Constitutional judgment 3-1-1-86-07

**JUDGMENT
OF THE GENERAL ASSEMBLY
OF THE SUPREME COURT**

No. of the case	3-1-1-86-07
Date of judgment	16 May 2008
Composition of court	Märt Rask and 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, Julia Laffranque, Jaak Luik, Jüri Põld, Harri Salmann and Tambet Tampuu
Court Case	Misdemeanour matter concerning punishment of Indrek Eiche under § 54^7(1) of the Public Transport Act.
Disputed judgment	Judgment of the Harju County Court of 19 June 2007 in misdemeanour matter no 4-07-1655
Complainant and the type of appeal	Appeal in cassation of sworn advocate Alar Eiche, counsel of Indrek Eiche
Date of hearing	19 February 2008
Persons participating at hearing	Counsel of Indrek Eiche: sworn advocate Alar Eiche; representative of the AS Ühisteenused: sworn advocate Margo Lemetti, and representatives of the Chancellor of Justice: Deputy Chancellor of Justice-Adviser Madis Ernits and adviser to the Chancellor of Justice Nele Parrest

DECISION

1. To declare § 54^{11}(3) of the Public Transport Act and §§ 9(3) and 10(5) of the Code of Misdemeanour Procedure unconstitutional and invalid.
2. To annul the judgment of the Harju County Court of 19 June 2007 concerning punishment of Indrek Eiche under § 54^{7}(1) of the Public Transport Act, and to terminate the misdemeanour proceeding under § 29(1)1) of the Code of Misdemeanour Procedure, because the act in question, committed by I. Eiche, does not contain the elements of a misdemeanour.
3. To satisfy the appeal in cassation.
4. To refuse to hear the application of Indrek Eiche to declare the stopping of public transport vehicles by AS Ühisteenused in between stops unlawful.

FACTS AND COURSE OF PROCEEDING

1. By her decision of 19 March 2007 Riina Helenurm, the city transport employee of the ticket inspection group of the AS Ühisteenused punished Indrek Eiche, on the basis of § 54^{7}(1) of the Public Transport Act (hereinafter "the PTA"), by a fine of 8 fine units (480 kroons) because on 22 February 2007 he had travelled by public transport vehicle without a document certifying the right to use public transport.

2. I. Eiche filed an appeal against the decision of the body conducting extra-judicial proceedings, applying for the annulment of the decision on punishment and the termination of the misdemeanour proceeding, and for the declaration of unlawfulness of stopping public transport vehicles in between stops by the AS Ühisteenused.

3. By the judgment of the Harju County Court of 19 June 2007 the decision of the body conducting extra-judicial proceedings on the punishment imposed on I. Eiche was annulled and I Eiche was punished by a fine of 4 fine units (240 kroons). The rest of the appeal was dismissed.

3.1. The county court pointed out that at the time of inspection I. Eiche lacked a document certifying the right to use public transport. The court can not define the concept "perforation of ticket in a specific type of hole puncher within a reasonable time", because according to § 7(3)2) of the General Rules for Regular Carriage of Passengers by Bus, Occasional Carriage by Bus, Taxi Service and Carriage of Baggage, approved by the Minister of Transport and Communications on the basis of § 52(1) of the PTA, a passenger is required to perforate a ticket in a specific type of hole puncher immediately after entering the vehicle. According to § 8(7) of the Procedure for Payment for Journey in Public Transport Vehicles in Tallinn, established by a regulation of the Tallinn City Council, a passenger is required to perforate a ticket in a specific type of hole puncher immediately after entering the vehicle. That is why the county court argued that the conduct of I. Eiche in a public transport vehicle was not in conformity either with the referred general rules or the regulation, because at the time of inspection he lacked a ticked perforated in a specific type of hole puncher. I. Eiche did not happen to be in a public transport vehicle by a chance, instead he had entered it with the wish of availing himself of the service, and thus he committed the misdemeanour of which he is accused. The court found that as I. Eiche had almost reached the specific type of hole puncher, yet he had not been able to use it by the time of inspection, he had committed an offence through negligence in the form of carelessness, as he had not performed the obligation of conscientiousness. The conscientious and attentive attitude expected of him as a passenger required that he ought to have perforated a ticket immediately after entering the public transport vehicle.

