

# The Principle of Equality in the Estonian Constitution

## A Systematic Perspective

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Summary of relevant Estonian Supreme Court jurisprudence – The equality principle as an enforceable subjective right which is binding on the legislature – Legal, not factual, equality – No requirement of unequal treatment of non-equals – Simple statutory reservation – Incomparability as a non-suitable criterion for determining the scope of the right to equality – Formation of comparison groups according to the most apparent violation – Special equality rights? – Original and ancillary equality application – Three different intensities of judicial review – Coherence.

### 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.

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The *Põhiseadus* [Estonian Constitution] (henceforth: the Constitution),<sup>1</sup> 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 appeal 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<sup>2</sup> and then, in the 2<sup>nd</sup> 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.’

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.<sup>3</sup> 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*,<sup>4</sup> its main elements were adopted by the SC and it has proved to be

<sup>1</sup> For the English translation of the *Põhiseadus* [Estonian Constitution], see: <[www.legaltext.ee/text/en/X0000K2.htm](http://www.legaltext.ee/text/en/X0000K2.htm)>, all internet links visited on 15 July 2014 and link to the English translations unless indicated otherwise.

<sup>2</sup> See §1 of the *Põhiseadus* [Estonian Constitution].

<sup>3</sup> R. Alexy, ‘*Põhiõigused Eesti põhiseaduses*’ [Fundamental Rights in Estonian Constitution], *Juridica Special Issue* (2001), p. 63.

<sup>4</sup> R. Alexy, *Theory of Constitutional Rights* (Oxford 2002), p. 5 f.

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.

## 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.

### *The first stage: early development – the property reform*

Three property reform<sup>5</sup> cases from the last decade of the 20<sup>th</sup> century characterise the early equality-related case-law of the SC in Estonia.<sup>6</sup> 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

<sup>5</sup> *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: <[www.riigiteataja.ee](http://www.riigiteataja.ee)>). An English translation of a later version of the law is available here: <[www.riigiteataja.ee/tutvustus.html?m=3](http://www.riigiteataja.ee/tutvustus.html?m=3)>. 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.

<sup>6</sup> 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 March 1997, 3-3-1-5-97, No. 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.

unjust.<sup>7</sup> 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.'<sup>8</sup>

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'.<sup>9</sup>

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.<sup>10</sup>

### *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

<sup>7</sup> CRCSD [hereinafter: decision of the Constitutional Review Chamber of the SC] 30 Sept. 1998, 3-4-1-6-98, No. II, <[www.riigikohus.ee/?id=459](http://www.riigikohus.ee/?id=459)>.

<sup>8</sup> CRCSD 30 Sept. 1998, 3-4-1-6-98, No. III, <[www.riigikohus.ee/?id=459](http://www.riigikohus.ee/?id=459)>.

<sup>9</sup> CRCSD 17 March 1999, 3-4-1-2-99, No. II, <[www.riigikohus.ee/?id=453](http://www.riigikohus.ee/?id=453)>.

<sup>10</sup> ALCSd [hereinafter: decision of the Administrative Law Chamber of the SC] 20 June 2000, 3-3-1-30-00, No. 3.

deficit from 2002 onwards.<sup>11</sup> 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.<sup>12</sup>

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 in cash. The Court declared the statute unconstitutional.<sup>13</sup> 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.<sup>14</sup> 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:

<sup>11</sup> 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' (ALCSd 20 Dec. 2001, 3-3-1-61-01, No. 5).

<sup>12</sup> CRCSD 6 March 2002, 3-4-1-1-02, No. 13, <[www.riigikohus.ee/?id=434](http://www.riigikohus.ee/?id=434)>; identical wording in CRCSD 12 June 2002, 3-4-1-6-02, No. 10, <[www.riigikohus.ee/?id=429](http://www.riigikohus.ee/?id=429)>.

<sup>13</sup> The decision of the Constitutional Review Chamber of 6 March 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 (No. 14 f.).

<sup>14</sup> CRCSD 6 March 2002, 3-4-1-1-02, No. 18, <[www.riigikohus.ee/?id=434](http://www.riigikohus.ee/?id=434)>; repeated in CRCSD 12 June 2002, 3-4-1-6-02, No. 15, <[www.riigikohus.ee/?id=429](http://www.riigikohus.ee/?id=429)>.

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.<sup>15</sup>

Following the decision above, the SC *en banc* confirmed the statements of the decision of 3 April 2002<sup>16</sup> and then subsequently condensed and combined its earlier statements.<sup>17</sup> 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.'<sup>18</sup> 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

<sup>15</sup> CRCSd 3 April 2002, 3-4-1-2-02, No. 16 f., <[www.riigikohus.ee/?id=433](http://www.riigikohus.ee/?id=433)>.

<sup>16</sup> SCebd [hereinafter: decision of the SC *en banc*] 14 Nov. 2002, 3-1-1-77-02, No. 22.

<sup>17</sup> SCebd 17 March 2003, 3-1-3-10-02, No. 36, <[www.riigikohus.ee/?id=419](http://www.riigikohus.ee/?id=419)>. 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.

<sup>18</sup> CRCSd 16 Sept. 2003, 3-4-1-6-03, No. 18, <[www.riigikohus.ee/?id=416](http://www.riigikohus.ee/?id=416)>. 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.

principle of equality. *Sotsiaalhoolekande seadus* [the Social Welfare Act]<sup>19</sup> 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 can not 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 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 can not be used to justify unequal treatment of needy persons and families.<sup>20</sup>

Furthermore, in 2005, the SC clarified that an infringement of the principle of equality does not automatically amount to a violation of the principle,<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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

<sup>19</sup> 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: <[www.riigiteataja.ee/tutvustus.html?m=3](http://www.riigiteataja.ee/tutvustus.html?m=3)>.

<sup>20</sup> CRCSd 21 Jan. 2004, 3-4-1-7-03, No. 15-17, 37, 39, <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>.

<sup>21</sup> CRCSd 2 May 2005, 3-4-1-3-05, No. 20, <[www.riigikohus.ee/?id=389](http://www.riigikohus.ee/?id=389)>.

<sup>22</sup> CRCSd 1 Oct. 2007, 3-4-1-14-07, No. 13, <[www.riigikohus.ee/?id=850](http://www.riigikohus.ee/?id=850)>. To the substantial scope of protection cf. already CRCSd 6 March 2002, 3-4-1-1-02, No. 13, <[www.riigikohus.ee/?id=434](http://www.riigikohus.ee/?id=434)>; SCebd 17 March 2003, 3-1-3-10-02, No. 36, <[www.riigikohus.ee/?id=419](http://www.riigikohus.ee/?id=419)>. To the personal scope of protection cf. ALCSd 20 Dec. 2001, 3-3-1-61-01, No. 5.

