Constitutional judgment 3-4-1-1-14

EN BANC

JUDGMENT
in the name of the Republic of Estonia

Case number	3-4-1-1-14
Date of judgment	26 June 2014
Formation	Chairman: Priit Pikamäe; members: Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Saale Laos, Jaak Luik, Ivo Pilving, Jüri Põld, Harri Salmann and Tambet Tampuu
Case	To declare unconstitutional and repeal subsection 2 of § 132^7 of the Courts Act and reverse the repeal of § 82 of the Courts Act based on clause 2 of § 3 of the Temporary Organisation of Payment of Salaries Bound to National Average Wage Act, Salaries of Higher State Servants Act and Courts Act Amendment Act to the extent that these do not allow, as of 1 July 2013, for recalculating the former old-age pensions of judges based on the salary of members of the Supreme Court, circuit court judges, county court judges and administrative court judge
Basis for proceedings	Judgment of the Tallinn Administrative Court of 13 January 2014 in administrative case no. 3-13-1451
Hearing	Written

OPERATIVE PART

To declare unconstitutional and repeal subsection 2 of § 132^7 of the Courts Act and reverse the repeal of § 82 of the Courts Act based on clause 2 of § 3 of the Temporary Organisation of Payment of Salaries Bound to National Average Wage Act to the extent that these did not allow for recalculating the old-age pensions of judges based on the salaries of judges as of 1 July 2013.

FACTS AND COURSE OF PROCEDURE

1. On 12 December 2012, the Riigikogu passed the Temporary Organisation of Payment of Salaries Bound to National Average Wage Act, Salaries of Higher State Servants Act and Courts Act Amendment Act (hereinafter the Amendment Act) whose clause 2 of § 3 repealed, among other things, § 82 of the Courts Act (CA), which stipulated that the judge's pension will be recalculated once the salary of the position based on which the judge's pension has been calculated and this will be done as of the time of amendment of the judge's salary. Clause 5 of § 3 of the Amendment Act added, among other things, subsection 2 of § 132^7 to the Courts Act, which stipulates that the judge's pension is indexed annually by April 1 with the highest salary rate index specified in subsection 2 of § 2 of the Salaries of Higher State Servants Act (SHSSA). These provisions entered into force on 1 July 2013.

2. Igor Amann, Ingrid Hallas, Tiiu Jervan, Jaan Kartau, Peeter Küttis, Reet Laasmaa, Eeva Levina, Poigo Nuuma, Jüri Paap, Uno Pender, Heino-Vello Pihlak, Ester Reimand, Hele-Kai Remmel, Mai Saunanen, Nelja Zaitseva, Helle Tamm, Sirje Tromp and Marion Vakker (applicants) addressed the Social Insurance Board (SIB) with a request for recalculating the judge's old-age pension as of 1 July 2013. The Social Insurance Board dismissed all the requests by its decisions.

3. The applicants filed applications with the Tallinn Administrative Court, requesting that the SIB's decisions be annulled and the SIB be ordered to reconsider the requests and calculate the judge's old-age pension granted to the applicants as of 1 July 2013, because the decisions are based on provisions that are in conflict with the Constitution. The SIB argued against the application.

JUDGMENT OF TALLINN ADMINISTRATIVE COURT

4. The Tallinn Administrative Court granted the applications, declared subsection 2 of § 132^7 of the CA unconstitutional and refused to apply it and declared the repeal of § 82 of the CA based on clause 2 of § 3 of the Amendment Act unconstitutional and refused to apply it to the extent that these provisions did not, as of 1 July 2013, allow for recalculating the former old-age pensions of judges based on the salaries of members of the Supreme Court, circuit court judges, county court judges and administrative court judges, which entered into force on 1 July 2013.

5. The administrative court identified that there is no dispute over the fact that the administrative decisions are in conformity with the law in force. Subsections 4, 8, 14 and 16 of § 3 of the SHSSA, which set out the salary coefficients of judges, entered into force on 1 July 2013, increasing the salaries of judges. Under § 82 of the CA in force before 1 July 2013, the judge's pension was recalculated based on a change of the salary of the position. As of 1 July 2013, the judge's pension is, based on §§ 132^6–132^7 of the CA, granted on the basis of the salary of their last position and it is indexed annually on April 1. The question is whether such a solution is constitutional.

6. If only subsection 2 of § 132^7 of the CA were to be deemed relevant and the court refused to apply it, it would not suffice for granting the applications. Thus, clause 2 of § 3 of the Amendment Act, which repealed § 82 of the CA, is also a relevant provision in this regard.

7. It is an interference with the principle of equal treatment and the principle of legitimate expectations may also be interference with. The right to independent administration of justice (§ 146 of the Constitution) or legal clarity (§ 10 of the Constitution) is not interfered with in the present case. The justifiability of the interference with the fundamental right must nevertheless be assessed based on § 146 of the Constitution.

8. Retired judges whom the pension was granted not later than on 30 June 2013 and whom the pension was granted or will be granted as of 1 July 2013 are being treated differently. Both reference groups are granted the pension in such a manner that it amounts to 75% of the salary corresponding to the last position of the retiring judge. The pensions of previously retired judges are indexed annually as of 2014 and the pension will no longer change once the salary changes. The pension of judges who retired or will retire later is granted on the basis of the judge's salary rate that entered into force on 1 July 2013. The pension of those judges is indexed as well, but the pension is granted on the basis of a considerably higher salary.

