Constitutional judgment 3-4-1-20-09

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-20-09
Date of decision	30 October 2009
Composition of court	Chairman Märt Rask, members Jüri Ilvest, Peeter Jerofejev, Priit Pikamäe and Harri Salmann.
Court Case	Complaint of the Estonian Centre Party faction against the Board of the Riigikogu resolution no. 157 of 1 September 2009.
Hearing	Written proceeding
DECISION	**To dismiss the complaint of the Estonian Centre Party faction.**

FACTS AND COURSE OF PROCEEDING

1. On 31 August 2009 the Estonian Centre Party faction submitted to the Board of the Riigikogu a draft resolution “Organisation of a referendum on the organisation of extraordinary Riigikogu elections” with an explanatory letter.

2. The Board of the Riigikogu discussed the acceptance of the draft for the legislative proceeding on 1 September 2009. The minutes no. 48 were taken of this. The Board of the Riigikogu held with two votes against one that taking into account the opinions of the Constitutional Committee of the Riigikogu and of the research department of the Chancellery of the Riigikogu, the draft should not be accepted for the legislative proceeding and it should be returned to the presenter without appointing a leading committee.

3. On the same day, under § 16(4) of the Riigikogu Rules of Procedure and Internal Rules Act (RT I 2003, 24, 148; hereinafter the “RRPA”), the member of the Board of the Riigikogu who maintained a dissenting opinion put the issue to a vote outside the agenda at a sitting of the Riigikogu. 57 members of the Riigikogu

voted for and 24 members of the Riigikogu voted against the return of the draft.

4. On 1 September 2009 the Board of the Riigikogu passed resolution no. 157 by which the draft presented by the Estonian Centre Party faction was returned to the presenter without appointing a leading committee.

5. On 10 September 2009 the Estonian Centre Party faction filed a complaint with the Supreme Court requesting that the Court annul the resolution referred to in the previous paragraph.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

6. The Estonian Centre Party faction is of the opinion that the Board of the Riigikogu had no right to return the draft to the presenter. The draft conformed to all the rules of legislative drafting, established for all drafts in § 92 of the RRPA and in clause 56 of the Rules of legislative drafting for draft legislation in the legislative proceeding of the Riigikogu (hereinafter "the rules of legislative drafting"). The Rules of legislative drafting were enacted by the Board of the Riigikogu on the basis of §§ 92(1) and § 13(2)10) of the RRPA. § 92(1) of the RRPA does not allow the Board of the Riigikogu to establish substantive requirements for draft legislation. As the Board of the Riigikogu did not find any procedural or formal violations, it must not have returned the draft.

The Board of the Riigikogu returned the draft because of the alleged unconstitutionality thereof, i.e. for substantive reasons. Yet, the law or the rules of legislative drafting do not entitle the Board of the Riigikogu to review the constitutionality of draft legislation or to otherwise review the content thereof. Pursuant to the Constitution and the Riigikogu Rules of Procedure and Internal Rules Act the substantive work is carried out in the Riigikogu and its committees.

The Board of the Riigikogu has no competence to review the conformity of legislative drafts with the Constitution, because the Board of the Riigikogu is not among the institutions authorised to exercise constitutional review.

For these reasons the Estonian Centre Party Faction requests the Supreme Court to annul the Board of the Riigikogu resolution no. 157 of 1 September 2009.

7. The Board of the Riigikogu – the body who passed the resolution – did not submit its opinion because, according to the letter of the President of the Riigikogu, the members of the Board did not come to an agreement concerning the submission of the opinion.

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

8. The Chamber is of the opinion that the adjudication of this case depends on whether the Board of the Riigikogu is entitled – under the Constitution and the Riigikogu Rules of Procedure and Internal Rules Act – upon accepting a legislative draft for legislative proceeding to check whether the resolution of a matter posed therein is within the competence of the Riigikogu. The complainant argues essentially that the Board of the Riigikogu has no such right.

9. Pursuant to the first sentence of § 3(1) of the Constitution the powers of the state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. This sentence gives rise to the requirement of legality, which means, inter alia, that there must be a legal basis for the exercise of the powers of the state either in the Constitution or in an Act or other legislation which is passed on the basis of the Constitution and is in conformity therewith. Every institution who exercises the powers of the state is under the obligation to check whether there exists a legal basis for its intended activities, i.e. whether its has the competence to perform these activities. This amounts to a general obligation to verify the existence of competence to exercise powers. If relevant competence has not been given by legislative provisions, the powers of the state can not be exercised.

