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How to Handle a Double-edged Sword Safely:

Protection of the Elements of the Principle of the Social State in the Constitutional Jurisprudence of the Supreme Court of Estonia

Most traditionally, it has been held that guaranteeing a modicum of social protection to those in need would be the exclusive task of the legislator within the political process.[*1] According to this approach, social entitlements were deemed not to belong to a constitution[*2]; and even if some social rights did, in fact, appear in a constitutional text, they would have been considered mere directive principles.[*3]

In contemporary constitutional democracies, however, the tide has turned. Social rights are taken increasingly seriously as legal rights capable of being invoked before domestic[*4] or international courts.[*5]

Once social-rights-related claims have entered the realm of judicial decision-making, the courts concerned must make up their minds as to how to handle such claims safely, as implementation of social rights routinely gives rise to a number of complex issues that may lead to questioning the legitimacy of judicial intervention or demonstrate the incompetence of the courts. The most cautious courts could combine various judicial techniques in order to achieve a balance between their obligation to protect fundamental rights of individuals and that of reasonably preserving the balance of powers.

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1 See T. Marauhn. Social Rights beyond the Traditional Welfare State: International Instruments and the Concept of Individual Entitlements. – E. Benvenisti, G. Nolte (eds.). The Welfare State, Globalization, and International Law. Berlin, Heidelberg, New York, Hong Kong, London, Milan, Paris, & Tokyo: Springer 2004, p. 275.

This approach would also correspond to the views of John Rawls, who sets forth in his world-famous treatise 'A Theory of Justice' that his second principle of justice, the difference principle, should be effected by choosing welfarist economic and social policies and upheld through appropriate legislation. See C. Kukathas, P. Pettit. Rawls: 'A Theory of Justice' and Its Critics. Polity Press 1998, pp. 49–50.

2 See T. Marauhn (Note 1), pp. 276.

3 J. Cottrell, Y. Ghai. The Role of the Courts in the Protection of Economic, Social & Cultural Rights. – Y. Ghai, J. Cottrell (eds.). Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights. London: Interights 2004, pp. 66–70.

4 See F. Coomans (ed.). Justiciability of Economic and Social Rights: Experiences from Domestic Systems. Antwerp: Intersentia 2006; D. Bilchitz. Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights. Oxford & New York: Oxford University Press 2007; Y. Ghai, J. Cottrell (Note 3); A. Brudner. Constitutional Goods. Oxford & New York: Oxford University Press 2007, pp. 173, 278.

5 See, for example, M. Scheinin. Economic and Social Rights As Legal Rights. – A. Eide, C. Krause, A. Rosas (eds.). Economic, Social and Cultural Rights. Dordrecht, Boston, & London: Martinus Nijhoff Publishers 2001, pp. 29–54; S. Hyttinen. A Second View from Elsewhere – the EU Debate on the Justiciability of Fundamental Social Rights and the International Justiciability Discourse. – Nordisk Tidsskrift for Menneskerettigheter (Nordic Journal of Human Rights) 2006 (24) 1, pp. 1–14.

My aim is to present the experience of the Supreme Court of Estonia in dealing with social-rights-related cases, complemented with some comparative remarks about other jurisdictions that have dealt with social rights cases, mainly South Africa and Germany. In this article, I analyse how the interpretations (that is, techniques of interpretation) and the standards of review that can be found in the case law of the Supreme Court of Estonia and other constitutional courts relate to the elements of the principle of the social state that underlies the concept of fundamental social rights. In doing this, I hope to demonstrate that the nature of the principle of the social state is twofold: it is both a guiding interpretative principle and a substantive structural principle of constitutional law, including a set of intertwined systemic elements. In addition, as a reply to a recent opinion that solving social rights cases depends on the way in which a particular decision-maker views the relationship between social rights and various civil and political rights[*6], I will show that the way courts handle social-rights-related cases depends on their understanding of the social state principle as a general principle of constitutional law in the particular historical, social, and economic context in which the court finds itself.

For the sake of clarity, the article is divided into four parts. Firstly, I will describe in broad terms how the principle of the social state has been understood in the theory so far and how it appears on the constitutional level. In doing so, I will present my understanding of the elements of the social state principle. The second, third, and fourth part of this article will be devoted to analysis of the judicial dynamics in cases addressing the various elements of the principle of the social state.

1. The principle of the social state and its elements

The essence of the principle of the social state is that the state — or, more broadly, the public power as a whole — has to take care of its people. The questions that immediately follow are why, how, and to what extent. In addition a question arises as to who is responsible for its implementation.

Answers to the 'why' question can mostly be grouped into dignity-, justice-, and solidarity-based arguments, if one presumes that the justice-grounded arguments encompass equality.

1.1. Dignity

Thus, for example, Günther Dürig has emphasised that human dignity would be violated if a human being were to be forced to exist economically in living conditions that would degrade him to the level of an object.[*7] This is an argument in true Kantian spirit. I would also like to refer to the writings of Sandra Liebenberg[*8], who thinks, combining her own thoughts with the capabilities approach of Martha Nussbaum, that human dignity requires that there be at least certain basic material conditions in place, enabling people to develop and exercise their capabilities.[*9] More specifically, she adds, respect should be shown for human potential and agency by creating an environment of basic liberties and material support that enables them to flourish.[*10]

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[6] In a recent article, Rosalind Dixon describes, using the wealth of literature on the landmark social rights cases of the Constitutional Court of South Africa as a basis, several equally plausible methods of judicial interpretation of social rights claims. According to her, social rights claims are prioritised according to how a particular person/decision-maker views the relationship between social rights and various civil and political rights. Thus, depending on the convictions of the decision-maker, priority should be either given to those rights that are necessary to ensure survival or protect the right to life or to rights linked to the right to dignity (understood either as a guarantee of a certain physical or material baseline necessary for a person's life to count as fully human or as a relationship between persons that is based on respect for and recognition of human subjectivity) or given to equality-based concerns, with the idea of trying to improve first the condition of the worst off in the society. See R. Dixon. Creating Dialogue about Socio-economic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited. – International Journal of Constitutional Law 2007 (5) 3, July, pp. 391–418 (see especially pp. 399–400).

[7] See G. Dürig. Verfassung und Verwaltung im Wohlfahrtstaat. – Juristen Zeitung 1953, p. 197, quoted in H. Gerber. Die Sozialstaatsklausel des Grundgesetzes. Ein Rechtsgutachten. – Archiv des öffentlichen Rechts. Vol. 81. Tübingen: J.C.B. Mohr (Paul Siebeck) 1956, p. 19.