3.2. The county court did not agree with the opinion of the person subject to the proceedings that N. Savtšenkova and M. Serkin were not competent to conduct proceedings. Neither did the court agree with the allegation that in a situation where one city transport service employee, i.e. N. Savtšenkova, commenced a

proceeding by apprehending a passenger without a document certifying the right to use public transport, she must have concluded the proceedings and must not have authorised M. Serkin to continue the proceedings and prepare a misdemeanour report. The court is of the opinion that this argument is not based on the law. According to § 54^{11}(3) of the PTA the extra-judicial proceedings concerning the misdemeanours provided for in § 54^{7} of this Act may be conducted by a legal person in private law on the basis of a contract under public law entered into with an extra-judicial body specified in § 54^{11}(2) 3), 4) and 5). On the basis of the provisions of § 9(3) of the Code of Misdemeanour Procedure (hereinafter "the CMP") a body conducting extra-judicial proceedings shall be a legal person in private law on the basis of a contract under public law, and not a concrete employee of the body conducting extra-judicial proceedings.

3.3. It is pointed out in the court judgment that although different Acts and rules are referred to in the appeal, none of these give rise to the unlawfulness of the stopping of public transport vehicles in between stops with the aim of ticket inspection. The restriction of the appellant's constitutional freedom of movement could be presumed by stopping a public transport vehicle in between stops, but if he had had a document certifying the right to use public transport, the appellant would not have been escorted out of the tram for the preparation of a misdemeanour report. Neither has the court received any complaints from other passengers of the tram which had been stopped that their rights had been violated by the stopping of the vehicle. Thus, it could be concluded as if of all the 20 passengers travelling in the tram which was stopped only the rights of the appellant were infringed, whereas he proved the only one lacking a document certifying the right to use public transport and concerning who a misdemeanour proceeding was commenced. The court held that a misdemeanour proceeding commenced against a person who has committed a misdemeanour is meant to restrict the person's freedom of movement, because otherwise it would be impossible to conduct a misdemeanour proceeding. The appeal stated further that the person conducting extra-judicial proceedings had not presented a certificate of competency, had behaved badly and that the person had signed the interrogation record before the person subject to the proceeding had written an explanation. The court found that none of the referred circumstances render the misdemeanour committed by I. Eiche non-existent and could not serve as a ground for the annulment of the contested decision for the purposes of § 150 of the CMP.

3.4. In regard to the punishment the county court pointed out that no circumstances aggravating or mitigating liability have been ascertained concerning I. Eiche. That is why, according to the established judicial practice, he must have been punished by a sanction of medium category. Yet, taking further into account that I. Eiche had committed the offence for the first time and out of negligence, the county court deemed it justified to punish him by a sanction of less than the medium category.

4. Indrek Eiche's counsel, sworn advocate Alar Eiche, submitted an appeal in cassation against the judgment of the Harju County Court, applying for the annulment of the county court judgment and termination of the misdemeanour proceeding.

5. On the basis of § 169(2) of the CMP, by its ruling of 31 December 2007, the Criminal Chamber of the Supreme Court referred the misdemeanour matter to the general assembly of the Supreme Court for hearing.

It appears from the file of the misdemeanour case that it was a city transport employee of the ticket inspection group of the AS Ühisteenused who punished I. Eiche on the basis of § 547(1) of the PTA by the decision of 19 March 2007. The AS Ühisteenused is a legal person in private law on whom the duties of a body conducting extra-judicial proceedings have been imposed on the basis of a contract under public law entered into with the city of Tallinn. The possibility to delegate the conduct of extra-judicial proceedings concerning the misdemeanours provided for in §§ 54^{1}, 54^{2}, 54^{3}, 54^{4}, 54^{5}, 54^{6}, 54^{7} and 54^{10} of the PTA to a legal person in private law is established in § 54^{11}(3) of the PTA. According to the first subsection of the same section all the provisions of the misdemeanour procedure shall apply to such bodies in private law conducting extra-judicial proceedings.

