Constitutional judgment 3-4-1-12-09

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-12-09
Date of decision	30 June 2009
Composition of court	Chairman Märt Rask, members Jüri Ilvest, Henn Jõks, Hannes Kiris, Indrek Koolmeister.
Court Case	Request of the Chancellor of Justice to declare §§ 1 and 2 of the Tallinn City Council regulation no. 3 of 1 July 2009 “Amendment of the Statutes of Tallinn” partly unconstitutional and § 3 thereof partly unconstitutional and invalid.
Date of hearing	12 June 2009
Persons participating in the hearing	The Deputy Chancellor of Justice-Adviser Madis Ernits; representatives of the Tallinn City Council sworn advocate Ants Nõmper and Director of the legal service of the city of Tallinn Priit Lello.
DECISION	**To dismiss the request of the Chancellor of Justice.**

FACTS AND COURSE OF PROCEEDING

1. On 19 February 2009 the Tallinn City Council passed regulation no. 3 “Amendment of the Statutes of Tallinn” (hereinafter “the regulation amending the Statutes”).

2. On 3 April 2004 the Chancellor of Justice made proposal no. 4 to the Tallinn City Council “To bring the Tallinn City Council regulation no. 3 of 19 February 2009 “Amendment of the Statutes of Tallinn” into conformity with the Constitution of the Republic of Estonia”. The Chancellor of Justice is of the opinion that the regulation amending the Statutes is in conflict with §§ 56-57^{1} of the Local Government Organisation Act and with §§ 154(1) and 160 of the Constitution to the extent that it provides for the transformation of the institutions of city district government and city district elder into regional agency of the city government and

the head of regional agency of the city government, respectively.

3. On 30 April 2009 the Tallinn City Council passed resolution no. 89, deciding not to consent to the proposal of the Chancellor of Justice.

4. On 6 May 2009 the Chancellor of Justice submitted to the Supreme Court a request to declare §§ 1 and 2 of the regulation amending the Statutes, due to enter into force on 1 July 2009, to the extent that these provide for the transformation of the institutions of city district government and city district elder into regional agency of the city government and the head of regional agency of the city government, unconstitutional; and a request to declare § 3 of the same regulation to the extent that it provides for the transformation of the institutions of city district government and city district elder into regional agency of the city government and the head of regional agency of the city government, unconstitutional and invalid. The Supreme Court received the request of the Chancellor of Justice on 6 May 2009.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

5. The Chancellor of Justice points out firstly that the Constitution provides neither for the obligation to form city districts nor for the prohibition to liquidate these.

§ 160 of the Constitution only establishes that the organisation of the local government shall be provided by law. § 3(1) of the Constitution establishes parliamentary reservation, i.e. the principle of importance, obligating the legislator to decide all the issues that are important from the point of view of functioning of public authority and of fundamental rights. Proceeding from the referred norms the Riigikogu must provide by law all the issues important from the point of view of administration of local governments, by establishing the general framework for the formation and activities (including authorised powers in regard to persons outside administration) of local government structural units (councils, agencies, persons) and by providing, if necessary, for the right of discretion. §§ 3(1) and 154 of the Constitution obligate local governments to observe these frames, established by law.

6. Next, the Chancellor of Justice argues that the obligation to form city districts or the prohibition to liquidate these does not arise from the European Charter of Local Self-Government (RT II 1994, 26, 95; hereinafter “the Charter”), either.

7. The Chancellor of Justice is of the opinion that the regulation amending the Statutes is also in conformity with the Riigikogu Election Act and with the Local Government Council Election Act (hereinafter “the LGCEA”; in the wording in force until 30 April 2004), which have greater legal effect than ordinary laws, including the Local Government Organisation Act. These Acts do not obligate the city of Tallinn to form city districts or prohibit the liquidation thereof. The Chancellor of Justice points out further that the same conclusion holds true in regard to § 8 of the LGCEA, which entered into force on 1 May 2009, subsection 41 of which *expressis verbis* provides the procedure for the situation where city districts have not been formed in Tallinn.

8. Next, the Chancellor of Justice explains why the idea of formation of rural municipality and city districts, established in Chapter VIII of the Local Government Organisation Act (hereinafter “the LGOA”), does not serve the idea of promotion of democracy and is instead necessitated by administrative-territorial deconcentration. § 57(8) of the Local Government Organisation Act (“The authority of rural municipality and city district governments and rural municipality and city district elders shall not be restricted and budgetary funds allocated to them shall not be decreased during the budgetary year of the rural municipality or city.”) does not prohibit to liquidate a rural municipality or city district as an institution during the budgetary year and to replace the exercise of administrative functions – because of the termination of activities of a territorially deconcentrated administrative authority – by relevant competence and liability of a sectoral administrative authority, when the consistent and smooth provision of public services in the interest of local residents is guaranteed.

