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## Constitutional judgment 3-4-1-22-03

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

<b>No. of the case</b>	3-4-1-22-03
<b>Date of decision</b>	19 December 2003
<b>Composition of court</b>	Chairman Uno Lõhmus, members Tõnu Anton, Ants Kull, Villu Kõve and Jüri Pöld
<b>Court case</b>	Petitions of the Tallinn City Court of 9 October 2003 and of the Põlva County Court of 24 October 2003 to review the constitutionality of the Bailiffs Act and of the Minister of Justice Regulation no. 16 of 16 February 2001 “Rates of Bailiffs’ Fees”
<b>Basis of proceeding</b>	Ruling of the Tallinn City Court of 9 October 2003 in civil matter no. 2/33-3238/03 and ruling of the Põlva County Court of 24 October 2003 in civil matter no. 2-151 2003.
<b>Hearing</b>	Written proceeding
<b>Decision</b>	<b>To declare that § 21(2) of the Bailiffs Act (in the wording in force from 1 March 2001 until 13 October 2003) and the Minister of Justice Regulation no. 16 of 16 February 2001 “Rates of Bailiffs’ Fees” were in conflict with the Constitution.</b>

### FACTS AND COURSE OF PROCEEDING

1. By the decision of bailiff Reet Vokk of 10 March 2003 in enforcement matter no. 032/2003/1015 bailiffs fee of 295 kroons (250.- kroons of fee and 45.- kroons of value added tax) was to be collected from Kaupo Türk. K. Türk filed an appeal against the decision of the bailiff and argued that there was no basis for the collection of the referred amount. According to the appeal it is not in conformity with § 113 of the Constitution that by and Act the authority to establish the rates of bailiffs fees has been delegated to the Minister of Justice, as pursuant to § 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.

By her decision of 4 April 2003 the bailiff dismissed the appeal of K. Türk. K. Türk appealed against this decision to the Tallinn City Court, and the court satisfied his appeal by a ruling of 9 October 2003 (civil matter no. 2/33-3238/03) and annulled the decision. The court declared that § 21(2) and (3) (in the wording in force on 10 March 2003) of the Bailiffs Act (hereinafter “the BaA”) to the extent that these provided for the right of a bailiff to charge a fee to the extent and pursuant to the procedure provided for in a legislation established on the basis of the Bailiffs Act, and §§ 1 and 2 of the Minister of Justice Regulation no. 16 of 16 February 2001 “Rates of Bailiffs’ Fees” were in conflict with the constitution and did not apply these.

2. By the decisions of bailiff Aive Kolsar of 22 May 2003 in enforcement matters no. 170/2002/7502, no. 70/2002/7504 and no. 170/2002/7506 bailiffs fee of 295 kroons (250.- kroons of fee and 45.- kroons of value added tax) was to be collected from Janar Tilga on the basis of each decision. In addition the bailiff ordered the payment of enforcement costs in the same matters – 55 kroons per matter. J. Tilga filed an appeal against the decisions of the bailiff with the Põlva County Court, arguing that the bailiff's decisions concerning the collection of bailiff's fees and enforcement costs were illegal and were to be annulled.

By its ruling of 24 October 2003 (in civil matter no. 2-151 2003) the Põlva County Court satisfied the appeal of J. Tilga and annulled the bailiff's decisions. The court declared § 21(2) and (3) (in the wording in force from 1 March 2001 until 13 October 2003) of the Bailiffs Act, and §§ 1 and 2 of the Minister of Justice Regulation no. 16 of 16 February 2001 "Rates of Bailiffs' Fees" to be in conflict with the Constitution and did not apply these.

3. These constitutional review matters were joined by the ruling of the Constitutional Review Chamber of the Supreme Court of 11 December 2003.

### **OPINIONS OF THE COURTS AND THE PARTICIPANTS IN THE PROCEEDING**

4. The Tallinn City Court based its judgment on § 113 of the Constitution, pursuant to which state taxes, duties fees, fines and compulsory insurance payments shall be provided by law. This norm prohibits the imposition of financial obligations in public law by legislation ranking lower than Acts. A bailiff's fee, being a financial payment obligation in public law, should be provided by an Act. Yet, the rates of bailiffs' fees have been established by the Minister of Justice Regulation no. 16 of 16 February 2001. Provision delegating authority for that proceeded from § 21(2) of the BaA. That is why both § 21(2) of the BaA and the Minister of Justice Regulation no. 16 are in conflict with § 113 of the Constitution.

5. The Põlva County Court, too, refers to § 113 of the Constitution, pursuant to which all financial obligations in public law must be imposed by law. A bailiff is an independent person who holds an office in public law and whose professional acts are also of public law character. Pursuant to § 21(1) of the Bailiffs Act a fee shall be charged for a professional act of a bailiff and the fee can be regarded as a state fee. Pursuant to § 94(2) of the Constitution a minister shall issue regulations and directives on the basis and for the implementation of law. The executive power is only entitled to issue regulations specifying the law. The delegation of the right to establish the rates of bailiffs' fees to the Minister of Justice essentially amounts to a delegation of the authority to issue *praeter legem* regulations. A norm delegating such authority is not in conformity with § 94(2) of the Constitution. The Regulation of the Minister of Justice, issued on the basis of an unconstitutional provision delegating authority, is also in conflict with the Constitution.

