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MADIS ERNITS

# Constitution as a System

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# Constitution as a System

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School of Law, University of Tartu, Estonia

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# CONSTITUTION AS A SYSTEM

# *Constitution as a System*

# INTRODUCTION

## I. Opening remarks

Robert Alexy wrote in 2001: "The spirit of the constitution consists of three elements: of (1) principles, (2) the system that they build and (3) rational argumentation that establishes the systematic unity and draws conclusions from it in respect of the existence of concrete rights and duties. These three elements are integral parts of the constitution. […] The constitution as a substantive or a material foundation does not stand unconnected to the constitution as a system of rules. Both together form a unity and, as this unity, the constitution."[1] This passage originates from the monograph on the constitutional rights in Estonia and it forms the starting point of the following analysis. The key message of the shown passage is the idea of the constitution as a system. A similar idea has also been expressed in Estonian political debate. For instance, President Lennart Meri stated in his speech in 1996: "The constitution is a system, an integral organism, the skeleton of our legislation."[2]

One might ask, why is the question of systematicity of the constitution an issue worth a closer look. The issue arose in the judgement of the Estonian Supreme Court *en banc* that established in 2008 somewhat surprisingly: "Even if we admitted that the regulatory provisions […] are not perfect, this in itself would not give rise to conflict with the constitution. Not everything imperfect is unconstitutional."[3] The latter view consists of two findings: First, the Supreme Court admitted that the legal regulation in question was deficient, and second, despite its deficiency, the Court held it for constitutional. The case dealt with the question whether the control mechanism of the party financing was sufficiently effective and met the constitutionally required minimum. The Supreme Court *en banc* summarised the core of the abstract norm control: "although the legislator has established legal regulation to check the sources of political party funding, it has chosen a mechanism which does not allow to ascertain the actual sources of political party funding."[4] The Court observed that the Parliament select committee of the implementation of the Anti-corruption Act was composed of the representatives of the political parties represented in the Parliament and one

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1 R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 89.

2 L. Meri. Vabariigi Presidendi ametivanne ja kõne. – VIII Riigikogu shorthand records, IV session, Monday, 7 October 1996, at 15:00 (https://www.riigikogu.ee; all internet links visited on 19 August 2019). For unexplicable reasons, this part of the speech has not been published in the collected speeches of Lennart Meri 'Riigimured' (ed. by T. Kiho. Tartu: Ilmamaa, 2001, p. 15).

3 SCebj 21.05.2008, 3-4-1-3-07, para. 50.

4 *Ibid*., para. 23.

of the tasks of this committee was to ensure the accessibility of election campaign funding.[5] The Court agreed "that in regard to a body formed on political party bases […] it is difficult to achieve the body's apparent independence through legal regulation."[6] But the Court did not ascertain any unconstitutionality.[7] Consequently, according to the Supreme Court, the control mechanism of the party financing was in accordance with the principle of democracy although the regulation did not ensure that all actual sources of political party funding were made public. In the context of this study the question of interest is not the contradiction in the reasoning of the Supreme Court but rather the broader issue that by tolerating considerable gaps in the control mechanism of the party financing the Supreme Court called the idea of the constitution as a system into question. If a serious inconsistency of a legal regulation is considered to be neutral from the perspective of the constitution, the constitution does not form any system. In case of an ineffectiveness or incoherence of the legal regulation, the assessment is more complicated. I shall argue that both cases would endanger the constitution as a system.

Constitutional theory presupposes a relatively independent and stable set of norms without being a one-way street – the constitutional theory also helps to secure and to maintain an independent and a stable basic order. On that basis, the present study intends to contribute to the constitutional theory in order to help to secure and to maintain Estonian constitutional order. This study will confirm that the Estonian Constitution forms a system. This system requires a seamless framework of constitutional norms and procedures and does not allow for significant gaps or deficiencies in interpretations of the constitutional norms. This introductory article will first analyse the two fundamental concepts – the concept of constitution (II) and the concept of system (III). Thereafter these ideas will be summarised (IV).

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5 *Ibid*., paras. 40, 47.

6 *Ibid*., para. 38.

7 The Court simply presumed that "political parties who politically compete with each other are interested that none of the political parties achieved a competitive advantage thanks to uncontrollable funds." It did not even discuss the possibility of a collusion. Furthermore, the Court stated despite the inquisitorial principle of the constitutional review proceedings that no evidence was presented to the Court "enabling the Supreme Court *en banc* to conclude that the described manner of setting up the committee does not guarantee the actual independence". "Instead, the documents of this court case tend to indicate that the 11th *Riigikogu*, and thus also the select committee of the implementation of Anti-corruption Act set up by the 11th *Riigikogu*, do have the interest of ascertaining the actual sources of political party funding. Namely, The Estonian People's Union faction, the faction of the Social Democratic Party, Estonian Green Party faction and Pro Patria and Res Publica Union faction consider the control mechanism of political party funding established in the Political Parties Act unconstitutional." (SCebd 21.05.2008, 3-4-1-3-07, para. 40).

## II. On the concept of constitution

The concept of constitution has not found much attention in Estonian legal literature until recent times.[8] This deficiency cannot be fixed here but rather outlined. The concept of constitution shall first be analysed from the historical perspective. Next we shall turn to the descriptive concept and finally deal with the analytical concepts of constitution.

### 1. Historical concept of constitution

The historical approach is widespread first and foremost in German academic literature.[9] Regarding the concept of constitution historically, it appears to be the result of a development that is aligned with the political reality, the phase of the development of philosophy and its important authors. Throughout centuries two methodologically different concepts can be distinguished.

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[8] The most comprehensive treatment until present is P. K. Tupay. Verfassung und Verfassungsänderung in Estland. Berlin: Berliner Wissenschafts-Verlag, 2015, p. 17 ff. Cf. T. Annus. Riigiõigus. 2. ed. Tallinn: Juura, 2006, p. 31 f.; R. Maruste. Põhiseadus ja selle järelevalve. Tallinn 1997, p. 13 ff.; U. Lõhmus. Põhiseaduse muutmine ja muutused põhiseaduses. – Juridica 2011/1, p. 12 ff. E.g. commentaries to the Estonian Constitution on more than 1000 pages do not treat the concept of Constitution at all, cf. Ü. Madise *et al*. (eds.).Eesti Vabariigi põhiseadus. 4. ed. Tallinn 2017.

[9] Cf. E.-W. Böckenförde. Geschichtliche Entwicklung und Bedeutungswandel der Verfassung. – E.-W. Böckenförde. Staat, Verfassung, Demokratie. Frankfurt a.M.: Suhrkamp, 1991, p. 29 ff.; D. Grimm. Der Verfassungsbegriff in historischer Entwicklung. – D. Grimm. Die Zukunft der Verfassung. Frankfurt a.M.: Suhrkamp, 1991, p. 101 ff.; *id*. Ursprung und Wandel der Verfassung. – D. Grimm. Die Zukunft der Verfassung II. Frankfurt a.M.: Suhrkamp, 2012, p. 11 ff.; *id*. Entwicklung und Funktion des Verfassungsbegriffs. – D. Grimm. Die Zukunft der Verfassung II. Frankfurt a.M.: Suhrkamp, 2012, p. 203 ff.; G. Jellinek. Allgemeine Staatslehre. 3. ed, 5. print. Berlin: Springer, 1929, p. 505 ff.; H. Mohnhaupt, D. Grimm. Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart. Berlin: Duncker & Humblot, 1995, p. 1 ff., 100 ff.; F. Renner. Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und 20. Jahrhundert. Zürich: Schultheiss, 1968, p. 77 ff.; E. Schmidt-Aßmann. Der Verfassungsbegriff in der deutschen Staatslehre der Aufklärung und des Historismus. Berlin: Duncker & Humblot, 1967, p. 27 ff.; P. Unruh. Der Verfassungsbegriff des Grundgesetzes. Tübingen: Mohr Siebeck, 2002, p. 39 ff.; C. Winterhoff. Verfassung – Verfassunggebung – Verfassungsänderung. Tübingen: Mohr Siebeck, 2007, p. 8 ff.

### *1.1. From the antiquity to the enlightenment – empirical concept of constitution*

Hsü Dau-Lin defined the empirical concept – without calling it the empirical concept – as the concrete mode of existence of a state.[10] In the early epoch, understanding the constitution as a perceived form of government can be viewed as the dominant position. During a quite long period – from the antiquity to the enlightenment – it was predominantly not an option to restrict the power of the ruler because the power was assumed to be of a divine origin and nothing divine can be limited. Therefore, the constitution was considered to be the form of the current government. For example according to Aristotle, the constitution is the government:

> "Now a constitution is the ordering of a state in respect of its various magistracies, and especially the magistracy that is supreme over all matters. For the government is everywhere supreme over the state and the constitution is the government."[11]

Although the empirical concept of constitution did not disappear with the enlightenment but lived on in the political science, the Estonian legal literature seems not to be aware of the empirical dimension of the concept of constitution. Instead, this concept still appears in political texts, for example the former President Toomas Hendrik Ilves wrote: "Constitution is the mode how to organise the relationship between citizens and political process into a lawbook."[12]

### *1.2. From the enlightenment to the present – normative concept of constitution*

Although the normative concept existed already earlier[13], it became dominant thanks to the changed political conditions over the course of the enlightenment. The change of the paradigm was caused by the need to limit the power of the absolutistic ruler. As a result, the function of the constitution changed – from a

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[10] H. Dau-Lin. Formalistischer und anti-formalistischer Verfassungsbegriff. – Archiv des öffentlichen Rechts NF 22 (1932), p. 43.

[11] Aristotle (English translation at Perseus Digital Library by H. Rackham). Politics. Book 3, 1278b.

[12] T. H. Ilves. Eesti jõudmine. Tallinn: Varrak, 2006, p. 130.

[13] E.g. Cicero. On the Commonwealth. – Cicero. On the Commonwealth and On the Laws. Ed. by J. E. G. Zetzel. Cambridge *et al*.: Cambridge University Press, 1999, Book 1, paras. 41–45. Cicero sayd that next to monarchy, aristocracy and democracy there should stand a fourth type of constitution that would be the best because it constitutes a moderate (*moderatum*) mixture of all aforementioned three (para. 45). Cf. H. Mohnhaupt, D. Grimm. Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart. Berlin: Duncker & Humblot, 1995, p. 10 ff.

tool of the ruler became the basis, limitation and separator of the state powers.[14] The government of men was supposed to be replaced by the government of laws.[15] The new understanding is best symbolised by the Article 16 of the French Declaration of the Rights of the Man and of the Citizen of 1789:

> "Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution."[16]

The basis of the new dominant concept of constitution was the presumption that all state power emanated from the people and only the constitution could create the basis for its exercise. The concept of constitution in the Declaration of the Rights of the Man and of the Citizen is also substantive because it included provisions on constitutional rights as well as on separation of powers.

## 2. Descriptive concept of constitution

A rather simple version of the modern concept of constitution is the descriptive concept.[17] The key question for the creators of this concept was: What are the common characteristics of such sets of norms that are commonly considered as constitutions. The first influential and still relevant descriptive concept was the definition of a Swiss scholar Emer de Vattel from 1758:

> "The basic regulation which determines the manner in which the Public Authority is to be exercised is what forms the *Constitution of the State*. In it is seen the form in which the Nation acts as a Political Body; how and by whom should the people be governed, what are the rights and duties of those who govern. This constitution is essentially nothing else than the establishment of the order in which a Nation intends to work together to obtain the advantages for which the Political Society was established."[18]

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[14] Cf. The Federalist Papers, No. 47, 48, 50 (Madison; http://files.libertyfund.org/files/788/0084_LFeBk.pdf); H. Heller. Staatslehre. – H. Heller. Gesammelte Schriften. Vol. III: Staatslehre als politische Wissenschaft. Tübingen: Mohr Siebeck, 1992, p. 361 ff., 387 ff.

[15] "[…] to the end it may be a government of laws, not of men" is the final clause of the Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, the first Chapter of the Constitution of Massachusetts from 1780.

[16] Déclaration des Droits de l'Homme et du Citoyen de 1789 (https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789): "*Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution*."

[17] P. Badura. Verfassung. – R. Herzog, H. Kunst, K. Schlaich, W. Schneelmelcher (eds.). Evangelisches Staatslexikon. Vol. II: N–Z. 3. ed. Stuttgart: Kreuz, 1987, col. 3741.

[18] E. de Vattel. De droit de gens (1758). Liv. I Chap. III, § 27 (http://oll.libertyfund.org/Home3/Book.php?recordID=0586.01): "*Le règlement fondamental qui détermine la manière dont l'Autorité Publique doit être exercée est ce qui forme la* ***Constitution de l'État****. En elle se voit la forme sous laquelle la Nation agit en qualité de Corps*

Structurally on the same page were on the brink of the 20th century's turn Thomas M. Cooley, Albert Venn Dicey and Georg Jellinek. The American legal scholar Thomas M. Cooley determined the constitution as follows:

> "The term *constitution* may be defined as the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."[19]

The English constitutional law expert Albert Venn Dicey found that:

> "Constitutional law […] appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state."[20]

The influential definition of the German scholar Georg Jellinek includes, likewise Emer de Vattel, also the rights determining the legal position of the individual:

> "Accordingly, the constitution of the state comprises as a rule the laws which designate the supreme organs of the state, the manner of their creation, their mutual relations and their sphere of action, and the fundamental position of the individual towards the authority of the state."[21]

As very successful appeared the descriptive definition of the Swiss constitutionalist Werner Kägi, according to which the constitution is the legal or normative basic order of the state.[22] Kägi's definition expresses the normative as well as the empirical dimension of the constitution because the term 'order' may express both the norms and state of affairs.

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*Politique ; comment & par qui le Peuple doit être gouverné, quels sont les droits & les devoirs de ceux qui gouvernent. Cette Constitution n'est dans le fonds autre chose, que l'établissement de l'ordre dans lequel une Nation se propose de travailler en commun à obtenir les avantages en vue desquels la Société Politique s'est établie*" (emphasis in original). De Vattel's definition contains also an intentional element but this is not sufficient to turn it into a substantive concept.

[19] T. M. Cooley. The general principles of constitutional law in the United States of America. 3. ed. Boston 1898, p. 22 (emphasis in original).

[20] Here cited: A. V. Dicey. Introduction to the Study of the Law of the Constitution. 9. ed. London: MacMillan and Co., 1939, p. 23.

[21] G. Jellinek. Allgemeine Staatslehre. 3. ed, 5. print. Berlin: Springer, 1929, p. 505: "*Die Verfassung des Staates umfaßt demnach in der Regel die Rechtssätze, welche die obersten Organe des Staates bezeichnen, die Art ihrer Schöpfung, ihr gegenseitiges Verhältnis und ihren Wirkungskreis festsetzen, ferner die grundsätzliche Stellung des einzelnen zur Staatsgewalt*."

[22] W. Kägi. Die Verfassung als rechtliche Grundordnung des Staates (1945). Darmstadt: Wissenschaftliche Buchgesellschaft, 1971, p. 9 ff. Cf. to the critique of Kägi's concept in particular G. Lübbe-Wolff. Die "Verfassung für Europa" – ein Etikettenschwindel? – W. Baumann, H.-J. v. Dickhuth-Harrach, W. Marotzke (eds.). Gesetz, Recht, Rechtsgeschichte. München: Sellier, 2005, p. 195 ff.; G. Lübbe-Wolff. Volk, Demokratie, Verfassung – Die "Verfassung für Europa" als Herausforderung an die Verfassungstheorie. – W. Kluth (ed.). Europäische Integration und nationales Verfassungsrecht. Baden-Baden: Nomos, 2007, p. 47 ff.; G. Lübbe-Wolff. Die Zukunft der europäischen Verfassung. – U. Davy, G. Lübbe-Wolff (eds.). Verfassung: Geschichte, Gegenwart, Zukunft. Baden-Baden: Nomos, 2018, p. 134 ff.

These definitions are predominantly considered as expressions of the substantive concept of constitution.[23] However, it is hard to agree with that. None of the above-mentioned definitions establishes substantive requirements for the constitution, they just describe the common features of most of the sets of norms commonly considered as constitutions. A description of common basic features does not constitute a substantive definition. Instead it remains a description of usual characteristics.[24] The substantive concept presupposes an answer to the question why it should be so.

If we would consider these definitions as substantive definitions, the result would be vagueness of the constitutional concept. Taking, for instance, the Jellinek's definition because of its advanced precision as the initial point, then all norms that constitute the manner of creation, mutual relations and sphere of action of supreme organs of a state would belong to the constitution. For the Parliament, the electoral laws and laws on political parties, for the Government, all laws that regulate governing and legal acts of the executive power, and for judiciary, the regulation of staffing of the Supreme Court and all procedural laws would be included. However, for instance, in the context of this concept the position of independent administrative bodies that are partly not subordinated to the government remains questionable. If we add the regulation on the fundamental positions of the individuals to the authority of the state, the constitutional concept expands even more because the fundamental position of individuals does not necessarily have to be determined by the constitutional rights. Roman Herzog has consequently drawn the conclusion that the constitution in the (so called) substantive sense is congruent to the public law.[25] And Herzog can be agreed with insofar that due to the definitions of de Vattel, Cooley, Dicey, Jellinek or Kägi it is very difficult, if not impossible, to distinguish between different levels of public law. However, on the other side, if we identified the constitution with the whole public law, we would just be one step away from the allegation that the constitution is an "egg of the world" (*Weltenei*) that involves everything from criminal code to the law about the production of the thermometers.[26] Then again, if we considered these definitions just as formal

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[23] J. Isensee. Staat und Verfassung. – J. Isensee, P. Kirchhof (eds.). Handbuch des Staatsrechts. Vol. I: Grundlagen von Staat und Verfassung. Heidelberg: C. F. Müller, 1987, § 13 recital 139; A. W. Heringa. Constitutions Compared. 4. ed. Cambridge, Antwerp, Portland: Intersentia, 2016, p. 3; K. Stern. Das Staatsrecht der Bundesrepublik Deutschland. Vol. I: Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung. 2. ed. München: C. H. Beck, 1984, p. 72 f.; A. Weber. Europäische Verfassungsvergleichung. München: C. H. Beck, 2010, p. 23.

[24] Cf. M. Tushnet. Constitution. – M. Rosenfeld, A. Sajó (eds.). The Oxford Handbook of Comparative Constitutional Law. Oxford: Oxford University Press, 2012, p. 218; P. Badura. Verfassung. – R. Herzog, H. Kunst, K. Schlaich, W. Schneelmelcher (eds.). Evangelisches Staatslexikon. Vol. II: N–Z. 3. ed. Stuttgart: Kreuz, 1987, col. 3742: "*im beschreibenden und theoretischen Sinn*".

[25] R. Herzog. Allgemeine Staatslehre. Frankfurt a.M.: Athenäum, 1971, p. 309.

[26] E. Forsthoff. Der Staat der Industriegesellschaft. München: C. H. Beck, 1971, p. 144.

descriptions, we would not face those difficulties because we would be able to apply a different substantive concept.

Consequently, it is not recommendable to treat the definitions of de Vattel, Cooley, Dicey, Jellinek, Kägi and their followers as substantive definitions but as formal descriptive definitions. Thus, there are two strategies to define the constitution formally: One may describe its usual content or analyse the essential formal characteristics that distinguish the constitution from simple laws. The latter would be an analytical formal concept.

## 3. Analytical concept of constitution

The analytical concept of constitution distinguishes between the constitution and the legal act that expresses the constitution.[27] This distinction corresponds to the distinction between a norm and a normative statement;[28] it is the basis of the semantic concept of norm and means that a norm is either the meaning[29] or the sense[30] of the normative statement.

We may call a text which is titled 'Constitution' a constitution. But it is recommended to search the real concept of constitution on the level of norms.

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[27] C. Schmitt. Verfassungslehre. München, Leipzig: Duncker & Humblot, 1928, p. 44; H. Dau-Lin. Formalistischer und anti-formalistischer Verfassungsbegriff. – Archiv des öffentlichen Rechts NF 22 (1932), p. 43 with references to the historical sources from the 19th century in fn. 26.

[28] Cf. R. Alexy. A Theory of Constitutional Rights. Oxford, New York: Oxford University Press, 2002, p. 22 ff.; M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 215 f.; *id*. Glaubens- und Gewissensfreiheit. Tübingen: Mohr, 2006, p. 181 f.; P. Holländer. Rechtsnorm, Logik und Wahrheitswerte. Baden-Baden: Nomos, 1993, p. 64 ff.; H. Kelsen. The Pure Theory of Law. 2. ed. Berkeley, Los Angeles, London: University of California Press, 1970, p. 5; P. Koller. Theorie des Rechts. 2. ed. Wien, Köln, Weimar: Böhlau, 1997, p. 66; A. Ross. Directives and Norms. London: Routledge &. Kegan Paul, 1968, p. 34; J.-R. Sieckmann. Regelmodelle und Prinzipienmodelle des Rechtssystems. Baden-Baden: Nomos, 1990, p. 25 ff.; C. and O. Weinberger. Logik, Semantik, Hermeneutik. München: C. H. Beck, 1979, p. 20, 108; O. Weinberger. Rechtslogik. 2. ed. Berlin: Duncker & Humblot, 1989, p. 55. K. F. and H. C. Röhl underline that the term 'norm' is ambiguous in the legal language, K. F. and H. C. Röhl. Allgemeine Rechtslehre. 3. ed. Köln, München: Heymanns, 2008, p. 92. Despite that they also distinguish the norm and the normative statement, *id*. p. 189 ff., 195 f. See to different norm theories P. Holländer. Rechtsnorm, Logik und Wahrheitswerte. Baden-Baden: Nomos, 1993, p. 64 ff.

[29] E.g. R. Alexy. A Theory of Constitutional Rights. Oxford, New York: Oxford University Press, 2002, p. 22; C. Weinberger, O. Weinberger. Logik, Semantik, Hermeneutik. München: C. H. Beck, 1979, p. 20, 108; O. Weinberger. Rechtslogik. 2. ed. Berlin: Duncker & Humblot, 1989, p. 55. Cf. A. Ross. Directives and Norms. London: Routledge & Kegan Paul, 1968, p. 34.

[30] E.g. H. Kelsen. The Pure Theory of Law. 2. ed. Berkeley, Los Angeles, London: University of California Press, 1970, p. 5.

Analytic approaches are less frequent in the legal literature than the descriptive ones.[31] The analytical concept of constitution is a normative one. The right place to search for it is the level of norms. In the normative sense the constitution must be determined by positively named characteristics that distinguish it from other sets of norms. On the level of norms, we can define the constitution either formally or substantively.[32] The formal approach connects the concept to certain formal characteristics, the substantive one to substantive characteristics. Thereby the line between the form and substance may be disputable.

### *3.1. Constitution in formal sense*

The formal concept of constitution is a suitable means for identifying the constitution in states where a certain determinable act exists that expresses the constitution. Characteristics that distinguish the constitution from simple statutes are in first order its supreme validity and the more difficult process of amending it.[33]

#### 3.1.1. Supreme validity

The formal concept of constitution presupposes that the constitution of a state derives from a single legal act or at least from clearly identifiable legal acts. However, the requirement of a single act is rather a regulative idea because many states have more than one legal act that contains constitutional norms. For example the Constitution of the United States of America consists of the Constitution from 1789 and its 27 amendments.[34] The textual basis of the Estonian Constitution also comprises of more than one legal act: The Constitution of the Republic of Estonia,[35] The Constitution of the Republic of Estonia Implementation

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[31] Cf. H. Heller. Staatslehre. – H. Heller. Gesammelte Schriften. Vol. III: Staatslehre als politische Wissenschaft. Tübingen: Mohr Siebeck, 1992, p. 385 ff.; A. Ross. Theorie der Rechtsquellen. Leipzig, Wien: Franz Deuticke, 1929, p. 350 ff.; K. Stern. Das Staatsrecht der Bundesrepublik Deutschland. Vol. I: Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung. 2. ed. München: C. H. Beck, 1984, p. 69 ff. (§ 3 II); A. Weber. Europäische Verfassungsvergleichung. München: C. H. Beck, 2010, p. 13 ff.

[32] G. Jellinek. Allgemeine Staatslehre. 3. ed, 5. print. Berlin: Springer, 1929, p. 506 ff. Cf. A. Weber. Europäische Verfassungsvergleichung. München: C. H. Beck, 2010, p. 18 ff.; M. Kloepfer. Verfassungsrecht I. München: C. H. Beck, 2011, p. 20 ff. (§ 1 recital 107 ff., 118 ff.).

[33] M. Kloepfer. Verfassungsrecht I. München: C. H. Beck, 2011, p. 22; A. Weber. Europäische Verfassungsvergleichung. München: C. H. Beck, 2010, p. 18 ff.

[34] Cf. https://www.senate.gov/civics/constitution_item/constitution.htm.

[35] *Riigi Teataja* [State Gazette] (RT) RT 1992, 26, 349; I, 15.05.2015, 2.

Act,[36] and The Constitution of the Republic of Estonia Amendment Act[37].[38] These three acts differ relatively clearly from the rest of the legal order so that they can be considered as the textual basis of the constitution.

The supreme validity means that the constitutional norms are on the highest level in the hierarchy of norms and thus possess the highest validity or binding force (*höchste Geltungskraft*). According to the rule *lex superior derogat legi inferiori*, in the hierarchy of validity, the validity of a higher rank invalidates the validities of lower ranks if they contradict. Alexander Hamilton explained the idea of the supreme validity in 1788: "[…] where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."[39] He added that courts' "duty […] must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."[40] Hamilton's ideas became reality for the first time in 1803 in the case Marbury v. Madison where the US Supreme Court confronted the government of men with the government of laws and declared for the first time in history an act of parliament for null and void.[41]

In the 20th century, Hans Kelsen was the most prominent defender of the idea of hierarchy of norms. He also emphasised the legal logical inevitability of the constitutional review: "As long as a constitution lacks the guarantee […] of the annullability of unconstitutional acts it also lacks the character of full legal bindingness in the technical sense. […] Any statute whatsoever, any simple degree – yes, even any general legal transaction of private parties – surpasses such a constitution in legal force […]."[42] The sole remedy is to invalidate the contradicting inferior legal norm by the constitutional review court.

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36 RT 1992, 26, 350.

37 RT I 2003, 64, 429.

38 The title of the legal commentaries of Estonian Constitution is therefore incorrect because it names only the Constitution of the Republic of Estonia, leaving other parts of the constitution aside. The commentaries themselves, however, also include the implementation act and the amendment act.

39 The Federalist Papers, No. 78 (1788, Hamilton; http://files.libertyfund.org/files/788/0084_LFeBk.pdf).

40 *Ibid*.

41 U.S. Supreme Court 23.02.1803, 5 U.S. 137 (163) – *Marbury v. Madison*.

42 H. Kelsen. The Nature and Development of Constitutional Adjudication. – L. Vinx (ed. and transl.). The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law. Cambridge: Cambridge University Press, 2015, p. 69. Original: H. Kelsen. Wesen und Entwicklung der Staatsgerichtsbarkeit. – Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 1929 (5), p. 78: "S*olange eine Verfassung der* […] *Garantie der* ***Vernichtbarkeit verfassungswidriger Akte*** *ermangelt, fehlt ihr auch der Charakter* ***voller Rechtsverbindlichkeit*** *im technischen Sinne*. […] *Jedes beliebige Gesetz, jede einfache Verordnung, ja jedes generelle Rechtsgeschäft privater Parteien* ***übertrifft*** *eine solche* ***Verfassung****, die über allen diesen Rechtsnormen steht, übertrifft* ***sie****, aus der alle diese niederen Stufen der Rechtsordnung ihre Geltung holen,* ***an Geltungskraft***" (emphasis in original).

Although Kelsen's inevitability theses has also been sharply criticised,[43] it is not necessary to go into the details here. For the first element of the formal concept of constitution it suffices to say that the constitutional validity or binding force is higher than that of the simple statutes. Instead, it should be distinguished between the supreme validity in a strong and in a weak sense. In the strong formal sense, the supreme validity exists in those states where functioning constitutional review exists. In the weak formal sense, the supreme validity exists also in those states where, although no functioning constitutional review exists, there is a common understanding that the constitution is more important or has a higher rank than simple statutes.

### 3.1.2. More difficult amendability compared to ordinary statutes

Paul Laband and Georg Jellinek called the more difficult amendability of the constitution the increased formal force of law (*erhöhte Gesetzeskraft*).[44] The more difficult amendability means that the constitution may not be amended by any simple statute or applying the rule '*lex posterior derogat legi priori*'. According to Klaus Stern, the more difficult amendability is, as a rule, manifested in a qualified majority or in the requirement of approval of the member states of a federal state.[45] He questions, whether a constitution that does not have such an increased formal force of law can qualify as a constitution at all.[46] This difficulty points to the necessity of an adequate theory of legal system as a precondition to the analytic theory of the formal concept of constitution. If a legal system is not sufficiently theorised, it will be difficult to determine the constitution formally. For example, in a legal system where the hierarchy of norms is not recognised, the search for the constitution in the formal sense would remain fruitless. Therefore, the analytic formal theory only applies to developed legal systems.

Jellinek points to the same direction. According to him, a constitution has no practical legal value in those states where it can be passed and amended by simple statutes or by simple parliamentary majority; it would be only consequent to deny the existence of the constitution in the formal sense altogether.[47] Indeed, if the constitution could be amended by a simple parliamentary majority, there would

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[43] Particularly by C. Schmitt. Das Reichsgericht als Hüter der Verfassung (1929). – C. Schmitt. Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954. Berlin: Duncker & Humblot, 1958, p. 73 ff.; C. Schmitt. Der Hüter der Verfassung. Tübingen: Mohr, 1931, p. 12 ff.

[44] P. Laband. Das Staatsrecht des Deutschen Reiches. Vol. 2. 5. ed. Tübingen: Mohr, 1911, p. 38 ff., 72 f.; G. Jellinek. Allgemeine Staatslehre. 3. ed, 5. print. Berlin: Springer, 1929, p. 534.

[45] K. Stern. Das Staatsrecht der Bundesrepublik Deutschland. Vol. I: Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung. 2. ed. München: C. H. Beck, 1984, p. 72.

[46] *Ibid*.

[47] G. Jellinek. Allgemeine Staatslehre. 3. ed, 5. print. Berlin: Springer, 1929, p. 534.

be no rational explanation why simple statutes cannot explicitly or implicitly give substance to the constitution.

#### 3.1.3. Interim result

The constitution in the formal analytical sense is a set of norms that has the highest binding force (*höchste Geltungskraft*) in a legal system and a more difficult amendability (*erhöhte Gesetzeskraft*) compared to simple statutes. It is possible to distinguish between constitutions in a strong and in a weak formal sense. The constitution in the strong formal sense exists where also a functioning constitutional review exists. The constitution in the weak formal sense exists where just a set of norms exists that is commonly considered to be more important or on a higher level than simple statutes.

### *3.2. Constitution in substantive sense*

In the substantive analytical sense, the question to ask is: What is the necessary content of any set of norms in order to deserve the label 'Constitution'? Any answer to that question presupposes a metatheory of a set of norms that is capable imposing requirements to the basic mechanisms for exercising the power. As will be shown below, the best candidate for such set of norms is human rights. The debates about the existence,[48] the concept[49] and the justification[50] of human rights are fundamental debates of legal philosophy. Therefore, it is not possible to go into more detail here. Instead, based on the Robert Alexy's theory of the

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[48] E.g. Alasdair MacIntyre's famous quote: "[…] there are no such rights, and belief in them is one with belief in witches and unicorns." (A. MacIntyre. After Virtue. 2. ed. London: Duckworth 1985, p. 69.) Cf. R. Alexy. The Existence of Human Rights. – U. Neumann, K. Günther, L. Schulz (eds.). Law, Science, Technology. Baden-Baden: Nomos, 2013, p. 9 ff.; *id*. Law, Morality, and the Existence of Human Rights. – Ratio Juris 25 (2012), p. 8 ff.

[49] E.g. Marie-Bénédicte Dembour distinguishes four schools of the concept of human rights: (1) natural or orthodoxic, (2) deliberative, (3) protest and (4) discursive schools of thought. (M.-B. Dembour. What Are Human Rights? Four Schools of Thought. – Human Rights Quarterly 32 (2010), p. 1 ff.; Cf. *id*. Who Believes in Human Rights? Cambridge *et al*.: Cambridge University Press, 2006, p. 232 ff., 253 ff.) Robert Alexy distinguishes eight approaches to human rights: (1) religious, (2) intuitionistic, (3) consensual, (4) socio-biological, (5) instrumentalistic, (6) cultural, (7) explicative and (8) existential. (R. Alexy. Discourse Theory and Fundamental Rights. – A. J. Menéndez, E. O. Eriksen (eds.). Arguing Fundamental Rights. Dordrecht: Springer, 2006, p. 18 ff.)

[50] Cf. R. Alexy. The Existence of Human Rights. – U. Neumann, K. Günther, L. Schulz (eds.). Law, Science, Technology. Baden-Baden: Nomos, 2013, p. 9 ff.; *id*. Law, Morality, and the Existence of Human Rights. – Ratio Juris 25 (2012), p. 10 ff.; *id*. Grund- und Menschenrechte. – J.-R. Sieckmann (ed.). Verfassung und Argumentation. Baden-Baden: Nomos, 2005, p. 61 f.; *id*. Menschenrechte ohne Metaphysik? – *Deutsche* Zeitschrift für Philosophie 2004, p. 16 ff.; *id*. Diskurstheorie und Menschenrechte. – R. Alexy. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 144 ff.

connection between human rights and the democratic constitutionalist state or democratic constitutionalism (*demokratischer Verfassungsstaat*)[51], I shall draft the connection between the human rights and the constitution.

### 3.2.1. Robert Alexy's theory of the connection between human rights and democratic constitutionalism

According to Robert Alexy, there is a normative type of connection between the human rights and the democratic constitutionalism.[52] Alexy explains his argument in two steps. First, he argues that the human rights require their transformation into the positive law and this transformation is only possible in the context of a state. Furthermore, because the enforcement of human rights

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[51] According to Walton H. Hamilton, the rise of modern constitutionalism may be dated from 1776 (W. H. Hamilton. Constitutionalism. – E. R. A. Seligman, A. Johnson (eds.). Encyclopaedia of the Social Sciences. Vol. 4. New York: Macmillan, 1931, p. 255). The English expression 'democratic constitutionalism' has been already in use in the end of the 19th century (cf. G. P. Gooch. History of English Democratic ideas in the Seventeenth Century. Cambridge 1898, p. 105). In the English-speaking literature constitutionalism is predominantly considered as an US-American invention (e.g. L. Henkin. A New Birth of Constitutionalism: Genetic Influences and Genetic Defects. – Cardozo Law Review 14 (1992), p. 533 ff., 536; G. A. Billias. American Constitutionalism Heard Round the World, 1776–1989. New York, London: New York University Press, 2009, p. XI ff., 51 ff. Cf. for a more differentiated approach e.g. D. Grimm. Constitutionalism. Oxford, New York: Oxford University Press, 2016, p. 41 ff., 53 ff.; V. Sellin. Restorations and Constitutions. – K. L. Grotke, M. J. Prutsch (eds.). Constitutionalism, Legitimacy, and Power. Oxford, New York: Oxford University Press, 2014, p. 85 f.). Immanuel Kant formulated the idea of constitutionalism or constitutionalist state in the end of 18th century as "a union of a multitude of human beings under laws of right" (I. Kant. The Metaphysics of Morals. – I. Kant. Practical Philosophy. Cambridge: Cambridge University Press, 1996, p. 456 (§ 45; 6:313). Original: I. Kant. Die Metaphysik der Sitten. Königsberg 1797/1798, p. A 165/B 195 (§ 45): "*Vereinigung einer Menge von Menschen unter Rechtsgesetzen*".) The German equivalent concept to the constitutionalism '*Verfassungsstaat*' did not occur by Kant but has been in use in the 19th century literature (e.g. J. C. Bluntschli. Lehre vom modernen Staat. Vol. 1: Allgemeine Staatslehre. 5. ed. Stuttgart 1875, p. 68, 75 f.). The German concept '*demokratischer Verfassungsstaat*' originates – as far as can be seen – from the judgement of the German Federal Constitutional Court in 1952 about the prohibition of the Socialist *Reich* Party (BVerfG 23.10.1952, 1 BvB 1/51, para. 37 (BVerfGE 2, 1, 12)). In Estonian, the term '*konstitutsionalism*' has been used partly in a similar meaning like here (cf. R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse. Tallinn: Juura, 2004, p. 17 ff.), partly in a different sense according to which from the supreme level of the legal system, i.e. from the constitution, are "streaming out" all other norms of the system (B. Aaviksoo. Riigi otsustusruumi ahenemine: kodakondsus nüüdisaegses Euroopas. Tartu: Tartu Ülikooli kirjastus, 2013, p. 92 ff.). To avoid confusion, it is preferable to use in Estonian for constitutionalism the term '*põhiseadusriik*' (constitutionalist state) instead.

[52] R. Alexy. Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat. – S. Gosepath, G. Lohmann (eds.). Philosophie der Menschenrechte. Frankfurt a.M.: Suhrkamp, 1998, p. 254.

causes the necessity of a state, there is a human right to the existence of a state.[53] As a second step, Alexy argues that not only the state as such is necessary but a state of a certain kind, namely the democratic constitutionalism.[54] Alexy explains this argument in three steps. First, he argues that implementation of human rights presupposes legality of the administration, independence of the judiciary and the separation of powers because otherwise the enforcement of a right would depend on the political will of those in power.[55] Second, the human rights should be included into the constitution as constitutional rights and the legislator should be controlled by the democratic process since there is also a human right to participate in the process of political decision-making.[56] Third, democracy alone does not guarantee human rights for all but only for the respective majority. In order to protect the rights of minorities, constitutional review over decisions of the legislator is necessary as well.[57]

### 3.2.2. Conclusions from Robert Alexy's theory

Alexy does not formalise his conclusions in this article. However, a formalisation of some key lines of his thought might throw some new light on the substantive concept of constitution. To do this, I shall first formalise Alexy's main conclusion, then extend it and then establish a connection between human rights and the concept of constitution.

Alexy comes to the result that the democratic constitutionalism (*DC*) is a necessary condition of human rights (*HR*):

(1) $\neg DC \rightarrow \neg HR$

Consequently, human rights are sufficient condition for the democratic constitutionalism:

(2) $HR \rightarrow DC$

Martin Kriele follows Alexy's line of thought and points out that the separation of powers (*SoP*) is not a sufficient condition for human rights but a necessary condition.[58] Along similar lines, the independence of judiciary (*IoJ*) is for Kriele

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[53] *Ibid*., p. 255.

[54] *Ibid*., p. 258.

[55] *Ibid*., p. 258 f.

[56] *Ibid*., p. 250 f., 259 ff.

[57] *Ibid*., p. 262 ff.

[58] M. Kriele. Einführung in die Staatslehre. 6. ed. Stuttgart, Berlin, Köln: Kohlhammer, 2003, p. 101, 107 f. Elsewhere, Kriele suggests that important institutions of the constitutionalism are validity of statutes, constitution-binding of state powers, human rights, separation of powers, democratic elections etc. (*Ibid*., p. 47.) However, the concept of institution is somewhat undetermined. Furthermore, Kriele also maintains that human rights and constitutionalism are conditional upon one another. (*Ibid*., p. 107.) The latter statement needs

a necessary condition for human rights, too.[59] This idea shall be formalised as follows:

(3) $\neg(SoP \wedge IoJ) \rightarrow \neg HR$

To turn this around, human rights are a sufficient condition for separation of powers and independence of judiciary:

(4) $HR \rightarrow (SoP \wedge IoJ)$

Thus, Kriele brings exactly the same argument as Alexy in respect to the separation of powers and the independence of judiciary.[60] To complete the formula with Alexy's other features, we must add the legality of administration (*LoA*), constitutional rights (*CR*), democracy (*Dem*) and constitutional review (*Rev*). All these elements together form, according to Alexy, the democratic constitutionalism:

(5) $DC \leftrightarrow (SoP \wedge IoJ \wedge LoA \wedge CR \wedge Dem \wedge Rev)$

Therefore, if we replace the democratic constitutionalism, which is a necessary condition for human rights by its elements, the formula looks like follows:

(6) $\neg(SoP \wedge IoJ \wedge LoA \wedge CR \wedge Dem \wedge Rev) \rightarrow \neg HR$

Consequently, human rights are a sufficient condition for the separation of powers, the independence of judiciary, the legality of administration, constitutional rights, democracy and constitutional review:

(7) $HR \rightarrow (SoP \wedge IoJ \wedge LoA \wedge CR \wedge Dem \wedge Rev)$

Moreover, Alexy's conclusions that human rights require their transformation into constitutional rights and a constitutional review over decisions of the legislator mean that democratic constitutionalism presupposes the existence of a constitution.[61] Since democratic constitutionalism is not possible without a constitution – written or unwritten –, which necessarily includes human rights in

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a clarification. As we have seen above, there is no biconditional relation between the two. Instead, human rights are a sufficient condition for democratic constitutionalism but democratic constitutionalism is a necessary condition for human rights.

[59] *Ibid*., p. 107 f.

[60] One might be tempted to argue with Kriele that the separation of powers together with the independence of the judiciary are more important than the existence of a catalogue of constitutional rights (M. Kriele. Einführung in die Staatslehre. 6. ed. Stuttgart, Berlin, Köln: Kohlhammer, 2003, p. 108). But for the pursued conclusion here it does not matter which of the both is more important. It is sufficient to state that both are necessary.

[61] Cf. to the necessity of law in general R. Alexy. Discourse Theory and Human Rights. – Ratio Juris 9 (1996), p. 220 f.

the form of constitutional rights and stipulates also constitutional review, a constitution (*Con*) is also necessary in relation to human rights:

(8) $\neg Con \rightarrow \neg HR$

Consequently, human rights are a sufficient condition for a constitution:

(9) $HR \rightarrow Con$

### 3.2.3. The substantive concept of constitution

In Alexy's model a constitution cannot succeed without democratic constitutionalism and *vice versa* because human rights are sufficient conditions for both. Moreover, constitutional rights and constitutional review conceptually and systematically presuppose constitutional level legal norms because their main function is to mark the limits of the legitimate space of legislative decision-making. The democratic character of the creation of a democratic will is a constitutional level question. It cannot be left to be decided by the simple parliamentary majority to guarantee the sustainability of the whole legitimisation process. The separation of powers and the independence of judiciary must be constitutional level questions as well because they constitute primary guarantees against decisions of the democratically elected legislative body.[62] What is left, is the legality of administration. If the legality of administration was not stated in the constitution, there would be a permanent conflict between the legislator and the administration about the determination of the scope of mutual competencies. The constitutional statement determines that the administration can act within the framework set by the legislator and restricts significantly the space for potential conflicts. Secondly, the constitutional statement of the legality of administration is also necessary in order to guarantee the enforcement and thus the validity of legislative acts. Without a clear constitutional statement, the legality of administration would either presuppose a process of interpretation in order to establish it as a constitutional principle by the case law or it would only be contingent, i.e. dependent from the decision of the legislator. Thirdly, if human rights require democratic constitutionalism and a constitution, there is a strong assumption that all necessary elements of the democratic constitutionalism must be included in the constitution. Thus, all principles of the democratic constitutionalism are either logically or at least for other good reasons principles of constitutional level. Therefore, there is a logical connection between the democratic constitutionalism and the substantive concept of constitution within this paradigm: no (proper) constitution without democratic constitutionalism and no democratic constitutionalism without a constitution:

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[62] Constitutional Rights and the separation of powers were considered as necessary elements of the Constitution already by the Article 16 of the French Declaration of the Rights of the Man and of the Citizen of 1789 (see above).

(10) $(\neg DC \rightarrow \neg Con) \wedge (\neg Con \rightarrow \neg DC)$

This is equivalent to the following formula:

(11) $\neg DC \leftrightarrow \neg Con$

This in turn is equivalent to the following formula which expresses the equivalence of the constitution with the democratic constitutionalism within this paradigm:[63]

(12) $Con \leftrightarrow DC$

If the constitution in the substantive sense equals to the democratic constitutionalism, we may replace the latter with its elements:

(13) $Con \leftrightarrow (SoP \wedge IoJ \wedge LoA \wedge CR \wedge Dem \wedge Rev)$

This formula expresses the substantive concept of constitution relative to human rights. It includes necessarily the following elements: separation of powers, independence of judiciary, legality of administration, constitutional rights, democracy and constitutional review. Consequently, constitution in a substantive sense are norms that regulate the fundamentals of separation of powers, independence of judiciary, legality of administration, constitutional rights, democracy and constitutional review. The difference to the descriptive definitions is that instead of referring to constitutional bodies and competencies, it consists of substantive principles that derive from human rights.

The presented substantive concept of constitution has been developed essentially with the help of Robert Alexy's theory of the normative connection between human rights and democratic constitutionalism but the idea as such is not new. According to Article 2 of the French Declaration of the Rights of Man and of the Citizen of 1789 the goal of any political association is the conservation of the natural and imprescriptible rights of Man.[64] A similar idea was also expressed by James Madison, one of the founding fathers of the United States, who named the

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[63] According to the traditional understanding, the democratic constitutionalism includes the statehood (of certain kind). The logical consequence of that is that the existence of a state (*St*) is a necessary condition for the existence of a constitution ($\neg St \rightarrow \neg Con$). Cf. to the critique and to the debate about the possibility of a constitution without a state instead of many G. Lübbe-Wolff. Volk, Demokratie, Verfassung – Die "Verfassung für Europa" als Herausforderung an die Verfassungstheorie. – W. Kluth (ed.). Europäische Integration und nationales Verfassungsrecht. Baden-Baden: Nomos, 2007, p. 52 ff. with further references in fn. 7 and 11.

[64] Déclaration des Droits de l'Homme et du Citoyen de 1789, https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789: „*Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme*." Furthermore, the above cited Article 16 emphasised the necessity to include the guarantee of rights and the separation of powers into the Constitution.

constitution as charters of power granted by liberty opposed to charters of liberty granted by power.[65] These thoughts from the era of enlightenment formulate the regulative idea that still remains actual: The intrinsic goal of any political association or any public power is the protection of human rights and human rights lead to a certain kind of state, namely to the democratic constitutionalism.