9. The Chancellor of Justice argues that the Local Government Organisation Act establishes exhaustively the forms of territorial deconcentration of the local government, i.e. this may be done in no other way than through formation of rural municipality or city districts.

The opinion that §§ 56-57[1] of the LGOA establish the only possible solution when opting for territorial deconcentration, is supported, first, by the referred principle of importance, arising from § 3(1) of the Constitution. This obligates the legislator to decide itself all the issues that are important from the point of view of functioning of public authority and of fundamental rights, including the organisation of the local government. The principle of importance would be meaningless when the local government could arbitrarily bypass the general frames established by the parliament by implementing its own understanding of what the organisation of the local government should look like.

The principle of legal clarity, arising from § 10 (in regard to the state and the local government) and § 13(2) (in regard to public authority and persons) of the Constitution, is to be pointed out in this context, too. When establishing the frames for the local government the legislator – in subsequent law-making - is justified to proceed from the prerequisite that the local government will observe these frames. The constitutional obligation to observe the law (§§ 3(1) and 154) of the Constitution) extends to the local government. As legal acts form a whole in their conjunction, then what is provided in one Act often serves as a prerequisite of applicability of another Act. The local government who, opting for territorial deconcentration, does not observe the general framework created by the parliament "jumbles up all the cards", which in turn will result in both legal and practical problems.

10. Having analysed whether Tallinn has decided – by amending the Statutes and liquidating city districts – to abandon the principle of territorial deconcentration, the Chancellor of Justice came to the conclusion that by amending the Statutes of Tallinn the city has not given up the provision of public services in a territorially deconcentrated manner. However, the general framework of opting for the discharge of administrative duties in deconcentrated form, established by the legislator, is not being observed; instead the city has created its own model. That is why the regulation amending the Statutes of Tallinn, to the extent that it provides for the transformation of the institutions of city district government and city district elder, is in conflict with what is provided in §§ 56-57[1] of the LGOA and, thus, also with §§ 154(1) and 160 of the Constitution.

11. At the court hearing the Chancellor of Justice persevered in the opinions set out in his request.

12. The Tallinn City Council agrees with the opinions of the Chancellor of Justice, expressed in paragraphs 5, 6, 7 and 8 of this judgment, but argues that rural municipality and city districts are not the only forms of territorial deconcentration.

13. The purpose of §§ 56-57[1] of the LGOA is not to establish the only form of territorial deconcentration. During the legislative proceeding of these provisions in 1993 the purpose was to establish the fiscal liability and legal status of city districts. Neither of these aims is no longer topical, because it is clear that the provisions no longer serve the referred purpose. The status of a legal person is determined by the General Part of the Civil Code Act, and the city districts no longer have a significant fiscal role. It is not necessary to try find the purpose of a valid provision at any cost and - if there is no current purpose – resort to the historical objective of the provision without verifying the relevance thereof in the fist place.

14. The Tallinn City Council does not agree with the opinion of the Chancellor of Justice that determination of the forms of territorial deconcentration of the local government is an important issue from the point of view of public authority and fundamental rights. If it were important, the legislator would have imposed some restrictions on (e.g. longer than usual term of entering into force of amendments) or criteria for (e.g. obligation to from city districts in the cities of concrete size) the formation of city districts. The fact that this has not been done indicates clearly that this is not an important issue.

It proceeds from Article 6(1) of the Charter that local authorities must be able to flexibly determine their own internal administrative structures. The Chancellor of Justice, however, interprets the law in a manner which brings about an extremely rigid result, leaving but one possibility of territorial deconcentration. Such a rigid interpretation is in conflict with Article 6(1) of the Charter.

15. The opinion of the Chancellor of Justice that other Acts prohibit to liquidate city districts is wrong, too. City districts have not been formed in order to make other legislation applicable. When relating an issue to a city or rural municipality district the legislator must have taken into account that the local government can liquidate these whenever it chooses.