9. It is not appropriate to compare retired judges with members of the Riigikogu. To examine the justifiability of different treatment the minimum common denominator must be identified on each occasion. For the purposes of this case, representatives of the Legislature and the Judiciary are not in an analogous situation. A comparison with the judges who retired between 1 January 2009 and 30 June 2013, i.e. at the time when the salaries were frozen, is also not necessary, because freezing the salaries is not a matter of dispute in the present case.

10. According to the explanatory memorandum on the transition to indexation, the judge's pension expenses were to fall by approx. 12% in 2013. Saving public funds is a legitimate purpose of an interference with the fundamental right of equality. The purpose specified in the explanatory memorandum of the Amendment Act, i.e. to harmonise pension systems, has not truly been attained, because pensions are indexed differently under the State Pension Insurance Act (SPIA) and under the SHSSA. Therefore, the harmonisation of the pension systems cannot be considered a legitimate purpose.

11. Different treatment for the purpose of saving money is appropriate and necessary for attainment of the legitimate purpose. As for reasonableness, it must be taken into account that the issue is a social one whereby the Legislature usually has a broad margin of discretion. The margin of discretion is broader in the case of a benefit or incentive granted to persons owing to the good will of the state and in pursuit of policy goals. The margin of discretion is narrower if advantaged groups are determined or exceptions are made within a social service that has already been regulated. There is no dispute over the fact that the pension paid ensures judges' ability to get by and that there is no interference with the fundamental right provided by subsection 2 of § 28 of the Constitution. Paragraph 6.4 of the European Charter on the Statute of Judges states that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge. The judge's pension as a guarantee of the independence of a judge is protected by §§ 15, 146 and subsection 4 of § 147 of the Constitution. In modern democratic rules of law, the risk of the interference with the independence of a judge is considered sufficient to consider the foreseeable, stable and higher-than-average income of judges at the time of service as well as after retirement to be inevitable.

12. There is no dispute over the fact that the applicants have started exercising their right to the judge's pension and therefore they have a reasoned expectation that the law will not be amended in a way that is highly disadvantageous towards them. The applicants can no longer change their work-related choices or further contribute to their pension scheme via the second or third pillar of the pension system.

13. The principle that the size of the pension of a retired judge is 75% of their last salary and that the judge's pension will be recalculated once the latter changes, was established in subsection 1 of § 33 of the Act on the Status of Judges of the Republic of Estonia by a decision of the Supreme Council of 23 October 1991. Thus, these provisions have been in force for a very long time and there must be weight reasons for a sudden highly disadvantageous amendment of these provisions. The payment of pensions based on the very same principle will also continue in the future: the salary rate currently in force will be indexed in the future in the same way as that of the judges who have retired and will retire after 1 July 2013. Thus, the Legislature has, as a one-off step, decided to change the principle with regard to previously retired judges and thus save public funds. In 2013, the funds saved amount to less than 1% of the labour and administrative expenses of the courts of the first and second instance.

14. The purpose of saving public funds is not in compliance with the constitutional principles and the interference with the principles as a result of the amendment outweighs the benefit obtained from the amendment. Legitimate expectations as well as the principle of independence of the court system are currently disproportionately interfered with, even though the state has a broad margin of discretion in social issues and in substantiating the principle of equality.

OPINIONS OF PARTIES

The Riigikogu

15.-22. [Not translated.]

Applicants

23.-34. [Not translated.]

Social Insurance Board

35.-38. [Not translated.]

Chancellor of Justice

39.-63. [Not translated.]

Minister of Justice

64.-72. [Not translated.]

PROVISIONS DECLARED UNCONSTITUTIONAL

73. Subsection 2 of § 132^7 'Granting and payment of judge's pension' of the Courts Act (RT I 2002, 64, 390; 06.02.2014, 14):
'The judge's pension, except for pension calculated on the basis of the salary of the current year, is indexed by April 1 of each year with the highest salary rate index specified in subsection 2 of § 2 of the Salaries of Higher State Servants Act.'

74. Clause 2 of § 3 'Amendment of Courts Act' of the Temporary Organisation of Payment of Salaries Bound to National Average Wage Act, Salaries of Higher State Servants Act and Courts Act Amendment Act:
'The Courts Act is amended as follows: [---] 2) sections 77–82 are repealed; [---].'

75. The wording of § 82 of the Courts Act in force from 29 July 2002 to 30 June 2013:
,§ 82. **Recalculation of pension amount**
(1) The judge's pension will be recalculated when the salary of the position on the basis of which the judge's pension has been calculated changes.
(2) In the case specified in subsection (1) of this section, the pension will be recalculated as of the time of the change of the judge's salary.'

OPINION OF COURT *EN BANC*

76. In order to be able to assess the constitutionality of provisions pursuant to the constitutional review procedure, the Supreme Court must first identify the relevant provisions (I). Thereafter the Court *en banc* will identify interferences with the fundamental rights (II) and the legitimate purposes of the interferences (III). Next, the Court *en banc* will discuss the reasonableness of the interferences regarding the legitimate purpose (IV) and draw its final conclusions (V). Finally, the Court *en banc* will explain the impact of the judgment (VI).

I

77. A provision is relevant if the Court, applying it upon adjudication of the case, should, in the event of its unconstitutionality, have to decide otherwise than in the event of its constitutionality (see, for instance, the

Supreme Court *en banc* judgment of 22 December 2000 in case no. 3-4-1-10-00, point 10; judgment of 28 October 2002 in case no. 3-4-1-5-02, point 15).