<sup>23</sup> CRCSd 30 Sept. 2008, 3-4-1-8-08, No. 20 f., 24, 27, 32, <[www.riigikohus.ee/?id=991](http://www.riigikohus.ee/?id=991)>.

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)<sup>24</sup> 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.<sup>25</sup>

*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.<sup>26</sup> 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]<sup>27</sup> 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.

<sup>24</sup> RT I 2001, 100, 648 (in Estonian). English translations of later versions of the law are available here: <[www.riigiteataja.ee/tutvustus.html?m=3](http://www.riigiteataja.ee/tutvustus.html?m=3)>.

<sup>25</sup> CRCSd 30 Sept. 2008, 3-4-1-8-08, No. 24, 32, <[www.riigikohus.ee/?id=991](http://www.riigikohus.ee/?id=991)>.

<sup>26</sup> CRCSr [hereafter: ruling of the Constitutional Review Chamber of the SC] 7 March 2011, 3-4-1-12-10, No. 58.

<sup>27</sup> RT I 2002, 62, 377 (in Estonian).



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.<sup>28</sup> But now the SC found:

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.<sup>29</sup>

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.<sup>30</sup> 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) (2<sup>nd</sup> 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.<sup>31</sup> The future application and extent of the

<sup>28</sup> Cf. SCEbd 20 Nov. 2009, 3-3-1-41-09, No. 21, 42, 51, <[www.riigikohus.ee/?id=1103](http://www.riigikohus.ee/?id=1103)>; ALCSD 20 Oct. 2008, 3-3-1-42-08, No. 28.

<sup>29</sup> SCEbd 7 June 2011, 3-4-1-12-10, No. 31, <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>.

<sup>30</sup> SCEbd 7 June 2011, 3-4-1-12-10, No. 31, <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>.

<sup>31</sup> SCEbd 7 June 2011, 3-4-1-12-10, No. 35, 43 ff., <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>. Cf. the three level principle of proportionality: CRCSD 6 March 2002, 3-4-1-1-02, No. 14 ff., <[www.riigikohus.ee/?id=434](http://www.riigikohus.ee/?id=434)>; and especially the wording in: CRCSD 17 July 2009, 3-4-1-6-09, No. 21, <[www.riigikohus.ee/?id=1042](http://www.riigikohus.ee/?id=1042)>.

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.<sup>32</sup> 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.

#### 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.<sup>33</sup> 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.<sup>34</sup> So, the starting point of the following analysis, is the principle theory of constitutional rights,<sup>35</sup> 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,

<sup>32</sup> SCebd 7 June 2011, 3-4-1-12-10, No. 32, <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>.

<sup>33</sup> Constitutively CRCSd 3 April 2002, 3-4-1-2-02, No. 17, <[www.riigikohus.ee/?id=433](http://www.riigikohus.ee/?id=433)>; cf. esp. CRCSd 2 May 2005, 3-4-1-3-05, No. 20, <[www.riigikohus.ee/?id=389](http://www.riigikohus.ee/?id=389)>.

<sup>34</sup> Alexy, *supra* n. 4, p. 181, 199 ff.; M. Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* (Tübingen 2006), p. 685 ff.

<sup>35</sup> Alexy, *supra* n. 4, p. 44 ff. An abstract of the distinction of rules and principles can be found in: R. Alexy, *Grundrechtsnorm und Grundrecht*, in: W. Krawietz et al. (eds.), *Politische Herrschaftsstrukturen und neuer Konstitutionalismus* (Berlin 2000), p. 103. Cf. the recent volumes: J.R. Sieckmann (ed.), *Die Prinzipientheorie der Grundrechte* (Baden-Baden 2007); L. Clérico and J.R. Sieckmann (eds.), *Grundrechte, Prinzipien und Argumentation* (Baden-Baden 2009); M. Borowski (ed.), *On the Nature of Legal Principles* (Stuttgart 2010).

whether there are different levels of scrutiny in the test of the principle of equality, and whether there is any principle of ‘coherence’.

*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 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.<sup>36</sup>

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.’<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup>

<sup>36</sup> CRCSd 3 April 2002, 3-4-1-2-02, No. 16, <[www.riigikohus.ee/?id=433](http://www.riigikohus.ee/?id=433)>.

<sup>37</sup> CRCSd 3 April 2002, 3-4-1-2-02, No. 16, <[www.riigikohus.ee/?id=433](http://www.riigikohus.ee/?id=433)>.

<sup>38</sup> CRCSd 3 April 2002, 3-4-1-2-02, No. 17, <[www.riigikohus.ee/?id=433](http://www.riigikohus.ee/?id=433)>.

<sup>39</sup> SCebd 14 Nov. 2002, 3-1-1-77-02, No. 22; 17 March 2003, 3-1-3-10-02, No. 36, <[www.riigikohus.ee/?id=419](http://www.riigikohus.ee/?id=419)>; 10 Dec. 2003, 3-3-1-47-03, No. 24, <[www.riigikohus.ee/?id=413](http://www.riigikohus.ee/?id=413)>; 27 June 2005, 3-4-1-2-05, No. 38 f., <[www.riigikohus.ee/?id=382](http://www.riigikohus.ee/?id=382)>; 2 June 2008, 3-4-1-19-07, No. 21, <[www.riigikohus.ee/?id=924](http://www.riigikohus.ee/?id=924)>; CRCSd 3 April 2002, 3-4-1-2-02, No. 17, <[www.riigikohus.ee/?id=433](http://www.riigikohus.ee/?id=433)>; 24 Jan. 2004, 3-4-1-7-03, No. 17, <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>; 2 May 2005, 3-4-1-3-05, No. 17, <[www.riigikohus.ee/?id=389](http://www.riigikohus.ee/?id=389)>; 20 March 2006, 3-4-1-33-05, No. 26, 32, <[www.riigikohus.ee/?id=583](http://www.riigikohus.ee/?id=583)>; 26 Sept. 2007, 3-4-1-12-07, No. 18 f., <[www.riigikohus.ee/?id=849](http://www.riigikohus.ee/?id=849)>; 1 Oct. 2007, 3-4-1-14-07, No. 13, <[www.riigikohus.ee/?id=850](http://www.riigikohus.ee/?id=850)>; 30 Sept. 2008, 3-4-1-8-08, No. 20, <[www.riigikohus.ee/?id=991](http://www.riigikohus.ee/?id=991)>.

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 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 préparatoires* of the Constitution, it was indisputable that the equality principle should also bind the legislature.<sup>40</sup> For these reasons the existence of the equality principle as a fully developed constitutional right is beyond dispute.<sup>41</sup>

<sup>40</sup> L. Hänni, in *Põhiseadus ja Põhiseaduse Assamblee: koguteos [Constitution and Constitutional Assembly: Digest]* (Tallinn 1997), p. 977 f.

