Constitutional judgment 3-4-1-11-05

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-11-05
Date of decision	14 October 2005
Composition of court	Chairman Märt Rask, members Tõnu Anton, Eerik Kergandberg, Villu Kõve, Jüri Põld
Court case	Petition of the President of the Republic to declare the Riigikogu Internal Rules Act Amendment Act unconstitutional
Hearing	Written proceeding
Decision	**To satisfy the petition of the President of the Republic to declare the Riigikogu Internal Rules Act Amendment Act unconstitutional**

FACTS AND COURSE OF PROCEEDING

1. On 27 March 2002 the Riigikogu passed the Local Government Council Election Act (hereinafter LGCEA), amending the Riigikogu Internal Rules Act (hereinafter RIRA) and the Local Government Organisation Act (LGOA) to the effect that as of 17 October 2005, a member of the Riigikogu shall not be allowed to simultaneously be a member of a local government council and vice versa.

2. On 12 May 2005 the Riigikogu passed the Riigikogu Internal Rules Act Amendment Act (hereinafter “the contested Act”), which, pursuant to the implementation provision thereof, shall enter into force on 17 October 2005. The Act passed deleted the second sentence of § 6(2) of the Riigikogu Internal Rules Act, which was meant to take effect as of 17 October 2005, which, upon the election of a member of the Riigikogu a member of a rural municipality council or city council, would have suspended his or her authority as a member of the rural municipality or city council, and the Act repealed § 7(2)3) of the Riigikogu Internal Rules Act, which also was to take effect as of 17 October 2005, pursuant to which, during his or her term of authority, a member of the Riigikogu was not to be a member of a rural municipality or city council.

3. By resolution No 848 of 30 May 2005, the President of the Republic refused to proclaim the Riigikogu Internal Rules Act Amendment Act and proposed to the Riigikogu that it bring the contested Act into conformity with the Constitution. The President of the Republic found that the Act was in conflict with the principle of local government autonomy deriving from § 154(1) of the Constitution, with the principle of separate and balanced powers established in § 4 of the Constitution and with the principle of incompatibility of offices included in § 63 of the Constitution.

4. On 8 June 2005 the Riigikogu discussed the Act contested by the President of the Republic, and passed it again, unamended. On 22 June 2005 the President of the Republic had recourse to the Supreme Court, requesting that the Riigikogu Internal Rules Act be declared unconstitutional.

OPINIONS OF THE PRESIDENT OF THE REPUBLIC AND PARTICIPANTS IN THE PROCEEDING

5. In the petition to the Supreme Court the President of the Republic argues that the contested Act is in conflict with the constitutional principles of local government autonomy, separation and balance of powers and incompatibility of offices.

The principle of local government autonomy, based on § 154 of the Constitution and the European Charter of Local Self-Government, requires that the activities of a local government council upon deciding local issues must primarily be based on local conditions and that the members of a local government council be able to take decisions independently of central authorities, putting the local interests first.

Te objective of the principle of separate and balanced powers, established in § 4 of the Constitution, is to avoid excessive concentration of power. The personal level of separation of powers is violated when a person fulfils the functions of two branches of power simultaneously. The activities of a local government council for local administration can be regarded as exercise of the executive power. When deciding and managing the duties imposed on a local government by law a member of the Riigikogu, who belongs to a local government council, exercises the executive state power, which is in conflict with the principle of separation and balance of powers.

Simultaneous performance of different functions of powers by one and the same person is not in conformity with the principle of incompatibility of offices, established in § 63 of the Constitution, one of the aims of which is to guarantee a member of the Riigikogu the possibility to focus on the fulfilment of the duties of a member of the Riigikogu.

6. The Constitutional Committee of the Riigikogu, who presented an opinion on behalf of the Riigikogu who passed the Act, is of the opinion that the Riigikogu Internal Rules Act Amendment Act is in conformity with the Constitution.