78. The applicants argue that the solution, according to which the pension of judges who retired before 1 July 2013 is calculated on a lower salary than that of the judges who retire as of 1 July 2013, is unconstitutional.

79. Subsection 3 of § 78 of the CA in force until 30 June 2013 stated that the amount of the judge's old-age pension is 75% of the judge's last salary; subsections 1 and 2 of § 82 stated that the judge's pension is recalculated once the salary of the position based on which the judge's pension was calculated and this is done as of the time of amendment of the salary of the position.

80. The Temporary Organisation of Payment of Salaries Bound to National Average Wage Act entered into force on 1 January 2009 and, initially, it froze salaries and amendments to the act, among other things, reduced judges' salaries as of 1 July 2009. Therefore, the pensions of judges decreased as well.

81. Clause 2 of § 3 of the Amendment Act that entered into force on 1 July 2013 repealed, among other things, the provisions specified in point 79 above. Subsection 1 of § 132^6 of the CA, which entered into force at the same time, states that the amount of the judge's old-age pension and superannuated pension is 75% of the salary corresponding to their last position, which is in force on the date as of which the pension is granted. Under subsection 2 of § 132^7 of the CA, the judge's pension, except for pension calculated on the basis of the salary of the current year, is indexed annually by April 1 with the highest salary rate index specified in subsection 2 of § 2 of the Salaries of Higher State Servants Act.

82. The applicants are persons who were granted the judge's pension before 1 July 2013. In addition to the provisions specified in the previous point, subsections 4, 8, 14 and 16 of § 3 of the SHSSA entered into force on 1 July 2013, increasing the salaries of judges. Thus, the pension of the applicant has been calculated on the basis of the previous reduced salaries of judges. As of 1 April 2014, the pensions of the applications are indexed annually. The pension of judges who retire later, i.e. as of 1 July 2013, is calculated on the basis of the new higher salary and they will be indexed in the future as well. Thus, the applicants' pension is smaller than that of judges who retire as of 1 July 2013, because the pension of the latter is calculated on the basis of higher salaries.

83. The applicants seek a situation where the basic level serving as the basis for indexing the applicants' pensions corresponds to the basic level of 1 July 2013, i.e. 75% of the judge's salary of 1 July 2013. Thus, the question is what provisions are relevant in a situation where the Legislature has redesigned the bases of calculation of the judge's pension. The relevant portion of the provisions of law is the portion on the basis of which the amount of the pension of the judges who retired before 1 July 2013 is calculated. The size of a benefit received in the form of pension may be constitutional or unconstitutional.

84. Since henceforth the pensions of the applicants are indexed on the basis of subsection 2 of § 132^7 of the CA and the revision of the amount of the applicants' pensions depends on it, the provision must be deemed relevant.

85. Furthermore, the amount of the applicants' pension depends on the Legislature's decision to repeal § 82 of the CA by clause 2 of § 3 of the Amendment Act. By doing it, the Legislature replaced the old system with a new one. This has direct effect on the amount of the pensions of the applicants.

86. Thus, the Court *en banc* deems subsection 2 of § 132^7 of the CA and the repeal of § 82 of the CA by clause 2 of § 3 of the Amendment Act relevant to the extent that these did not allow for recalculating the old-age pensions of judges based on the salaries of judges as of 1 July 2013.

II

87. To assess the constitutionality of the relevant provisions, the fundamental rights interfered with need to

be identified first.

88. Section 32 of the Constitution guarantees the fundamental right to property. It is a general provision protecting property rights, which, besides immovables and movables, also covers rights and claims that can be assessed in money (see the Supreme Court *en banc* judgment of 17 June 2004 in case no. 3-2-1-143-03, point 18). Thus, the right to pension, which is a right that can be assessed in money, essentially falls within the scope of the fundamental right to property. However, in the present case the justifiability of the applicants' claim and, thus, the interference with the fundamental right to property depends on whether the applicants had a legitimate expectation that the pensions will be recalculated in a situation where the salary of judges changes, and to what an extent this expectation may be disregarded. Next, the Court *en banc* will examine whether the applicants could have a legitimate expectation.

89. The principle of legitimate expectations arises from § 10 of the Constitution. According to the principle, everyone has the right to act with a reasonable expectation that the applicable law remains in force. Everyone must be able to use the rights and freedoms granted to them by a law at least within the term provided by the law. (See as of the judgment of the Constitutional Review Chamber of the Supreme Court of 30 September 1994 in case no. III-4/A-5/94).

90. Recently, the Constitutional Review Chamber of the Supreme Court further clarified the substance of the principle of legitimate expectations. The protection of legitimate expectations must ensure an undistorted exercise of the rights and freedoms (second sentence of § 11 of the Constitution). The rights and obligations can be exercised in full only if the person does not have to fear that the state imposes unforeseeable disadvantageous consequences. Thereby, the realisation of one's own rights, i.e. the exercise of the rights and freedoms granted to a person by law, requires acting on the basis of a legal provision, hoping that it will remain in force. The state has broken its promise when a person has, by their acts, fulfilled the prerequisites owing to which the person has the right to expect the application of an advantageous solution towards them, but the state nevertheless established a new less advantageous solution towards the person (the judgment of the Constitutional Review Chamber of the Supreme Court of 9 December 2013 in case no. 3-4-1-27-13, point 50).

