Constitutional judgment 3-4-1-18-08

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-4-1-18-08
Date of judgment	23 February 2009
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu.
Court Case	Petition of the President of the Republic of 11 December 2008 for declaration of unconstitutionality of the Temporary Procedure for Remuneration of Members of the Riigikogu Act.
Hearing	20 January 2009
Persons participating at hearing	Representatives of the President of the Republic Mall Gramberg and Aaro Mõttus; chairman of the Constitutional Committee of the Riigikogu Väino Linde; Chancellor of Justice Indrek Teder and Deputy Chancellor of Justice-Adviser Madis Ernits, and Minister of Justice Rein Lang.
DECISION	**To declare the Temporary Procedure for Remuneration of Members of the Riigikogu Act unconstitutional.**

FACTS AND COURSE OF PROCEEDING

1. On 19 November 2008 the Riigikogu passed the Temporary Procedure for Remuneration of Members of the Riigikogu Act.

2. By his resolution no. 362 of 24 November 2008 the President of the Republic refused to proclaim the

referred Act, and made a proposal to the Riigikogu to deliberate the Act again and bring it into conformity with the Constitution.

3. On 2 December 2008 the Riigikogu passed the Temporary Procedure for Remuneration of Members of the Riigikogu Act again, unamended.

4. On 11 December 2008, on the basis of § 107(2) of the Constitution and § 5 of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA"), the President of the Republic submitted to the Supreme Court a petition for declaration of unconstitutionality of the referred Act.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

5. The President of the Republic is of the opinion that the Temporary Procedure for Remuneration of Members of the Riigikogu Act (hereinafter "the contested Act") is in conflict with § 75 of the Constitution.

The referred Act changes the principles of calculating the remuneration of a member of the Riigikogu with the aim of precluding the increase of the remuneration of members of the Riigikogu in 2009. Pursuant to § 29 of the Status of Members of the Riigikogu Act (RT I 2007, 44; 316; hereinafter "the SMRA") the remuneration of a member of the Riigikogu from 1 March 2009 until 28 February 2010 shall equal the Estonian average wages of the fourth quarter of 2008 multiplied by the coefficient established in the same provision. Pursuant to the contested Act the remuneration of a member of the Riigikogu would equal the referred amount only if the Estonian average wages of the fourth quarter of 2008 were equal or less than the Estonian average wages of the fourth quarter of 2007.

By passing the referred Act the Riigikogu has ignored § 75 of the Constitution pursuant to which the remuneration of members of the Riigikogu and restrictions on the receipt of other employment income shall be provided by law, which may be amended for the next membership of the Riigikogu.

The wording of § 75 of the Constitution is unambiguous. "Amendment" includes any amendment: increasing and decreasing the remuneration as well as changing the basis of calculation of the remuneration and imposing additional restrictions or alleviating restrictions on other employment income. Had the Constitutional Assembly considered it necessary to prohibit only the increasing of remuneration it would have worded the referred provision accordingly.

The aim of the remuneration of a member of the Riigikogu is to create preconditions to a people's representative for the performance of his or her constitutional function. To achieve this aim the remuneration must be sufficient and ensure the independence of the people's representatives. Such remuneration enables, at the same time, the citizens to exercise their passive electoral right, established in § 60(2) of the Constitution, i.e. to be a candidate for the Riigikogu, and creates preconditions for the realisation of the principle of general elections and for the formation of a representative Riigikogu.

§ 75 of the Constitution is aimed at creating a situation wherein no constitutional institution can determine its own remuneration. By deciding on the issues of their own remuneration the members of the Riigikogu would inevitably get into conflict of interests. That is why the Riigikogu can determine the remuneration for the next membership of the Riigikogu and do this in a situation where the election results are not yet known.

The aim of the prohibition of § 75 of the Constitution is to prevent the dealing with remuneration issues for political considerations. The possibility to decrease remuneration gives the political forces represented in the Riigikogu a possibility to initiate – in order to increase their popularity – drafts concerning remuneration of members of the Riigikogu and force the parliament to permanently deal with these issues. The same may be a result of outside pressure to the parliament. Such a situation may prevent the parliament from performing its primary functions, such as legislating, exercising control over the executive and deciding essential national matters.

The purpose of § 75 of the Constitution is to protect the parliamentary minority against the majority who

may wish to deteriorate the situation of its political opponents by decreasing their remuneration. This may suppress the important role of opposition in a democratic society. At the court hearing the representative of the President of the Republic added that in a parliamentary state the fear of people's representatives' enrichment can not be of greater weight than the fear of undermining the guarantees that enable the people's representatives to perform their constitutional functions independently and with commitment.

Furthermore, § 75 of the Constitution reflects the requirement, arising from the democratic system of government, that after the elections of a new membership of the Riigikogu the conditions of the use of mandates in regard to remuneration or in regard to the possibilities of a people's representative to participate in the parliamentary decision-making must not be amended.

Consequently, § 75 of the Constitution aims at precluding the amendment of provisions concerning remuneration of members of the Riigikogu and restrictions on the receipt of other employment income either to the advantage or disadvantage for the sitting membership of the Riigikogu. Moreover, the purpose of § 75 of the Constitution is to preclude the possibility that a membership of the Riigikogu would ever deal with these issues in regard to itself.

The contested Act is unconstitutional irrespective of whether what it provides for is justified and expedient or not. These considerations are irrelevant from the aspect of constitutionality. § 75 of the Constitution would be deprived of its content and spirit and it would not serve its purpose if the Riigikogu could decide under which circumstances the provision is valid and under which circumstances it is not.

The representative of the President of the Republic specified at the court hearing that § 75 of the Constitution can not be treated as a mere principle that entitles the members of the Riigikogu to receive sufficient and just remuneration, and allows to change the remuneration also for the sitting membership of the Riigikogu. The right of a member of the Riigikogu to sufficient remuneration arises from other provisions of the Constitution, such as §§ 60(2) and 62.