A local government can not be regarded as a part of the executive branch. The objective and essence of local government is to decide local issues independently. The fact that a local government exercises the functions of the executive when discharging the duties imposed by law is not sufficient to ascertain a violation of the principle of separation of powers. If the state empowers a local government to fulfil national duties, the content of the duty delegated is determined by an Act or an agreement and the state authorities can not act arbitrarily in relation to local governments. The bodies of the executive power have no right of command or disciplinary powers in relation to the members of local councils, neither do the members of local councils receive remuneration from an executive state authority. Being a member of a council can not be regarded as holding a state office for the purposes of § 63 of the Constitution, because there is no inherent conflict of interests between the positions of a member of the Riigikogu and that of a local government council. If a member of a local government council is implementing the interest of the central power on the local level, it is the electors who shall judge such activities.

Pursuant to the European Charter on Local Self-Government the activities incompatible with the work in a local representative body shall be determined either by legislation of by general principles of law. The Riigikogu has concluded that the combining of the positions of a member of the Riigikogu and that of a local government council is reasonable, because it does not prevent a member of the Riigikogu from fulfilling his or her basic functions, at the same time enabling him or her to be informed of local problems. According to the results of an inquiry by the Constitutional Committee the members of the Riigikogu are capable, in addition to their basic work, participate in the work of local councils and they take their responsibilities

seriously.

7. The Chancellor of Justice is of the opinion that to the extent that it allows a member of the Riigikogu be also a member of a local government council and vice versa, the Riigikogu Internal Rules Act Amendment Act is in conflict with the Constitution.

The principle of local government autonomy is an expression of the vertical separation of powers, which is to guarantee the local governments the right to decide local issues independently. If the members of the parliament are also allowed to participate in deciding local matters, the independence of local governments in deciding local issues is significantly diminished, because a situation may arise where local issues are decided on the basis of state interests and not local needs. One does not have to be a member of a local council in order to be informed of local problems. Furthermore, simultaneous membership in a local council and the Riigikogu affects the stability of the activities of representative bodies. Thus, the regulation allowing for simultaneous membership in both representative bodies is in conflict with § 154(1) of the Constitution.

The principle of incompatibility of offices consists, inter alia, in the prohibition to vest the authorities of two different powers to one and the same person at the same time, which in turn is aimed at preventing the conflict of interests. The second objective of the prohibition to combine offices is to guarantee that the members of the Riigikogu occupy themselves with the work of the parliament. The Constitution relates the prohibition to combine offices with the concept of “state office”, which is to be interpreted broadly. Bearing in mind the trichotomy of powers the activities of a local government in the broader sense represent the exercise of the executive power. Especially, when deciding on the fulfilment of the duties imposed on a local government by the state, a local government council functions as a part of the executive branch of the state. Thus, when a member of the Riigikogu functions as a member of a local government council, it has to be regarded as holding another state office. Any regulation allowing for simultaneous membership in both representative bodies is in conflict with § 63(1) and § 64(2) 1) of the Constitution.

The fact that a member of the Riigikogu or of a local council is simultaneously a member of both representative bodies is not in conformity with the principle of personal separation of powers. In a situation where a state official simultaneously performs essentially opposing duties and strives for opposing interests, a conflict of interest may arise, leading to neglect of ones duties. For example, participation of the members of the Riigikogu, who are also members of local government councils, in deciding on the state budget my result in unequal treatment of local governments.

8. The Minister of Justice is of the opinion that he Act contested by the President of the Republic is not in conflict with the Constitution.

The basic activity of a local government – to decide and manage local issues – is the direct exercise of the functions of none of the branches of power. A local government performs these duties independently of the state. The Constitution of Estonia does not treat the exercise of local power as the exercise of state power. Thus, the activities of a member of the Riigikogu in a local government council deciding and managing local issues are not in conflict with the principle of horizontal separation and balance of powers. Although, in addition to its main duties, a local government also performs duties imposed by the state, the latter are secondary by nature and do not essentially affect the functioning of local governments. The fulfilment of these duties by a member of the Riigikogu who belongs to a local government council can not actually undermine the values which are the reasons for the separation of powers. Several European states do not find that allowing for a double mandate is in conflict with the principle of separate and balanced powers.

