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## Constitutional judgment 3-4-1-10-09

### JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

<b>No. of the case</b>	3-4-1-10-09
<b>Date of decision</b>	29 September 2009
<b>Composition of court</b>	Chairman Märt Rask, members Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Indrek Koolmeister.
<b>Court Case</b>	Review of constitutionality of § 218(3) and (4), § 344(2), the first sentence of § 654(2 <sup>1</sup> ) and § 677(4) of the Code of Civil Procedure.
<b>Basis of proceeding</b>	The request of the Rapla rural municipality council of 24 April 2009.
<b>Hearing</b>	Written procedure.
<b>DECISION</b>	<b>To refuse to hear the request of the Rapla rural municipality council.</b>

#### FACTS AND COURSE OF PROCEEDING

1. On 27 November 2008 the Rapla rural municipality council adopted decision no. 66 by which it was decided to submit a request to the Supreme Court to repeal § 218(3) of the Code of Civil Procedure (hereinafter “the CCP”), because the provision was in conflict with the constitutional guarantees of the local government.
2. The Supreme Court received the request of the Rapla rural municipality council on 24 April 2009. In addition to the repeal of § 218(3) of the CCP, referred to in the Rapla rural municipality council decision no. 66, the council requests the repeal of § 218(4), § 344(2), the first sentence of § 654(2<sup>1</sup>) and § 677(4) of the

CCP, because the provisions are in conflict with the constitutional guarantees of the local government.

## **JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING**

**3.** The Rapla rural municipality council is of the opinion that § 218(3) of the CCP deprived the lawyer who is the contractual representative of the rural municipality of the possibility to defend the interests of the rural municipality at the Supreme Court hearing of 17 November 2008 in civil case no. 3-2-1-126-08. The application of the provision resulted in the infringement of human dignity; an official was considered equal to a person with restricted active legal capacity who, as a rule, may not act as a representative in a court. The allegations relating to the restriction of the rights and freedoms of the representative of the rural municipality also pertain to the infringement of the rights and freedoms of the rural municipality, because the rural municipality can only act through its representatives. By restricting the rights of the rural municipality's representative the constitutional guarantee of independence of the rural municipality is violated.

**4.** The rural municipality adds further that the freedom to choose its representatives is one of the local government's rights and that the procedural laws enacted by the state must guarantee the exercise and effective protection of the right. § 218(3) of the CCP does not serve the efficient protection of the rights of the local government and, instead, causes inexpedient problems and confusion upon finding another representative.

Choosing a representative for a civil litigation is definitely a local issue; precepts regarding this infringe independence and show that the legislator's understanding of democracy is more than bizarre. § 154 of the Constitution establishes that the independence of the local government is of primary importance and does not allow the state to interfere with the issues that are inherently local, which the choosing of a representative for a proceeding in the Supreme Court definitely constitutes. The provisions of the CCP restrict the right of the local government to choose the best and the most suitable representative and by requiring to hire a sworn lawyer the provisions obligate the local government to incur expenditure, which would not be necessary upon authorising an official to be a representative. Thus, the provisions of the CCP does not allow the local government to act financially in the most economical manner; also, the possibility of the local government to take decisions only in the interest of the local community is impeded.

**5.** § 218(4) of the CCP is apparently a provision that infringes the rights of participants in a proceeding because the provision precludes the participant in a proceeding from stating its views and presenting closing arguments independently. The wrong rules of § 218(3) and (4) of the CCP are also reflected in § 344(2), § 654(2<sup>1</sup>) and § 677(4) of the CCP:

**6.** On behalf of the Riigikogu opinions were submitted by the Constitutional Committee and the Legal Affairs Committee thereof.

**6.1.** The Constitutional Committee of the Riigikogu is of the opinion that the petitioner has failed to present convincing arguments about how the contested provisions violate the constitutional guarantees of the local government. The local government's right to choose a representative in judicial proceedings does not arise from the fact that this pertains to resolution of local issues, instead the right arises from the fact that the local government is a legal person in public law, who has passive and active civil procedural legal capacity within the limits established by law. Moreover, a line has been drawn between the choosing of a representative and the establishment of procedure for representation, whereas the latter is what is actually contested. The Committee is of the opinion that the contested provisions are not capable of violating constitutional guarantees of the local government and the request is to be dismissed.

