitive questions. For example, in 2004, the Supreme Court dismissed the request of an administrative court to declare invalid the provision of the Health Insurance Act that imposed a transition period in connection with the expiry of the insurance cover of persons dependent of an insured spouse. The Supreme Court concluded that the contested provision prescribing the transition period was irrelevant, as its repeal would not restore the right of the person concerned to insurance cover, but rather shorten the coverage time by the transition period, which would deteriorate the complainant's situation.^{*39} The Supreme Court noted that, although the procedural limits did not preclude the broadening of the object of the proceedings, arising from the fact that the provisions were inseparably interrelated, a situation could not be allowed in which the Supreme Court declares to be constitutional a provision whose constitutionality was brought before the court for review but then starts searching for an unconstitutional provision on its own initiative.^{*40} In this, the Supreme Court departed from a principle that it earlier had postulated itself, according to which it was the duty of the court to establish the actual will of the complainant.^{*41}

Hence, the question of the constitutionality of the exclusion of a particular group of persons from the insurance cover did not receive an opinion from the Supreme Court, regardless of the fact that the actual object of the administrative action was the contestation of the expiry of the insurance cover that had extended to the person until that time, and a request for the recognition of the continuing insurance cover. Appealing to procedural limits, the Supreme Court in fact refrained from answering the question of whether the changes in the health insurance system were in compliance with everyone's constitutional right to health protection.

4. Substantial activism — out of the frying pan into the fire?

This approach, supported by many contemporary scholars, calls for the analysis of the content of the decision in question rather than drawing of conclusions from the interpretive methodology used or procedural limits transgressed, arguing that, in essence, there is greater justification for the courts' engagement in policy-making in some areas than in others. According to this approach, judicial activism or substantive policy-making involves the interference by the court in directing social processes in areas where it lacks the so-to-say privilege of policy-making.^{*42} Below, I will discuss the areas to which this privilege applies ('routine constitutional

³⁷ The Estonian legal order does not provide for the right of individuals to have direct recourse to the Supreme Court for the assessment of the constitutionality of a legal act or an action. This does not mean, however, that an individual has no right to verify the constitutionality of the legislation of general application applied to his or her case. Administrative courts are obliged to verify that the administrative act that violates the rights of an individual conforms to the law and the Constitution. If a court, regardless of its instance, establishes that the legislation of general application to be applied to the case is in conflict with the Constitution, it will not apply it, declare it unconstitutional, and forward it to the Supreme Court to be declared invalid.

³⁸ SCeb 6.01.2004, 3-1-3-13-03 (*Veeber*). Available in English at <http://www.nc.ee/?id=410> (28.11.2007).

³⁹ CRCSCd 31.05.2004, 3-4-1-7-04 (*Toom*). Available in English at <http://www.nc.ee/?id=405> (28.11.2007).

⁴⁰ *Ibid.*, p. 23.

⁴¹ The Administrative Law Chamber of the Supreme Court has established that the duty of the administrative court to establish the actual will of the complainant upon hearing the matter derives from the second sentence of § 19 (7) of the Code of Administrative Procedure, according to which an administrative court shall not be bound by the wording of an action. See, e.g., ALCSCd 5.02.2004, 3-3-1-3-04, p. 12. There is no reason to claim that a similar duty, unless carried out by a lower court applying to the Supreme Court for the review of constitutionality, does not extend also to the judicial panel adjudicating the constitutional dispute.

⁴² In the broad sense, the constitutional court always engages in policy-making. According to the seminal definition offered by David Easton, politics is the authoritative allocation of values. See D. Easton. *An Approach to the Analysis of Political Systems*. – *World Politics* 1957 (9), pp. 383–400, p. 383. Cited in: A. Stone Sweet. *The Politics of Constitutional Review in France and Europe*. – *International Journal of Constitutional Law* 2007 (5), pp. 69–92, Note 12. Given the authoritative status and the normative nature in the sense of choosing between competing values of any judgement a constitutional court renders, all constitutional courts are involved in politics already by definition. For discussion in greater detail, see R. Hodder-Williams. *Six Notions of 'Political' and the United States Supreme Court*. – *British Journal of Political Science* 1992 (22) 1, pp. 1–20, pp. 2–3. Unauthorised interference in policy-making or policy-making in stricto sensu (i.e., judicial activism) is what is meant here.

review'), and will touch upon the category of activities that are fairly universally considered to be 'interference in policy-making' in the sense of the topic of the conference having given rise to this publication.