6. The Constitutional Committee, who submitted a written opinion on behalf of the Riigikogu, points out that no consensus was reached within the Committee in regard to the issue of constitutionality of the contested Act.

Some members of the Committee are of the opinion that § 75 of the Constitution constitutes a principle, and when interpreting the purpose thereof the result is that both the suspension of the increase of remuneration (freezing) and the decrease of remuneration of a member of the Riigikogu in regard to the sitting membership of the Riigikogu are permissible, because the main aim of the provision is to prevent the self-enrichment of the members of parliament.

Other members of the Committee are of the opinion that § 75 of the Constitution is a provision for the protection of parliamentarism, and the provision covers any amendments to remuneration of a member of the Riigikogu in regard to the sitting membership of the Riigikogu. This conclusion is reached by grammatical interpretation of the provision as well as on the basis of the purpose and aim of the provision, which has correctly been reasoned in the petition of the President of the Republic.

At the court session the chairman of the Constitutional Committee explained that the Riigikogu had no doubts as to the political necessity of the contested Act, and that in essence the Act amounts to the amendment of one provision of the Status of Members of the Riigikogu Act. It was decided to initiate a separate Act because the initiators of the draft wanted to show that the contested Act is of temporary character. The factions who initiated the draft in the Riigikogu agreed that the Act would become invalid on 1 March 2010. In reply to the question of the Supreme Court *en banc* about the urgent amendment of § 75 of the Constitution the representative of the Riigikogu explained that the possibility had been discussed but was not favoured because that could have started the practice of constitutional amendments prompted by current circumstances.

7. The Chancellor of Justice is of the opinion that the contested Act is constitutional.

As it is presupposed in a democratic state that the parliament is competent to decide on all matters in the state, the issues that the Riigikogu is not competent to decide must arise from the Constitution itself. The wording of § 75 of the Constitution does not pertain *solely* to amendments in regard to the next membership of the Riigikogu. Neither is the norm worded in a strictly prohibiting manner. Linguistic interpretation of § 75 of the Constitution does not allow to derive from it a negative clause concerning competence, because the competence of the Riigikogu to pass the laws of any content arises from §§ 4, 59 and 65(1) of the Constitution. The wording of § 75 of the Constitution does not in any way restrict this competence, it only supplements the competence with the authority to amend the remuneration of members of the Riigikogu and restrictions on the receipt of other employment income for the next membership of the Riigikogu. What was expressed at the Constitutional Assembly indicates, indeed, that they essentially wanted to preclude a situation where the Riigikogu undertakes to increase its remuneration, but the intent of the author of the norm does not indicate that the competence of the Riigikogu to pass a relevant law would be excluded. When interpreted systematically, the norm contains the obligation of the Riigikogu to pass a law to determine a sufficient and just remuneration of members of the Riigikogu, and therefore the norm can not amount to a negative clause concerning competence. Consequently, the Riigikogu was competent to pass the contested Act.

In regard to the substantive constitutionality of the contested Act the Chancellor of Justice points out that it can not be logically concluded from the aims that the President of the Republic has correctly referred to that § 75 of the Constitution constitutes an absolute prohibition to amend the remuneration of a member of the Riigikogu for the sitting membership. This interpretation is supported neither by the wording of § 75 of the Constitution nor by the general competence of the Riigikogu to pass the laws of any content.

§ 75 of the Constitution is a principle or a *prima facie* prohibition to amend the remuneration of a member of the Riigikogu for the sitting composition. The representative of the Chancellor of Justice explained at the court hearing that a principle and a rule are differentiated through norm interpretation. Interpretation of a norm begins with the wording. The text of § 75 of the Constitution words a permissive norm about what is permitted to amend for the next membership of the Riigikogu. In regard to the will of the legislator the materials of the Constitutional Assembly indicate that the will of the legislator was to eliminate the possibility of the Riigikogu to deal with its own remuneration. Systematic arguments (comparison with the texts of the Constitutions of 1920 and 1938, with other norms of the Constitution authorising the Riigikogu to pass laws) make it difficult to apply § 75 of the Constitution as a norm containing an absolute prohibition. Thus, the norm amounts to a principle.

When applying a *prima facie* prohibition the following have to be taken into account: the reasons justifying the violation in a concrete case, the overall conditions, other constitutional values and the whole system of constitutional values. The simpler and rigid solutions may not allow for adequate reactions in all situations of life. For example, a question arises how to act within the valid system under hyperinflation, where the average salary of the fourth quarter of previous years will lose most of is initial purchasing power by March, whereas the constitutional obligation of the Riigikogu to guarantee to the members of the Riigikogu for the duration of their mandate a sufficient and just remuneration is still valid. In such a case it is only through interpreting § 75 of the Constitution as a *prima facie* prohibition that it would be possible to take into consideration both of the opposing principles of law – the obligation to guarantee each member of the Riigikogu sufficient and just remuneration for the duration of his or her mandate, and the prohibition to amend the remuneration of a member of the Riigikogu for the sitting membership.

Upon interpreting § 75 of the Constitution as a *prima facie* prohibition it must be ascertained first that the contested Act infringes this prohibition, and secondly whether this infringement is justified by dominant reasons. In the end the collision of the opposing principles of law has to be solved by weighing.

The contested Act amends the remuneration of the sitting membership of the Riigikogu and thus infringes on

§ 75 of the Constitution.

The Chancellor of Justice agrees that the right of the members of the Riigikogu to decide on their own remuneration may cause a conflict of interest, yet he points out that in the present case the Riigikogu has – with the contested Act – adhered to public interest to economize budgetary funds, and has ignored personal interests to increase their income.

He also agrees with the President of the Republic in that the purpose of § 75 of the Constitution is to prevent the members of the Riigikogu from dealing with the issue of their own remuneration for populist considerations.