<sup>41</sup> Cf. the European Court of Justice made recently a recapitulating clarification in respect of Art. 20 of the Charter too, ECJ 17 Oct. 2013, Case C-101/12, *Herbert Schaible v. Land Baden-Württemberg*, No. 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 [...]’

*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.<sup>42</sup> In 2003, it had considered legal equality in relation to the relevant statutory regulation.<sup>43</sup> 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,<sup>44</sup> but whether, and to what extent, it also aims to create factual equality is much more problematic.<sup>45</sup> The equality-paradox states that if factual equality is sought, one must also be prepared to accept legal inequality.<sup>46</sup> 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.<sup>47</sup> If we interpret the requirements as principles, such an interpretation is not logically excluded.<sup>48</sup> 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.<sup>49</sup> 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-

<sup>42</sup> CRCSd 1 Sept. 2005, 3-4-1-13-05, No. 24, <[www.riigikohus.ee/?id=381](http://www.riigikohus.ee/?id=381)>. However, the English translation of the decision is misleading because it uses the term 'actual equality' instead of the correct 'factual equality'.

<sup>43</sup> CRCSd 16 Sept. 2003, 3-4-1-6-03, No 24, <[www.riigikohus.ee/?id=416](http://www.riigikohus.ee/?id=416)>.

<sup>44</sup> ALCSd 20 Oct. 2008, 3-3-1-42-08, No. 25. Cf. instead of many F. Schoch, *Der Gleichheitssatz, DVBl.* (1988), p. 866; M. Borowski, *Grundrechte als Prinzipien*, 2nd edn. (Baden-Baden 2007), p. 396.

<sup>45</sup> Borowski, *supra* n. 34, p. 682 with further references to both positions.

<sup>46</sup> Alexy, *supra* n. 4, 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 Borowski, *supra* n. 44, p. 397 ff.

<sup>47</sup> The legal equality is act-related and the factual equality consequence-related [Alexy, *supra* n. 4, p. 276; Borowski, *supra* n. 44, p. 396].

<sup>48</sup> Jürgen Habermas takes 'the dialectic between legal and factual equality [for] an inconspicuous motor of legal development', see J. Habermas, *Between Facts and Norms*, translated by W. Rehg, (Mass. 1996), p. 416. On the contrary, Christian Starck considers it illogical, cf. C. Starck, in: von Mangoldt/Klein/Starck, *Kommentar zum Grundgesetz*, vol. 1, 6th edn. (München 2010), Art. 3(1) No. 5.

<sup>49</sup> Cf. Alexy, *supra* n. 4, p. 284.

tively to recognise the subjectivity of granting minimum social rights in the Constitution.<sup>50</sup> 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 foremost,<sup>51</sup> which congruously leads to the burden of argumentation in favour of legal equality,<sup>52</sup> or that legal equality enjoys a *prima facie* priority.<sup>53</sup> 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.<sup>54</sup> 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*).<sup>55,56</sup>

Without being able to answer this fundamental question exhaustively here, it seems possible to conclude that §12(1) of the Constitution requires legal equality

<sup>50</sup>The Estonian Constitution CRCSD 21 Jan. 2004, 3-4-1-7-03, No. 16, <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>. 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. BVerfGE 125, 175, 221 ff. (*Hartz IV*), <[www.bundesverfassungsgericht.de/entscheidungen/lis20100209\\_1bvl000109en.html](http://www.bundesverfassungsgericht.de/entscheidungen/lis20100209_1bvl000109en.html)>, and BVerfGE 132, 134, 166 ff. (*Asylbewerberleistungsgesetz*), <[www.bundesverfassungsgericht.de/entscheidungen/lis20120718\\_1bvl001010en.html](http://www.bundesverfassungsgericht.de/entscheidungen/lis20120718_1bvl001010en.html)>.

<sup>51</sup>Cf. Alexy, *supra* n. 4, p. 280.

<sup>52</sup>Alexy, *supra* n. 4, p. 283.

<sup>53</sup>Alexy, *supra* n. 3, p. 61; Borowski, *supra* n. 34, p. 397.

<sup>54</sup>Alexy, *supra* n. 4, p. 280.

<sup>55</sup>E.-W. Böckenförde, *Grundrechte als Grundsatznormen*, in: E.-W. Böckenförde, *Staat, Verfassung, Demokratie* (Frankfurt a.M. 1991), p. 190. Böckenförde has embraced the concept of the 'verfassungsgerichtlicher Verfassungsstaat'. 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 exceeds its jurisdiction, raises the question of a possible violation of the competence of the legislature.

<sup>56</sup>In relation to the problem of competence see: Alexy, *supra* n. 4, 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.

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 omnipresence<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.

### *Unequal treatment for non-equals*

In one case, the SC held that the requirement of unequal treatment for non-equals was infringed.<sup>60</sup> 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]<sup>61</sup> 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

<sup>57</sup> Cf. F. Schoch, *Der Gleichheitssatz*, DVBl. (1988), p. 864.

<sup>58</sup> See also Schoch, *supra* n. 57, p. 866 f.; P. Martini, *Art. 3 Abs. 1 GG als Prinzip absoluter Rechtsgleichheit* (Köln et al. 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.

<sup>59</sup> CRCSD 21 Jan 2004, 3-4-1-7-03, <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>.

<sup>60</sup> SCebd 10 Dec. 2003, 3-3-1-47-03, No. 26, <[www.riigikohus.ee/?id=413](http://www.riigikohus.ee/?id=413)>.

<sup>61</sup> RT I 1999, 16, 273 (in Estonian). An English translation of a later version of the law is available here: <[www.riigiteataja.ee/tutvustus.html?m=3](http://www.riigiteataja.ee/tutvustus.html?m=3)>.

forms part of the naturalisation process. *Kodakondsusseadus* [the Citizenship Act]<sup>62</sup> recognised the intermediate degree of disability as a ground for exemption from the otherwise mandatory language test in the naturalisation process.

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.<sup>63</sup> 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,<sup>64</sup> and this has been repeated by the SC, as well as by the most influential Constitutional Court in Europe, the German Federal Constitutional Court.<sup>65</sup> The SC considered the individual characteristics of the person to be relevant, stating that equals should be treated equally and non-equals unequally.<sup>66</sup> 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.<sup>67</sup> A good example is the judgment of the SC of 7 June 2011

<sup>62</sup> RT I 1995, 12, 122 (in Estonian).

<sup>63</sup> 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.

<sup>64</sup> Plato, *Laws*, VI 757; Aristotle, *Politics*, III 9 (1280a); id., *Nichomachean Ethics*, V 3 (1131a); cf. Alexy, *supra* n. 4, p. 263.

<sup>65</sup> Cf. BVerfGE 3, 58, 135; 9, 124, 129 f.

<sup>66</sup> CRCSD 3 April 2002, 3-4-1-2-02, No. 17, <[www.riigikohus.ee/?id=433](http://www.riigikohus.ee/?id=433)>.