16. The Chancellor of Justice has come to an erroneous conclusion that the principle of monopoly of one from of territorial deconcentration of public authority exists in Estonia. The same or even grater measure of closeness to people is achievable in the performance of the functions of the state by county as in the performance of the local government functions in Tallinn by city district, because the number of residents in the counties and in the city districts of Tallinn is of the same magnitude. Neither is the difference between the public law functions to be performed by the local government and the state an argument to support the validity of this principle in regard to the local government.

It would be impossible to observe this principle in Estonia, because functional deconcentration can yield the same results as territorial deconcentration; neither could this principle be observed upon the merger of rural municipalities.

17. The Tallinn City Council points out further that if the Local Government Organisation Act indeed gave rise to the requirement to organise territorial deconcentration pursuant to §§ 56-57^1 of the LGOA only, such a restriction would constitute disproportional interference with the right of self-management of the local government and would thus be in conflict with the Constitution.

18. The reproach of the Chancellor of Justice that Tallinn has not given up the performance of public law functions in a deconcentrated manner does not take into account that this is a process which has just been started and the completion of which will take time. As some legal acts have not yet been passed it is impossible to decide whether the situation is unconstitutional or not. The principal substantial changes brought about by the liquidation of city districts will become evident in the subsequent legislation issued by the city of Tallinn. This is caused by the fact that the city Statutes did establish the bodies and the formation thereof on the level of city district, but did not provide what these bodies were to engage in on the level of city district.

19. At the court hearing the Tallinn City Council persevered in the opinions expressed in its written opinion.

20. The Minister of Justice is of the opinion that the regulation amending the Statutes is in conflict with §§ 154(1) and 104(2)4) of the Constitution, as well as with § 6 of the Riigikogu Election Act (hereinafter “the REA”) and §§ 56-57^1 of the LGOA, due to violation of the principle of legality of the local government.

In Estonia the organisation of the local government is uniform. Uniform organisation does not mean that in all local government units the organisation is exactly the same to the detail, because this would result in the conflict with the right of self-management of the local government (Article 6(1) of the Charter). §§ 56-57^1 of the LGOA establish the formation and organisation of work of mural municipality and city districts. The legislator has determined the elements of the internal structure of the territory of local government to be city districts and rural municipality districts, and these are obligatory for the local government in the division of its territory. Once the procedure for resolution of an issue is determined by law, the local government has no right to ignore the law or to independently extend its powers, including legislative powers. Should the local government come to the conclusion that the law unconstitutionally restricts its constitutional guarantees, including the independence in determining its internal structure or the right to resolve certain issues, the local government can initiate a constitutional review proceeding for the protection of its rights. As long as

the law is valid the local government must observe it.

In the preparation of the Statutes of Tallinn the council has exceeded the legal framework, has taken the place of the legislator and has ignored the forms allowed by the legislator. By liquidating the city districts the local government has set about manipulating the elements of electoral system, because the city districts are the bases of formation of electoral districts both in the local and in the Riigikogu elections.

The legislator has proceeded from the presumption that the city of Tallinn has city districts. This presumption of the legislator is supported by the fact that the Riigikogu Election Act refers to the city districts of Tallinn by their names. § 6 of the REA or § 8 of the LGCEA do not obligate the city of Tallinn to from city districts, instead these provisions are based on the presumption that the city districts already exist. Consequently, these provisions restrict the liquidation of city districts. Through the liquidation of city districts the city of Tallinn changed, before elections, the electoral system referred to in § 104(2)4) of the Constitution. This is the objective result of the introduced amendments irrespective of the purposes of these amendments. The number of electoral districts constitutes an essential part of the electoral system. The establishment of local government council election rules is a duty of the state within the exclusive competence of the legislator, and relevant Act has been passed. Consequently, the city of Tallinn has no right to change the electoral system by its own legislation.

21. The Minister of Justice also submits a request to suspend, on the basis of § 12 of the Constitutional Review Court Procedure Act (RT I 2002, 29, 174; hereinafter “the CRCPA”) the enforcement of the provisions of the contested legislation of general application until entry into force of the judgment of the Supreme Court. Should the Statutes of Tallinn, nevertheless, enter into force before the Supreme Court renders its judgment, there will be the lack of legal clarity, because pursuant to § 8 of the LGCEA the local government must from electoral districts. And at the moment it is unclear on which basis the electoral districts are to be formed. That is why it would be expedient, on the basis of § 12 of the CRCPA, to suspend the enforcement of those provisions of the Statutes of Tallinn, which have not yet entered into force, until the entry into force of the Supreme Court judgment. The consequence of this would be that electoral districts will be formed on the basis of the Local Government Council Election Act. Should the court come to the conclusion that the regulation amending the Statutes is in conformity with the Constitution and the laws, the provisions of the regulation amending the Statutes will be enforced later. The suspension of the enforcement of the regulation amending the Statutes will not infringe the autonomy of the local government very extensively, because the enforcement thereof before the court judgment would create ambiguity and lack of legal clarity in the local government council elections due in autumn.