This idea has been labelled by Carl Schmitt as the ideal concept of constitution (*Idealbegriff*)[66] levelling a charge of lack of realism. Peter Badura criticises it as a battle cry (*Kampfbegriff*)[67] meaning that it is a polemically used political slogan. Likewise, Paloma Krõõt Tupay names it an enlightening-ideologised concept of constitution (*"aufklärerisch-ideologisierter" Verfassungsbegriff*).[68] The attempt to define fundamental concepts of the system of government established to organise the society entails the allegation of being political or ideologised. According to Alexy, human rights are universal, fundamental, abstract, and moral rights that are established with priority over all other kinds of rights.[69] If the demand for something universal, fundamental and moral is political, then this theory is political. The allegation of lacking the realism can only be refuted by demonstrating the practical usability. This will be essentially demonstrated in the following chapters.

Since according to Alexy the human rights have only moral validity,[70] the connection between the human rights and the constitution is a moral connection. In contrast to legal validity one may call this connection a weak one because it does not legally invalidate a constitution that does not include the elements of the democratic constitutionalism. However, the substantive concept still opens the

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65 J. Madison. Charters. – National Gazette, 19 January 1792 (http://www.constitution.org/jm/17920119_charters.htm): "In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty." Cf. A. Somek. The Cosmopolitan Constitution. Oxford: Oxford University Press, 2014, p. 1.

66 C. Schmitt. Verfassungslehre. München, Leipzig: Duncker & Humblot, 1928, p. 36 ff.

67 P. Badura. Verfassung. – R. Herzog, H. Kunst, K. Schlaich, W. Schneelmelcher (eds.). Evangelisches Staatslexikon. Vol. II: N–Z. 3. ed. Stuttgart: Kreuz, 1987, col. 3741.

68 P. K. Tupay. Verfassung und Verfassungsänderung in Estland. Berlin: Berliner Wissenschafts-Verlag, 2015, p. 21. On the other hand, Tupay claims that a scientifically relevant treatment of Estonian Constitution presupposes the recognition of its substantial democratically legitimating effect (*ibid*., p. 22: "*Eine wissenschaftlich relevante Auseinandersetzung mit der estnischen Verfassung […] kann […] nur unter der Bedingung geleistet werden, dass dieser auch inhaltlich eine legitimierende Wirkung zukommt*.") The present study is based on the view that conceptual questions have to be strictly distinguished from the questions of legitimation.

69 R. Alexy. Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat. – S. Gosepath, G. Lohmann (eds.). Philosophie der Menschenrechte. Frankfurt a.M.: Suhrkamp, 1998, p. 246–254; *id*. The Existence of Human Rights. – U. Neumann, K. Günther, L. Schulz (eds.). Law, Science, Technology. Stuttgart: Nomos, 2013, p. 10–12.

70 R. Alexy. Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat. – S. Gosepath, G. Lohmann (eds.). Philosophie der Menschenrechte. Frankfurt a.M.: Suhrkamp, 1998, p. 249 f.

possibility to evaluate such a constitution. As Alexy expresses it, the best doctrine of human rights can be implemented in a democratic constitutionalism.[71] To rephrase it, the best doctrine of human rights can be implemented in a constitution. With other words, states that have constitutions implementing better doctrines of human rights are better states. To go even further, a legal system that does not recognise human rights as its fundamental elements runs the risk to end up as a rogue state.[72]

The substantive concept of constitution is a non-positivistic concept in contrast to the purely positivistic descriptive concepts. By non-positivism I mean, likewise Robert Alexy, the thesis according to which, by crossing a certain threshold of injustice, law ceases to be law.[73] Moreover, the substantive concept of constitution is connected with the thesis that there is a necessary connection between law and the correct morality (the strong morality thesis).[74] If there is on the one hand a necessary connection between the correct morality and law and, on the other hand, between human rights and democratic constitutionalism and we seek – from the moral point of view – the best fundamental order for a state, then there is a necessary connection between human rights and law. Human rights are the best version of morality that determines a legal system, mainly through principles.[75] Thus, human rights as the correct morality in the Alexyian sense help

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[71] *Ibid*., p. 244.

[72] Cf. R. Alexy. The Argument from Injustice. Oxford: Clarendon Press, 2002, p. 50 f., 62.

[73] *Ibid*., p. 4, 28; R. Alexy. On Necessary Relations Between Law and Morality. – Ratio Juris 2 (1989), p. 173 ff. Alexy's theory of non-positivism is based on the Radbruch's Formula. (G. Radbruch. Statutory Lawlessness and Supra-Statutory Law (1946). – Oxford Journal of Legal Studies 26 (2006), p. 7.) In later articles Alexy differentiates between three versions of non-positivism. (R. Alexy. On the Concept and the Nature of Law. – Ratio Juris 21 (2008), p. 286 ff.; *id*. The Dual Nature of Law. – Ratio Juris 23 (2010), p. 175 ff.; *id*. Law, Morality, and the Existence of Human Rights. – Ratio Juris 25 (2012), p. 4 ff.) According to this, "the most radical version of non-positivism" is the 'exclusive non-positivism' according to which "every moral defect, every injustice, yields legal invalidity". (*Id*. Law, Morality, and the Existence of Human Rights. – Ratio Juris 25 (2012), p. 5.) The other extreme is called the 'super-inclusive non-positivism' and means that "legal validity is in no way whatever affected by moral defects". (*Ibid*., p. 5 f.) The moderate form, called the 'inclusive non-positivism' "claims neither that moral defects always undermine legal validity nor that they never do"; instead it "maintains that moral defects undermine legal validity if and only if the threshold of extreme injustice is transgressed". (*Ibid*., p. 6.) The viewpoint defended here corresponds to the inclusive non-positivism in Alexyian sense.

[74] R. Alexy. The Argument from Injustice. Oxford: Clarendon Press, 2002, p. 75; *id*. On Necessary Relations between Law and Morality. – Ratio Juris 2 (1989), p. 167 ff.; *id*. On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique. – Ratio Juris 13 (2000), p. 138 ff.

[75] Cf. to the argument from principles R. Alexy. The Argument from Injustice. Oxford: Clarendon Press, 2002, p. 68 ff.

to determine the threshold of injustice,[76] the crossing of which results in the defectiveness of law.[77]

According to some authors, the scope of application of the substantive concept of constitution is restricted to those cases where the formal criteria are not fulfilled, i.e. cases where no constitution in formal sense exists.[78] But there is another way of approaching it. A consequence of the presented theory is that if we accept the necessary connection between human rights and democratic constitutionalism, we must also accept that states not fulfilling this premise and not implementing the principles of the democratic constitutionalism have no constitution in the substantive sense at all. However, they will most probably still have a constitution in the descriptive sense and perhaps in the formal analytical sense. The lack of the constitution in the substantive sense means however that their legal order is defective and needs – from the moral point of view – some substantial improvement. In this way the substantive concept is usable even if a constitution in formal sense exists.

### *3.3. Mixed concepts*

Several authors combine the descriptive and formal and/or substantive analytical elements of the concept of constitution.[79] These concepts shall be called mixed concepts. One example is the concept of Andrei Marmor, according to which constitutional documents have five main features: supremacy, longevity, rigidity,

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[76] Cf. R. Alexy. Law, Morality, and the Existence of Human Rights. – Ratio Juris 25 (2012), p. 9. According to Alexy, the connection between human rights and justice can be seen in two different ways. First, according to the 'core thesis' "human rights represent the core of justice" in the way that: "Every violation of human rights is unjust, but not every injustice is a violation of human rights". (*Ibid*.) According to the 'equivalence thesis': "Every violation of human rights is unjust, and every injustice is a violation of human rights." (*Ibid*.)

[77] Cf. to the qualifying connection between morality and law R. Alexy. The Argument from Injustice. Oxford: Clarendon Press, 2002, p. 79.

[78] Cf. G. Jellinek. Allgemeine Staatslehre. 3. ed, 5. print. Berlin: Springer, 1929, p. 506 ff.; R. Smend. Verfassung und Verfassungsrecht. – R. Smend. Staatsrechtliche Abhandlungen. Berlin: Duncker & Humblot, 1955, p. 237 j.

[79] K. Stern. Das Staatsrecht der Bundesrepublik Deutschland. Vol. I: Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung. 2. ed. München: C. H. Beck, 1984, p. 69 ff., 78; D. Grimm. Die Zukunft der Verfassung II. Frankfurt a.M.: Suhrkamp, 2012, p. 298; P. Unruh. Der Verfassungsbegriff des Grundgesetzes. Tübingen: Mohr Siebeck, 2002, p. 9 ff., 380 ff., 450 ff.; C. Winterhoff. Verfassung – Verfassunggebung – Verfassungsänderung. Tübingen: Mohr Siebeck, 2007, p. 95 ff.; G. Stourzh. Vom aristotelischen zum liberalen Verfassungsbegriff. – F. Engel-Janosi, G. Klinenstein, H. Lutz (eds.). Fürst, Bürger, Mensch. Wien: Verlag für Geschichte und Politik, 1975, p. 97 ff.; P. K. Tupay. Verfassung und Verfassungsänderung in Estland. Berlin: Berliner Wissenschafts-Verlag, 2015, p. 17 ff., 20.

moral content and generality and abstraction.[80] This concept has descriptive elements (longevity, generality and abstraction), formal analytical elements (supremacy and rigidity) and substantive analytical element (moral content).

In order to define a constitution, there is no need for a mixed concept. If we consider the mixed concept as a description of some essential elements of the democratic constitutionalism, it has a heuristic value. The mixed concept can also be regarded as an attempt to achieve more rationality. In this case, the mixed concept has a similar function as the substantive concept but because of the integrated formal elements it would not be able to determine the constitution in those states where no written document exists or where it is vague or too extensive.

Mixed concepts point to an important aspect: A constitution of a democratic constitutionalist state has necessarily formal and substantive features because the rule of law principle deriving from human rights requires the formal features. Despite that, it remains recommendable to distinguish the descriptive from the analytical concepts and the formal from the substantive concepts. Different concepts of constitution have different functions and provide us with different information.

### *3.4. Interim result*

Analytical concepts are either formal or substantive. Mixed concepts that also occur in theoretical literature are not sufficiently theorised and will be let aside here.

The formal concept of constitution is determined by two elements: the supreme validity or binding force and the more difficult amendability. It enables to determine the constitution in those states where a written document which serves as the origin of the constitution exists. Since Estonia belongs to those states, it also enables us to determine the type of constitution in Estonia. The formal concept of constitution is content neutral, i.e. it enables us to determine the supreme level of norms in any legal system with a certain kind of hierarchy of norms regardless of their content. The formal concept makes even possible to classify states in those where a constitution in the strong formal sense exists, like e.g. in Estonia, and those where only a constitution in the weak formal sense exists. The formal concept of constitution is a positivistic concept.

The rediscovered substantive concept sets a number of conditions to a proper constitution. The constitution in substantive sense includes necessarily separation of powers, independence of judiciary, legality of administration, constitutional rights, democracy and constitutional review. If a constitution includes these elements, then those are more important than other, optional elements of constitution.

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[80] A. Marmor. Interpretation and Legal Theory. 2. ed. Oxford, Portland: Hart Publishing, 2005, p. 142 f.

The most important elements of any constitution are its fundamental principles,[81] i.e. the principles without which any constitution would lose its essence.[82] The substantive concept of constitution links human rights with its fundamental principles: The core of constitutional rights are formed by human rights and by human dignity and social state principles; separation of powers, independence of judiciary, legality of administration and constitutional review form the backbone of *Rechtsstaat*, whereas democracy remains democracy. Thus, human rights are the reason why human dignity, democracy, *Rechtsstaat* and social state are fundamental principles of a constitution. Without a proper guarantee of human dignity, democracy, *Rechtsstaat* or social state, a constitution would be deprived of its essence. Estonian legal system is, according to the Supreme Court, determined by five fundamental constitutional principles: human dignity,[83] democracy,[84] rule of law,[85] social state[86] and Estonian identity[87].[88] Thus, the Estonian constitutional doctrine corresponds to the conclusion from the substantive concept of constitution. This is a strong indication for the validity of the substantive concept of constitution for Estonian legal system.

The substantive concept is a non-positivistic concept. In this way the substantive concept enables not only to answer the question whether there is a

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[81] The first treatment of the catalogue of fundamental principles of Estonian constitution originates from R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 89.

[82] This definition goes back to J. Laffranque. A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act. – Juridica International 12 (2007), p. 57.

[83] CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49; ALCSCr 04.05.2011, 3-3-1-11-11, para. 10.

[84] SCebj 01.07.2010, 3-4-1-33-09, para. 52, 67; ALCSCr 16.01.2003, 3-3-1-2-03, para. 11; 27.01.2003, 3-3-1-6-03, para. 11.

[85] CRCSCr 07.11.2014, 3-4-1-32-14, para. 28. Cf. CRCSCj 19.03.2009, 3-4-1-17-08, para. 26; 06.01.2015, 3-4-1-34-14, para. 33; ALCSCr 16.01.2003, 3-3-1-2-03, para. 11; 27.01.2003, 3-3-1-6-03, para. 11.

[86] CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49.

[87] CRCSCj 04.11.1998, 3-4-1-7-98, para. III.

[88] To the debate about fundamental principles of the Constitution see: W. Drechsler, T. Annus. Die Verfassungsentwicklung in Estland von 1992 bis 2001. – Jahrbuch des öffentlichen Rechts der Gegenwart NF 50 (2002), p. 473 ff.; M. Ernits. 20 Jahre Menschenwürde, Demokratie, Rechtsstaat, Sozialstaat. – S. Hülshörster, D. Mirow (eds.). Deutsche Beratung bei Rechts- und Justizreformen im Ausland. Berlin: Berliner Wissenschafts-Verlag, 2012, p. 126 ff.; R. Maruste. The Role of the Constitutional Court in Democratic Society. – Juridica International 13 (2007), p. 8 ff.; R. Maruste. Democracy and the Rule of Law in Estonia. – Review of Central and East European Law 26 (2000), p. 311 ff.; J. Laffranque. A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act. – Juridica International 12 (2007), p. 55 ff.; R. Narits. About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia. – Juridica International 16 (2009), p. 56 ff. See compilation of the sources in Estonian and presentation of the debate: M. Ernits. Põhiõigused, demokraatia, õigusriik. Tartu: Tartu Ülikooli Kirjastus, 2011, p. 5 fn. 9, p. 6 ff., 23 f.

constitution, but also to evaluate whether there is good or proper constitution, depending on the degree of compliance with the substantive concept.

### 4. Result – the concept of constitution

Historically the prevailing concept of constitution from the antiquity to the enlightenment was the empirical concept. According to the empirical concept, a constitution is how the powers are exercised. From the enlightenment on, the normative concept prevails.

The normative concept can be determined in different ways. The simplest way is to describe the core of the vast majority of the valid constitutions. According to the most abstract descriptive definition, a constitution is the normative basic order of the state. In contrast to the descriptive approach, the concept of constitution shall be preferably determined by analysis. In the formal analytical sense, the concept has two main defining features: supreme validity and more difficult amendability. This is a positivistic definition. In the substantive analytical sense, a constitution has a necessary connection with human rights and consists of following defining features: separation of powers, independence of judiciary, legality of administration, constitutional rights, democracy and constitutional review. This is the non-positivistic concept of constitution. In some cases, a state might not have a constitution in the substantive sense but only in formal and/or descriptive sense. The conclusion that a state lacks a constitution in substantive sense, provides us the information that the particular legal system has some issues with implementation of human rights.

## III. On the concept of system

According to Immanuel Kant, the system is "the unity of the manifold cognitions under one idea"[89] or "a whole of cognition ordered according to principles"[90] and the opposite of a system is rhapsody[91].[92]

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[89] I. Kant. Critique of Pure Reason. Cambridge: Cambridge University Press, 1998, p. 691 (A 832/B 860). (Original: I. Kant. Kritik der reinen Vernunft. 1. ed. Riga 1781, p. 832; 2. ed. Riga 1787, p. 860: "*die Einheit der mannigfaltigen Erkenntnisse unter einer idee*").

[90] I. Kant. Metaphysical Foundations of Natural Science. Cambridge: Cambridge University Press, 2004, p. 3 (467). (Original: I. Kant. Metaphysische Anfangssgründe der Naturwissenschaft. 1. ed. Riga 1786, p. IV: "*ein nach Prinzipien geordnetes Ganzes der Erkenntnis*").

[91] I. Kant. Critique of Pure Reason. Cambridge: Cambridge University Press, 1998, p. 282 (A 156), 691 (A 832/B 860).

[92] Cf. M. Klatt. Robert Alexy's Philosophy of Law as a System. – M. Klatt (ed.). Institutionalized Reason. Oxford, New York: Oxford University Press, 2012, p. 1 fn. 4; C.-W. Canaris. Systemdenken und Systembegriff in der Jurisprudenz. 2. ed. Berlin: Duncker & Humblot, 1983, p. 11; C. Strub. System; Systematik; systematisch. System II. – J. Ritter, K. Gründer, G. Gabriel (eds.). Historisches Wörterbuch der Philosophie. Vol. 10. Basel: Schwabe, 1998, col. 837 ff.

In the following subsections, we focus on the concept of system. At this point, we do not explore the abstract concept of the system but the concept of the legal system. The idea of a system has fascinated legal scholars since the year dot.[93] One of the major legal theoretical works of the 19th century was coined by Friedrich Carl von Savigny, comprising of eight volumes, and deals with the system of the modern Roman law.[94] According to Savigny, the system is the intrinsic link that combines legal institutions and legal rules to a bigger unity[95] that foremost allows us to fully understand them.[96] The background of Savigny's concept is a three level hierarchical construct where the rules on the first level are followed by legal institutions on the second and the system as a whole on the third. This system is not static but continuously changing and developing but nevertheless all the time recognisable in its essence.

A century later, Wilhelm Sauer exclaimed in his methodology: "Only a system guarantees knowledge, guarantees culture. Only in the system is true knowledge, true action possible."[97] After the Second World War Hans J. Wolff stated: "The legal science is systematical or it does not exist."[98] On the opposite side was for example Eugen Ehrlich who denied the systematicity of the legal science and consequently its scientific nature and came, therefore, to the conclusion that dealing with law is a technical artistic theory.[99] Since the claim to the scientificity is inherent to the present thesis – in the words of Carlos E. Alchourrón and

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[93] Already Aristotle considered the polis as a societal organisation to be a system (Aristotle: Eth. Nic. IX, 8, 1168 b 32) Cf. to this and to the following: F.-P. Hager. System; Systematik; systematisch. System I. – J. Ritter, K. Gründer, G. Gabriel (eds.). Historisches Wörterbuch der Philosophie. Vol. 10. Basel: Schwabe, 1998, p. 824.

[94] F. C. v. Savigny. System des heutigen Römischen Rechts. Vol. 1.–8. Berlin 1840–1849.

[95] F. C. v. Savigny. System des heutigen Römischen Rechts. Vol. 1. Berlin 1840, p. 214: "*Das **systematische** Element endlich bezieht sich auf den inneren Zusammenhang, welcher alle Rechtsinstitute und Rechtsregeln zu einer großen Einheit verknüpft*" (emphasis in original); Cf. p. XXXVI, 262 ff.

[96] F. C. v. Savigny. System des heutigen Römischen Rechts. 1. Vol. Berlin 1840, p. 10: "*In fernerer Betrachtung aber erkennen wir, daß alle Rechtsinstitute zu einem System verbunden bestehen, und daß sie nur in dem großen Zusammenhang dieses Systems, in welchem wieder dieselbe organische Natur erscheint, vollständig begriffen werden können*." Under the organic nature Savigny meant the connection between the different elements of a legal institute and the development of this legal institute. (F. C. v. Savigny. System des heutigen Römischen Rechts. 1. Vol. Berlin 1840, p. 9: "*Denn auch die Rechtsregel, so wie deren Ausprägung im Gesetz, hat ihre tiefere Grundlage in der Anschauung des **Rechtsinstituts**, und auch dessen organische Natur zeigt sich sowohl in dem lebendigen Zusammenhang der Bestandtheile, als in seiner fortschreitenden Entwicklung*" (emphasis in original).

[97] W. Sauer. Juristische Methodenlehre. Stuttgart: Ferdinand Enke, 1940, p. 171: "*Nur das System verbürgt Erkenntnis, verbürgt Kultur. Nur im System ist möglich wahres Wissen, wahres Wirken*."

[98] H. J. Wolff. Typen im Recht und in der Rechtswissenschaft. – Studium Generale 1952, p. 205: "*Rechtswissenschaft ist systematisch oder sie ist nicht*."

[99] E. Ehrlich. Grundlegung der Soziologie des Rechts. München, Leipzig: Duncker & Humblot, 1913, p. 1 ff., 198.

Eugenio Bulygin, the "systematization is one of the legal scientist's fundamental tasks"[100] – the denier of systematicity of legal science shall not be discussed here.

These quotes illustrate that legal science is something systematical in its very essence. The idea of systematicity of law forms the basis of the systematic interpretation which is central in legal argumentation.[101] The functioning of the systematic interpretation and its central role again constitute an argument pro systematicity of law. Another argument for the systematicity of law is the tendency of legal science to filter out general principles of law[102] which constitute overarching principles of the legal system. Finally, law is a system also because of the imperatives in positive law. In Estonian Constitution the systematicity requirement follows mainly from the general legal reservation (§ 3(1)1 of the Estonian Constitution), establishing the system in hierarchical or vertical dimension, from the general right to equal treatment (§ 12(1) of the Estonian Constitution), establishing the system in horizontal or comparative dimension, and the principle of legal certainty (§ 10 of the Estonian Constitution), establishing the system in temporal dimension. For constitutional rights, the requirement of systematicity follows from the general limiting clause (§ 11 of the Estonian Constitution), too, drawing the system of the formal and substantive limits of the rights.

### 1. Participant's, not observer's perspective

It makes a difference from what perspective we seek to determine a set of norms as a system. From the observer's perspective, the system relates only to results of concrete cases: The legal system would be a structured set of the post-conflict solutions.[103] Thus, the system would concern only the individual norms that have come to existence as conflict solutions. The observer does not participate in the scientific debate.

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[100] C. E. Alchourrón, E. Bulygin. Normative Systems. Wien, New York: Springer, 1971, p. 53.

[101] Cf. to the systematic interpretation R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 8 ff.; *id*. Juristische Interpretation. – R. Alexy. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 84, 86 f.; *id*. R. Dreier. Statutory Interpretation in the Federal Republic of Germany. – N. MacCormick, R. S. Summers (eds.). Interpreting Statutes. Aldershot *et al*.: Dartmouth, 1991, p. 88; J. Wróblewski. Statutory Interpretation in Poland. – N. MacCormick, R. S. Summers (eds.). Interpreting Statutes. Aldershot *et al*.: Dartmouth, 1991, p. 269 ff.

[102] Cf. C.-W. Canaris. Systemdenken und Systembegriff in der Jurisprudenz. 2. ed. Berlin: Duncker & Humblot, 1983, p. 14.

[103] O. Ballweg. Rechtswissenschaft und Jurisprudenz. Basel: Helbing & Lichtenhahn, 1970, p. 100 ff. Cf. N. Luhmann. Rechtssystem und Rechtsdogmatik. Stuttgart *et al*.: Kohlhammer, 1974, p. 24.

In contrast to that, from the participant's perspective, the system includes universal and/or more abstract norms too: The system is a linked, i.e. structured set of norms that determine how to decide or behave.[104] The participant's perspective includes all legal norms, i.e. the universal and/or more abstract norms as well as the individual and/or more concrete norms.

The perspective of this thesis is the participant's perspective because the author seeks to offer interpretations to valid constitutional norms and to participate in the debate of constitutional interpretation.

## 2. Systasis, not systatic

From the participant's perspective, a system can be approached in two different ways. Firstly, one can maintain that a set of norms constitutes a system only when it is totally consistent. For example according to Hans Kelsen, only consistent sets of norms can be regarded as systems.[105]

On the other hand, it is possible to maintain that seeking for consistency suffices in order to assume the existence of a system. In opposition to Kelsen, for example Carlos E. Alchourrón and Eugenio Bulygin regard as systems sets of norms that seek for consistency.[106] This position goes back to Nicolai Hartmann, according to whom the system "means no given systatic but seeking for it, systasis".[107] Thus, according to this view, the system is not the starting point of an inquiry but its end. Contradictions are possible in a system of norms, but they shall be eliminated with the help of the system.

In this thesis, the system as systasis is assumed because probably every human made set of norms contains at least some contradictions. If we required the systatic, we would have to deny the system already when the first contradiction occurs.

Since consistency is a rational ideal, an inconsistent set of norms would be irrational.[108] I shall argue that law being a system means necessarily raising a

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[104] Cf. J.-R. Sieckmann. Recht als normatives System. Baden-Baden: Nomos, 2009, p. 120.

[105] H. Kelsen. The Pure Theory of Law. 2. ed. Berkeley, Los Angeles, London: University of California Press, 1970, p. 205 ff., 276, 328 f.; H. Kelsen. General Theory of Law and State. New York: Russell & Russell, 1945, p. 374 f. According to Joseph Raz, Kelsen later retracted his claim that valid norms are necessarily consistent (J. Raz. Kelsen's Theory of the Basic Norm. – The American Journal of Jurisprudence 19 (1974), p. 106 fn. 29).

[106] C. E. Alchourrón, E. Bulygin. Normative Systems. Wien, New York: Springer, 1971, p. 53 ff.

[107] N. Hartmann. Systematische Methode. – Logos. Internationale Zeitschrift für Philosophie der Kultur 3/2 (1912), p. 122: "*System bedeutet keine gegebene Systatik, sondern das Suchen nach ihr, die Systasis*." Cf. C. Strub. System; Systematik; systematisch. System II. – J. Ritter, K. Gründer, G. Gabriel (eds.). Historisches Wörterbuch der Philosophie. Vol. 10. Basel: Schwabe, 1998, col. 849.

[108] C. E. Alchourrón, E. Bulygin. Normative Systems. Wien, New York: Springer, 1971, p. 63.

claim to consistency.[109] Otherwise the contradicting rules would lead to partly absurd results, the conclusions of courts would be merely unpredictable and would form a sort of a chain novel.[110] However, it is the fundamental task of legal scientists and of courts to eliminate the contradictions and to make the set of norms in question more rational.[111] Thus, the claim to consistency follows from the claim to correctness raised by law in general.[112]

### 3. Principles and rules

A system as a unified whole can be formed by different interacting or interrelated entities. Legal systems, including constitutions, consist in the first place of norms. A norm is the meaning of a normative statement.[113] Norms are either rules or principles.[114] Rules are norms which are always either fulfilled or not whereas principles are norms which require that something be realised to the greatest extent possible given the legal and factual possibilities.[115]

The constitution as a system contains both types of norms: principles and rules.[116] Since most constitutional level normative statements are highly abstract and vague and contain norms that have a dimension of weight or importance[117],

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[109] Cf. to the concept of raising a claim R. Alexy. Law and Correctness. – M. D. A. Freeman (ed.). Legal Theory at the End of the Millennium. Oxford: Oxford University Press, 1998, p. 206 ff.; *id*. My Philosophy of Law: The Institutionalisation of Reason. – L. J. Wintgens (ed.). The Law in Philosophical Perspectives. Dordrecht *et al*.: Kluwer, 1999, p. 24.

[110] R. Dworkin. Law's Empire. Cambridge Mass., London: Harvard University Press, 1986, p. 228 ff.

[111] Cf. C. E. Alchourrón, E. Bulygin. Normative Systems. Wien, New York: Springer, 1971, p. 53.

[112] Cf. to the claim to correctness in general R. Alexy. Law and Correctness. – M. D. A. Freeman (ed.). Legal Theory at the End of the Millennium. Oxford: Oxford University Press, 1998, p. 205 ff. Cf. to the principle of correctness of content *id*. Legal Certainty and Correctness. – Ratio Juris 28 (2015), p. 442 f. Cf. to the necessity of the claim to correctness *id*. On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique. – Ratio Juris 13 (2000), p. 139 ff.; *id*. Law and Correctness. – M. D. A. Freeman (ed.). Legal Theory at the End of the Millennium. Oxford: Oxford University Press, 1998, p. 209 ff. The claim to correctness is for the claim to consistency an sufficient, not a necessary condition.

[113] See above.

[114] R. Alexy. A Theory of Constitutional Rights. Oxford, New York: Oxford University Press, 2002, p. 48.

[115] *Ibid*., p. 47 f. Cf. the first chapter of the present thesis.

[116] Cf. to the reasons why a legal system contains not only rules but also principles R. Alexy. Rechtssystem und praktische Vernunft. – R. Alexy. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 219 ff.; *id*. The Argument from Injustice. Oxford: Clarendon Press, 2002, p. 71 ff.

[117] Cf. R. Dworkin. Taking Rights Seriously. Cambridge, Mass.: Oxford University Press, 1977, p. 26.

they are more likely sources of principles. E.g. § 19(1) of the Estonian Constitution states: "Everyone has the right to free self-realisation." This is a classic wording of a normative statement that is a source for a principle-norm. But constitutions contain rules, too, as does the Estonian Constitution. E.g. § 60(1)1 of the Estonian Constitution states: "The *Riigikogu* comprises of one hundred and one members." This normative statement contains clearly a rule because there can either be exactly one hundred and one members or not.

## 4. Coherence

A system does not need to be wholly consistent but it needs to raise a claim to consistency as we have seen above. Coherence goes further, being however an extremely disputable topic.[118] It expresses the idea that the whole is more than the sum of its parts.

According to Robert Alexy, the concept of coherence has a principle's like structure: "The better the structure of a reasoning of a class of statements is, the more coherent this class of statements is."[119] According to this, a class of statements can be more or less coherent. The coherence is a matter of degree and the quality of the structure of reasoning depends on the grade of fulfilment of the criteria of coherence.[120] Furthermore, since the criteria of coherence may conflict, the coherence is also a matter of balancing.[121] It is possible that, as a result of balancing, one of the conflicting criteria has to withdraw. A detailed presentation and analysis of the criteria of coherence would be beyond the scope of this thesis.[122] Instead, we shall restrict us to the three main elements of coherence – consistency, connection and comprehensiveness – named by Robert Alexy in a

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[118] Cf. instead of many S. Bracker. Kohärenz und juristische Interpretation. Baden-Baden: Nomos, 2000, p. 16 ff.

[119] R. Alexy. Juristische Begründung, System und Kohärenz. – O. Behrens, M. Dießelhorst, R. Dreier (eds.). Rechtsdogmatik und praktische Vernunft. Göttingen: Vandenhoeck & Ruprecht, 1990, p. 97: "*Je besser die Begründungsstruktur einer Klasse von Aussagen ist, desto kohärenter ist diese Klasse von Aussagen*."

[120] *Ibid*.; R. Alexy, A. Peczenik. The Concept of Coherence and Its Significance for Discursive Rationality. – Ratio Juris 3 (1990), p. 145.

[121] R. Alexy. Juristische Begründung, System und Kohärenz. – O. Behrens, M. Dießelhorst, R. Dreier (eds.). Rechtsdogmatik und praktische Vernunft. Göttingen: Vandenhoeck & Ruprecht, 1990, p. 97; *id*., A. Peczenik. The Concept of Coherence and Its Significance for Discursive Rationality. – Ratio Juris 3 (1990), p. 131, 145.

[122] Cf. to the criteria of coherence: R. Alexy. Juristische Begründung, System und Kohärenz. – O. Behrens, M. Dießelhorst, R. Dreier (eds.). Rechtsdogmatik und praktische Vernunft. Göttingen: Vandenhoeck & Ruprecht, 1990, p. 97 ff.; *id*., A. Peczenik. The Concept of Coherence and Its Significance for Discursive Rationality. – Ratio Juris 3 (1990), p. 132 ff.; S. Bracker. Kohärenz und juristische Interpretation. Baden-Baden: Nomos, 2000, p. 170 ff.

later article.[123] Furthermore, Neil MacCormick interconnects the concept of coherence with principles.[124] Alexander Somek speaks of coherence in the context of the system of values, puts forth the incapability of rules to indicate which of several applicable rules ought to be applied in a particular case at hand, and stresses the need to provide equality of application as the main purpose of the coherence.[125] According to Claus-Wilhelm Canaris, the task of the concept of system is to present and to implement the evaluation-related congruousness and inner unity of a legal order.[126] These ideas altogether bring us to the interconnection between the coherence and the principles.

Indeed, it seems that the coherence has a similar function for the system of principles as the consistency for a system of rules. Rules may conflict in the strict sense, i.e. in the way that the conflict can only be solved by invalidating one of the rules. Therefore, elimination of contradictions is what establishes the system. Principles cannot conflict in the strict sense but only collide or compete. A collision of principles will be solved by weighing the principles against each other while both principles remain valid. A system will be established by creating a sound balance between the principles. The German Federal Constitutional Court has since its early days spoken of the "unity of the constitution"[127] expressing the idea of coherence of principles within the constitution. According to that, the coherence equals to the claim that all principles of a system have to be in a sound balance to each other. This shall suffice for the purposes of the present paper.

Consequently, the task of legal science that deals with legal system is, besides avoiding contradictions, also to offer harmonious solutions to legal issues concerning the system of principles. Contradicting rules lead to an inconsistency while incoherence occurs where a connection between principles is disregarded or weighing is based on incomprehensive set of arguments. According to Robert Alexy, justice requires the embedment of the legal reasoning into a possibly coherent system.[128] In case of a constitution, human rights (externally) and fundamental constitutional principles (internally) require the embedment of the

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[123] R. Alexy. Coherence and Argumentation or the Genuine Twin Criterialess Super Criterion. – A. Aarnio, R. Alexy, A. Peczenik, W. Rabinowicz, J. Wolenski (eds.). On Coherence Theory of Law. Lund: Juristförl., 1998, p. 41 f. Cf. S. Bracker. Kohärenz und juristische Interpretation. Baden-Baden: Nomos, 2000, p. 170.

[124] N. MacCormick. Legal Reasoning and Legal Theory. Oxford: Clarendon Press, 1978, p. 107. Cf. R. Alexy. My Philosophy of Law: The Institutionalisation of Reason. – L. J. Wintgens (ed.). The Law in Philosophical Perspectives. Dordrecht *et al*.: Kluwer, 1999, p. 40.

[125] A. Somek. The Cosmopolitan Constitution. Oxford, New York: Oxford University Press, 2014, p. 108, 114 f.

[126] C.-W. Canaris. Systemdenken und Systembegriff in der Jurisprudenz. 2. ed. Berlin: Duncker & Humblot, 1983, p. 18.

[127] Since BVerfG 23.10.1951, 2 BvG 1/51, para. 76 (BVerfGE 1, 14 (32)). Cf. BVerfG 10.12.1980, 2 BvF 3/77, para. 73 (BVerfGE 55, 274 (300)).

[128] R. Alexy. Juristische Begründung, System und Kohärenz. – O. Behrens, M. Dießelhorst, R. Dreier (eds.). Rechtsdogmatik und praktische Vernunft. Göttingen: Vandenhoeck & Ruprecht, 1990, p. 106.

constitutional reasoning into a possibly coherent system.[129] Since the constitutional set of norms includes rules and principles, raising a claim to consistency will not suffice in order to establish a system. A purely consistency-oriented system that also involves principles would be faulty because it would ignore the mutual relations between the elements of the system and because of the incomprehensiveness. Therefore, a system – in order to be a system – necessarily raises a claim to coherence, too.[130]

## 5. Procedural dimension

"As a system of *norms*, the legal system is a system of results or products of norm-creating procedures, whatever the origin or character of these procedures."[131] If we considered the system consisting only of principles and rules, we would put ourselves into the observer's perspective. Thus, constitutional principles and rules are necessary but not sufficient conditions of the constitutional system. They cannot form a system by themselves.[132] According to Robert Alexy, the principles and rules belong to the passive dimension of the legal system because they do not regulate their application.[133] The participant's perspective requires additionally a *modus operandi*. In order to complete the system, we need to add the active, i.e. the procedural dimension which includes the institutionalised legal application as well as the not institutionalised process

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[129] This will be more closely dealt in fourth Chapter using the example of the principle of equality.

[130] Cf. to the idea of coherence already by F. C. v. Savigny. System des heutigen Römischen Rechts. Vol. 1. Berlin 1840, p. XXXVI: "*Ich setze das Wesen der systematischen Methode in die Erkenntnis und Darstellung des inneren Zusammenhangs […], wodurch die einzelnen Rechtsbegriffe und Rechtsregeln zu einer großen Einheit verbunden werden*." Cf. p. 214, 262 ff. More recently Ronald Dworkin has put the integrity which is considered to be methodologically identical with the coherence (R. Alexy. My Philosophy of Law: The Institutionalisation of Reason. – L. J. Wintgens (ed.). The Law in Philosophical Perspectives. Dordrecht *et al*.: Kluwer, 1999, p. 40 fn. 57) into the centre of his theory, R. Dworkin. Law's Empire. Cambridge (Mass.): Harvard University Press, 1986, p. 245: "Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole." In contrast to the theories of von Savigny and Dworkin, according to the point of view presented here the coherence is a necessary but not a sufficient condition of the systematicity.

[131] R. Alexy. The Argument from Injustice. Oxford: Clarendon Press, 2002, p. 24 (emphasis in original).

[132] R. Alexy. My Philosophy of Law: The Institutionalisation of Reason. – L. J. Wintgens (ed.). The Law in Philosophical Perspectives. Dordrecht *et al*.: Kluwer, 1999, p. 40.

[133] R. Alexy. Rechtssystem und praktische Vernunft. – R. Alexy. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 228.

of thought and argumentation.[134] "As a system of *procedures*, the legal system is a system of processes or actions based on and governed by rules, actions by means of which norms are issued, justified, interpreted, applied, and enforced."[135]

The procedural dimension of the legal system faces two main challenges. Firstly, a legal methodology is required in order to organise the process of application.[136] This means that particularly the modi of application of principles and rules have to be developed.[137] Since a constitution as a system is to a large extent determined by principles which tend to collide or compete with each other in concrete cases, particularly an adequate method of solving the principles collisions is necessary. For this reason, we need an adequate theory of proportionality.[138]

Secondly, since the solution of every more complicated legal case presupposes evaluations that cannot be deduced from authoritatively given material the rationality of the procedure of legal application depends considerably on whether and to what degree these additional evaluations are accessible to a rational control.[139] This again depends on whether and to what extent the practical moral statements are justifiable.[140] A substantive moral theory that would be able to give every moral question an intersubjectively compelling answer is impossible.[141] Instead, it appears to be possible to develop a procedural moral theory that would formulate rules or conditions for a rational moral discourse.[142] According to Alexy, a particularly promising version for such procedural moral theory is the theory of rational practical discourse[143] that has been founded by Alexy

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[134] *Ibid*.; R. Alexy. Diskurstheorie und Rechtssystem. – Synthesis philosophica 5 (1988), p. 307 ff.

[135] R. Alexy. The Argument from Injustice. Oxford: Clarendon Press, 2002, p. 24 (emphasis in original).

[136] R. Alexy. Rechtssystem und praktische Vernunft. – R. Alexy. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 229.

[137] Cf. R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 7 ff.; M. Ernits. Põhiõigused, demokraatia, õigusriik. Tartu: Tartu Ülikooli Kirjastus, 2011, p. 86 ff.

[138] R. Alexy. Kollisioon ja kaalumine kui põhiõiguste dogmaatika põhiprobleemid. – Juridica 2001/1, p. 5 ff.; *id*. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 66 ff. Cf. the first chapter of the present thesis.

[139] R. Alexy. Rechtssystem und praktische Vernunft. – R. Alexy. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 229.

[140] R. Alexy. Oikeusjärjestelmä, oikeusperiaate ja käytännöllinen järki. – Lakimies 87 (1989), p. 631.

[141] *Ibid*.; R. Alexy. Rechtssystem und praktische Vernunft. – R. Alexy. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 230.

[142] R. Alexy. Oikeusjärjestelmä, oikeusperiaate ja käytännöllinen järki. – Lakimies 87 (1989), p. 631.

[143] R. Alexy. Rechtssystem und praktische Vernunft. – R. Alexy. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 229.

himself together with Aulis Aarnio and Aleksander Peczenik[144] and by Jürgen Habermas[145].

Thus, the procedural dimension of the system consists of both, the institutionalised legal application as well as the not institutionalised process of thought and argumentation. In case of constitution, the institutionalisation consists in constitutional review. Theoretically even more important is the not institutionalised process. In general, the legal discourse is concerned with the question "what is correct within the scope of a specific legal system."[146] The minimum of systematicity will be established hereby by raising the claims to consistency and to coherence in the process of application.

## 6. Overarching idea or common principles

According to Kant, a system is determined by either an overarching idea[147] or common principles[148]. The overarching idea of a legal system is disputable in legal theory. For example according to Jan-Reinard Sieckmann, a legal system is determined by four formal criteria: institutionalisation, objectivity (i.e. claim to bindingness), authoritative character and claim to legitimacy.[149] This would also

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[144] A. Aarnio, R. Alexy, A. Peczenik. The foundation of legal reasoning. – Rechtstheorie 12 (1981), p. 133 ff., 257 ff., 423 ff.; A. Peczenik. Grundlagen der juristischen Argumentation. Wien, New York: Springer, 1983, p. 167 ff.; A. Aarnio. The Rational as Reasonable. Dordrecht *et al*.: Reidel, 1987, p. 185 ff.; *id*. Õiguse tõlgendamise teooria. Tallinn: Juura, 1996; R. Alexy. A Theory of Legal Argumentation. Oxford: Clarendon Press, 1989, p. 177 ff.; *id*. Diskurstheorie und Rechtssystem. – Synthesis philosophica 5 (1988), p. 299 ff.; *id*. Probems in Discursive Rationality in Law. – W. Maihofer, G. Sprenger (eds.). Law and the States in Modern Times. Stuttgart: Franz Steiner, 1990, p. 174 ff.; *id*. Idee und Struktur eines vernünftigen Rechtssystems. – R. Alexy, R. Dreier, U. Neumann (eds.). Rechts- und Sozialphilosophie in Deutschland heute. Stuttgart: Franz Steiner, 1991, p. 30 ff.; *id*. A Discourse-Theoretical Conception of Practical Reason. – Ratio Juris 5 (1992), p. 232 ff.; *id*. Legal Argumentation as Rational Discourse. – Rivista internazionale di filosofia del diritto 70 (1993), p. 165 ff., 171 ff.; *id*. Law and Correctness. – M. D. A. Freeman (ed.). Legal Theory at the End of the Millennium. Oxford: Oxford University Press, 1998, p. 205 ff.; *id*. The Special Case Thesis. – Ratio Juris 12 (1999), p. 374 ff.; *id*. My Philosophy of Law: The Institutionalisation of Reason. – L. J. Wintgens (ed.). The Law in Philosophical Perspectives. Dordrecht *et al*.: Kluwer, 1999, p. 23 ff. Cf. C. Bäcker. Begründen und Entscheiden. 2. ed. Baden-Baden: Nomos, 2012, p. 30 ff., 175 ff., 207 ff., 287 ff.

[145] J. Habermas. Diskursethik – Notizen zu einem Begründungsprogramm. – J. Habermas. Moralbewusstsein und kommunikatives Handeln. Frankfurt a.M.: Suhrkamp, 1983, p. 53 ff.

[146] R. Alexy. My Philosophy of Law: The Institutionalisation of Reason. – L. J. Wintgens (ed.). The Law in Philosophical Perspectives. Dordrecht *et al*.: Kluwer, 1999, p. 41.

[147] I. Kant. Critique of Pure Reason. Cambridge: Cambridge University Press, 1998, p. 691 (A 832/B 860).

[148] I. Kant. Metaphysical Foundations of Natural Science. Cambridge: Cambridge University Press, 2004, p. 3 (467).

[149] J.-R. Sieckmann. Recht als normatives System. Baden-Baden: Nomos, 2009, p. 120 ff., 127.

apply to a part of a legal system or a subsystem, i.e. to a constitution. On the other hand, it is also possible to determine a legal system with the help of substantive ideas. The substantive overarching idea of a constitution, which constitutes the top of a legal system, may be either formed by human rights which determine the substantive concept of constitution (external idea) or by fundamental principles of the constitution which determine the unchangeable core of it (internal idea).

Firstly, a legal system is a system and its constitution constitutes the top part of it. Secondly, there are formal criteria as well as substantive ideas that are candidates for the overarching idea. In a comprehensive theory of a legal system, both formal as well as substantive ideas have to be followed. For the present thesis it suffices to state that for a constitution being a comprehensive system there are formal and substantive common principles to be followed.

### 7. Result – the concept of system

We approach the legal system from the participant's perspective. As a system of rules, a legal system necessarily raises the claim to consistency. As a system of principles that may contain rules, too, a legal system necessarily raises a claim to coherence. The system of procedures determines particularly the modi of application of principles and rules. Thus, a legal system exists where all three elements – legal principles, rules and procedures – exist and the claims to consistency and to coherence are being raised.

## IV. The constitution as a system

Constitution being a legal system is a system in the Kantian sense. A constitution is a system of norms and procedures, especially of principles that compete and require an adequate theory of proportionality. Inherent to the constitutional system are the claims to consistency and to coherence. The latter presupposes, apart from the consistency, also connection between norms and comprehensiveness of argumentation.