[8] While the concept of the necessity of having a social state clause in the constitutional text was rejected in the debates prior to the adoption of the Constitution of South Africa (see the description of the debates preceding the adoption of the South African Constitution in: E. de Wet. The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model for South Africa. Durban, Johannesburg, & Cape Town: Butterworths 1996, pp. 99–104), I think that one should not draw far-reaching conclusions from this. The debate over whether one should have a list of social rights or just a social state clause that might not be capable of producing justiciable subjective rights was, in my opinion, more about the form than concerned with the substance of the Constitution. I believe that, when one considers the promises made in the preamble to the South African Constitution, and its overall spirit, along with the catalogue of social rights and substantive equality jurisprudence, the social state principle might appear in the background as an unwritten structural constitutional principle. The appearance of this mostly Continental European constitutional principle in the South African Constitution might well be related to the growing internationalisation of constitutional law through constitutional dialogues.

[9] S. Liebenberg. The Value of Human Dignity in Interpreting Socio-economic Rights. – South African Journal on Human Rights 2005 (21) 1, pp. 1–12 (see especially the material on pp. 7–12).

[10] *Ibid*., p. 8.

Similarly, a number of eminent German constitutional lawyers*[11] emphasise that the aim of application of the social state principle is to create social and economic conditions in which individuals can exercise their fundamental rights.*[12]

In my opinion, the last two dignity-based arguments for the protection of the social state principle resemble each other significantly, differing at most in their details. Most importantly, they highlight the necessity to respect the private autonomy of the recipient of state assistance. This means that the individual's perception of a good life and life plans should not be interfered with. In addition, creating the social and economic prerequisites for enjoyment of fundamental rights advances also the public autonomy of the individual to participate meaningfully in the life of the society and therefore indirectly also the principle of democracy. The minimalist approach of Günther Dürig seems to require only fulfilment of basic economic needs and would thus not take into account other necessities (capabilities) that human beings in want might have.

The social aspect of human dignity is elucidated by Peter Häberle, according to whom the concept of human dignity includes an element of mutual respect and concern that he calls solidarity.*[13] Uwe Volkmann goes even further and argues that human dignity entails a mutual obligation to guarantee — partially individually, partially collectively — care for the well-being of others.*[14]

1.2. Justice

If the public authorities are supposed to care for individuals, they have to do it justly.*[15]

The difference principle, the Rawlsian second principle of justice, requires that "social and economic inequalities are to be arranged so that they are both: a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and b) attached to offices and positions open to all under conditions of fair equality of opportunity".*[16] He also contends that "fair, as opposed to formal[,] equality of opportunity requires that the government, in addition to maintaining the usual kinds of overhead social capital, tries to ensure equal chances of education, and culture through subsidised or public schooling, tries to ensure equality of opportunity in economic activities by policing the conduct of firms, and preventing monopolies, and generally guarantees a social minimum income".*[17] It must be noted that this conception of justice goes further than the traditional Aristotelian understanding of justice in that it allows affirmative action to remedy social injustices. On the other hand, Rawls seems to be very cautious in his approach, as government only has to try to achieve the substantive requirements he proposes. This weakens his difference principle considerably.

The argument of justice, proposed by Hans F. Zacher, is much firmer. Thus, in a social state, the principle of social justice is to be incorporated into the legal order as a fundamental value, in order to promote substantial, material equality.*[18] On the other hand, it is not clear whether implementation of this notion of justice requires assistance by the state or is satisfied with just distribution of state assistance, if it should be decided for any reason that the state has to provide it.

In this regard, the collective responsibility to correct market outcomes in terms of (social) justice, by conferring on all citizens a right to those resources that may not be secured for each person in a fair and predictable manner by the market, underlined by Raymond Plant*[19], is a much more dynamic conception of justice. Even if it is hard to determine in individual cases what kinds of resources a fair market would have provided to the persons concerned, this argument brings to the foreground that the principle of the social state functions always as a corrective mechanism to the invisible hand of the market economy.

The most down-to-earth equality-based theory is the social citizenship theory of T. H. Marshall. In his opinion, there is a kind of basic human equality associated with full membership of a community — i.e., citizenship —

[11] Thorsten Kingreen refers to Ernst Benda, Hans Buchheim, Shristoph Degenhart, Horst Dreier, Rolf Gröschner, Hans D. Jarass, Paul Kirchhof, and Karl-Peter Sommermann in T. Kingreen. Das Sozialstaatsprinzip im eurpäischen Verfassungsverbund. Mohr Siebeck 2003, p. 129.

[12] I qualify this argument as a dignity argument in its broader sense, because it has been pointed out that human dignity is regarded as the foundational value of all fundamental rights in the German constitutional system. See A. Chaskalson. Human Dignity As a Constitutional Value. – D. Kretzmer, E. Klein (eds.). The Concept of Human Dignity in Human Rights Discourse. The Hague, London, & New York: Kluwer Law International 2002, p. 135.

[13] See U. Volkmann. Solidarität – Programm und Prinzip der Verfassung. Tübingen: Mohr Siebeck 1998, p. 223.

[14] *Ibid.*, p. 226.

[15] As I have noted above, I will consider the justice- and equality-based arguments for the social state to belong to one and the same category, as any notion of equality is based on some understanding of justice.

[16] C. Kukathas, P. Pettit (Note 1), p. 43.

[17] *Ibid*., p. 275.

[18] See H. F. Zacher. Soziale Gleichheit. Zur Rechtsprechung des Bundesverfassungsgerichts zu Gleichheitssatz und Sozialstaatsprinzip. – Archiv des öffentliches Rechts 1968, No. 93, p. 341.