91. As indicated above in point 79, the wording of the Courts Act in force until 30 June 2013 stipulated that the judge's old-age pension is 75% of their last salary and that the pension will be recalculated accordingly when the salary of the position changes. In order to identify if the applicants may have had legitimate expectations, an answer must be given to the question of whether the applicants could expect that their pension, following the emergence of the entitlement to the pension, will be 75% of the salary of a judge of the respective position at the time of payment of the pension.

92. Historically, the given solution was introduced for the first time in the Act on the Status of Judges of the Republic of Estonia that was passed on 23 October 1991. Subsection 2 of § 33 of the Act read as follows: 'The pension of a retired judge amounts to 75% of their last salary and if the latter changes, the judge's pension will be recalculated.' By § 140 of the CA that entered into force on 29 July 2002, the Act on the Status of Judges of the Republic of Estonia was repealed, but a similar solution was established by subsection 3 of § 78 and by § 82. Thus, the solution whereby the judge's pension is, provided that certain prerequisites are fulfilled, 75% of their last salary and the pension will be recalculated once the salary changes, was in force for over twenty years, until it was repealed as of 1 July 2013.

93. Upon taking office as a judge, the applicants were able to take into account the fact that following the retirement they will have higher income than in the case of other choices. Upon choosing an occupation, all circumstances are considered as a whole. If these include the promise to pay a specified office-related pension that has been good for decades, it may prove to be an important criterion upon making a decision. Thus, historic arguments speak in favour of the emergence of legitimate expectations.

94. The teleological argument is also important upon assessing the solution.

95. Subsection 2 of § 147 of the Constitution states that judges are appointed for life. Even though every judge is free to resign and choose another job at any time, the judge's office, given the length and complexity of applying to become a judge and the characteristics of the office, it must be considered a rather long-term occupational choice of a person, which is not made lightly.

96. The second sentence of § 146 of the Constitution provides for the independence of the court. The substance thereof is clarified by §§ 147, 150 and 153 of the Constitution. The judge's pension is one of the guarantees of the independence of judges and courts. The knowledge that specific office-related pension is ensured for a judge after resigning from office also reduces the risk of corruption.

97. Subsection 3 of § 147 of the Constitution states that judges may not hold any other elected or appointed office, except for those prescribed by law. The first sentence of subsection 1 of § 49 of the CA states that judges are not allowed to hold any other office or position with the exception of teaching or research. Due to the prohibition on holding any other office or position, judges have few chances of earning additional income besides that of their salary. Thus, from that point of view the judge's pension is a guarantee of independence and compensation for the prohibition as well.

98. Given that the legislation contained a virtually unaltered pension promise for decades as well as the long-term nature of the office and the independence of judges, the Court *en banc* finds that the applicants had legitimate expectations that upon retirement they will receive the judge's pension at the rate of 75% of the salary of a judge holding the respective office.

99. The applicants also argue that they had legitimate expectations also based on the temporary solution established by the TOPSBNAWA. The Court *en banc* is of the opinion that the temporary nature of the solution resulted in the applicants' legitimate expectation that the former situation will be restored following the abolition of the temporary solution, whereby the pension amounts to 75% of the salary of a judge of a court of the respective instance.

100. Next, the Court *en banc* will examine whether the solution in force is in conformity with the principle of legitimate expectations.

101. The pension of the applicants accounted for 75% of the salary of a respective judge until 30 June 2013 when the salaries provided by the TOPSBNAWA were in force. The basis for the calculation of the pension of a judge of the first instance who retired before 1 July 2013 was a salary of 2666 euros and 16 cents and the amount of pension calculated on it was 1999 euros and 62 cents, while the respective figures of a circuit court judge were 2999 euros and 43 cents and 2249 euros and 57 cents and those of a justice of the Supreme Court were 3665 euros and 97 cents and 2749 euros and 48 cents. As of the 1 July 2013, the salaries of judges rose, but the applicants' pension remained at the level decreased as of 1 July 2009. Thus, as of 1 July 2013 the applicants' pension no longer amounted to 75% of the salary of a judge holding the respective office.

102. However, under subsection 1 of § 132^6 of the CA, the pension of judges retiring as of 1 July 2013 is 75% of the salary of a judge of the respective position at the time of granting the pension. At the time of filing the applications, the salary serving as the basis for calculating the judge's pension of a judge of the first instance retiring as of 1 July 2013 was 3380 euros and the pension calculated on it was 2535 euros, the respective figures of a circuit court judge amounted to 3900 euros and 2925 euros, and those of a Supreme Court justice to 4420 euros and 3315 euros, respectively. The applicants' pension would have been of the same size under the former solution or if the applicants' pension had been recalculated on the basis of the new salaries of judges, which entered into force as of 1 July 2013.

103. Thus, the applicants' pension was smaller than it would have been under the former solution or if the applicants' pension had been recalculated on the basis of the new salaries of judges, which entered into force as of 1 July 2013, i.e. 535 euros and 38 cents (21%) in the case of a former judge of the first instance, 675

euros and 43 cents (23%) in the case of a former circuit court judge and 565 euros and 52 cents (17%) in the case of a former Supreme Court justice (based on the time of filing the application). It is quite a considerable difference.

104. Since the pension of the judges who retired before 1 July 2013 is since 1 July 2013 smaller than 75% of the respective judge's salary, the applicants' pension was also not restored following the termination of the temporary solution.