The Chamber agreed with the appellant in cassation that the adjudication of this misdemeanour matter requires the commencement of a constitutional review proceeding with the aim of finding out whether § 54^{11}

(3) of the PTA was in conformity with the provisions of the preamble and §§ 3, 10, 13 and 14 of the Constitution in their conjunction. According to generally recognised opinion the proceedings of offences, including misdemeanour procedures, constitute a sphere where – on the basis of the Constitution itself – be biggest number and the most serious infringements of fundamental rights are acceptable. This means, in turn, that especially in the case of procedures concerning offences, in each concrete case there must be a maximum guarantee on the state level that the infringements are legal and justified. The Chamber is of the opinion that it is first and foremost the possible intensity of infringement of fundamental rights that serves as a basis for examining, by way of constitutional review, whether proceedings of offences and the state's penal power related thereto constitute such core functions of the state the delegation of which to private sector is not constitutional.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING

6. The counsel of I. Eiche is of the opinion that by the finding that a passenger is required to perforate his ticket immediately after entering a public transport vehicle and not within a reasonable time, the county court had wrongly interpreted § 7(3)2 of the General Rules for Regular Carriage of Passengers. The counsel points out that the official of the body conducting the extra-judicial proceeding did not present, irrespective of I. Eiche's relevant request, a certificate of competency, and thus violated § 10(4) of the CMP. In addition, the counsel argues that the proceeding concerning the alleged misdemeanour of I. Eiche was conducted by a body without the right to conduct proceedings. As the decision of the body conducting extra-judicial proceedings does not address the arguments presented in the objection of the person subject to the proceeding, the decision of the body conducting extra-judicial proceedings is not reasoned and thus the law of misdemeanour procedure for the purposes of § 150(1)7) of the CMP has been fundamentally violated. The appellant in cassation is of the opinion that the body conducting extra-judicial proceedings has fundamentally breached the law on misdemeanour procedure also for the purposes of § 150(1)8) of the CMP. The counsel points out further that the AS Ühisteenused, who is the body conducting extra-judicial proceeding of the misdemeanour matter, has no competence to stop a public transport vehicle in between stops, and that therefore the activities of the AS Ühisteenused upon conducting the proceeding concerning the misdemeanour matter have been illegal. The appellant in cassation also raises the issue of whether the delegation of the functions of a body conducting extra-judicial proceedings to legal persons in private law is in conformity with the provisions of § 3(1) of the Constitution.

7. Representative of the AS Ühisteenused, sworn advocate Margo Lemetti, submitted an opinion to the Supreme Court, pointing out the following. Transfer of public functions to a legal person in private law is permissible on the basis of a formal legal authorisation and on the condition that the norm-making and supervision guarantee effective protection of persons' fundamental rights. It is within the competence of the Tallinn City Government, on the basis of § 6(1) of the Local Government Organisation Act, §§ 4, 5(1)11), 54^{7} and 54^{11}(2)3) of the PTA, to organise public transport within the city, as well as to organise the sale of transport tickets, ticket inspection and conduct of misdemeanour proceedings concerning travel without a ticket. § 9(3) of the CMP, § 54^{11}(1)3) of the PTA, and §§ 3(2) and 5(1) of the Administrative Cooperation Act in their conjunction form a formal legal authorisation, on the basis of which the Tallinn City Government may, on the basis of contracts under public law, authorise legal persons in private law to perform the duties of a body conducting extra-judicial proceedings concerning misdemeanours provided for in §§ 54^{1}, 54^{2}, 54^{3}, 54^{4}, 54^{5}, 54^{6}, 54^{7} and 54^{10} of the PTA. As all fundamental and procedural rights are guaranteed to persons subject to proceedings irrespective of whether the body conducting extra-judicial proceedings is a legal person in private law, and as a local government has the right to exercise supervision over a legal person in private law on the basis of § 5(1) of the PTA, the misdemeanour procedures conducted by a legal person in private law can not involve more intensive infringements of fundamental rights than the procedures conducted by any other body conducting the proceedings. That is why the respondent is of the opinion that § 54^{11}(3) of the PTA is not in conflict with the provisions of the preamble and §§ 3, 10, 13 and 14 of the Constitution in their conjunction, and the respondent requests the general assembly of the Supreme Court not to declare the contested provision of law unconstitutional.