22. The Association of Estonian Cities does not support the request of the Chancellor of Justice and is of the opinion that the contested provisions are not in conflict with the Constitution.

§ 2(4) of the Territory of Estonia Administrative Division Act establishes that rural municipality districts or city districts may be formed in a rural municipality or city, respectively. It proceeds from this that the formation of a rural municipality or city district is not absolutely necessarily or obligatory and that these may be formed, pursuant to the procedure provided by law, if it is deemed expedient.

Clause 11) of § 22(1) of the LGOA, establishing the exclusive competence of a council, provides that the formation and liquidation of rural municipality or city districts, and determination of the competence and approval of the statutes thereof is within the competence of a council. What is at issue upon deciding whether to form or liquidate a city or rural municipality district or not is the question of functioning of ordering of the local affairs and the question of functionality and expediency of the internal administrative structure, the proportion of territorial and sectoral components and the names of which are primarily chosen on the basis of local circumstances and needs and the changes in these circumstances and needs. The Constitution can not impose restrictions on taking these choices into account.

23. The Association of Municipalities of Estonia does not agree with the interpretation offered by the Chancellor of Justice. Such an interpretation would mean an extensive interference with the internal

organisation of the local government and should be justified by a substantial public interest, a concrete aim and proportionality. The referred justifications are hard to find and the request of the Chancellor of Justice does not provide an answer to this question, either.

As this is an issue related to the internal administration of the local government, it is protected by the guarantee of the autonomy of the local government.

The conclusion that the law does not provide that the only possible form is the formation of rural municipality or city districts to provide public services on territorial or regional basis can also be drawn on the basis of the initial wording of the draft of the Promotion of Local Government Merger Act. § 4 of this Act ("Guarantee of accessibility of public services") provided that service points must be located in at least all the settlement units where, before the merger, rural municipality or city governments were situated. § 4(3) specified further that a service point means a structural unit of a local government administrative agency or an agency administered by such administrative agency, or a part thereof which guarantees the provision of public services offered by the local government within the territory of the local government outside of the settlement unit where the rural municipality or city government formed as the result of the merger is situated.

In the wording of the Act which entered into force on 1 January 2009 this provision was repealed and § 4(3) and (2) were worded as follows: "Provision of public services shall be organised in all settlement units where, before the merger, rural municipality or city governments were situated." Thus, the definition of a service point was omitted as well as the obligation to have one in all the locations referred to in subsection (2). However, the purpose of these amendments was not to establish the rural municipality or city district as the only possible form. It was pointed out in the explanatory letter that this was to guarantee to the local government the right to independently administer its internal functioning and provide public services in rural municipalities with big number of residents in the most cost effective way. The explanatory letter also pointed out the following: "The definition of a service point established in § 4(3) of the valid Act has in practice created different interpretations and in some places resulted in the preservation of such structural units the operational expenditure of which is too big. The draft is aimed at giving the local government the right to organise the provision of public services in a manner which is most natural for a particular region."

CONTESTED PROVISIONS

24. Subsections (1), (4), (6), (10), (20)-(22), (25)-(28), (30), (31), (34), (36), (37), (39), (41), (42) of § 1 and §§ 2 and 3 of the Tallinn City Council regulation no. 3 of 19 February 2009 "Amendment of the statutes of Tallinn", to the extent that these provide for the transformation of the institutions of city district government and city district elder into regional agency of the city government and the head of regional agency of the city government.

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

25. Pursuant to § 154(1) of the Constitution all local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law. This provision gives rise to the right of the local government to self-management. The right of self-management means discretion to make decisions and choices in the resolution of local issues (judgment of the Constitutional Review Chamber of the Supreme Court (hereinafter "the CRC") of 16 January 2007 in case no. 3-4-1-9-06, paragraph 22). On the basis of substantial criteria local issues are those that arise from within a local community and relate to it and are not, from the formal aspect or under the Constitution, within the competence of some other state authority (judgment of the CRC of 8 June 2007 in case no. 3-4-1-4-07, paragraph 12).