[19] R. Plant. Citizenship, Rights and Welfare. – A. Coote (ed.). The Welfare of Citizens: Developing New Social Rights. London: IPPR/Rivers Oram Press 1992, p. 19.

that is not inconsistent with the inequalities that distinguish the various economic levels in a society.[*20] Thus his theory is not supposed to include a transformative notion of justice. This understanding seems to be in conflict with his description of social citizenship, which is supposed to contain "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society".[*21]

It appears that some commentators from outside Continental Europe prefer to refer to the principle of the social state as social democratic constitutionalism motivated fully by support for social democracy.[*22] Despite this, Gavin W. Anderson captures the essence of the principle well, in describing it as follows:

> First, social democracy sees the state as not only having a legitimate role, but, as the historical record would appear to bear out, the best hope for achieving progressive social change. Second, social democracy does not valorise civil society for its own sake, but rather sees it as a potential source of oppression, and so contemplates checking social and economic inequalities where necessary. Third, social democracy sees reducing material inequality as a necessary precondition of political freedom, and so values those rights, such as second and third generation rights, which focus "less on governability than on citizen empowerment and social justice".[*23]

1.3. Solidarity

Solidarity, also known as fraternity, presupposes a sort of social cohesion or commonness between equal members of a group, based on some common features, beliefs, etc., that is then the main reason why members of such a group should help each other if the need arises.[*24] In fact, the proper content and role of solidarity are a subject of lively debate between liberals and communitarians; whereas the liberals emphasise the autonomy of individuals to pursue their own plans for a good life, as well as freedom of choice, the communitarians underscore the dependence on community and traditions.[*25] Volkmann concludes that perhaps a more liberal notion of solidarity should be preferred, where mutual recognition of individuals that is based on the right to equal respect, the co-operation of all members of society in building just institutions, and a resulting equal concern for each other would not exclude redistribution of goods in favour of the disadvantaged and would include an extensive neutrality with regard to diverging visions of what constitutes a good life.[*26] Alternatively, one could perhaps consider another compromise, the liberal communitarian approach.[*27]

The social state is just the means best situated to mediate and facilitate this process of social inclusion, by formalising mutual dependency and creating access to resources that enable all members of society to participate in the society's life without any distinctions.[*28] Some early conceptions of solidarity have maintained that the aim of solidarity is to create more just and equal societies.[*29] Contemporary conceptions of the principle of solidarity go further than that and stipulate that it aims to create equal opportunities for individuals and to enable them to make use of their freedom within the society.[*30]

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20 T. H. Marshall, T. Bottomore. Citizenship and Social Class. London: Pluto Classic 1992, pp. 6–7.

21 *Ibid*., p. 8.

22 See G. W. Anderson. Social Democracy and the Limits of Rights Constitutionalism. – Canadian Journal of Law and Jurisprudence 2004 (17) 1, pp. 31–58. Anderson has based his article on the works of R. Plant and N. MacCormick. See footnotes 1 and 2 in T. H. Marshall, T. Bottomore (*ibid*.), p. 31. I disagree with the association of the principle of the social state with social democracy. Even if this normative principle of governance has historically emerged out of practical considerations (see G. S. Katrougalos. Constitution, Law and Rights in the Welfare State ... and Beyond. Athens & Komotini: Ant. N. Sakkoulas Publishers 1998, pp. 28–35), in a clash between the supporters of liberal capitalism and socialism (see E. Laaman. Solidarism ja selle rakendumine meie põhiseadustes (Solidarism and Its Implementation in our Constitutions). – Õigus 1938/9, p. 410 (in Estonian), in Continental European constitutional systems the social state principle has long been an inherent element of constitutionalism, irrespective of the political preferences of the political parties in power (see, for example, the systematic thesaurus of the constitutional law database CODICES published by the Venice Commission of the Council of Europe, available at http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm).

23 T. H. Marshall, T. Bottomore (Note 20), p. 34.

24 See T. Kingreen (Note 11), pp. 244–246.

25 See U. Volkmann (Note 13), pp. 20–49.

26 See U. Volkmann (Note 13), p. 49.

27 See W. Brugger. Communitarianism As the Social and Legal Theory behind the German Constitution. – International Journal of Constitutional Law 2004 (2) 3, July, pp. 431–460. Also *mutatis mutandis* Katrin Saaremäel-Stoilov. Liberal Communitarian Interpretation of Social and Equality Rights: A Balanced Approach? – Juridica International 2006 (11), pp. 85–92; M. Galenkamp. Individualism Versus Collectivism: The Concept of Collective Rights. Rotterdam: Sanders Instituut, Erasmus Universiteit / Gouda Quint 1998, pp. 63–84.

28 T. Kingreen (Note 11), pp. 253–258.

29 Eduard Laaman refers to the essay 'Essai d´une philosophie de la Solidarité' of Leon Bourgeois, written in 1902, in his analysis of expression of solidarity in the Estonian constitutions in: E. Laaman (Note 22), p. 409.

30 T. Kingreen (Note 11), pp. 253–254.

In my opinion, there are two ways in which the preceding theories can be perceived. Firstly, it is possible to argue that a contemporary and normative conception of solidarity is capable of encompassing the justice, equality, and dignity concerns presented above. Then, essentially, the principle of the social state would be based on a broad notion of solidarity. Alternatively, one could stipulate that any kind of social state should be directed toward promotion of human dignity and social justice based on and enhancing the solidarity in a given society. In an attempt to simplify the sub-principles of the principle of the social state, we would necessarily have to take into account the implications for constitutionalism in general of omitting some of the aspects thereof. Thus, for example, if we leave human dignity (including the respect for autonomy and fundamental rights of an individual) out of our equation, we might end up in a situation where the only aim of the social state would be promotion of social justice as a common good without taking into account the individual necessities and capabilities of the persons in need. This would resemble the pre-Second-World-War understanding of solidarity, advanced by Léon Duguit, wherein the intervention of a social state would be deemed justified for achievement of greater justice and equality as a common good, for improving the society and creating greater cohesion, not for the gain of its individual members.[*31] In contemporary constitutionalism, based on rule of law[*32], such an approach would not be acceptable. In addition, it has been demonstrated that the reasons that the state should take care of its people are not mutually exclusive. Rather, by complementing each other, they create a clearer idea of the state's obligations and can be used dynamically to elucidate different aspects of the whole. This is why the option of a social state directed towards promotion of human dignity and social justice through solidarity in any given society should be preferred.

The solidarity and equality concerns answer to a great extent the 'how' question posed at the beginning of the article. The principle of the social state is highly abstract, and the goals to be achieved — the protection of human dignity and achievement of greater social justice — are demanding and dependent on the available resources and on the historical and cultural context. This is why it can only be said that the principle of the social state should be guaranteed on the basis of some redistribution of resources that would enable the state to cover the costs necessary for providing adequate social assistance, required by dignity and social justice. At the same time, the dignity of those whose economic rights are limited for the sake of protecting the dignity of the least advantaged must be guaranteed too. This is why any limitations must not go further than necessary for achieving the desired goal and must correspond to the principle of equal treatment.

The extent question is partly answered by the answer to the 'why' question, as dignity, justice, and solidarity require different degrees of protection of individuals but are, on the other hand, still very abstract and flexible terms. A number of historical[*33], cultural, political, social[*34], economic, and institutional concerns enter the forum when the extent of justified state intervention is discussed. But this should not result in a 'proceed as you like' kind of empty standard.[*35] Rather, a somewhat relaxed but still adequate standard of protection, perhaps best termed as at least 'reasonable care', should be required under the principle of the social state.