The systematicity is highly relevant for practical application of the constitution. Three most typical examples should be named in this context. Firstly, the limits of unconditionally granted constitutional rights are a consequence of that idea. The Estonian Supreme Court has repeatedly stressed that a constitutional right with no legal reservation "may be interfered with in order to protect other fundamental rights or values provided in the Constitution".[150] As a result, the principle of proportionality applies in order to determine whether the interference is constitutional or not. Weighing being the central method of application of

[150] SCebj 03.07.2012, 3-3-1-44-11, para. 72; cf. SCebj 17.03.2003, 3-1-3-10-02, para. 28; 19.04.2005, 3-4-1-1-05, para. 24; 02.06.2008, 3-4-1-19-07, para. 23; SCebr 28.04.2004, 3-3-1-69-03, para. 28; CRCSCj 05.03.2001, 3-4-1-2-01.

proportionality is an important means in order to reach the unity of the constitution and therefore a particularly important systematic argument.[151] Secondly, also in case of a collision of other constitutional principles than constitutional rights the idea of the systematicity of the constitution has to be taken into account. Such a collision may occur between basic principles of state structure like democracy or rule of law and/or constitutional principles called 'state objectives' like environmental protection (§ 5 in conjunction with § 53 of the Estonian Constitution).[152] As a consequence of the systematicity of the constitution, such collisions will be solved by means of the principle of proportionality as well.[153] Thirdly, the systematicity of the constitution is also relevant for the application of the principle of equality. The Supreme Court has recently reiterated the idea of coherence in context of the principle of equality: "the Legislature is indeed free to decide which social guarantees to create, but once it has created a system, the persons entitled to the benefits must not be treated unequally without reason."[154] As a consequence, the constitutional system has to be taken into account not only in infringement cases but also in cases where the state takes positive measures and treats beneficiaries differently.

We may distinguish between the real and the ideal system. The real system is the product of the really existing doctrine of the constitutional law which continuously becomes more complete. The ideal system is the product of the ideal constitutional law doctrine, i.e. of the doctrine that is performed by infinite number of constitutional scholars who have infinite resources of time, cases and intellect. In the ideal system, all contradictions between rules are eliminated and its principles are perfectly balanced out. The real system never reaches the ideal system. However, the ideal system constitutes the regulative idea towards which we must continue to move uninterruptedly. Every new critical approach might bring out a new valuable connection and make another step toward the comprehensiveness of argumentation.

In the legal practice no constitutional court should stop seeking for the systematicity of the constitutional law, because doing so we may become problems not only with unsound relations between principles but even with avoiding the contradictions between rules. In the end the constitutional system may cease to exist entirely. If the legislator does not fulfil its positive obligations and the enforced set of norms contains significant caps and does not serve its inherent purpose, i.e. is ineffective, the legal regulation is, from systematic point of view, unconstitutional. Tolerating this, the constitutional court violates the

[151] R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 9.

[152] Cf. to the terminology R. Herzog. Staatszielbestimmungen. – R. Pitschas, A. Uhle (eds.). Wege gelebter Verfassung in Recht und Politik. Berlin: Duncker & Humblot, 2007, p. 219 ff.; K.-P. Sommermann. Staatsziele und Staatszielbestimmungen. Tübingen: Mohr Siebeck, 1997, p. 199 ff., 223 ff., 359 ff., 411 ff. Cf. J.-R. Sieckmann. Regelmodelle und Prinzipienmodelle des Rechtssystems. Baden-Baden: Nomos, 1990, p. 141.

[153] SCebj 12.07.2012, 3-4-1-6-12, paras. 170 f.; 16.03.2010, 3-4-1-8-09, para. 64.

[154] SCebj 26.06.2014, 3-4-1-1-14, para. 118. Cf. the fourth chapter of the present thesis.

constitution itself by ignoring the claim to coherence. If a legal scientist does not stand up against such a tendency, with the disappearance of the constitutional system, the constitutional legal science would disappear, too. In this case we would have a constitutional rhapsody in Kantian sense instead of a constitutional system.[155] In the contemporary language, we may also simply call it a constitutional rap.

## V. Research task, statements presented for the doctoral defence and methodology

According to the Procedure for awarding doctorates,[156] the thesis must contain inter alia the formulation of the research task, the statements presented for defence and a description of methodology.

### 1. Research task

The aim of the following chapters is to confirm the idea that the constitution is a system and to demonstrate the advantages of the systematic approach. The author considers that every new critical approach might bring a new valuable connection of the constitutional system to light and help to broaden the scope of available arguments. In the first chapter the author will defend central theoretical foundations of the systematicity of the constitution. In the following chapters the author will demonstrate that the idea of the constitution being a system enables us to achieve consistent and coherent doctrine of constitutional law and therefore better solutions for practical constitutional cases.

The first chapter[157] defends the principles theory. Principles theory is the theory of different logical structures of norms as principles and rules and their various application doctrines, especially in relation to balancing colliding or competing principles. Estonian Supreme Court started to apply the principles theory and to balance colliding constitutional principles in 1997.[158] The starting point and basis for this case law was the first systematic monograph concerning fundamental rights in the Estonian Constitution from Robert Alexy published in 2001,[159] however, its text was available to the Supreme Court already in 1997.

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[155] I. Kant. Critique of Pure Reason. Cambridge: Cambridge University Press, 1998, p. 282 (A 156), 691 (A 832/B 860).

[156] Adopted by the Senate of the University of Tartu Regulation no. 23 of 20.12.2013, amended by the Senate of the University of Tartu Regulation no. 12 of 29.05.2015 (no. 14.2–14.4).

[157] M. Ernits. A response to Estonian critics of principles theory. – M. La Torre, L. Niglia, M. Susi (eds.). The Quest for Rights. Cheltenham: Edward Elgar, 2019, p. 88−108.

[158] CRCSCj 06.10.1997, 3-4-1-3-97, para. I.

[159] R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 5–96.

The first chapter discusses six main arguments presented by Estonian critics against continued application of the principles theory by the Supreme Court, and especially against the balancing. According to the critics, (1) the constitution exists only as a plain framework and not as a foundation, what is more, viewing the constitution as a system of values leads to over-constitutionalisation. (2) The distinction between rules and principles is inadequate, (3) application of the principles theory leads to a disentanglement from the constitution, and (4) the principle of proportionality leads to suspension of the constitution. (5) The principle of proportionality is a purely formal guideline, therefore, the demand to balance competing principles equals to the demand of simply deciding. (6) Finally, they argue, as there is no universal 'theory of blue items', there shall be no universal theory of fundamental rights. Most of these arguments also occur in international debate about the principles theory. The purpose of the first chapter is to reply to the critics, to link the arguments to the international debate and to defend the principles theory.

The second chapter[160] analyses the use of international and foreign law as comparative arguments in the case law of the Supreme Court of Estonia. This chapter analysis the comparative dimension of the constitutional system. The aim of the chapter is to find out how open the Estonian constitutional system is towards other legal systems that are based on democratic constitutionalism. We will see that the general principles of legal doctrine, especially the principle of proportionality have similarities with many other developed European legal systems, e.g. to Germany. The links to other legal systems, especially links to the Constitutions of other European states, witness the openness of the system and the comparison is immanent to Estonian constitutional doctrine.

In the focus of the third chapter[161] is one of the most important early judgements of the Supreme Court from 1994.[162] The chapter analysis the relevance of this judgement for the Estonian constitutional system. It traces how the Supreme Court developed the principle of parliamentary prerogative and the general constitutional right to organisation and procedure, and how the court established its competence to lay positive obligations on the legislator.

Finally, the fourth chapter[163] will work out the principle of equality in Estonian Constitution from the systematic perspective and demonstrates how the principle of equality has emerged and evolved in relation to Estonian constitutional law. The aspects taken under scrutiny are questions whether the principle of equality is an enforceable subjective right which is binding for the legislature, whether the

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[160] M. Ernits. Use of Foreign Law by Estonian Supreme Court. – G. F. Ferrari (ed.). Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems. Leiden: Brill, 2019, p. 501−527.

[161] M. Ernits. An Early Decision with Far-reaching Consequences. – Juridica International 12 (2007), p. 23−35.

[162] CRCSCj 12.01.1994, III-4/1-1/94.

[163] M. Ernits. The Principle of Equality in the Estonian Constitution. – European Constitutional Law Review 10 (2014), p. 444−480.

equality requires legal or factual equality, whether it requires unequal treatment of non-equals, what kind of statutory reservation it has, whether the incomparability is a suitable criterion for determining the scope of the right to equality, how to form comparison groups, are there any special equality rights, should we distinguish original from the ancillary equality application, are there different intensities of judicial review while applying the equality principle, and finally, the question of coherence. According to the argument advanced here, the principle of equality is a requirement for the equal implementation of (constitutional) law.

## 2. Statements presented for defence

### *2.1. Chapter 1*

Firstly, the constitution is neither a plain framework nor does viewing the constitution as a system of values lead to over-constitutionalisation.

Secondly, the distinction between rules and principles is adequate.

Thirdly, the application of the principles theory does not lead to a dis-entanglement from the constitution.

Fourth, the principle of proportionality does not suspend the constitution.

Fifth, the principle of proportionality is not a purely formal guideline and the demand to balance competing principles does not equal the demand of simply deciding.

Sixth, a universal theory of fundamental rights is possible.

### *2.2. Chapter 2*

Comparative arguments have played a significant role in the development of Estonian constitutional review, mainly as a catalyst to help to boost the Estonian constitutional law doctrine to a contemporary one.

### *2.3. Chapter 3*

Firstly, Estonian Constitution contains the principle of parliamentary prerogative according to which the legislator is obliged to regulate important matters by itself and cannot delegate them to the executive.

Secondly, the general constitutional right to organisation and procedure has played an important role in the development of the rule of law.

Thirdly, next to the infringements caused by the legislator also legislative omissions may be subject to the constitutional review.

### *2.4. Chapter 4*

Firstly, the principle of equality is fully enforceable and may be used as a constitutional right by a rights-holder and at the same time being binding for the legislature, too.

Secondly, it is not recommendable to deduce the factual equality from the principle of equality but rather from the social state principle.

Thirdly, the requirement to treat non-equals unequally is better not interpreted as a normative requirement deriving from the principle of equality.

Fourth, the principle of equality shall be interpreted as the requirement to treat legally equals equally.

Fifth, the correct legal reservation for the principle of equality is the simple legal reservation.

Sixth, the comparison pairs or groups must always consist of persons, but not of situations.

Seventh, relevant is the concrete unequal treatment which is most likely questionable.

Eighth, the principle of equality can be applied originally or ancillarily.

Ninth, the coherence is an important requirement of the principle of equality.

## 3. Description of methodology

The method of the present thesis is based on legal methodology, mainly on the theory of interpretation[164] and argumentation[165] of Robert Alexy. The unifying idea of all parts is the idea of the constitution of a democratic constitutionalism.

# VI. Concluding remarks

Constitution being a system means that it includes principles, rules, and procedures and raises necessarily claims to consistency and coherence. If the situation in real life does not entirely correspond to that ideal, the real situation is criticisable.

As we have seen in the first chapter, Robert Alexy's distinction between principles and rules provides a working basic model for the Estonian constitutional review. Based on the principles theory, the substantive core of constitutionality is, in most cases, the principle of proportionality and the central method for solving constitutional cases is balancing. The Estonian critics have not been able to raise an issue that would give cause to be sceptical regarding the correctness of this practice in general. The six main arguments presented by them proved to be unconvincing. Firstly, the constitution is neither a plain framework nor does it

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[164] R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 7 ff. Cf. M. Ernits. Põhiõigused, demokraatia, õigusriik. Tartu: Tartu Ülikooli Kirjastus, 2011, p. 86 ff.

[165] R. Alexy. A Theory of Legal Argumentation. Oxford: Clarendon Press, 1989, p. 211 ff.

lead to viewing the constitution as a system of values to over-constitutionalisation. The constitution constitutes a framework as well as a foundation. Secondly, the distinction between rules and principles is adequate. The determination of the structure of the Ought (*Sollen*) is a part of the interpretation process. Thirdly, the application of the principles theory does not lead to a disentanglement from the constitution. Normative statements of the constitution still remain relevant. Fourth, the principle of proportionality does not suspend the constitution. Fifth, the principle of proportionality is not a purely formal guideline and the demand to balance competing principles does not equal the demand of simply deciding. And finally, there is a universal theory of fundamental rights. A good example of such a theory is Robert Alexy's principles theory that provides the constitutional court with a structure that makes the reasoning more rational.

In the second chapter the use of comparative arguments by the Supreme Court was in the centre of attention. It appears that the Supreme Court does use the foreign law but mostly does not do so explicitly. Nevertheless, comparative arguments have played a significant role in the development of Estonian constitutional review, mainly as a catalyst to help to boost the Estonian constitutional law doctrine to a contemporary one. The general principles of law doctrine, especially the principle of proportionality, have similarities with many other developed European legal systems, e.g. to Germany. The links to other legal systems, especially links to the Constitutions of other European states, prove the openness of the Estonian system. However, the sceptical statement of the Supreme Court from 2009 towards the German Constitution[166] remains a rather disputable step in other direction. Hopefully the Supreme Court finds a way to clarify it.

The third chapter analysed critically the relevance of a ground-breaking judgement of the Supreme Court from 1994[167] and its subsequent practice. Three important elements of the constitutional system originate from this judgement. Firstly, the principle of parliamentary prerogative was established according to which the legislator is obliged to regulate important matters by itself and cannot delegate them to the executive. Secondly, the Supreme Court established the general constitutional right to organisation and procedure which has – except for some serious issues[168] – played an important role in the development of the rule of law in Estonia. Thirdly, the Supreme Court found already in 1994 that next to the infringements caused by the legislator also legislative omissions may be subject to scrutiny. Thus, Estonian constitution contains also enforceable positive obligations of the legislator.

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[166] CRCSCr 22.12.2009, 3-4-1-16-09, para. 42.

[167] CRCSCj 12.01.1994, III-4/1-1/94.

[168] SCebj 25.10.2004, 3-4-1-10-04; 27.06.2005, 3-4-1-2-05; 27.06.2005, 3-3-1-1-05; CRCSCj 10.12.2004, 3-4-1-24-04.

The object of the fourth chapter is the principle of equality in the Estonian constitution. In contrast to the previous chapters, the last chapter deals with the system of a single constitutional right. It resulted that the principle of equality is fully enforceable and may be used as a constitutional right by a rights-holder and at the same time being binding for the legislature, too. The analysis revealed that it is not recommendable to deduce the factual equality from the principle of equality but rather from the social state principle. It also resulted that the requirement to treat non-equals unequally is better not interpreted as a normative requirement deriving from the principle of equality. The principle of equality shall be interpreted as the requirement to treat legally equals equally. Furthermore, we found out that the correct legal reservation for the principle of equality is the simple legal reservation. We saw that the comparison pairs or groups must always consist of persons, but not of situations, and that relevant is the concrete unequal treatment which is most likely questionable. We also saw that the principle of equality can be applied originally or ancillarily and that the coherence is also an important requirement of it.

The fundamental idea of the thesis is the idea of the constitution as a system. This idea is the methodological basis of all chapters in order to reach better results in interpretation and balancing. The thesis is an attempt to establish more system and the author considers that every new critical approach might bring a new valuable connection of the constitutional system to light and help to broaden the scope of available arguments. In doing so, the ultimate objective of the thesis is to strengthen the democratic constitutionalism. Democratic constitutionalism, i.e. a state where the fundamental principles of human dignity, democracy and rule of law apply, where constitutional rights, separation and balance of powers and functioning constitutional review exist, is the most significant realisation of the ancient principle of *sub lege rex* throughout the history.[169] The democratic constitutionalism is systematically the institutionalisation of human rights[170] and since 1992 empirically also the reality in Estonia.

Throughout the history the tension between the normativity and reality of human rights has varied. Lately this tension has grown again worldwide.[171] In the framework of a single state democratic constitutionalism, it corresponds to the tension between the normativity and reality of the constitution. The task to defend the normative force of the normativity against the popular readiness to obediently recognise the normative force of the facts seems to be never-ending.[172] To stand

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[169] Cf. W. Kägi. Die Verfassung als rechtliche Grundordnung des Staates (1945). Darmstadt: Wissenschaftliche Buchgesellschaft, 1971, p. 42.

[170] R. Alexy. Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat. – S. Gosepath, G. Lohmann (eds.). Philosophie der Menschenrechte. Frankfurt a.M.: Suhrkamp, 1998, p. 246 ff.

[171] Cf. A. Sajó, R. Uitz. The Constitution of Freedom. Oxford: Oxford University Press, 2017, p. 52 ff.

[172] Cf. W. Kägi. Die Verfassung als rechtliche Grundordnung des Staates (1945). Darmstadt: Wissenschaftliche Buchgesellschaft, 1971, p. 2.

up for the normative force of normativity means also to stand up for freedom and democracy. A legal order which does not uphold the principles deriving from human rights tends, sooner or later, to slip toward authoritarianism which in turn abolishes the democratic constitutionalism. Without democratic constitutionalism the life would be unfree, unsecure and poorer. Therefore, the present thesis is also a defence of freedom, democracy and good life.

CHAPTER 1

# A RESPONSE TO ESTONIAN CRITICS OF PRINCIPLES THEORY

# *A Response to Estonian Critics of Principles Theory*[1]

'Principles theory' is an abbreviation. The full name could be the theory of the different logical structures of norms as principles and rules and their various application doctrines, especially in relation to balancing competing principles.

In 1967, Ronald Dworkin introduced the logical distinction between rules and principles.[2] In 1979,[3] and in his major work of 1985, Robert Alexy developed this idea further and presented the even more profoundly elaborated logical distinction of legal norms into two groups.[4] According to Alexy,

> "principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules. By contrast, rules are norms which are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less. In this way rules contain fixed points in the field of the factually and legally possible. This means

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[1] An earlier version of this chapter was published with the title 'Constitutional Review in the Age of Balancing. Estonian Perspective' in: Collection of Research Papers in Conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia 'Constitutional Values in Contemporary Legal Space I. 16–17 November 2016'. Riga: University of Latvia, 2016, p. 127–150. The author is grateful to Ms. Andra Laurand and Ms. Katrin Prükk for valuable help in preparation of the final version.

[2] R. Dworkin. The Model of Rules. – University of Chicago Law Review 35 (1967), p. 25; *id*. Taking Rights Seriously. Cambridge, Mass.: Harvard University Press, 1977, p. 24. Cf. R. Alexy. Zum Begriff des Rechtsprinzips. – W. Krawietz, K. Opalek, A. Peczenik (eds.). Argumentation und Hermeneutik in der Jurisprudenz. Berlin: Duncker & Humblot, 1979, p. 59–87, published again in: *id*. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 177–212; *id*. Rechtsregeln und Rechtsprinzipien. – N. MacCormick, S. Panou, L. Vallauri (eds.). Geltungs- und Erkenntnisbedingungen im modernen Rechtsdenken. Stuttgart: Franz Steiner, 1985, p. 13–29, published again in: R. Alexy, H.-J. Koch, L. Kuhlen, H. Rüßmann (eds.). Elemente einer juristischen Begründungslehre. Baden-Baden: Nomos, 2003, p. 217–233; M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 118 ff.; J.-R. Sieckmann. Regelmodelle und Prinzipienmodelle des Rechtssystems. Baden-Baden: Nomos, 1990, p. 54 ff., 199 ff. About the earlier theoretical attempts, see M. Borowski. *Ibid*., p. 117 f.

[3] R. Alexy. Zum Begriff des Rechtsprinzips. – W. Krawietz, K. Opalek, A. Peczenik (eds.). Argumentation und Hermeneutik in der Jurisprudenz. Berlin: Duncker & Humblot, 1979, p. 59 ff.

[4] R. Alexy. Theorie der Grundrechte. 1. ed. Baden-Baden: Nomos, 1985, p. 71 ff.; *id*. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 44 ff. Cf. furthermore, *id*. Zum Begriff des Rechtsprinzips. – W. Krawietz, K. Opalek, A. Peczenik (eds.). Argumentation und Hermeneutik in der Jurisprudenz. Berlin: Duncker & Humblot, 1979, p. 59 ff.; *id*. On the Structure of Legal Principles. – Ratio Juris 13 (2000), p. 294 ff.; *id*. The Construction of Constitutional Rights. – Law and Ethics of Human Rights 4 (2010), p. 20 ff.

> that the distinction between rules and principles is a qualitative one and not one of degree. Every norm is either a rule or a principle."[5]

Based on his 'principles theory',[6] Alexy presented an influential analysis about the constitutional rights of Estonian Constitution in 1997.[7,8] Therein, Alexy brought forward the idea of the comprehensive legal science of constitutional rights. According to this idea, there are three aspects of why the theory of constitutional rights exceeds the national doctrines: the substantial, the institutional and the systematic. Substantially, all constitutional rights are linked to human rights. The institutional aspect refers, in the first place, to the European Court of Human Rights and to the European Court of Justice, which add the international and supranational institutionalisations to the national institutionalisations. The systematic aspect refers to similar systematic questions in all constitutional reviews, for example, the principle of proportionality.[9] The thesis of the comprehensive legal science of constitutional rights allowed Alexy to focus on the systematic aspects and to lay down the cornerstone for the Estonian doctrine of constitutional rights.

The Estonian Supreme Court (SC) started following the main systematic ideas of Alexy's analysis as early as in 1997 and held that a restriction on the freedom of movement was justifiable, "if it is proportional with the desired goal and it is impossible to achieve the desired goal by other means".[10] In 1998, the SC reformulated the core of the principle of proportionality – "Pursuant to the principle of proportionality, valid in a state based on the rule of law, the measures taken must be proportionate to the objectives to be achieved"[11] – and delivered the following authoritative justification:

> "It is a principle of constitutional jurisdiction that when assessing the conflicting rights or competencies, a solution has to be found that does not damage constitutional stability, that would restrict rights as little as possible, and would maintain the constitutional nature of law, and guarantee a justified and constitutional exercise of rights."[12]

The next milestone was the judgement of the SC in 2000, where the SC for the first time clearly applied the scheme of infringement and limits, as well as all three levels of the principle of proportionality and stated: "Restrictions must not

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5 R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 47 f.

6 R. Alexy. The Construction of Constitutional Rights. – Law and Ethics of Human Rights 4 (2010), p. 22.

7 *Eesti Vabariigi põhiseadus* [Constitution of Republic of Estonia] (PS).

8 Published in: R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001.

9 *Ibid*., p. 5 f.

10 CRCSCj 06.10.1997, 3-4-1-3-97, para. I.

11 CRCSCj 30.09.1998, 3-4-1-6-98, para. III.

12 CRCSCj 14.04.1998, 3-4-1-3-98, para. IV.

prejudice legally protected interests or rights more than is justifiable by the legitimate aim of the provision. The means must be proportional to the desired aim […]. The legislators, as well as those who apply law, must take the proportionality principle into consideration."[13] From 2002 onwards, the SC has applied the fully developed three-level principle of proportionality:

> "The principle of proportionality arises from the second sentence of §11 of the Constitution, pursuant to which the restrictions on rights and freedoms must be necessary in a democratic society. The compliance with the principle of proportionality is reviewed by the courts on three consecutive levels – first the suitability of a measure, then the necessity of the measure and, if necessary, also the proportionality of the measure in the narrower sense; that is, its reasonableness. If a measure is manifestly unsuitable, it is needless to review the necessity and reasonableness of the measure. A measure that fosters the achievement of a goal is suitable. For the purposes of suitability, a measure, which in no way fosters the achievement of a goal, is undisputedly disproportional. The requirement of suitability is meant to protect a person against the unnecessary interference of public power. A measure is necessary, if it is not possible to achieve the goal by some other measure, which is less burdening on a person, but is at least as effective as the former measure. In order to determine the reasonableness of a measure, the extent and intensity of the interference with a fundamental right on the one hand, and the importance of the aim on the other hand have to be weighed. The more intensive the infringement of a fundamental right the weightier the reasons justifying it have to be."[14]

In a procedure of 2003, the principles theory was explicitly referred to by the Chancellor of Justice and criticised in a dissenting opinion of Justice Eerik Kergandberg.[15] Nevertheless, the SC *en banc* maintained it. However, it has recently also been criticised by another Estonian author Hent Kalmo.[16]

The following sections discusses six main arguments presented by Estonian critics against principles theory – the backbone of Estonian constitutional review. The purpose of the chapter is to reply to the critics, to link the arguments to the international debate and to defend principles theory.

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[13] CRCSCj 28.04.2000, 3-4-1-6-00, para. 13.

[14] Formulation from CRCSCj 17.07.2009, 3-4-1-6-09, para. 21 and 15.12.2009, 3-4-1-25-09, para. 24. Beginning with CRCSCj 06.03.2002, 3-4-1-1-02, para. 15; cf. CRCSCj 12.06.2002, 3-4-1-6-02, para. 12; 30.04.2004, 3-4-1-3-04, para. 31; 16.11.2016, 3-4-1-2-16, paras. 98 ff.; judgement of the Supreme Court *en banc* (SCebj) 17.03.2003, 3-1-3-10-02, para. 30; 17.06.2004, 3-2-1-143-03, paras. 20 ff.; 03.01.2008, 3-3-1-101-06, para. 27; 07.12.2009, 3-3-1-5-09, para. 37; 21.01.2014, 3-4-1-17-13, paras. 32 ff.

[15] SCebj 17.03.2003, 3-1-3-10-02, para. 9 and Dissenting Opinion of Justice Eerik Kergandberg. Cf. E. Kergandberg. Natuke privaatsusest ja mõnevõrra enam selle jälitustegevuslikust riivest isikuandmeid töötleva avaliku võimu poolt. – Juridica 2005/8, p. 545 f.; E. Kergandberg, M. Sillaots. Kriminaalmenetlus. Tallinn: Juura 2006, p. 43 fn. 42.

[16] H. Kalmo. Põhiseadus ja proportsionaalsus – kas pilvitu kooselu? – Juridica 2013/2, p. 79 ff.

## I. The constitution is not a plain framework and the principles theory is not a track to over-constitutionalisation

The constitution is, for Kalmo, solely a framework of constitutional prohibitions, which guarantees a wide range of discretion for political decision-making. Because of that, constitutional review should be concentrated, in his view, upon the question of whether the legislator has exceeded its limits, instead of dealing with the question of whether it has correctly balanced collective goods within the framework.[17]

According to Kalmo, every legal rule is a result of a democratic balancing act that has been made considering different principles. Constitutionalism is characterised by the rule that neither the legislator nor the constitutional court may decide the balance of values in the framework questions of the affairs of the state. In his opinion, the balance has been written directly into the democratically passed norms of the constitution.[18] The role of the constitution is solely to distribute the decision-making powers.[19]

Despite that, Kalmo seems to assume that the constitution contains values, too. He argues that the constitutional value system tends to expand like the universe. When the constitution imposes a value that is instrumentally related to another value, then, according to Kalmo, one can reasonably argue that the constitution imposes the other value too.[20] But when legal protection can always be extended – by indirect methods – to new objects, it is difficult to understand what will be excluded at all.[21] Therefore, the combination of arbitrary values with constitutional values and their transformation into constitutional values is, according to Kalmo, a further sin of principles theory.

Moreover, Kalmo claims that the principles theory would also lead to expansionism of the constitutional value system at the level of limits. According to him, the possible legitimate aims of infringements are only loosely tied to the text of the constitution. In most cases, the text of the norm does not contain any aims. They stand behind the text. Therefore, the aforementioned rule is also valid here: when promoting an aim favours at least one other aim, then the constitution also imposes the other aim.[22] Therefore, the catalogue of potential aims would be limitless.

Both lines of Kalmo's arguments are mutually connected – they maintain the over-constitutionalisation and stress the framework function of the constitution. The argument of over-constitutionalisation against the principles theory has been

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17 *Ibid*., p. 90 fn. 41.

18 *Ibid*., p. 89, 94.

19 *Ibid*., p. 93.

20 *Ibid*., p. 84.

21 *Ibid*., p. 85.

22 *Ibid*., p. 84 f.

put forward many times in the past.[23] One of the most prominent representatives of this argument is Ernst-Wolfgang Böckenförde.[24] Beyond that, Kalmo's argument that the role of the constitution is solely to distribute decision-making power is reminiscent of John Hart Ely's representation-reinforcing approach to judicial review, as Ely himself calls it.[25] This argument questions the possibility of substantial constitutional review.

The criticism of Böckenförde has already been answered by Alexy with his theory of discretion. Alexy distinguishes between the concepts of constitution as a framework (*Rahmenordnung*) and constitution as a foundation (*Grundordnung*).[26] Whereas the framework aspect leaves the legislator room for discretion, the foundation aspect in the qualitative sense determines these fundamental questions of society that can and must be decided by the constitution itself. The two paradigms are compatible and exist at the same time. Furthermore, Alexy has distinguished between two different kinds of discretion left for decision-makers: structural and epistemic discretion.[27] "Structural discretion exists when the constitution neither commands nor prohibits a specific action."[28] Epistemic discretion exists when the knowledge of what is commanded, prohibited or left free by the constitution is uncertain.[29] According to Julian Rivers:

> "Epistemic discretion arises on account of the fact that we suffer relative ignorance about the world, so we do not always know to what extent policies will be successful or how significant a particular breach of rights is. In spite of such relative ignorance we still need to decide what to do."[30]

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[23] E.g. E.-W. Böckenförde. Staat, Verfassung, Demokratie. Frankfurt a.M.: Suhrkamp 1991, p. 188; J. F. Lindner. Theorie der Grundrechtsdogmatik. Tübingen: Mohr, 2005, p. 55; R. Poscher. Grundrechte als Abwehrrechte. Tübingen: Mohr, 2003, p. 82 f.

[24] E.-W. Böckenförde. Staat, Verfassung, Demokratie. Frankfurt a.M.: Suhrkamp 1991, p. 159 ff., 185 ff.

[25] J. H. Ely. Democracy and Distrust. Cambridge, Mass., London: Harvard University Press, 1980, p. 87 f., 181.

[26] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 390; *id*. Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit. – Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 61 (2002), p. 14 f.

[27] *Ibid*.

[28] M. Klatt, M. Meister. The Constitutional Structure of Proportionality. Oxford: Oxford University Press, 2012, p. 79; R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 394 f.; J. Rivers. Proportionality, Discretion and the Second Law of Balancing. – G. Pavlakos (ed.). Law, Rights and Discourse. Oxford, Portland: Hart, 2007, p. 170 ff.; M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 175.

[29] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 414; J. Rivers. Proportionality, Discretion and the Second Law of Balancing. – G. Pavlakos (ed.). Law, Rights and Discourse. Oxford, Portland: Hart, 2007, p. 169, 177 ff.

[30] J. Rivers. Proportionality, Discretion and the Second Law of Balancing. – G. Pavlakos (ed.). Law, Rights and Discourse. Oxford, Portland: Hart, 2007, p. 169.

The legislator has structural discretion concerning setting the goals, selecting the means and balancing; in addition, epistemic discretion concerning empirical and normative knowledge also exists.[31] Summing up, structural discretion demonstrates the limits of the substantial content of the constitution and epistemic discretion points to the uncertainties of constitutional decision-making.[32] Therefore, there is no reason to worry about over-constitutionalisation on account of the principles theory. The constitution is neither a pure foundation nor a plain framework. At the same time, the room for discretion guarantees the decision prerogative of the parliament and avoids over-constitutionalisation. A constitutional court may bindingly decide only as far as the constitution extends – in the sense of a foundation in the qualitative sense. Everything beyond that lies in the competence of other constitutional bodies, mainly in that of the parliament.

Ely's theory has been responded to by Hans Kelsen, who can be considered the theoretical founder of the European model of constitutional review, long before Ely wrote his criticism. There is no doubt that in democratic constitutionalism legislation is a prerogative of the parliament. A rational justification of this prerogative is the direct democratic legitimisation of the parliament. While the supreme power of a state is vested in the people, the parliament exercises this power between elections. According to the legal logic, the legal force of an act of the parliament is stronger than that of a regulation, and also stronger than that of a judgement. It would be unthinkable that a court itself, instead of the legislator, would decide upon issues of, for example, judicial proceedings or judicial organisation. In short, a court is established to keep watch that all subjects of law observe the legislator's word. The legislator's word may be put aside only in exceptional circumstances. The constitutional review procedure constitutes such an exceptional procedure as it is only within this procedure that a court can place itself above an act of the parliament, who has directly been legitimised by the people. Kelsen argues that ordinary measures would be insufficient. It would be inappropriate to convict and punish members of a parliament for passing an unconstitutional law, because the parliament is a collective body. As for ministers, Kelsen argues that in theory they can be held liable but this would be ineffective since the unconstitutional law would remain in force. Therefore, the only option is destruction (*Vernichtung*); that is, the annulment of the

[31] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 394 ff.; *id*. Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit. – Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 61 (2002), p. 15 ff. Cf. M. Klatt, M. Meister. The Constitutional Structure of Proportionality. Oxford: Oxford University Press, 2012, p. 79 ff.

[32] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 414 ff.; *id*. Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit. – Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 61 (2002), p. 30; J. Rivers. Proportionality, Discretion and the Second Law of Balancing. – G. Pavlakos (ed.). Law, Rights and Discourse. Oxford, Portland: Hart, 2007, p. 169.

unconstitutional act. This, in turn, could not be left for the parliament itself. Kelsen calls the latter possibility a political naivety.[33]

Kelsen stresses the inevitability of the constitutional review from the standpoint of legal logic:

> "As long as a constitution lacks a guarantee of invalidating unconstitutional acts, the full legal force in the technical sense does not exist either. […] Any law, any ordinary regulation, even a general legal transaction between private persons is superior to such a constitution which should stand above all these legal forms and from which all lower levels should draw their validity, superior by its force."[34]

The only remedy against this is the invalidation of an unconstitutional act by an independent court of constitutional review. "Only a body different from the legislator and independent from the legislator, and therefore from all state influence, must be set up to invalidate the legislator's unconstitutional acts. This is the institution of a constitutional court."[35]

Although Kelsen's argument is mainly of a procedural nature, it concerns the substantial aspect, too: "Acts of parliament should not just be created following the prescribed procedures but may also not have a content that violates equality, liberty, property etc."[36] Therefore, as far as substantial questions like conformity with equality, liberty, property and others are concerned, the constitution is a foundation. To enforce it, substantial constitutional review is inevitable within democratic constitutionalism. Therefore, the review cannot be restricted solely to the distribution of the decision-making powers but must cover all substantial constitutional questions in the qualitative sense.

## II. The distinction between rules and principles is adequate

According to Kalmo, principles theory does not help us to sieve out those provisions that are objectively principles. Every rule may, according to him, be reinterpreted into a balanceable principle. Kalmo takes the rule 'it is prohibited to drive faster than 90 km/h' and argues that even this norm may be reinterpreted into a principle according to which the obligation prevails only if no weightier counter-arguments justify driving faster. Somebody would not violate the provision if, it is true, he drives faster than 90 km/h, but only as far as this is necessary to respect other legal values, for example, to perform an urgent task. Accordingly, there is no norm at all, no matter how categorically formulated, that

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[33] H. Kelsen. Wesen und Entwicklung der Staalsgerichtsbarkeit. – Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 5 (1929), p. 53 and in general p. 51 ff. Kelsen's line of reasoning goes on, but for the purpose of this article the above reference is sufficient.

[34] *Ibid*., p. 78.

[35] *Ibid*., p. 53.

[36] *Ibid*., p. 37.

those applying the law and desiring to apply the principle of proportionality could not reinterpret into a principle.[37]

According to Kergandberg, the clear classification of norms into rules and principles is just one of many possible theoretical hypotheses and has not been sufficiently founded by its proponents.[38]

As formulated by Martin Borowski, the principles theory as a theoretical legal theory alone does not classify concrete norms – such as, for example, the fundamental rights of the constitution – as rules or principles but can rather only show which theoretical norm structures are available for use.[39] There are three possible ways to characterise the distinction of rules and principles. First, one can maintain that there is no logical difference at all – rules and principles are logically identical norms.[40] This can be called the identity thesis.[41] Second, one can maintain that the distinction between rules and principles is a matter of degree, not logic.[42] This can be called the weak separation thesis.[43] Third, it can be asserted that there is a logical difference between rules and principles.[44] This is the strict separation thesis.[45]

Kergandberg and Kalmo reject the thesis of strict separation. Kergandberg barely sees it as a conceivable classification without presenting his own viewpoint; Kalmo, on the other hand, maintains that any rule can be reformulated as a principle. Therefore, Kalmo seems to be in favour of the identity thesis that has been explicitly brought up earlier by Aulis Aarnio. Aarnio also rejects the

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37 H. Kalmo. Põhiseadus ja proportsionaalsus – kas pilvitu kooselu? – Juridica 2013/2, p. 81.

38 Dissenting Opinion of Justice Eerik Kergandberg to SCebj 17.03.2003, 3-1-3-10-02, para. 8.3.

39 M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 114 f.

40 E.g. A. Aarnio. Taking Rules Seriously. – W. Maihofer, G. Sprenger (eds.). Law and States in Modern Times. Stuttgart: Franz Steiner, 1990, p. 180 ff.

41 M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 117; *id*. Glaubens- und Gewissensfreiheit des Grundgesetzes. Tübingen: Mohr, 2006, p. 196; R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 47.

42 E.g. H. L. A. Hart. The Concept of Law. 2. ed. Oxford: Oxford University Press, 1994, p. 262; J. Raz. Legal Principles and the Limits of Law. – Yale Law Journal 81 (1972), p. 838.

43 M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 116; *id*. Glaubens- und Gewissensfreiheit des Grundgesetzes. Tübingen: Mohr, 2006, p. 196; R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 47.

44 E.g. R. Dworkin. Taking Rights Seriously. Cambridge, Mass.: Harvard University Press, 1977, p. 24; R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 47; M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 160.

45 M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 116; *id*. Glaubens- und Gewissensfreiheit des Grundgesetzes. Tübingen: Mohr, 2006, p. 197; R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 47.

possibility of a fundamental distinction between rules and principles.[46] The starting point of Aarnio's discourse is the level of language.

According to Aarnio, the meaning that is assigned to a normative statement before interpreting on the grounds of the general knowledge of the language is a '*prima facie*-meaning'.[47] The 'all-things-considered-meaning' is, however, the one meaning that is assigned to the normative statement after interpreting.[48] The interpretation can lead to the point where the original meaning changes because better reasons speak for excluding the norm from the legal system that comes into question as *prima facie*. In short, this process is the same for all norms, and therefore solely because of the wording of the norms, it is not possible to draw an abstract distinction between rules and principles. Rules and principles are, according to Aarnio, not deontic but axiological phenomena.[49]

Aarnio refers to the decisive meaning of interpretation. The before/after approach is insofar accurate, since barely any normative statement can be treated as a source of a rule or a principle before interpretation. Indeed, it is conceivable that the normative statement contains a wording that can be unmistakably classified as a rule or a principle. This, however, in practice would occur only rarely. In most cases, the structural distinction between a rule and a principle can only be determined after interpretation. The determination of the structure of the Ought (*Sollen*) is therefore, as Borowski accurately emphasises, part of the interpretation process.[50]

In his criticism, Aarnio also makes another important point: one normative statement can be assigned both to a rule and to a principle. This thesis is correct since one normative statement can embody several norms. For example, Alexy differentiates between the rule of human dignity and the principle of human dignity.[51] One can also find provisions to which both types of norms correspond in the Estonian Constitution. For example, §9(1) PS: "The rights, freedoms and duties of each and every person, as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia." This normative statement expresses a rule, as well as a principle. First of all, it provides the rule that all natural persons are entitled to fundamental rights. Simultaneously, the normative statement also provides a principle of a specific fundamental right to equality.[52] The possibility that a normative statement can be assigned to several norms also explains the view of Kalmo about

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[46] A. Aarnio. Taking Rules Seriously. – W. Maihofer, G. Sprenger (eds.). Law and States in Modern Times. Stuttgart: Franz Steiner, 1990, p. 180 ff. Cf. M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 154 ff.

[47] A. Aarnio. Taking Rules Seriously. – W. Maihofer, G. Sprenger (eds.). Law and States in Modern Times. Stuttgart: Franz Steiner, 1990, p. 185.

[48] *Ibid*., p. 192.

[49] *Ibid*., p. 188.

[50] M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 161 ff.

[51] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 64.

[52] R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 66.

the norms that can be reformulated. However, at the same time, the rule will neither be reformulated into a principle nor the other way around – a principle into a rule. If it is clear that a normative statement is assigned to a rule, then *this* rule cannot be converted into a principle. Then the norm at hand is a rule-norm. The necessary prerequisite of the semantic concept of a norm[53] is that the normative statement (the wording of the law) and the norm itself are strictly held apart. The distinction between rules and principles concerns the level of the norm and not of the normative statement.

Moreover, having identified a rule does not mean that the Ought is absolute. An exception from a rule may result from another rule, but it may also result from a balancing of competing principles. In the latter case, we do not balance the rule itself but the principle(s) that justify the rule in question with principle(s) that demand the exception. For example, all norms of special parts of criminal law are clearly rules. According to the established doctrine of criminal law, the method of assessment of a criminal offence has several levels. If the criteria of the offence are met, the offence is, as a rule, punishable. However, exceptions like state of emergency or lack of guilt may apply and abolish the punishment. The complicated assessment structure is a good example of a doctrine that deals mostly with rules. Returning to the example offered by Kalmo, if there is a speed limit of 50 km/h within towns and villages and 90 km/h outside towns and villages, then this is a rule according to which it is forbidden to drive faster than the corresponding speed limit. The rule-character of the prohibition on driving faster than the speed limit can be determined through interpretation of the normative statement. To determine the character of the concrete norm, the different abstract logical characteristics of rules and principles must be taken into account. The prohibition on driving faster than the speed limit is a rule and not a principle because its legal consequence does not depend on counter-reasons and the norm itself lacks the dimension of weight or importance. The correct way to apply it is the subsumption and not balancing. However, exceptions still may apply, if a police car follows an escaping criminal, a fire engine drives to a burning house or an ambulance brings a seriously injured patient to a hospital. Beyond that, it may be that a principle or some principles justify another exception. For example, it may be that a pregnant woman starts giving birth and needs to get to a hospital, there is no time or no opportunity to call the ambulance and there is little traffic on the streets. In this case, the violation of the speed limit rule may be justified by the state of emergency, which constitutes another exception. To introduce the exception, we do not weigh the speed limit itself, but the reasons behind it with reasons that will justify the faster driving – i.e. life, physical integrity and property of traffic participants versus life and physical integrity of the mother and child.

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[53] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 21 ff.

## III. No disentanglement from the constitution

Third, according to Kalmo, the application of the principle of proportionality presupposes a conversion of constitutional rules into principles. The principles theory is, according to him, tempted to convert clear prohibitions with predictable legal consequences into vague *prima facie* guidelines.[54]

As maintained by Kalmo, the above consideration results in the situation where those who apply the law by the means of the principle of proportionality do not rely on constitutional guidelines anymore – instead, they rely on their own opinion of reasonable behaviour.[55] Consequently, those applying the law will be exempted from the text of the constitution, and they will take the place of the constitutional legislator.[56] Furthermore, Kalmo maintains that, according to the principles theory, constitutional amendments would no longer be necessary; even the constitution itself would no longer be necessary because the value doctrine would make values directly applicable and a written constitution superfluous or at least compatible with any proportional measure.[57] Therefore, according to him, the principles theory would necessarily offer the constitutional legislator the possibility to pass a list of protected values instead of detailed provisions. The constitutional legislator could just add that, in the case of any combination of these values, the principle of proportionality applies.[58]

Moreover, the application of the principle of proportionality converts, according to Kalmo, the meaning of words into momentary bubbles that those applying the law blow out every time in a different manner depending on the weight that they attribute to different legal values during decision-making. This leads to disentanglement from the constitution.[59]

Kalmo seems to assert that the principles theory would make it possible to disregard the *ratio legis* completely and to lead to a full disentanglement from the written text of the constitution. Kalmo claims that the applier of the norm who will balance the reasons behind a norm practically annuls the normative decision and replaces it with his own.[60] Based on these reasons, he denies the principles theory and wants to replace it with a theory that guarantees a better tie to the text of the constitution.[61]

Kalmo's thesis reminds one of Jürgen Habermas: it contains the view that the principles' construction of constitutional rights eliminates their strict validity as

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54 H. Kalmo. Põhiseadus ja proportsionaalsus – kas pilvitu kooselu? – Juridica 2013/2, p. 79.

55 *Ibid*., p. 83, cf. p. 89.

56 *Ibid*., p. 80.

57 *Ibid*., p. 86, 97.

58 *Ibid*., p. 83.

59 *Ibid*., p. 96.

60 *Ibid*., p. 89.

61 *Ibid*., p. 95.

rules.[62] As stated by Habermas, if in the case of a conflict we allow all reasons to be included in the class of arguments defining an end, it would allow the firewall that has been erected in the legal discourse by a deontological understanding of legal norms and principles to collapse.[63]

Borowski has directly responded to this criticism. According to him, the constitution contains strict determinations, non-strict determinations and determinations of reason for limits.[64] Based on this distinction, a strict determination would be, for example, §38(1) PS: "Science and art and their teachings are free." There is no space for balancing at the level of the scope of constitutional rights – if we can determine that a particular action must be understood as science or art, it must be free (*prima facie*). However, strict does not mean definite. Therefore, not every science or art can be entirely free because the constitutional limits of the freedom may still apply. A non-strict determination would be, for example, §5 PS: "The natural wealth and resources of Estonia are national riches which must be used economically." This is rather a constitutional end that has to be taken into account within a constitutional reasoning concerning natural wealth or natural resources. There is much less clarity on the field of determinations of reasons for limits.

As possible classes of determinations of reasons for limits, Borowski distinguishes between positive constitutional ends, relative constitutional ends and negative constitutional ends.[65] A positive constitutional end would be, for example, nature protection that can serve as a principle of constitutional rank to justify an infringement of a constitutional right without any legal reservation like the freedom of science and art. Relative constitutional ends are defined by the legislator. Their legitimacy depends on the correctness of the use of the constitutional authorisation by the legislator. Finally, negative constitutional ends lay down constitutional prohibitions; for example, §12(2)1 PS: "Incitement to ethnic, racial, religious or political hatred, violence or discrimination is prohibited and punishable by law." Negative constitutional ends have to be considered by the question of whether the end of the infringement is legitimate. If we dug deeper and looked behind the three different paradigms of the limits of constitutional rights – simple, qualified and zero legal reservation – the system would get much more complex.

However, to respond to Kalmo, this outline must suffice at this point. There are still strict determinations in the constitution that must be followed. And, as far as the text of the constitution is linguistically or structurally open, the principles theory offers a method to reduce the openness significantly. Alexy goes

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62 J. Habermas. Between Facts and Norms. Cambridge, Mass.: MIT Press, 1996, p. 254.

63 *Ibid*., p. 258 f.