Nevertheless, it is doubtful whether the contested Act affects the possibilities of emergence of populism at all. The argument of the President of the Republic does not specifically pertain to the Act under discussion, the argument is an abstract one. The President of the Republic does not argue that this Act bears the stamp of populism, instead he argues that a danger may arise some time in the future that the issue of remuneration may be used for populist purposes. The main aim of § 75 of the Constitution is, after all, to guarantee the right to sufficient and just remuneration to every member of the Riigikogu. Thus, the abolition of the remuneration of a member of the Riigikogu is precluded because every member of the Riigikogu has a constitutional right, pursuable by judicial process, to receive sufficient and just remuneration.

The Chancellor of Justice also agrees with the President of the republic in that the purpose of § 75 of the Constitution is to protect the parliamentary minority against its majority. The protection against the majority consists in the fact that the referred norm gives every member of the Riigikogu a constitutional right to sufficient and just remuneration.

Finally, he also admits that § 75 of the Constitution reflects the requirement arising from the democratic system of government, that after the elections of a new membership of the Riigikogu the conditions of exercising a mandate must no be amended in principle. Yet, this prohibition of principle is a *prima facie* prohibition that allows to take into account the reasons that in a concrete case justify the violation, the overall conditions, other constitutional values and the whole system of constitutional values.

The Chancellor of Justice argues that the solution lies in the reasons why the Riigikogu passed the law, and in the weight these reasons carry. The Riigikogu passed the Temporary Procedure for Remuneration of Members of the Riigikogu Act to meet the need to economize. This is a serious need arising from objective circumstances supported by the data from the Statistical Office, Eesti Pank, and the Ministry of Finance that indicate that the business environment of Estonia is deteriorating. When making budgetary decisions the legislator can not ignore the objective overall conditions. In the conditions of economic depression this Act constitutes one measure of the package of savings measures. Considering the overall conditions this does not amount to populism, instead this is an expression of solidarity.

The contested Act does not change the procedure for remuneration very extensively. The establishment of a temporary maximum limit of remuneration doest not constitute an essential change of the remuneration system.

Interpreting § 75 of the Constitution as an absolute substantive prohibition may, in the end, undermine the reputation of the parliament. In a parliamentary democracy the high reputation of parliament has an important function. The members of the Riigikogu must take into account the same overall conditions that the society as a whole, and the Constitution as well as the rest of the legal order are applicable to the members of the Riigikogu. Consequently, the Temporary Procedure for Remuneration of Members of the Riigikogu Act is to be deemed a reasonable solution. At the court hearing the Chancellor of Justice added further that the opinion expressed in the petition of the President of the Republic would give an unjust result and would destruct the unity of society. This would not be compatible with the principles of the preamble of the Constitution, pursuant to which the Estonian state is founded on liberty, justice and law.

Upon consistent and purely genetic interpretation of § 75 of the Constitution also the earlier amendment of the remuneration of a member of the Riigikogu during the mandate of the XI membership should have been contested. Then the Status of Members of the Riigikogu Act was passed, which entered into force on 14 July 2007. The Status of Members of the Riigikogu Act contains at least one amendment of remuneration for the sitting membership: as of the entry into force of that Act the members of the Riigikogu no longer have annual rest, and thus they can apply for expenses benefit for 12 months (earlier for 11 months).

The deterioration of conditions of remuneration of a member of the Riigikogu (including the decrease of remuneration) for the sitting membership of the Riigikogu in the present case is also in conformity with the principle of legitimate expectation. Pursuant to § 75 of the Constitution a member of the Riigikogu has a constitutional right to receive sufficient and just remuneration during his or her mandate. Legitimate expectation can not extend beyond this principle.

8. The Minister of Justice supports the petition of the President of the Republic to declare the contested Act unconstitutional, and does not consider it necessary to reiterate the arguments set forth in the petition.

At the court hearing the Minister of Justice explained that the President of the Republic, the Minister of Justice as well as the Estonian society can interpret the contested Act only on the basis of what is written therein. The contested Act is in conflict with the Constitution because the sentences, written in the Estonian language, are in conflict with the Constitution, which is also in Estonian. The Minister of Justice is of the opinion that the approach that grammatical interpretation is of no significance and the only important thing is the idea expressed by the Riigikogu upon passing an Act will result in throwing our mother tongue in the dustbin.

THE CONTESTED ACT

9. The Temporary Procedure for Remuneration of Members of the Riigikogu Act provides for the following:

“§ 1. Payment of remuneration of a member of the Riigikogu in 2009 and 2010

Until 28 February 2010 the remuneration of a member of the Riigikogu shall equal the Estonian average wages of the fourth quarter of 2008 multiplied by the coefficient established in § 29 of the Status of the Members of the Riigikogu Act, but not more than the Estonian average wages of the fourth quarter of 2007 multiplied by the coefficient established in § 29 of the referred Act.

§ 2. Entry into force

This Act shall enter into force on 1 January 2009.”

OPINION OF THE SUPREME COURT EN BANC

10. First, the Supreme Court *en banc* shall establish whether § 75 of the Constitution contains a prohibition to amend the remuneration of a member of the Riigikogu for the sitting membership and the restrictions on the receipt of other employment income (I). Thereafter the Supreme Court *en banc* shall analyse the content of the provision (II) and adjudicate the petition of the President of the Republic (III).

I.

11. § 75 of the Constitution is worded as follows: “The remuneration of members of the Riigikogu and restrictions on the receipt of other employment income shall be provided by law, which may be amended for the next membership of the Riigikogu.”

12. The Supreme Court *en banc* agrees with the President of the Republic and the Chancellor of Justice that

the first clause of § 75 of the constitution reading "[t]he remuneration of members of the Riigikogu and restrictions on the receipt of other employment income shall be provided by law" gives rise to the obligation to establish the remuneration of members of the Riigikogu and restrictions on the receipt of other employment income solely by law.

13. The second clause of § 75 of the Constitution reading "which may be amended for the next membership of the Riigikogu" pertains to the amendment of remuneration and restrictions on the receipt of other employment income. The second clause does not pertain to those provisions that do not regulate remuneration or restrictions on the receipt of other employment income. Consequently, it has to be ascertained whether what has been established in § 75 of the Constitution "[remuneration and restrictions on the receipt of other employment income] may be amended for the next membership of the Riigikogu" – must be understood as prohibition to amend these for the sitting membership of the Riigikogu.