The 'who' question is mostly answered with a democratic bias in favour of the legislature[*36], but, as has been mentioned above[*37], protection of the principle of the social state is not considered to belong to the exclusive

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31 See references to the treatise Traité de droit constitutionnel I of Léon Duguit, published in Paris in 1930, in: E. Laaman (Note 22), p. 411.

32 In German constitutional law, the notion of *sozialer Rechtsstaat* (the social state based on rule of law) has been developed in order to protect the social state against its inherent collectivist tendencies by means of subjecting it to the principles of rule of law — legal certainty, liberty, and separation of powers — and the principle of the social state is therefore not regarded as an independent phenomenon. Conversely, the social state principle is supposed to mitigate the injustices that would have arisen from the non-involvement of the rule-of-law-based state in socio-economic processes (see E. de Wet (Note 8), pp. 32–33). Estonian constitutional law follows the same approach — see the wording of § 10 of the Constitution of the Republic of Estonia: "The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law" (*sozialer und demokratischer Rechtsstaat*).

33 George S. Katrougalos emphasises that, in a social state, the minimal constitutional protection is the maximum possible under the actual historical and economic circumstances. See G. S. Katrougalos (Note 22), p. 165.

34 Lon L. Fuller coined the term 'polycentric' to describe choices to which broad social considerations, extrinsic to the litigants' interactions, are relevant, when he argued that the judges are not suited for making them. See Lon L. Fuller. The Forms and Limits of Adjudication. – Harvard Law Review 1978 (92), pp. 394–404.

35 The 'Commentary' to the social state clause in § 10 of the Constitution of the Republic of Estonia is quite close to depriving the social state principle of any independent legal meaning. According to it, the Constitutional principle only requires that the state guarantee the minimum immediately necessary for survival (staying alive) to those who cannot earn their living themselves, and anything beyond that is a political question. See the commentary on § 10 by Madis Ernits. – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition). Panel of editors led by E.-J. Truuväli. Tallinn: Juura Õigusteabe AS 2002, p. 106 (in Estonian).

36 J. Waldron. A Right-Based Critique of Constitutional Rights. – Oxford Journal of Legal Studies 1993 (13), pp. 18–51; E. Forsthoff. Begriff und Wesen des sozialen Rechtsstaates, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Heft 12, Berlin: Walter de Gruyter & Co. 1954, p. 20; K.-P. Sommermann. Staatsziele und Staatszielbestimmungen. Tübingen: Mohr Siebeck 1997, p. 424; W. Osiatynski. Social and Economic Rights in a New Constitution for Poland. – A. Sajo (ed.). Western Rights? Post-Communist Application. 1996, as reprinted in V. C. Jackson, M. Tushnet. Comparative Constitutional Law. New York: Foundation Press 1999, p. 1485.

37 See Notes 4 and 5 above.

domain of the legislator anymore.*[38] In contemporary constitutional democracies, the courts have an increasing role to play, too, having to keep in mind the principle of separation and balance of powers. Besides the horizontal separation of powers, the response to the 'who' question can be influenced by the vertical one, as, in some contexts, the primary responsibility to provide social assistance may lie with the local governments*[39], the states*[40], or provinces, or it may be linked to obligations on supranational*[41] or international level.*[42]

1.4. Textual level

On the constitutional level, the permissibility of judicial implementation of the principle of the social state is expressed by insertion of catalogues of social rights and equal protection clauses into the constitutional texts that are regarded to produce subjective and justiciable rights for individuals. Textually, the social state principle can be expressed either in a separate clause*[43] or through the establishment of fundamental social rights and the prohibition of unequal treatment on the basis of social or economic status. As all of the duties referred to inevitably incur expenses, they relate directly to the redistributive function of the state, which is expressed in the constitutions through the competence of the state to levy taxes in the broader sense. The principles (values) of human dignity and justice*[44] are also closely intertwined with the principle of the social state.

As the constitutional provisions are just a basis for judicial interpretation, which is the main focus of my interest, I will not stop short here but instead will describe briefly what kind of influence the principle of the social state could exert on judicial application of its elements.

1.5. Influence of the nature of the social state principle on jurisprudence concerning some of its elements

As has been demonstrated above, the principle of the social state is a complex phenomenon. Any increase in the level of protection of one social right could mean that the economic rights of the taxpayers or the economic freedom of entrepreneurs would have to be limited more intensely, or that the protection of other economic, social, or cultural rights might be weakened thereby. Judges try to strike a reasonable balance between the interests of the community and its vulnerable individuals, as well as between the priority of claims to protection of different vulnerable groups. In addition, they must tackle complicated questions of how to determine desert and social necessity whereby they may end up at the boundaries of their competence or risk extensive public criticism. Therefore, figuratively speaking, elements of the principle of the social state are like a double-edged sword that might cut in unwanted directions and even hurt the sword-bearer at the same time. In order to protect themselves, the courts have equipped themselves with significant armour. This armour includes a set of judicial techniques.

Courts elaborate on the admissibility criteria rather carefully, as they are mindful of their limited role in the protection of the elements of the social state principle. The factors listed above as influencing the manner of implementation of the principle create significant tension and bring about a significant degree of deferentialism in the jurisprudence of constitutional courts concerning elements of the social state. In judgments, it can be expressed as judicial self-restraint or leaving of a wide margin of appreciation to the legislator. In addition, the resource restraint may be specifically mentioned in the reasoning of judicial decisions.*[45] Due to the complexity and indeterminacy surrounding the extent question, constitutional courts tend to apply a relaxed review standard in deciding cases involving some elements of the social state principle, which, depending on the legal tradition, could be called a reasonableness test, rational and relevant reason test, intermediate scrutiny, or relaxed proportionality test. In addition, the scope of protection of various elements of the principle of

[38] Cécile Fabre argues that the democratic majority does not have the right to have its preferences implemented in those cases where application of its preferences would harm individuals' interest in adequate minimum income, housing, education, and health care. See C. Fabre. Social Rights under the Constitution: Government and the Decent Life. Oxford: Clarendon Press 2000, p. 110.

[39] In Estonia, § 28 of the Constitution emphasises the importance of local governments in the sphere of social assistance.

[40] In the US, there are a number of states whose constitutions include obligations of state assistance, whereas the Federal Constitution seems to be more or less silent on that particular issue.