Thus, the executive must make sure that its activities have a legal basis (see § 87 of the Constitution which

sets out a non-exhaustive list of competencies of the Government of the Republic). Also, an administrative authority, when commencing an administrative proceeding, must make sure that it has the competence to issue the intended administrative legislation or regulation or to perform the intended procedure, because the observance of competencies is the prerequisite of lawfulness. The court, too, must make sure that the object of dispute is within its competence and that it has the territorial jurisdiction as well as jurisdiction in the sense of court instance.

10. Consequently, the obligation established in § 3(1) of the Constitution to exercise the powers of the state pursuant to the Constitution and laws which are in conformity therewith, inevitably gives rise to the obligation of those who exercise the powers of the state to check whether they have the competence to exercise these powers. Although, frequently, in the interest of clarity of law the obligation to verify the existence of competence is clearly set out in the law, it need not always be so. This obligation arises in regard to the institutions exercising the powers of the state directly from the Constitution even if not expressly established in the law or in legislation ranking lower than parliamentary Acts.

11. Through the activities enumerated in § 65 of the Constitution (including also the passing of resolutions) the Riigikogu, too, exercises the powers of the state. That is why the Riigikogu is under the obligation to check whether it has the competence to resolve the issues that have been presented to it for legislative proceeding.

The competence of the Riigikogu is set out in § 65 of the Constitution, nevertheless, there are other provisions of the Constitution which, too, give competencies to the Riigikogu (see e.g. § 128(1), including the right – not referred to in § 65 – to decide on the utilisation of the Defence Forces in the fulfilment of the international obligations of the Estonian state). § 65(16) of the Constitution establishes that in addition to the activities vested in the competence of the Riigikogu by the preceding subsections of § 65 the Riigikogu shall resolve other national issues which the Constitution does not vest in the President of the Republic, the Government of the Republic, other state bodies or local governments. It is partly this provision and partly the principle of separate and balanced powers (§ 4 of the Constitution) that give rise to the prohibition to interfere with the constitutional competencies of other state bodies or local governments (see in this regard also the Constitutional Review Chamber of the Supreme Court judgment of 19 March 2009, paragraph 43, on the interference with the constitutional competence of the National Audit Office).

As the general obligation of the Riigikogu to check the existence of its competence arises directly from the Constitution, the arguments of the complainant that this obligation does not arise from § 92 of the RRPA or the rules of legislative drafting are irrelevant.

12. By § 13(2)4) of the RRPA the Riigikogu has vested the right to introduce draft legislation to the legislative proceeding of the Riigikogu and to appoint leading committees for the draft legislation in the Board of the Riigikogu. The Board of the Riigikogu exercises the competence of the Riigikogu as a whole, vested in it by the Riigikogu by law for the organisation of the work and for the administration of the Riigikogu. The plenary assembly of the Riigikogu could itself perform all these functions, yet some of the duties have been imposed on the Board to guarantee speedy and smooth work.

The Chamber is of the opinion that as the function of accepting draft legislation to the legislative proceeding of the Riigikogu has been vested in the Board of the Riigikogu, it is the Board that must decide whether the Riigikogu is competent to resolve the issue posed in the draft. The Riigikogu must make sure that it has relevant competence as early on as possible in the process of substantive legislative proceeding, and therefore it is unthinkable, as a rule, that the issue of competence could be discussed by the plenary assembly of the Riigikogu.

Nevertheless, the Board of the Riigikogu must refuse to accept a draft only if the lack of competence of the Riigikogu is obvious, this deficiency can not be eliminated during legislative proceeding and a proposal of constitutional amendment has not been submitted with the proposal of draft legislation.

The Chamber is of the opinion that the control mechanism to prevent the interpretation of the constitutional competence of the Board of the Riigikogu so that it precludes such draft legislation from the legislative proceeding of the Riigikogu the lack of competence for the passing of which is not manifest, is guaranteed by § 16(4) of the RRPA. This provision establishes that if consensus is not reached within the Board of the Riigikogu, a member of the Board may put the issue to a vote outside the agenda at a sitting of the Riigikogu. This guarantees a possibility to all the members of the Riigikogu to express their opinion on the return of the draft legislation due to lack of competence.