8. The Chancellor of Justice is of the opinion that § 54^{11}(3) of the PTA and §§ 9(3) and 10(5) of the CMP,

to the extent that these provide that a body conducting extra-judicial proceedings of misdemeanour matters is a legal person in private law on the basis of a contract under public law, are in conflict with the preamble and with §§ 1, 10, 13, 14, 19 and 30 of the Constitution. The Chancellor of Justice points out that the Constitution prohibits the state authorities to delegate the core functions of the state outside the public sector. The prohibition to delegate the core functions of the state arises from the basic democratic principle, the state's monopoly of power, from the fundamental rights and from the requirement of existence of officials, all binding on all three powers of the state. The violation of this prohibition means erring against the division of competencies established by the Constitution. The Chancellor of Justice is of the opinion that the exercise of the penal power is a core function of the state, and thus the delegation of the right to conduct misdemeanour proceedings and take decisions in misdemeanour matters to a legal person in private law is in conflict with the constitutional prohibition to delegate core functions.

9. The Minister of Justice is of the opinion that the penal power of the state in the sphere of procedures of offences constitutes one of the so called core functions of the state, and therefore the transfer of the function to a legal person in private law is, as a rule, precluded. Nevertheless, the Minister of Justice is of the opinion that in the case the penal power is transferred to a limited extent in the misdemeanour procedure, and if sufficient supervision over the body conducting proceedings and the protection of the fundamental rights of persons subject to proceedings are guaranteed, this can not be considered unconstitutional *a priori*. A legitimate and weighty aim of the delegation of the rights to conduct proceedings is to guarantee exhaustive control over offenders in the cases when the state itself or – primarily—a local government lacks sufficient capability and capacity to exercise direct control over the observance of the established requirements and impose sanctions. From the aspect of protection of persons' rights it is of primary importance that the maximum rate of punishments imposable by a legal person in private law is small and that the discretion of a person conducting misdemeanour proceedings on the basis of a contract under public law upon imposing sanctions is narrow. That is why the contested norms can not be considered unconstitutional.

10. At the hearing of the general assembly of the Supreme Court the participants in the proceeding adhered to their written opinions.

RELEVANT PROVISIONS

11. The Public Transport Act (RT I 2000, 10, 58; 2007, 12, 66) provides as follows:

"[…]

§ 54^{7}. Travel without document certifying right to use public transport and refusal to pay taxi travel fare

(1) Travel without a document certifying the right to use public transport on a bus, tram, trolleybus or passenger train is punishable by a fine of up to 10 fine units.

[…]

§ 54^{11}. Proceedings

[…]

(3) The extra-judicial proceedings concerning the misdemeanours provided for in §§ 54^{1}, 54^{2}, 54^{3}, 54^{4}, 54^{5}, 54^{6}, 54^{7} and 54^{10} of this Act shall be conducted by a legal person in private law on the basis of a contract under public law entered into with an extra-judicial body specified in clauses (2) 3)–5) of this section."

The Code of Misdemeanour Procedure (RT I 2002, 50, 313; 2008, 1, 1) provides as follows:

"[…]

§ 9. Bodies conducting extra-judicial proceedings

In the cases provided by law, extra-judicial proceedings shall be conducted by:

[…]

3) legal persons in private law on the basis of a contract under public law.