<sup>67</sup> Martini, *supra* n. 58, p. 219 ff.; W. Rübner, 'Der allgemeine Gleichheitssatz als Differenzierungsgebot', in: *Festschrift für M. Kriele* (München 1997), p. 271 ff., 279; M. Sachs, *Der allgemeine Gleichheitssatz*, in: K. Stern, *Staatsrecht*, vol. IV/2 (München 2011), p. 1479 with further references in fn. 239. See also for a detailed approach to the other direction Borowski, *supra* n. 44, p. 402; Borowski, *supra* n. 34, p. 685 ff.



considered above,<sup>68</sup> where the issue was whether a rule that equated the over65s 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.<sup>69</sup> 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.<sup>70</sup>

Secondly, the rejection of a requirement of unequal treatment is reflective of historical arguments. The principle of equality was initially opposed to nobility privileges,<sup>71</sup> 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.<sup>72</sup>

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.<sup>73</sup> 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

<sup>68</sup> SCebd 7 June 2011, 3-4-1-12-10, <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>.

<sup>69</sup> SCebd 10 Dec. 2003, 3-3-1-47-03, No. 26, <[www.riigikohus.ee/?id=413](http://www.riigikohus.ee/?id=413)>.

<sup>70</sup> SCebd 10 Dec. 2003, 3-3-1-47-03, No. 27, <[www.riigikohus.ee/?id=413](http://www.riigikohus.ee/?id=413)>.

<sup>71</sup> S. Huster, *Rechte und Ziele* (Berlin 1993), p. 25 with further references; Sachs, *supra* n. 67, p. 1444 ff, 1479 ff.

<sup>72</sup> A. Podlech, *Gehalt und Funktionen des allgemeinen verfassungsrechtlichen Gleichheitssatzes* (Berlin 1971), p. 57.

<sup>73</sup> SCebd 12 July 2012, 3-4-1-6-12, No. 173, <[www.riigikohus.ee/?id=1347](http://www.riigikohus.ee/?id=1347)>: '§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.'

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 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 20<sup>th</sup> century, wrote, in his influential commentary on the article of equality, that the right to equality defines an egalitarian standard.<sup>74</sup> 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.

### *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*.<sup>75</sup>

<sup>74</sup> G. Dürig, in: Maunz/Dürig, *Grundgesetz-Kommentar* (München 1973), Art. 3(1)1 No. 22 ff.

<sup>75</sup> CRCSr 7 March 2011, 3-4-1-12-10, No. 52 f.

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.<sup>76</sup> This conception would have meant that only other constitutional rights, or other constitutional values, could 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) 2<sup>nd</sup> sentence of the Constitution);<sup>77</sup> and the application of the principle of equality alone.<sup>78</sup> The SC has even referred to it later and, in 2004, confirmed the statement regarding the statutory reservation.<sup>79</sup> 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.<sup>80</sup>

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.<sup>81</sup> 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.<sup>82</sup> Therefore, conversely, an open list of possible justifications is needed and should include all constitutional norms and

<sup>76</sup> SCebd 17 March 2003, 3-1-3-10-02, No. 27 f., <[www.riigikohus.ee/?id=419](http://www.riigikohus.ee/?id=419)>.

<sup>77</sup> §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. SCebd 17 March 2003, 3-1-3-10-02, No. 19–34, <[www.riigikohus.ee/?id=419](http://www.riigikohus.ee/?id=419)>.

<sup>78</sup> SCebd 17 March 2003, 3-1-3-10-02, No. 35 ff., <[www.riigikohus.ee/?id=419](http://www.riigikohus.ee/?id=419)>.

<sup>79</sup> Confirming the lack of the statutory reservation for the same norm combination: SCebr [hereinafter: ruling of the SC *en banc*] 28 April 2004, 3-3-1-69-03, No. 28, <[www.riigikohus.ee/?id=400](http://www.riigikohus.ee/?id=400)>; SCebd 2 June 2008, 3-4-1-19-07, No. 23, <[www.riigikohus.ee/?id=924](http://www.riigikohus.ee/?id=924)>. In a further case the SC dealt with the principle of equality as if it had no statutory reservation: SCebd 19 April 2005, 3-4-1-1-05, No. 16, 24, 36, <[www.riigikohus.ee/?id=391](http://www.riigikohus.ee/?id=391)>.

<sup>80</sup> Cf. CRCSr 7 March 2011, 3-4-1-12-10, No. 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.

<sup>81</sup> SCebd 7 June 2011, 3-4-1-12-10, No. 31, <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>; CRCSd 27 Dec. 2011, 3-4-1-23-11, No. 41; also substantively CRCSd 14 May 2013, 3-4-1-7-13, No. 41, <[www.riigikohus.ee/?id=1450](http://www.riigikohus.ee/?id=1450)> and SCebd 26 June 2014, 3-4-1-1-14, No. 113.

<sup>82</sup> Cf. SCebd 17 March 2003, 3-1-3-10-02, No. 36, <[www.riigikohus.ee/?id=419](http://www.riigikohus.ee/?id=419)>; CRCSd 6 March 2002, 3-4-1-1-02, No. 13, <[www.riigikohus.ee/?id=434](http://www.riigikohus.ee/?id=434)>; 1 Oct. 2007, 3-4-1-14-07, No. 13, <[www.riigikohus.ee/?id=850](http://www.riigikohus.ee/?id=850)>.

legitimate objectives pursued by the legislature.<sup>83</sup> 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 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.<sup>84</sup> 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.<sup>85</sup> The SC has reviewed the formal constitutionality of an original unequal treatment only three times in its case-law.<sup>86</sup>

### *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.<sup>87</sup> 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.<sup>88</sup> 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-

<sup>83</sup> Cf. Borowski, *supra* n. 44, p. 448; Huster, *supra* n. 71, p. 239.

<sup>84</sup> Cf. CRCSD 6 March 2002, 3-4-1-1-02, No. 18, <[www.riigikohus.ee/?id=434](http://www.riigikohus.ee/?id=434)>; 12 June 2002, 3-4-1-6-02, No. 15, <[www.riigikohus.ee/?id=429](http://www.riigikohus.ee/?id=429)>.

<sup>85</sup> E.g. CRCSD 16 Jan. 2007, 3-4-1-9-06, No. 32, <[www.riigikohus.ee/?id=736](http://www.riigikohus.ee/?id=736)>.

<sup>86</sup> CRCSD 30 Sept. 2008, 3-4-1-8-08, No. 18, <[www.riigikohus.ee/?id=991](http://www.riigikohus.ee/?id=991)>: 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. SCEbd 7 June 2011, 3-4-1-12-10, No. 40, <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>: 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. CRCSD 14 May 2013, 3-4-1-7-13, No. 40, <[www.riigikohus.ee/?id=1450](http://www.riigikohus.ee/?id=1450)>: 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.