105. Therefore, the Court *en banc* holds that the applicants' fundamental right to property in conjunction with the principle of legitimate expectations has been interfered with.

106. Next, the Court *en banc* will examine whether the fundamental right of equality of the applicants under § 12 of the Constitution has been interfered with. Subsection 1 of § 12 of the Constitution states that everyone is equal before the law and that 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.

107. There can be an interference with subsection 1 of § 12 of the Constitution only if persons who are in a similar situation are being treated unequally (see the Supreme Court *en banc* judgment of 27 June 2005 in case no. 3-4-1-2-05, point 40). To identify an interference with the fundamental right of equality, a group of persons that are in a situation similar to that of the applicant and in comparison with whom the applicant is being treated worse must be found (most recently discussed in the Supreme Court *en banc* judgment of 22 April 2014 in case no. 3-3-1-51-13, point 69).

108. According to the Court *en banc*, the recipients of the judge's pension who were granted or will be granted the judge's pension on 1 July 2013 or later are in a situation comparable to that of the applicants. The common characteristics of these persons and the applicants is that both have worked as judges and fulfilled the conditions entitling them to the judge's pension. The only difference lies in the fact that the group of the applicants was granted the judge's pension at the latest by 30 June 2013, while the reference group was granted the pension on 1 July 2013 or later. Thus, upon granting the judge's pension, the size of the pension may extensively differ in the case of a time difference of merely a few days. No other reference group that receives office-related pension has had similar work characteristics or been subject to requirements and guarantees of independence of a similar extent and therefore forming other reference groups is not appropriate.

109. The amount of the judge's pension of the reference group specified in the previous point is given in point 102 above. Point 103 indicates the sum by which the applicants' pension is smaller than that of the judges who retired or retire as of 1 July 2013. Since the applicants' pension is smaller, they are treated worse than the reference group. Thus, it constitutes an interference with the fundamental right of equality.

III

110. Next, the Court *en banc* will discuss the purpose of the interferences and examine the legitimacy of the purpose.

111. The parties to the proceedings point out that the pensions of the judges that retired before 1 July 2013 were established below the level than can be legitimately expected and below the level of the pensions of the reference group for the purpose of saving public funds, raising judges' salaries and ensuring the sustainability of the pension system.

112. Given the aging of the population and the volume of long-term obligations assumed by the state after the restoration of the Republic of Estonia, the payment of pensions in such a manner is no longer sustainable and therefore changes will need to be made to the pension system. In the report titled 'Sustainability of the Pension System of the State,' which was published on 21 February 2014, the National Audit Office pointed out that the expenses per special pensioner are disproportionately high (see the National Audit Office's

report, p. 53 et seq). The Court *en banc* realises that the need to raise judges' salaries and ensure the sustainability of the pension system are covered by the purpose of the sustainable use of public funds. The state must use funds sparingly in order to finance all its functions to a reasonable extent.

113. The legitimacy of the purpose of interference depends on the reservation of the fundamental right that is being interfered with. The second sentence of subsection 2 of § 32 of the Constitution states that limitations of the right to property must be provided by law. Thus, the fundamental right to property may be restricted for any purpose that is in accordance with the Constitution. Regarding the fundamental right of equality secured by subsection 1 of § 12 of the Constitution, the Court *en banc* has noted that it can be restricted for any reason that is in accordance with the Constitution (the judgment of 7 June 2011 in case no. 3-4-1-12-10, point 31). Thus, both the fundamental rights interfered with in the present case can be limited for any purpose that is in accordance with the Constitution.

114. In many previous cases the Supreme Court has held that saving the state's expenses is a constitutional purpose (e.g. the Court *en banc*judgment of 22 April 2014 in case no. 3-3-1-51-13, point 77).

115. Based on the aforementioned, the Court *en banc* holds that the purpose to use public funds sparingly is a legitimate purpose of interference with the fundamental right of equality set out in subsection 1 of § 12 of the Constitution and of the fundamental right to property set out in § 32 of the Constitution in conjunction with the principle of legitimate expectations.

IV

116. Next, the Court *en banc* will examine the proportionality of the interferences with the fundamental right of equal treatment and the fundamental right to property in conjunction with the principle of legitimate expectations with regard to the purpose of using public funds economically.

117. First, the Court *en banc* will consider the proportionality of the interference with the fundamental right of equality of the applicants.

118. In point 108, the Court *en banc* identified that the recipients of the judge's pension who were granted or will be granted the judge's pension on 1 July 2013 or later are in a situation comparable to that of the applicants and the difference lies solely in the time of granting the pension. The time difference in granting pension may be merely one day (30 June and 1 July 2013); thereby the length of employment of the persons and the time of working as a judge may be exactly the same with the accuracy of dates, but the amount of the pension is different. This is the case where the person has fulfilled the length of employment and other requirements provided for in subsections 1 and 3 of § 1322 of the CA, but resigns from the position of a judge before the retirement age. In such an event the person will be entitled to granting the judge's pension once the person reaches the age of retirement. Thus, the different treatment of the persons belonging to the reference groups is extremely accidental. However, the difference between the pension amounts is approx. 20% (see point 103 above). Outside the compulsory assistance provided for in the Constitution (e.g. subsection 2 of § 28) the Legislature is indeed free to decide which social guarantees to create, but once it has created a system, the persons entitled to the benefits must not be treated unequally without reason. Given the accidental nature of the criterion of differentiation and the extent of the different treatment, the different treatment is not proportional.