[41] See K. Lenaerts, T. Heremans. Contours of a European Social Union in the Case-Law of the European Court of Justice. – European Constitutional Law Review 2006 (2), pp. 101–115; K. Saaremäel-Stoilov. Polish Plumbers, the EU Constitutional Treaty, and the Principle of the Welfare State. – Juridica International 2005 (10), pp. 126–134.

[42] See T. Marauhn (Note 1); K. Saaremäel-Stoilov (Note 27), pp. 85–92.

[43] Some constitutions, like the 1992 Constitution of the Republic of Estonia or the Basic Law of the German Federation, include an explicit social state clause.

[44] The Finnish Constitution of year 2000 makes reference to promotion of justice in the society. See § 1 of the Finnish Constitution. Available at http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf (03.11.2007).

[45] See Soobramoney v. Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC).

the social state is frequently interpreted in a manner that uses the highest values of the legal order — justice, equality, and dignity[*46] — to legitimise the judicial intervention and its result beyond any reasonable doubt. Solidarity, as a more dubious argument, appears in the argumentation of the courts less frequently.

I will continue with analysis of the constitutional jurisprudence of the Supreme Court of Estonia, also making some comparative remarks about the jurisprudence of the Federal Constitutional Court of Germany and the Constitutional Court of South Africa in similar cases. In doing that, I try to identify how these courts have tackled the difficulties surrounding the principle of the social state and its elements.

2. Does the social state principle equate to the principle of human dignity?

In January 2004, the Constitutional Review Chamber of the Supreme Court of Estonia was faced with a case involving the right to housing subsistence benefits, the first constitutional review case before it involving arguments of protection of the right to social assistance by the state and the principle of the social state.[*47] A university student had been denied subsistence benefits by local authorities because he was residing in a student dormitory and the Social Welfare Act had not foreseen a possibility of paying subsistence benefits to persons living in dormitories. Any other kind of accommodation, including a leased or owned apartment, corresponding to the requirements prescribed by the Social Welfare Act would have been acceptable. At about the same time as the court received a referral from the first-instance administrative court to review the constitutionality of the pertinent norm of the Social Welfare Act, the Legal Chancellor submitted a similar application to the court. These two cases were joined. The Supreme Court began its analysis with explanation of what the social state principle entails. Accordingly, "the concept of the social state principle and protection of social rights contains an idea of state assistance and care to all those who are not capable of coping independently and sufficiently. Human dignity of those persons would be degraded if they were deprived of the assistance they need for satisfaction of their primary needs."[*48]

As the chamber refers simultaneously to both the principle of the social state and the principle of human dignity, and explains the meaning of those principles jointly, one could erroneously conclude that the social state principle lacks any independent meaning and coincides fully in meaning with the principle of human dignity.

I am convinced that this is not the case. Instead, the court has tried to identify the necessary level of state assistance by using dignity, one of the core elements of the principle of the social state, as a yardstick. The question that remains, however, is whether the level of protection described in this judgment is to be the general standard, applicable in all subsequent social rights cases, or whether the court has focused fully on the influence of the social state principle on subsistence benefits, which constitute — by definition — at least the minimum necessary for survival.[*49]

Taking into account the principle of continuity of the constitutions of the Republic of Estonia[*50], the reference to human dignity is not very surprising.[*51] The 1920 and 1937 constitutions of the Republic of Estonia, and

[46] These are the arguments that the principle of the social state is based on; therefore, it is hard to agree with the claim of Rosalind Dixon that the way social rights claims are prioritised depends on how a particular person/decision-maker views the relationship between social rights and various civil and political rights.

[47] A couple of months before that, the Administrative Law Chamber of the Supreme Court considered it necessary to initiate constitutional review proceedings in a genuine right to health care case, but it succumbed to procedural deficiencies of the Estonian constitutional review procedure. See the judgment of the Administrative Law Chamber of the Supreme Court of Estonia of 10 November 2003 in case No. 3-3-1-65-03, available in Estonian at http://www.riigikohus.ee/?id=11&tekst=RK/3-3-1-65-03, as well as the subsequent judgment of the Constitutional Review Chamber of the Supreme Court of Estonia in the same case contending that the contested norm was not pertinent, and thus that its constitutionality could not be reviewed (i.e., the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 31 May 2004 in case No. 3-4-1-7-04, paras 17–23).

[48] Judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 21 January 2004 in case No. 3-4-1-7-03.

[49] It must be kept in mind that this was a mixture of abstract and concrete norm control, as the court decided to review the applications of the Legal Chancellor and the first-instance administrative court jointly.

[50] For example, Hesi Siimets-Gross considers the constitutions of 1920 and 1937 to have been the direct predecessors of the current 1992 Constitution of the Republic of Estonia. See H. Siimets-Gross. Social and Economic Fundamental Rights in Estonian Constitutions between World Wars I and II: A Vanguard or Rearguard of Europe? – Juridica International 2005 (10), pp. 135–143.

[51] It must be noted, however, that the current (1992) Constitution limits itself to mentioning the principle of the social state as one of its basic principles in § 10 and does not expressly state what the principle would mean. The Proceedings of the Constitutional Assembly do not contain any discussion of the principle of the social state either. Head of the Redaction Committee of the Constitutional Assembly Liia Hänni has just noted as a reply to the questions of why the Constitution's text contained too little social rights that it is questionable to what extent a constitution could in fact guarantee such rights and that it is hoped that the Government of the Republic of Estonia and the parliament would conduct such social policies as would guarantee these rights even if they would not be fixed specifically in the Constitution. See Põhiseadus ja Põhiseaduse Assamblee. Koguteos (Constitution and Constitutional Assembly. Digest). Tallinn: Juura Õigusteabe AS 1997, p. 943 (in Estonian).

even the 1919 Interim Constitution, have all included a social justice clause, aimed at ensuring a dignified life for the peoples of Estonia.*[52] What seems to have gone missing from the interpretation of the Supreme Court as compared to the texts of the two previous constitutions is the justice element.*[53] This kind of dignity-based approach is not very typical for Eastern European countries, save for in the practice of the Hungarian Constitutional Court*[54], but it makes sense if one takes a look at the social state jurisprudence of the German Federal Constitutional Court, from which both the Hungarian Constitutional Court and the Supreme Court of Estonia have drawn inspiration. After initial rejection of it*[55], the German Federal Constitutional Court accepted that a right to minimum social subsistence can be derived from respect for human dignity.*[56] It must be noted, however, that the German Federal Constitutional Court does not rely solely on human dignity in its social state jurisprudence and that it bases its decisions extensively on the notion of social justice.*[57] Thus, the Supreme Court of Estonia seems to have followed only a suitable and minimalist part of the jurisprudence of the Federal Constitutional Court. Why?