<sup>87</sup> SCEbd 27 June 2005, 3-4-1-2-05, No. 50, 54, <[www.riigikohus.ee/?id=382](http://www.riigikohus.ee/?id=382)>.

<sup>88</sup> SCEbd 3 Jan. 2008, 3-3-1-101-06, No. 23, <[www.riigikohus.ee/?id=889](http://www.riigikohus.ee/?id=889)>.

rable with each other, when the SC examined the constitutionality of the confiscation of the vehicle used in the crime.<sup>89</sup> 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.<sup>90</sup>

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 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',<sup>91</sup> although the SC does not give any further explanation of the meaning of this point.

However, Judge Jüri Pöld 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.<sup>92</sup> Shortly thereafter, the Constitutional Review Chamber gave up the theory of incomparability, agreeing explicitly that, in principle, everybody is comparable to everybody else.<sup>93</sup> 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.<sup>94</sup> Therefore, the question of which opinion should be followed still remains.

The European Court of Justice,<sup>95</sup> the European Court of Human Rights<sup>96</sup> and the German Federal Constitutional Court<sup>97</sup> 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 incom-

<sup>89</sup> SCebd 12 June 2008, 3-1-1-37-07, No. 24, <[www.riigikohus.ee/?id=926](http://www.riigikohus.ee/?id=926)>.

<sup>90</sup> SCebd 7 Dec. 2009, 3-3-1-5-09, No. 28, <[www.riigikohus.ee/?id=1149](http://www.riigikohus.ee/?id=1149)>.

<sup>91</sup> SCebd 27 June 2005, 3-4-1-2-05, No. 40, <[www.riigikohus.ee/?id=382](http://www.riigikohus.ee/?id=382)>; 3 Jan. 2008, 3-3-1-101-06, No. 23, <[www.riigikohus.ee/?id=889](http://www.riigikohus.ee/?id=889)>.

<sup>92</sup> Dissenting opinion to SCebd 3 Jan. 2008, 3-3-1-101-06.

<sup>93</sup> CRCSd 30 Sept. 2008, 3-4-1-8-08, No. 24, <[www.riigikohus.ee/?id=991](http://www.riigikohus.ee/?id=991)>.

<sup>94</sup> SCebd 7 July 2009, 3-3-1-5-09, No. 28, <[www.riigikohus.ee/?id=1149](http://www.riigikohus.ee/?id=1149)>.

<sup>95</sup> E.g.: ECJ 6 July 1982, Case C-188/80, *France et al. v. Commission*, No. 21; 12 Oct. 2004, Case C-313/02, *Nicole Wippel*, No. 64; 26 Oct. 2006, Case C-248/04, *Koninklijke Coöperatie Cosun UA*, No. 72. See also M. Rossi, *EU-GRCharta Art. 20. Gleichheit vor dem Gesetz*, in: Calliess/Ruffert, *EU/VAEU*, 4th edn. (München 2011), No. 20 f.

<sup>96</sup> E.g.: ECtHR 26 April 1979, Case 6 538/74, *Sunday Times v. UK*, No. 72; 29 April 2008, Case 13 378/05, *Burden v. UK*, No. 62; 16 March 2010, Case 42 184/05, *Carson et al. v. UK*, No. 85; 4 Nov. 2010, Case 14 480/08, *Tarkoiev v. Estonia*, No. 61. C. Grabenwarter and K. Pabel, *Europäische Menschenrechtskonvention*, 5th edn. (München 2012), § 26 No. 6.

<sup>97</sup> See also M. Sachs, *Besondere Gleichheitsgarantien*, in: Isensee and Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. VIII, 3rd edn. (Heidelberg 2010), §182 No. 33 ff.

parable, something can always be compared with something else.<sup>98</sup> 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 reasons, one has to agree with the position of the Constitutional Review Chamber, and Jüri Pöld, and hope that the SC *en banc* clarifies the ambiguity in the future.

### *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.<sup>99</sup> 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,<sup>100</sup> or the theory of transitive action-related predicates,<sup>101</sup> 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.<sup>102</sup> It was an abstract judicial review, on the subject of a municipal statute of Tallinn, which introduced a childbirth

<sup>98</sup> See also V. Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume* (Baden-Baden 2002), p. 170 ff.

<sup>99</sup> Cf. esp. W. Heun, in: H. Dreier, *Grundgesetz-Kommentar*, vol. 1, 3rd edn. (Tübingen 2013), Art. 3, No. 24; Sachs, *supra* n. 67, p. 1513 in fn. 419 with further references.

<sup>100</sup> A. Podlech, *Gehalt und Funktionen des allgemeinen Gleichheitssatzes* (Berlin 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 pp. 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.

<sup>101</sup> S. Kempny and P. Reimer, *Die Gleichheitssätze* (Tübingen 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.

<sup>102</sup> CRCSd 8 March 2011, 3-4-1-11-10, <[www.riigikohus.ee/?id=1270](http://www.riigikohus.ee/?id=1270)>. Ironically, on the day before this decision, 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 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 (CRCSr 7 March 2011, 3-4-1-12-10, No. 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.

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 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,<sup>103</sup> 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

<sup>103</sup> The monocratic institution of Chancellor of Justice is an exceptional one. Heiki Loot, the current Secretary of State since 2003, 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.

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 the right comparison groups.<sup>104</sup> 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’.<sup>105</sup>

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.<sup>106</sup> 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],<sup>107</sup> 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.

<sup>104</sup> CRCSD 8 March 2011, 3-4-1-11-10, No. 52, <[www.riigikohus.ee/?id=1270](http://www.riigikohus.ee/?id=1270)>.

<sup>105</sup> CRCSD 8 March 2011, 3-4-1-11-10, No. 53, <[www.riigikohus.ee/?id=1270](http://www.riigikohus.ee/?id=1270)>.

<sup>106</sup> Cf. CRCSD 8 March 2011, 3-4-1-11-10, No. 8 (this part of the decision does not appear in the translated version).

<sup>107</sup> RT I 2000, 50, 317 (in Estonian).



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.<sup>108</sup> This is because, the principle of equality being orientated 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.<sup>109</sup> 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.<sup>110</sup> In other words, the comparison groups that indicate a violation of the principle of equality are the most likely 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.

### *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.<sup>111</sup> Consequently, the second sentence of §12(1) of the Constitution was treated as a source of special principles of equality.<sup>112</sup> The SC case-law left

<sup>108</sup> Cf. e.g. Borowski, *supra* n. 44, p. 454.

<sup>109</sup> Huster, *supra* n. 71, p. 18 f. in fn. 22. It remains an open question whether the people compared must always be entitled to fundamental rights.

<sup>110</sup> D. Schmalz, *Grundrechte*, 4th. edn. (Baden-Baden 2001), No. 569; Martini, *supra* n. 58, p. 257.