64 M. Borowski. Die Bindung an Festsetzungen des Gesetzgebers in der grundrechtlicher Abwägung. – L. Clérico, J.-R. Sieckmann (eds.). Grundrechte, Prinzipien und Argumentation. Baden-Baden: Nomos, 2009, p. 101 ff.

65 *Ibid*., p. 107 f.

further and presents a weight-formula to reduce the openness even more.[66] But this shall not be made a subject of discussion here.

## IV. The demand to balance is more than just a demand to simply decide

The principle of proportionality is, in Kalmo's opinion, a purely formal guideline.[67] The formulation of a legal problem as a question of balancing of values or principles, in his view, puts very different and, at first glance, incommensurable considerations like obligations, prohibitions, needs, interests, among others, on an equal footing. A comparison works out only because of the transformation of economic theory into constitutional law.[68]

Then Kalmo turns explicitly to Robert Alexy's principles theory, which, according to him, is one of the most thorough and systematic principles theories. Since Alexy's reasoning is, according to Kalmo, parallel to economic theory, the conclusions of economic theory without further treatment apply to the constitutional rights doctrine. In the principles theory, values perform the same role as goods in economic theory. The central role in the principles theory is played by Pareto-optimality because the first two levels of the principles theory are nothing but the application of Pareto-optimality.[69]

The first two levels of the proportionality test – suitability and necessity – are of a rather technical nature; that is, they guarantee 'the best use of legal production technology' in such a way that no constitutional right or collective good will be interfered with without reason.[70] Kalmo brings up the example of whether the available resources would allow producing the optimal amount of bread and weapons together. On the third level, we have to weigh whether we will reduce the production of bread to increase the production of weapons. The requirement

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[66] R. Alexy. On Balancing and Subsumption. A Structural Comparison. – Ratio Juris 16 (2003), p. 433–449; *id*. Balancing, constitutional review, and representation. – I•CON 3 (2005), p. 572–581; *id*. The Weight Formula. – J. Stelmach, B. Brożek, W. Załuski (eds.). Studies in the Philosophy of Law: Frontiers of the Economic Analysis of Law. Vol. 3. Krakow: Jagiellonian University Press, 2007, p. 9–27; *id*. Constitutional Rights and Proportionality. – Revus 22 (2014), p. 51–65. Cf. M. Klatt, M. Meister. The Constitutional Structure of Proportionality. Oxford: Oxford University Press, 2012, p. 10 ff.; M. Borowski. Robert Alexy's Reconstruction of Formal Principles. – J. Aguiar de Oliveira, S. L. Paulson, A. T. G. Trivisonno (eds.). Alexy's Theory of Law. Stuttgart: Franz Steiner, 2015, p. 99 ff.; *id*. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 129 ff.; J.-R. Sieckmann. Zur Prinzipientheorie Robert Alexys. Gemeinsamkeiten und Differenzen. – M. Klatt (ed.). Prinzipientheorie und Theorie der Abwägung. Tübingen: Mohr, 2013, p. 282 ff.

[67] H. Kalmo. Põhiseadus ja proportsionaalsus – kas pilvitu kooselu? – Juridica 2013/2, p. 83.

[68] *Ibid*., p. 87.

[69] *Ibid*., p. 88 f.

[70] *Ibid*., p. 89.

to weigh corresponds to the requirement to decide because the goods themselves do not allow us to decide between the goods.[71]

Kalmo's standpoint that Pareto-optimality does not cover the balancing, that is, proportionality in the narrower sense, is correct. The first two levels of the principle of proportionality "are concerned with the question of whether the factual possibilities allow the avoidance of costs to constitutional rights without bringing about costs contrary to the aims of the legislator."[72] Therefore, the principles of suitability and necessity will not be discussed here.

Kalmo's conclusion that balancing corresponds to the requirement to decide is again reminiscent of Habermas, this time his thesis that balancing lacks 'rational standards' and "takes place either arbitrarily or unreflectively, according to customary standards and hierarchies."[73] Kalmo's conclusion is essentially another type of the irrationality allegation. To respond to this, we shall once again turn to Alexy[74] and Borowski[75]. According to Borowski, the thesis of Habermas should be termed 'radical balancing scepticism'.[76] The radical antithesis to that would be – in terms of Alexy – that "balancing leads in a rational way to one outcome in every case."[77] This evokes Dworkin's famous judge Hercules, who would always come to the one right answer,[78] and should, according to Borowski, be called 'radical balancing optimism'.[79] Kalmo, as a sceptic regarding balancing, criticises the radical balancing optimism. However, there is, logically, a third way. According to Alexy, there is also a moderate antithesis, according to which "one outcome can be rationally established through the use of balancing, not in every case, but at least in some cases, and the class of these cases is interesting enough to justify balancing as a method."[80] It is impossible not to agree with

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71 *Ibid*.

72 R. Alexy. The Construction of Constitutional Rights. – Law and Ethics of Human Rights 4 (2010), p. 28.

73 J. Habermas. Between Facts and Norms. Cambridge, Mass.: MIT Press, 1996, p. 259.

74 R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 401 ff.

75 M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 173 f.; *id*. Glaubens- und Gewissensfreiheit des Grundgesetzes. Tübingen: Mohr, 2006, p. 209 f.; *id*. On Apples and Oranges. Comment on Niels Petersen. – German Law Journal 14 (2013), p. 1412 f.

76 M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 173; *id*. On Apples and Oranges. Comment on Niels Petersen. – German Law Journal 14 (2013), p. 1412.

77 R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 401.

78 R. Dworkin. Taking Rights Seriously. Cambridge, Mass.: Harvard University Press, 1977, p. 119 ff., 279.

79 M. Borowski. On Apples and Oranges. Comment on Niels Petersen. – German Law Journal 14 (2013), p. 1412.

80 R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 402.

Borowski that, besides the hard cases, there are also plain cases, like the disproportionality of the following punishment: cutting off a person's feet for stepping onto the lawn in public parks.[81] Between the two extremes, there is a broad spectrum of cases that are neither plain nor structurally hard. According to Borowski, it depends on how sceptical or optimistic one is with an eye to the number of cases in which a single outcome can be rationally established by means of balancing. One might be tempted to refer to this moderate thesis as either 'moderate scepticism toward balancing' or 'moderate optimism toward balancing'.[82]

Furthermore, Borowski points out that 'radical balancing optimism' is no more than an artificial position often mistakenly ascribed to the supporters of the doctrine of proportionality by sceptics of balancing and that 'radical balancing scepticism' is, on closer reading, rarely supported by critical sceptics.[83] Therefore, the discussion about the rationality of balancing often misses the point. On the other hand, both moderate theses on the rationality of balancing are supported by most authors and they are by far the most plausible.[84]

The allegation of irrationality against balancing may also target the level of justification of a balancing decision. In this case, the question is whether the outcome of the argumentation in favour of one of the competing principles can be rational. On the level of the justification of balancing decisions, a justification model instead of a decision-taking model is preferable.[85] According to Alexy:

> "The point that values play a role in balancing exercises does not of itself represent an objection to the rational justification of balancing decisions, unless one is prepared to say that the legal argument is always non-rational or irrational the moment one enters the arena of non-authoritatively binding predetermined evaluations."[86]

This would be an extremely radical position that questions the rationality of legal science as such. "So the problem of the rationality of balancing principles leads to the question of the rationality of establishing statements which determine conditional preferential statements between competing values or principles."[87] To establish rationality at the level of the justification of non-balanced statements of conditional preference, all groups of rules and forms of external justification are

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[81] M. Borowski. Grundrechte als Prinzipien. 3. ed. Baden-Baden: Nomos, 2018, p. 173; *id*. On Apples and Oranges. Comment on Niels Petersen. – German Law Journal 14 (2013), p. 1412.

[82] M. Borowski. On Apples and Oranges. Comment on Niels Petersen. – German Law Journal 14 (2013), p. 1412 f.

[83] *Ibid*.

[84] *Ibid*.

[85] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 100.

[86] *Ibid*., p. 106.

[87] *Ibid*., p. 101.

applicable,[88] insofar as the rationality of the decision depends on the rationality of the argumentation; that is, on following the rules of the argumentation.

## V. No suspension of the constitution

Furthermore, Kalmo claims that the principles theory leads to the suspension of the constitution because the infringement of personal freedoms would not be prevented by a general rule that inhibits assaults on the protected sphere of freedom but merely by the disproportionality of the infringement in a concrete case. Kalmo maintains that it would be equivalent to saying that the use of personal freedom interferes with collective goods. According to him, both sides – the subjects of constitutional freedom and the state authorities – have a right to proportionality. No side is more important or better protected than the other. Uncertainty remains in regard to what the constitution contributes to this formula. Kalmo presumes that a solution will be found by way of balancing after hearing both sides. It would also be possible to reach a solution without the constitution because balancing is what every rational man would do if there were no constitution.[89]

Here are two assumptions. First, Kalmo maintains that constitutional rights *prima facie* have equal weight or importance as collective goods and are therefore equally protected. Second, he asserts that, because balancing is reasonable, the constitution is redundant.

First of all, it is true that constitutional norms are formally (mostly) on the same level.[90] However, it would be a mistake to conclude that the democratic state is the bearer of collective goods. There is no bearer of collective goods. Collective goods can be a reason for restrictions on constitutional rights but they can also be a reason for individual rights.[91] Collective goods serve society and individuals, and not the state as such. The state is no bearer of collective goods but just their enforcer. The democratic constitutionalism is itself a collective good that serves constitutional rights. Therefore, it is only a means to an end – for a human being. No constitution of democratic constitutionalism puts the constitutional rights and collective goods substantially on an equal level because

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[88] *Ibid*.; R. Alexy. A Theory of Legal Argumentation. Oxford: Clarendon Press 1989, p. 231 ff. Cf. a modified list of forms of arguments in: *id*. Juristische Interpretation. – R. Alexy. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 84 ff.; *id*. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 8 ff. According to the modified list, there are four main groups of arguments: linguistic, genetic, systematic and general practical arguments.

[89] H. Kalmo. Põhiseadus ja proportsionaalsus – kas pilvitu kooselu? – Juridica 2013/2, p. 86.

[90] It is disputable, whether it is so under the Estonian Constitution, because different parts of the Constitution have significantly different rules of amendment (see §162 PS and §4 of Constitution of Republic of Estonian Amendment Act).

[91] R. Alexy. Individuelle Rechte und kollektive Güter. – R. Alexy. Recht, Vernunft, Diskurs. Frankfurt a.M.: Suhrkamp, 1995, p. 234.

they have different functions. Instead, constitutions contain constitutional rights primarily to guarantee the sphere of freedom and to restrict public power, while the state enforces the collective goods and individual rights of other persons. It would be a logical mistake to scrutinise an infringement of a collective good and try to justify it with a constitutional right.

Second, from the assumption that balancing is reasonable, it does not follow that the constitution is redundant.[92] It is easy to agree that balancing is reasonable, but without constitutional rights or a constitutional command to balance competing principles, the balancing would be contingent. People do not always behave reasonably and they are inclined to arbitrariness. Moreover, the right to be arbitrary is a human right. That is why the law is necessary. Since modern society is complex, a hierarchical legal order with a constitution at the top determining the most important questions in society is needed. The aforementioned circumstance becomes even more complicated when taking into account European Union law. The constitution, that would logically be more difficult to amend,[93] guarantees constitutional rights and collective goods. Because of the principle-character of (most) constitutional rights, the principle of proportionality, in turn, commands balancing the aforementioned rights. To question the necessity of the constitution in this paradigm means to question democratic constitutionalism as such.

## VI. Feasibility of a universal theory of fundamental rights

Last but not least, Kalmo questions the possibility of a universal theory of constitutional rights. Kalmo names three groups of cases: first, cases where the constitution contains a clear prohibition; second, cases where there is no clear constitutional prohibition but a law seems to interfere with a constitutionally protected good; and third, cases where the question lies in the limits of constitutional rights. The first two groups of cases will be solved without the use of the principle of proportionality. The first is a clear case of unconstitutionality. In the second case, Kalmo applies the rule 'everything that is not prohibited is allowed'. However, Kalmo does not apply it to individual freedom, but to the universal competence of the parliament; that is, according to him, if the constitution does not prohibit the parliament from doing something, the parliament may freely decide.[94]

Although in the third case the application of the principle of proportionality seems to be inevitable, Kalmo denies its applicability in the context of the Estonian constitution. His main argument is that every substantial theory shall be

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[92] For an overview of the concept of the constitution in the Estonian context, see P. K. Tupay. Verfassung und Verfassungsänderung in Estland. Berlin: Berliner Wissenschafts-Verlag, 2015, p. 17 ff.

[93] H. Kelsen. Reine Rechtslehre. 2. ed. Wien: Deuticke, 1960, p. 229.

[94] H. Kalmo. Põhiseadus ja proportsionaalsus – kas pilvitu kooselu? – Juridica 2013/2, p. 90.

dependent on the text of the constitution.[95] The concentration on the substance – that is, on the value system behind the norms – causes us to forget, in his view, that under the democratic rule of law it is not unimportant who assigns the importance of different values in society. According to him, the constitution cannot distribute the competencies properly if the norm-technical meaning for that – the prohibition of substantial balancing – is made null and void by some theory and replaced by a principle that allows substantial balancing.[96]

Article 11 PS would lead to no different conclusion. This article is, according to Kalmo, like a gateway for smuggling the proportionality test into Estonian case law.[97] However, he maintains that the wording of the article may also be understood in a way that the prohibition on distorting the nature of rights entirely bans the restriction of some constitutional rights,[98] such as in §§8, 17, 18, 22, 23, 24 PS.[99]

Kalmo continues that the removal of the legal validity of the constitutional rights is more difficult than the removal of the legal validity of an act of parliament. Constitutional rights are also criteria for judgements on the validity of an act of parliament. But these are purely formal characteristics. According to him, there is no reason to believe that there are substantial characteristics common to all constitutional rights, but that do not exist on the basis of rights derived from simple laws. Therefore, just as there is no 'theory of blue items' there is also no theory of constitutional norms.[100] Kalmo argues that in different constitutional systems very different norms exist at a constitutional level. But the question of whether a provision should be a rule or a principle is, according to Kalmo, quite a substantial one. However, it would be difficult to criticise the more reserved position that applies principles theory to those constitutional rights that can be treated as principles.[101]

Kalmo does not invalidate the arguments presented by Alexy in his analysis of 1997 referred to in the introduction to this chapter.[102] Furthermore, other authors have presented arguments for the universality of Alexy's theory. For example, according to Rivers, who translated Alexy's *Theory of Constitutional Rights* into English, there are ample grounds why the theory should be applicable more widely; he argues that its transferability between systems is at

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95 *Ibid*., p. 92.

96 *Ibid*., p. 90 ff.

97 *Ibid*., p. 90.

98 *Ibid*., p. 94 fn. 53.

99 *Ibid*., p. 92.

100 *Ibid*., p. 91.

101 *Ibid*.

102 R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 5 f.

least plausible.[103] The main reasons for that are the formal abstraction and substantive openness of the principles theory. The feature that principles are optimisation requirements "explains the logical necessity of the principle of proportionality and exposes constitutional reasoning as the process of identifying the conditions under which one of two or more competing principles takes precedence on the facts of specific cases."[104]

> "Constitutional rights need not be limited to the classic liberties, or defensive rights against public authorities: equality rights, rights to protection and procedure, and social rights are all conceivable as constitutionally protected rights. Nor need constitutional rights to be limited to relationships between the individual and the state; the precise degree of third party, or horizontal, effect is also a matter of substance. Finally, the theory manages a (partial) reconciliation between democracy and human rights, once again, not in substantive sense, but in showing how the structure of constitutional rights reasoning can be sensitive to both concerns."[105]

Furthermore, concerning the German doctrine, historical and genetic arguments can be brought forward: German *Grundgesetz* was one of the main examples for the Estonian Constitution during its *travaux preparatoires*.[106] It is, therefore, a logical next step to look towards the prevailing doctrine of its application. And, finally, the case law of the SC cited above is a good proof of the inter-systematic transferability of the principles theory.

## VII. Closing remarks

To conclude, the substantial core of constitutionality is, in most cases, the principle of proportionality and the central method for solving constitutional cases is balancing. The SC appears to be right and its method, developed since 1997, is a success.[107] The Estonian critics have not been able to raise an issue that

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[103] J. Rivers. A Theory of Constitutional Rights and the British Constitution. – R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. XVIII. Cf. J. Rivers. Fundamental Rights in the UK Human Rights Act. – A. J. Menéndez, E. O. Eriksen (eds.). Arguing Fundamental Rights. Dordrecht: Springer, 2006, p. 141 ff.

[104] J. Rivers. A Theory of Constitutional Rights and the British Constitution. – R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. XVIII.

[105] *Ibid*.

[106] M. Ernits. 20 Jahre Menschenwürde, Demokratie, Rechtsstaat, Sozialstaat. – S. Hülshörster, D. Mirow (eds.). Deutsche Beratung bei Rechts- und Justizreformen im Ausland. Berlin: Berliner Wissenschafts-Verlag, 2012, p. 124; P. K. Tupay. Verfassung und Verfassungsänderung in Estland. Berlin: Berliner Wissenschafts-Verlag, 2015, p. 35 ff.

[107] In a recent judgement the CRCSC stated: "§11 of the Constitution according to which circumscriptions of constitutional rights must be necessary in a democratic society does not contain any constitutional right to balancing. It requires only that from point of view of the constitutional right the balancing delivers ultimately a proportionate result. According to the

would cause us to be sceptical regarding the correctness of this practice in general. Although originally developed explicitly for the German context,[108] Alexy's principles theory has proven to be a useful tool for constitutional review in Estonia as well. In the case of principles, the principles theory even in hard cases provides the constitutional court with a structure that makes the reasoning more rational.

However, not all constitutional norms are principles. The deontological structure of a constitutional norm has to be found with the help of interpretation on a case-by-case basis, taking into account that there are logically two different kinds of norms – principles and rules. Instead of questioning proportionality and balancing as such, we could rather concentrate on the problem of structural interpretation; that is, on the clarification of which constitutional norms are not principles but rules. There are rules among constitutional rights as well as among the norms relating to the organisation of the state. Their identification seems to be one of the constitutional interpretation challenges that will need more effort in the future.

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view of the Chamber, no other constitutional provision requires such constitutional right to balancing. An infringement of constitutional right to family life may be proportionate also when democratically legitimated lawgiver has weighed it by enacting the law." (CRCSCj 16.11.2016, 3-4-1-2-16, para. 119). This statement is at least ambiguous. There is no doubt that when the law in question is proportionate (and meets all formal and other requirements of the constitution) it is also constitutional. However, it does not mean that the SC may omit its independent substantial scrutiny whether the particular law is proportionate because the assessment whether the law is proportionate or not can only be carried out after the proportionality test by the SC itself. Therefore, the claim that there is no constitutional right to balancing is misleading. As far as a constitutional right with the nature of a principle is infringed there must be an individual right to an answer as to whether this infringement is proportionate. And this answer can only be given using the method of balancing. In this sense there is an individual right to balancing.

[108] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 1 ff.

CHAPTER 2

# THE USE OF FOREIGN LAW BY ESTONIAN SUPREME COURT

# *The Use of Foreign Law by Estonian Supreme Court*

## I. Introduction

Estonian Constitution consists of three acts. *Eesti Vabariigi põhiseadus* [The Constitution of the Republic of Estonia] (Constitution),[1] as the main act was adopted *via* a referendum on 28 June 1992 and came into force on the following day, as prescribed by §1(1) of the *Eesti Vabariigi põhiseaduse rakendamise seadus* [The Constitution of the Republic of Estonia Implementation Act] (CIA).[2] CIA was adopted together with the Constitution by a referendum on the same day. On 1 May 2004 Estonia, together with nine other European countries, joined the European Union (EU). Before the accession the Constitution of the Republic of Estonia was amended *via* a referendum on 14 September 2003. The *Eesti Vabariigi põhiseaduse täiendamise seadus* [The Constitution of the Republic of Estonia Amendment Act] (CAA)[3] was added to the Constitution. This act provides for that Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected and that when Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty.

The Estonian constitutional order is determined by five fundamental constitutional principles: human dignity,[4] democracy,[5] rule of law,[6] social state[7] and

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1 *Riigi Teataja* [State Gazette] (RT) 1992, 26, 349; 15.05.2015, 1. For the English translation of the Constitution, see:
https://www.riigiteataja.ee/en/eli/ee/521052015001/consolide/current. All electronic resources accessed on 27.05.2019. The links are to the English translations unless indicated otherwise.

2 RT I 1992, 26, 350:
https://www.riigiteataja.ee/en/eli/ee/530102013012/consolide/current.

3 RT I 2003, 64, 429; RT I 2007, 43, 313:
https://www.riigiteataja.ee/en/eli/ee/530102013005/consolide/current.

4 Judgment of the Constitutional Review Chamber of the Supreme Court (CRCSCj) 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49; ruling of the Administrative Law Chamber of the Supreme Court (ALCSCr) 04.05.2011, 3-3-1-11-11, para. 10. Selected Constitutional Review judgments and selected judgments of the Administrative Law Chamber are available in English under:
https://www.riigikohus.ee/en/judgements/constitutional-judgments and
https://www.riigikohus.ee/en/judgements/judgments-administrative-law-chamber.

5 Supreme Court *en banc* judgment (SCebj) 01.07.2010, 3-4-1-33-09, paras. 52, 67; ALCSCr 16.01.2003, 3-3-1-2-03, para. 11; 27.01.2003, 3-3-1-6-03, para. 11.

6 CRCSCr 07.11.2014, 3-4-1-32-14, para. 28. Cf. CRCSCj 19.03.2009, 3-4-1-17-08, para. 26; 06.01.2015, 3-4-1-34-14, para. 33; ALCSCr 16.01.2003, 3-3-1-2-03, para. 11; 27.01.2003, 3-3-1-6-03, para. 11.

7 CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49.

Estonian identity.[8],[9] The Estonian legal order is a part of continental legal culture with a strict hierarchy of norms, with the principle of reservation of law provided for by §3(1)1[10] of the Constitution, according to which the Constitution requires a specific enactment of a statute for every specific exercise of the state power, and with the fundamental division of the legal order in public and private law. According to the Constitution, Estonia is a parliamentary republic, with governments being subject to the confidence of the directly and proportionally elected Parliament. The 2nd Chapter of the Constitution provides for a rather detailed catalogue of 48 provisions of enforceable constitutional rights. Five general rights can be identified: general liberty right in §19(1),[11] general equality right in §12(1),[12] general right to state protection in §13(1),[13] general right to organisation and procedure in §14[14] and general social right in §28(2)1.[15],[16] The chapter on constitutional rights is otherwise also rather comprehensive and

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[8] CRCSCj 04.11.1998, 3-4-1-7-98, para. III.

[9] To the debate about fundamental principles of the Constitution see: W. Drechsler, T. Annus. Die Verfassungsentwicklung in Estland von 1992 bis 2001. – Jahrbuch des öffentlichen Rechts der Gegenwart 50 (2002), p. 473 ff.; M. Ernits. 20 Jahre Menschenwürde, Demokratie, Rechtsstaat, Sozialstaat. – S. Hülshörster, D. Mirow (eds.). Deutsche Beratung bei Rechts- und Justizreformen im Ausland. Berlin: Berliner Wissenschafts-Verlag, 2012, p. 126 ff.; R. Maruste. The Role of the Constitutional Court in Democratic Society. – Juridica International 13 (2007), p. 8 ff.; R. Maruste. Democracy and the Rule of Law in Estonia. – Review of Central and East European Law 26 (2000), p. 311 ff.; J. Laffranque. A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act. – Juridica International 12 (2007), p. 55 ff.; R. Narits. About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia. – Juridica International 16 (2009), p. 56 ff. See compilation of the sources in Estonian and presentation of the debate: M. Ernits. Põhiõigused, demokraatia, õigusriik. Tartu: Tartu Ülikooli Kirjastus, 2011, p. 5 fn. 9, p. 6 ff., 23 f.

[10] "Governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith."

[11] "Everyone has the right to free self-realisation."

[12] "Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds."

[13] "Everyone has the right to the protection of the state and of the law. The Estonian state shall also protect its citizens abroad."

[14] "The guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments."

[15] "An Estonian citizen has the right to state assistance in the case of old age, incapacity for work, loss of a provider, or need."

[16] This division was first introduced by Robert Alexy in the first systematic monograph concerning fundamental rights in the Estonian Constitution: R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 51 ff., 56 ff., 68 ff., 73 f., 76 f.

detailed.[17] In addition, §10[18] opens the constitutional rights catalogue towards human rights and constitutes a constitutional rights development clause.[19] All constitutional rights are procedurally guaranteed by the general right to address a court in case of an alleged violation of a right in §15(1).[20] Therefore, the Estonian Constitution is a typical example of a constitution adopted after the fall of an authoritarian regime – it is fully binding and enforceable in courts.

The highest appeal court is the Estonian Supreme Court (SC), which unifies the functions of the final appellate instance of civil, criminal, and administrative jurisdictions, alongside constitutional review.[21] The power of constitutional review can be exercised either by the Constitutional Review Chamber or, alternatively, by the SC *en banc*. The first public hearing of the SC took place on 27 May 1993 and the Constitutional Review Chamber of the SC rendered its first judgment on 22 June 1993. The constitutional procedural law is regulated by the Constitutional Review Court Procedure Act (CRCPA)[22] which provides for 14 different types of proceedings. The most important type of proceedings is the concrete norm control which may be initiated by any court that concludes that a law, on whose validity its decision depends, is unconstitutional. However, the CRCPA does not provide for explicitly an individual constitutional complaint. In spite of that, there has been one successful precedent[23] and the SC has in several decisions stressed the possibility of the individual constitutional complaint

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[17] It contains classic rights and liberties like the right to privacy in §26, freedom to choose an occupation in §29(1), property right in §32, inviolability of the home in §33, right to free movement in §34, freedom of religion in §40, secrecy of correspondence in §43, freedom of expression in §45, freedom of assembly in §47 etc. as well as special social rights like e.g. the right to education in §37.

[18] "The rights, freedoms and duties set out in this chapter do not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and which are in conformity with the principles of human dignity, social justice and democratic government founded on the rule of law."

[19] P. Häberle. Dokumentation von Verfassungsentwürfen und Verfassungen ehemals sozialistischer Staaten. – Jahrbuch des öffentlichen Rechts der Gegenwart 43 (1995), p. 177; R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 87 f.; M. Ernits. Põhiõigused, demokraatia, õigusriik. Tartu: Tartu Ülikooli Kirjastus, 2011, p. 140.

[20] "Everyone whose rights and freedoms have been violated has the right of recourse to the courts. Everyone is entitled to petition the court that hears his or her case to declare unconstitutional any law, other legislative instrument or measure which is relevant in the case."

[21] §149(3): "The Supreme Court is the highest court in the state and shall review court judgments by way of cassation proceedings. The Supreme Court is also the court of constitutional review."

[22] *Põhiseaduslikkuse järelevalve kohtumenetluse seadus*. – RT I 2002, 29, 174; RT I, 23.12.2013, 57: https://www.riigiteataja.ee/en/eli/ee/508042019015/consolide/current.

[23] SCebj 17.03.2003, 3-1-3-10-02 (*Brusilov*), especially para. 17. Cf. ALCSCr 22.12.2003 and SCebj 30.04.2004, 3-3-1-77-03.

deriving directly from §15(1) of the Constitution.[24] Nevertheless, it remains disputable in Estonian constitutional law theory whether the Constitution establishes a right to individual constitutional complaint to the SC or do all courts have the obligation to enforce constitutional rights and there remains no room for a direct complaint to the SC.[25]

The following analysis will not include numerous references of the SC on judgments of the European Court of Human Rights. Already in *travaux preparatoirs* of the Constitution the prominent role of the European Convention on Human Rights (ECHR) was underlined[26] and the ECHR was one of the main models for the constitutional rights chapter of the Constitution. Later on the SC pointed out "that proceeding from the aforesaid the European Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an inseparable part of Estonian legal order and the guarantee of the rights and freedoms of the Convention is, under §14 of the Constitution, also the duty the judicial power."[27] The SC used the ECHR as an interpretation argument even

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[24] CRCSCj 09.06.2009, 3-4-1-2-09, para. 36; CRCSCr 23.03.2005, 3-4-1-6-05, para. 4; 09.05.2006, 3-4-1-4-06, paras. 8 f.; 20.05.2009, 3-4-1-11-09, paras. 5 ff.; 07.12.2009, 3-4-1-22-09, para. 7; 10.06.2010, 3-4-1-3-10, paras. 13 f.; 23.01.2014, 3-4-1-43-13, para. 9; 27.01.2017, 3-4-1-14-16, para. 22.

[25] See e.g. the materials of the 2013 conference on the Brusilov case (SCebj 01.01.2009, 3-1-3-10-02), (available in Estonian) http://www.oigus-selts.ee/konverentsid/kumme-aastat-brusiloviga-kuidas-edasi. In 2017 the controversy sparked again, cf. I. Pilving. Kas Eestis on vaja individuaalkaebust? – Kohtute aastaraamat 2016, p. 81 ff.; E. Kerganberg. Individuaalkaebus kui riigisaladus. – Kohtute aastaraamat 2016, p. 91 ff. There was also a passionate debate in the press: L. Velsker. Reinsalu plaanitav seaduseelnõu on õiguskantsleri hinnangul arusaamatu ja ohustab demokraatiat. – Postimees Online (10.03.2017); R. Maruste. Õiguskantsler püüab eksitada seadusandjat ja avalikkust. – Postimees Online (14.03.2017); K. Kangro. Rask näeb otsekaebuste lubamise plaanis katset õiguskantsler tasalülitada. – Postimees Online (15.03.2017); Ü. Madise. Otsekaebuse petukaup ehk kuidas rohkem on tegelikult vähem. – Postimees Online (16.03.2017); H. Mihelson. Riigikohus ei toeta otsekaebuste lubamise plaani, kuid soovib arutelu jätkata. – Postimees Online (29.03.2017); I. Pilving. Põhiõiguste kaitset tuleb alustada õigest otsast. – Postimees Online (02.04.2017) (all available in Estonian at: http://www.postimees.ee/); U. Lõhmus. Võimalus pöörduda otse riigikohtusse väärib arutelu. – ERR (16.03.2017) (available in Estonian at: https://www.err.ee/584528/uno-lohmus-voimalus-poorduda-otse-riigikohtusse-vaarib-arutelu). The starting point of the debate was a plan of the Minister of Justice to introduce the individual constitutional complaint to the CRCPA that triggered exceptionally harsh critique especially from the Chancellor of Justice Ülle Madise. The strong reaction is somewhat surprising and regrettable because the central task of the Chancellor of Justice is to protect constitutional rights and the individual constitutional complaint is their procedural guarantee of the last resort.

[26] V. Rumessen. – V. Peep (ed.). Põhiseadus ja Põhiseaduse Assamblee. Tallinn: Juura, 1997, p. 172.

[27] SCebj 06.01.2004, 3-1-3-13-03, para. 31; cf. CRCSCj 04.04.2011, 3-4-1-9-10, para. 54.

before Estonian accession to the ECHR[28] and has repeatedly done this after the accession.[29]

Except some early references to the Charter of Fundamental Rights of the European Union, the following analysis will not deal with links to the EU Law.[30]

The following analysis concentrates on the use of comparative national and international law beyond the ECHR and the case law of the ECtHR in judgments of constitutional review and judgments of the SC *en banc*. References to the judgments of the Administrative Law Chamber are also used where appropriate. Some of the judgments of the SC *en banc* are also formally constitutional review cases but often they are formally criminal, civil or administrative law cases which despite that essentially deal with the constitutional matters.

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[28] CRCSCj 12.01.1994, III-4/1-1/94; cf. judgment of the Criminal Law Chamber of the SC (CLCSCj) 12.12.1995, III-1/3-47/95.

[29] Some of the most important cases: SCebj 06.01.2004, 3-1-3-13-03; 06.01.2004, 3-3-2-1-04; 18.03.2005, 3-2-1-59-04; 14.04.2009, 3-3-1-59-07, para. 32; 12.04.2011, 3-2-1-62-10, paras. 48.4, 57.3, 62.2; CRCSCj 04.04.2011, 3-4-1-9-10.

[30] 2005 the SC formulated its first version of the relationship between EU Law and domestic law: "The European Union law has indeed supremacy over Estonian law, but taking into account the case law of the European Court of Justice, this means the supremacy upon application. The supremacy of application means that the national act which is in conflict with the European Union law should be set aside in a concrete dispute […]" (SCebj 19.04.2005, 3-4-1-1-05, para. 49. To this judgment: U. Lõhmus. Euroopa Liidu õigussüsteem ja põhiseaduslikkuse kontroll pärast 1. maid 2004. – Juridica 2006/1, p. 4 f.) 2006 the SC went significantly further and suspended large parts of the Constitution: "[…] the Constitution of the Republic of Estonia must be read together with the Constitution of the Republic of Estonia Amendment Act, applying only the part of the Constitution that is not amended by the CAA. […] In the substantive sense this amounted to a material amendment of the entirety of the Constitution to the extent that it is not compatible with the European Union law. To find out, which part of the Constitution is applicable, it has to be interpreted in conjunction with the European Union law, which became binding for Estonia through the Accession Treaty. At that, only that part of the Constitution is applicable, which is in conformity with the European Union law or which regulates the relationships that are not regulated by the European Union law. The effect of those provisions of the Constitution that are not compatible with the European Union law and thus inapplicable is suspended." (Opinion of the CRCSC 11.05.2006, 3-4-1-3-06, paras. 14, 16.) This statement of the SC has been heavily criticized in the literature as too far going. (L. Mälksoo. Eesti suveräänsus 1988–2008. – H. Kalmo, M. Luts-Sootak (eds.). Iganenud või igavene? Tekste kaasaegsest suveräänsusest. Tartu: Tartu Ülikooli Kirjastus, 2010, p. 147 f.; U. Lõhmus. Põhiseaduse muutmine ja muutused põhiseaduses. – Juridica 2011/1, p. 24 f.; M. Ernits. Põhiõigused, demokraatia, õigusriik. Tartu: Tartu Ülikooli Kirjastus, 2011, p. 37 ff., 63 ff.; cf. B. Aaviksoo. Konstitutsiooniline identiteet: kild moodsa konstitutsionalismi kaleidoskoobis. – Juridica 2010/5, p. 335 ff.).

## II. Comparative National and International Law in the Case Law of the Supreme Court

Historically bound to the German legal culture, after regaining the independence in 1991 Estonia took again mainly an example of the German legal doctrine. The most influential model for reconstruction of vast parts of the Estonian legal order was modern German law. In first order this applies to the central parts of private law but also for criminal law and general administrative law. However, often the introduced rules were radically simplified. In this way Estonia gained a young and dynamic legal order where some of the principles and tenets that have become natural in more settled legal systems must still develop.

In Estonian public law literature comparative law arguments are widespread.[31] However, probably due to limited academic capacity there has been no serious academic controversy about the use of foreign law arguments in constitutional law or specifically in the case law of the SC.[32] The possibility to use comparative law arguments in constitutional review judgments can therefore be regarded as the dominant opinion.

### 1. General Principles of Law

Already in 1994, the Supreme Court declared that general principles of law developed by European institutions are incorporated into the Estonian legal system. The facts of the case were, in short, that the Farm Act introduced a five-year income tax exemption for interest on loans granted to farmers, which was subsequently repealed when the coalition changed. In this connection, the question arose as to whether the tax advantage can be repealed before the end of the five-year period granted. The SC held such drawback for a violation of the

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[31] E.g. K. Merusk, I. Koolmeister. Haldusõigus. Tallinn: Juura, 1995; K. Merusk. Administratsiooni diskretsioon ja selle kohtulik kontroll. Tallinn: Juura, 1997: R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljanne 2001; A. Aedmaa, E. Lopman, N. Parrest, I. Pilving, E. Vene. Haldusmenetluse käsiraamat. Tartu: Tartu Ülikooli Kirjastus, 2004; R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse. Tallinn: Juura, 2004; P. K. Tupay. Verfassung und Verfassungsänderung in Estland. Berlin: Berliner Wissenschafts-Verlag, 2015. Cf. Dissenting opinion of the justice Uno Lõhmus to the CRCSCj 05.10.2000, 3-4-1-8-00, para. II; Dissenting Opinion of Justice Eerik Kergandberg, joined by Justices Jaak Luik and Hele-Kai Remmel, to the SCebj 17.03.2003, 3-1-3-10-02, paras. 9 f.; Dissenting opinion of Justice Julia Laffranque, joined by Justices Tõnu Anton, Peeter Jerofejev, Hannes Kiris, Indrek Koolmeister and Harri Salmann, to the SCebj 19.04.2005, 3-4-1-1-05, para. 10; Dissenting opinion of the Justices Villu Kõve, Peeter Jerofejev and Henn Jõks to the SCebj 21.06.2011, 3-4-1-16-10, para. 5; Dissenting opinion of the justices Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa to the SCebj 12.07.2012, 3-4-1-6-12, para. 3.

[32] Cf. M. Ernits. Põhiõigused, demokraatia, õigusriik. Tartu: Tartu Ülikooli Kirjastus, 2011, p. 119 ff.

principle of legitimate expectations. However, the Constitutional Review Chamber of the SC spiced the reasons of the judgment with one of its best known *obiter dictums* in Estonia:

> "In democratic states the laws and general principles of law developed in the course of history are observed in law-making as well as in implementation of law, including in the administration of justice. When creating the general principles of Estonian law the general principles of law developed by the institutions of the Council of Europe and the European Union should be taken into consideration alongside the Constitution. These principles have their origin in the general principles of law of the highly developed legal cultures of the member states. […] The validity of the principles of a state based on democracy, social justice and the rule of law means that in Estonia the general principles of law recognised within the European legal space are in force. Pursuant to the Preamble of the Constitution, the Estonian state is founded on liberty, justice and law. In a state founded on liberty, justice and law the general principles of law are in force. Consequently, an Act which is in conflict with these principles is also in conflict with the Constitution."[33]

The general principles of law referred by the SC have the following characteristics cumulatively – they:

- are developed in the course of history;
- are developed by the institutions of the Council of Europe and the European Union (recognised within the European legal space);
- have their origin in the general principles of law of the highly developed legal cultures of the member states;
- are based on democracy, social justice and the rule of law;
- are founded on liberty, justice and law.

The SC stresses that a law which is in conflict with the general principles is also in conflict with the Constitution.

From these observations arises the question why did the SC need the general principles in its reasoning if the Constitution already introduces constitutional rights, democracy and the rule of law? If the Constitution includes all important principles there is no logical need to invent external principles and to declare afterwards that a breach of the latter would lead to a breach of the Constitution. Later the SC has declared repeatedly that the case deciding principle, i.e. the principle of legitimate expectations derives from the Constitution itself, more precisely from §10.[34] Consequently, the general principles of law were strictly speaking superfluous.

However, the SC did not commit a mistake by declaring the general principles of law to be an important part of Estonian legal system. In the early phase of the

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[33] CRCSCj 30.09.1994, III-4/A-5/94. Cf. CRCSCj 17.02.2003, 3-4-1-1-03.

[34] CRCSCj 17.03.1999, 3-4-1-2-99, para. II; 02.12.2004, 3-4-1-20-04, para. 11.

constitutional review the interpretative skills such as understanding of the fundamental principles of a constitutional democracy were half-baked. With the introduction of the general principles of law the SC paved the way for faster integration of those doctrines and structures into Estonian legal system that have been developed by states with advanced legal culture. Essentially it was a comparative argument. With the help of the catalyst of the general principles of law the Constitutional Review Chamber of the SC stimulated the development of particularly the following principles in Estonian constitutional review: legality,[35] prohibition on retroactivity,[36] legitimate expectations[37] and the even broader legal certainty.[38] The Administrative Law Chamber of the SC also elaborated in its early judgments on general principles of administrative law, especially on proportionality,[39] legitimate expectations[40] and the principle of equal treatment.[41] According to the model from 1994, the Administrative Law Chamber derived those principles also directly from the Constitution.

Although not explicitly connected to the general principles of law by the Constitutional Review Chamber of the SC, the principle of proportionality may also be considered to be a general principle of law deriving from legal systems of constitutional democracies with highly developed legal culture. The Constitutional Review Chamber of the SC introduced it in 1997, without connecting it with any constitutional provision, holding a restriction of freedom of movement for justifiable "if it is proportional with the desired goal and it is impossible to achieve the desired goal by other means".[42] It therefore was first introduced essentially as a general principle of law. In 1998 the SC reformulated the core of the principle of proportionality deducing it from the rule of law: "Pursuant to the principle of proportionality, valid in a state based on the rule of law, the measures taken must be proportional to the objectives to be achieved"[43] and delivered the following justification: "It is a principle of constitutional jurisdiction that when assessing the conflicting rights or competencies a solution has to be found that does not damage constitutional stability, that would restrict rights as little as possible, and would maintain the constitutional nature of law, and guarantee a

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[35] CRCSCj 12.01.1994, III-4/1-1/94: „According to the principle of legality, which is a generally recognised principle of (international) law and is established in §3 of the Constitution of the Republic of Estonia, fundamental rights and freedoms may be restricted solely on the basis of law."

[36] CRCSCj 30.09.1994, III-4/A-5/94.

[37] CRCSCj 30.09.1994, III-4/A-5/94; 30.09.1998, 3-4-1-6-98, para. II.

[38] CRCSCj 30.09.1998, 3-4-1-6-98, para. II.

[39] ALCSCr 13.04.1998, 3-3-1-14-98, para. 3; ALCSCj 17.06.2002, 3-3-1-32-02, para. 21; 26.11.2002, 3-3- 1-64-02, para. 10.

[40] ALCSCj 27.03.2002, 3-3-1-17-02, para. 18.

[41] ALCSCr 24.03.1997, 3-3-1-5-97, para. 4.

[42] CRCSCj 06.10.1997, 3-4-1-3-97, para. I.

[43] CRCSCj 30.09.1998, 3-4-1-6-98, para. III.

justified and constitutional exercise of rights."[44] The next milestone was judgment of the Constitutional Review Chamber of the SC from 2000, where the SC for the first time clearly applied the scheme of infringement and limits as well as all three levels of the principle of proportionality and stated: "Restrictions must not prejudice legally protected interests or rights more than is justifiable by the legitimate aim of the provision. The means must be proportional to the desired aim […]. The legislators, as well as those who apply law, must take the proportionality principle into consideration."[45] In this judgment the SC also connected for the first time the principle of proportionality with §11 of the Constitution.[46] From 2002 on the SC has applied the fully developed three level principle of proportionality:

> "The principle of proportionality arises from the second sentence of §11 of the Constitution, pursuant to which the restrictions on rights and freedoms must be necessary in a democratic society. The compliance with the principle of proportionality is reviewed by the courts on three consecutive levels – first the suitability of a measure, then the necessity of the measure and, if necessary, also the proportionality of the measure in the narrower sense, i.e. the reasonableness thereof. If a measure is manifestly unsuitable, it is needless to review the necessity and reasonableness of the measure. A measure that fosters the achievement of a goal is suitable. For the purposes of suitability a measure, which in no way fosters the achievement of a goal, is undisputedly disproportional. The requirement of suitability is meant to protect a person against unnecessary interference of public power. A measure is necessary if it is not possible to achieve the goal by some other measure which is less burdening on a person but is at least as effective as the former measure. In order to determine the reasonableness of a measure the extent and intensity of the interference with a fundamental right on the one hand and the importance of the aim on the other hand have to be weighed. The more intensive the infringement of a fundamental right the weightier the reasons justifying it have to be."[47]

The use of general principles of law in reasons of early SC judgments represents a willingness to integrate the Estonian legal system that was for long time locked behind the iron curtain to the (continental) European legal culture and to open it up to human rights based values and to speed up the transformation of the legal system. The SC has essentially succeeded in reaching this aim.

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[44] CRCSCj 14.04.1998, 3-4-1-3-98, para. IV.

[45] CRCSCj 28.04.2000, 3-4-1-6-00, para. 13.

[46] "Rights and freedoms may only be circumscribed in accordance with the Constitution. Such circumscription must be necessary in a democratic society and may not distort the nature of the rights and freedoms circumscribed."

[47] Formulation from CRCSCj 17.07.2009, 3-4-1-6-09, para. 21, and 15.12.2009, 3-4-1-25-09, para. 24. Beginning with CRCSCj 06.03.2002, 3-4-1-1-02, para. 15; cf. CRCSCj 12.06.2002, 3-4-1-6-02, para. 12; 30.04.2004, 3-4-1-3-04, para. 31; SCebj 17.03.2003, 3-1-3-10-02, para. 30; 17.06.2004, 3-2-1-143- 03, paras. 20 ff.; 03.01.2008, 3-3-1-101-06, para. 27; 07.12.2009, 3-3-1-5-09, para. 37; 21.01.2014, 3-4-1-17-13, paras. 32 ff.

Furthermore, the SC has deduced from "general principles of law of a democratic rule of law state" the right to self-regulation, i.e. "that the branches of state power and constitutional institutions must have autonomy in the exercise of the competencies given to them by the Constitution".[48] This is essentially a concretisation of the checks and balances principle. Later on the SC added the autonomy of local governments as "a general constitutional principle".[49] The autonomy is set out as the principle of local self-government in XIV. Chapter of the Constitution and it is structurally similar to the autonomy of universities and research institutions (§38(2)) and the partial autonomy of the Bank of Estonia (§111 and §112) – all three are guarantees of lower level public law legal persons to decide some issues on its own responsibility. These two principles differ from the principles above because they belong rather to the law relating to the organisation of the state and they do not concern the relationship between the state and individuals. However, they have become important principles of Estonian constitutional law as well.