It seems that the experience of having been part of a totalitarian Soviet regime, where social security was provided as a trade-off for deprivation of liberty and property, has pushed the pendulum towards the other extreme in Estonia. Thus, liberty and property are considered to be more important than social solidarity. Moreover, it is feared that anything having something to do with social justice or the social state could, in fact, lead back to socialism.*[58] This attitudinal change is visible even in the Preamble of the 1992 Constitution, where the values of justice, law, and liberty have been rearranged to liberty, justice, and law.*[59] It must also be taken into account that, during the drafting process of the first social justice provisions, the prevailing ethos among the drafters was that, first of all, it is the duty of the individual and his family to take care of him and that the state would intervene only if they fail to do so.*[60] The spirit of the Constitution of Estonia today is very similar.*[61] These considerations may explain the very cautious interpretation of the principle of the social state by the Supreme Court of Estonia.*[62]

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[52] Section 7 of the Temporary Regime of Government of the Republic of Estonia (Eesti Vabariigi ajutise valitsemise kord; RT 1919, 44, 345 (in Estonian)), also known as the Interim Constitution, stated that a dignified standard of living must be secured through laws on granting land for cultivation, securing housing and employment, and protecting mothers and the labour force, as well as on providing the necessary support in situations of youth, old age, incapability to work, or occupational accidents (see E. Laaman (Note 22), pp. 417–419).

Section 25 of the 1920 Constitution of the Republic of Estonia took over the wording of the Interim Constitution and added the requirement of organisation of economic life based on principles of justice from the Weimar Constitution (see E. Laaman (Note 22), p. 419). It stipulated: "The organisation of economic life in Estonia must correspond to the principles of justice, aiming to secure a dignified standard of living through laws on granting of land for cultivation; securing of housing and employment; protection of mothers and the labour force; and provision of the necessary support for youth, those of old age, those with incapability to work, and those having suffered occupational accidents". – RT 1920, 113/114, 243 (in Estonian).

Section 24 of the 1937 Constitution of the Republic of Estonia was worded as follows: "The organisation of economic life must be based on the principle of justice, the aim being the development of creative forces, the promotion of general prosperity, and the attainment through this latter of a standard of living compatible with human dignity". – RT 1937, 71, 590 (in Estonian). For English translation see The Constitution of the Republic of Estonia with the Decision of the Estonian People for Convening the National Constituent Assembly and the Law for the Transition Period, Preceded by Introductory Articles by J. Uluots and J. Klesment. Tallinn 1937, pp. 16–17.

[53] See Note 52 above. It should not be concluded from the fact that the provision on organisation of economic life on the basis of the principle of justice is borrowed from the German Weimar Constitution that justice is just an imported value in the Estonian constitutional tradition. To the contrary, all the preambles of the constitutions of the Republic of Estonia have emphasised justice, law, and liberty as the primary values on which the state is based. See the 'Preamble' sections of the 1920, 1937, and 1992 constitutions. For some reason, however, the Supreme Court of Estonia does not tend to use the justice argument very frequently. See M. Linntam. Õigluse idee kui argument Eesti Vabariigi Riigikohtus ja Euroopa Kohtus (The Idea of Justice as an Argument in the Jurisprudence of the Supreme Court of Estonia and the European Court of Justice). – Juridica 2002/1, pp. 49–57 (in Estonian).

[54] A. Sajo. Implementing Welfare in Eastern Europe after Communism. – Y. Ghai, J. Cottrell (Note 3), p. 56.

[55] BVerfGE 1, 104.

[56] BVerfGE 40, 133; 103, 197.

[57] BVerfGE 5, 198; 22, 180 at 204; 27, 253 at 283; 35, 202 at 235.

[58] T. Annus, A. Nõmper. The Right to Health Protection in the Estonian Constitution. – Juridica International 2002 (7), pp. 117–126 (see especially p. 118); W. Drechsler, T. Annus. Die Verfassungsentwiklung in Estland von 1992 bis 2001. Jahrbuch des öffentlichen Rechts der Gegenwart, Neue Folge 2002 (50). Tübingen: Mohr Siebeck, pp. 473–492. Material reprinted in T. Annus. Governance and Law in Transition States. Tartu University Press 2004, p. 105.

[59] As has been noted above, the two previous constitutions stated that the state is based on justice, law, and liberty.

[60] See E. Laaman (Note 22), p. 416; E. Laaman. Kodaniku põhiõigused ja kohused (Fundamental Rights and Duties of a Citizen). – Põhiseadus ja Rahvuskogu (Constitution and Constitutional Assembly). Tallinn 1937, p. 355 (in Estonian).

[61] It contains, similarly to the earlier constitutions, in its § 27 (5) a clause stating that it is the obligation of the family to take care of those of its members who need assistance.

[62] It must be noted that the approach of the Supreme Court also coincides with the minimalist interpretation offered in the 'Commentary' material on § 10 of the Constitution as referred to in Note 35 above.

3. Is only the core of fundamental social rights justiciable?

Another question that arises when one reads the decision of the Supreme Court of Estonia in the Social Welfare Act case is whether only the core of the fundamental social rights can be considered justiciable. In this decision, the Supreme Court explains that, in order to delimit different branches of public power and to preserve the balance between them, the court may intervene in social rights cases only if this is necessary for the prevention of violation of human dignity — it is not for the court to replace the legislator or the executive and to make or second-guess choices of social and budgetary policy. Accordingly, the court may deal with subsistence benefits cases only when the assistance provided by the state remains below the required minimum level. With this stance the court is consciously avoiding any activism.

The position of the court might be regarded as problematic, as it has been argued that the catalogue of fundamental rights enshrined in the Constitution of the Republic of Estonia is a very well balanced and minimalist one.[*63] The drafters have fleshed out the core of certain social rights that could potentially be fully justiciable. If the Supreme Court were to decide to render only the core of such social rights provisions justiciable, only 'the core of the core' of social rights would be enforceable, and the resulting level of protection of these rights could be remarkably low. Whereas the priority of judicial protection of the core of social rights has been emphasised by several scholars[*64], they have not gone so far as to suggest that only the core of those rights should be judicially enforceable.[*65] Perhaps it is because these scholars have based their argumentation on the South African experience, wherein the Constitutional Court explained in the Grootboom[*66] and TAC[*67] cases that the government has to take into account both the immediate necessity and the aspirational aspects[*68] of social rights. Taavi Annus and Ants Nõmper have argued that, in the Estonian constitutional context, different layers of social rights require the use of differing judicial techniques, and that the courts should be most careful in dealing with resource-dependent aspects of social rights.[*69] Even if one might imagine that the position of the court, as voiced in the Social Welfare Act case, is just a starting point, concerning exclusively the fulfilment aspect[*70] of this particular social right and not applicable in any further cases concerning the respect and protection aspects of social rights before it, it still fails to address several practical issues.