14. The Supreme Court *en banc* is of the opinion that in addition to the obligation addressed to the Riigikogu § 75 of the Constitution also gives rise to the prohibition to amend the remuneration and the restrictions on the receipt of other employment income for the sitting membership of the Riigikogu.

Unlike the Chancellor of Justice the Supreme Court *en banc* is of the opinion that the second clause of § 75 of the Constitution can not be understood as a mere permission to amend the remuneration of members of the Riigikogu and restrictions on the receipt of other employment income for the next membership of the Riigikogu. The provision under discussion differentiates the permissible activities (in the present case the amendment of remuneration and restrictions on the receipt of other employment income for the next membership of the Riigikogu) from those that are not permitted (amendment for the sitting membership).

The competence of the Riigikogu as the legislator (§ 59 of the Constitution) to pass, amend and repeal laws arises from § 65(1) of the Constitution. On the basis of this provision the Riigikogu would have the right to amend the remuneration and restrictions on the receipt of other employment remuneration, already established by law, for the sitting as well as the next membership of the Riigikogu. Thus, the second clause of § 75 of the Constitution would have no independent meaning, because the Riigikogu would have the right to amend the remuneration and restrictions on the receipt of other employment income for the next membership of the Riigikogu even without this clause. Pursuant to the earlier practice of the Supreme Court an Act may not be interpreted in a manner that renders the Act or its provisions meaningless (Constitutional Review Chamber of the Supreme Court judgment of 2 November 1994 no. III 4/A 6/94, paragraph 1). Consequently, the second clause of § 75 of the Constitution must not be interpreted as a useless repetition of the general competence given to the Riigikogu to pass laws, because there exists another reasonable interpretation. The words "for the next membership of the Riigikogu" have an independent meaning in this provision only if the clause is interpreted to mean a prohibition to amend the remuneration of members of the Riigikogu and restrictions on the receipt of other employment income for the sitting membership.

This opinion is supported also by the comparison with the evolution of the provision of similar content in the first Constitution of the Republic of Estonia, the Constitution of 1920. In the draft Constitution of 1920 § 51 read as follows: "Members of the Riigiwolikogu [lower house of the Estonian Parliament] shall receive travel allowances and remuneration, the amount of which shall be provided by law, which may be amended by the Riigiwolikogu only for the next memberships." In the minutes of the Constituent Assembly the following is pointed out in regard to the referred wording: "here is in operation the constitutional principle that it is embarrassing to determine one's own remuneration and that the latter may only be amended for the next membership and the sitting membership must not undertake to amend the remuneration for itself." (Asutawa Kogu IV istungjärk. Protokollid nr 120 – 154. [Plenary Session IV of the Constituent Assembly. Minutes no. 120 154.] Tallinn: Täht, 1920, minutes no. 138, column 830.)

The Chancellor of Justice is of the opinion that what is provided in § 75 of the Constitution can not be interpreted as a prohibiting norm also because unlike § 51 of the 1920 Constitution and § 81(2) of the 1937 Constitution – the provision does not include a qualification that the law establishing the bases of remuneration of members of parliament may be amended "only" for the next membership of the Riigikogu.

The Supreme Court *en banc* does not agree with the historical argument set forth by the Chancellor of Justice. The fact that § 75 of the Constitution does not contain the words "only" or "solely" does not give rise to the conclusion that this provision does not prohibit to amend the remuneration of members of the sitting membership of the Riigikogu. This conclusion is further contravened by the drafting process of § 75 of the Constitution and the systematic interpretation of the Constitution. Namely, in regard to the provision under discussion the following was pointed out by the Constitional Assembly: "[…] the idea has been added that the procedure for remuneration of members of the Riigikogu may be amended *only* [emphasis added by the Supreme Court *en banc*] for the next membership of the Riigikogu." (Põhiseadus ja Põhiseaduse Assamblee [Constitution and the Constitutional Assembly]. Tallinn, 1997, p 553.) Upon systematic interpretation it is impossible to ignore the fact that the words "only" and "solely" were used in the constitutional provisions to emphasise the solutions that are the only possible solutions anyhow. For example, it would be prohibited to exercise the powers of state pursuant to unconstitutional laws even if the first sentence of § 3 of the Constitution did not contain the word "solely". Also, pursuant to § 104(2) of the Constitution the laws enumerated therein could not be passed with the majority of votes in favour, required by § 73 of the Constitution, if § 104(2) did not contain the word "only". Consequently, the leaving out of these emphases does not change the content of constitutional provisions.

15. It proceeds from the above that the second clause of § 75 of the Constitution is to be understood to mean that it is prohibited for the Riigikogu to amend the remuneration of members of the Riigikogu and the restrictions on the receipt of other employment income for the sitting membership of the Riigikogu.

II.

16. The starting point for interpreting the prohibition arising from the second clause of § 75 of the Constitution can be the linguistic expression of the prohibition, i.e. the wording of this provision. In order to determine the content of the prohibition under discussion it has to be clarified what is to be understood by the words "amend" and "remuneration and restrictions on the receipt of other employment income" used in § 75 of the Constitution.

17. Linguistic interpretation must first and foremost be based on the ordinary meaning of words. The interpretation based on the ordinary meaning of words helps to guarantee legal clarity, predictability of legal consequences, legal certainty, and to secure against the interpretational preferences of different decision-makers. In the general language the verb "*muutma*" [to amend] means to dissimilate or make totally different (Eesti kirjakeele seltussõnaraamat, [Explanatory Dictionary of Standard Estonian] vol 3, part 3. Tallinn: Eesti TA Eesti Keele Instituut, 1994). The Dictionary of Correct Usage of Estonian, too, (Tallinn: Eesti Keele Sihtasutus, 2006) attributes to the word "*muutma*" the same meaning.