## 2. International Law

§123 of the Constitution provides for: "The Republic of Estonia may not enter into international treaties which are in conflict with the Constitution. When laws or other legislation of Estonia are in conflict with an international treaty ratified by the *Riigikogu,*[50] provisions of the international treaty apply." This means that any international treaty has to be in conformity with the Constitution. If the SC discovers a contradiction between the Constitution and a treaty after the treaty has entered into force and the SC cannot eliminate the contradiction by interpretation, the state organ which entered into the treaty is obliged to withdraw from it or initiate its denunciation or amendment. The §123(2) introduces a primacy of applicability of treaties in relation to acts of the parliament which is similar to the primacy of the EU Law. However, §158(4) of the Code of Administrative Court Procedure[51] does not provide for any competence of administrative courts to set aside a valid act of parliament if it contravenes any international treaty as it does for contradictions with the Constitution or the EU Law. Thus, although §123(2) of the Constitution introduces by wording a primacy of application of any international treaty, a contradiction of an act of parliament and

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48 CRCSCj 14.04.1998, 3-4-1-3-98, para. IV.

49 SCebj 19.04.2005, 3-4-1-1-05, para. 24.

50 The Estonian Parliament, see: https://www.riigikogu.ee/en/.

51 "When deciding a matter, the court sets aside any Act of Parliament or other legislative act if that Act of Parliament or legislative act contravenes the Constitution of the Republic of Estonia or the law of the European Union."
(https://www.riigiteataja.ee/en/eli/ee/512122017007/consolide/current).

an international treaty is considered by the SC as an argument for unconstitutionality of the corresponding act of parliament.[52]

Thus, the application of the international law in the case law of the SC is twofold. In some cases the SC confirms the interpretation indicated above and refers to the possibility of disapplication of the contradicting national norm.[53] In other cases the SC does not use the international law in the sense of §123 of the Constitution but uses it instead as a comparative argument in order to interpret a constitutional provision. In this way the international law gains a double function – first, as a binding norm below the Constitution and above parliamentary law and second, as a guideline in the framework of interpretation. Hereby the SC uses references to hard[54] as well as to soft law.[55]

In 1996 the President of the Republic initiated an abstract norm control of the Non-profit Associations Act passed by the *Riigikogu* but not yet promulgated and contested *inter alia* the conformity with the UN Convention on the Rights of the Child. The Act provided for that only persons with active legal capacity may set up and belong to the leadership of non-profit associations. As according to the General Part of the Civil Code Act a person with active legal capacity is, as a rule, a person who has attained 18 years of age, the Act excluded children's right to found associations and participate in the leadership thereof. First, the SC established that the Convention has become binding for Estonia and then subsumed:

> "Article 15(1) of the Convention on the Rights of the Child provides for that States Parties recognise the rights of the child to freedom of association, which embraces the freedom to form associations, and freedom of peaceful assembly. According to Article 1 of the Convention a child means every human being below the age of 18 years. According to Article 3 of the Convention in all actions concerning children, whether undertaken by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. With the accession to the Convention Estonia has recognised the rights of the child to freedom of association, and the obligation of the state authority to establish pertinent legal mechanisms in national legislation. On the basis of the aforesaid, §5 of the Non-profit Associations Act is in conflict with Article 15(1) of the Convention."[56]

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[52] CRCSCj 10.05.1996, 3-4-1-1-96, para. II; 21.01.2004, 3-4-1-7-03, para. 20; SCebj 14.04.2009, 3-3-1-59-07, paras. 33 f.

[53] ALCSCj 02.10.2014, 3-3-1-47-14, para. 17: "The Chamber notes that direct application of provisions of an international treaty on the basis of §123 of the Constitution does not provide for the initiation of constitutional review proceedings in relation to the domestic norm. The court dealing with the matter has in case of identification of a contradiction pursuant to §123(2) the right to disapply the domestic norm and to rely on the provision of the international treaty."

[54] E.g. CRCSCj 10.05.1996, 3-4-1-1-96, para. II; 26.03.1998, 3-4-1-4-98, paras. III, IV; 21.01.2004, 3-4-1-7-03, para. 20.

[55] E.g. CRCSCj 01.09.2005, 3-4-1-13-05, para. 17; SCebj 14.04.2009, 3-3-1-59-07, para. 33.

[56] CRCSCj 10.05.1996, 3-4-1-1-96, para. II.

In the resolution the SC declared the whole Non-profit Associations Act unconstitutional. It was legally possible because the Act was not valid law yet and the §123 of the Constitution was not applicable. In this way the international law argument became supportive constitutional argument in a comparative role.

Another case from 1998 concerned a professional foreign seafarer who was refused to leave Estonia because he was not entered into the crew list of a ship flying Estonian flag although he had the seafarer's discharge book provided for by the Convention No. 108 of the International Labour Organisation[57] that enabled him to leave Estonia. According to the Convention No. 108 the seafarer's discharge book was an employment document proving the identity of a professional seafarer and enabled the holder thereof to leave the country on a ship and arrive from a ship which was located abroad; also to leave and arrive on a ship to the crew list of which he or she had been entered. The Administrative Court satisfied the complaint of the seafarer and initiated a concrete norm control of the corresponding government regulation that imposed the additional requirement of the entry into the crew list of a ship flying Estonian flag. Before the SC managed to render the judgment, the government abolished the regulation because it lacked a legal basis. However, the SC held it for necessary to examine the merits of the application. Thereby the SC found:

> "The unequal treatment of aliens and Estonian citizens is not in conformity […] with Article 5 of Convention No. 108, pursuant to which any seafarer who holds a valid seafarer's identity document issued by the competent authority of a territory for which this Convention is in force, shall be readmitted to that territory, irrespective of whether he or she has been or has not been entered in the crew list of a ship flying Estonian flag. Pursuant to Article 6 of the Convention each member state shall permit the entry into a territory for which this Convention is in force of a seafarer holding a valid seafarer's identity document, when entry is requested for temporary shore leave while ship is in port. The Convention does not regulate the issues of leaving the territory of a state. This right, especially if related to going on board of one's ship, is self-evident and proceeds from the purpose of the Convention, namely to simplify the formalities related to seafarer's travel to or from ships. As the referred Regulation of the Government of the Republic is in conflict with Convention No. 108, the implementation of the Regulation is in conflict with §123 of the Constitution. If Estonian laws or other legislation are in conflict with international agreements ratified by the *Riigikogu*, then, pursuant to second indent of §123 of the Constitution, the provisions of the international agreement shall apply. […] Pursuant to Article 1 of Convention No. 108 it was decided to unify seafarers' national identity documents, so that every seafarer could freely and without any restrictions work on a ship of a country, member to the convention, other than a ship of war, if the ship is registered in a territory for which the convention is in force. Under this principle it is unjustified and contrary to the spirit of the Convention to issue to seafarers identity documents on nationality grounds, pursuant to which an Estonian citizen can, on the basis of

[57] Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C108.

> a seafarer's service record book, enjoy wider rights upon arrival in Estonia and leave from Estonia than an alien who has been issued a certificate of record of service on Estonian ships."[58]

The whole judgment of the SC should be considered as an *obiter dictum* because since the government had abolished its restricting regulation there was no constitutional need to render any review judgment anymore. Therefore, the actual message of the judgment is that international obligations should be taken seriously by the legislator and that international law may be used as a supportive tool for constitutional interpretation. The extensive quotes of the Convention No. 108 witness the eagerness of the SC to demonstrate its international and comparative law friendliness.

A further example derives from one of the few landmark judgments of the Constitutional Review Chamber of the SC. The judgment that was rendered 2004 was based on joined cases of a concrete norm control and abstract norm control initiated by the Chancellor of Justice[59] and concerned a provision in the Social Welfare Act which deprived persons who were using dwellings on the bases different from those established in that provision of the possibility to get subsistence benefits. According the SC:

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[58] CRCSCj 26.03.1998, 3-4-1-4-98, paras. III, IV.

[59] The monocratic institution of the Chancellor of Justice is an exceptional one (see: http://www.oiguskantsler.ee/en). Heiki Loot, the current justice at the SC, was the first to propose a tripartite division of the functions of the Chancellor of Justice (protocol of the meeting of the Commission for the Legal Expertise of the Constitution from 14–15 November 1997, not yet published). The first function of the Chancellor of Justice is to exercise supervision over the constitutionality and legality of the proceedings of the legislative and executive power. To perform this function the Chancellor of Justice has four wide-reaching competences. The Chancellor of Justice has the right to speak before the *Riigikogu* and during the sessions of the Government (§141(2) of the Constitution), to lodge a complaint against any state organ, to submit a direction to the *Riigikogu* to bring forward an Act within 20 days in accordance with the Constitution (§142(1)) and also to appeal to the SC, if his request was not fulfilled (§142(2)). The second function is the ombudsman function (§139(1) and (2)). This function includes the right to receive individual complaints, and to analyse and make suggestions to improve administrative governance. His third function is that of State Prosecutor (§139(3)). The Chancellor of Justice has the right to decide whether to bring a question of removal of immunity before the Parliament. According to the Constitution, this immunity is granted to members of the Parliament (§76), the President (§85), the Ministers (§101), the Auditor General (§138), and to all the judges (§153). In addition, the Chancellor of Justice has an immunity, which can be waived in cases where the right to decide over his immunity belongs to the *Riigikogu* and the President has the right to propose removal. A fourth important function of the Chancellor of Justice derives not from the Constitution but from the crcpa and consists in acting as *amicus curiae* in most of the constitutional proceedings. This function reminds to the function of Advocate General at the Court of Justice. Finally, the Chancellor of Justice Act adds to Chancellor of Justice several further functions like e.g. the Children's Ombudsman or the national preventive mechanism provided for in Article 3 of the Optional Protocol of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

> "The Constitution does not specify when a person is needy, that is when the satisfaction of his or her primary needs is not guaranteed, and that is why, to interpret the Constitution, it is necessary to examine international agreements to which the Republic of Estonia has acceded. Article 11 of the International Covenant on Economic, Social and Cultural Rights […] recognises "the right of everyone to an adequate standard of living for himself and his family". According to Article 13(1) of the European Social Charter (revised) […] a state must "ensure that any person who is without adequate resources and who is unable to secure such resources whether by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance […]". The Social Charter requires that the states establish systems of social security (Article 12(1)) that guarantee benefits in certain situations (sickness, incapacity for work, maternity, unemployment, family, old age, death, widowhood, industrial accidents, occupational diseases). Social insurance systems require the contribution of people themselves into the accumulation of funds out of which the payments shall be made. The Constitution does not expressly speak of the state's duty to create social insurance systems. The application practice of the Social Charter, in assessing the need, proceeds from the minimum means of subsistence, established by state, which means that those persons are needy whose resources do not guarantee the minimum means of subsistence. That is why the amount of assistance given to such a person must not be in manifest inconformity with the minimum means of subsistence of the state."[60]

Furthermore, the SC made a reference to the Charter of Fundamental Rights of the European Union.[61] Finally the SC declared the provision of the Social Welfare Act for unconstitutional to the extent that expenses connected with dwelling of needy people and families who were using dwellings not referred to in the corresponding provision were not taken into account and were not compensated for upon the grant of subsistence benefits.

This judgment demonstrates once again the use of international law as comparative arguments by the SC. The outstanding importance of this judgment arises mainly from the facts that the SC declared the right to receive state assistance in the case of need to a subjective constitutional right and the principles of a state based on social justice and human dignity to fundamental constitutional principles.[62] Ten years later, in a judgment of 2014 the SC referred in an *obiter dictum* to the European Committee of Social Rights Conclusions 2013 according to which Estonian practice of granting social assistance to a single needy person is inadequate and not in conformity with article 13(1) of the European Social Charter.[63]

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[60] CRCSCj 21.01.2004, 3-4-1-7-03, para. 20.

[61] See next section.

[62] CRCSCj 21.01.2004, 3-4-1-7-03, paras. 16, 14.

[63] CRCSCj 05.05.2014, 3-4-1-67-13, para. 50. The European Committee of Social Rights concluded (European Committee of Social Rights. Activity Report 2013. Council of Europe, 2014, p. 84. Available at: https://www.coe.int/en/web/european-social-charter/activity-reports): "The Committee concludes that the situation in Estonia is not in conformity with

The further judgment from 2005 dealt with e-voting issues. In 2002 the *Riigikogu* passed the Local Government Council Election Act that enabled the voters holding a certificate for giving a digital signature to vote from 2005 on in local government council elections electronically on the webpage of the National Electoral Committee. In 2005, before the election, the *Riigikogu* amended the aforementioned election law. The President of the Republic held the amendment for unconstitutional and appealed the amendment act to the SC. In its argumentation the SC referred *inter alia* to a recommendation of the Council of Europe Committee of Ministers:

> "Pursuant to Recommendation Rec(2004)11 of the Council of Europe Committee of Ministers to member states on legal, operational and technical standards of e-voting […] the principle of uniform suffrage in the context of e-voting means four requirements. Firstly, it should be guaranteed that a voter shall be prevented from inserting more than one ballot into the electronic ballot box, and that a voter shall be authorised to vote only if it has been established that his/her ballot has not yet been inserted into the ballot box (§5). Secondly, the e-voting system shall prevent any voter from casting a final vote by more than one voting channel (§6). Thirdly, every vote deposited in an electronic ballot box shall be counted, and each vote cast in the election or referendum shall be counted only once (§7). Fourthly, where electronic and non-electronic voting channels are used in the same election or referendum, there shall be a secure and reliable method to aggregate all votes and to calculate the correct result (§8). All the requirements are aimed at guaranteeing that only one vote per voter is taken into account upon electronic voting. Although the Recommendation of the Council of Europe is not a legally binding document, it summarises the understanding of the democratic states of Europe of the conformity of electronic voting with the election principles inherent to democratic states, and it is thus an appropriate tool for interpreting the Constitution."[64]

Finally the SC dismissed the claim of the President. However, the introduction of these comparative arguments to the reasoning conveys the notion of elegance.

A further landmark judgment of the SC *en banc* from 2009 addressed the constitutionally necessary extent of legislative safeguards for the independence of judges. A judge under criminal investigation was suspended from the office and the Minister of Justice suspended by his decision also his salary payments. However, despite the suspension of the public service relationship the judge's status was retained and pursuant to law he could not be employed other than in the office of judge, except for teaching or research. The judge filed an action before the administrative court against the decision of the Minister of Justice. As the case reached the SC, the Administrative Law Chamber referred the matter to the SC *en banc* for adjudication. The SC *en banc* referred *inter alia* to the European Charter on the Statute for Judges:

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Article 13§1 of the Charter on the ground that the amount of social assistance granted to a single person without resources is inadequate."

64 CRCSCj 01.09.2005, 3-4-1-13-05, para. 17.

> "Nevertheless, in Article 6.1 of the European Charter on the Statute for Judges, adopted at a multilateral meeting organised by the Council of Europe […] it is considered to be universally recognised that remuneration is one of the guarantees for the independence of judges. The referred Article establishes the following: "Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality." In regard to the referred provision the following is pointed out in the Explanatory Memorandum to the Charter: "The Charter provides that the level of the remuneration to which judges are entitled for performing their professional judicial duties must be set so as to shield them from pressures intended to influence their decisions or judicial conduct in general, impairing their independence and impartiality." […] On the basis of the aforesaid the Supreme Court *en banc* holds that salary as a guarantee for the independence of judges is within the sphere of protection of §§15, 146 and 147(4) of the Constitution. Sufficient income guaranteed by the state to the judges while they hold the office of judge allows them to perform the role of judge as expected and, at the same time, constitutes a guarantee to participants in proceedings that their cases are heard by an independent and impartial tribunal. The Constitution does not allow for the conclusion that the guarantees for the independence of judges are not applicable to a judge during certain periods of time while he or she holds the office of judge, e.g. during the suspension of a service relationship. Also, for the duration of suspension of a service relationship […] an income must be guaranteed to a judge in order to guarantee his or her independence as a judge after his or her authority is restored."[65]

As we have seen, the SC used the European Charter on the Statute for Judges as the crucial argument to interpret constitutional provisions. As a result, the SC declared the failure to pass such legislation that would allow paying a salary or other equivalent compensation to a judge whose service relationship is suspended for the duration of a criminal proceeding for unconstitutional.

The SC has also made references to other treaties,[66] especially numerous references the European Charter of Local Self-Government[67] but the aforementioned examples shall suffice here.

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[65] SCebj 14.04.2009, 3-3-1-59-07, paras. 33 f.

[66] E.g. SCebj 17.03.2003, 3-1-3-10-02, para. 21: "The Constitution was worded on the model of Article 15(1) of the UN International Covenant on Civil and Political Rights, the wording of which coincides with that of §23 of the Constitution."

[67] CRCSCj 05.02.1998, 3-4-1-1-98, para. IV; 09.02.2000, 3-4-1-2-00, para. 17; 15.07.2002, 3-4-1-7-02, para. 20; 16.01.2007, 3-4-1-9-06, para. 29; 19.03.2009, 3-4-1-17-08, paras. 38, 50 f.; 09.06.2009, 3-4-1- 2-09, paras. 41 f.; 26.06.2009, 3-4-1-4-09, para. 16; 30.09.2009, 3-4-1-9-09, para. 27; 15.10.2013, 3-4-1-47-13, para. 21; 20.12.2016, 3-4-1-3-16, paras. 89, 136; SCebj 19.04.2005, 3-4-1-1-05, para. 17; 16.03.2010, 3-4-1-8-09, paras. 50 f., 55, 57 f., 65, 68, 71, 83.

### 3. Charter of Fundamental Rights of the European Union

It is common knowledge that the Charter of Fundamental Rights of the European Union (Charter) was solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission but it became legally binding on the EU institutions and on national governments with the entry into force of the Treaty of Lisbon on 1 December 2009, which amended Article 6 of the Treaty on European Union.[68] However, the SC referred to the Charter even before Estonia's accession to the EU on 1 May 2004.

Already in February 2003 the SC consulted first time the Charter.[69] The case concerned the constitutionality of a government regulation that provided for in case of a satisfaction of any protest by a public tender the obligation to organise a new auction. The plaintiff of the underlying administrative proceedings was a company that gave the highest bid but had thereby breached some minor formalities. The plaintiff was therefore first excluded from the tender but after the satisfaction of his protest his bid was approved again. However, the plaintiff did not win the auction in spite of the highest bid because the government regulation did not allow simply awarding the highest bidder but prescribed the announcement of a new auction. The SC made in the reasons first a reference to the general principles of law and repeated essentially what it had said in 1994.[70] Then the SC introduced general principles of administrative law:

> "Principles of administrative law constitute a generalisation of rules valid in different branches of administrative law, which are expressed in different sources of law in different countries (e.g. in codified codes of administrative procedure, specific laws, judicial practice). In the European legal space the following principles are recognised as principles of administrative law: legal certainty, legitimate expectation, proportionality, non-discrimination, right to be heard in administrative procedure, right to procedure within a reasonable time, effectiveness and efficiency."[71]

After that the SC referred to Article 41 of the Charter:

> "Article 41 of one of the most recent international documents on fundamental rights – the European Union Charter of Fundamental Rights – directly refers to the right to good administration. The Charter puts an obligation on the European Union institutions and bodies to handle the affairs of persons impartially, fairly and within reasonable time. Pursuant to the Charter the right to good administration includes, inter alia, the right to have access to a person's file, right to be heard, the

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[68] 2016/C 202/02, OJ C 202, 07.06.2016, p. 389–405. Earlier versions of the Charter: 2000/C 364/01, OJ C 364, 18.12.2000, p. 1–22; 2007/C 303/01, OJ C 303, 14.12.2007, p. 1–16; 2010/C 83/02, OJ C 83, 30.03.2010, p. 389–403; 2012/C 326/02, OJ C 326, 26.10.2012, p. 391–407.

[69] CRCSCj 17.02.2003, 3-4-1-1-03.

[70] CRCSCj 30.09.1994, III-4/A-5/94.

[71] CRCSCj 17.02.2003, 3-4-1-1-03, para. 14.

> obligation of the administration to give reasons for its decisions and the right to compensation for damage caused by an administrative agency."[72]

The SC justified the reliance on the Charter essentially in two steps. First, the SC argued that constitutions of some European countries include some of the relevant principles. In step two the SC jumped to the Charter, presuming that the Charter is a certain concentrate of these principles. The Charter was not yet legally binding and Estonia was not yet a member state of the EU, but the SC decided to integrate the Charter as a comparative law argument into its argumentation. This witnesses obviously the EU friendliness of the SC. Furthermore, the actual trick of this argumentation was to make use of the constitutional rights development clause of §10 of the Constitution in order to introduce a new constitutional right – the right to good administration:

> "Pursuant to §10 of the Constitution the principles of a state based on democracy and rule of law are valid in Estonia. […] The analysis of the principles recognised in the European legal space leads to the conclusion that §14 of the Constitution gives rise to a person's right to good administration, which is one of the fundamental rights."[73]

It was a simple case because the government had obviously misused its discretion allowed by law. But, instead of simply examining the use of discretion, the SC chose to bring in many different principles. Thus, this judgment witnesses above the EU friendliness of the SC also the open mindedness and creativity of the SC.

The SC referred before the accession to the EU in two further judgments to the Charter. In the landmark judgment from March 2003 that was initiated by the individual constitutional complaint the SC *en banc* referred to the Charter deducing that it "establishes a principle that if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable".[74] In the above mentioned subsistence minimum case from January 2004 the SC referred *inter alia* to clauses in Charter that recognise the right to social and housing assistance and that ensure a decent existence for all those who lack sufficient resources as additional arguments to the European Social Charter (revised).[75]

After Estonia's accession to the EU in Mai 2004 the Charter continued to be a source for supportive arguments until it became fully binding. For instance in 2005 the SC referred, as an example, to Article 17 of the Charter to support the existence of the constitutional right to bequeath one's property.[76] In 2006 the Administrative Law Chamber of the SC made a reference to Article 1 of the

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[72] CRCSCj 17.02.2003, 3-4-1-1-03, para. 15. Cf. ALCSCj 19.12.2007, 3-3-1-80-06, para. 20.

[73] CRCSCj 17.02.2003, 3-4-1-1-03, paras.14, 16.

[74] SCebj 17.03.2003, 3-1-3-10-02, para. 21 (see a more detailed presentation of the case below).

[75] CRCSCj 21.01.2004, 3-4-1-7-03, para. 20.

[76] SCebj 22.02.2005, 3-2-1-73-04, para. 17.

Charter to support its argument that human dignity is inviolable, a basis for all constitutional rights of a person and the goal of protection of constitutional rights and freedoms.[77] After the Charter became binding, the SC used it a couple of times clearly outside of its field of application.[78]

All in this section mentioned references to the Charter can be considered as comparative law references.

### 4. Constitutions of Other Countries

In the context of its general principles case law the SC *en banc* pointed 2003 to different Constitutions of EU member states as sources of general principles of law:

> "The principles of good administration have been inserted in black and white into several constitutions. For example, pursuant to §21(2) of the Constitution of Finland provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as other guarantees of a fair trial and good governance shall be laid down by an Act. §31(2) of the Spanish Constitution requires efficient and economical use of public resources."[79]

Later in this judgment the SC added that "the Basic Law of the Federal Republic of Germany does not establish a principle that a law providing for a lesser punishment shall have retroactive force."[80]

These have remained the clearest comparative references to constitutional provisions of other countries.

In 2009 the SC held it for necessary to significantly restrict the possibility to use comparative argumentation in the reasoning of the judgments:

> "As regards the statement of the Tallinn City Council that the request should be admissible also arising from the source of §7 of the crcpa in the Constitution of the Federal Republic of Germany and the practice of the German Federal Constitutional Court which has been developed on the basis of the Constitution of the Federal Republic of Germany, the Chamber notes that the Supreme Court of the Republic of Estonia can only make its judgments on the basis of the Constitution of the Republic of Estonia. The comparative law arguments may have weight upon determining the content of the provisions of the Constitution of the Republic of Estonia but they cannot be used to constitute binding instructions for Estonian courts."[81]

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77 ALCSCj 28.03.2006, 3-3-1-14-06, para. 11.

78 ALCSCj 10.12.2010, 3-3-1-72-10, para. 14; ALCSCr 21.06.2010, 3-3-1-85-09, para. 19.

79 CRCSCj 17.02.2003, 3-4-1-1-03, para. 14.

80 SCebj 17.03.2003, 3-1-3-10-02, para. 24 (see next section of this article).

81 CRCSCr 22.12.2009, 3-4-1-16-09, para. 42.

However, the statement of the SC is at least misleading. The case was initiated by Tallinn City Council as a municipal constitutional complaint against some provisions of Local Government Council Election Act. The main issue of the case was the admissibility of the complaint. In the statement of claim the Tallinn City Council supported his interpretation of admissibility with some comparative arguments from German system.[82] The Chancellor of Justice acting as *amicus curiae* expressed his scepticism towards this interpretation.[83] The statement of the SC went even beyond the scepticism of the Chancellor of Justice and could be misinterpreted as a rejection of comparative law arguments. This is detrimental.

## 5. Other Comparative Law Arguments

The comparative law arguments below the constitutional level are relatively rare. However, there are a few good examples. They occur in judgments of the SC *en banc* which require in vast majority of cases also an interpretation of statutory law.

The best known example is the already mentioned landmark judgment from 2003. In this case the complainant whose name was Brusilov was convicted in 1997 for theft of other person's property on a large scale and punished for that by six years' imprisonment. On September 1 2002 a new Penal Code entered into force and replaced the old Criminal Code that had been a modification of the Soviet Criminal Code. The new Penal Code was prepared taking into account constitutional rights and fundamental principles of the Constitution and it – generally speaking – raised the sanctions for crimes against the person and reduced the sanctions for crimes against property. According to the new Penal Code, the maximum rate of punishment for the complainant's crime would have been five years' imprisonment. After entering into force of the new Penal Code the complainant wished to get released from further serving the sentence but the Penal Code Implementation Act did not provide for any legal basis for his release. The main substantial constitutional issue of the case was whether §23(2)2 of the Constitution[84] had to be extended to persons who were serving their sentences pursuant to judgments which had entered into force or not. In this judgment the SC made also long references to penal codes of other countries:

> "Some countries have further specified or established the principle of retroactive force of a lesser punishment in their Penal Codes. For example, the 1997 Criminal Code of Poland establishes that if for an offence, for which a new law establishes a maximum punishment which is lower than the sentence already passed, a judgment has already been rendered, then length of the sentence shall be decreased up to the maximum punishment established by the new law (§4(2)). The 1995 Penal Code of Spain stipulates that a law which alleviates the situation of a person

[82] CRCSCr 22.12.2009, 3-4-1-16-09, para. 11.

[83] CRCSCr 22.12.2009, 3-4-1-16-09, para. 23.

[84] "If, subsequent to the commission of the offence, the law makes provision for a lighter penalty, the lighter penalty applies."

> shall have retroactive force, even if a sentence has been pronounced and enforced (§282)). The same principle has been adopted in the 1999 Criminal Code of Latvia (§5(2)) and 1996 Criminal Code of the Russian Federation (§10(5)). These examples allow to draw a conclusion that the Penal Codes of several European countries extend the effect of criminal laws alleviating the situation of a person also to the time of serving the sentence. […] The discussions during the legislative proceeding of the Penal Code Implementation Act in the Riigikogu shed light on the formation of the will of the legislator. […] At the second reading of the draft the chairman of the Legal Affairs Committee gave the following explanation to the *Riigikogu*: "[…] We also studied how these issues have been solved abroad. We found that in many respects the penal law of Germany has served as a model for drafting our Penal Code. The commentary of the German Penal Code concerning penal law states clearly that the principle of retroactive force of a law applying lesser punishment shall not mean the obligation to render a new judgment retroactively. […] Thus, we can assert that neither international law nor our Constitution give rise to a general obligation to review punishments imposed by court judgments that have entered into force." […] The Supreme Court *en banc* is of the opinion that although German penal law has essentially influenced the wording of our Penal Code, it cannot be used to interpret the second sentence of §23(2) of the Constitution. Firstly, the Basic Law of the Federal Republic of Germany does not establish a principle that a law providing for a lesser punishment shall have retroactive force. Secondly, the German Penal Code establishes clearly that if the statute as it appeared at the completion of the crime is amended prior to the judgment in the case, the most lenient statute shall be applied (§2(3)).[85]

As a result, the SC declared the Penal Code Implementation Act to be in conflict with the §23(2)2 of the Constitution in conjunction with the principle of equality to the extent that the Act did not provide for a possibility to mitigate the punishment of a person serving imprisonment, imposed under the Criminal Code, up to the maximum rate of imprisonment established by a corresponding section of the Special Part of Penal Code. In this case the SC combined genuine comparative arguments with the will of the legislator who had also used comparative arguments. The comparative arguments played a crucial role to substantiate the wide scope of protection of the §23(2)2 of the Constitution which influenced the result of weighing the competing constitutional principles.

The second example concerns too high court fees. Due to the outbreak of the economic crisis the legislator raised significantly and in several steps all court fees. From 2008 on the minimum court fee for general courts was rapidly raised from 15.98 to 75 Euro and the maximum court fee from 47 933.74 to 131 955.82 Euro for every level of jurisdiction. The SC *en banc* argued in 2011:

> "Concerning the Estonian state fee rates it is important to note that at least in case of financial claims, legal costs, including fees, in Estonia are proportionally the highest compared to other European Union Member States, forming ca. 12.3% of the claim compared to, for example, France's 2.7%, Finland's 3.06%, Lithuania's 6% or Latvia's 6.4% of the claim (The World Bank's report Doing Business 2011,

[85] SCebj 17.03.2003, 3-1-3-10-02, paras. 22 ff.

based on countries' reports; http://www.doingbusiness.org/). The legislator has also not pointed out a reasonable and significant justification for establishing extraordinary state fees on the scale of Europe."[86]

In the underlying case the plaintiff was originally obliged to pay 60 396.51 Euro court fee but the SC found that this was too high. Since the SC dealt with every single table entry of the court fee table separately, there are more than 50 judgments of the SC dealing with the constitutionality of the court fees. The main result of this painful process was the reduction of higher court fees, e.g. the maximum court fee is since July 2012 fixed to 10 500 Euro. By reaching this result some role was played by the cited comparative argument.

The third example concerns the question of constitutionality of a prohibition for persons in custody to receive long-term visits from wife or husband in contrast to convicted prisoners who were allowed to receive long-term visits. The Constitutional Review Chamber of the SC used comparative law arguments while assessing the proportionality of the prohibition:

> "To the knowledge of the Chamber, similarly to Estonia, Croatia, Lithuania and the Czech Republic, the Grand Duchy of Luxembourg, several cantons in the Swiss Confederation and Georgia permit persons in custody to receive only short-term visits, duration of which is almost the same as in Estonia (about one hour in a week on the average). The Constitutional Court of Latvia also found, based mostly on the opinion of the European Court of Human Rights and, among other, also directly on the regulatory framework in Estonia and Lithuania, that the Constitution of Latvia does not require enabling persons in custody to receive long-term visits (judgment of 23 April 2009 no. 2008-42-01). Unlike the aforementioned, for example, Canada, the Kingdom of Norway and the Federal Republic of Germany have provided persons in custody with the right to longterm visits."[87]

The SC weighed the aims of preventing evasion from criminal proceedings and continuous commission of criminal offences, including destruction, alteration and falsification of evidence and influencing of witnesses, against the interests of family life and found no violation of the latter. The comparative argument was in this case not decisive but rather illustrative.

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[86] SCebj 12.04.2011, 3-2-1-62-10, para. 48.3; cf. SCebj 22.11.2011, 3-3-1-33-11, para. 29.3.

[87] CRCSCj 04.04.2011, 3-4-1-9-10, para. 56.

## III. Concluding Remarks

Estonian legal system has since beginning of the nineties performed a turn from a post-communist country to a modern Western European type of constitutional democracy. I have called this development elsewhere a constitutional tiger leap.[88] Comparative national and international law arguments have played a significant role in this development, mainly as a catalyst to help to boost the Estonian constitutional law doctrine to a contemporary one. The general principles of law doctrine, especially the principle of proportionality have similarities with many other developed European legal systems, e.g. to Germany. The links to other legal systems, especially links to the Constitutions of other European states, witness the openness of the system. However, the sceptical statement of the SC from 2009 towards the German Constitution[89] remains a rather disputable step into other direction. Hopefully the SC finds a way to clarify it.

Gábor Halmai has divided constitutional jurisdictions into three categories: those who do not use foreign law, those who do use foreign law implicitly, i.e. without any references to foreign constitutional review judgments, and those who do so explicitly.[90] As we have seen, the SC uses foreign case law but mostly does not do so explicitly. Only very few references to constitutional review judgments of foreign constitutional courts exist.[91] It belongs therefore somewhere in between the second and the third category. The use of references to foreign constitutional review judgments of the SC stands still in sharp contrast e.g. to the South African Constitutional Court.[92] There is some room for improvement in this area.

Michael Rosenfeld and András Sajó have drawn the link of the comparative constitutional law to the enlightenment and the early developments in the United

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[88] M. Ernits. 20 Jahre Menschenwürde, Demokratie, Rechtsstaat, Sozialstaat. – S. Hülshörster, D. Mirow (eds.). Deutsche Beratung bei Rechts- und Justizreformen im Ausland. Berlin: Berliner Wissenschafts-Verlag, 2012, p. 123.

[89] CRCSCr 22.12.2009, 3-4-1-16-09, para. 42 (see above).

[90] G. Halmai. The Use of Foreign Law in Constitutional Interpretation. – M. Rosenfeld, A. Sajó (eds.). The Oxford Handbook of Comparative Constitutional Law. Oxford: Oxford University Press, 2012, p. 1329.

[91] Reference to the judgment of 23 April 2009 (2008-42-01) of the Constitutional Court of Latvia in CRCSCj 04.04.2011, 3-4-1-9-10, para. 56. Furthermore, there have been some references to judgments of the German Constitutional Court in dissenting opinions: reference to the judgment of 4 May 2011 (2 BvR 2365/09) in the Dissenting opinion of the judges Villu Kõve, Peeter Jerofejev and Henn Jõks to the SCebj 21.06.2011, 3-4-1-16-10, para. 5; reference to the judgment of 19 June 2012 (2 BvE 4/11) in the Dissenting opinion of the justices Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa to the SCebj 12.07.2012, 3-4-1-6-12, para. 3.

[92] Cf. J. Fedtke. Die Rezeption von Verfassungsrecht. Südafrika 1993-1996. Baden-Baden: Nomos, 2000 to the beginnings and N. Petersen. Proportionality and Judicial Activism. Fundamental Rights Adjudication in Canada, Germany and South Africa. Cambridge *et al*.: Cambridge University Press, 2017 to some more recent developments.

States and France.[93] In these times not only the confirmation of the new ideas was a reason for comparative arguments but also the immanent universality and open-mindedness of the great doctrines of human rights, democracy and rule of law. The fall of the iron curtain in the end of the 20th century reminds a little to upheaval of enlightenment and could perhaps be called the small enlightenment – the great ideas were not invented but (re)implemented in a large area of Central and Eastern Europe. The Estonian Constitution is a child of these times. And therefore the comparison is immanent to Estonian constitutional doctrine.

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[93] M. Rosenfeld, A. Sajó. Introduction. – M. Rosenfeld, A. Sajó (eds.). The Oxford Handbook of Comparative Constitutional Law. Oxford: Oxford University Press, 2012, p. 3 ff.

CHAPTER 3

# AN EARLY DECISION WITH FAR-REACHING CONSEQUENCES

# *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]

## I. 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[2] 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 stillborn 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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[1] The paper expresses the author's personal opinions.

[2] CRCSCj 12.01.1994, III-4/1-1/94. The decision Operative Technical Measures II also originates from the same date. Cf. CRCSCj 12.01.1994, III-4/1-2/94. All decisions of the Supreme Court referred to in the article are available at https://www.riigikohus.ee/.

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

On 21 April 1993, the *Riigikogu* adopted the Republic of Estonia Police Act Amendment Act.[3] 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

[3] Eesti Vabariigi politseiseaduse muutmise ja täiendamise seadus. – RT I 1993, 20, 355 (in Estonian).

> 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.

## 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 12 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."[4]

[4] CRCSCj 23.03.1998, 3-4-1-2-98, para. VIII.

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[5], a government regulation that restricts fundamental rights passed without legal basis[6] as well as a government regulation that restricts fundamental rights exceeding the parliamentary delegation of power[7]. 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."[8]

A detailed procedure for restricting rights[9] or the designation of a competent administrative body[10] 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

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5 CRCSCj 12.01.1994, III-4/1-1/94; 05.02.1998, 3-4-1-1-98, paras. III and IV; 23.03.1998, 3-4-1-2-98; 04.11.1998, 3-4-1-7-98, para. II; 05.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, para. 25; 19.12.2003, 3-4-1-22-03.

6 CRCSCj 02.11.1994, III-4/1-8/94; 11.01.1995, III-4/A-12/94; 06.10.1997, 3-4-1-3-97; 17.06.1998, 3-4-1-5-98; 23.11.1998, 3-4-1-8-98; 09.02.2000, 3-4-1-2-00; 10.04.2002, 3-4-1-4-02.

7 SCebj 22.12.2000, 3-4-1-10-00; CRCSCj 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, para. 42; 08.02.2001, 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; 02.05.2007, 3-4-1-2-07.

8 CRCSCj 24.12.2002, 3-4-1-10-02, para. 24.

9 CRCSCj 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.

10 ALCSCr 22.12.2003, 3-3-1-77-03, para. 24.

regulation.[11] A regulation cannot establish customs duty or customs tariff[12], tax interest or fine for delay[13], a participation fee in the privatisation of land by auction[14] or the rate of a bailiff[15]. 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."[16]

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."[17] In this context, the Supreme Court further discusses the transfer of technical specification to the government.[18]

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."[19]

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

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11 CRCSCj 11.06.1997, 3-4-1-1-97.

12 CRCSCj 23.03.98, 3-4-1-2-98.

13 CRCSCj 05.11.2002, 3-4-1-8-02.

14 SCebj 22.12.2000, 3-4-1-10-00.

15 CRCSCj 19.12.2003, 3-4-1-22-03.

16 CRCSCj 08.02.2001, 3-4-1-1-01, para. 13. Cf. also CRCSCj 20.12.1996, 3-4-1-3-96, para. III; 05.02.1998, 3-4-1-1-98, para. V; 13.02.2007, 3-4-1-16-06, para. 21; 02.05.2007, 3-4-1-2-07, para. 20.

17 CRCSCj 17.03.1999, 3-4-1-1-99, para. 14.

18 CRCSCj 20.12.1996, 3-4-1-3-96, para. II.

19 CRCSCj 05.02.1998, 3-4-1-1-98, para. V.

operative technical measures, cases, conditions, procedure, guarantees, control and supervision and liability remain unspecified."[20]

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.[21] 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[22] or the border regime rules[23] approved by the Government of the Republic or the internal rules of prisons[24] or regulation of an armed

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[20] 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 (CRCSCj 04.11.1998, 3-4-1-7-98, para. 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) No. 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.

[21] In the same decision, the Supreme Court declared the unconstitutionality of two delegation norms violating the principle of parliamentary prerogative. See CRCSCj 05.02.1998, 3-4-1-1-98, paras. III and IV.

[22] The regulation is called Traffic Code (Liikluseeskiri. – RT I 2001, 15, 66; 2003, 22, 131; 2005, 41, 336 (in Estonian)). English translation is no longer available. The Traffic Code established important traffic and movement restrictions, the violations of which were subject to a punishment. However, the authorisation norm that the Traffic Code is based on, was rather brief. Subsection 3 (Determination of road traffic rules) (2) of the Traffic Act (RT I 2001, 3, 6; 2007, 4, 19; in Estonian) layd down: The Government of the Republic shall determine the road traffic rules with the Traffic Code.

[23] 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.

[24] 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

unit[25] 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 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.[26]

### 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."[27] The Supreme Court shall later name §14 of the Constitution the general fundamental right to organisation and procedure.[28]

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.

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law renders the regulation difficult to survey and in turn raises issues in connection with legal clarity.)

[25] 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.

[26] CRCSCj 05.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, para. 25; 19.12.2003, 3-4-1-22-03.

[27] Author's emphasis.

[28] SCebj 28.10.2002, 3-4-1-5-02, paras. 30, 35; 12.04.2006, 3-1-63-05, para. 24; CRCSCj 17.02.2003, 3-4-1-1-03, para. 12; 31.01.2007, 3-4-1-14-06, paras. 22, 34.

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."[29] 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."[30]

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.[31] 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.[32] An effective remedy means a remedy that is as effective as can be.[33]

The second development appears in the good administration precedents. The Supreme Court names §14 of the Constitution a fundamental right to good administration[34], 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

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[29] CRCSCj 14.04.2003, 3-4-1-4-03, para. 16. The obligation to guarantee rights also expands to the rights arising from European Convention on Human Rights. See SCebj 06.01.2004, 3-1-3-13-03, para. 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."

[30] SCebj 06.01.2004, 3-3-2-1-04, para. 27.

[31] SCebr 22.12.2000, 3-3-1-38-00, para. 19; 28.04.2004, 3-3-1-69-03, para. 24; SCebj 17.03.2003, 3-1-3-10-02, para. 17. Cf. CRCSCj 22.02.2001, 3-4-1-4-01, paras. 9–11; U. Lõhmus. Õigus õiglasele kohtulikule arutamisele. – U. Lõhmus (ed.). Inimõigused ja nende kaitse Euroopas. Tartu: Iuridicum, 2003, p. 152 ff. (in Estonian).

[32] European Court of Human Rights uses the concept 'redress' in ECtHR 06.09.1978, Case 5029/71, *Klass etc. v. Germany*, para. 64. In later cases it uses instead of redress the broader concept 'relief' (ECtHR 26.10.2000, Case 30210/96, *Kudla v. Poland*, para. 157; 26.10.2000, Case 30985/96, *Hasan and Chaush v. Bulgaria*, para. 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."

[33] SCebr 22.12.2000, 3-3-1-38-00, para. 19 with a reference to ECtHR 06.09.1978, Case 5029/71, *Klass etc. v. Germany*, paras. 64, 69.

[34] CRCSCj 17.02.2003, 3-4-1-1-03, para. 23.

governments to ensure fundamental rights, is a fundamental right to an effective administrative procedure.[35] A fundamental right to good administration or 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."[36] Shortly, the principle of good administration means that "an administrative procedure must also be fair".[37]

### *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.[38] 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 §$41^3$(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

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[35] 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: Oxford University Press, 2002, p. 324 ff.

[36] ALCSCj 05.03.2007, 3-3-1-102-06, para. 21. Cf. also ALCSCj 27.03.2002, 3-3-1-17-02, para. 18; 20.06.2003, 3-3-1-49-03, para. 16; 25.10.2004, 3-3-1-47-04, para. 18; 18.11.2004, 3-3-1-33-04, para. 16; 23.02.2004, 3-3-1-1-04, para. 20; 09.05.2006, 3-3-1-6-06, para. 29; 11.12.2006, 3-3-1-61-06, para. 20; 19.12.2006, 3-3-1-80-06, paras. 18–22; 10.01.2007, 3-3-1-85-06, para. 12; 10.05.2007, 3-3-1-100-06, 15; ALCSCr 08.10.2002, 3-3-1-56-02, para. 9; 20.05.2003, 3-3-1-37-03, para. 13; 03.03.2005, 3-3-1-1-05, paras. 18–22; 27.09.2005, 3-3-1-47-05, para. 13; 22.12.2005, 3-3-1-73-05, para. 14.

[37] ALCSCj 11.12.2006, 3-3-1-61-06, para. 20.

[38] SCebj 25.10.2004, 3-4-1-10-04; 27.06.2005, 3-4-1-2-05; 27.06.2005, 3-3-1-1-05; CRCSCj 10.12.2004, 3-4-1-24-04.

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[3](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[39] and the Administrative Law Chamber of the Supreme Court[40] expressed doubt about the constitutionality of §41[3](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*[41] declared on three and the Constitutional Review Chamber[42] on one occasion the compliance of the Traffic Act with the Constitution. Nevertheless, the Estonian parliament *Riigikogu* declared §41[3] 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*.[43] 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.[44] 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,

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[39] Tallinn Administrative Court judgments 05.03.2004, 3-799/2004; 19.05.2004, 3-1298/2004; 25.06.2004, 3-1473/2004; 01.09.2004, 3-1763/2004; 08.02.2005, 3-1368/2004; Tartu Administrative Court judgments 22.12.2004, 3-480/04 and 3-509/04; 28.12.2004, 3-461/04; Jõhvi Administrative Court judgments 28.12.2004, 3-249/2004; 30.12.2004, 3-254/2004 and 3-255/2004; 10.02.2005, 3-309/2004.

[40] ALCSCr 03.03.2005, 3-3-1-1-05, paras. 18–22; cf. also ALCSCj 23.02.2004, 3-3-1-1-04, para. 20.

[41] SCebj 25.10.2004, 3-4-1-10-04; 27.06.2005, 3-4-1-2-05; 27.06.2005, 3-3-1-1-05.

[42] CRCSCj 10.12.2004, 3-4-1-24-04.

[43] RT I 2005, 40, 311 (in Estonian).

[44] SCebj 27.06.2005, 3-4-1-2-05, para. 36: "[T]he right to a fair and effective procedure stemmed from §14 of the Constitution has been restricted". Cf. also SCebj 27.06.2005, 3-3-1-1-05, para. 20.

they can be regarded as 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."[45]

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.[46] Based on this, the Supreme Court *en banc* concludes that a person knows what awaits him and can thus also protect himself.[47] 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.[48]

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[3] 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.[49] 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."[50]

Fourthly, according to the Supreme Court "pursuant to subsection 10 of §41[3] 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."[51]

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45 SCebj 27.06.2005, 3-3-1-1-05, para. 19. Cf. also SCebj 25.10.2004, 3-4-1-10-04, para. 23; 27.06.2005, 3-4-1-2-05, paras. 28–29.

46 SCebj 27.06.2005, 3-4-1-2-05, para. 32.

47 SCebj 25.10.2004, 3-4-1-10-04, para. 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."

48 SCebj 27.06.2005, 3-4-1-2-05, para. 34.

49 *Ibid*., para. 35.

50 *Ibid*., para. 36.

51 *Ibid*., para. 37.

Fifthly, the Supreme Court is of the opinion that the limitation is not intensive[52], 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."[53]

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.[54]

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."[55]

### *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

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52 SCebj 27.06.2005, 3-3-1-1-05, para. 20; 27.06.2005, 3-4-1-2-05, para. 37.