[…]

§ 10. Official of body conducting extra-judicial proceedings

[…]

(5) A legal person in private law specified in clause 9 3) of this Code shall participate in misdemeanour procedure through its employee. The provisions of subsections (2)-(4) of this section apply to legal persons in private law, taking account their differences."

OPINION OF THE GENERAL ASSEMBLY

12. First, the general assembly of the Supreme Court shall from an opinion on the issue of relevant norms (I). Thereafter the general assembly shall analyse the conformity of the relevant provisions with the Constitution (II), and finally, shall adjudicate the misdemeanour matter (III).

I.

13. By its ruling of 31 December 2007 the Criminal Chamber of the Supreme Court referred the misdemeanour matter of I. Eiche to the general assembly of the Supreme Court on the basis of § 169(2) of the CMP for the examination of constitutionality of § 54^{11}(3) of the PTA.

14. According to § 3(3) of the Constitutional Review Court Procedure Act the general assembly shall adjudicate cases referred to it by the Administrative Law, Civil or Criminal Chamber or a special ad hoc panel of the Supreme Court, if a Chamber or the panel has a reasonable doubt as to the constitutionality of relevant legislation of general application. An Act is relevant, if it is of decisive importance for the adjudication of the case (see judgment of the general assembly of the Supreme Court of 22 December 2000 in case no 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 10). An Act is of decisive importance when in the case of unconstitutionality of the Act a court should render a judgment different from that in the case of constitutionality of the Act (see judgment of the general assembly of the Supreme Court of 28 October 2002 in case no 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15).

15. A city transport service employee of the ticket inspection group of the AS Ühisteenused punished I. Eiche by a fine by its decision of 19 March 2007, on the basis of § 54^{7}(1) of the PTA, because on 22 February 2007 he had travelled by a public transport vehicle without a document certifying the right to use public transport. If § 54^{11}(3) of the Public Transport Act were unconstitutional the AS Ühisteenused would lack jurisdiction to proceed with misdemeanour matters provided for in § 54^{7} of the PTA. According to § 150(1)2) of the Code of Misdemeanour Procedure a material violation of law on misdemeanour procedure was committed when a body without the right to conduct proceedings has made the decision in a misdemeanour proceeding. If § 54^{11}(3) of the PTA, pursuant to which the extra-judicial proceedings concerning the misdemeanours provided for in § 54^{7} of the PTA may be conducted by a legal person in private law on the basis of a contract under public law, is unconstitutional, the decision on punishment made by the legal person in private law on the basis of the concerned norm is unlawful, too. On the basis of the aforesaid the general assembly argues that § 54^{11}(3) of the PTA is a relevant norm.

16. Both the Chancellor of Justice and the representative of the AS Ühisteenused argue that if § 54^{11}(3) of

the PTA is unconstitutional, § 9(3) of the CMP – giving rise to the right to delegate, on the basis of specific laws, including § 54^{11}(3) of the PTA, the competence of a body conducting extra-judicial proceedings to a legal person in private law under an administrative contract should be declared unconstitutional, too. The referred regulation is further supplemented by § 10(5) of the Code of Misdemeanour Procedure, pursuant to which a legal person in private law specified in § 9(3) of the CMP shall participate in misdemeanour procedure through its employee, and the provisions of § 10(2) - (4) of the CMP apply to legal persons in private law, taking account their differences.

The general assembly agrees with the above opinion of the participants in the proceeding and holds that the provisions of § 54^{11}(3) of the PTA and §§ 9(3) and 10(5) of the CMP must be regarded as a single regulation, which provides for a possibility to delegate to a legal person in private law, on the basis of a contract under public law, the rights of a body conducting extra-judicial proceedings. On the basis of the earlier opinions of the Supreme Court, with the aim of guaranteeing legal clarity, the provisions which are closely related to the contested norm and which may – when they remain in force – create ambiguity as to the legal reality, are to be regarded as relevant, too (see judgments of the Constitutional Review Chamber of the Supreme Court of 1 October 2007 in case no 3-4-1-14-07 – RT III 2007, 34, 274, paragraph 12; and of 8 October 2007 in case no 3-4-1-15-07 – RT III 2007, 33, 263, paragraph 16). That is why the general assembly also deems § 9(3) and § 10(5) of the CMP to be relevant norms.