Banning the members of the Riigikogu from belonging to local government councils is not a productive measure for precluding the central power to control the exercise of local self-government. Bearing in mind the level of partisanship of local politics the political parties have a possibility to influence the exercise of local self-government in the interests of central power also through those members of political parties who belong to local councils and are not members of the Riigikogu. Simultaneous membership in the Riigikogu and in a local government council gives a better insight into the problems of both levels of power and a

possibility to raise in the Riigikogu those issues which are essential for local governments. Such a solution is not is conflict with the principle of autonomy of local self-governments.

Pursuant to the principle of incompatibility of offices a member of the Riigikogu must not hold any other state office. Membership in a local government council can not be regarded as holding a state office for the purposes of the Public Service Act. Neither can a member of a local government council be regarded as a person holding a state office on the basis of broader interpretation of the concept of state office. Furthermore, a member of a local government council meets none of the criteria described by the Supreme Court when defining the concept of state office. The fulfilment of some state duties by a local government is of secondary importance. Neither does the membership in a local government council violate the requirement that a member of the Riigikogu must focus on his or her work in the Riigikogu.

Furthermore, deprivation of a member of the Riigikogu of the possibility to simultaneously belong to a local government council can be regarded as a disproportionate restriction of the general right of equality and passive right to vote of a member of the Riigikogu.

PERTINENT PROVISIONS

9. By § 71 of the Local Government Council Election Act, passed by the Riigikogu on 27 March 2002, §§ 6(2) and 7(2) of the Riigikogu Internal Rules Act were amended.

According to the amendment, as of 17 October 2005, § 6(2) of the Riigikogu Internal Rules Act should read as follows:

“In addition to the cases listed in subsection (1), the authority of a member of the Riigikogu also terminates prematurely if he or she loses Estonian citizenship pursuant to the Citizenship Act (RT I 1995, 12, 122; 83, 1442) or upon his or her assumption of an office specified in subsection 7 (2) of his Act. If a member of the Riigikogu is elected a member of a rural municipality council or city council, his or her authority as a member of the rural municipality or city council is suspended.”

As of 17 October 2005, § 7(2)3) of the Riigikogu Internal Rules Act should read as follows:

“During his or her term of authority, a member of the Riigikogu shall not:
/…/

3) be a member of a rural municipality or city council; /…/.”

10. On 12 May 2005 the Riigikogu passed the Riigikogu Internal Rules Act Amendment Act, §§ 1 (1) and (2) of which amend, beginning from 17 October 2005, the second sentence of § 6(2) and § 7(2)3) of the Riigikogu Internal Rules Act, passed on 27 March 2002 but not yet entered into force. In the present matter the President of the Republic has contested the constitutionality of the provisions of the Riigikogu Internal Rules Act.

The contested subsections (1) and (2) of § 1 of the Riigikogu Internal Rules Act Amendment Act provide as follows:

“§ 1. The Riigikogu Internal Rules Act /…/ is amended as follows:

(1) the second sentence of subsection 6 (2), which shall enter into force on 17 October 2005, is omitted;

(2) clause 3) of subsection 7 (2), which shall enter into force on 17 October 2005, is repealed; /…/.”

11. In the case the petition of the President of the Republic is not satisfied, the situation valid before 27 March 2002, after the passing and publishing of the Riigikogu Internal Rules Act Amendment Act, would be restored.

In that case § 6(2) of the Riigikogu Internal Rules Act would read as follows:

“In addition to the cases listed in subsection (1), the authority of a member of the Riigikogu also terminates prematurely if he or she loses Estonian citizenship pursuant to the Citizenship Act (RT I 1995, 12, 122; 83, 1442) or upon his or her assumption of an office specified in subsection 7 (2) of his Act.”

Clause 3) of subsection 7 (2) would be omitted.

12. § 72 of the Local Government Council Election Act, passed by the Riigikogu on 27 March 2002, added clause 11) to subsection 19 (2) of the Local Government Organisation Act, which was to enter into force on 17 October 2005.