<sup>111</sup> Alexy, *supra* n. 3, p. 56; M. Ernits, §12, in: *Eesti Vabariigi põhiseadus* [Constitution of the Republic of Estonia], 3rd edn. (Tallinn 2012), No. 1.2.1. Also clear statements of the SC: CRCSD 6 March 2002, 3-4-1-1-02, No. 13, <[www.riigikohus.ee/?id=434](http://www.riigikohus.ee/?id=434)>; 12 June 2002, 3-4-1-6-02, No. 10, <[www.riigikohus.ee/?id=429](http://www.riigikohus.ee/?id=429)>; 30 Sept. 2008, 3-4-1-8-08, No. 19 f., <[www.riigikohus.ee/?id=991](http://www.riigikohus.ee/?id=991)>; SCEbd 17 March 2003, 3-1-3-10-02, No. 35, <[www.riigikohus.ee/?id=419](http://www.riigikohus.ee/?id=419)>.

<sup>112</sup> Alexy, *supra* n. 3, p. 63 f.; M. Ernits, §12, in: *Eesti Vabariigi põhiseadus* [Constitution of the Republic of Estonia], 3rd edn. (Tallinn 2012), No. 1.2.2.

room for an interpretation, later adopted by the SC, that §12(1) of the Constitution was in part a uniform equality principle.<sup>113</sup>

Another problem was that the catalogue in the 2<sup>nd</sup> 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; 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.<sup>114</sup>

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 2<sup>nd</sup> 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.<sup>115</sup>

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 2<sup>nd</sup> sentence of the above-mentioned §12(1). Specifically, §9(1) requires the equal application of everyone's constitu-

<sup>113</sup> CRCSD 21 June 2005, 3-4-1-9-05, No. 13, <[www.riigikohus.ee/?id=384](http://www.riigikohus.ee/?id=384)>; 8 March 2011, 3-4-1-11-10, No. 62, 66, <[www.riigikohus.ee/?id=1270](http://www.riigikohus.ee/?id=1270)>; SCEbd 3 Jan. 2008, 3-3-1-101-06, No. 20, <[www.riigikohus.ee/?id=889](http://www.riigikohus.ee/?id=889)>.

<sup>114</sup> SCEbd 20 Nov. 2009, 3-3-1-41-09, No. 21, 42, 51, <[www.riigikohus.ee/?id=1103](http://www.riigikohus.ee/?id=1103)>.

<sup>115</sup> SCEbd 7 June 2011, 3-4-1-12-10, No. 32, <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>.

tional 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 2<sup>nd</sup> 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.

The subject matter of the judgment of the Constitutional Review Chamber on 1<sup>st</sup> 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:<sup>116</sup>

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.<sup>117</sup>

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.<sup>118</sup> 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.<sup>119</sup> 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-

<sup>116</sup> CRCSD 1 Sept. 2005, 3-4-1-13-05, No. 21, <[www.riigikohus.ee/?id=381](http://www.riigikohus.ee/?id=381)>.

<sup>117</sup> CRCSD 1 Sept. 2005, 3-4-1-13-05, No. 16, <[www.riigikohus.ee/?id=381](http://www.riigikohus.ee/?id=381)>.

<sup>118</sup> CRCSD 1 Sept. 2005, 3-4-1-13-05, No. 32, <[www.riigikohus.ee/?id=381](http://www.riigikohus.ee/?id=381)>.

<sup>119</sup> CRCSD 1 Sept. 2005, 3-4-1-13-05, No. 23, <[www.riigikohus.ee/?id=381](http://www.riigikohus.ee/?id=381)>. 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.

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.

### *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.<sup>120</sup> 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) (2<sup>nd</sup> sentence) of the Constitution).<sup>121</sup> Subsequently, it applied the combination of the equality principle with other constitutional rights in a number of cases.<sup>122</sup> 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;<sup>123</sup> secondly, it is applied in conjunction with other constitutional rights, or even in the context of application of other constitutional rights.<sup>124</sup> The

<sup>120</sup> CRCSd 6 March 2002, 3-4-1-1-02, No. 18, <[www.riigikohus.ee/?id=434](http://www.riigikohus.ee/?id=434)>; repeated in CRCSd 12 June 2002, 3-4-1-6-02, No. 15, <[www.riigikohus.ee/?id=429](http://www.riigikohus.ee/?id=429)>.

<sup>121</sup> §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. SCebd 17 March 2003, 3-1-3-10-02, Resolution No. 1, Reasons No. 19–34, <[www.riigikohus.ee/?id=419](http://www.riigikohus.ee/?id=419)>.

<sup>122</sup> Esp. CRCSd 21 Jan. 2004, 3-4-1-7-03, No. 25, 40, <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>. E.g. to the application of the equality principle within the framework of proportionality SCebr 28 April 2004, 3-3-1-69-03, No. 28 ff., <[www.riigikohus.ee/?id=400](http://www.riigikohus.ee/?id=400)>; SCebd 2 June 2008, 3-4-1-19-07, No. 24 ff., <[www.riigikohus.ee/?id=924](http://www.riigikohus.ee/?id=924)>; CRCSd 16 Jan. 2007, 3-4-1-9-06, No. 32, <[www.riigikohus.ee/?id=736](http://www.riigikohus.ee/?id=736)>.

<sup>123</sup> E.g. CRCSd 30 Sept. 2008, 3-4-1-8-08, No. 19 ff., <[www.riigikohus.ee/?id=991](http://www.riigikohus.ee/?id=991)>; SCebd 7 June 2011, 3-4-1-12-10, No. 27 ff., <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>.

<sup>124</sup> SCebd 17 March 2003, 3-1-3-10-02, No. 19–34, <[www.riigikohus.ee/?id=419](http://www.riigikohus.ee/?id=419)>; 2 June 2008, 3-4-1-19-07, No. 21, 23 ff., <[www.riigikohus.ee/?id=924](http://www.riigikohus.ee/?id=924)>; 9 Dec. 2013, 3-4-1-2-13, No. 114, 163, <[www.riigikohus.ee/?id=1494](http://www.riigikohus.ee/?id=1494)>; 26 June 2014, 3-4-1-1-14, No. 106–109, 113–115, 117 ff.; SCebr 28 April 2004, 3-3-1-69-03, No. 27 ff., <[www.riigikohus.ee/?id=400](http://www.riigikohus.ee/?id=400)>; CRCSd 21

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.<sup>125</sup> It may also be that the SC applies a (criminal) procedural constitutional right in conjunction with the principle of equality, and considers the equality arguments in the context of proportionality in the narrow sense.<sup>126</sup> Finally, the principle of equality itself may be considered as an additional argument in relation to proportionality in the narrow sense.<sup>127</sup> When this is put together with the principle of subsidiarity in the equality test, expressed earlier in respect of the examination of freedom rights,<sup>128</sup> 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

Jan. 2004, 3-4-1-7-03, No. 14 ff., <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>. 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 (SCebd 26 June 2014, 3-4-1-1-14, No. 117–127).