II.

17. The general assembly of the Supreme Court is of the opinion that the delegation of proceedings of offences and the related penal power of the state to a legal person in private law is in conflict with the provisions of §§ 3, 10, 13 and 14 of the Constitution in their conjunction, and substantiates the opinion as follows.

18. An employee of the city transport service of the ticket inspection group of the AS Ühisteenused punished I. Eiche on the basis of § 54^{7}(1) of the PTA by a fine of 8 fine units (480 kroons) for having travelled by public transport vehicle without a document certifying the right to use public transport. Among other things it is pointed out in the appeal in cassation that the proceedings concerning the alleged misdemeanour of I. Eiche had been conducted by a body without the right to do so. In this context the appellant in cassation makes a reference to the judgment of the Criminal Chamber of the Supreme Court of 10 April 2006 in case no 3-1-1-7-06, in which the following has been pointed out: “According to the first sentence of § 3(1) of the Constitution the powers of the state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. The fact that a body conducting extra-judicial proceedings in misdemeanour matters makes decisions can be regarded as the exercise of state power restricting fundamental rights of persons, for which the body conducting proceedings must have, inter alia, procedural competence.”

19. First, the general assembly has to agree with the appellant in cassation that both, criminal procedure and misdemeanour procedure, constitute the exercise of one of the sub-categories of state power – the penal power , and that according to the first sentence of § 3(1) of the Constitution state power, including the penal power, must be exercised solely pursuant to the Constitution and laws which are in conformity therewith. As the exercise of powers of state solely pursuant to the Constitution and laws which are in conformity therewith is also one of the expressions of the principle of a state based on the rule of law, § 3(1) of the Constitution must be read in conjunction with the principle of a democratic state based on the rule of law expressed in § 10 of the Constitution. In the context of this case it is justified to address the exercise of powers of state primarily and mainly as the activities of the state infringing fundamental rights.

20. The competence of the AS Ühisteenused as a body conducting extra-judicial proceedings is, no doubt, initially based on the law – on §§ 9(3) and 10(5) of the CMP and § 54^{11}(3) of the PTA, relevant for the adjudication of this case. Yet, the requirement that restrictions of fundamental rights be established by law can not be regarded as fulfilled by the mere existence of an Act, without paying attention to the actual possibilities of infringement of fundamental rights arising from the Act. Indeed, the provisions of §§ 9(3) and 10(5) of the CMP and § 54^{11}(3) of the PTA are a necessary, but not a sufficient condition for the AS

Ühisteenused to acquire the competence to exercise the powers of state as a body conducting extra-judicial proceedings, because – in fact – the competence of the AS Ühisteenused as a body conducting extra-judicial proceedings proceeded instead from a contract under public law entered into with the city of Tallinn. The requirement that restrictions of fundamental rights be established by law does not mean an absolute prohibition to delegate certain powers of the state. Nevertheless, the general assembly is of the opinion that the Constitution does not permit to delegate all powers of state, and that the method of delegation must be in conformity with the Constitution. It is the very title of the contract that indicates that in principle it is permissible to delegate by a contract under public law solely and without exception the administrative functions within the sphere of executive power. The penal power, including the proceeding of offences in its entirety – with the possible judicial procedure – can not be considered as (ordinary) exercise of administrative functions. That is why the general assembly is of the opinion that the provisions of §§ 9(3) and 10(5) of the CMP and § 54^{11}(3) of the PTA, to the extent that these allow, on the basis of a contract under public law, to delegate the penal power of the state to a legal person in private law, can not be deemed to be in full conformity with the requirement that restrictions of fundamental rights be established by law.