Subsequent to entering into force of the amendment § 19(2)11) would have read as follows:

“(2) The authority of a member of the local government council shall be suspended:
/…/
11) for the duration of his or her authority as a member of the Riigikogu until termination of his or her authority as a member of the Riigikogu;”

On 12 May the Riigikogu passed the Local Government Organisation Act Amendment Act. § 11 of the Act amended, as of 17 October 2005, § 19(2)11) of the Local Government Organisation Act. After the amendments take effect § 19(2)11) of LGCA shall provide for the following:

“(2) The authority of a member of the local government council shall be suspended:
/…/
11) for the duration of his or her authority as a member of the Government of the Republic until termination of his or her authority as a member of the Government of the Republic;”

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

13. In the present matter the President of the Republic requests that the Supreme Court review the constitutionality the Riigikogu Internal Rules Act Amendment Act, which he did not proclaim. The President of the Republic did not proclaim the Riigikogu Internal Rules Act Amendment Act, because he is of the opinion that the possibility of a member of the Riigikogu to run as a candidate to and if elected be a member of a local government council simultaneously with being a member of the Riigikogu, is not in conformity with the principle of local government autonomy included in § 154 (1) of the Constitution, with the principle of separate and balanced powers arising from § 4 of the Constitution and with the principle of incompatibility of offices included in § 63 of the Constitution. The opinion of the President of the Republic is supported by the Chancellor of Justice, whereas the Riigikogu and the Minister of Justice find the regulation under examination to be constitutional.

Firstly, the Chamber shall analyse the situation at hand.

I.

14. Proceeding from § 156(2) of the Constitution and from the Local Government Council Act a member of the Riigikogu has the right to stand as a candidate at local government council elections.

15. The amendment to the Riigikogu Internal Rules Act, which was made in 2002 and would enter into force on 17 October 2005, would exclude a person from simultaneously fulfilling the functions of a member of the Riigikogu and of a member of a local government council. According to the amendment the authority of a member of the Riigikogu would terminate in the Riigikogu, when, after the elections, he or she assumes the position in a local government council. If he or she does not assume the position in a local government council after elections, he or shell shall continue to fulfil his or her duties in the Riigikogu, whereas his or

her authority in the local government council shall be suspended. If, subsequent to the suspension of authority in the local government council, he or she assumes a position in the council, his or her authority in the Riigikogu shall terminate.

Suspension of the authority of a council member means temporary release of a council member from the fulfilment of the duties of a council member (§ 19(1) of LGOA).

16. The Act, which was passed by the Riigikogu on 12 May 2005 and which the President of the Republic refused to proclaim on 30 May 2005, and the constitutionality of which is under dispute in the present matter, would create a situation – if enacted – where a member of the Riigikogu could simultaneously fulfil the duties of a member of the Riigikogu and those of a member of a local government council.

17. In order to implement the amendments to the Riigikogu Internal Rules Act an amendment was made in 2002 also to the local Government Organisation Act, which was to take effect on 17 October 2005. Pursuant to § 19(2)11) of LGCA the authority of a member of the local government council was to be suspended for the duration of his or her authority as a member of the Riigikogu until termination of his or her authority as a member of the Riigikogu. On 12 May 2005 clause 11) of § 19(2) of LGOA was amended to the effect that the authority of a member of the local government council shall be suspended for the duration of his or her authority as a member of the Government of the Republic until termination of his or her authority as a member of the Government of the Republic. The amendment made to clause 11) of § 19(2) of LGOA on 12 May 2005 consisted in the fact that the words “a member of the Riigikogu” were omitted from the provision and the latter started to regulate the suspension of authority of a member of the Government of the Republic as a member of the local government council if he or she was elected to the council. This amendment was proclaimed by the President of the Republic on 25 May 2005 and it shall enter into force on 17 October 2005, irrespective of the outcome of the present dispute.

18. The latter amendment to the Local Government Organisation Act does not prevent the resolution of this dispute, as the amendments to the Local Government Organisation Act, pertaining to members of the Riigikogu, made in 2002 and 2005, are of organisational nature. The right of a member of the Riigikogu to simultaneously fulfil the duties of a member of a local government council depends on the constitutionality of the Act, which the President of the Republic refused to proclaim on 30 May 2005.

II.

19. The Chamber is of the opinion that the Act which was not proclaimed by the President of the Republic would amount to a major change in the right to vote and to stand as a candidate. Next, the Chamber shall examine whether it would be permissible to introduce such an essential legislative amendment shortly before the elections.