<sup>125</sup> CRCSd 21 Jan. 2004, 3-4-1-7-03, No. 25, 40, <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>.

<sup>126</sup> SCEbr 28 April 2004, 3-3-1-69-03, No. 28 ff., <[www.riigikohus.ee/?id=400](http://www.riigikohus.ee/?id=400)>; SCEbd 2 June 2008, 3-4-1-19-07, No. 24 ff., <[www.riigikohus.ee/?id=924](http://www.riigikohus.ee/?id=924)>.

<sup>127</sup> E.g. in CRCSd 16 Jan. 2007, 3-4-1-9-06, No. 32, <[www.riigikohus.ee/?id=736](http://www.riigikohus.ee/?id=736)>, 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 SCEbd 13 Nov. 2012, 3-1-1-45-12, No. 29; 9 Dec. 2013, 3-4-1-2-13, No. 114, <[www.riigikohus.ee/?id=1494](http://www.riigikohus.ee/?id=1494)>.

<sup>128</sup> CRCSd 6 March 2002, 3-4-1-1-02, No. 18, <[www.riigikohus.ee/?id=434](http://www.riigikohus.ee/?id=434)>; 12 June 2002, 3-4-1-6-02, No. 15, <[www.riigikohus.ee/?id=429](http://www.riigikohus.ee/?id=429)>.

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.

*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.<sup>129</sup> In 2004, the SC stated that unequal treatment is arbitrary when it is manifestly inappropriate, thus defining the criterion for arbitrariness.<sup>130</sup> 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.<sup>131</sup> 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 [...].<sup>132</sup>

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

<sup>129</sup> CRCsd 3 April 2002, 3-4-1-2-02, No. 17, <[www.riigikohus.ee/?id=433](http://www.riigikohus.ee/?id=433)>.

<sup>130</sup> CRCsd 21 Jan. 2004, 3-4-1-7-03, No. 37, <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>.

<sup>131</sup> CRCsd 30 Sept. 2008, 3-4-1-8-08, No. 24, 32, <[www.riigikohus.ee/?id=991](http://www.riigikohus.ee/?id=991)>.

<sup>132</sup> SCebd 7 June 2011, 3-4-1-12-10, No. 35, <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>.

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 sanctions on the one hand<sup>133</sup> and electoral rights on the other.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup> 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<sup>138</sup> (and the appropriateness)<sup>139</sup> of the cause. The cause is reasonable if it is proportional

<sup>133</sup> Cf. CRCSd 25 Nov. 2003, 3-4-1-9-03, No. 21, <www.riigikohus.ee/?id=414>: ‘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.’

<sup>134</sup> Cf. SCebd 1 July 2010, 3-4-1-33-09, No. 67, <www.riigikohus.ee/?id=1157>: ‘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 [...]’

<sup>135</sup> See, for different schemes, M. Ernits, ‘II peatüki sissejuhatus’ [Introduction to Chapter II], in: *Eesti Vabariigi põhiseadus* [Constitution of the Republic of Estonia], 3rd edn. (Tallinn 2012), No. 10.

<sup>136</sup> CRCSd 21 Jan. 2004, 3-4-1-7-03, <www.riigikohus.ee/?id=412>.

<sup>137</sup> CRCSd 21 Jan. 2004, 3-4-1-7-03, No. 37.

<sup>138</sup> CRCSd 30 Sept. 1998, 3-4-1-6-98, No. II; 20 June 2000, 3-3-1-30-00, No. 3; SCebd 17 March 2003, 3-1-3-10-02, No. 36, <www.riigikohus.ee/?id=419>; 10 Dec. 2003, 3-3-1-47-03, No. 27, <www.riigikohus.ee/?id=413>; 20 Nov. 2009, 3-3-1-41-09, No. 51, <www.riigikohus.ee/?id=1103>.

<sup>139</sup> CRCSd 3 April 2002, 3-4-1-2-02, No. 17, <www.riigikohus.ee/?id=433>; 2 May 2005, 3-4-1-3-05, No. 20, <www.riigikohus.ee/?id=389>; 20 March 2006, 3-4-1-33-05, No. 26, <www.riigikohus.ee/?id=583>; 26 Sept. 2007, 3-4-1-12-07, No. 19, <www.riigikohus.ee/?id=849>; 1 Oct. 2007, 3-4-1-14-07, No. 13, <www.riigikohus.ee/?id=850>; 30 Sept. 2008, 3-4-1-8-08, No. 27, 32, <www.riigikohus.ee/?id=991>; SCebd 14 Nov. 2002, 3-1-1-77-02, No. 22; 27 June 2005, 3-4-1-2-05, No. 39, <www.riigikohus.ee/?id=382>; 3 Jan. 2008, 3-3-1-101-06, No. 20, <www.riigikohus.ee/?id=889>.

in the narrow sense.<sup>140</sup> 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.

Finally, the SC introduced the full proportionality test and assessed suitability, necessity and proportionality in the narrow sense.<sup>141</sup> 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.<sup>142</sup> Moreover, it has also used, at least partly, the terminology of the reasonable cause in an arbitrariness test<sup>143</sup> and, additionally, in a full proportionality test.<sup>144</sup> In some cases the choice of criteria is difficult to comprehend. The SC merely applied the reasonableness test in a sex discrimination case,<sup>145</sup> whilst, in an electoral equality case, it left the criterion open but also asked for a reasonable cause to justify the infringement.<sup>146</sup> 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-

<sup>140</sup> CRCSD 30 Sept. 2008, 3-4-1-8-08, No. 32, <[www.riigikohus.ee/?id=991](http://www.riigikohus.ee/?id=991)>.

<sup>141</sup> SCEbd 7 June 2011, 3-4-1-12-10, No. 35, 43 ff., <[www.riigikohus.ee/?id=1301](http://www.riigikohus.ee/?id=1301)>; 3 July 2012, 3-1-1-18-12, No. 43 ff.; CRCSD 27 Dec. 2011, 3-4-1-23-11, No. 61 ff.; 14 May 2013, 3-4-1-7-13, No. 44 ff., <[www.riigikohus.ee/?id=1450](http://www.riigikohus.ee/?id=1450)>. The SC had applied the criterion of proportionality in the context of the equality principle once already, in 2001: CRCSD 22 Feb. 2001, 3-4-1-4-01, No. 16, <[www.riigikohus.ee/?id=438](http://www.riigikohus.ee/?id=438)>: '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.'

<sup>142</sup> CRCSD 3 April 2002, 3-4-1-2-02, No. 17, <[www.riigikohus.ee/?id=433](http://www.riigikohus.ee/?id=433)>; 20 March 2006, 3-4-1-33-05, No. 26, <[www.riigikohus.ee/?id=583](http://www.riigikohus.ee/?id=583)>; SCEbd 14 Nov. 2002, 3-1-1-77-02, No. 22; 27 June 2005, 3-4-1-2-05, No. 39, <[www.riigikohus.ee/?id=382](http://www.riigikohus.ee/?id=382)>.