21. The delegation of the competence of a body conducting extra-judicial proceedings to the AS Ühisteenused and, thus, the delegation of penal power in the broader sense, is unconstitutional not only because of the non-observance of the requirement that restrictions of fundamental rights be established by law. The general assembly is of the opinion that the delegation of penal power to a legal person in private law is also in conflict with the requirement, arising from the first sentence of § 3(1) and § 10 of the Constitution, that powers of state must be exercised solely pursuant to the Constitution. This requirement includes, inter alia, the requirement that exercise of powers of state must not be in conflict with the Constitution. According to the judgment of the Constitutional Review Chamber of the Supreme Court of 5 March 2001, in case no 3-4-1-2-01, it proceeds from § 10 of the Constitution that the interpretation of the Constitution amounts to much more than mere determination of the meaning of words. The general assembly agrees with the Chancellor of Justice that also those functions which, pursuant to the Constitution, must be exercised by the state power and which therefore make up the core functions of the state can not be delegated by the state to a legal person in private law. The general assembly holds that penal power, including the proceeding of offences, must be deemed as one of the core functions of the state, and this is for the following considerations.

22. The proceeding of offences amounts to a sphere of state activities, in which extensive infringements of fundamental rights are allowed. At the same time the Code of Misdemeanour Procedure does not differentiate the extent of competence of bodies conducting extra-judicial proceedings on the basis of whether the body conducting proceedings is a public authority or a legal person in private law. In accordance with the provisions of § 31(1) of the CMP the burden of proof and collection of evidence in misdemeanour procedure are subject to the provisions concerning criminal procedure, taking into account the specifications provided for in Chapter V of the CMP. This means, inter alia, that a legal person in private law as a body conducting extra-judicial proceedings is entitled to require in misdemeanour proceedings that a person submit documents, things or other objects (§ 31(2) of the CMP), is entitled to submit a request for physical examination of a person (§ 43(2) of the CMP) and submit a request for the detention of a person for up to 48 hours (§ 45(2) of the CMP), may conduct a search (§ 35(1) of the CMP) and impose a punishment (§ 73 of the CMP). For the misdemeanour under discussion the norm providing for the necessary elements of a misdemeanour (§ 54^{7}(1) of the PTA) does, in fact, provide for a possibility to impose a rather small fine (of up to 10 fine units), but if an offender fails to pay a fine imposed on him or her, the court shall substitute the fine by detention (§ 72(1) of the Penal Code). Thus, also a detention may be a consequence of a decision of a legal person in private law in a misdemeanour proceeding. The criminal record of a person may, in turn, serve as a ground for subsequent restrictions of fundamental rights.

23. The more extensive the legal possibilities of restricting fundamental rights in certain spheres, the more responsibly the state must act in the protection of persons and in creating a situation which must exclude unjustified infringements of fundamental rights. Proceeding from § 13 of the Constitution everyone has the right to the protection of the state and of the law, and according to § 14 the guarantee of rights and freedoms

is the duty of the legislative, executive and judicial powers, and of local governments. These provisions of the Constitution give rise to the right of every person to organisation and procedure (see also judgment of the general assembly of the Supreme Court of 28 October 2002 in case no 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 30). The right to organisation and procedure contains the right to the normative and factual activities of the state, so that a person could find protection and feel safe.

24. A person's possibility to protect himself and feel secure within a proceeding of an offence means that that the public authority must establish the rules for proceeding offences, and that the public power is responsible for the training and continuous in-service training of those who conduct proceedings of offences, and guarantees departmental supervision over their activities, including control within each misdemeanour proceeding that the fundamental rights are not excessively infringed. The general assembly is of the opinion that in the situation where the authority of the state does not have that direct responsibility in misdemeanour proceedings and does not exercise supervision over the body conducting the proceedings the fundamental right to procedure and organisation is not guaranteed in the state.