119. Since equal treatment of comparable groups can be ensured in such a manner that a group that has been treated more advantageously will be treated less advantageously, the Court *en banc* must examine the proportionality of the interference with the fundamental right to property in conjunction with legitimate expectations.

120. The explanatory memorandum to the draft Amendment Act specifies the following: 'Due to the transition to indexation, the expenses of the judge's pension in 2013 will be approximately 270 000 euros (i.e. 12%) lower than in the event of recalculating the pensions as of 1 July 2013 based on the salary (the total pension expenditure and the rise of the number of pensioners by 14 has been taken into account). According to the current forecast, in 2014 and 2015 the pension expenditure of the already retired judges will increase by approx. 1.7% (index 1.023) and the expenses of new pensioners will be added thereto.' (explanatory memorandum of the second reading of Bill 279 of the XII composition of the Riigikogu, p. 5).

121. Under subsection 3 of § 132^7 of the CA, the portion of the judge's pension that exceeds the pension calculated on the basis of the State Pension Insurance Act is paid from the state budget via the budget of the Ministry of Justice and the Supreme Court. Thereby money is allocated to the courts of the first and second instance via the budget of the Ministry of Justice. In 2013, a total of 33 774 939 euros was allocated to the entire court system. Thus, by paying smaller pension to the judges who retired before 1 July 2013, 0.80% of the total budget was saved in 2013, given the budget of the entire court system (270 000 : 33 774 939 = 0.00799 * 100%). Therefore, the Court *en banc* is of the opinion that saving the public funds is not extensive.

122. Next, the Court *en banc* will discuss the proportionality of the interference with the fundamental right to property in conjunction with the principle of legitimate expectations.

123. The extent to which the pension of persons is smaller than the pension corresponding to the promise that was respected for decades shows the extent of the interference with the fundamental right to property. The pension corresponding to the promise would have been the same as that of the comparable group at the time of granting the pension, as discussed in point 118. Thus, the difference is approx. 20%.

124. The Court *en banc* pointed out above that the solution that gave rise to the legitimate expectations was used for over 20 years (points 91–92). The judge's office is usually a long-term choice of the occupation, which results in restrictions aimed at ensuring the independence of the court; thereby the judge's pension is, on the one hand, compensation for the restrictions as well as a guarantee of independence (points 95–97 above). Thereby the Court *en banc* takes into account the fact that the applicants cannot change their past occupational and pension choices. Upon reforming the pension system, the legitimate expectations of all persons must be taken into account. The current pensioners can no longer contribute to the pension pillars, i.e. to influence the size of their pension themselves.

125. The fact that the TOPSBNAWA established a temporary solution is indicated by the title of the act (Temporary Organisation of Payment of Salaries Bound to National Average Wage Act) as well as the wording of § 1, which provided for the temporal nature of the solution. The Legislature did not freeze or reduce the pensions of expressis verbis retired judges by the TOPSBNAWA or any other act. The freezing and reduction of pensions automatically arose from the freezing and reduction of the salaries of judges, because subsection 1 of § 82 of the former wording of the Courts Act stipulated that the judge's pension is to be recalculated when the salary of the position on the basis of which the judge's pension is calculated changes.

126. Upon termination of the validity of the temporary solution, the pensions of persons who started receiving the judge's pension before 1 July 2013 were regulated expressis verbis by establishing a new solution whereby judges' pensions will be indexed (subsection 2 of § 132^7 of the CA), not recalculated upon a change of the judge's salary. Indexation was also provided for judges' salaries (subsection 2 of § 2 of the SHSSA), but the act also raised the salary as of 1 July 2013 and, thus, the base level of indexation (subsection 1 of § 2 of the SHSSA) upon terminating the temporary solution. The pension of judges retiring as of 1 July 2013 is calculated on the basis of the new salary (subsection 1 of § 132^6 of the CA). The base

level of the pensions of the judges who started receiving pension before 1 July 2013 was, however, not raised upon terminating the temporary solution. Thereby the pensions of previously retired judges were also not restored to the level preceding the reduction. Such behaviour constitutes breaking a promise.

127. The Court *en banc* also relies on the judgment of the Constitutional Review Chamber of the Supreme Court of 21 January 2004 in case no. 3-4-1-7-03 where the Chamber noted that granting an extensive decision-making right to the Legislature arises from the fact that the economic an social policy and budgeting falls within its competence (point 15). However, the Legislature's freedom of policymaking and budgeting is limited by the principles of the Constitution and by fundamental rights. A constitutional review court must avoid a situation where the budgetary policy is largely made by the court, but that does not mean that the court cannot examine the safeguarding of persons' fundamental rights or adherence to the principles of the Constitution (see point 16 of the aforementioned judgment).

V

128. Given the seriousness of the interferences as well as the fact that a portion of the recipients of the judge's pension is arbitrarily being treated worse and that the temporary situation established before 1 July 2013 was not abolished with regard to retired judges, thereby breaking the promise, as well as taking into account the extent of attainment of the purpose of the economical use of the public funds, the Court *en banc* holds that the applicants' fundamental right to property in conjunction with the principle of legitimate expectations and the fundamental right of equality have been disproportionately and, thus, unconstitutionally interfered with.