Thus, in the context of § 75 of the Constitution the prohibition to amend applies to any alteration of the remuneration of members of the Riigikogu and restrictions on the receipt of other employment income. Consequently, it is prohibited for the sitting membership of the Riigikogu to increase and decrease the remuneration, to alleviate the restrictions and impose further restrictions on the receipt of other employment income for themselves, as well as to reorganise the bases for calculating remuneration.

18. Nevertheless, for the historical reasons and due to higher level of abstraction the content of a term employed in the Constitution may differ from the meaning of the same word in the general language or in specific branches of law. That is why the Supreme Court *en banc* still considers it necessary, in addition to general linguistic interpretation, to examine the genesis of this provision, the intent of the drafters of the Constitution, and the purposes of the provision.

19. Historically, the wording of § 75 of the Constitution is based on § 51 of the 1920 Constitution, the amendments thereto by the Constitution Amendment Act of 1933, as well as on § 81(2) of the Constitution of 1937. In all the referred provisions the word "*muutma*" is used in the same context, but none of the provisions makes it clear what exactly is meant by that. Neither can an unambiguous answer to this question be found in the documents reflecting the legislative proceeding of the draft Constitution (the referred

minutes of the Constituent Assembly, explanations to the draft amendments of the Constitution by the participants in the Estonian War of Independence (Tallinn: Edu, 1933), and the working documents of the National Assembly).

20. Unequivocal clarity as to the meaning of the prohibition arising from § 75 of the Constitution can not be found on the basis of the discussions at the Constitutional Assembly, either. § 59 of the draft Constitution in the wording of 13 December 1991 reads as follows: "Members of the Riigikogu shall receive remuneration for their work. The types and amount or remuneration and restrictions on the receipt of other employment income shall be provided by law, which may be amended for the next membership of the Riigikogu." In regard to the latter clause it was pointed out at the Constitutional Assembly that "[…] the idea has been added that the procedure for remuneration of members of the Riigikogu may be amended only for the next membership of the Riigikogu. We hold that it is a matter of course that a democratic parliament should have such a norm" (Põhiseadus ja Põhiseaduse Assamblee [Constitution and the Constitutional Assembly]. Tallinn, 1997, p 553.) When reporting on the letters that the Constitutional Assembly had received regarding the draft Constitution, it was pointed out that "[t]here is the fear that the Riigikogu, having been given the right to determine its own remuneration, may establish high salary, thus increasing the public expenditure" (ibid., p 695).

The Supreme Court *en banc* is of the opinion that on the basis of the referred statements it can not be concluded that the drafters of the Constitution intended to attribute to the word "*muutma*" in § 75 of the Constitution a meaning different from the ordinary meaning of the word.

21. Further, the objective purposes attributable to the prohibition included in § 75 of the Constitution have to be taken into account.

The purpose of the prohibition is first, to create a situation where persons who are members of a constitutional institution can not determine their own remuneration. Determination of one's own remuneration would inevitably cause a conflict of interests. Bearing in mind this objective the first things to be precluded are increase of remuneration and alleviation of restrictions on the receipt of other employment income.

The purpose of the prohibition under discussion – at least partly – is also to prevent the members of the Riigikogu from dealing with the issues of their remuneration for populist considerations. In essence, this provision offers protection against pressure to deal with the issue of determining their own remuneration. Nevertheless, as the prohibition is not applicable to determination of remuneration for the following memberships of the Riigikogu, the populist considerations upon deciding on remuneration and restrictions on other employment income can not be entirely precluded.

It is also possible to see behind this prohibition the purpose of protecting the minority of the sitting membership of the parliament against the possible decision of the majority to deteriorate the situation of political opponents by decreasing their remuneration or imposing further restrictions on the receipt of other employment income. It is not only § 75 of the Constitution that protects the members of the Riigikogu from excessive decrease of their remuneration but also § 60(2) and § 62 of the Constitution. First, the remuneration established for members of the Riigikogu for the discharge of the obligation arising from § 75 of the Constitution must guarantee an equal right to be a candidate for the Riigikogu (§ 60(2) of the Constitution) to both financially secure and to not so well-off persons. The remuneration must be such as to enable a person who is elected to the Riigikogu to fulfil the duties of a member of the Riigikogu as his or her principal job, and ensure to him or her a standard of living commensurate with the dignity and burden of responsibilities of the position. Secondly, the remuneration established under § 75 of the Constitution must guarantee the free use of mandate by members of the Riigikogu (§ 62 of the Constitution), i.e. the possibility to perform their duties independently and to make political choices according to their conscience.

On the basis of what has been pointed out in this paragraph the Supreme Court en banc is of the opinion that the analysis of the purposes attributable to the prohibition arising from the second clause of § 75 of the

Constitution does not allow to conclude that the word "*muutma*" should be given a meaning different from the ordinary meaning in the language in general.

22. Next, the Supreme Court *en banc* shall ascertain how the words "remuneration and restrictions on the receipt of other employment income" of § 75 of the Constitution should be understood. It appears from the shorthand notes of the Constitutional Assembly that under employment income the drafters of the Constitution bore in mind the income received for other work than that of a member of the parliament, and they have precluded the possibility of receiving proprietary income (op.cit., p 370). In the wording of § 75 of the Constitution "remuneration" is syntactically related to "other employment income", therefore, for the purposes of this provision, the remuneration must be interpreted to mean the remuneration payable for the work of a member of the Riigikogu, that is remuneration for work, i.e. wages.

23. Consequently, the second clause of § 75 of the Constitution must be understood to mean that it is prohibited for the Riigikogu to increase and decrease the salary of members of the Riigikogu, alleviate and impose further restrictions on the receipt of other employment income, and to reorganise the bases for calculating remuneration for the sitting membership of the Riigikogu.