53 SCebj 27.06.2005, 3-4-1-2-05, para. 37. Cf. also SCebj 27.06.2005, 3-3-1-1-05, para. 20.

54 SCebj 25.10.2004, 3-4-1-10-04, para. 19.

55 *Ibid*.

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[56] as well as special regulations of the administrative procedure (e.g., §41[3](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.[57]

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.[58] 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[59], 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

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[56] 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."

[57] Cf. ALCSCr 03.03.2005, 3-3-1-1-05, paras. 18 ff.; Dissenting opinion of Justice Indrek Koolmeister, SCebj 25.10.2004, 3-4-1-10-04, paras. 1 and 3; Dissenting opinion of Justice Indrek Koolmeister, joined by Justices Tõnu Anton, Julia Laffranque, Jüri Põld and Harri Salmann, to the SCebj 25.10.2004, 3-3-1-29-04, para. 1.

[58] Traffic Act §41[1] (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[3] 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."

[59] RT I 2001, 61, 364; 2004, 88, 600 (in Estonian). English translation available at https://www.riigiteataja.ee/en/eli/ee/529052014006/consolide/current.

considerations, including the suspension of the right to drive following the penalty could and ought not to have been taken into consideration.[60]

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.[61] 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[62], 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 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$^3$(10)) precludes the notification of a person even on the initiative of MVRC."[63] 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.[64] "Even as

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[60] Cf. ALCSCr 03.03.2005, 3-3-1-1-05, para. 20; Dissenting opinion of Justices Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann to the SCebj 27.06.2005, 3-4-1-2-05, para. 1.

[61] SCebj 27.06.2005, 3-4-1-2-05, para. 35 (see above).

[62] 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."

[63] Dissenting opinion of Justices Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann to the SCebj 27.06.2005, 3-4-1-2-05, para. 1 subitem 3. Cf. ALCSCj 23.02.2004, 3-3-1-1-04, para. 20: "[P]roceeding from the priciples 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."

[64] 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

a formality, it must be considered that this kind of hearing would take place by violating either the term provided in §41[3](10) of the Traffic Act or the principles provided by the Administrative Procedure Act."[65] 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."[66] 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.[67] 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*."[68] 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."[69] Apart from that, the Supreme Court *en banc* disregards the opportunity to analyze alternative procedures that ensure better the rights in individual cases.[70] A suspicion arises

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§40(3) of the Administrative Procedure Act is applicable in case of a suspension of the right to drive. See ALCSCr 03.03.2005, 3-3-1-1-05m, para. 21.

65 Dissenting opinion of Justices Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann to the SCebj 27.06.2005, 3-4-1-2-05, para. 1 subitem 3.

66 ALCSCr 03.03.2005, 3-3-1-1-05, para. 19.

67 *Ibid*.

68 SCebj 27.06.2005, 3-4-1-2-05, para. 37 (author's emphasis).

69 SCebj 25.10.2004, 3-4-1-10-04, para. 19 (author's emphasis).

70 Dissenting opinion of Justices Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann to the SCebj 27.06.2005, 3-4-1-2-05, para. 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

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."[71] 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.[72] 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 for this appears to be the utilitarianism of Jeremy Bentham[73] and John Stuart Mill.[74] 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."[75] It is precisely the procedural dimension that serves human dignity[76] 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.[77] 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

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and the suspension of the right to drive is usually long, during which a person practices the right to drive."

71 ALCSCj 22.03.2006, 3-3-1-2-06, para. 10.

72 In Estonian literature R. Maruste. Põhiseadus ja selle järelevalve. Tallinn: Juura, 1997, p. 113 (in Estonian). This object formula originates from a German state lawyer Günter Dürig: G. Dürig. – T. Maunz, G. Dürig (eds.). Grundgesetz, Kommentar. Vol. 1. München: C. H. Beck, 1958, Art. 1 Abs. 1 recital 28: "Die Menschenwürde ist getroffen, wenn der konkrete Mensch zum Objekt, zu einem bloßen Mittel, zur vertretbaren Größe herabgewürdigt wird."

73 J. Bentham. An Introduction to the Principles of Morals and Legislation. J. H. Burns, H. L. A. Hart (eds.). London: The Athlone Press, 1970.

74 J. S. Mill. Utilitarianism. 7. ed. London: Longmans, Green, 1879.

75 CRCSCj 31.01.07, 3-4-1-14-06, para. 28.

76 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. – T. Maunz, G. Dürig (eds.). Grundgesetz, Kommentar. Vol. 1. München: C. H. Beck, 1958, Art. 1 Abs. 1 recital 34: "Es verstößt gegen die Menschenwürde, wenn der Mensch zum Objekt eines staatlichen Verfahrens gemacht wird."

77 Cf. SCebj 25.10.2004, 3-4-1-10-04, para. 19.

drive.[78] 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."[79] It was this type of obligation to notify and opportunity to contest that the Estonian system lacked.

### *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 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[3] 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."[80]

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.

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[78] ECtHR 23.09.1998, Case 68/1997/852/1059, *Malige v. France*, paras. 17–20.

[79] *Ibid*., para. 47.

[80] Dissenting opinion of Justices Tõnu Anton, Indrek Koolmeister, Julia Laffranque, Jüri Põld and Harri Salmann to the SCebj 27.06.2005, 3-3-1-1-05, para. 1.

### 3. Judicial activism[81]

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 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."[82]

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."[83]

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.

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[81] 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 92 (2004), p. 1442 ff., 1463 ff. See also an excellent analytical approach in Estonian: B. Aaviksoo. Kohtulik aktivism põhiseaduslikkuse järelevalve funktsioonina. – Juridica 2005/5, p. 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 activistic, which may declare the legislator's omission unconstitutional.

[82] CRCSCj 12.01.1994, III-4/1-1/94.

[83] CRCSCj 02.12.2004, 3-4-1-20-04, para. 42.

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.

### *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.[84] 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.[85]

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.[86] 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."[87]

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."[88]

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

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[84] CRCSCj 12.01.1994, III-4/1-1/94.

[85] CRCSCj 05.02.1998, 3-4-1-1-98, paras. III and IV; 23.03.1998, 3-4-1-2-98; 04.11.1998, 3-4-1-7-98, para. II; 05.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, para. 25; 19.12.2003, 3-4-1-22-03.

[86] See above CRCSCj 14.04.2003, 3-4-1-4-03, para. 16.

[87] SCebj 06.01.2004, 3-1-3-13-03, para. 31. To date, the indicated procedure for the review of a criminal matter has been adopted and enforced (RT I 2006, 48, 360).

[88] CRCSCj 25.03.2004, 3-4-1-1-04, para. 22, cf. also para. 17.

have not provided the administrative body with the right of discretion.[89] 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.[90] 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 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."[91]

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[92] 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

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[89] SCebj 11.10.2001, 3-4-1-7-01; CRCSCj 28.04.2000, 3-4-1-6-00; 05.03.2001, 3-4-1-2-01; 03.05.2001, 3-4-1-6-01; 21.06.2004, 3-4-1-9-04.

[90] CRCSCj 21.06.2004, 3-4-1-9-04.

[91] CRCSCj 05.03.2001, 3-4-1-2-01, para. 20. Cf. also CRCSCj 28.04.2000, 3-4-1-6-00, para. 17: "§19(1) No. 2 of the Alcohol Act is disproportional regarding the inability of the issuer of the activity licence to choose legal consequences."

[92] Karistusseadustik. Adopted 6.06.2001, entry into force 1.09.2002. – RT I 2001, 61, 364 (in Estonian). English translation available at https://www.riigiteataja.ee/en/eli/ee/529052014006/consolide/current.

imprisonment laid down in the relevant provision of the special part of the Penal Code."[93]

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 comprehensibly establish the rights of persons who resettled and of the users of the property which had belonged to them."[94]

### *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 […]."[95] 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."[96]

### *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

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93 SCebj 17.03.2003, 3-1-3-10-02, para. 40.

94 SCebj 28.10.2002, 3-4-1-5-02, para. 37. Cf. also SCebj 12.04.2006, 3-3-1-63-05; CRCSCj 31.01.2007, 3-4-1-14-06.

95 CRCSCj 15.07.2002, 3-4-1-7-02, para. 15. Cf. also SCebj 19.04.2005, 3-4-1-1-05.

96 CRCSCj 15.07.2002, 3-4-1-7-02, para. 34.

would be degraded if they were left without aid that they need to satisfy their primary needs."[97]

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 […]."

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 confl ict with § 12 of the Constitution[98] to the extent that the provisions did not allow to pay early-retirement pension to those employed persons who had attained pensionable age."[99]

### *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[100], in the form of a proactive abstract norm control initiated by the President of the Republic[101], in the form of a retrospective abstract norm control initiated by the Chancellor of Justice[102] as well as in the form of an individual constitutional complaint, which so far remains the only successful precedent.[103] The Supreme Court itself has discussed the

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97 CRCSCj 21.01.2004, 3-4-1-7-03, para. 33.

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

99 CRCSCj 21.06.2005, 3-4-1-9-05, resolution, cf. also para. 24.

100 SCebj 11.10.2001, 3-4-1-7-01; 28.10.2002, 3-4-1-5-02; 12.04.2006, 3-3-1-63-05; CRCSCj 04.11.1998, 3-4-1-7-98, para. II; 28.04.2000, 3-4-1-6-00; 05.03.2001, 3-4-1-2-01; 03.05.2001, 3-4-1-6-01; 05.11.2002, 3-4-1-8-02; 24.12.2002, 3-4-1-10-02, para. 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.

101 CRCSCj 05.02.1998, 3-4-1-1-98, paras. III and IV; 31.01.2007, 3-4-1-14-06. Cf. CRCSCj 02.12.2004, 3-4-1-20-04, paras. 41–46.

102 SCebj 19.04.2005, 3-4-1-1-05; CRCSCj 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.

103 SCebj 17.03.2003, 3-1-3-10-02.

different initiators at length in an *obiter dictum*.[104] 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.[105]

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.[106] 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.[107]

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."[108]

## III. 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 forwardlooking decisions in the future.

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[104] Cf. CRCSCj 02.12.2004, 3-4-1-20-04, paras. 41–46.

[105] 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." (CRCSCj 02.12.2004, 3-4-1-20-04, para. 45, cf. also para. 46; 31.01.2007, 3-4-1-14-06, para. 18.) Such norms include, for instance, procedural rules or transitional provisions. Cf. CRCSCj 31.01.2007, 3-4-1-14-06, para. 21. One can hope that in the future, the Supreme Court shall explain this relatively new criterion in more detail.

[106] This happened as a consequence of a decision of the Supreme Court *en banc* from autumn 2002 (SCebj 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. SCebj 12.04.2006, 3-3-1-63-05.

[107] 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." (SCebj 12.04.2006, 3-3-1-63-05, para. 31.)

[108] CRCSCj 21.01.2004, 3-4-1-7-03, para. 16.

CHAPTER 4

# THE PRINCIPLE OF EQUALITY IN THE ESTONIAN CONSTITUTION

# *The Principle of Equality in the Estonian Constitution*

A Systematic Perspective

## I. Introduction

The powers within a state, of both the executive and the judiciary, must be exercised subject to the principle of equality or equal treatment. This is almost trivial. The problem is that, whilst the principle may be stated simply, imposing such an equality obligation on the legislative body is far from trivial, and must rank as a major achievement of democratic constitutionalism: only a fully functioning mechanism for constitutional review genuinely provides equality, in relation to any given constitution. The principle of constitutional equality is embodied, in this sense, by the general fundamental right to equal implementation of the (constitutional) law. The aim here is to demonstrate how the principle of equality has emerged and evolved in relation to Estonian constitutional law, by conducting a structural analysis of the doctrine, together with an analysis of the main questions posed during its implementation. This is achieved through systematic analysis and criticism of relevant case law.

The *Põhiseadus* [Estonian Constitution] (henceforth: the Constitution),[1] was adopted *via* a referendum on 28 June 1992 and came into force on the following day, as prescribed by §1(1), *Eesti Vabariigi põhiseaduse rakendamise seadus* [The Constitution of the Republic of Estonia Implementation Act]. According to the Constitution, Estonia is a parliamentary republic, with governments being subject to the confidence of the directly and proportionally elected Parliament. The highest court is the Estonian Supreme Court (henceforth: the SC), which unifies the functions of the final appellate instance of civil, criminal, and administrative jurisdictions, alongside constitutional review. The power of constitutional review can be exercised either by the Constitutional Review Chamber or, alternatively, by the SC *en banc*. The Constitution stresses the general principles of democracy and independence of the state[2] and then, in the 2nd Chapter, provides a rather detailed catalogue of 48 provisions of enforceable constitutional rights. One of them, §12(1), states the principle of equality: "Everyone is equal before the law. No one may be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other views, property or social status, or on other grounds."

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1 For the English translation of the *Põhiseadus* [Estonian Constitution], see: https://www.riigiteataja.ee/en/eli/ee/521052015001/consolide/current, all internet links visited on 30 September 2019 and link to the English translations unless indicated otherwise.

2 See §1 of the *Põhiseadus* [Estonian Constitution].

The first sentence of §12(1) corresponds exactly to Article 20 of the European Charter of Fundamental Rights (henceforth: the Charter). This short provision is not, however, as straightforward as one might expect. The wording itself raises a question as to the enforceability of the equality principle, both in terms of providing a constitutional right for a rights-holder, and indeed of binding the legislature. However, §12(1) of the Constitution additionally includes a second sentence, which distinguishes it from the Charter, providing a prohibition on discrimination on the basis of nationality; race; colour; sex; language; origin; religion; political or other views; property or social status; or on other grounds. This second sentence is problematic, as previously examined by Robert Alexy, in the first systematic monograph concerning fundamental rights in the Estonian Constitution.[3] In addition to the points made by Alexy, in the Estonian doctrine the equality principle also raises questions about the relevant standard for justifying unequal treatment, the exact meaning of the constitutional requirement of statutory reservation, and the relationship between general and special equality rights. Although Alexy's theory was explicitly designed for the constitutional rights of the German *Grundgesetz*,[4] its main elements were adopted by the SC and it has proved to be a powerful practical weapon in resolving constitutional rights cases. Alexy's theory is thereby the binding link that allows us to address the arguments made in German jurisprudence.

This article is divided into two main parts. In the first part a summary is made of the development of the equality principle related case law of the SC since the 1990s, while in the second part a critical analysis of the case law is presented in order to build a system of equality rights, which could serve as the basis for future case law.

## II. Development of the Case Law of the Estonian Supreme Court

The SC has made a moderate number of decisions concerning the right to equal treatment. They can be divided into three stages: first, an initial period of early development at the end of the 1990s; secondly, the foundation of the first doctrine of the equality principle; and, finally, the new doctrine.

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3 R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 63.

4 R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 5 f.

## 1. The first stage: early development – the property reform

Three property reform[5] cases from the last decade of the 20th century characterise the early equality-related case law of the SC in Estonia.[6] The first occurred in 1998, and concerned compensation for property unlawfully expropriated during the Soviet occupation and later demolished. A Parliamentary amendment to the relevant Act had previously abolished the compensatory scheme in relation to property destruction. The issue was the supervision procedure between the State and the local government who granted compensation in a particular case, despite the abolition of the scheme. As the case reached the SC, the Court stated that the unequal treatment of the relevant individuals, whose applications for compensation were at different stages of the compensation procedure, was unreasonable and unjust.[7] The SC added: "If a social-economic analysis indicates that compensating for unlawfully expropriated property in the present amount would be essentially detrimental to Estonia's economy, then compensation should be restricted at least according to the principle of equal treatment."[8]

In the second case, heard in 1999, the applicant was a widow of a man whose parents were former landowners: she was therefore entitled to compensation under the original scheme. However, Parliament restricted the circle of those so entitled, removing from it the spouses of children of former owners. The Constitutional Review Chamber observed, in accordance with its aforementioned decision, that "contrary to the principle of equal treatment, the legislator has failed to apply the principles of legal certainty and legitimate expectation to some of the persons who have started to exercise their right to claim the return of or compensation for unlawfully expropriated property".[9]

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5 *Eesti Vabariigi omandireformi aluste seadus* [Republic of Estonia Principles of Ownership Reform Act] was passed 13 June 1991 and came into force a week later, 20 June 1991 (RT 1991, 21, 257 [in Estonian; 'RT' stands for '*Riigi Teataja*', the Estonian State Gazette, available only in electronic version: https://www.riigiteataja.ee). An English translation of a later version of the law is available here: https://www.riigiteataja.ee/en/eli/ee/520122018006/consolide/current. The four major areas of regulation of this pre-constitutional law were return, compensation, municipalisation, and privatisation of property. It was an Act of major importance for Estonian economic and societal transition. Up to April 2014, it has been amended 41 times.

6 Prior to these developments the Administrative Law Chamber of the SC stated, in respect of the principle of equality, that it is a general principle of European Union Law, and declared it to be a general principle of Estonian Law (ALCSr [hereinafter: ruling of the Administrative Law Chamber of the SC] 24.03.1997, 3-3-1-5-97, para. 4). In the ruling the Administrative Law Chamber also states: "According to the principle of equality, equal situations have to be treated equally." This can be considered as the very first doctrinal description of the principle of equality.

7 CRCSCj [hereinafter: judgment of the Constitutional Review Chamber of the SC] 30.09.1998, 3-4-1-6-98, para. II.

8 CRCSCj 30.09.1998, 3-4-1-6-98, para. III.

9 CRCSCj 17.03.1999, 3-4-1-2-99, para. II.

A third case dealt with the delayed return procedure for land unlawfully expropriated during the Soviet era. The dispute originated from the question of whether legal title to land continued to exist, despite subsequent redevelopment of the property, given that non-redevelopment was an essential pre-supposition for the return of the land. The local government, as the relevant competent authority, insisted on awarding compensation rather than returning the land to the original landowner. Four years after the submission of the original application, the Parliament amended the relevant statutory regime and changed the criteria for assessing the continuance of the original legal title. The disputed land did not fulfil the new criteria and the local government again rejected the application, this time on the basis of the new law. The fifth attempt at litigating the case reached finally the SC; according to the SC there was a violation of the equality principle due to the application of the procedure. Furthermore, the SC formulated a standard interpretation of the procedure, which was to be in favour of the applicant. The main reasoning of the SC was that the application of the new statutory wording to the applicant was unfounded, unreasonable, and unfair.[10]

## 2. The second stage: the doctrinal foundation

To refer to an unconstitutional unequal treatment as unfounded, unreasonable and unfair is not erroneous, but it lacks the necessary doctrinal structure and criteria for rational control of the principle of equality. The SC addressed this deficit from 2002 onwards.[11] The initial foundation of the first doctrine of the principle of equality was laid in the decision of the Constitutional Review Chamber of the SC in March 2002. The Court stated:

> "The first sentence of §12(1) of the Constitution, 'Everyone is equal before the law', establishes the general fundamental right to equality, the sphere of protection of which embraces all spheres of life, including enterprise. The fundamental right to equality, just like freedom of enterprise, is extended also to legal persons under §9(2) of the Constitution. This fundamental right is infringed in the case of unequal treatment."[12]

The case concerned value added tax for businesses. According to the statute, the business was obliged to pay the tax, even when it purchased an item worth more than 50,000 Estonian *kroon* (approx. 3,200 EUR) for its business, but paid for it

[10] ALCSCj [hereinafter: judgment of the Administrative Law Chamber of the SC] 20.06.2000, 3-3-1-30-00, para. 3.

[11] Previously the Administrative Law Chamber declared: "According to the principle of equal treatment, all persons under the same circumstances and the same conditions shall be treated equally" (ALCSCj 20.12.2001, 3-3-1-61-01, para. 5).

[12] CRCSCj 06.03.2002, 3-4-1-1-02, para. 13, identical wording in CRCSCj 12.06.2002, 3-4-1-6-02, para. 10.

in cash. The Court declared the statute unconstitutional.[13] Furthermore, the Court created a principle according to which the supervision of equality rights is subordinate to the control of freedom rights, hence giving the principle of equality a subsidiary nature. Thus, the Court indicated that it will not apply the equality principle if the contested measure violates a freedom right, because the application of the relevant freedom right will prevail.[14] Therefore, the first pieces of the equality principle doctrine in Estonian constitutional law were created by way of *obiter dictum*.

A little less than a month later, in April 2002, the Constitutional Review Chamber considered the constitutionality of combined criminal penalties. According to the Criminal Code, which was part of the Soviet legacy (although extensively modified), different rules were to be applied by the courts depending on whether the combined penalty resulted from multiple counts in a single criminal case, or whether it was formed subsequently as a result of further counts at a second trial. The Constitutional Review Chamber declared this provision unconstitutional, because of a violation of the principle of equality, establishing another cornerstone of the equality doctrine:

> "The Constitutional Review Chamber observes first of all that the first sentence of §12(1) of the Constitution does not expressly refer to a subjective right. It only states that everyone is equal before the law. Nevertheless, these words embrace the right of a person not to be treated unequally. The wording of the first sentence expresses, above all, equality as to the application of law and means a requirement to implement valid laws in regard of every person impartially and uniformly. […] The Chamber shares the opinion that the first sentence of §12(1) of the Constitution is to be interpreted as also meaning equality in legislation. Equality in legislation requires, as a rule, that persons who are in similar situations must be treated equally by law. This principle expresses the idea of essential equality: those who are equal, have to be treated equally and those who are unequal must be treated unequally. But not any unequal treatment of equals amounts to the violation of the right to equality. The prohibition to treat equal persons unequally has been violated if two persons, groups of persons or situations are arbitrarily treated unequally. An unequal treatment can be regarded as arbitrary if there is no reasonable cause therefor. The Chamber admits that, although the review of arbitrariness is extended to the legislator, the latter must be awarded a wide margin of appreciation. If there is a reasonable and appropriate cause, unequal treatment in legislation is justified."[15]

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[13] The decision of the Constitutional Review Chamber of 06.03.2002 plays a significant role in Estonian fundamental rights doctrine, because the SC first established the principle of proportionality with three stages: the suitability, the necessity and the proportionality in the narrow sense (paras. 14 f.).

[14] CRCSCj 06.03.2002, 3-4-1-1-02, para. 18; repeated in CRCSCj 12.06.2002, 3-4-1-6-02, para. 15.

[15] CRCSCj 03.04.2002, 3-4-1-2-02, paras. 16 f.

Following the decision above, the SC *en banc* confirmed the statements of the decision of 3 April 2002[16] and then subsequently condensed and combined its earlier statements.[17] In the autumn of 2003, the Constitutional Review Chamber specified the criteria for establishing unequal treatment. It found that: "It is first necessary to find the closest common generic concept of the persons to be compared, and after that to describe the alleged unequal treatment."[18] In other words, the SC invented the classic criteria for examining unequal treatment – the *genus proximum* and the *differentia specifica*. This methodological precision is also a necessary further piece of the first equality doctrine.

The second set of developments began in 2004. In the decision of 21 January 2004, the Constitutional Review Chamber pointed out the connection between the equality principle and social rights. According to the SC, the right of the complainant, who was a student, to housing benefit derived from the fundamental social right (§28(2) of the Constitution), in combination with the general principle of equality. *Sotsiaalhoolekande seadus* [the Social Welfare Act][19] made the payment of housing benefit dependent on the type of accommodation, so that the majority of students were now excluded. The justification of the Constitutional Review Chamber can be summarised as follows:

> "The legislator is granted an extended power of decision because of the fact that economic and social policies and the formation of the budget are within the competence of the legislator. Still, an increase of tax burden and redistribution of resources may result in a collision of social rights with other fundamental rights. […] In making social policy choices the legislator is bound by the constitutional principles and the nature of fundamental rights. The right to receive state assistance in the case of need is a subjective right, in the case of violation of which a person is entitled to go to court, and the courts have an obligation to review the constitutionality of an Act granting a social right. But a court of constitutional review must avoid a situation where the development of budgetary policies goes, to a large extent, into the hands of court. That is why in implementing social policies the court cannot replace the legislative or executive powers. […] The connection of social fundamental rights with the general right to equality is closer than that with other fundamental rights. […] Recognising the wide margin of

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16 SCebj [hereinafter: judgment of the SC *en banc*] 14.11.2002, 3-1-1-77-02, para. 22.

17 SCebj 17.03.2003, 3-1-3-10-02, para. 36. This decision is one of the most important decisions of the SC, because so far it is the only successful individual constitutional complaint in Estonian constitutional case law.

18 CRCSCj 16.09.2003, 3-4-1-6-03, para. 18. The Court stated: "In order to ascertain a violation of the fundamental right to equality, it is first necessary to find the closest common generic concept of the persons to be compared, and after that to describe the alleged unequal treatment." However, it must be considered as a mistake. The Court did not find any violation of the principle of equality in the end in this case. Therefore, the sentence must be interpreted in this way, since only these first two conditions are presented and, apparently, satisfied.

19 RT I 1995, 21, 323 (in Estonian; a revised single text e.g. in RT I 2001, 98, 617). An English translation of a later version of the law is available here: https://www.riigiteataja.ee/en/eli/ee/522032019017/consolide/current.

> appreciation of the legislator, an unequal treatment is arbitrary when it is manifestly inappropriate. […] Unequal treatment cannot be justified by difficulties of mere administrative and technical nature. Excessive burden on the state budget is an argument that can be considered when deciding on the scope of social assistance, but the argument cannot be used to justify unequal treatment of needy persons and families."[20]

Furthermore, in 2005, the SC clarified that an infringement of the principle of equality does not automatically amount to a violation of the principle,[21] and, in 2007, declared that the substantial scope of protection of the general equality right covers all areas of life and extends personal protection to every individual.[22]

The first doctrine experienced a third and final development in 2008. The Constitutional Review Chamber summarised and developed the existing doctrine further, in an outstandingly detailed judgement.[23] The complainant was a pensioner who wanted time spent in the Soviet Army recognised as a period of employment relevant for the calculation of his pension, as the pension benefit varied according to length of service. He was an Estonian, born in Estonia, who was studying in Leningrad (now St. Petersburg) when he was recruited to the Soviet Army. After his release from the army, he successfully completed his studies in Leningrad and returned to Estonia. *Riikliku pensionikindlustuse seadus* [the State Pension Insurance Act] (hereinafter: the Pension Act)[24] recognised time spent in the Soviet Army as a pension-relevant period of employment, only if the applicant had been recruited in Estonian territory. The Constitutional Review Chamber rightly considered this as a violation of the principle of equality and declared the relevant clause of the Pension Act void. The doctrinal essence of the equality principle is extended by this decision in two ways: first, in achieving the necessary precision for determining unequal treatment; and, secondly, in the criteria for determining when unequal treatment is reasonable:

> "Whereas the smallest common denominator should be found on the basis of the fact that it shall depend on who is compared to whom. This means that in principle everybody is comparable to everybody else […] A cause is reasonable and appropriate if it is proportional in the narrow sense. To ascertain whether unequal treatment is proportional in the narrow sense it is necessary to weigh the objective of unequal treatment and the gravity of the unequal situation that has been created."[25]

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[20] CRCSCj 21.01.2004, 3-4-1-7-03, paras. 15–17, 37, 39.

[21] CRCSCj 02.05.2005, 3-4-1-3-05, para. 20.

[22] CRCSCj 01.10.2007, 3-4-1-14-07, para. 13. To the substantial scope of protection cf. already CRCSCj 06.03.2002, 3-4-1-1-02, para. 13; SCebj 17.03.2003, 3-1-3-10-02, para. 36. To the personal scope of protection cf. ALCSCj 20.12.2001, 3-3-1-61-01, para. 5.

[23] CRCSCj 30.09.2008, 3-4-1-8-08, paras. 20 f., 24, 27, 32.

[24] RT I 2001, 100, 648 (in Estonian). English translations of later versions of the law are available here: https://www.riigiteataja.ee/en/eli/ee/504022019001/consolide/current.

[25] CRCSCj 30.09.2008, 3-4-1-8-08, paras. 24, 32.

### 3. The third stage: the new doctrine

On 7 March 2011, the Constitutional Review Chamber forwarded a case to the SC *en banc*, because the judges of the Constitutional Review Chamber had fundamental disagreements regarding the interpretation of §12(1) of the Constitution and considered it necessary to harmonise the case law regarding the application of the equality principle.[26] The initial case concerned the question of whether those over 65 years of age could be treated in the same way as receivers of disability benefit when calculating the maximum period of statutory sickness benefit. The regular statutory maximum period of sickness benefit is 250 days per calendar year. After the expiry of that period it is possible to apply for the disability benefit scheme, provided that the capacity to work is reduced by between 40% and 100%. Furthermore, there are special rules in *ravikindlustuse seadus* [the Health Insurance Act][27] for those who receive disability benefit. In this case, the maximum period of statutory sickness benefit is no more than sixty consecutive days, and a total of ninety days, per calendar year. This means that those who have lost about 50% of their capacity to work may receive the disability benefit, but still work part-time. But if such a person becomes sick, the Health Insurance Agency will pay sickness benefit for a much shorter duration than to those who do not receive disability benefit. The legislature purported to place identical restrictions on statutory sickness benefit for the over 65s: ninety days maximum, with no more than sixty consecutive days. In the immediate case, a 67 year old working pensioner became sick for an extended period and requested sickness benefit, but the Health Insurance Agency declined to continue making payments after reaching the maximum of ninety days. The pensioner brought an action before the Administrative Court.

The SC *en banc* declared the unequal treatment of the over 65s, compared to the younger workers, to be unconstitutional. The Court also considered the previous fundamental judicial disagreement regarding the interpretation of §12(1) of the Constitution and thus the new doctrine of equality was born. The decision contained four key points regarding the new doctrine: first, the SC interpreted §12(1) of the Constitution, so that its first and second sentence combined to generate a comprehensive, uniform, equality right. Previously, the SC had assumed that the first sentence constituted the general equality right and that the specific discrimination prohibition, contained in the second sentence, constituted special equality rights.[28] But now the SC found:

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[26] CRCSCr [hereafter: ruling of the Constitutional Review Chamber of the SC] 07.03.2011, 3-4-1-12-10, para. 58.

[27] RT I 2002, 62, 377 (in Estonian).

[28] Cf. SCebj 20.11.2009, 3-3-1-41-09, paras. 21, 42, 51; ALCSCj 20.10.2008, 3-3-1-42-08, para. 28.

> "After analysing the case law, the Supreme Court *en banc* is of the opinion that distinguishing between the grounds of discrimination in the first and second sentence of §12(1) of the Constitution and the legitimate objectives of the infringement is not justified. §12(1) of the Constitution includes a fundamental right to equality which is uniform with respect to all grounds of unequal treatment […]. It guarantees a uniform approach to the fundamental right to equality."[29]

Secondly, the SC clarified the question of statutory reservation of the general equality right, finding that it is a right with a simple statutory reservation.[30] This ended the earlier contradictory practice, whereby the statutory reservation applied only to the general equality right, extending the simple statutory reservation to include the special discrimination prohibitions contained in §12(1) (2nd sentence) of the Constitution. Thirdly, the SC prescribed that justifications of unequal treatment should be reviewed with the help of the principle of proportionality, rather than of the reasonable cause criteria.[31] The future application and extent of the tests of suitability and necessity remain to be seen. However, it does appear to be an important part of the doctrinal specification, at least in some cases, as will be demonstrated below. Lastly, the SC added a balancing rule, drawing a distinction between personal attributes acquired by act of will, such as language skills and, to a certain extent, religion or beliefs, which are changeable, and attributes that exist independently of the will of the person, which include: race, age, disability, genetic characteristics, or mother tongue. According to the SC, even stronger reasons must be brought forth to justify unequal treatment in the latter case.[32] Since the particular case concerned the attribute 'age', which exists regardless of the will of the person, the SC turned to the stricter criteria and declared the unequal treatment on grounds of age to be disproportionate.

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[29] SCebj 07.06.2011, 3-4-1-12-10, para. 31.

[30] SCebj 07.06.2011, 3-4-1-12-10, para. 31.

[31] SCebj 07.06.2011, 3-4-1-12-10, paras. 35, 43 ff. Cf. the three level principle of proportionality: CRCSCj 06.03.2002, 3-4-1-1-02, paras. 14 ff.; and especially the wording in: CRCSCj 17.07.2009, 3-4-1-6-09, para. 21.

[32] SCebj 07.06.2011, 3-4-1-12-10, para. 32.

## III. Systematic Analysis and Review of the Case Law

The SC control of the equality right has a two-level-structure: an unequal treatment level and a justification of the unequal treatment level.[33] From this standpoint of the SC it can be concluded that the general structure of the right to equality corresponds to the principle theory, and therefore the equality right is correctly treated as a principle, given that it applies the scheme of infringement and limitation of constitutional rights.[34] So, the starting point of the following analysis, is the principle theory of constitutional rights,[35] with slight modifications by the author.

The analysis and review of relevant case law, considers whether the principle of equality constitutes a constitutional right that also binds the legislature, whether it protects factual equality as well as legal equality, whether it contains a requirement of unequal treatment for those who are not equal, whether the principle of equality has any statutory reservation, whether the applicability of the principle of equality can legitimately be excluded when the persons to be compared are allegedly incomparable, how the comparison groups should be formed, whether any special equality rights exist and, if so , what kind of structure they have, how the principle of equality functions in interaction with other constitutional rights, whether there are different levels of scrutiny in the test of the principle of equality, and whether there is any principle of 'coherence'.

### 1. The equality principle as a fully developed constitutional right

The questions of whether the principle of equality is enforceable and could be used as a constitutional right by a rights-holder and, if so, whether it is also binding for the legislature, were clearly answered by the SC in a judgement on

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[33] Constitutively CRCSCj 03.04.2002, 3-4-1-2-02, para. 17; cf. esp. CRCSCj 02.05.2005, 3-4-1-3-05, para. 20.

[34] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 181, 199 f.; M. Borowski. Die Glaubens- und Gewissensfreiheit des Grundgesetzes. Tübingen: Mohr, 2006, p. 685 ff.

[35] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 44 ff. An abstract of the distinction of rules and principles can be found in: R. Alexy. Grundrechtsnorm und Grundrecht. – W. Krawietz *et al*. (eds.). Politische Herrschaftsstrukturen und neuer Konstitutionalismus. Berlin: Duncker & Humblot, 2000, p. 103. Cf. the recent volumes: J.-R. Sieckmann (ed.). Die Prinzipientheorie der Grundrechte. Baden-Baden: Nomos, 2007; L. Clérico, J.-R. Sieckmann (eds.). Grundrechte, Prinzipien und Argumentation. Baden-Baden: Nomos, 2009; M. Borowski (ed.). On the Nature of Legal Principles. Stuttgart: Franz Steiner, 2010; G. Pavlakos (ed.). Law, Rights and Discourse. Oxford, Portland: Hart, 2007; M. Klatt (ed.). Institutionalized Reason. Oxford, New York: Oxford University Press, 2012; M. Klatt (ed.). Prinzipientheorie und Theorie der Abwägung. Tübingen: Mohr, 2013.

3 April 2002. The SC indicated, in relation to both questions, that the answer might be ambiguous:

> "The Constitutional Review Chamber observes first of all that the first sentence of §12(1) of the Constitution does not expressly refer to a subjective right. It states only that everyone is equal before the law. […] The wording of the first sentence expresses, above all, the equality upon application of law and means a requirement to implement valid laws in regard to every person impartially and uniformly."[36]

Although the SC considered that §12(1) does not *expressis verbis* indicate a subjective right, it said: "Nevertheless, these words embrace the right of a person not to be treated unequally."[37] The SC also affirmed that the right to equality is also binding on the legislature:

> "The Chamber shares the opinion that the first sentence of §12(1) of the Constitution is to be interpreted as also meaning equality in legislation. Equality in legislation requires, as a rule, that persons who are in similar situations must be treated equally by the law."[38]

The question of the subjectivity of the equality principle has not been considered by the courts since the aforementioned decision. However, the SC has from then on repeatedly affirmed that the first sentence of §12(1) of the Constitution is to be interpreted as also meaning equality in legislation.[39]

The SC is correct with regard to both of these fundamental questions. Whereas the subjectivity issue also concerns the general question of the subjectivity of constitutional rights, which will not be analysed here, one could ask whether legislative equality is a fundamental precondition for the proper functioning of the equality principle. To answer this question it should first be pointed out that if the equality principle were to apply only to the exercise of executive and judicial powers, the protection of fundamental rights would be superficial. It is evident that all laws should be applied equally to everyone and that binding the legislature is the main aim of the equality principle, as a right deriving from the Constitution. This leads to the second argument: according to §14 of the Constitution, it is the primary duty of the legislature to guarantee the rights and freedoms provided in the Constitution. Since the equality principle is also provided in the Constitution, it is the duty of the legislature to guarantee it. Thirdly, if the principle of equality were not to cover legislative equality, discriminatory Acts of Parliament, for example in relation to taxation, would be possible. The

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36 CRCSCj 03.04.2002, 3-4-1-2-02, para. 16.

37 CRCSCj 03.04.2002, 3-4-1-2-02, para. 16.

38 CRCSCj 03.04.2002, 3-4-1-2-02, para. 17.

39 SCebj 14.11.2002, 3-1-1-77-02, para. 22; 17.03.2003, 3-1-3-10-02, para. 36; 10.12.2003, 3-3-1-47-03, para. 24; 27.06.2005, 3-4-1-2-05, paras. 38 f.; 02.06.2008, 3-4-1-19-07, para. 21; CRCSCj 03.04.2002, 3-4-1-2-02, para. 17; 24.01.2004, 3-4-1-7-03, para. 17; 02.05.2005, 3-4-1-3-05, para. 17; 20.03.2006, 3-4-1-33-05, paras. 26, 32; 26.09.2007, 3-4-1-12-07, paras. 18 f.; 01.10.2007, 3-4-1-14-07, para. 13; 30.09.2008, 3-4-1-8-08, para. 20.

requirement that everyone is equal before the law is, in its narrowest sense, fulfilled if the executive power applies a discriminatory law equally to everyone. However, this result would be unsatisfactory and would not be in accordance with the idea of §12 of the Constitution. Fourthly, according to the preamble to the Constitution, the Estonian state is founded first and foremost on liberty. Since the main obligation of all state powers is to guarantee liberty, §12(1) serves, amongst other ideals, that of equal freedom for everyone and therefore must necessarily also bind legislative powers. Fifthly, in the *travaux preparatoires* of the Constitution, it was indisputable that the equality principle should also bind the legislature.[40] For these reasons the existence of the equality principle as a fully developed constitutional right is beyond dispute.[41]

## 2. Legal and factual equality

The SC decided in 2005 that the guarantee of full factual equality for individuals exercising the right to vote is infeasible in principle and not required by the Constitution.[42] In 2003, it had considered legal equality in relation to the relevant statutory regulation.[43] Thus, the SC differentiates between these two basic categories. However, it has not yet given its view on whether the principle of equality includes both – factual and legal equality –, or legal equality only.

It is indisputable that the principle of equality is primarily designed to produce legal equality,[44] but whether, and to what extent, it also aims to create factual equality is much more problematic.[45] The equality-paradox states that if factual

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[40] L. Hänni. – V. Peep (ed.). Põhiseadus ja Põhiseaduse Assamblee. Tallinn: Juura, 1997, p. 977 f.

[41] Cf. the European Court of Justice made recently a recapitulating clarification in respect of Art. 20 of the Charter too, ECJ 17.10.2013, Case C-101/12, *Herbert Schaible* v. *Land Baden-Württemberg*, paras. 76–78: "Equality before the law, set out in Article 20 of the Charter, is a general principle of European Union law which requires that comparable situations should not be treated differently, and that different situations should not be treated in the same way, unless such different treatment is objectively justified […] According to the case law of the Court a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment […] Since a European Union legislative act is concerned, it is for the European Union legislature to demonstrate the existence of objective criteria put forward as justification and to provide the Court with the necessary information for it to verify that those criteria do exist […]."

[42] CRCSCj 01.09.2005, 3-4-1-13-05, para. 24. However, the English translation of the decision is misleading because it uses the term 'actual equality' instead of the correct 'factual equality'.

[43] CRCSCj 16.09.2003, 3-4-1-6-03, para. 24.

[44] ALCSCj 20.10.2008, 3-3-1-42-08, para. 25. Cf. instead of many F. Schoch. Der Gleichheitssatz. – Deutsches Verwaltungsblatt 1988, p. 866; M. Borowski. Grundrechte als Prinzipien. 2. ed. Baden-Baden: Nomos, 2007, p. 396.

[45] M. Borowski. Die Glaubens- und Gewissensfreiheit des Grundgesetzes. Tübingen: Mohr, 2006, p. 682 with further rerferences to both positions.

equality is sought, one must also be prepared to accept legal inequality.[46] Thus, if one wants to guarantee legal equality and inequality at the same time *via* the principle of equality, the equality provision has to be interpreted in a manner that infers that two contrary requirements derive from it simultaneously. On the one hand, the state ought to treat persons equally in a legal sense; on the other hand, legally equal treatment is (indirectly) prohibited.[47] If we interpret the requirements as principles, such an interpretation is not logically excluded.[48] But this seems to be technically inexpedient: there must be really good reasons for interpreting a provision in this manner, which will result in two contrary requirements emerging. Alexy, in his theory of constitutional rights, defends the theory of factual equality because he seeks the subjectification of the principle of the social state.[49] To cope with the constitutional issues in a modern society, this subjectification of the social state must be considered as necessary, although the principle of equality might not be the best way to achieve this. It seems more appropriate to interpret the social state principle itself in a way that includes a subjective dimension, or alterna- tively to recognise the subjectivity of granting minimum social rights in the Constitution.[50] Moreover, if one claims the promotion of factual equality, at least as a secondary function of the principle of equality, then justification is necessary as to why factual equality must be internally bounded and pursued only to a limited extent, in marked contrast to legal equality. But defenders of the theory of factual equality simply assume that the principle of equality should be interpreted in the act-related sense first and

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[46] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 277. As a matter of fact, this is not a logical paradox in the strict sense but rather a collision of two opposing principles – that of legal equality and that of factual equality. This has been clearly demonstrated by M. Borowski. Grundrechte als Prinzipien. 2. ed. Baden-Baden: Nomos, 2007, p. 397 ff.

[47] The legal equality is act-related and the factual equality consequence-related, R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 276; M. Borowski. Grundrechte als Prinzipien. 2. ed. Baden-Baden: Nomos, 2007, p. 396.

[48] Jürgen Habermas takes "the dialectic between legal and factual equality [for] an inconspi- cuous motor of legal development", see J. Habermas. Between Facts and Norms. Mass.: MIT Press, 1996, p. 416. On the contrary, Christian Starck considers it illogical, cf. C. Starck. – H. von Mangoldt, F. Klein, C. Starck (eds.). Kommentar zum Grundgesetz, Vol. 1, 6. ed. München: C. H. Beck, 2010, Art. 3(1) recital 5.

[49] Cf. R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 284.

[50] The Estonian Constitution CRCSCj 21.01.2004, 3-4-1-7-03, para. 16. The German Constitutional Court deduces now from Art. 1(1) in conjunction with Art. 20(1) of the German Constitution a fundamental right to a subsistence minimum that is in line with human dignity, cf. BVerfG 09.02.2010, joined cases 1 BvL 1, 3, 4/09, *Hartz IV*, paras. 132 ff. (BVerfGE 125, 175, 221 ff.), available here:
https://www.bundesverfassungsgericht.de/entscheidungen/ls20100209_1bvl000109en.html,
and BVerfG 18.07.2012, joined cases 1 BvL 10/10, 2/11, *Asylbewerberleistungsgesetz*, paras. 62 ff. (BVerfGE 132, 134, 166 ff.), available here:
https://www.bundesverfassungsgericht.de/entscheidungen/ls20120718_1bvl001010en.html.

foremost,[51] which congruously leads to the burden of argumentation in favour of legal equality,[52] or that legal equality enjoys a *prima facie* priority.[53] However, the most important objection to be raised is the particular potential risk that lies in the combination of factual equality with the requirement of unequal treatment. Alexy himself describes the individual right to factually unequal treatment as a critical point.[54] In fact, if one combines the alleged requirement of factual equality with the supposed requirement of unequal treatment, one would enable the Constitutional Court to supplant the legislature in many areas and exercise massive judicial discretion in determining the relevant factual differences for requiring a statutory exception, or even to create an alternative regulatory scheme. Such an interpretation would in the most extreme case leave the gates wide open for a transition from a parliamentary state to an immoderate constitutional-court state (*verfassungsgerichtlicher Jurisdiktionsstaat*).[55,56]

Without being able to answer this fundamental question exhaustively here, it seems possible to conclude that §12(1) of the Constitution requires legal equality alone and that the principle of equality provides a sufficiently contoured scope for protection. The principle of factual equality does not follow from the principle of equality, but from the fundamental social right (§28(2) of the Constitution) and from the principle of the social state (§10 of the Constitution), assuming of course that it is a principle at all. There is no need to strive for factual equality from the general principle of equality, but it is necessary to specify the basis of the principle of equality more precisely; otherwise, its omnipotence and

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[51] Cf. R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 280.

[52] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 283.

[53] R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 61; M. Borowski. Die Glaubens- und Gewissensfreiheit des Grundgesetzes. Tübingen: Mohr, 2006, p. 397.

[54] R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 280.

[55] E.-W. Böckenförde. Grundrechte als Grundsatznormen. – E.-W. Böckenförde. Staat, Verfassung, Demokratie. Frankfurt a.M.: Suhrkamp, 1991, p. 190. Böckenförde has embraced the concept of the '*verfassungsgerichtlicher Jurisdiktionsstaat*'. However, a moderate Constitutional Court is not negative, but a necessary condition of the constitutionalism. Only the immoderate constitutional-court state, i.e. if the Constitutional Court excesses its jurisdiction, raises the question of a possible violation of the competence of the legislature.