129. Acting on clause 2 of subsection 1 of § 15 of the Judicial Constitutional Review Procedure Act, the Court *en banc* declares unconstitutional and repeals subsection 2 of § 132^7 of the Courts Act and reverses the repeal of § 82 of the Courts Act based on clause 2 of § 3 of the Temporary Organisation of Payment of Salaries Bound to National Average Wage Act to the extent that these did not allow for recalculating the old-age pensions of judges based on the salaries of judges as of 1 July 2013.

VI

130. By a constitutional review judgment, provisions of law are usually repealed retroactively (see the judgment of the Constitutional Review Chamber of the Supreme Court of 17 April 2012 in case no. 3-4-1-25-11, point 55). This means that the applicants are retroactively entitled to a higher pension as of 1 July 2013. Thereby the wording of § 82 of the CA in force until 30 June 2013 must be applied only to the recipients of the judge's pension as of 30 June 2013 solely based on the salaries of judges serving as the basis for recalculating the pension as of 1 July 2013. Henceforth, the new solution of the judge's pension, which entered into force as of 1 July 2013 must be applied to the applicants and to persons belonging to the same comparable group as the applicants, i.e. their pensions must be indexed, not recalculated once the salaries of judges change.

131. Given granting the judge's pension based on the judge's salary, the Court *en banc* considers it necessary to additionally point out the following. Subsection 1 of the SHSSA stipulates that the salary of higher state servants specified in this Act is the highest salary rate specified in subsection 1 of § 2 of this Act multiplied by the highest salary rate index specified in subsection 2 and the coefficient specified in § 3. Under subsection 1 of § 2 of the SHSSA, the highest salary rate of higher state servants is 5200 euros. Under the first sentence of subsection 2 of the same section, the highest salary rate is indexed by April 1 each calendar year with the highest salary rate index the value of which is 50% of the arithmetic average of the annual change in the consumer price index and the annual change in the social tax accruals. Section 3 of the SHSSA sets out the coefficients of the salary of higher state servants and subsections 4, 8, 14 and 16 thereof set out the coefficients of the salaries of judges. Under subsection 2 of § 17 of the SHSSA, among other things, the salaries of judges are indexed as of 1 April 2015.

132. Thus, as of 1 April 2015 the salary of a judge will be calculated as follows: 5200 euros times the salary coefficient times the highest salary rate index. Assuming that the economy will rise in the long term or decline in the short term, the salary of judges is going to fluctuate in the future, being approximately the multiple of 5200 euros and the coefficient corresponding to the position (the same goes for the salaries of other higher state servants, even though some of the salaries were indexed already since 1 April 2013). Thus, regardless of the fact that the salaries will rise in the long term, the salary of judges will remain at the current level. The Court *en banc* has doubts above the reasonableness of such a solution, because as of a certain point it may seriously jeopardise the sustainability and independence of the court system and, thus, the functioning of the courts in line with the Constitution. Looking at the explanatory memorandum of the bill, it can be noted that the establishment of a solution of such substance was not the Legislature's purpose, because the Legislature merely wanted indexation similar to that of the State Pension Insurance Act, even though with a 'more conservative index,' i.e. the Legislature wanted to index the last (calculated) salary, not the multiple of the initial highest salary rate of 5200 euros and the position's coefficient (Bill 369 of the XI composition of the Riigikogu, p. 3).

133. Unlike the salary arrangement of judges, subsection 2 of § 132^7 of the CA, which provides for the judges' pension, stipulates that the judge's pension, except for the pension calculated on the basis of the salary of the current year, is indexed by April 1 each year with the highest salary rate index specified in subsection 2 of § 2 of the SHSSA. This means that not the initially granted pension or the pension of the applicants as of 30 June 2013, but the previous actual pension will be indexed annually.

Dissenting opinion of justices Priit Pikamäe and Jüri Põld on the judgment of the Supreme Court *en banc* in case no. 3-4-1-1-14

1. We disagree with the majority of the Court *en banc* in that the applicants had legitimate expectations that their old-age pension would be recalculated on the basis of judges' salary that entered into force as of 1 July 2013 and that these legitimate expectations of the applicants have been violated. We also disagree with the position that the applicants who retired before 1 July 2013 had to be compared with judges whose old-age pension was granted on 1 July 2013 or will be granted later and that, as a result of such a comparison, it must be concluded that the principle of equal treatment has been violated with regard to the applicants. We also disagree with the operative part of the judgment of the Court *en banc*.

2. We believe that the legitimate expectations associated with the applicants' right to property is limited to the fact that the amount of the old-age pension granted to them, which after their retirement had been reduced due to the legislative amendment that entered into force on 1 July 2009, must be restored to the level preceding the reduction. We believe that the contested solution is in conflict with §§ 32 and 11 of the Constitution to the extent that it did not allow for restoring the amount of the judges' pension. The office-related salaries that were reduced due to the economic crisis should have been restored to the level preceding the reduction not later than as of 1 January 2014, when the salary fund of budgetary institutions was noticeably increased.

However, in the present case the contested provisions could not have been declared unconstitutional and repealed using such argument. The applicants did not request that the prior amount of the pension be restored. The requested that the pension be recalculated as of the salaries of judges that entered into force on 1 July 2013.

3. The majority of the Court *en banc* relied on the indisputable fact that both before and after 1 July 2013 the amount of the judge's old-age pension under the Courts Act was 75% of the salary of a judge of the respective instance and on the fact that, until 1 July 2013, § 82 of the Courts Act stipulated that the judge's pension will be recalculated once the salary of the position based on which the judge's pension has been calculated changes. It is also true that such a solution for recalculation of the pension was used for over

twenty years.