4.1. Preservation of the democratic process versus substantive policy-making

Firstly, a distinction is made between the preservation of democracy and substantive policy-making within the framework of this dimension. According to Bradley Canon, decisions related to the integrity of the democratic political processes, such as those involving freedom of expression, conduct of elections, and the nature of representation, are not to be treated as activist, as they do not directly affect substantive politics, while decisions falling outside the scope of that 'privilege' should be considered making substantive policy.^{*43}

This special privilege of the courts to strike down laws concerning political processes without fear of being accused of overstepping the boundaries of the judicial power is inherent in the prerequisite of democracy. As Bojan Bugarcic notes, this exception to traditional judicial statecraft emerges from the democratic ideal of popular self-government, well reflected in John Hart Ely's representation-reinforcement theory of judicial review, according to which judicial review should primarily focus on strengthening the process of political representation, clearing obstacles to political change, and facilitating minority representation.^{*44} Drawing on that, any measure having impact on the political processes should be protected to a greater extent by not having been left to be decided by the parliamentary majority, often said to be apt to constrain the rights of minorities.

The Supreme Court has, by overruling the choices made by the legislator, repeatedly contributed to preservation of democracy in the above sense. Paradoxically, the first decision of this kind has received severe criticism in the Estonian press as one of the most political decisions in the history of the Supreme Court. This case merits discussion here.

In 2002, the Chancellor of Justice requested that the Supreme Court declare unconstitutional the provision of the Local Government Council Election Act that prohibited the participation of the citizen election coalitions in the election of the representative body of the local government. The Supreme Court granted the petition of the Chancellor of Justice, reasoning that the restrictions of the subjective right to vote must not prevent persons and groups who have real supporters from running as candidates, as thus the representative body would not be capable of becoming sufficiently representative.^{*45} In 2005, the Estonian parliament (the *Riigikogu*) prohibited the local election coalitions again and the Chancellor of Justice turned to the Supreme Court for the second time. The Supreme Court declared the provision prohibiting election coalitions partly invalid, due to conflict with the right to stand as a candidate and the principle of local autonomy.^{*46} Proceeding from the above-described privilege of policy-making, these two decisions of the Supreme Court were clearly aimed at the greater representation of the local representative bodies and thus at the strengthening of (local) democracy, and cannot hence be classified as activist on the scale of substantial activism.

In this respect, one has to pay attention to another decision of the Supreme Court dating from 2005, where, appealing to the principle of democracy, the Supreme Court decided on an important issue in an area in which — in the author's opinion — it lacked the privilege of policy-making. In that matter, the President of the Republic^{*47} contested a provision that allowed for simultaneous membership of the *Riigikogu* and a local government council, on the grounds that such simultaneous membership of two representative bodies was in conflict with the principles of separation of powers, local government autonomy, and incompatibility of offices.^{*48} The Supreme Court granted the petition of the President of the Republic yet did not consider any of the grounds highlighted by the President of the Republic. The Supreme Court established instead that making amendments to the Election Code immediately before the elections was not in conformity with the principle of democracy. Such appeal to the principle of democracy and the prohibition of rapid changes derived therefrom in a situation in which the President of the Republic had instead pointed to a conflict with the principles that are diversely furnished in the practice of the European constitutional courts, such as separation of powers and local government autonomy, appears to the author to be cutting the Gordian knot to the disadvantage of the

⁴³ See B. C. Canon (Note 5), p. 399.

⁴⁴ See B. Bugarcic. Courts as Policy-Makers: Lessons from Transition. – Harvard International Law Journal 2001 (42), p. 274.