The right of self-management is not an absolute right, yet the central authority of the state may interfere with the right only with such measures that are proportional and bear in mind a clearly defined lawful objective (see the judgment of the CRC of 9 June 2009 in case no. 3-4-1-2-09, paragraph 32).

26. For the adjudication of this court case it is necessary to assess whether the transformation of the institutions of city district government and city district elder into regional agency of the city government and the head of regional agency of the city government is a local issue to the resolution of which the sphere of protection of the right of self-management is extended. Also, it is to be analysed whether the state has restricted the right of self-management in resolution of this issue.

27. Participants in the proceeding have argued that the transformation of the institutions of city district government and city district elder into regional agency of the city government and the head of regional agency of the city government amounts to making structural changes in the government of the city of Tallinn necessary for the provision of public services. The organisational structure necessary for the provision of public services in the local government can only be established by the local government. Only the local government can assess, taking account of local circumstances, which organisational structure would be most expedient for the provision of services to the members of its community. The creation of organisational structure for the performance of the functions of the local government is, thus, an issue arising from within the local community and directly affecting the members of the community, and to this issue the sphere of protection of the right of self-management is extended.

28. It is also pursuant to the Charter that the internal structure of the local government constitutes a local issue. Article 6(1) of the Charter, entitled "Appropriate administrative structures and resources for the tasks of local authorities", establishes that without prejudice to more general statutory provisions, local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.

Consequently, Article 6(1) of the Charter establishes, on the one hand, an extensive autonomy in the resolution of the issues pertaining to the internal structure of the local government, but on the other hand allows the state to prescribe to the local government certain organisational solutions (e.g. requirement of concrete agencies or offices). However, such solutions must not be rigid and hinder the introduction of solutions based on local circumstances (see in this regard the Explanatory Report at http://conventions.coe.int/Treaty/EN/Reports/HTML/122.htm [1]).

29. In this court case the dispute is about whether the legislator has exhaustively established the organisational framework of performance of public functions in the Local Government Organisation Act (i.e. has restricted the right of self-management), or whether on the basis of the right of self-management the local government has a wide margin of appreciation concerning this issue.

30. §§ 56-57[1] of the Local Government Organisation Act, passed on the basis of § 160 of the Constitution, establish the formation and organisation of work of rural municipality and city districts. The Chamber is of the opinion that neither these provisions nor any other legislation allow to conclude unambiguously that with these provisions the legislator has restricted the right of self-management of the local government in deciding on its internal structure. A local government unit is not obliged to provide all public services in different regions of the local government through the formation of rural municipality or city districts described in the referred provisions.

The fact that in several Acts different legal consequences are made dependent on the existence of city districts can not giver rise to the conclusion that there exist restrictions on the right of self-management. The legislator must take into consideration that the conditions of application of such provisions may change once a local government unit decides to liquidate rural municipality or city districts. If necessary, the legislator can establish such provisions the implementation of which does not depend on the existence of city or rural municipality districts.

31. The Chamber is of the opinion that although the Local Government Organisation Act establishes that one possibility of providing public services in different regions of a local government unit is through rural municipality or city districts, this is not the only possibility of formation of organisational structures that

take into account local circumstances and peculiarities.

Nevertheless, the Chamber points out that both, the Charter and § 154(1) of the Constitution allow the legislator to restrict and regulate, to certain extent, also the internal structure of the local government. However, such a regulatory framework must take into consideration the restrictions established in § 154(1) of the Constitution and in the Charter, and is also subject to constitutional review.

32. Taking into account what has been said above, the regulation amending the Statutes, to the extent that it provides for the transformation of the institutions of city district government and city district elder into regional agency of the city government and the head of regional agency of the city government, is not in conflict with §§ 56-57^{1} of the LGOA or with the Constitution.

33. Therefore, on the basis of § 15(1)6) of the CRCPA, the request of the Chancellor of the Justice is to be dismissed.

34. The request of the Minister of Justice to suspend the enforcement of the contested provisions of the regulation amending the Statutes is also to be dismissed. The Supreme Court has rendered the judgment before 1 July 2009, i.e. before the entry into force of the referred amendments, and has declared the contested provisions constitutional. The implementation of these amendments does not affect the formation of electoral districts in Tallinn and does not cause the lack of legal clarity.

Links
[1] http://conventions.coe.int/Treaty/EN/Reports/HTML/122.htm