Firstly, it cannot be clear for applicants — until sufficient case law has emerged — what kind of interference with fundamental social rights constitutes at the same time a violation of the principle of human dignity and a situation in which they would be entitled to recourse to the courts for the protection of their fundamental social rights.

Secondly, it remains unclear in this case how to guarantee satisfaction of the requirement of the UN Covenant on Economic, Social and Cultural Rights that the level of protection of social rights be gradually raised, taking into account the economic possibilities of the state concerned.[*71] When the justiciability of fundamental social rights is restricted in a manner described above, there is no domestic mechanism to compel the legislator and the executive to take steps in that direction if they fail to act on their own initiative. The same problem arises with regard to guaranteeing compliance with the ban on regressive measures that is established in the Covenant.

It can be argued that, within the system of balance of powers emanating from the court's reasoning, the powers of the state are separated but the balance has been struck between them in a manner that clearly favours the legislator and the executive.

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63 R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in the Estonian Constitution). – Special Issue of Juridica 2001, p. 76 (in Estonian).

64 T. Roux. Understanding Grootboom — a Response to Cass R. Sunstein. – Constitutional Forum 2002 (12) 2, pp. 112–122, especially p. 46; D. Bilchitz (Note 4), p. 208.

65 See D. Bilchitz (Note 4).

66 Government of South Africa v. Grootboom, 2001 (1) SA 46 (CC).

67 Minister of Health v. Treatment Action Campaign, 2002 (5) SA 721 (CC).

68 By 'aspirational aspect' I refer particularly to the standard-setting Grootboom case, where the court stated that the government must set forth reasonable, balanced, and flexible programmes addressing social problems in short-, medium-, and long-term perspective.

69 T. Annus, A. Nõmper (Note 58), pp. 121–125.

70 See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. – Human Rights Quarterly 1998 (20), pp. 691–705. Consider here also the duty to avoid deprivation, the duty to protect from deprivation, and the duty to aid the deprived, proposed by Henry Shue; see H. Shue. Basic Rights. Princeton: Princeton University Press 1980, p. 52.

71 It must be taken into account that the 1992 Constitution of the Republic of Estonia is particularly open to international law. For details, see H. Vallikivi. Välislepingud Eesti õigussüsteemis: 1992. aasta põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus (Treaties in the Estonian Legal System: The Domestic Validity and Applicability of Treaties Concluded under the Constitution of 1992). Tallinn: Õiguskirjastuse OÜ 2001 (in Estonian).

The Supreme Court has so far not rendered any other judgments on the merits in genuine social rights cases, although it had a theoretical possibility of doing so in the case of Johannes Toom[*72] and in the rent restrictions case[*73] initiated by the President of the Republic.

4. Equal access to social rights as a solution to the ambiguity related to social rights

The test that the Supreme Court would apply in cases concerning possible restriction of social rights remains unclear, because all of the cases concerning social rights, including the groundbreaking Social Welfare Act case, have so far been adjudicated on the basis of the 'equality in lawmaking' principle[*74], derived from § 12 of the Constitution. Moreover, the Supreme Court has considered it essential to point out that fundamental social rights and the general right to equality are more closely connected to each other than other fundamental rights are to the right to equality.[*75]

The principle of equality in lawmaking[*76] requires, pursuant to the Supreme Court's jurisprudence[*77], that laws treat all persons who are in a similar situation similarly. Departure from this principle is permissible if there is a reasonable and appropriate justification for this.[*78]

Bearing in mind that the Supreme Court applies the full proportionality test[*79] when considering freedom rights in combination with equality rights, it can be argued that in the cases concerning social rights the Supreme Court intentionally leaves the legislator a much wider margin of appreciation than that provided in freedom rights cases.[*80]

Yet it seems that, when solving concrete cases, the Supreme Court has encountered situations where applying a stricter test[*81] would have been necessary for achievement of the desired result. For example, in the Parental Benefit Act case[*82] the Supreme Court pointed out that the application of the contested norm of the Parental

[72] See the judgment of the Administrative Chamber of the Supreme Court of Estonia of 10 November 2003 in case No. 3-3-1-65-03, as well as the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 31 May 2004 in case No. 3-4-1-7-04.

[73] See the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 2 December 2004 in case No. 3-4-1-20-04.

[74] See the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia in the early-retirement pension case (that is, the judgment of 21 June 2005 in case No. 3-4-1-9-05, RT III 2005, 24, 250, paras 14 and 19), in the Social Welfare Act case (i.e., the judgment of 21 January 2004 in case No. 3-4-1-7-03, RT III 2004, 5, 45, para. 17), and in a key case of dismissal on the grounds of age that constituted a double discrimination case (namely, the judgment of 1 October 2007 in case No. 3-4-1-14-07, RT III 2007, 34, 274, para. 13).

[75] Similarly, the Constitutional Court of South Africa pointed out in the Khosa case that the requirement of equal access to social rights can be derived from the social rights as such (see Khosa v. Minister of Social Development, 2004 (6) SA 505 (CC), para. 44). In Estonia, the aim of connecting the two intertwined elements of the principle of the social state – social rights and the right to equality – might have been to prepare the grounds for a more relaxed review standard for social rights similar to the standard for equality in lawmaking review. In South Africa, the aim might have been to adjust the standard of review for equal access to social rights cases to incorporate the reasonableness review employed in social rights cases.

[76] In German constitutional law, there is also a concept of equality of lawmaking (*Rechtssetzungsgleichheit*), binding the legislator to the right to equality. See P. Martini. Art. 3, Abs. 1. GG als Prinzip absoluter Rechtsgleichheit. Cologne, Berlin, Bonn, & Munich: Carl Heymanns Verlag 1997, pp. 5–6. In concrete cases, however, the stringency of the standard of review depends on the intensity of the interference with the right to equality and on whether and to what extent a person can influence the factors on which the differential treatment was based. In cases involving right-to-equality claims in the sphere of application of the principle of the social state, the German Federal Constitutional Court employs the most lenient ban-of-arbitrariness test, which may be strengthened if a freedom right has been infringed at the same time. See H.-M. Kallina. Willkürverbot und Neue Formel. Der Wandel der Rechtsprechung des Bundesverfassungsgerichts zu Art. 3 I GG. Tübingen: Köhler-Druck 2001, pp. 26–29. In a case concerning old-age pension insurance, the GFCC explained that even if the primary responsibility for making social policy decisions lies with the legislator, it is bound by the Constitution's social equality requirements. Thus the expediency arguments should be overridden by social justice arguments. See BVerfGE 36, 237.