⁴⁵ CRCSCd 15.07.2002, 3-4-1-7-02 (*Election coalitions I*). Available in English at <http://www.nc.ee/?id=428> (28.11.2007). Finally, the chamber established that the prohibition of the election coalitions was not justified in the "legal and social context" of the time and because of the short time remaining until the elections. According to the court, making changes to the Election Code immediately before the elections was not democratic.

⁴⁶ SCeb 19.04.2005, 3-4-1-1-05 (*Election coalitions II*). Available in English at <http://www.nc.ee/?id=391> (28.11.2007).

⁴⁷ The President of the Republic may refuse to proclaim an act adopted by the *Riigikogu*. Unless the *Riigikogu* amends said act, the President of the Republic may propose to the Supreme Court to declare the act unconstitutional. See § 107 of the Constitution.

⁴⁸ CRCSCd 14.10.2005, 3-4-1-11-05 (*Two chairs*). Available in English at <http://www.nc.ee/?id=563> (28.11.2007).

legislator in a situation in which the relation to the preservation of democracy is rather indirect, and hence an instance of judicial activism.

4.2. Universally accepted rights *versus* complex issues

In addition to the preservation of democracy, greater freedom of intervention for the courts has also been sought for activities protecting the universally recognised fundamental rights. According to this approach, the courts should afford greater protection to those principles that, according to universal consensus, deserve to be protected^{*49}, while decisions that regulate the non-political-process activities of groups, impinge upon people's careers, lifestyles, or moral or religious values, and decisions making economic policy can be regarded as highly activist.^{*50}

This far, the Supreme Court has not had to take a stand on highly sensitive issues, such as euthanasia, abortion, same-sex marriages, etc., in which the practice of democratic countries diverges. However, the decision of the Supreme Court *en banc* by which the institution of compulsory portion in the law of succession was furnished differently from the interpretation applied so far may be considered activist in this context. Namely, in 2005, the Supreme Court *en banc* established that the provision that provides for allocation of a compulsorily specified portion of the estate to the bequeather's descendants who are incapacitated for work had to be interpreted such that it excluded from among the persons entitled to succeed to the compulsory portion those old-age pensioners who were not in factual need of support for their livelihood.^{*51} The Supreme Court arrived at the conclusion, after considering contradictory values such as freedom of intestacy and the hereditary succession of the family, to give greater weight to the former. Although the Supreme Court left it to the legislator to further develop the institution of the compulsory portion, the amendment of the long-term application practice as a result of balancing such ideologically loaded principles may be considered to be substantive policy-making and thus a manifestation of judicial activism.

As the world practice shows that such universal consensus does not exist, particularly with regard to issues that are actually addressed in constitutional courts, and since it is impossible to preclude the existence of a broad but perhaps morally questionable consensus on certain sensitive issues, this criterion, as well as many of its predecessors, seems to be relatively unreliable for judgment on judicial activism. However, broad scholarly consensus does seem to exist as to the 'substantiveness' of a specific area of policy-making.

Namely, the activities of the courts in areas where they lack both the necessary means and adequate preparation for rendering a decision, are rather uniformly considered as substantial policy-making. Such areas have been, above all, claimed to include economic policy, where the impact of a decision is predominantly not linear^{*52}, and issues such as the appropriate size of local government units.^{*53} Cass Sunstein warns that, because of the lack of means for settling such complex issues, the courts may, in such areas, produce unfortunate systemic effects, with unanticipated negative consequences that are not visible to them at the time of decision.^{*54} Those studying constitutional courts of post-Communist countries, in particular, severely criticise judicial policy-making that concerns transition issues as special cases of complex issues — that is, issues such as privatisation of state enterprises, reform of social security systems, and return of unlawfully expropriated property.^{*55} In addition to complexity, the trickiness of reform decisions by the court is further exacerbated by the nature of the reform as something that by definition changes the status quo.^{*56}

The Supreme Court has not, over the years of its existence, engaged in economic policy-making or adopted positions on issues such as the appropriate size of local government units. The Supreme Court has, however, been involved in reform policy repeatedly. The conduct of the Supreme Court from the perspective of judicial activism as judged by the criteria presented in this section of the paper has not been uniform in that respect.