Moreover, under § 17 of the Constitutional Review Court Procedure Act (RT I 2002, 29, 174; hereinafter the "CRCPA") the resolutions of the Board of the Riigikogu on refusal to accept a draft legislation due to the lack of competence can be contested in the Supreme Court.

The aforesaid does not mean that the members of the Riigikogu are not allowed to exercise the right given to them by § 161 of the Constitution to initiate amendment of the Constitution to amend the provisions thereof establishing the competence of the Riigikogu or other state bodies.

13. Consequently, the Board of the Riigikogu acted correctly when verifying whether the resolution of the issue posed in the draft legislation presented by the Estonian Centre Party faction was within the competence of the Riigikogu. By controlling the existence of the competence the Board of the Riigikogu fulfilled the obligation imposed on the Riigikogu by the first sentence of § 3(1) of the Constitution. Furthermore, in this case all members of the Riigikogu had the possibility to express their opinion concerning the return of the draft legislation (see paragraph 3 above).

14. The Chamber is of the opinion that upon controlling the existence of the competence to pass the draft resolution the Board of the Riigikogu correctly found that the draft resolution on submitting to a referendum the issue of organising extraordinary elections, presented by the Estonian Centre Party faction, was to be returned to the presenter without appointing a leading committee. Although the draft resolution was in conformity with all the formal requirements established in § 92 of the RRPA and the rules of legislative drafting, it was obvious that the deciding on the issue posed therein was not within the Competence of the Riigikogu for the following reasons.

15. Pursuant to § 105(1) of the Constitution the Riigikogu has the right to submit a bill or other national issue to a referendum. The Riigikogu may submit an issue to a referendum if the organisation of a referendum concerning the issue is not prohibited by § 106 of the Constitution, when the Riigikogu itself is competent to decide on this issue and the Constitution does not specify a procedure for deciding on the issue. The requirement that the Riigikogu itself must have competence to decide on the issue arises from the prohibition to interfere with the constitutional competencies of other state bodies or local governments (see paragraph 12 above). That is why the Riigikogu may not submit to a referendum e.g. issues relating to administration of justice. Neither can the issues subject to resolution pursuant to specified constitutional procedure be submitted to referenda (see e.g. § 153(2) of the Constitution, establishing the procedure for bringing criminal charges against the Chief Justice and justices of the Supreme Court), because the organisation of a referendum in such a case would amount to ignoring a constitutional procedure.

16. Deciding on the organisation of extraordinary elections is not in the competence of the Riigikogu. Pursuant to § 78(3) of the Constitution the extraordinary elections to the Riigikogu shall be declared by the President of the Republic; that is why the Riigikogu must not submit this issue to a referendum.

The bases for extraordinary elections are provided in § 60(4) of the Constitution, which refers to §§ 89, 97, 105 and 119 of the Constitution. § 89 of the Constitution deals with the situation where the Government can not be formed within the period prescribed by the Constitution; § 97 deals with the situation where the Riigikogu has expressed no confidence in the Government of the Republic or a minister and the Government has made a proposal to the President of the Republic to declare extraordinary elections to the Riigikogu; § 105 deals with the situation where legislative draft submitted to a referendum does not get the majority of

votes in favour, and § 119 deals with the situation where Riigikogu has not passed the state budget within two months after the beginning of the budgetary year. All these provisions give the declaration of extraordinary elections in the competence of the President of the Republic. This is further supported by § 78 of the Constitution, which enumerates the competencies of the President of the Republic and establishes in subsection (3) that the President of the Republic shall declare extraordinary elections to the Riigikogu in the cases established in §§ 89, 97, 105 and 119 of the Constitution.

Consequently, the Constitution exhaustively establishes the bases for organising extraordinary elections, and deciding on declaration of extraordinary elections has been given in the sole competence of the President of the Republic. The Riigikogu has no right to decide whether to organise extraordinary elections, or to submit relevant decision to a referendum.

17. In the light of the above considerations the draft presented by the Estonian Centre Party faction was in manifest conflict with the constitutional competence of the Riigikogu, a constitutional amendment to amend this competence had not been initiated, and the conflict could not be resolved during further legislative proceeding; therefore, on the basis of § 24(1)2) of the CRCPA, the complaint is to be dismissed.