However, the majority of the Court *en banc* has failed to notice that as of 1 July 2013 the principles of payment of the salary of judges changed considerably. Before 1 July 2013, the judge's salary consisted of the office-related salary and a pay for the length of service (§ 75 and subsection 1 of § 76 of the Courts Act). However, as of 1 July 2013 the Courts Act no longer provided for any pay for the length of service. The salary in force before 1 July 2013 and the salary in force as of 1 July 2013 are no longer comparable due to a significant structural change in the principles of payment of the salary. Thereby the new salary provided under the Salaries of Higher State Servants Act that entered into force as of 1 July 2013 is bigger than the total of the former salary and the pay for the length of service of a judge.

The majority of the Court *en banc* has also disregarded the fact that as of 1 July 2013 the salary serving as the basis for calculating the judge's pension also changed due to the structural change made to the principles of payment of the salary. Before 1 July 2013, the judge's pension was calculated on the salary without taking into account the pay for the length of service and as of 1 July 2013 the judge's pension is calculated on the new salary that is not inclusive of the pay for the length of service, but that is nevertheless considerably higher than the total of the former salary and pay for the length of service.

The principles of payment of the salary of judges have been repeatedly revised in the past. But the previous changes did not concern the components that the salary of judges consisted of and therefore the salaries of judges, on the basis of which their office-related pensions were calculated, were comparable before and after the past changes of the principles of payment of the salary.

In this legal and factual situation that has changed considerably we cannot take the view that the judges who retired before 1 July 2013 had legitimate expectations that their old-age pension will be 75% of the judge's salary also after 1 July 2013. One cannot have legitimate expectations that in the event of transition to a new salary arrangement individual elements favourable to the applicants will be preserved and the applicants must start receiving pension calculated on the basis of a salary arrangement on the basis of which they have never been remunerated.

4. Since the salary arrangement of judges and the resulting pension arrangement before and after 1 July 2013 are considerably different, we believe that upon identifying a violation of the fundamental right of equality in the present case the comparable groups cannot be judges who retired before 1 July 2013 and judges who retired or will retire after this date.

5. The application of the principle of legitimate expectations and equal treatment in the case law of the Supreme Court should not result in a situation where structural reforms, e.g. making structural changes to the salary arrangement, prove to be impossible or extremely complicated to carry out. In the present case the application of the thinking pattern used by the Court *en banc* in other fields would, in our opinion, inevitably lead to a situation where the implementation of structural reforms is in many cases impossible or impeded.

6. This does not mean that we are convinced that the contested provisions of the Courts Act are in accordance with the principle of equal treatment. We believe that the comparable groups must be formed on a different basis. Since the solution that no longer provides for the recalculation of the judge's pension has been contested, the comparable groups should be formed of retired judges and other persons who receive office-related pension whose office-related pension is still recalculated in the event of a change of the office-related salary.

Comparable groups could be former judges who receive the judge's old-age pension and whose pensions can no longer be recalculated under the law as well as, for instance, former members of the Supreme Council and the Riigikogu who receive the old-age pension of the member of the parliament and whose pensions can still be recalculated on the basis of the law. Such law is the Pensions of Members of XII Composition of Supreme Council of the Republic of Estonia and VII, VIII and IX Composition of the Riigikogu Act whose § 20 reads as follows: 'In the event of a change of the salary of the member of the Riigikogu, which served

as the basis for calculating the pension, the pension will be recalculated.' The comparison of these groups for the purpose of reviewing the constitutionality of an interference with the fundamental right of equality becomes an issue when the salaries of members of the Riigikogu and judges provided by the Salaries of Higher State Servants Act change and, accordingly, the pension of the former members of the Supreme Council and the Riigikogu will be recalculated, while that of the judges will not. Then it should be explained why after the entry into force of the current judgment of the Supreme Court the getting in the way of the rise of the cost of living in the case of the judges' pension is avoided using the indexing provided for in subsection 2 of § 132^7 of the Courts Act and the getting in the way of the rise of the cost of living in the case of the parliamentary pension is still avoided using the recalculation of the pension.

Comparable groups may be searched from among other persons who receive office-related pensions and whose pension can still be recalculated in the event of a change of the office-related salary. In this regard we note that office-related pensions are very different and they are essentially the employer's pensions and the recalculation of some office-related pensions once the office-related salary changes may be justifiable using legal arguments. For instance, such a recalculation of the office-related pension may be justifiable until the pensioner reaches the general retirement age in cases where the law demands release from service in the event of reaching a certain age limit before reaching the general retirement age provided under the State Pension Insurance Act.

7. The serious structural flaw of the reform of office-related pensions lies, in our opinion, in the failure to complete the reform. So far the reform of office-related pensions has been limited to the Judiciary, the National Audit Office and the office of the Chancellor of Justice, which are independent of the Executive in their activities under the Constitution.
The non-finalised reform may give rise to quite a few issues of the constitutionality of the legislation. We are far from claiming that the constitutional principle of equal treatment or another provision of the Constitution demands securing office-related pensions to persons who take office at the time when no office-related pension is foreseen for the respective office. Office-related pensions are essentially the employer's pensions and the state as a public employer has a broad margin of discretion in shaping office-related pensions. However, it is important to eliminate unjustified differences between the legal arrangements of different office-related pensions as well as the legal uncertainties found in laws.