[77] See the judgments of the Supreme Court of Estonia in the following cases: No. 3-4-1-2-02, para. 17 (RT III 2002, 11, 108); No. 3-1-3-10-02, para. 36 (RT III, 2003, 10. 95); No. 3-4-1-33-05, para. 26 (RT III 2006, 10, 89).

[78] The 'reasonable and appropriate justification' test of the Supreme Court of Estonia resembles the reasonableness test of the South African Constitutional Court, applied in the Khosa case, in that the differentiation must not be arbitrary, and the court leaves the legislator considerable leeway in choosing means for achievement of the constitutionally required goals. However, the reasonableness and appropriateness test of the Supreme Court of Estonia does not require assessment of the impact of the limitation.

[79] See, for example, the judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 1 September 2005 in case No. 3-4-1-13-05, para. 32 (RT III 2005, 26, 262). Available at http://www.riigikohus.ee/.

[80] The court explicitly expressed such a necessity in the Social Welfare Act case.

[81] Conversely, it has been pointed out that "substantive equality manifests as judicial deference when it protects the state from having to explain its decision to exclude a particular group from a particular benefit." See S. Fredman. Providing Equality: Substantive Equality and the Positive Duty to Provide. – South African Journal on Human Rights 2005 (21) 2, pp. 163–190 (especially the material on p. 175).

[82] Judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 20 March 2005 in case No. 3-4-1-33-05. Available at http://www.riigikohus.ee/, also published as RT III 2006, 10, 89.

Benefit Act had led to an unjust result[*83]: a mother remaining at home with a child and receiving her salary for past work periods with a significant delay that was caused through the fault of her employer would be deprived of parental benefits. That is why the court found that the argument of complexity of administration invoked by the state did not outweigh the infringement of the general right to equality, where weighing refers to the principle of proportionality. The need to weigh the different interests at stake was also mentioned by the court in the early-retirement pension case. Thus, it remains to be seen whether the Supreme Court will consider it possible to apply a more stringent test in future social and equality rights cases.

Unlike many other constitutions, the 1992 Constitution of the Republic of Estonia contains a specific ban of discrimination based on a person's economic or social status.[*84] Still, the Supreme Court of Estonia has so far refrained from applying this ban and refers in solving cases that would qualify as economic or social status discrimination cases instead to the general right to equality in combination with some social rights. Perhaps the court has followed this approach in an attempt to avoid the application of a strict proportionality test[*85] in such cases.

Another aspect that deserves attention is whether and how the court has based its decisions on particular social and economic context arguments. So far, the court has abstained from any explicit analysis of social and economic data, with the exception of the early-retirement pension case. In that case, the court performed a rather thorough analysis of social and economic data when assessing the social and budgetary impact of the legislative change required for equal treatment of different groups of pensioners.[*86] This does not mean, however, that the court would normally not take into account the social and economic effects of its decisions, or its inability to predict these. Similarly to the historical and cultural background issues, these kinds of considerations can sometimes be read between the lines.

5. Conclusions

The Supreme Court of Estonia has dealt with social-state-related cases extremely carefully, mindful of all the dangers that could emanate from such claims, and it has used most of the judicial tools at its disposal to protect itself from the double-edged sword. This has led to a moderate level of judicial protection of social rights and leaves most of the questions for the legislator to solve. The level of protection of the principle of the social state by the Supreme Court of Estonia is comparable to that offered by the German and South African constitutional courts, as both use a relaxed standard of review in social-rights-related cases. Compared to the practice in jurisdictions that have not declared social rights justiciable, however, the constitutional jurisprudence of the Supreme Court of Estonia is progressive.

Although the judicial restraint exercised by the Supreme Court of Estonia in social-rights-related cases can be ascribed in part to a particular historical and social context, it is guided by the nature of the social state principle, as an interpretative principle. A particular feature of the Estonian social state jurisprudence is that it hardly ever mentions solidarity. Equally the (social) justice element can also be found relatively rarely in the cases of the Supreme Court of Estonia that address the principle of the social state.

As there is an ambiguity in the jurisprudence of the Supreme Court of Estonia as to what extent the social state principle and fundamental social rights are independently justiciable, the case law on the elements of the social state has so far been concentrated around the principle of equal treatment. The general right to equality and the principle of equality in lawmaking, arising from the former, do not enable the resolution of all types of social rights disputes. Thus, for example, if the state fails to establish a system for the protection of certain types of social rights, the question of observance of the principle of equal treatment cannot be invoked, as in such a case all persons concerned are equally unprotected. That is why the Supreme Court will have to decide in the future whether (and, if at all, how strictly) to apply the proportionality test to social rights cases, or whether to proceed from the more lenient 'reasonable and appropriate justification' test instead.

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[83] Besides being an excellent example of how the Supreme Court of Estonia has based its decision on the value of justice as an element of the principle of the social state, this decision is also one of the first ones where the court has in fact ruled a legislative provision unconstitutional because of its disparate / indirectly discriminating effect on the applicant.

[84] See the second sentence of the first paragraph of § 12 of the Constitution of the Republic of Estonia.

[85] Whereas Robert Alexy and Katri Lõhmus consider it necessary to solve all discrimination cases on the basis of strict proportionality analysis. See R. Alexy (Note 63), p. 78; K. Lõhmus. Võrdsusõiguse kontroll Riigikohtus ja Euroopa Inimõiguste Kohtus. – Juridica 2003/2, pp. 107–119, especially p. 108 (in Estonian). Taavi Annus contends that socio-economic discrimination is less burdensome, and that therefore the court should apply a rational reason test. See T. Annus. Riigiõigus (Constitutional Law). Tallinn: Juura 2001, p. 299 (in Estonian).

[86] The reason the court was willing to engage in this kind of analysis in that case was, perhaps, that the court had to analyse the effect of a piece of legislation in the past, and by the time of the proceedings, the parliament had already changed the unconstitutional provisions to bring it into conformity with the Constitution. By that time, the data regarding the social and budgetary impact of the legislative changes had been made readily available in the explanatory note to the Amendment Act.