[56] In relation to the problem of competence see: R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 282 ff. However, Alexy points to the theories of factual equality, but the essence of the competence problem does not concern the question of which theory of factual equality is right, but rather the question whether the principle of factual equality can be legitimately assigned to the principle of equality at all. The problem of the shifting of legislative competence from Parliament to the Constitutional Court begins with the assignment of the principle of factual equality to the scope of protection of the principle of equality. The constellation becomes really problematic in combination with the assumption of unequal treatment, as a constitutional requirement.

omnipresence[57] raises the risk of its degradation. The principle of equality is not a tool to solve all cases, but serves structurally the subjectification of the principle that (constitutional) law shall be applied equally to all persons. So an intermediate conclusion is that the principle of equality promotes legal equality, but not factual equality.[58] Implementation of factual equality requires that the fundamental social right and/or the principle of the social state be addressed. However, the sharp doctrinal separation of legal and factual equality is relativised in practice when the SC combines them in cases where it strives for factual equality on the basis of a fundamental social right in conjunction with the principle of equality.[59] Ultimately, the principle of equality is in practice involved in striving for factual equality, but this is a question of the ancillary application of the equality principle, as we shall see below.

### 3. Unequal treatment for non-equals

In one case, the SC held that the requirement of unequal treatment for non-equals was infringed.[60] The complainant had lost 100% of his hearing in one ear and 99% in the other ear. However, this was not recognised by the Social Insurance Agency as a disability within the meaning of *puuetega inimeste sotsiaaltoetuste seadus* [the Social Benefits for Disabled Persons Act][61] because the complainant did not require assistance from others. The complainant challenged the decision, which had been made on the grounds that he did not seek help from other persons, because he wanted to know whether he was exempt from the language test, which forms part of the naturalisation process. *Kodakondsusseadus* [the Citizenship Act][62] recognised the intermediate degree of disability as a ground for exemption from the otherwise mandatory language test in the naturalisation process.

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[57] Cf. F. Schoch. Der Gleichheitssatz. – Deutsches Verwaltungsblatt 1988, p. 864.

[58] See also F. Schoch. Der Gleichheitssatz. – Deutsches Verwaltungsblatt 1988, p. 866 f.; P. Martini. Art. 3 Abs. 1 GG als Prinzip absoluter Rechtsgleichheit. Köln *et al*.: Heymanns, 1997, p. 249 f. This means especially that no reverse discrimination can be justified with the principle of equal treatment itself but needs for its constitutional justification (dependent on the statutory reservation of the infringed constitutional right) either a substantial ground in the Constitution beyond the principle of equality (constitutional right with no statutory reservation) or at least a legitimate, i.e. constitutionally compliant, reason (constitutional right with the simple statutory reservation). The question of possible justifications in the case of an infringement of a freedom right with a qualified statutory reservation will not be discussed in detail here.

[59] CRCSCj 21.01.2004, 3-4-1-7-03.

[60] SCebj 10.12.2003, 3-3-1-47-03, para. 26.

[61] RT I 1999, 16, 273 (in Estonian). An English translation of a later version of the law is available here: https://www.riigiteataja.ee/en/eli/ee/518122017011/consolide/current.

[62] RT I 1995, 12, 122 (in Estonian). An English translation of a later version of the law is available here: https://www.riigiteataja.ee/en/eli/ee/521032019009/consolide/current.

The SC *en banc* decided, in a concrete norm control procedure which was presented to the plenary by the Administrative Law Chamber, that the Citizenship Act was partially unconstitutional because it violated the principle of equality.[63] The court considered two issues in terms of the general principle of equality: first, the unequal treatment relevant to the question of potential exemption from the language test for those with hearing impairments, depending on whether they need help from other people or not; and, secondly, the equal treatment of the hearingimpaired who are not exempted from the language test compared to people who can hear normally (and are also not exempted from the language test). But was the identification of the second infringement necessary? To put the question more generally, is there a constitutional requirement regarding unequal treatment for non-equals. "Treat the same similarly and differences differently", said both Plato and Aristotle,[64] and this has been repeated by the SC, as well as by the most influential Constitutional Court in Europe, the German Federal Constitutional Court.[65] The SC considered the individual characteristics of the person to be relevant, stating that equals should be treated equally and non-equals unequally.[66] This general statement is of course correct, but it is doubtful whether the requirement of unequal treatment for non-equals can serve as a control scheme for the principle of equality.

First, the requirement of unequal treatment is redundant because complaints regarding equal treatment can be re-phrased as complaints regarding unequal treatment, i.e. for every disapproved equal treatment, one can find a relevant unequal treatment.[67] A good example is the judgment of the SC of 7 June 2011 considered above,[68] where the issue was whether a rule that equated the over65s

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[63] We shall leave out of focus here whether such a question was in this particular court procedure admissible at all. Although the wording of §15(1) PS and the Constitutional Review Court Procedure Act seem to insist that the criterion 'relevant in the case' is a strict one and similar to the parallel criterion of Art. 100 of the German Constitution, it seems according to the case law of the SC to be rather similar to the interpretation of the European Court of Justice as to whether a referral for preliminary ruling in the sense of Art. 267 TFEU is required. The SC, in assessing the admissibility test, was neither particularly strict nor excessively consistent.

[64] Plato. Laws. VI 757; Aristotle. Politics. III 9 (1280a); *id*. Nichomachean Ethics. V 3 (1131a); cf. R. Alexy. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p. 263.

[65] Cf. BVerfG 17.12.1953, case 1 BvR 147/52, *Beamtenverhältnisse* (BVerfGE 3, 58, 135); 22.01.1959, case 1 BvR 154/55, *Armenrecht* (BVerfGE 9, 124, 129 f.)

[66] CRCSCj 03.04.2002, 3-4-1-2-02, para. 17.

[67] P. Martini. Art. 3 Abs. 1 GG als Prinzip absoluter Rechtsgleichheit. Köln *et al*.: Heymanns, 1997, p. 219 ff.; W. Rüfner. Der allgemeine Gleichheitssatz als Differenzierungsgebot. – B. Ziemske (ed.). Staatsphilosophie und Rechtspolitik. München: C. H. Beck, 1997, p. 271 ff., 279; M. Sachs. Der allgemeine Gleichheitssatz. – K. Stern. Staatsrecht. Vol. IV/2. München: C. H. Beck, 2011, p. 1479 with further references in fn. 239. See also for a detailed approach to the other direction M. Borowski. Grundrechte als Prinzipien. 2. ed. Baden-Baden: Nomos, 2007, p. 402; M. Borowski. Die Glaubens- und Gewissensfreiheit des Grundgesetzes. Tübingen: Mohr, 2006, p. 685 ff.

[68] SCebj 07.06.2011, 3-4-1-12-10.

with recipients of disability benefit for the allowed maximum duration of any sickness benefit was constitutional. It would have been easy to form comparison groups of the over65s, and of the recipients of disability benefit in respect of the allowed maximum duration of sickness benefit and to consider the violation of the requirement of unequal treatment. The SC, however, did not examine the unequal treatment of the aforementioned comparison groups, but instead looked at the requirement of equal treatment of over65s with younger people. In addition, the case of the naturalisation process also points to this redundancy. The court noted that, on the one hand, the hearing-impaired with recognised intermediate-level disability and those with normal hearing are different, but are treated equally in the naturalisation process. On the other hand, however, the hearing-impaired are equal, but the law provides exemption from the language test only if the hearing loss is recognised as an intermediate-level disability.[69] In the course of further examination, the SC reviewed whether the latter unequal treatment is in accordance with the principle of equal treatment, i.e. whether there was a reasonable cause for the unequal treatment.[70]

Secondly, the rejection of a requirement of unequal treatment is reflective of historical arguments. The principle of equality was initially opposed to nobility privileges,[71] thus directed towards bringing about legal equality. The function of legal equality may become obscured by the inclusion of the requirement of inequality, because these two principles are mutually opposed; and thus the principle of equality threatens to mutate into a simple demand for the justification of norms.[72]

Third, and most importantly, the requirement of unequal treatment for non-equals would lead to an issue in its implementation regarding the separation and balance of powers and competences.[73] While the application of the requirement of equal treatment subsists in the control of unequal treatment by the legislature and thus the principle is clearly directed to the promotion of legal equality, the objective of the requirement of unequal treatment remains undefined. Just one equal treatment issue has to be found in relation to two persons or groups and almost any legislative omission could be reviewed, because the SC would be in a position almost freely to determine the direction of its supervision. The aim of

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69 SCebj 10.12.2003, 3-3-1-47-03, para. 26.

70 SCebj 10.12.2003, 3-3-1-47-03, para. 27.

71 S. Huster. Rechte und Ziele. Berlin: Duncker & Humblot, 1993, p. 25 with further references; M. Sachs. Der allgemeine Gleichheitssatz. – K. Stern. Staatsrecht. Vol. IV/2. München: C. H. Beck, 2011, p. 1444 ff, 1479 ff.

72 A. Podlech. Gehalt und Funktionen des allgemeinen verfassungsrechtlichen Gleichheitssatzes. Berlin: Duncker & Humblot, 1971, p. 57.

73 SCebj 12.07.2012, 3-4-1-6-12, para. 173: "§152 of the Constitution obliges the SC to verify whether the activities of the legislature and the executive are in accordance with the Constitution. However, by performing this duty the SC must consider the principle of separation and balance of powers and the competences of state bodies established by the Constitution. The SC must verify whether the activities of the legislature are constitutional, but it cannot decide on matters entrusted to the *Riigikogu* by the Constitution."

the requirement of unequal treatment for non-equals must lie not only in something that the Constitution commands, but may well be everything permitted or possible under the Constitution. The determination of the objective of unequal treatment intended by the SC must simply not be unconstitutional. Only that which is prohibited by the Constitution can be excluded as a suitable objective in the first place. Thus, the discretion granted by the principle of equality is given not to the legislature but to the Constitutional Court and the principle of equality is inverted. Furthermore, it would not be correct to allow the complainant or applicant to determine the objective in a binding manner. This would leave the equality doctrine to chance and procedurally contradict the general principle of law '*iura novit curia*'. Therefore, using the requirement of unequal treatment for non-equals, the SC could legislate exceptions or even new sets of rules without particularly high standards of justification and, therefore, without the necessary legitimation. The only requirement is that the objective is not clearly unconstitutional. However, in constitutionalism, the law-making powers must belong to the legislature and not to the Constitutional Court, even if the Constitutional Court must have wide law-nullifying powers and even the power to disapprove of a Parliamentary omission of a constitutional obligation.

The legal existence of the constitutional requirement of unequal treatment for non-equals must therefore be denied primarily because of the principle of separation and balance of powers. Günter Dürig, one of the most important German constitutional lawyers of the 20th century, wrote, in his influential commentary on the article of equality, that the right to equality defines an egalitarian standard.[74] This can be affirmed with a little clarification: there is no such thing as a right to unequal treatment deriving from the principle of equality.

## 4. Statutory reservation

The question of the statutory reservation of the principle of equality was another riddle in Estonia for a long time. The statutory reservation has to be more closely scrutinised for two reasons: first, it determines the circle of legitimate aims for infringements of the equality principle, i.e. for unequal treatments; and, secondly, it points out that every infringement needs to be justified on a formally constitutional legal basis. The SC considered the question of the statutory reservation to be one of the fundamental questions that had to be clarified by the SC *en banc*.[75]

The origin of this debate dates back to 2003. Barely was the doctrine of the equality principle born, when the SC expressed, somewhat misleadingly, that the general equality right had no statutory reservation.[76] This conception would have meant that only other constitutional rights, or other constitutional values, could

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[74] G. Dürig. – T. Maunz, G. Dürig (eds.). Grundgesetz-Kommentar. München: C. H. Beck, 1973, Art. 3(1)1 recital 22 ff.

[75] CRCSCr 07.03.2011, 3-4-1-12-10, paras. 52 f.

[76] SCebj 17.03.2003, 3-1-3-10-02, paras. 27 f.

have been legitimately considered as justifications for unequal treatment. However, the SC in 2003 distinguished between two different applications of the equality principle: the application of the principle of equality in conjunction with the constitutional principle of *lex mitior* (§23(2) 2nd sentence of the Constitution);[77] and the application of the principle of equality alone.[78] The SC has even referred to it later and, in 2004, confirmed the statement regarding the statutory reservation.[79] Elsewhere, the SC held that the principle of equality is a right with a simple statutory reservation, which means that any Act of Parliament would suffice as a legal basis for unequal treatment.[80]

Today it is regarded as settled law that the general principle of equality in the Estonian Constitution has a simple statutory reservation. The SC *en banc* declared that the principle of equality has a simple statutory reservation and this has subsequently been repeated by the Constitutional Review Chamber.[81] The clarification is welcome. The main reason that the SC is right is that the alternative interpretation of the principle of equality (i.e. that the principle of equality as a constitutional right does not have a statutory reservation at all) would excessively limit the catalogue of legitimate aims for any constitutional unequal treatment. The principle of equality has, as a general constitutional right, an extremely wide scope and embraces all people and all spheres of life.[82] Therefore, conversely, an open list of possible justifications is needed and should include all constitutional norms and legitimate objectives pursued by the legislature.[83] Furthermore, the wording of the first sentence of §12(1) of the Constitution insists that equality exists 'before the law'. It too can be regarded as a pointer towards the simple statutory reservation.

On the other hand, the dimension of the formal protection of the equality principle is in the background. The principle of equality preponderantly plays an important role in entitlement situations where the possibility of formal protection

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[77] §23(2) second sentence PS: "If, subsequent to the commission of the offence, the law makes provision for a lighter penalty, the lighter penalty applies." Cf. SCebj 17.03.2003, 3-1-3-10-02, paras. 19–34.

[78] SCebj 17.03.2003, 3-1-3-10-02, paras. 35 ff.

[79] Confirming the lack of the statutory reservation for the same norm combination: SCebr [hereinafter: ruling of the SC *en banc*] 28.04.2004, 3-3-1-69-03, para. 28; SCebj 02.06.2008, 3-4-1-19-07, para. 23. In a further case the SC dealt with the principle of equality as if it had no statutory reservation: SCebj 19.04.2005, 3-4-1-1-05, paras. 16, 24, 36.

[80] Cf. CRCSCr 07.03.2011, 3-4-1-12-10, para. 53. The Constitutional Review Chamber of the SC noted that, according to the established jurisprudence of the SC, the equality right has been treated as being similar to the rights with a simple statutory reservation.

[81] SCebj 07.06.2011, 3-4-1-12-10, para. 31; CRCSCj 27.12.2011, 3-4-1-23-11, para. 41; also substantively CRCSCj 14.05.2013, 3-4-1-7-13, para. 41, and SCebj 26.06.2014, 3-4-1-1-14, para. 113.

[82] Cf. SCebj 17.03.2003, 3-1-3-10-02, para. 36; CRCSCj 06.03.2002, 3-4-1-1-02, para. 13; 01.10.2007, 3-4-1-14-07, para. 13.

[83] Cf. M. Borowski. Grundrechte als Prinzipien. 2. ed. Baden-Baden: Nomos, 2007, p. 448; S. Huster. Rechte und Ziele. Berlin: Duncker & Humblot, 1993, p. 239.

is already logically questionable because the relevant legal question lies in the lack of the law. How can the formal constitutionality of something that does not (yet) exist be supervised? However, if the principle of equality is applied in conjunction with freedoms, it would systematically be subordinated to the relevant legal freedom.[84] In such cases of ancillary application, the argument of equality should be considered in the context of proportionality in the narrow sense, as we will see below.[85] The SC has reviewed the formal constitutionality of an original unequal treatment only three times in its case law.[86]

## 5. Incomparability

In 2008, an unexpected turn was taken in the case law of the SC, in the form of an incomparability thesis. In four particular cases, the SC denied the violation of the principle of equality because the groups formed were allegedly not comparable. In the first case, the SC found that persons who have committed a traffic law misdemeanour are not comparable with persons who have committed a traffic law offence.[87] In the second case, the SC found that individuals who have performed support functions in the intelligence or security services and those individuals who have performed support functions outside the intelligence or security services are not comparable.[88] In the third case, the SC held that people who commit a crime with a motor vehicle which they own and people who use a motor vehicle owned by another person or by joint owners when committing a crime, are not compa- rable with each other, when the SC examined the constitutionality of the confiscation of the vehicle used in the crime.[89] In the fourth case, the SC found that prisoners and persons who are free are not comparable in relation to a prohibition on prisoners accessing certain webpages.[90]

The SC denied any infringement in these cases, meaning that there would be no need for further justification of any unequal treatment. The starting point of

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84 Cf. CRCSCj 06.03.2002, 3-4-1-1-02, para. 18; 12.06.2002, 3-4-1-6-02, para. 15.

85 E.g. CRCSCj 1601.2007, 3-4-1-9-06, para. 32.

86 CRCSCj 30.09.2008, 3-4-1-8-08, para. 18 – the SC takes the examination of the formal constitutionality before the brackets, whereas the resolution of the decision indicates that the unconstitutionality lies in an omission of the legislature. SCebj 07.06.2011, 3-4-1-12-10, para. 40 – the SC examines the formal constitutionality using general formulae within the examination of the principle of equality, the resolution of the decision declares the supervised provision partially invalid for material reasons. CRCSCj 14.05.2013, 3-4-1-7-13, para. 40 – the SC examines the formal constitutionality very briefly within the examination of the principle of equality, on the basis that there is no evidence of any breach of procedural norms in the law-making procedure, whereas the resolution of the decision declares the supervised provision invalid for material reasons.

87 SCebj 27.06.2005, 3-4-1-2-05, paras. 50, 54.

88 SCebj 301.2008, 3-3-1-101-06, para. 23.

89 SCebj 12.06.2008, 3-1-1-37-07, para. 24.

90 SCebj 07.12.2009, 3-3-1-5-09, para. 28.

the SC in these cases was that the question of whether the unequal treatment is justified or not could arise only when the individuals or groups who are treated differently are comparable with each other. The comparability presupposes that the persons or groups "are in an analogous situation from the aspect of concrete differentiation",[91] although the SC does not give any further explanation of the meaning of this point.

However, Judge Jüri Põld criticised the doctrine of the SC and wrote, in his dissenting opinion in 2008, that it is inconceivable that a group could be so extraordinary as to be totally incomparable with anyone.[92] Shortly thereafter, the Constitutional Review Chamber gave up the theory of incomparability, agreeing explicitly that, in principle, everybody is comparable to everybody else.[93] Paradoxically, the SC *en banc* repeated the incomparability theory subsequently, in the aforementioned case, without any reference to the opinion of the Constitutional Review Chamber.[94] Therefore, the question of which opinion should be followed still remains.

The European Court of Justice,[95] the European Court of Human Rights[96] and the German Federal Constitutional Court[97] have all deployed the incomparability thesis in at least some cases where the equality principle came under consideration. It is doubtful, however, whether the declaration of incomparability can be a sufficient justification for denying any violation of the equality principle. It has theoretically been proven that there is nothing in a particular case that it is incomparable, something can always be compared with something else.[98] It is important to emphasise that there are justification deficits, in cases where unequal treatment claims are rejected on the basis of the incomparability thesis. Transparency and procedural justice are improved if the SC makes its reasons public and names them after an affirmation of the unequal treatment. For all these

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91 SCebj 27.06.2005, 3-4-1-2-05, para. 40; 03.01.2008, 3-3-1-101-06, para. 23.

92 Dissenting opinion of Justice Jüri Põld, joined by Justices Tõnu Anton, Jüri Ilvest, Indrek Koolmeister, Julia Laffranque and Harri Salmann, to the SCebj 03.01.2008, 3-3-1-101-06.

93 CRCSCj 30.09.2008, 3-4-1-8-08, para. 24.

94 SCebj 07.07.2009, 3-3-1-5-09, para. 28.

95 E.g.: ECJ 06.07.1982, Case C-188/80, *France et al*. v. *Commission*, para. 21; 12.10.2004, Case C-313/02, *Nicole Wippel*, para. 64; 26.10.2006, Case C-248/04, *Koninklijke Coöperatie Cosun UA*, para. 72. See also M. Rossi. EU-GRCharta Art. 20. Gleichheit vor dem Gesetz. – C. Calliess, M. Ruffert (eds.). EUV/AEUV. 4. ed. München: C. H. Beck, 2011, recital 20 f.

96 E.g.: ECtHR 26.04.1979, Case 6 538/74, *Sunday Times* v. *UK*, para. 72; 29.04.2008, Case 13 378/05, *Burden* v. *UK*, para. 62; 16.03.2010, Case 42 184/05, *Carson et al*. v. *UK*, para. 85; 04.11.2010, Case 14 480/08, *Tarkoev* v. *Estonia*, para. 61. C. Grabenwarter, K. Pabel. Europäische Menschenrechtskonvention. 5. ed. München: C. H. Beck, 2012, § 26 recital 6.

97 See also M. Sachs. Besondere Gleichheitsgarantien. – J. Isensee, P. Kirchhof (eds.). Handbuch des Staatsrechts der Bundesrepublik Deutschland. Vol. VIII. 3. ed. Heidelberg: C. F. Müller, 2010, §182 recital 33 ff.

98 See also V. Afonso da Silva. Grundrechte und gesetzgeberische Spielräume. Baden-Baden: Nomos, 2002, p. 170 ff.

reasons, one has to agree with the position of the Constitutional Review Chamber, and Jüri Põld, and hope that the SC *en banc* clarifies the ambiguity in the future.

## 6. Formation of the comparison groups

Since the formation of the comparison groups determines the unequal treatment that has to be justified, such formation is one of the keys for finding the right solution in an equality case. To analyse an unequal treatment, the two elements '*genus proximum*' and '*differentia specifica*' are widely used.[99] However, the step from these abstract criteria to a concrete comparison of two persons, or groups of persons, which has to be justified, is rather difficult. Constructions like the characterising tree of Adalbert Podlech,[100] or the theory of transitive action-related predicates,[101] are not really helpful in determining the formation of the correct comparison groups.

The SC had some difficulties with the formation of comparison groups, particularly in the Judgment of 8 March 2011.[102] It was an abstract judicial review, on the subject of a municipal statute of Tallinn, which introduced a child-birth allowance as a voluntary community-based social service. The childbirth allowance is paid to the parents of a child born in Tallinn, on the condition that both parents are residents of Tallinn before the birth of the child and at least one of the parents has, based on the Population Register data, resided in Tallinn for at

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[99] Cf. esp. W. Heun. – H. Dreier. (ed.). Grundgesetz-Kommentar. Vol. 1, 3. ed. Tübingen: Mohr, 2013, Art. 3, recital 24; M. Sachs. Der allgemeine Gleichheitssatz. – K. Stern, Staatsrecht. Vol. IV/2. München: C. H. Beck, 2011, p. 1513 in fn. 419 with further references.

[100] A. Podlech. Gehalt und Funktionen des allgemeinen Gleichheitssatzes. Berlin: Duncker & Humblot, 1971, p. 70, 264: "*Kennzeichnender Baum einer behandelten Klasse heißt jeder Klassenbaum, der die behandelte Klasse, eine nächste Einschlußklasse der behandelten Klasse und die Restklasse der behandelten Klasse hinsichtlich der nächsten Einschlußklasse als Glieder enthält*." Podlech gives an example of a right and wrong characterising tree on p. 68-69. According to him, the correct differentiation has to derive from the legal treatment of the case. However, the legal treatment is not a suitable criterion for the differentiation.

[101] S. Kempny, P. Reimer. Die Gleichheitssätze. Tübingen: Mohr 2012, p. 51 f.: "*Eine Ungleichbehandlung liegt vor, wenn jemand (der Verpflichtete) ein transitives handlungsbezogenes Prädikat in Bezug auf eine bestimmte Person (den Gleichzubehandelnden) verwirklicht und er dasselbe Prädikat nicht zugleich auch in Bezug auf eine andere bestimmte Person (die Vergleichsperson) verwirklicht*." This theory may describe the formation of a comparison pair correctly, but it does not contain any normative statement as to how the particular action-related predicate shall be found.

[102] CRCSCj 08.03.2011, 3-4-1-11-10. Ironically, on the day before this decision, on 07.03.2011 the Constitutional Review Chamber forwarded a case to the SC *en banc* because the judges of the Constitutional Review Chamber had fundamental disagreements related to the interpretation of §12(1) of the Constitution, and considered it necessary to harmonise the case law related to the application of the equality principle (CRCSCr 07.03.2011, 3-4-1-12-10, para. 58). It would have been preferable either to forward this case too to the SC *en banc* or to postpone the decision until the decision of the SC *en banc* in the other case.

least one year prior to the birth of the child. According to information from the local government of Tallinn the objectives of the childbirth allowance were to support the families living in Tallinn in the case of a birth of a child to foster strong families, to promote births in families with cohabiting parents and to ensure that the income tax of both parents flows into the budget of Tallinn. Furthermore, the local government explained that the childbirth allowance is paid beyond the requirements of the municipal statute in question, even to the child's mother when no father is listed on the birth-certificate, or where the birth certificate was issued according to the testimony of the mother and the mother resided in Tallinn for at least one year prior to the birth of the child. The Chancellor of Justice,[103] who initiated the constitutional review proceedings, requested a declaration that the municipal statute was unconstitutional because the principle of equality had been breached. He argued that, according to the regulations, children were treated differently depending on whether only one or both parents are residents of Tallinn.

During the proceedings, a key issue was how the groups for comparison should be formed. The Chancellor of Justice argued that the main purpose of the childbirth allowance was to support the new-born, and therefore the children born in Tallinn with both parents as residents, and those with only one parent resident, should be compared. The representatives of the city replied that the parents should be the comparison groups, because in this case there would be no problem favouring Tallinn residents, since the childbirth allowance is a voluntary community-based social service. The Constitutional Review Chamber also dealt with the question of how the comparison groups should be formed. It decided that "children and their parents who are registered as residents of Tallinn, and children and their parents, one of whom is not registered as a resident of Tallinn", were

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[103] The monocratic institution of Chancellor of Justice is an exceptional one. Heiki Loot was the first to propose a tripartite division of the functions of the Chancellor of Justice (protocol of the meeting of the Commission for the Legal Expertise of the Constitution from 14-15 November 1997, not yet published). The first function of the Chancellor is to exercise supervision over the constitutionality and legality of the proceedings of the legislative and executive power. To perform this function the Chancellor of Justice has four wide-reaching competences. The Chancellor has the right to speak before the Parliament (*Riigikogu*) and during the sessions of the Government (§141(2) PS), to lodge a complaint against any state organ, to submit a direction to the *Riigikogu* to bring forward an Act within 20 days in accordance with the Constitution (§142(1) PS) and also to appeal to the SC, if his request was not fulfilled (§142(2) PS). The second function is the ombudsman function (PS §139(1) and (2) PS). This function includes the right to receive individual complaints, and to analyse and make suggestions to improve administrative governance. His third function is that of State Prosecutor. (§139(3) PS). The Chancellor of Justice has the right to decide whether to bring a question of removal of immunity before the Parliament. According to the Constitution, this immunity is granted to members of the Parliament (§76 PS), the President (§85 PS), the Ministers (§101 PS), the Auditor General (§138 PS), and to all the judges (§153 PS). In addition, the Chancellor of Justice has an immunity, which can be waived in cases where the right to decide over his immunity belongs to the Parliament and the President has the right to propose removal.

the right comparison groups.[104] The SC also noted that the constitutionality of this requirement had not been contested. Therefore, the SC formed new comparison groups, "children who have been registered as residents of Tallinn from birth with their parents who are registered as residents of Tallinn continuously until the child reaches the age of one, and children with their parents, one of whom is not continuously a resident of Tallinn until the child reaches the age of one".[105]

By deploying these comparison groups, the SC avoids tackling the question posed by the Chancellor of Justice as to whether unequal treatment of children with regard to the childbirth allowance can be justified in the light of the principle of equality. Furthermore, it is evident that the Chancellor of Justice saw potential problems regarding the treatment of children and parents where only one parent was a Tallinn resident at the time of the birth. Accordingly, his request included an explicit proposal for judicial review of the municipal statute in respect of (a) children and parents where both parents were registered as residents of Tallinn, and (b) those children and parents where one parent was registered as a resident of Tallinn.[106] Even if we take the comparison groups formed by the SC as the starting point, it would still be necessary to carry out the analysis of the other unequal treatment as well. Additionally, the result of the SC's formation of the comparison groups is that there are no longer serious doubts regarding the constitutionality of the childbirth allowance rules. If parents are included in the group of beneficiaries of the childbirth allowance, it will be difficult to question the preferential treatment of the Tallinn residents. However, a tougher question remained outside the scope of the decision. If the SC had compared only the two groups of children with each other instead, namely children born in Tallinn whose parents are both properly registered in Tallinn, and children born in Tallinn whose mother, but not father, is properly registered in Tallinn, it would have had difficulties finding plausible reasons as to why the latter might be excluded from childbirth allowance benefits. According to the *rahvastikuregistri seadus* [Population Register Act],[107] a new-born child will be automatically registered at the residence of the mother, and it therefore becomes impossible for a child to obtain the childbirth allowance in another town. The child simply gets no childbirth allowance at all.

As we have seen, the comparison groups chosen eventually influenced the operative part of the judgment decisively. But how can this issue be effectively addressed? First, the comparison pairs or groups must always consist of persons, but not of situations.[108] This is because, the principle of equality being orientated

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[104] CRCSCj 08.03.2011, 3-4-1-11-10, para. 52.

[105] CRCSCj 08.03.2011, 3-4-1-11-10, para. 53.

[106] Cf. CRCSCj 08.03.2011, 3-4-1-11-10, para. 8 (this part of the decision does not appear in the translated version).

[107] RT I 2000, 50, 317 (in Estonian).

[108] Cf. e.g. M. Borowski. Grundrechte als Prinzipien. 2. ed. Baden-Baden: Nomos, 2007, p. 454.

towards legal equality and legal equality influencing only the extent of legal rights, it is only the extent of these rights that can be subject to equalisation. Given that these legal rights are held only by persons, the comparison pairs or groups must always consist of persons, not situations. Where only situational comparison groups can be identified, legal equalisation cannot occur, but merely a process of legal attribution, assessment, and evaluation. A comparison of facts is therefore always an indirect comparison of persons, as holders of constitutional rights.[109] Secondly, to find a helpful criterion for the formation of the correct comparison groups, the theory of Dieter Schmalz is worthy of consideration. According to that, concrete unequal treatment is always essential, which is most likely questionable.[110] In other words, the comparison groups that indicate a violation of the principle of equality are the most likely be to be subjected to scrutiny. Only in this way can the right questions, in the context of the principle of equality, be asked and interesting answers obtained.

## 7. Special equality rights

The wording of the second sentence of §12(1) of the Constitution contains an open catalogue of discrimination prohibitions, similar to the historic example of Article 14 of the European Convention on Human Rights (hereafter: the ECHR). The openness of the catalogue was the main reason why the relationship between the first and second sentences was disputed. The prevailing opinion saw the first sentence of §12(1) of the Constitution as the guarantee of the general principle of equality.[111] Consequently, the second sentence of §12(1) of the Constitution was treated as a source of special principles of equality.[112] The SC case law left room for an interpretation, later adopted by the SC, that §12(1) of the Constitution was in part a uniform equality principle.[113]

Another problem was that the catalogue in the 2nd sentence of §12(1) of the Constitution contains, in addition to the classic discrimination prohibitions such as sex, several partly overlapping grounds, such as race, skin-colour or origin;

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[109] S. Huster. Rechte und Ziele. Berlin: Duncker & Humblot, 1993, p. 18 f. in fn. 22. It remains an open question whether the people compared must always be entitled to fundamental rights.

[110] D. Schmalz. Grundrechte. 4. ed. Baden-Baden: Nomos, 2001, recital 569; P. Martini. Art. 3 Abs. 1 GG als Prinzip absoluter Rechtsgleichheit. Köln *et al*.: Heymanns, 1997, p. 257.

[111] R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 56; M. Ernits. §12. – Ü. Madise *et al*. (eds.). Eesti Vabariigi põhiseadus. 3. ed. Tallinn: Juura, 2012, para. 1.2.1. Also clear statements of the SC: CRCSCj 06.03.2002, 3-4-1-1-02, para. 13; 12.06.2002, 3-4-1-6-02, para. 10; 30.09.2008, 3-4-1-8-08, paras. 19 f.; SCebj 17.03.2003, 3-1-3-10-02, para. 35.

[112] R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 63 f.; M. Ernits. §12. – Ü. Madise *et al*. (eds.). Eesti Vabariigi põhiseadus. 3. ed. Tallinn: Juura, 2012, para. 1.2.2.

[113] CRCSCj 21.06.2005, 3-4-1-9-05, para. 13; 08.03.2011, 3-4-1-11-10, paras. 62, 66, SCebj 03.01.2008, 3-3-1-101-06, para. 20.

and some completely indeterminate grounds, such as financial or social circumstances; and also some grounds that can be influenced by the subject of the constitutional right itself, such as language. For that reason alone, it was difficult to treat all the discrimination prohibitions uniformly and, similarly, to establish constitutional rights that are guaranteed, without any statutory reservation. The SC has only once mentioned discrimination based on sex, without elaborating the structure of the particular discrimination prohibition.[114]

In its judgment of 7 June 2011, the SC *en banc* cut the seemingly Gordian knot and re-ordered the doctrine of the special principles of equality. It dismissed the then prevailing interpretation of the 2nd sentence of §12(1) of the Constitution and reformulated §12(1) of the Constitution as a uniform equality principle. The SC created a new criterion for scrutinising unequal treatment:

> "The list of prohibitions against discrimination of the fundamental right comprised in §12(1) of the Constitution is not exhaustive and is therefore an example. That the list is an example is also indicated by the fact that the characteristics in the list are of different levels of importance. In addition to the characteristics irrespective of the people's intentions, the list in the second sentence also includes language, which can usually be learned, and religion and opinions, which can be changed to some extent. If unequal treatment is based on the characteristics irrespective of the people's intentions (e.g. race, age, disability, genetic characteristics, and also native language), better reasons must generally be found as justification."[115]

According to the new doctrine, one must ask whether the *differentia specifica* is dependent on the will of the person: if the *differentia specifica* is dependent on the will, then the requirements for justification of the particular unequal treatment will be lower; whereas if there is no dependence on the will, then the requirements will be higher. The question that interests us at this point is whether, after this judgment, there are any special equality rights that differ from the general right. According to the wording of the relevant provisions there are several specific equality rights in the Constitution beyond the 2nd sentence of the above-mentioned §12(1). Specifically, §9(1) requires the equal application of everyone's constitutional rights to both citizens and non-citizens; §27(2) declares spouses to be equal; §30(1) provides a right to equal opportunities when citizens apply for positions in government agencies and local authorities; §32(1) contains a property-related specific equality right; §60(1) lays down the principles of generality and uniformity for parliamentary elections; and §156(1) provides for the same electoral principles at local level. These requirements of equal treatment differ from the prohibitions of discrimination in the 2nd sentence of §12(1), in the sense that they are grounds of discrimination that are not generally prohibited, but are instead prohibited in particular circumstances. The theory of will dependence cannot, therefore, be applied simply to these more specific guarantees.

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[114] SCebj 20.11.2009, 3-3-1-41-09, paras. 21, 42, 51.

[115] SCebj 07.06.2011, 3-4-1-12-10, para. 32.

The subject matter of the judgment of the Constitutional Review Chamber on 1st September 2005 concerned the constitutionality of internet voting in the then imminent municipal elections. The SC reviewed, among other alleged violations, the violation of electoral equality, describing it as a special case in relation to the general principle of equality:[116]

> "The principle of uniform elections, being one of the pillars of democratic statehood, means that all voters must have equal possibilities to influence the voting results. In the context of active right to vote the principle of uniformity primarily means that all persons with the right to vote must have an equal number of votes and that all votes must have equal weight upon deciding the division of seats in a representative body."[117]

The Court found unequal treatment in the different methods of voting. Although electoral equality has no statutory reservation, the SC did not consider the legitimacy of the infringing purposes, but held that the aim was to increase participation in elections and to introduce new technological solutions for legitimate purposes.[118] The SC then decided the case by weighing the intensity of the infringement, on the one hand, against the importance of the aims pursued, on the other.[119] Thus, it is important that the SC did not require a constitutional principle for the justification of an infringement of electoral equality, which is guaranteed without any statutory reservation, but held that any purpose is legitimate provided that it is in accordance with the Constitution.

The doctrine of the special equality principles, as developed by the SC, can be summarised as follows. The SC considers, in principle, that there are no stand-alone special equality rights; and that the specific guarantees cover only sub-segments of the general principle of equality. The SC clearly expressed this when it described electoral equality as a special case of the general principle of equality. There are no specific requirements as to the legitimacy of the infringement purposes; and the catalogue of valid justification grounds encompasses all legitimate objectives that may be pursued by the legislature. In the case of a prohibition of discrimination, the requirements for the justification are lower where the unequal treatment ground is dependent on the will of the person, and higher where this is not the case.

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[116] CRCSCj 01.09.2005, 3-4-1-13-05, para. 21.

[117] CRCSCj 01.09.2005, 3-4-1-13-05, para. 16.

[118] CRCSCj 01.09.2005, 3-4-1-13-05, para. 32.

[119] CRCSCj 01.09.2005, 3-4-1-13-05, para. 23. The SC concluded that Internet voting was constitutional. It did not, however, address the really interesting issues as to whether the freedom and the secrecy of voting are sufficiently protected from the risk of manipulation and being compromised.

## 8. Original and ancillary equality application

In 2002, the SC indicated that it will not apply the equality principle if the contested measure violates a freedom right, because the application of the relevant freedom right will prevail.[120] This subsidiarity doctrine lays down a necessary precondition for the ancillary application of equality rights in cases dealing with freedom rights. Since the equality principle is not to be applied separately, but cannot be ignored either, it must be considered by the application of the principle of proportionality, while still making sure of the constitutionality of the infringement of the freedom right.

By 2003, the SC *en banc* had combined the application of the equality right with a constitutional procedural guarantee of *lex mitior* (§23(2) (2nd sentence) of the Constitution).[121] Subsequently, it applied the combination of the equality principle with other constitutional rights in a number of cases.[122] As a result, two different manifestations of the equality principle can be observed in the case law of the SC. First, the principle of equality functions as an autonomous constitutional right;[123] secondly, it is applied in conjunction with other constitutional rights, or even in the context of application of other constitutional rights.[124] The first alternative can be called the original, and the second the ancillary, equality application, since in the latter case the equality right fulfils only an ancillary function relative to the other constitutional right.

The ancillary application may occur, for example, if the SC applies the equality principle in conjunction with a fundamental social right in the context of a self-executing constitution-based claim from a complainant in proceedings against the State.[125] It may also be that the SC applies a (criminal) procedural constitutional right in conjunction with the principle of equality, and considers

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[120] CRCSCj 06.03.2002, 3-4-1-1-02, para. 18; repeated in CRCSCj 12.06.2002, 3-4-1-6-02, para. 15.

[121] §23(2) second sentence PS: "If, subsequent to the commission of the offence, the law makes provision for a lighter penalty, the lighter penalty applies." Cf. SCebj 17.03.2003, 3-1-3-10-02, Resolution para. 1, Reasons paras. 19–34.

[122] Esp. CRCSCj 21.01.2004, 3-4-1-7-03, paras. 25, 40. E.g. to the application of the equality principle within the framework of proportionality SCebr 28.04.2004, 3-3-1-69-03, paras. 28 ff.; SCebj 02.06.2008, 3-4-1-19-07, paras. 24 ff.; CRCSCj 16.01.2007, 3-4-1-9-06, para. 32.

[123] E.g. CRCSCj 30.09.2008, 3-4-1-8-08, paras. 19 ff.; SCebj 7.06.2011, 3-4-1-12-10, paras. 27 ff.

[124] SCebj 17.03.2003, 3-1-3-10-02, paras. 19–34; 02.06.2008, 3-4-1-19-07, paras. 21, 23 ff.; 09.12.2013, 3-4-1-2-13, paras. 114, 163; 26.06.2014, 3-4-1-1-14, paras. 106–109, 113–115, 117 ff.; SCebr 28.04.2004, 3-3-1-69-03, paras. 27 ff.; CRCSCj 21.01.2004, 3-4-1-7-03, paras. 14 ff. Unfortunately the SC does not follow the subsidiarity doctrine in the latest *en banc* decision which deals with pensions of judges. On the justification level, the SC puts emphasis on the principle of equality instead of guarantee of property, which might have delivered weightier arguments in proper application (SCebj 26.06.2014, 3-4-1-1-14, paras. 117–127).

[125] CRCSCj 21.01.2004, 3-4-1-7-03, paras. 25, 40.

the equality arguments in the context of proportionality in the narrow sense.[126] Finally, the principle of equality itself may be considered as an additional argument in relation to proportionality in the narrow sense.[127] When this is put together with the principle of subsidiarity in the equality test, expressed earlier in respect of the examination of freedom rights,[128] the idea becomes apparent that equality arguments will always be taken into account in relation to the proportionality test. Since every infringement – i.e. every adverse influence upon the particular right – needs justification and the proportionality test is the core of substantial justification, the equality principle must always be taken into account if there is an infringement and there is no room left for a separate equality test, going beyond that as to proportionality.

However, where circumstances are reversed, i.e. if the right holder seeks to obtain something from the state or any other addressee of the right, the structure of this right seems to be fundamentally different from that of civil and political rights. In this case, there seems to be no room for the proportionality test, but there is enough for the original equality test instead. This suggests that the original equality application becomes relevant only in cases where the right is directed at positive State action or an entitlement. On the other hand, one can even argue that equality is oriented to the ancillary application in infringement circumstances because of its subsidiary nature.

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[126] SCebr 28.04.2004, 3-3-1-69-03, paras. 28 ff.; SCebj 02.06.2008, 3-4-1-19-07, paras. 24 ff.

[127] E.g. in CRCSCj 16.01.2007, 3-4-1-9-06, para. 32, the SC ruled that the principle of equality should have been taken into account in circumstances where a local authority refused to initiate proceedings for preparation of a construction development plan: "As the administrative act issued upon refusal to initiate the preparation of a detailed plan is one issued on the basis of discretion, a local authority must, when deciding on the initiation of the preparation and adoption of a detailed plan, on a case-by-case basis, consider the influence of its decision – taken in the public interest – on other persons' fundamental rights and interests, whether the infringements of the related rights are proportional and whether a decision meets the requirements of equal treatment." Cf. also SCebj 13.11.2012, 3-1-1-45-12, para. 29; 09.12.2013, 3-4-1-2-13, para. 114.

[128] CRCSCj 06.03.2002, 3-4-1-1-02, para. 18; 12.06.2002, 3-4-1-6-02, para. 15.

## 9. Different intensities of judicial review

By April 2002, the criterion of reasonable cause was defined by the SC, that being the standard justification of unequal treatment.[129] In 2004, the SC stated that unequal treatment is arbitrary when it is manifestly inappropriate, thus defining the criterion for arbitrariness.[130] In 2008, the SC made clear that, to ascertain whether unequal treatment is reasonable, i.e. proportional in the narrow sense, it is necessary to weigh the objective of unequal treatment against the gravity of the unequal situation that has been created.[131] Finally, in 2011, the SC prescribed that the justification of any given unequal treatment shall be reviewed in the light of the principle of proportionality, rather than in that of the reasonable cause criterion:

> "The result of the verification of the arbitrariness, i.e. relevant and reasonable justification, and the proportionality, i.e. the appropriateness, necessity and reasonableness to achieve the legitimate objective, is the same in terms of constitutionality. Consequently, in the interests of the uniform application of the verification scheme for fundamental rights, a verification of proportionality corresponding to §11 of the Constitution shall be conducted […]."[132]

The question arises as to whether this case law of the SC has to be considered as inconsistent, or whether it is possible to find a uniting systemic element that allows for combinations of these elements, even the SC itself observes that it has, in 2011, replaced the arbitrariness and reasonableness criteria with the proportionality test, in the interests of uniform application of the control scheme. Taking a closer look, it seems that the SC has rather used three different equality tests, corresponding to three different test intensities: the test of arbitrariness, the test of reasonableness, and the full proportionality test. These three intensities of judicial review correspond to different scopes of the assessment prerogative of the legislature: the stricter the judicial review, the narrower the assessment prerogative; and the looser the judicial review, the wider the assessment prerogative of the legislature.

There are three arguments for this attempted systematisation. To begin with, the uniform application of the control scheme of constitutional rights cannot be a suitable argument for abolishing different test intensities that depend on different levels of assessment prerogative for the legislature in relation to differing subject matters. There are substantial reasons for different test intensities, e.g. criminal

[129] CRCSCj 03.04.2002, 3-4-1-2-02, para. 17.

[130] CRCSCj 21.01.2004, 3-4-1-7-03, para. 37.

[131] CRCSCj 30.09.2008, 3-4-1-8-08, paras. 24, 32.

[132] SCebj 07.06.2011, 3-4-1-12-10, para. 35.

sanctions on the one hand[133] and electoral rights on the other.[134] The criteria of arbitrariness, reasonableness, and proportionality are structurally different and fulfil different functions. Furthermore, it is doubtful whether there is anything like a uniform control scheme for all constitutional rights, as the SC assumed.[135] Finally, the control scheme is a result of an analysis of particular constitutional rights and not a purpose in itself. Therefore, the assumption arises that three different test intensities continue to exist and that the SC chose an unfortunate formulation in 2011.

First, as we have seen, the SC applied the arbitrariness test in its social law judgment of 21 January 2004.[136] In the passages quoted above, the SC recognised the broad discretion of the legislature in organising social benefit schemes and held that unequal treatment is arbitrary if it is manifestly inappropriate.[137] Consequently, in cases applying the arbitrariness test, the justification of unequal treatment presupposes that the unequal treatment is not manifestly or evidently inappropriate.

In the majority of equality cases, the SC focuses on the reasonableness[138] (and the appropriateness)[139] of the cause. The cause is reasonable if it is proportional in the narrow sense.[140] It is not about the evidence, but about balancing. Proportionality, in the narrow sense, is the third stage of the proportionality test and can therefore also be described as the balancing test.

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[133] Cf. CRCSCj 25.11.2003, 3-4-1-9-03, para. 21: "The Constitutional Review Chamber points out that the legislator has wide discretion in determining a punishment corresponding to necessary elements of an offence. Terms and rates of punishments are based on value judgments accepted by society, which the legislator is competent to express. Also, in this way Parliament can form the penal policy of the state and influence criminal behaviour."

[134] Cf. SCebj 01.07.2010, 3-4-1-33-09, para. 67: "Democracy is one of the most important principles of organisation of the Estonian state. [...] In the opinion of the Supreme Court *en banc*, the right to vote and the right to stand as a candidate, the freedom of activity of political parties, and the freedom of political expression [are] fundamental rights without which democracy would be impossible [...]."