The Chamber points out that the Supreme Court already had to resolve a similar problem in 2002, shortly before the local government council elections (see judgment of the Constitutional Review Chamber of 15 July 2002 in matter no 3-4-1-7-02 – RT III 2002, 22, 251).

20. The contested Act was passed on 12 May of current year and the date of entry into force thereof is 17 October of current year. The local government elections, the results of which are materially affected by the amendments introduced by the Act, shall be held – pursuant to the second sentence of § 2 of LGCEA – on the third Sunday in October in an election year. In 2005 local government council elections shall be held on 16 October. Pursuant to § 35 (1) and (2) of the Local Government Council Election Act the nomination of candidates shall begin on the sixtieth day before election day.

What has also to be taken into account is the fact that the date of entry into force of the amendments made to the Riigikogu Internal Rules Act by the Local Government Council Election Act passed on 2002, is also 17 October 2005. Thus, the non-entering into force of the Riigikogu Internal Rules Act Amendment Act would result in non-entering into force of the prohibition that a member of the Riigikogu may not belong to a local

government council.

21. Bearing in mind that the Riigikogu substantially amended the electoral rules just three months before the beginning of the electoral procedures, the Chamber considers it necessary to separately examine the conformity of the amendments to the principle of democracy, arising from § 10 of the Constitution, and whether the provisions under examination contain a reasonable term for the implementation of the amendments.

22. The Constitution does not establish an explicit prohibition to introduce substantial changes into electoral rules shortly before the elections. Nevertheless, the Chamber considers that such amendments of electoral rules, introduced shortly before the elections and capable of essentially affecting the voting results in favour of one or another political party, are not democratic.

In the present case it is obvious that the changes introduced shortly before the elections are aimed at improving the position at local elections of those political parties that are in the parliament, in comparison to those political parties that are not and to election coalitions and independent candidates. The Chamber does not consider this to be compatible with the principle of democracy.

On the basis of the requirements of democracy the Chamber can not accept situations where the ruling political forces significantly amend in their own favour the electoral rules, which are known ahead for several years, and they do this immediately before the elections.

23. The Chamber can not lay down the reasonable time for making substantial changes in electoral rules. Nevertheless, the Chamber considers it obvious that the amendment to electoral rules, which should enter into force during the period when – pursuant to Constitutional Review Court Procedure Act – a judicial dispute may still be pending concerning the constitutionality of the regulation limiting the right to vote and stand as a candidate, not proclaimed by the President of the Republic, is belated. The Chamber is of the opinion that the minimum requirement for changing electoral rules would be that an Act introducing a substantial change should be passed seeing to it that it would enter into force in good time before elections. Both the voters and the candidates must have time to learn the new rules and to choose how to proceed.

24. The conclusion that introduction of substantial amendments to the Riigikogu Internal Rules Act is unconstitutional can not be refuted with the argument that a member of the Riigikogu who runs as a candidate at the local elections of 16 October 2005 has a legitimate expectation to assume – in addition to the duties of a member of the Riigikogu – also the duties of a local government council, if she or he becomes elected. There is no such expectation solely because it was already in 2002 that an amendment was passed, prohibiting such combination of offices and the non-proclaimed Act repealing this prohibition, the constitutionality of which is presently being discussed, can not be a basis for a legitimate expectation. On the contrary, the amendment, which is the object of the present dispute, has created a situation of legal ambiguity, which consists in the fact that neither a candidate nor the voters know whether a member of the Riigikogu, who proves to be elected, may or may not combine the duties of a member of the Riigikogu and those of a member of a local government council.

The Chamber is of the opinion that when creating this situation the Riigikogu did not take into account the principle of legal clarity.

25. The aforesaid can not lead to a conclusion that the situation which has turned out essentially prejudices the voters' right to vote. The judgment shall enter into force before the election day and the voters will be able to exercise their will under the circumstances of legal clarity.

26. As the Chamber has come to the conclusion that the contested Act is in conflict with the requirements of democracy, arising from § 10 of the Constitution, it shall satisfy the petition of the President of the Republic and shall declare the Riigikogu Internal Rules Act Amendment Act unconstitutional.

Märt Rask, Tõnu Anton, Eerik Kergandberg, Villu Kõve, Jüri Põld

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