The prohibition arising from § 75 of the Constitution, according to the wording of the provision, does not extend to expenses benefits related to the work of members of the Riigikogu. In contractual relations and in public service, too, the work-related expenses benefits of the legislator are not deemed a part of wages. For example, the following do not constitute a part of wages: compensation for travel expenses (The Wages Act, RT I 1994, 11, 154; § 27), expenses related to resettlement (The Defence Forces Service Act, RT I 2000, 28, 167; § 162) or compensation of travel expenses to boarder guard officials (The Border Guard Service Act, RT I 2007, 24, 126; § 46). Substantive restrictions on regulating expenses benefits relating to the work of members of the Riigikogu may arise from the obligation to guarantee an extensive right to be a candidate for the Riigikogu (§ 60(2) of the Constitution) and the freedom to use the mandate of a member of the Riigikogu (§ 62 of the Constitution). The types and limits of expenses benefits are to be determined bearing in mind the purposes of §§ 60(2) and 62 of the Constitution, and the payment thereof must not serve other interests, such as financing a faction or a political party or covering of election costs. Neither must such benefits in essence constitute a bonus payable to the members of the Riigikogu.

Bearing in mind the above interpretation the procedure for compensating for the work-related expenses of members of the Riigikogu may be amended for the sitting membership of the Riigikogu.

III.

24. The contested Act is meant to regulate the temporary procedure for the remuneration of members of the Riigikogu. Thus, in order to adjudicate the petition of the President of the Republic it must be ascertained first, whether the Riigikogu has – by this Act – amended the remuneration of members of the Riigikogu for the sitting membership, i.e. has increased or decreased the remuneration or has reorganised the bases for calculating the remuneration.

25. The bases for the formation of the remuneration of members of the Riigikogu are provided in § 29 of the SMRA. Pursuant to subsection (1) of this section the remuneration of a member of the Riigikogu shall equal the Estonian average wages multiplied by the coefficient established in subsections (2) – (6) of the same section. Pursuant to § 29(7) of the SMRA the remuneration of members of the Riigikogu is recalculated after February 26 every year. The basis of the calculation shall be the Estonia's average wages of the fourth quarter of the previous year as submitted by the Statistical Office. This is how every year the remuneration of members of the Riigikogu is calculated for the next 12 months beginning from 1 March.

26. The Riigikogu wishes, by the Act under discussion, to amend the bases of calculation of remuneration so that beginning from 1 March 2009 until 28 February 2010 the remuneration of members of the Riigikogu would equal the Estonia's average wages of the fourth quarter of 2008 multiplied by relevant coefficient only if the average wages of the fourth quarter of 2008 is equal or less than the average wages of the fourth

quarter of 2007.

The described amendment has to be deemed reorganisation of bases for calculating remuneration, i.e. amendment of remuneration for the purposes of § 75 of the Constitution. In this context it is irrelevant whether the Act under discussion will in fact result in the change of remuneration in comparison to the remuneration calculated on the basis of previous procedure for remuneration.

27. The date of entry into force of the Act is meant to be 1 January 2009, and the Act is meant to regulate the procedure for remuneration of members of the Riigikogu until 28 February 2010. As, supposedly, the authority of the members of the XI membership of the Riigikogu shall terminate after the proclamation of the Riigikogu elections of March 2011, it is obvious that the bases of calculating the remuneration of members of the Riigikogu have been amended for the sitting membership.

28. As a matter of fact, it appears from the explanatory letter to the Act and the legislative proceeding in the Riigikogu that the prohibition included in § 75 of the Constitution may be temporarily infringed when the decrease of remuneration or the reorganisation of the bases for calculation of the remuneration arise from the necessity to economize state budget funds in a situation where the economic growth of the state has come to a halt. Also, it can be concluded from the opinion of the Chancellor of Justice that the prohibition arising from the second clause of § 75 of the Constitution is not an absolute one and that it may be ignored for weighty reasons. The Chancellor of Justice is of the opinion that the necessity of strict economy caused by the deterioration of Estonia's economic environment constitutes such a weighty reason.

29. The Supreme Court en banc is of the opinion that in addition to the general linguistic interpretation also other provisions of the Constitution, primarily §§ 60(2), 62 and 130, are to be taken into account upon the application of § 75 of the Constitution. These provisions in their conjunction give rise to the norm pursuant to which it is prohibited for the sitting membership of the Riigikogu to amend for themselves the remuneration of members of the Riigikogu and the restrictions of the receipt of other employment income, except in the cases when it endangers the independence of members of the Riigikogu and the freedom of their mandate or the national defence. The necessity of application of this norm may arise e.g. because of hyperinflation. In such a situation, in order to avoid conflict with the obligation to guarantee to the members of the Riigikogu a remuneration that is sufficient and ensures their independence and the freedom of exercise of their mandate, arising from §§ 60(2) and 62 of the Constitution, it may prove necessary to amend the remuneration of members of the Riigikogu by the sitting membership. The amendment of the remuneration of and restrictions on the receipt of other employment income by members of the Riigikogu may prove constitutional also when the previous membership of the Riigikogu has established such provisions for the next membership that do not guarantee sufficient income, independence and freedom to exercise their mandate. The necessity to apply the described norm may also be conditioned by the declaration of a state of war, under which it may be required to amend the remuneration of members of the Riigikogu by the sitting membership with the aim of using the state budget funds for national defence. In the case under discussion no such situations exist, therefore no exceptions can be made upon application of § 75 of the Constitution.

30. As, pursuant to § 75 of the Constitution, it is prohibited to reorganise the bases for calculating the remuneration of the members of the Riigikogu so that the amendments are enacted for the membership of the Riigikogu who has passed these, and there exist no situations discussed in the previous paragraph, the contested Act is in conflict with the Constitution.

31. The Supreme Court *en banc* further adds that the exclusion of decrease of remuneration of members of the Riigikogu or the reorganisation of the bases of calculating the remuneration from the application of § 75 of the Constitution is possible through urgent amendment of the Constitution.

32. Taking into account the above considerations the Supreme Court *en banc* satisfies the petition of the President of the Republic and declares, on the basis of § 15(1) of the CRCPA, the Temporary Procedure for Remuneration of Members of the Riigikogu Act unconstitutional.