<sup>143</sup> CRCSD 21 Jan. 2004, 3-4-1-7-03, No. 37, 40, <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>.

<sup>144</sup> SCEbd 3 July 2012, 3-1-1-18-12, No. 43 ff., 50.

<sup>145</sup> SCEbd 20 Nov. 2009, 3-3-1-41-09, No. 51, <[www.riigikohus.ee/?id=1103](http://www.riigikohus.ee/?id=1103)>.

<sup>146</sup> Cf. CRCSD 1 Sept. 2005, 3-4-1-13-05, No. 21 ff., <[www.riigikohus.ee/?id=381](http://www.riigikohus.ee/?id=381)>.



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.

### Coherence

The idea of the coherence or logic or justice of the system (*Systemgerechtigkeit*) is both criticised<sup>147</sup> and advocated<sup>148</sup> in the German academic debate.<sup>149</sup> 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.<sup>150</sup> 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<sup>151</sup> 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.<sup>152</sup> 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 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

<sup>147</sup> See U. Battis, 'Systemgerechtigkeit', in: *Festschrift für H. P. Ipsen* (Tübingen 1977), p. 11 ff.; C. Gusy, *Der Gleichheitssatz*, NJW (1988), p. 2508; W. Heun, in: H. Dreier, *Grundgesetz-Kommentar*, vol. 1, 3rd edn. (Tübingen 2013), Art. 3 No. 37; U. Kischel, 'Systembindung des Gesetzgebers und Gleichheitssatz', 124 *AöR* (1999), p. 174 ff., 197 ff.; Martini, *supra* n. 58, p. 288 ff., 296; F.-J. Peine, *Systemgerechtigkeit* (Baden-Baden 1985), p. 211 ff., 230 ff., 255 ff.

<sup>148</sup> See B.-O. Bryde and R. Kleindiek, *Der allgemeine Gleichheitssatz*, Jura (1999), p. 41; C. Degenhart, *Systemgerechtigkeit und Selbstbindung des Gesetzgebers als Verfassungspostulat* (München 1976), p. 49 ff., 79 ff.; P. Kirchhof, 'Allgemeiner Gleichheitssatz', in: Isensee/Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. VIII, 3rd edn. (Heidelberg 2010), § 181 No. 209 ff.; L. Osterloh, in: M. Sachs, *Grundgesetz*, 6th edn. (München 2011), Art. 3 No. 98; J. Pietzcker, 'Der allgemeine Gleichheitssatz', in: Merten and Papier, *Handbuch der Grundrechte*, vol. V (Heidelberg 2013), § 125 No. 23 ff.; Schoch, *supra* n. 57, p. 878 f.; C. Starck, in: von Mangoldt et al., *Kommentar zum Grundgesetz*, vol. 1, 6th edn. (München 2010), Art. 3(1) No. 44 ff.

<sup>149</sup> For the German debate, with further references, see Sachs, *supra* n. 67, p. 1527 ff.

<sup>150</sup> H. Hoffmann, *Verfassungsrechtliche Perspektiven: Aufsätze aus den Jahren 1980–1994* (Tübingen 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.

<sup>151</sup> ECJ 29 March 1979, Case C-113/77, *NTN Toyo Bearing Company et al. v. Council*, No. 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.'

<sup>152</sup> Bryde and Kleindiek, *supra* n. 148, p. 41.

by the legislature.<sup>153</sup> But the truly interesting question here is the formal meaning of coherence. It has been characterised<sup>154</sup> as a burden of proof,<sup>155</sup> burden of argumentation,<sup>156</sup> a question of control intensity,<sup>157</sup> and as a maxim of interpretation.<sup>158</sup> 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.<sup>159</sup> 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.<sup>160</sup> 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 equally.<sup>161</sup> 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,

<sup>153</sup> *Ibid.*

<sup>154</sup> See, for further opportunities of its characterisation, Kischel, *supra* n. 147, p. 193.

<sup>155</sup> Degenhart, *supra* n. 148, p. 22 ff.

<sup>156</sup> Schoch, *supra* n. 57, p. 878 f.

<sup>157</sup> R. Wendt, *Der Gleichheitssatz*, NVwZ (1988), p. 786.

<sup>158</sup> J.F. Lindner, *Theorie der Grundrechtsdogmatik* (Tübingen 2005), p. 157 f.

<sup>159</sup> Lindner, *supra* n. 158, p. 157 f.

<sup>160</sup> Schoch, *supra* n. 57, p. 878 f.

<sup>161</sup> CRCsD 30 Sept. 1998, 3-4-1-6-98, No. III, <[www.riigikohus.ee/?id=459](http://www.riigikohus.ee/?id=459)>.

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.<sup>162</sup> Although the SC does not deal more comprehensively with the principle of coherence in this judgement, the key question for the judgement 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.<sup>163</sup>

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.<sup>164</sup>

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'.<sup>165</sup> Elsewhere, the SC found the calculation of the pension-relevant period of employment 'by way of exception from the general rule' to be unconstitutional.<sup>166</sup> Finally, the SC criticised the financing model of local governments as follows: 'For instance, according to the

<sup>162</sup> CRCSd 21 Jan. 2004, 3-4-1-7-03, No. 17, <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>. 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 (No. 7).

<sup>163</sup> Cf. CRCSd 21 Jan. 2004, 3-4-1-7-03, No. 17, 37, 40, <[www.riigikohus.ee/?id=412](http://www.riigikohus.ee/?id=412)>.

<sup>164</sup> CRCSd 20 March 2006, 3-4-1-33-05, No. 25, 30, <[www.riigikohus.ee/?id=583](http://www.riigikohus.ee/?id=583)>.

<sup>165</sup> CRCSd 26 Sept. 2007, 3-4-1-12-07, No. 21, <[www.riigikohus.ee/?id=849](http://www.riigikohus.ee/?id=849)>.

<sup>166</sup> CRCSd 30 Sept. 2008, 3-4-1-8-08, No. 34, <[www.riigikohus.ee/?id=991](http://www.riigikohus.ee/?id=991)>.

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.<sup>167</sup> 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.

## CONCLUDING REMARKS

The general principle of equality is one of five general constitutional rights in Estonian constitutional rights catalogue.<sup>168</sup> 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

<sup>167</sup> SCebd 16 March 2010, 3-4-1-8-09, No. 67, <[www.riigikohus.ee/?id=1122](http://www.riigikohus.ee/?id=1122)>.

<sup>168</sup> Cf. Alexy, *supra* n. 3, p. 49 ff., 56 ff., 68 ff., 73 f., 76 f.

right to equal treatment under the law as far as the Constitution 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.