**6.2.** The Legal Affairs Committee of the Riigikogu is of the opinion that the rural municipality council has contested the provisions concerning contractual representation in civil litigation, and this does not pertain to the sphere of resolution and management of local issues, in regard to which – pursuant to § 154(1) of the Constitution – the local government has independence. Consequently, the request is not in conformity with the provisions of § 7 of the Constitutional Review Court Procedure Act (hereinafter “the CRCPA”) and is to

be dismissed.

**7.** The Minister of Justice is of the opinion that the request of the Rapla rural municipality council is not admissible. Should the Supreme Court find that this amounts to a constitutional review matter, the Minister of Justice argues that the contested provisions are constitutional. To ascertain whether a provision infringes the constitutional guarantees of the local government it is to be examined, firstly, whether this is a local issue. The way the legislator has arranged the mechanism of exercise of rights in judicial proceedings does not constitute a conflict with the constitutional guarantees of local governments. The organisation of judicial proceedings does not directly affect the relations between the local government and the state with the aim of guaranteeing the independence of local governments in resolution and management of local issues. The Constitution provides expressly for the right of recourse to the courts (§ 15 of the Constitution) and the establishment of court procedure rules is the duty of the state. The Constitution requires that court procedure rules must be established by a constitutional law, these can not be established by a legislation of the local government.

**8.** The Chancellor of Justice is of the opinion that the request is inadmissible. Pursuant to clause 1 of its decision no. 66 of 27 November 2008 the rural municipality council decided to submit to the Supreme Court a request to repeal § 218(3) of the CCP. Thus, the will of the rural municipality council only extends to the referred norm. The request is not admissible in regard to § 218(4), § 344(2), § 654(2<sup>1</sup>) and the first sentence of § 677(4) of the CCP merely because nobody is authorised to extend the request of a rural municipality council. In this regard the request is prepared by exceeding the authority of the person submitting the request, and it has to be ignored.

Neither is the request admissible in regard to § 218(3) of the CCP, because the provision does not infringe the local government's right of self-management. Local governments participate in legal relationships as legal persons in public law, and therefore they can be affected by any regulatory framework the addressee of which is a legal person. As the aim of constitutional guarantees of the local government is to guarantee the position of the local government in the administrative organisation of the state and the inherent competence of the local government, the right to self-management can only be infringed when a legislative measure specifically infringes a local government, not all the participants in legal relationships in the same manner. Otherwise the right of appeal of the local government for the purposes of § 7 of the CRCPPA would become essentially unlimited. The petitioner has failed to show convincingly how § 218(3) of the CCP infringes, in a specific manner, the constitutional guarantees of the local government.

**9.** The Association of Municipalities of Estonia argues in its letter that the request is justified. It arises from the practice of the Rapla rural municipality, where the contested restriction has proven to be an impediment in the protection of the rights of the local government.

## **CONTESTED PROVISIONS**

**10.** § 218(3) and (4) of the Code of Civil Procedure read as follows:

“§ 218. Contractual representative

[---]

(3) In an action in the Supreme Court, a participant in a proceeding may perform procedural acts and file petitions and applications only through a sworn advocate. In a proceeding on petition in the Supreme Court, a participant in a proceeding may perform procedural acts and file petitions and applications personally or through an advocate.

(4) In an action in the Supreme Court a participant in a proceeding may personally file a request for procedural assistance as well as submit opinions and objections concerning the action of another participant in the proceeding or other request. Together with a sworn advocate he or she may submit opinions at a Supreme Court hearing.”

**11.** § 344(2) of the CCP reads as follows:

“§344. Content of summonses

[---]

(2) If in actions a participant in a proceeding is summoned to a session of the Supreme Court and the summons is not forwarded to the sworn advocate, it shall also be indicated in the summons that the participant in the proceeding is permitted to perform procedural acts, and file petitions and applications in the Supreme Court only through a sworn advocate.”

**12.** The first sentence of § 654(2<sup>1</sup>) of the CCP reads as follows:

“§ 654. Content of judgment of circuit court

[---]

(2<sup>1</sup>) The conclusion of a judgment shall point out, inter alia, that an appeal in cassation may be submitted to the Supreme Court only through a sworn advocate if not otherwise prescribed by law.”[---]

**13.** § 677(4) of the CCP reads as follows:

“§ 677. Notification of participants in proceeding of appeal in cassation

[---]

(4) Upon service of an appeal in cassation on the participants in the proceeding, the Court shall also inform the participants in the proceeding about whether and which requests they may submit and that they are permitted to perform procedural acts in the Supreme Court only through a sworn advocate, and that any procedural acts which are not performed through a sworn advocate are not taken into consideration in adjudicating the appeal in cassation.”