25. It is important to bear in mind that according to the provisions of § 25(1) of the General Part of the Civil Code Act "legal person in private law" means a legal person founded in private interests and pursuant to an Act concerning the corresponding type of legal persons. Consequently, the delegation of penal power to a legal person in private law means at least the recognition that penal power may be exercised also on the basis of any private interest. The general assembly can not consider such a possibility acceptable. The exercise of penal power pursuant to the Constitution requires that a penal authority be objective and independent and act solely proceeding from the public interests.

26. The Minister of Justice, too, admits that the penal power is one of the so called core functions of the state and that the delegation thereof to a legal person in private law is precluded, as a rule. Nevertheless, the Minister of Justice argues that by way of exception from the general rule the penal power in misdemeanour proceedings could still be delegated to a legal person in private law. The general assembly is of the opinion that penal power as a whole should be deemed as belonging among the core functions of the state and it is precluded to allow exemptions from the prohibition thereof. At the same time the general assembly considers it necessary to point out that the prohibition to delegate penal power to a legal person in private law explicitly and directly concerns solely the proceedings of offences and does not extend to e.g. administrative activities of supervisory nature preceding proceedings of offences.

III.

27. As regards the adjudication of the misdemeanour matter of I. Eiche the general assembly is of the opinion that the proceeding of the misdemeanour matter should be terminated and substantiates the opinion as follows. § 29 of the Code of Misdemeanour Procedure enumerates the circumstances upon the existence of which misdemeanour procedure shall not be commenced and the proceedings commenced shall be terminated. This provision does not provide, among the circumstances precluding misdemeanour procedure, proceeding by a body without the right to conduct proceedings. Nevertheless, the general assembly is of the opinion that in the present situation the proceeding can be terminated on the basis of § 29(1)1) of the CMP, according to which the proceedings commenced shall be terminated if the act in question does not contain the elements of a misdemeanour. The circumstances of subject of proof in misdemeanour procedure can be deemed established solely by a body conducting extra-judicial proceedings. § 9 of the Code of Misdemeanour Procedure enumerates the following as bodies conducting extra-judicial proceedings: 1) agencies with the authority of executive power; 2) rural municipality and city governments; 3) legal persons in private law on the basis of a contract under public law. As the general assembly declared § 54^{11}(3) of the PTA and §§ 9(3) and 10(5) of the CMP to be in conflict with §§ 3, 10, 13 and 14 of the Constitution, the officials of the AS Ühisteenused had no jurisdiction to establish the necessary elements of a misdemeanour in the conduct of I. Eiche. The general assembly points out, outside the scope of this court case, that on the basis of § 54^{11}(2)1) to 5) of the PTA the proceedings concerning the misdemeanour provided for in § 54^{7} of the PTA can be conducted by police prefectures, the Personal Protection service, border guard officials, rural municipality or city governments, county governments and the Ministry of Economic Affairs and

Communications.

28. In the appeal in cassation the counsel of I. Eiche applies, among other things, for the annulment of the county court judgment with the reason that the AS Ühisteenused has no competence to stop public transport vehicles in between stops. The general assembly can not form an opinion concerning this application of the appellant in cassation, because in the present case the stopping of a public transport vehicle constituted an inspection operation, the lawfulness of which can be reviewed by way of procedure established in the Code of Administrative Court Procedure, and not within a misdemeanour procedure. That is why the general assembly refuses to her this application.

29. For the above reasons and on the basis of §§ 14(3) and 15(1)2) of the Constitutional Review Court Procedure Act and § 174(4) of the CMP the general assembly hereby declares § 54^{11}(3) of the PTA and §§ 9(3) and 10(5) of the CMP unconstitutional and invalid; annuls the judgment of the Harju County Court of 19 June 2007, and terminates the misdemeanour proceeding on the basis of § 29(1)1) of the CMP because the act in question does not contain the elements of a misdemeanour.