[135] See, for different schemes, M. Ernits. II peatüki sissejuhatus [Introduction to Chapter II]. – Ü. Madise *et al*. (eds.). Eesti Vabariigi põhiseadus. 3. ed. Tallinn: Juura, 2012, para. 10.

[136] CRCSCj 21.01.2004, 3-4-1-7-03.

[137] CRCSCj 21.01.2004, 3-4-1-7-03, para. 37.

[138] CRCSCj 30.09.1998, 3-4-1-6-98, para. II; 20.06.2000, 3-3-1-30-00, para. 3; SCebj 17.03.2003, 3-1-3-10-02, para. 36; 10.12.2003, 3-3-1-47-03, para. 27; 20.11.2009, 3-3-1-41-09, para. 51.

[139] CRCSCj 03.04.2002, 3-4-1-2-02, para. 17; 02.05.2005, 3-4-1-3-05, para. 20; 20.03.2006, 3-4-1-33-05, para. 26; 26.09.2007, 3-4-1-12-07, para. 19; 01.10.2007, 3-4-1-14-07, para. 13; 30.09.2008, 3-4-1-8-08, paras. 27, 32; SCebj 14.11.2002, 3-1-1-77-02, para. 22; 27.06.2005, 3-4-1-2-05, para. 39; 03.01.2008, 3-3-1-101-06, para. 20.

[140] CRCSCj 30.09.2008, 3-4-1-8-08, para. 32.

Finally, the SC introduced the full proportionality test and assessed suitability, necessity and proportionality in the narrow sense.[141] This can also be described as a full examination of the merits.

One slight problem is that the SC has not been particularly clear so far as regards the intensity of the test. For example, it has deployed the test of reasonableness, for the test of arbitrariness.[142] Moreover, it has also used, at least partly, the terminology of the reasonable cause in an arbitrariness test[143] and, additionally, in a full proportionality test.[144] In some cases the choice of criteria is difficult to comprehend. The SC merely applied the reasonableness test in a sex discrimination case,[145] whilst, in an electoral equality case, it left the criterion open but also asked for a reasonable cause to justify the infringement.[146] In both cases, the more stringent criterion of the full proportionality test would have been appropriate.

However, one has to agree in principle with the essence of the case law of the SC that different unequal treatments have to be justified differently and that we can broadly distinguish three different test intensities. Clearly, there is an inverse relationship between the scope of legislative discretion and the intensity of scrutiny of the SC. The more intensely the SC scrutinises, the smaller the scope of legislative discretion, and *vice versa*. This also applies to the justification of unequal treatments. When it comes to unequal treatment with a potentially significant influence on the State budget, the legislature must be granted a wider assessment prerogative. In comparison, it is also true that, in the case of unequal treatment on grounds that are independent of the will of the person, the full proportional- ity test is appropriate. But in most cases the reasonable – i.e. proportionate – cause, in its narrow sense, must be sufficient to justify the unequal treatment.

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[141] SCebj 07.06.2011, 3-4-1-12-10, paras. 35, 43 ff.; 03.07.2012, 3-1-1-18-12, paras. 43 ff.; CRCSCj 27.12.2011, 3-4-1-23-11, paras. 61 ff.; 14.05.2013, 3-4-1-7-13, paras. 44 ff. The SC had applied the criterion of proportionality in the context of the equality principle once already, in 2001: CRCSCj 22.02.2001, 3-4-1-4-01, para. 16: "The Supreme Court finds no violation of §12(1) of the Constitution. In the present case the regulatory framework of the law does not proceed from the characteristics of an individual but from the peculiarities of administrative offences. The procedure can not be the same for all administrative offences. Violation of parking arrangements is a specific offence, the proceedings in matters concerning such offences are effected under simplified procedure. Bearing in mind the specific character and large number of the offences such simplified procedure is both reasonable and proportional."

[142] CRCSCj 03.04.2002, 3-4-1-2-02, para. 17; 20.03.2006, 3-4-1-33-05, para. 26; SCebj 14.11.2002, 3-1-1-77-02, para. 22; 27.06.2005, 3-4-1-2-05, para. 39.

[143] CRCSCj 21.01.2004, 3-4-1-7-03, paras. 37, 40.

[144] SCebj 03.07.2012, 3-1-1-18-12, paras. 43 ff., 50.

[145] SCebj 20.11.2009, 3-3-1-41-09, para. 51.

[146] Cf. CRCSCj 01.09.2005, 3-4-1-13-05, paras. 21 ff.

## 10. Coherence

The idea of the coherence or logic or justice of the system (*Systemgerechtigkeit*) is both criticised[147] and advocated[148] in the German academic debate.[149] The German scholar Hasso Hoffmann includes coherence, together with the principles of proportionality, legal certainty and protection of legitimate expectations, as an element of the rule of law.[150] All these components arise from differentiation and concretisation of constitutional rights, the separation and balance of powers, the principle of legality and the guarantee of judicial protection. Furthermore, it has even been applied by the European Court of Justice[151] and also applies to Estonian constitutional doctrine. Thus, coherence is a legal principle derived from the principle of equality.

But what does coherence mean? Substantially, it helps the general principle of equality to bind the legislature to its self-created structures.[152] Thereafter, the legislature has a lot of leeway in the creation and design of laws. But, if the legislature creates a system of rules, the logic of its work provides a framework

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[147] See U. Battis. Systemgerechtigkeit. – R. Stödter, W. Thieme (eds.). Hamburg, Deutschland, Europa. Tübingen: Mohr, 1977, p. 11 ff.; C. Gusy. Der Gleichheitssatz. – Neue Juristische Wochenschrift 1988, p. 2508; W. Heun. – H. Dreier (ed.). Grundgesetz-Kommentar. Vol. 1, 3. ed. Tübingen: Mohr, 2013, Art. 3 recital 37; U. Kischel. Systembindung des Gesetzgebers und Gleichheitssatz. – Archiv des öffentlichen Rechts 124 (1999), p. 174 ff., 197 ff.; P. Martini. Art. 3 Abs. 1 GG als Prinzip absoluter Rechtsgleichheit. Köln *et al*.: Heymanns, 1997, p. 288 ff., 296; F.-J. Peine. Systemgerechtigkeit. Baden-Baden: Nomos, 1985, p. 211 ff., 230 ff., 255 ff.

[148] See B.-O. Bryde, R. Kleindiek. Der allgemeine Gleichheitssatz. – Jura 1999, p. 41; C. Degenhart. Systemgerechtigkeit und Selbstbindung des Gesetzgebers als Verfassungspostulat. München: C. H. Beck, 1976, p. 49 ff., 79 ff.; P. Kirchhof. Allgemeiner Gleichheitssatz. – J. Isensee, P. Kirchhof (eds.). Handbuch des Staatsrechts der Bundesrepublik Deutschland. Vol. VIII, 3. ed. Heidelberg: C. F. Müller, 2010, § 181 recital 209 ff.; L. Osterloh. – M. Sachs (ed.). Grundgesetz. 6. ed. München: C. H. Beck, 2011, Art. 3 recital 98; J. Pietzcker. Der allgemeine Gleichheitssatz. – D. Merten, H.-J. Papier (eds.). Handbuch der Grundrechte. Vol. V. Heidelberg: C. F. Müller, 2013, § 125 recital 23 ff.; F. Schoch. Der Gleichheitssatz. – Deutsches Verwaltungsblatt 1988, p. 878 f.; C. Starck. – H. von Mangoldt, F. Klein, C. Starck (eds.). Kommentar zum Grundgesetz, Vol. 1, 6. ed. München: C. H. Beck, 2010, Art. 3(1) recital 44 ff.

[149] For the German debate, with further references, see M. Sachs. Der allgemeine Gleichheitssatz. – K. Stern, Staatsrecht. Vol. IV/2. München: C. H. Beck, 2011, p. 1527 ff.

[150] H. Hoffmann. Verfassungsrechtliche Perspektiven. Tübingen: Mohr, 1995, p. 239. The latter two elements of this list recall the early equality case law of the Estonian SC, where the Court used the arguments of legal certainty and legitimate expectations next to the principle of equality.

[151] ECJ 29.03.1979, Case C-113/77, *NTN Toyo Bearing Company et al*. v. *Council*, para. 21: "The Council, having adopted a general regulation with a view to implementing one of the objectives laid down in Article 113 of the Treaty, cannot derogate from the rules thus laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom that law applies."

[152] B.-O. Bryde, R. Kleindiek. Der allgemeine Gleichheitssatz. – Jura 1999, p. 41.

of analysis that imposes stricter requirements for justification of regulations that appear as exceptions, or at least do not correspond to the system of rules set down by the legislature.[153] But the truly interesting question here is the formal meaning of coherence. It has been characterised[154] as a burden of proof,[155] burden of argumentation,[156] a question of control intensity,[157] and as a maxim of interpretation.[158] Coherence cannot be a question of the burden of proof, because the justification of unequal treatment is not a question about the facts of the case, but about legal value assessments. Josef Franz Lindner discusses coherence as a maxim of interpretation and deduces from it three aspects: the principle of consistency, the principle of consequence, and the principle of compensation.[159] However, coherence concerns the question of justification of unequal treatment: either the test of arbitrariness, the test of reasonableness, or the full proportionality test. All these tests concern weighing or balancing, but not interpreting, a law. Nevertheless, all three requirements seem to have a connection with coherence and they should be considered as deriving from the principle of equality itself; the burden of argumentation and question of control intensity remain. Coherence seems to constitute an argumentation burden in favour of equal treatment. This does not mean that the legislature is banned from developing, adjusting, modifying or abandoning any existing regulatory complex. However, every development, modulation, modification, abandonment etc. of existing regulatory complexes is more complicated, because the legislature is obliged to provide weightier reasons for a statutory novelty or breakthrough.[160] In this sense, the coherence requirement intensifies the control of the equality right and influences the control of intensity. Thus, coherence constitutes a maxim of interpretation within the scope of the protection of the equality principle. On the level of justification of unequal treatment, it constitutes a burden of argumentation and thus imposes a further check upon the equality principle.

The application of this principle can already be seen in the 1998 case analysed above, in which the SC, examining a restriction on compensation available in respect of property unlawfully expropriated in Soviet times and subsequently destroyed, declared the principle of equality to be the minimum criterion that had to be upheld; and deduced from it a general rule that all entitled subjects, regardless of the character of the expropriated property and its condition, must be treated

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[153] *Ibid*.

[154] See, for further opportunities of its characterisation, U. Kischel. Systembindung des Gesetzgebers und Gleichheitssatz. – Archiv des öffentlichen Rechts 124 (1999), p. 193.

[155] C. Degenhart. Systemgerechtigkeit und Selbstbindung des Gesetzgebers als Verfassungspostulat. München: C. H. Beck, 1976, p. 22 ff.

[156] F. Schoch. Der Gleichheitssatz. – Deutsches Verwaltungsblatt 1988, p. 878 f.

[157] R. Wendt. Der Gleichheitssatz. – Neue Zeitschrift für Verwaltungsrecht 1988, p. 786.

[158] J. F. Lindner. Theorie der Grundrechtsdogmatik. Tübingen: Mohr, 2005, p. 157 f.

[159] *Ibid*.

[160] F. Schoch. Der Gleichheitssatz. – Deutsches Verwaltungsblatt 1988, p. 878 f.

equally.[161] Perhaps the most important decision on the principle of coherence is the social law judgment of 21 January 2004, where the SC underlines: "A state, having created social security systems and provided for social assistance, must also ensure the observance of the fundamental right to equality, expressed in §12(1) of the Constitution."[162] Although the SC does not deal more comprehensively with the principle of coherence in this judgement, the key question for the judgment was whether a deviation from the system would be permissible. The decision is also particularly noteworthy because the SC found that the principle of equality was violated because of a lack of coherence, even though the lowest intensity test for social matters was applied.[163]

The SC formulates the idea of coherence more clearly in a judgment on the parental benefit scheme. In this case the employer had paid the complainant part of his salary more than a year late. The Social Insurance Agency re-determined the parental benefit and, instead of taking the salary into account in the applicant's favour, considered it to her disadvantage as supplementary income exceeding the permissible upper limit, and therefore reclaimed a part of the previously paid parental benefit. The SC held this to be a violation of the principle of equality and declared the parental benefit scheme invalid to this extent. The SC stated, *inter alia*:

> "The parental benefit is a benefit dispensed by the state to persons. The Constitutional Review Chamber is of the opinion that, upon giving and restricting the right to receive the parental benefit the state as a whole, including the legislator, must observe the principle of equal treatment. […] Bearing in mind that the unequal treatment of [name of the complainant], as compared with those parents who received their wages in a timely manner, may result in an unfair outcome, the complexity of administration, asserted by the state by way of justification, does not outweigh the infringement of the fundamental right to equality."[164]

The idea of coherence also influences the decision if the SC finds that a particular action (tax differentiation of subsidised and non-subsidised operators) does not achieve its purpose (promotion of culturally highly valuable, as opposed to culturally low value, concerts and performances) and therefore "the norm was not appropriate in the light of its actual effect".[165] Elsewhere, the SC found the calculation of the pension-relevant period of employment 'by way of exception from the general rule' to be unconstitutional.[166] Finally, the SC criticised the

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[161] CRCSCj 30.09.1998, 3-4-1-6-98, para. III.

[162] CRCSCj 21.01.2004, 3-4-1-7-03, para. 17. The Court summarises in the facts of the case also the arguments of the Chancellor of Justice, who had substantiated his application, also, with that principle (para. 7).

[163] Cf. CRCSCj 21.01.2004, 3-4-1-7-03, paras. 17, 37, 40.

[164] CRCSCj 20.03.2006, 3-4-1-33-05, paras. 25, 30.

[165] CRCSCj 26.09.2007, 3-4-1-12-07, para. 21.

[166] CRCSCj 30.09.2008, 3-4-1-8-08, para. 34.

financing model of local governments as follows: 'For instance, according to the purpose of §28 of the Constitution, a situation in which the principal social rights guaranteed by the Constitution and for which the local authority is responsible, vary substantially in different regions of the state due to differences in the economic capacity of those local authorities, is unacceptable.'[167] As a consequence of this finding, the legislature is required to establish a framework that guarantees by and large similar social benefits in all municipalities. This can only be justified assuming the constitutional requirement of coherence.

## IV. Concluding Remarks

The general principle of equality is one of five general constitutional rights in Estonian constitutional rights catalogue.[168] Coming from an equality-oriented society the courts had some difficulties at first with the application of the principle of equality. In the past 15 years, however, the SC has made a moderate number of decisions, which have already covered the whole spectrum of the equality doctrine.

The overall picture presented by the equality doctrine and principle is positive. Although the principle of equality hides expansive potential within it, the SC has practised a moderate level of self-restraint in its judgments. Notably, the doctrinal interest of the SC should be highlighted, which has clearly manifested itself in the equality case law. Both the original and the new doctrines are functioning tools used in practice to solve equality cases coherently, consistently, and adequately to justify solutions. Although the new doctrine is not entirely complete, the remaining problems are rather minor in nature and can easily be dealt with in subsequent practice. However, it is vital that the new doctrine does not dismantle doctrinal foundations and hence derogate from key achievements of the former equality doctrine. The consistent application of the scheme of infringement and justification is noteworthy, in terms of the wide scope of protection, the ancillary application of the principle of equality in the context of other rights, the identification of various test intensities and the tendency towards coherence. The scheme of infringement and justification, and the wide scope of protection, guarantee the broadest possible legal equality, whilst restrictions upon that equality are transparent. The ancillary application of the principle of equality, in the context of other rights, helps equality arguments to have an even broader relevance. Different test intensities are evidence of the precise application of equality across the entire legal system.

According to the argument advanced here, the principle of equality is a requirement for the equal implementation of (constitutional) law. One has a subjective right to equal treatment under the law as far as the Constitution

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[167] SCebj 16.03.2010, 3-4-1-8-09, para. 67.

[168] Cf. R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica eriväljaanne 2001, p. 49 ff., 56 ff., 68 ff., 73 f., 76 f.

reaches, no matter which of the three branches of government, as defined in the separation and balance of powers doctrine, is concerned. This is complemented by the ancillary application and coherence requirements. This latter requirement ultimately imposes on the legislators a self-binding, more far-reaching, obligation of systemic justification and thus narrows the area of arbitrariness in democratic constitutionalism.

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KOKKUVÕTE

# PÕHISEADUS KUI SÜSTEEM

# Kokkuvõte

## Põhiseadus kui süsteem

Antiigist valgustusajani oli valdav empiiriline põhiseaduse mõiste. Empiirilise mõiste kohaselt on põhiseadus viis, kuidas võimu teostatakse. Alates valgustusajast sai valitsevaks normatiivne põhiseaduse mõiste.

Normatiivses tähenduses põhiseadust saab määratleda mitmel erineval viisil. Lihtsaim viis on kirjeldada valdava enamuse kehtivate põhiseaduste tuuma. Kõige abstraktsema kirjeldava määratluse kohaselt on põhiseadus riigi normatiivne põhikord.

Eelistatavam viis põhiseadust määratleda on analüütiline. Formaalses analüütilises mõttes on põhiseadusel kaks peamist tunnust: ülim kehtivusjõud ja raskendatud muudetavus. Tegemist on positivistliku määratlusega. Materiaalses analüütilises mõttes on põhiseadusel vajalik seos inimõigustega ning mõiste koosneb järgnevatest määratlevatest tunnustest: võimude lahusus ja tasakaalustatus, kohtu sõltumatus, halduse seaduslikkus, põhiõigused, demokraatia ja põhiseaduslikkuse järelevalve. See on põhiseaduse mittepositivistlik määratlus.

Mõnel juhul ei pruugi riigil olla põhiseadust materiaalses tähenduses, vaid ainult formaalses ja/või kirjeldavas tähenduses. Järeldus, et riigil puudub põhiseadus materiaalses tähenduses, osutab sellele, et konkreetses õigussüsteemis esineb inimõiguste rakendamisega probleeme.

Õigussüsteemi vaatleme osaleja perspektiivist. Reeglite süsteemina nõuab õigussüsteem tingimata konsistentsi, st vastuolude kõrvaldamist. Kuna õigussüsteem sisaldab ka põhimõtteid, siis nõuab see tingimata ka koherentsi, st head tasakaalu süsteemi kõigi printsiipide vahel. Menetluste süsteem määrab kindlaks printsiipide ja reeglite kohaldamise viisid. Kokkuvõttes eksisteerib õigussüsteem siis, kus on olemas kõik kolm elementi – õiguslikud printsiibid, reeglid ja menetlused – ning nõutakse nii konsistentsi kui ka koherentsi.

Põhiseadus on normide ja menetluste süsteem, kus on olulisel kohal printsiibid, mis võivad kollideeruda ja nõuavad seetõttu adekvaatset proportsionaalsuse teooriat. Põhiseaduslikule süsteemile on omased konsistentsi ja koherentsi nõuded. Viimane eeldab eelkõige seose loomist normide vahel ja argumentatsiooni ammendavust.

Praktikas ei tohiks ükski põhiseaduslikkuse järelevalve kohus lakata taotlemast põhiseaduse süsteemsust. Seda tehes ei pruugi probleemid piirduda üksnes printsiipidevaheliste seostega, vaid probleemiks võib kujuneda koguni reeglitevaheliste vastuolude vältimine. Lõpuks võib põhiseaduslik süsteem lakata täielikult eksisteerimast. Kui seadusandja ei ole täitnud oma positiivseid kohustusi ning jõustatud normide kogum sisaldab olulisi lünki või ei täida oma eesmärki, on õiguslik regulatsioon ebasüsteemsuse tõttu põhiseadusega vastuolus. Kui põhiseaduslikkuse järelevalve kohus seda sallib, rikub ta ise põhiseadust, jättes tähelepanuta koherentsi nõude. Kui õigusteadlane sellisele praktikale vastu ei seisa, siis kaob koos põhiseadusliku süsteemi kadumisega ka riigiõigusteadus.

Sellisel juhul oleks põhiseadusliku süsteemi asemel tegemist põhiseadusliku rapsoodiaga Immanuel Kanti mõistes.

Sissejuhatavale osale järgnevate, varem artiklitena avaldatud või avaldamiseks vastu võetud peatükkide eesmärk on kinnitada ideed, et põhiseadus on süsteem, ning näidata süsteemse käsitluse eeliseid. Iga uus konstruktiivselt kriitiline käsitlus võib tuua päevavalgele põhiseadusliku süsteemi mõne uue väärtusliku seose ja aidata laiendada kasutatavate argumentide ringi. Esimeses peatükis kaitseb autor põhiseaduse süsteemsuse keskseid teoreetilisi aluseid. Järgnevates peatükkides demonstreerib autor, et idee põhiseadusest kui süsteemist võimaldab saavutada põhiseadusõiguse konsistentsemat ja koherentsemat õpetust ning seeläbi paremaid õiguslikke lahendusi praktilistele põhiseaduslikele juhtumitele.

Esimene peatükk käsitleb printsiibiteooriat. Printsiibiteooria on teooria printsiipide ja reeglite erinevast loogilisest struktuurist ning nende erinevatest rakendamisõpetusest, iseäranis kollideeruvate printsiipide kaalumisest. Eesti Riigikohus hakkas printsiibiteooriat rakendama ja kollideeruvaid põhiseaduse printsiipe kaaluma 1997. aastal. Selle kohtupraktika lähtekohaks ja aluseks oli 1997. aastal valminud, kuid alles 2001. aastal avaldatud Robert Alexy süstemaatiline monograafia põhiõigustest Eesti põhiseaduses. Esimeses peatükis käsitletakse kuut peamist argumenti, mida on esitanud Eesti kriitikud printsiibiteooria jätkuva kohaldamise ja eriti põhiseaduslike printsiipide kaalumise vastu Riigikohtus. Esiteks eksisteerib kriitikute sõnul põhiseadus ainult raamkorrana, mitte materiaalse põhikorrana, ning põhiseaduse käsitlemine väärtuste süsteemina toob endaga kaasa ülekonstitutsionaliseerimise. Teiseks on reeglite ja printsiipide eristamine kriitikute sõnul ebaadekvaatne, kolmandaks toob printsiibiteooria rakendamine endaga kaasa lahkumise põhiseaduse teksti pinnalt ning neljandaks viib proportsionaalsuse põhimõtte kohaldamine põhiseaduse toime peatamiseni. Viiendaks on proportsionaalsuse põhimõte kriitikute arvates puhtalt formaalne suunis, mistõttu võrdub kollideeruvate printsiipide kaalumise nõue lihtsalt nõudega igal juhul eraldi otsustada, kui kaugele ulatub ühe või teise normi kehtivusala. Lõpuks väidavad nad, et kuna ei ole olemas universaalset „siniste esemete teooriat", siis ei ole olemas ka põhiõiguste universaalset teooriat. Enamik neist argumentidest leiab kajastamist ka rahvusvahelises diskursuses printsiibiteooria üle.

Esimene peatükk kinnitab, et printsiipide ja reeglite eristamine pakub põhiseaduslikkuse järelevalvele toimivat põhimudelit. Printsiibiteooriast lähtudes tuleb põhiseaduspärasuse materiaalne tuum selgitada enamasti välja proportsionaalsuse põhimõtte abil ning põhiseaduslike juhtumite lahendamise keskne meetod on kaalumine. Eesti kriitikute esitatud kuus peamist argumenti ei suuda kummutada printsiibiteooriat. Esiteks ei ole põhiseadus üksnes raamkord ning samuti ei too põhiseaduse käsitlemine väärtuste süsteemina endaga kaasa ülekonstitutsionaliseerimist. Põhiseadus on nii raamkord kui ka materiaalne põhikord ning põhiseaduse jõustamiseks on demokraatlikus põhiseadusriigis möödapääsmatu selle sisuline järelevalve. Teiseks on reeglite ja printsiipide eristamine piisav. Peandumise (*Sollen*; *Ought*) struktuuri kindlaksmääramine on osa tõlgendamisprotsessist. Kolmandaks ei põhjusta printsiibiteooria rakendamine

põhiseaduse teksti pinnalt lahkumist. Põhiseadus sisaldab jätkuvalt rangeid määranguid, mida tuleb järgida, ja niivõrd, kuivõrd põhiseaduse tekst on keeleliselt või struktuurselt avatud, pakub printsiibiteooria meetodit avatuse oluliseks vähendamiseks. Neljandaks ei peata proportsionaalsuse põhimõtte rakendamine põhiseaduse toimet. Eeldusest, et kaalumine on mõistlik, ei järeldu, et põhiseadus on ülearune. Viiendaks ei ole proportsionaalsuse põhimõte puhtformaalne suunis ning kollideeruvate printsiipide kaalumine ei võrdu lihtsalt suunisega otsustada. Kaalumist kasutades saab jõuda ratsionaalselt ühe tulemuseni küll mitte igal üksikul juhul, kuid siiski piisaval arvul juhtudel, et õigustada kaalumist kui meetodit. Ja lõpuks on olemas universaalne põhiõiguste teooria. Sellise teooria heaks näiteks on Robert Alexy printsiibiteooria, mis pakub põhiseaduslikkuse järelevalve teostamiseks struktuuri, mis muudab arutluskäigu ratsionaalsemaks.

Teises peatükis analüüsitakse rahvusvahelise ja teiste riikide õiguse kasutamist võrdlevate argumentidena Riigikohtu praktikas. See peatükk käsitleb põhiseadusliku süsteemi võrdlevõiguslikku mõõdet. Riigikohus kasutab argumendina küll teiste riikide õigust, kuid konkreetsele allikale viitamise täpsus jätab enamjaolt soovida. Uurimus toob välja, et võrdlevatel argumentidel on olnud oluline roll Eesti põhiseaduslikkuse järelevalve arengus, eelkõige katalüsaatorina, mis aitas Eesti riigiõiguslikku mõtlemist kaasajastada. Õiguse üldpõhimõtetel, eriti proportsionaalsuse põhimõttel, on märkimisväärseid sarnasusi mitmete teiste arenenud Euroopa õigussüsteemides tunnustatud põhimõtetega. Viited teistele õigussüsteemidele, eriti teiste Euroopa riikide põhiseadustele ja põhiseaduslikkuse järelevalve lahenditele, on tõendiks Eesti õigussüsteemi avatusest. Riigikohtu 2009. aasta skeptiline avaldus, mille järgi ei saa võrdleva õiguse argumentidest tuletada Eesti kohtute jaoks siduvaid käitumisjuhiseid, oli siiski üsna vaieldav samm vastupidises suunas.

Kolmanda peatüki fookuses on üks olulisemaid Riigikohtu varaseid otsuseid aastast 1994. Peatükis analüüsitakse selle kohtuotsuse olulisust Eesti põhiseadusliku süsteemi jaoks. Sellest kohtuotsusest tulenevad põhiseadusliku süsteemi kolm olulist elementi. Esiteks kehtestas Riigikohus parlamendireservatsiooni põhimõtte, mille kohaselt on seadusandja kohustatud otsustama olulisi küsimusi ise ega saa neid edasi delegeerida täitevvõimule. Teiseks tuletas Riigikohus põhiseadusest üldise põhiõiguse korraldusele ja menetlusele, millel on olnud oluline roll Eesti õigusriikluse kujunemisel. Peatükk käsitleb sellega seoses kriitiliselt aastatel 2004–2005 aset leidnud nn liiklusseaduse saagat, kus Riigikohus jättis korduvalt rahuldamata halduskohtute algatatud põhiseaduslikkuse järelevalve menetlused liiklusseaduse muudatuste osas, millega seadusandja kaotas sisuliselt võimaluse vaidlustada kohtus juhtimisõiguse peatamist liiklusrikkumise järelmina. Kolmandaks leidis Riigikohus juba 1994. aastal, et seadusandja põhjustatud rikkumiste kõrval võivad ka seadusandlikud tegematajätmised olla järelevalve esemeks. Sellest tulenevalt sisaldab Eesti põhiseadus ka seadusandja positiivseid kohustusi, mis on täitmisele pööratavad.

Neljas peatükk käsitleb võrdsuse põhimõtet ja selle arendamist Riigikohtu praktikas. Erinevalt eelmistest peatükkidest on viimases peatükis luubi all ühe konkreetse põhiõiguse süsteem. Uurimus näitab, et võrdsuse põhimõte on täies

ulatuses rakendatav, põhiõiguste kandja saab sellele tugineda kui subjektiivsele õigusele ning see seob ka seadusandjat. Analüüsist selgus, et faktilise võrdsuse nõuet ei ole soovitatav tuletada võrdsuspõhiõigusest, vaid pigem sotsiaalriigi põhimõttest. Samuti tulenes sellest, et nõuet kohelda ebavõrdseid ebavõrdselt ei tuleks käsitada võrdsuspõhiõiguses sisalduva normatiivse nõudena. Võrdsuspõhiõigust tuleb tõlgendada nõudena kohelda õiguslikult võrdseid võrdselt. Lisaks leidis kinnitust, et võrdsuse põhimõtte piiriklausel on lihtne piiriklausel. Nägime, et võrdluspaarid või -rühmad peavad alati koosnema inimestest, mitte aga olukordadest, ning et järelevalves tuleb alati keskenduda sellele ebavõrdsele kohtlemisele, mille põhiseaduspärasus on kõige tõenäolisemalt küsitav. Samuti nägime, et võrdsuse põhimõtet saab rakendada kas originaarselt või aktsessoorselt, ning et koherents ehk süsteemiõiglus on võrdsuspõhiõiguse oluline nõue.

Demokraatlik põhiseadusriik, st riik, kus kehtivad inimväärikuse, demokraatia ja õigusriigi aluspõhimõtted, on olemas põhiõigused, võimude lahusus ja tasakaalustatus ning toimiv põhiseaduslikkuse järelevalve, on iidse põhimõtte *sub lege rex* olulisim väljendus ajaloos. Süstemaatiliselt on demokraatlik põhiseadusriik inimõiguste institutsionaliseering ja empiiriliselt 1992. aastast saati Eestis meid ümbritsev tegelikkus. Käesolev töö annab oma tagasihoidliku panuse selleks, et see nii ka jääks.

# APPENDIXES

# Indication of First Publications

Chapter 1:
– A Response to Estonian Critics of Principles Theory. – M. La Torre, L. Niglia, M. Susi (eds.). *The Quest for Rights. Ideal and Normative Dimensions*. Cheltenham, Northampton, MA: Edward Elgar, 2019, p. 88–108 (Reprinted with permission)

Chapter 2:
– The Use of foreign law by Estonian Supreme Court. – G. F. Ferrari (ed.). *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*. Leiden, Boston: Brill, 2019, p. 501–527 (Reprinted with permission)

Chapter 3:
– 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. – *Juridica International* 12 (2007), p. 23–35 (Reprinted with permission)

Chapter 4:
– The Principle of Equality in the Estonian Constitution: A Systematic Perspective. – *European Constitutional Law Review* 10 (2014), p. 444–480 (Reprinted with permission)

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CRCSCj 05.05.2014, 3-4-1-67-13 – *Sotsiaalhoolekande seadus III*

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CRCSCj 02.02.2015, 3-4-1-33-14 – *Sotsiaalhoolekande seadus IV*
CRCSCj 20.12.2016, 3-4-1-3-16 – *Haldusreform I*
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Dissenting opinion of Justice Eerik Kergandberg, joined by Justices Jaak Luik and Hele-Kai Remmel, to the SCebj 17.03.2003, 3-1-3-10-02
Dissenting opinion of Justice Indrek Koolmeister to the SCebj 25.10.2004, 3-4-1-10-04
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Dissenting opinion of the Justice Jüri Põld, joined by Justices Tõnu Anton, Jüri Ilvest, Indrek Koolmeister, Julia Laffranque and Harri Salmann, to SCebj 03.01.2008, 3-3-1-101-06
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## III. Legal acts

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[2] Available in English at: https://www.riigiteataja.ee/en/.

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# *CURRICULUM VITAE*

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***Education and academic and other qualifications***

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| 2012–2019 | PhD Student, Faculty of Law, University of Tartu |
| 2011 | Estonian judge's examination with emphasis on administrative and criminal law |
| 1998–2001 | Legal clerkship in Kiel and the Final State Exam in Law (Große Juristische Staatsprüfung) in Hamburg |
| 1996–1998 | LL.M. Programme at the University of Helsinki with major in "Public Law and Legal Theory" |
| 1991–1996 | Legal studies at the University of Kiel and the First State Exam in Law (Erste Juristische Staatsprüfung) in Schleswig |

***Relevant professional activities***

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| 02.01.2012–Present | Judge at the Administrative Law Chamber of the Tartu Court of Appeal |
| 2002–Present | Lecturer of Constitutional Law at the University of Tartu, Faculty of Law |
| 2017–2018 | Member of the Estonian Constitutional Expert Group established by the Ministry of Justice; Rapporteur for possible constitutional amendments concerning the transfer of sovereign rights to the international organisations |
| 2012 | Government expert in the constitutional review case of Article 4 Section 4 of the Treaty Establishing the European Stability Mechanism (Case No. 3-4-1-6-12); Preparation of a legal opinion which was annexed to the government opinion |
| 2011 | Legal adviser of the Legal and Research Department of the Parliament of Estonia |
| 2003–2010 | Deputy Chancellor of Justice |
| 2002–2003 | Legal adviser in the Office of the Chancellor of Justice; Reviewing the constitutionality of legal acts, drafting opinions in ombudsman proceedings, leading the Department responsible for Ministries of Defence, Justice, Internal and Foreign Affairs |
| 2002 | Research Associate at the Chair of Prof. Dr. Dr. h.c. mult. Robert Alexy, University of Kiel |

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| 2000–2002 | Legal adviser of the Constitutional Review Chamber of the Supreme Court |
| 1999–2000 | Legal adviser at the Ministry of Justice; Member of both the Permanent Commission and the Leading Commission of the Reform of the General Part of Administrative Law |
| 1996–1997 | Legal adviser at the Ministry of Justice; Member of the workgroup of the Government Commission for the Legal Expertise of the Constitution of the Republic of Estonia; Member of the Working Group for the General Part of the new Penal Code |

***Research fields***
Legal theory, constitutional rights, constitutional review, constitutional theory, constitutional law

***Memberships***
Member of the Estonian Judge's Association and the Estonian Academic Law Society

# ELULUGU

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***Haridustee ning akadeemilised ja muud kvalifikatsioonid***

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| 2012–2019 | Õigusteaduse doktoriõpe, Tartu Ülikool |
| 2011 | Eesti kohtunikueksam (valdkonnad: haldus- ja karistusõigus) |
| 1998–2001 | Juriidiline ettevalmistusteenistus (Referendariaat) Kielis ja Saksa teine juriidiline riigieksam (Große Juristische Staatsprüfung) Hamburgis |
| 1996–1998 | LL.M. programm „Public Law and Legal Theory“ Helsinki Ülikoolis |
| 1991–1996 | Õigusteaduse õpingud Kieli Ülikoolis ja Saksa esimene juriidiline riigieksam (Erste Juristische Staatsprüfung) Schleswigis |

***Töökogemus***

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| Alates 02.01.2012 | Tartu Ringkonnakohtu kohtunik, halduskolleegium |
| 2002–täna | Riigiõiguse õppejõud Tartu Ülikooli õigusteaduskonnas |
| 2017–2018 | Põhiseaduse asjatundjate kogu liige; raportöör riigi otsustusõiguse üleandmise osas rahvusvahelistele organisatsioonidele |
| 2012 | Valitsuse ekspert Euroopa stabiilsusmehhanismi puudutavas põhiseaduslikkuse järelevalve asjas nr 3-4-1-6-12; ekspertarvamus esitati Riigikohtule koos Vabariigi Valitsuse seisukohaga |
| 2011 | Riigikogu Kantselei õigus- ja analüüsi osakonna nõunik |
| 2003–2010 | Õiguskantsleri asetäitja |
| 2002–2003 | Õiguskantsleri Kantselei nõunik |
| 2002 | Teaduslik kaastöötaja Prof. Dr. Dr. h.c. mult. Robert Alexy õppetoolis, Kieli Ülikool |
| 2000–2002 | Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi nõunik |
| 1999–2000 | Justiitsministeeriumi nõunik; töö haldusõiguse üldosa reformi komisjonides |
| 1996–1997 | Justiitsministeeriumi nõunik; osalemine põhiseaduse 5. aastapäeva juriidilise ekspertiisi komisjoni töös; karistusseadustiku üldosa eelnõu väljatöötamine |

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***Liikmesus***
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## List of publications

1) Europeanisation through Constitutionalism (Estonian Report). – U. Stelkens, A. Andrijauskaitė (eds.). *Added Value of the Council of Europe to Administrative Law: The Development of Pan-European General Principles of Good Administration by the Council of Europe and their impact on the administrative law of its Member States*. Oxford: Oxford University Press [forthcoming in 2020] (in co-authorship with K. Pähkla)
2) A Response to Estonian Critics of Principles Theory. – M. La Torre, L. Niglia, M. Susi (eds.). *The Quest for Rights. Ideal and Normative Dimensions*. Cheltenham, Northampton, MA: Edward Elgar, 2019, p. 88–108
3) The Use of foreign law by Estonian Supreme Court. – G. F. Ferrari (ed.). *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*. Leiden, Boston: Brill, 2019, p. 501–527
4) The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law. – A. Albi, S. Bardutzky (eds.). *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*. The Hague: Springer, 2019 (in co-authorship with C. Ginter, S. Laos, M. Allikmets, P. K. Tupay, R. Värk, A. Laurand), p. 887–950
5) Verwaltungsgerichtsbarkeit in Estland: Geschichte und Gegenwart. – K.-P. Sommermann, B. Schaffarzik (eds.). *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa*. Vol. 2. Berlin, Heidelberg: Springer, 2019 (in co-authorship with I. Pilving), p. 1601–1626
6) Kolmanda akti tõus ja langus [The Rise and Fall of the Third Act]. – *Juridica* 2017/1 (in co-authorship with A. Laurand), p. 3−26
7) Põhiõigused [Constitutional Rights]. – J. Sootak (ed.). *Õigus igaühele* [*Law for Everyone*]. Tallinn: Juura, 2017, p. 35−71
8) Põhiseaduse aluspõhimõtted ja riigikorraldusõigus [Fundamental Constitutional Principles and State Organisation Law]. – Sootak, J. (ed.). *Õigus igaühele* [*Law for Everyone*]. Tallinn: Juura, 2017 (in co-authorship with J. Jäätma), p. 72−134
9) Commentaries to § 3 (paras. 1–41); § 4 (in co-authorship with K. Merusk); §§ 9–13; § 14 (in co-authorship with N. Parrest); §§ 15, 19; § 32 (in co-authorship with A. Kelli and P. Roosma); § 152 and the Introduction to the II Chapter. – Ü. Madise *et al*. (eds.). *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* [*Constitution of the Republic of Estonia. Commentaries*]. 4. ed. Tallinn: Juura, 2017
10) Fraktsioonikaebusest – poolt ja vastu [On a Fraction Complaint – Pro and Contra]. – A. Parmas *et al.* (eds.). *Kohtute aastaraamat 2016*. Tartu: Riigikohus, 2017 (in co-authorship with J. Sarv), p. 99−102
11) Constitutional Review in the Age of Balancing. – K. Torgans, J. Pleps *et al*. (eds.). *Collection of Research Papers in Conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia "Constitutional Values in Contemporary Legal Space I" 16–17 November, 2016*. Riga: University of Latvia Press, 2016, p. 127−151

12) Millestki ürgsest ja kargest ning autoriteediröövist [On Something Aboriginal and Crisp and About the Robbery of Authority]. – *Juridica* 2015/2, p. 77−87
13) The Principle of Equality in the Estonian Constitution: A Systematic Perspective. – *European Constitutional Law Review* 10 (2014), p. 444–480
14) Remargi korras ja vabas vormis: kohtute nn tulemuslepingutest välisriikide kogemuse ja Eesti Vabariigi põhiseaduse valguses [In Sporting Terms and Informally: On the So-Called Performance Agreements of the Courts in the Light of Experiences of Foreign Countries and of Estonian Constitution]. – R. Teeveer *et al.* (eds.). *Kohtute aastaraamat 2013*. Tartu: Riigikohus, 2014 (in co-authorship with M. Leppik), p. 48−53
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17) 20 Jahre Menschenwürde, Demokratie, Rechtsstaat, Sozialstaat. – S. Hülshörster, D. Mirow (eds.). *Deutsche Beratung bei Rechts- und Justizreformen. 20 Jahre Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit*. Berlin: Berliner Wissenschaftsverlag, 2012, p. 123–140
18) ESM asutamisleping: rahvusvaheline leping ja malpropre Euroopa Liidu õigus [The ESM-Treaty as an International Treaty and as a Malpropre EU Law]. – *Juridica* 2012/5 (in co-authorship with A. Laurand and M. Saluste), p. 359–375
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20) Riigikogu kodu- ja töökorra seadus. Kommentaarid [Riigikogu Rules of Procedure and Internal Rules Act. Commentaries]. Tallinn: Tallinna Raamatutrükikoda, 2012 (co-editor with A. Mõttus and L. Oja)
21) Commentaries to the General Provisions (in co-authorship with K. Merusk, T. Annus, H. Kalmo, H. Lindpere, L. Madise, L. Mälksoo); § 3 (paras. 1–41); § 4 (in co-authorship with K. Merusk), §§ 9–13; § 14 (in co-authorship with N. Parrest); §§ 15, 19; § 32 (in co-authorship with A. Kelli and P. Roosma), § 152 and the Introduction to the II. Chapter. – Ü. Madise *et al*. (eds.). *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* [*Constitution of the Republic of Estonia. Commentaries*]. 3. ed. Tallinn: Juura, 2012
22) Euroopa Stabiilsusmehhanismi asutamislepingu art 4 lg 4 põhiseaduspärasus [The Constitutionality of the Article 4 para 4 of the Treaty Establishing the European Stability Mechanism], Tartu: Justiitsministeerium, 2012 (in co-authorship with A. Laurand and M. Saluste). Available at: https://www.riigikohus.ee/sites/default/files/elfinder/analyysid/2012/ESMasutamislepingPS.pdf [last viewed 1 September 2019]

23) Põhiõigused, demokraatia, õigusriik [Constitutional Rights, Democracy, Rule of Law]. Tartu: Tartu Ülikooli Kirjastus, 2011 [XII; 425 p.]
24) Põhiseaduse aluspõhimõtted [The Fundamental Principles of the Constitution]. – *Riigikogu Toimetised* 24 (2011), p. 95–104.
25) Tõlgendamisest Riigikohtu praktikas [Interpretation in the Practice of the Supreme Court]. – *Juridica* 2010/9, p. 666–686
26) Määruse mõiste [The Concept of Regulation]. – *Õiguskeel* 2010, p. 16–37
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32) Commentaries to the General Provisions (in co-authorship with K. Merusk, T. Annus, H. Lindpere, L. Madise); §§ 9–15, § 19, § 152 and the Introduction to the II. Chapter. – E.-J. Truuväli *et al*. (eds.). *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* [*Constitution of the Republic of Estonia. Commentaries]*. 2. ed. Tallinn: Juura, 2008
33) An Early Decision with Far-reaching Consequences. – *Juridica International* 7 (2007), p. 23–35
34) Avalik väljendusvabadus ja demokraatia [Freedom of Public Expression and Democracy]. – *Juridica* 2007/1, p. 16–29; *Juridica* 2007/3, p. 155–172
35) Põhiõigused kui väärtusotsustused Riigikohtu praktikas. Riigikohtu lahendid Eesti õiguskorras: tähendus ja kriitika [Constitutional Rights as Value Judgments in the Case-Law of the Supreme Court. – Decisions of the Supreme Court in the Estonian Legal Order: Meaning and Critique]. Tartu: Riigikohus, 2005, p. 29–59
36) Kättetoimetamisest põhiõiguste valguses [Delivery in the light of fundamental rights]. – *Juridica* 2004/5, p. 321–333
37) Erakond Eesti põhiseaduses ja erakonnaseaduses [Political Party in the Estonian Constitution and in the Political Parties Act]. – *Juridica* 2003 (Special Issue), p. 5–18
38) Õiguskantsler [Legal Chancellor]. – *Juridica* 2003/1, p. 14–27
39) Commentaries to the General Provisions (in co-authorship with T. Annus, H. Lindpere, Ü. Madise, K. Merusk); §§ 9–15, § 19, § 152 and the Intro-

duction to the II. Chapter. – E.-J. Truuväli *et al*. (eds.). *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* [*Constitution of the Republic of Estonia. Commentaries*]. Tallinn: Juura, 2002

40) Konkreetne normikontroll de lege lata ja de lege ferenda [The Concrete Norm Control de lege lata and de lege ferenda]. – *Juridica* 2001/8, p. 572–595
41) Holders and Addressees of Basic Rights in the Constitution of the Republic of Estonia. – *Juridica International* 4 (1999), p. 11–34
42) Karistusseadustiku üldosa eelnõu: Eelnõu lähtealused ja põhjendus [The Draft General Part of the Penal Code Act: Basis and Reasoning of the Draft Act]. Tartu: Juura, 1999 (in co-authorship with J. Sootak, P. Pikamäe and E. Samson) [166 p.]
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44) Põhiseaduse Riigikogu peatüki probleemid [Problems Concerning the Chapter on Riigikogu in the Constitution]. – *Juridica* 1999/10, p. 472–479
45) Põhiõiguste mõiste ja tähtsus õigussüsteemis [The concept and Implications of Constitutional Rights in the Legal System]. – *Juridica* 1996/9, p. 463–471

# DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS

1. **Херберт Линдмяэ**. Управление проведением судебных экспертиз и его эффективность в уголовном судопроизводстве. Тарту, 1991.
2. **Peep Pruks**. Strafprozesse: Wissenschaftliche "Lügendetektion". (Instrumentaldiagnostik der emotionalen Spannung und ihre Anwendungsmöglichkeiten in Strafprozess). Tartu, 1991.
3 **Marju Luts**. Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus. Tartu, 2000.
4. **Gaabriel Tavits**. Tööõiguse rakendusala määratlemine töötaja, tööandja ja töölepingu mõistete abil. Tartu, 2001.
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