⁴⁹ For example, Bugaric argues that whenever there is universal consensus on, for instance, gender equality, the courts should not hesitate to vigorously protect the legal principles that underlie such rights. See B. Bugaric (Note 44), p. 287.

⁵⁰ B. C. Canon (Note 5), p. 399.

⁵¹ SCeb 22.02.2005, 3-2-1-73-04 (*Compulsory portion*). Available in English at <http://www.nc.ee/?id=394> (28.11.2007).

⁵² L. L. Fuller calls such issues polycentric. For details, see L. L. Fuller. *Forms and Limits of Adjudication*. – Harvard Law Review 1978 (92), pp. 353–409, pp. 394–395.

⁵³ See, e.g., B. Bugaric (Note 44), pp. 268–269.

⁵⁴ See C. Sunstein. *Legal Reasoning and Political Conflict*. 1996, p. 45. See also B. Bugaric (Note 44), pp. 262–269.

⁵⁵ See, for example, B. Bugaric (Note 44).

⁵⁶ Hungarian constitutional scholar Peter Paczolay refers in this relation to the notorious distinction, made by Carl Schmitt, between times of normalcy and extraordinary times, noting that historical conditions of the transition make necessary the use of exceptional means and call for ignoring temporarily the strict measures of the rule of law. See P. Paczolay. *Judicial Review of the Compensation Law in Hungary*. – Michigan Journal of International Law 1992 (13), pp. 806–831, p. 828. This, above all, applies to the implementation of the principle of legitimate expectation in reform situations.

In 2005, the Supreme Court established in *Desintegraator*, which concerned compensation for damages incurred by a successor to a Soviet co-operative organisation and caused to it by the privatisation obligation in the course of the ownership reform, that “the legislator has a wide discretion for the protection of public interests upon transforming ownership relationships in the course of a wide-scale reform. The legislator is entitled to decide on essential expropriations and establish special means of compensation, fair from the aspect of transformation of relationships, which do not need to guarantee total compensation of market value to the owner of property.”⁵⁷ Thus, the Supreme Court expressly effected self-restraint in verifying the legislative choices made during the reforms.

However, the Supreme Court did not show such modesty concerning the other group of cases in the context of the ownership reform. Namely, in 2002, the Supreme Court declared unconstitutional a provision of the Principles of Ownership Reform Act according to which the issue of the return of the property of the people emigrating from Estonia to Germany in 1941 had to be decided by an international agreement, because of its conflict with the principle of legal clarity. The court did not declare the provision invalid because the property of the resettled people would have to be returned or compensated for as a result of the invalidation. According to the Supreme Court, the latter would have been “a political decision the court had no competence to make”.⁵⁸ In 2006, the Supreme Court still declared the same provision invalid⁵⁹, as a result of which the principled decision — to return such property — was eventually made by the Supreme Court.⁶⁰

However, it must be admitted that the Supreme Court made what one could call a political substantially decision (to return the property) in circumstances in which the legislator for three years had been unable to decide whether to return the property to the group of aggrieved persons or not. The Supreme Court thus made use of its powers in a situation in which the legislator, on account of the issue’s sensitivity, did not wish to address it at all. For example, according to Canon, the absolute lack of interest on the part of the political branches of government in addressing an issue finally settled by the court legitimises powerful intervention of the constitutional courts.⁶¹

In the opinion of the author, the steps taken by the Supreme Court in reforming penal law can be considered activist without reservation. Namely, in 2003, the Supreme Court established that, upon moderation of punishments within the framework of the penal law reform, the constitutional principle of applying a lesser punishment gave rise to the obligation to review the decisions concerning people who had been convicted by a court and were serving a prison sentence before the entry into force of the amendments to the Penal Code.⁶² The obligation to extend the principle of application of a lesser punishment to those already convicted and serving an actual prison sentence cannot be found in international practice. Through such an innovative interpretation of the Constitution, the Supreme Court considerably restricted the legislator’s freedom to reform penal law. The dissenting opinion appended to the decision also points to the threat that, because of the decision, the legislator might, by way of autolimitation, give up the idea of reforming penal law in the future after all.⁶³ Thus, the development of national penal policy has been made problematic for the legislator.