## **OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER**

**14.** Pursuant to § 7 of the Constitutional Review Court Procedure Act (CRCPA – RT I 2002, 29, 174) a local government council may submit a request to the Supreme Court to repeal an Act which has entered into force or a provision thereof if it is in conflict with constitutional guarantees of the local government.

**15.** Consequently, the Supreme Court can hear on the merits only such requests that meet the following three requirements: firstly, the request must be submitted by a local government council; secondly, the request must argue that a legislation referred to in § 7 of the CRCPA or a provision thereof is in conflict with constitutional guarantees of the local government, and thirdly, the infringement of constitutional guarantees of the local government by the contested legislation must be possible (see the Constitutional Review Chamber of the Supreme Court (hereinafter “the CRC”) judgment of 9 June 2009 in case no. 3-4-1-2-09, paragraph 23).

The request of the Rapla rural municipality, as far as it concerns § 218(3) of the CCP, meets the first two requirements referred to in paragraph 15 above. The request on behalf of the Rapla rural municipality council was submitted to the Supreme Court by the Rapla rural municipality government, who argues that § 218(3) and (4), § 344(2), the first sentence of § 654(2<sup>1</sup>) and § 677(4) of the CCP are in conflict with constitutional guarantees of the local government.

**16.** According to clause 1 of the Rapla rural municipality council decision no. 66 of 27 November 2008 the rural municipality council decided to submit a request to the Supreme court to repeal only § 218(3) of the CCP. According to clause 3 of the decision the rural municipality government was authorised to submit the

request. Consequently, the request is not admissible in regard to § 218(4), § 344(2), the first sentence of § 654(2<sup>1</sup>) and § 677(4) of the CCP, because the rural municipality council did not seek the repeal of the referred provisions. In regard to the referred norms the request is to be dismissed.

**17.** The Rapla rural municipality council argues that as the choosing of a representative for civil litigations in order to fulfil the requirements of § 218(3) of the CCP is a local issue, the making of precepts in this regard infringes the independence of the local government, i.e. constitutional guarantees of the local government. The Chamber is of the opinion that in regard to § 218(3) of the CCP the third requirement set out in paragraph 15 above is not fulfilled. The contested provision is not capable of infringing, i.e. unfavourably affecting the independent resolution of local issues.

**18.** The relevant guarantee of the local government is established in § 154(1) of the Constitution, pursuant to which all local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law. This provision creates the right of self-management of local governments. The essence of the right of self-management is the discretion of the local government to decide and choose in the resolution of local issues (the CRC judgment of 16 January 2007 in case no. 3-4-1-9-06, paragraph 22). Proceeding from the substantive criterion local issues are the issues arising from and pertaining to a local community and are not – as regards the formal criterion – subjected into the competence of a state authority by the Constitution (the CRC judgment on 8 June 2007 in case no. 3-4-1-4-07, paragraph 12).

**19.** In the case under discussion it is to be ascertained whether the establishment of the requirements concerning the institute of representation in civil cases constitutes a local issue to which the right of self-management of the local government is extended.

The Chamber is of the opinion that this is not a local issue. The organisation of court procedure, including the appointment of a representative, is a matter of how the state decides to regulate the procedure for resolution of legal disputes. The Constitution does not establish that deciding on the organisation of court procedure is in the competence of the local government and no exceptions regarding this issue are made to the local government in Chapter 14 of the Constitution. Consequently, the organisation of court procedure established by the state is uniformly applicable to all legal and natural persons. Local governments are legal persons in public law and that is why any legislation the addressee of which is a legal person may affect local governments. The purpose of constitutional guarantees of the local government established in Chapter 14 of the Constitution is to guarantee the position of the local government in the administrative organisation of the state and the inherent competence of the local government. Consequently, the right of self-management can only be infringed when a legislative measure specifically infringes a local government, not all the participants in legal relationships in the same manner. The Supreme Court has come to a similar conclusion in its earlier practice (the CRC judgment of 21 February 2003 in case no. 3-4-1-2-03, paragraph 13).

**20.** As the establishment of requirements of the institute of representation in civil cases is not a local issue, the local governments' right of self-management does not include the issues resolved in § 218(3) of the CCP. The referred provision is not capable of directly infringing the right of self-management of the local government. By establishing § 218(3) of the CCP the legislator has not resolved or interfered with the resolution of local issues.

**21.** Taking into account the aforesaid § 218(3) can not infringe constitutional guarantees of the local government. Consequently, the request of the Rapla rural municipality council is not admissible in regard to the referred provision, and the Chamber refuses to hear it.