Dissenting opinion of justices Henn Jõks, Ants Kull, Villu Kõve, Lea Laarmaa and Tambet Tampuu to the judgment of the Supreme Court *en banc* in case no. 3-4-1-18-08

1. We are of the opinion that the Temporary Procedure for Remuneration of Members of the Riigikogu Act, passed by the Riigikogu on 2 December 2008 (the contested Act) is not in conflict with the Constitution and the petition of the President of the Republic should have been dismissed.

2. When interpreting the provisions of a law, including those of the Constitution, all methods of interpretation law must be employed, having first ascertained the grammatical meaning of the applicable provision.

If a constitutional provision applicable in the constitutional review court proceeding establishes a prohibition of certain conduct, the Supreme Court must ascertain the purpose of the prohibition and assess whether the contested Act is in conformity therewith. The interpretation of a prohibiting provision of the Constitution must be based on the constitutional principles and values. This requirement directly arises from § 152(2) of the Constitution, pursuant to which the Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution. Thus, upon implementing the Constitution the spirit of the Constitution must be preserved alongside with the provisions thereof. Unfortunately, the spirit of the Constitution has been abandoned upon satisfying the petition of the Head of State.

3. We are of the opinion that the judgment of the Supreme Court *en banc* is inconsistent. Namely, the general logic of the Supreme Court *en banc* judgment is based on the assumption that according to § 75 of the Constitution it is prohibited for the Riigikogu to amend the law establishing the remuneration of members of the Riigikogu for the sitting membership (see paragraphs 14 and 15 of the judgment). At the same time the Supreme Court *en banc* argues that when applying § 75 of the Constitution also other provisions of the Constitution, primarily §§ 60(2), 62 and 130, must be taken into account in addition to general linguistic interpretation, and that the prohibition arising from § 75 of the Constitution is not valid in the cases when the application of the prohibition would endanger the independence of members of the Riigikogu and the freedom of their mandate or the national defence (see paragraph 29 of the judgment). Consequently, the Supreme Court *en banc* does not find the prohibition established in § 75 of the Constitution to be an absolute one. Yet, the Supreme Court *en banc* judgment does not explain why, upon application of § 75 of the Constitution, the constitutional principles and constitutional values are not to be taken into account.

4. § 75 of the Constitution reads as follows: “The remuneration of members of the Riigikogu and restrictions on the receipt of other employment income shall be provided by law, which may [*Estonian: tohib*] be amended for the next membership of the Riigikogu.”

The verb “*võima*” [to be permitted] is a synonym of the verb “*tohtima*” [to be allowed] (see Dictionary of Synonyms. Accessible at:http://www.eki.ee/dict/synonyymid/index.cgi?Q=tohtima&F=M&O=0&E=0 [1]). These verbs can be utilised for wording a prohibition, but in that case a negation must be added to them or an expression limiting permissibility, e.g. “*välja arvatud*” [except]. We would have an explicit prohibition in § 75 of the Constitution if the coma were followed by the words “which must not be amended for the sitting membership of the Riigikogu.” To underline a prohibition the word “*ainult*” [only] has been used in §§ 11, 20, 21, 38, 48, 72, 76, 85, 101, 104, 138, 145, 146, 153 and 162, and the word “*üksnes*” [solely] in §§ 3, 20, 140 and 147 of the Constitution.

Thus, we do not agree with the opinion of the majority of the Supreme Court *en banc* that the words “only” and “solely” are used in the Constitution to emphasise the solutions that are the only possible solutions anyhow (see the firth indent of paragraph 14 of the judgment). We do not think that the wording of § 75 of the Constitution itself, i.e. read independently from other constitutional provisions, gives rise to the conclusion that the provision contains a prohibition of certain conduct. On the contrary – according to the

wording of § 75 of the Constitution the Riigikogu is permitted to amend the law regulating the remuneration of the next membership of the Riigikogu. The earlier Constitutions of the Republic of Estonia (the Constitutions of 1920, 1933 and 1937) provided that the Riigikogu may amend the law on remuneration of members of the Riigikogu only for the next memberships of the Riigikogu.

It can still be concluded from the other provisions of the Constitution and the working documents of the Constitutional Assembly that § 75 of the Constitution is meant as a prohibition to amend the law regulating the remuneration of members of the Riigikogu for the sitting membership of the Riigikogu. Nevertheless, we do not agree with the opinion that the prohibition arising from § 75 of the Constitution also includes such an amendment of the law establishing the remuneration of members of the Riigikogu, by which the increase of salary of the sitting membership of the Riigikogu is suspended.

5. In paragraph 21 of the judgment the Supreme Court *en banc* considered the purpose of the prohibition established in § 75 of the Constitution to be the creation of a situation wherein the members of a constitutional institution could not determine their own remuneration, because deciding on one's own remuneration inevitably causes a conflict of interests. The second purpose was pointed out to be the necessity to prevent the dealing with the issue of one's own remuneration for populist considerations. The third purpose of the prohibition was found to be the protection of the majority of the membership of the parliament against the decisions of the majority to deteriorate the situation of political opponents. Fourthly, it was argued that § 75 of the Constitution protects the free use of the mandate of members of the Riigikogu, i.e. the possibility to perform duties independently and make political choices proceeding from one's conscience. In this context it is worth pointing out that the Supreme Court *en banc* did not find that the contested Act was in conflict with the referred purposes.

Next, we shall set out our opinion concerning the purposes attributed by the Supreme Court *en banc* to the prohibition included in § 75 of the Constitution.

It appears from the working documents of the Constitutional Assembly that § 75 of the Constitution addresses the danger that the sitting membership of the Riigikogu may start to increase its remuneration. This idea was clearly expressed by Liia Hänni when - addressing the 21stsitting of the Constitutional Assembly - she reported on the written proposals received by the Assembly (see Põhiseadus ja Põhiseaduse Assamblee [Constitution and the Constitutional Assembly]. Tallinn, 1997, p 695.) As a result of previous discussions and examination of the received proposals by the Constitutional Assembly, § 75 of the Constitution was put to referendum in the wording not containing the word "only". This allows to conclude that when drafting the Constitution and adopting it by referendum the intent was to prohibit only the increasing of the remuneration of members of the Riigikogu for the sitting membership of the Riigikogu.