⁵⁷ SCebd 18.03.2005, 3-2-1-59-04 (*Desintegraator*). Available in English at <http://www.nc.ee/?id=393> (28.11.2007).

⁵⁸ SCebd 28.10.2002, 3-4-1-5-02 (*Resettlers I*). Available in English at <http://www.nc.ee/?id=430> (28.11.2007).

⁵⁹ SCebd 12.04.2006, 3-3-1-63-05 (*Resettlers II*). Available in English at <http://www.riigikohus.ee/?id=735> (28.11.2007).

⁶⁰ For the sake of precision, it is still necessary to note that the Supreme Court deferred entry into force of that decision in accordance with the Constitutional Review Proceedings Act (põhiseaduslikkuse järelevalve kohtumenetluse seadus. – RT I 2002, 29, 174; 2007, 44, 316 (in Estonian)), in order to give the legislator an opportunity to decide on the desirability of returning the property to the people who had resettled. Before the entry into force of the decision of the Supreme Court, the legislator adopted an amendment that would have had an effect similar to the decision of the Supreme Court and that prescribed rules of procedure for returning property to people who had resettled. The President of the Republic refused to proclaim the act, referring to the violation of the principle of equal treatment in the rules of procedure, and appealed to the Supreme Court, requesting that it declare the act unconstitutional. The Supreme Court granted this petition (CRCSCd 31.01.2007, 3-4-1-14-06 (*Resettlers III*)). While the petition was being processed, the decision of the Supreme Court in the case SCebd 12.04.2006, 3-3-1-63-05 (*Resettlers II*) entered into force, as a result of which the persons who had resettled acquired the right to regain their property or receive compensation. The parliamentary debates unjustly indicated that the Supreme Court by its decision imposed a single option — to return such property — on the legislator.

⁶¹ B. C. Canon (Note 5), pp. 402–403. Here it becomes important whether the legislator could have been compelled to act even via less activist conduct by the court. In that, the opinion of the author coincides with that of Justice Eerik Kergandberg, whose dissenting opinion set forth a position according to which the Supreme Court could have confined itself to the invalidation of the provision concerned to only the extent to which the issue of the return of the property of the people resettling in Germany had to be decided by means of an international agreement. See Justice Eerik Kergandberg’s dissenting opinion in SCeb 12.04.2006, 3-3-1-63-05 (*Resettlers II*), available at <http://www.riigikohus.ee/?id=11&tekst=222487194> (in Estonian) (28.11.2007).

⁶² SCebd 3-1-3-10-02 (Note 36).

⁶³ See Justice Tõnu Anton’s dissenting opinion in SCeb 17.03.2003, 3-1-3-10-02 (*Brusilov*), available at <http://www.riigikohus.ee/?id=11&tekst=222465805> (in Estonian) (28.11.2007).

5. Conclusions

To sum up, in its almost fifteen years of activity, the Supreme Court has not been obliged to answer exceptionally sensitive questions — disputes concerning, for example, same-sex marriages, euthanasia, abortion, and freedom of religion have not been brought before the court. Unlike its German and US counterparts, the Supreme Court of Estonia has so far also managed to escape from developing formulae for calculating specific ‘teaching unit capacity’ or regulating the shower temperatures in prisons. The decisions in *Brusilov*, *Compulsory portion*, *Two chairs*, and provisionally *Resettlers* aside, the Supreme Court has not shown particularly activist stance in shaping the life of the polity. Rather, the court has hidden behind procedural justifications in cases concerning sensitive issues in order to avoid answering, for example, the question of the extent to which the Constitution of Estonia ensures everyone’s right to health protection (*Toom*).

In the end, it must be noted that, although the proportion of activist, as defined by the author above, decisions among all constitutional review decisions of the Supreme Court is not large, all of these have been rendered in the past five years of operation of the Supreme Court. Hence, time will tell whether it is justified to speak of all the more noticeable appearance of the Supreme Court on the arena of policy-makers in Estonia.