The referred conclusion was also reached by the Expert Committee for the Review of the Constitution of the Republic of Estonia in its final report. The experts pointed out the following: "The aim of § 75 of the Constitution is to prevent the enrichment of the members of the Riigikogu at the cost of the tax-payer. To ensure even greater stability the Constitution provides for an additional restriction and requires the majority of the membership of the Riigikogu for the determination of remuneration of members of the Riigikogu (§ 104(2)7) of the Constitution). § 75 of the Constitution restricts the competence of the Riigikogu. The Riigikogu must not, first of all, regulate the remuneration of the sitting membership. The purpose of this provision is to prevent the possibility that the legislator may increase its remuneration without restraint. The second half of the sentence of § 75, after comma, establishing the restriction that respective procedure for remuneration can become valid only for the next membership of the Riigikogu, is logically valid only in regard to the law regulating the amount of remuneration of members of the Riigikogu. This norm is based on the assumption that the Riigikogu shall never decrease the remuneration of its members." (Accessible at: http://www.just.ee/10732 [2].)

We can agree with the Supreme Court *en banc* that the purpose of § 75 of the Constitution is to create a situation where the members of a constitutional institution can not determine their own remuneration and, thus, to prevent the conflict of interests (see the second indent of paragraph 21 of the judgment). We do not

think that by voting for the suspension of the increase of their remuneration the Riigikogu has gotten into a conflict of interests.

Neither can we agree with the opinion of the majority of the Supreme Court *en banc* that the prohibition established in § 75 of the Constitution serves the aim of preventing the dealing with the issue of remuneration of members of the Riigikogu on populist grounds (see the third indent of paragraph 21 of the judgment). The word *populism* does have a negative connotation in conventional usage, but this is an inappropriate concept to be used for the implementation of the Constitution. We argue that it is not right, without defining what populism is, to set the passing of laws for allegedly populist motifs against constitutional regime, i.e. the general right of the Riigikogu to pass laws (§ 65(1) of the Constitution. If populism were to mean, for example, political activities (including voting for draft laws in the Riigikogu) with the aim of achieving bigger support of the electorate, it is obvious that such activities are not unconstitutional and as such are not covered by the purpose of the prohibition arising from § 75 of the Constitution. We would like to underline further that in the judicial proceeding none of the participants called the contested Act a populist one.

We do admit that the purpose of § 75 of the Constitution may be, among other things, to protect the parliamentary minority against the possible decisions of the majority to deteriorate the situation of the minority by decreasing their remuneration or by imposing additional restrictions on the receipt of other employment income (the fourth indent of paragraph 21 of the judgment). Yet, this aim has not been prejudiced by the contested Act. Firstly, the members of the Riigikogu belonging to both coalition and opposition voted in favour of the contested Act (the total of 58 members of the Riigikogu) and only one voted against. Secondly, the contested Act, if it entered into force, would apply to the members of the Riigikogu belonging to both coalition and opposition, and it would not prejudice the situation of the minority in comparison to that of the majority.

We agree that the first clause of § 75 of the Constitution gives rise to the obligation to establish a remuneration enabling the free use of the mandate of a member of the Riigikogu (see the fourth indent of paragraph 21 of the judgment). At the same time nobody has argued in the present case that upon entry into force of the contested Act the remuneration of members of the Riigikogu would not be sufficient for the free use of the mandate acquired through elections.

6. To assess the conformity of the contested Act with § 75 of the Constitution, both § 75 of the Constitution and the contested Act have to be interpreted taking into account the constitutional principles and constitutional values, bearing in mind – in addition to the purposes of § 75 of the Constitution – also the purposes of the contested Act. The purpose of the contested Act, pursuant to the explanatory letter to it (accessible at: http://www.riigikogu.ee/?page=en [3] vaade&op=ems&eid=406662&u=20090216124800) is to economize the state budget funds.

We find that the economizing of the state budget funds at the cost of the remuneration of the sitting membership of the Riigikogu to the extent and in the manner established in the contested Act is – under the conditions of the deepening economic crisis – in conformity with the principles of the state based on social justice, democracy and the rule of law as arising from the preamble and from § 10 of the Constitution, and that it is an expression of solidarity of all members of society, and carries the idea of justice as a constitutional value. The contested Act would also guarantee a reasonable proportion of wages between the different branches of power. The Supreme Court *en banc* did not bother to weight these principles and values. Instead the Supreme Court en banc has addressed hypothetical situations that might justify the increase of remuneration of members of the Riigikogu for the same membership (see paragraph 29 of the judgment).

The adjudication of constitutional review matters is to lesser or greater extent influenced by the beliefs and value judgments of the adjudicators. We do not share the opinion expressed in paragraph 29 of the Supreme court *en banc* judgment that the suspension of the increase of remuneration of the sitting membership of the Riigikogu would be justified solely by the declaration of a state of war and not by the current economic

situation.

7. In paragraph 23 of the judgment the Supreme Court *en banc* has failed to take into account §§ 4, 5, 10 and 14 of the Constitutional Review Court Procedure Act. The object of dispute is not the amendment of the procedure for paying the expenses benefits to members of the Riigikogu. We do not consider it right that the Supreme Court *en banc* renders a judgment concerning an issue in regard to which a constitutional review proceeding has not been initiated, which is not relevant for the adjudication of the matter and concerning which the participants in the proceeding have had no possibility to express their opinion.

It is argued in the referred paragraph of the Supreme Court *en banc* judgment that the procedure for compensating for the work-related expenses of members of the Riigikogu may be amended for the sitting membership of the Riigikogu. This opinion does not make it clear whether what was born in mind was the procedure for compensating for work-related expenses in the abstract sense or the provisions that currently regulate the compensation for the work-related expenses of members of the Riigikogu.

Links
[1] http://www.eki.ee/dict/synonyymid/index.cgi?Q=tohtima&F=M&O=0&E=0
[2] http://www.just.ee/10732
[3] http://www.riigikogu.ee/?page=en