6. The Constitutional Committee of the Riigikogu was of the opinion that from 1 March 2001 until 13 October of 2003 the wording of the legislation regulating the rates of bailiff's fees was in conflict with § 113 of the Constitution, because an essential part of a financial obligation in public law – rate of a fee – was established by a Regulation of the Minister of Justice. Nevertheless, the Constitutional Committee pointed out that that the conflict was a formal one. The legal deficiency did not, in reality, result in more unfavourable treatment of those who paid the fees, and the legislator has rectified the deficiency. On 16 September 2003 the Riigikogu passed the Bailiffs Act Amendment Act, which entered into force on 14 October 2003, and by which the rates of a bailiff's fee were introduced into the Bailiffs Act. Reclamation of the already paid bailiff's fees by persons who did not contest the obligation to pay in a timely manner can not be a consequence of the declaration of partial unconstitutionality of the Bailiffs Act.

7. The Chancellor of Justice concurred with the opinions of the courts and argued that § 21(2) of the BaA which was in force on 10 March 2003, and the Minister of Justice Regulation no. 16 of 16 February 2001 were in conflict with § 113 of the Constitution. The Chancellor of Justice considers § 21(3) of the BaA to be irrelevant in this matter.

**8.** The Minister of Justice is of the opinion that § 21(2) and (3) of the BaA, which were in force until 14 October 2003, and the Minister of Justice Regulation no. 16 issued on the basis thereof were in conflict with § 113 of the Constitution to the extent that they provided for the right of a bailiff to charge a fee only to the extent and pursuant to the procedure provided for in the Bailiffs Act and the legislation issued on the basis thereof. This, in turn, means conflict with § 3(1) and § 94(2) of the Constitution.

**9.** The representative of K. Türk argued that the petition of the Tallinn City Court was justified and was to be satisfied. In addition to the provisions not applied by the Tallinn City Court, § 9 of the Minister of Justice Regulation no. 16 of 16 February 2001 was also pertinent. This establishes the requirement that if a bailiff is a person liable to value added tax for the purposes of the Value Added Tax Act, the value added tax shall be added to a bailiff's fee and to an advance payment of the fee. The representative of K. Türk is of the opinion that the pertinent provision of the Regulation is also unconstitutional.

**10.** J. Tilga concurred with the view of the Põlva County Court and argued that § 21(2) and (3) of the BaA, and the Minister of Justice Regulation no. 16 issued on the basis thereof, were in conflict with § 113 and § 94(2) of the Constitution.

## **CONTESTED LEGISLATION**

**11.** § 21(2) and (3) of the Bailiffs Act in the wording which was in force from 1 March 2001 until 13 October 2003 (RT I 2001,16,69):

“§ 21. Remuneration of bailiffs

[...]

(2) The rates of a bailiff's fee shall be established by the Minister of Justice. The Minister of Justice is entitled to establish special rates concerning the claims of the state and of local government units.

(3) A bailiff has the right to charge a fee only to the extent and pursuant to the procedure provided for in this Act and on the basis thereof. A bailiff is prohibited from entering into agreements to alter the rates of fees or the procedure for the charging of fees provided for in this Act or on the basis thereof.”

**12.** Also, the Minister of Justice Regulation no. 16 of 16 February 2001 “Rates of Bailiffs' Fees” (RTL 2001,22, 304; RTL 2003, 46, 676) has been contested in its entirety.

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

**13.** The Põlva County Court declared unconstitutional and did not apply § 21(2) of the BaA and the Minister of Justice Regulation no. 16 of 16 February 2001. The Tallinn City Court declared unconstitutional and did not apply § 21(2) and (3) of the BaA to the extent that they provided for a bailiff's right to charge a fee to the extent and pursuant to the procedure provided for in legislation passed on the basis of the Bailiffs Act, and § 16(1) and (2) of the Minister of Justice Regulation of 16 February 2001.

**14.** Pursuant to § 15 of the Constitution and § 9(1) of the Constitutional Review Court Procedure Act a court shall declare unconstitutional and shall not apply a legal act if, in the course of resolving a matter, the court comes to the conclusion that an applicable Act or other legislation is in conflict with the Constitution. Thus, within concrete norm control, the court of constitutional review shall review the constitutionality of only applicable, i.e. pertinent provisions.

The Supreme Court shall review whether the court who submitted a petition applied, upon resolving the dispute, the provisions which were of decisive importance for the resolution of the case. A legal 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 Supreme Court en banc of 28 October 2002 in matter no. 3-4-1-5-02 – RT III 2002,28,308 § 15*).

**15.** The courts found that the legislator has, in violation of § 113 of the Constitution, delegated the authority to establish the rates of bailiffs' fees to the Minister of Justice. The Constitutional Review Chamber is of the opinion that the provision delegating the authority was included in § 21(2) of the BaA. § 21(3) of the BaA, which allows to charge a bailiff's fee only to the extent and pursuant to the procedure provided for in the Bailiffs Act and on the basis thereof, is irrelevant, if § 21(2) of the BaA is not valid. The essence of the provision is to prohibit a bailiff from collecting for his or her acts a fee, which does not proceed from the Bailiffs Act. What is also pertinent is Regulation no. 16 of the Minister of Justice, issued on the basis of § 21(2) of the BaA, by which rates of bailiffs' fees were established.

Thus, the Constitutional Review Chamber is of the opinion that pertinent legal acts are § 21(2) of the BaA and Regulation no. 16 of the Minister of Justice, issued on the basis thereof.

**16.** Next, the Supreme Court shall answer the question of whether such provision delegating authority and the Regulation issued on the basis thereof are in conformity with the Constitution.

**17.** § 113 of the Constitution establishes that state taxes, duties, fees, fines and compulsory insurance payments shall be provided by law. The Supreme Court *en banc* has found that financial obligations in public law, irrespective of how they may be called in one or another legal act, are within the sphere of protection of § 113 of the Constitution. The objective of § 113 of the Constitution is to achieve a situation where financial obligations in public law are imposed solely by legislation passed by the state in the form of Acts. This provision also gives rise to the subjective right of persons against the state (*see judgment of the Supreme Court en banc of 22 December 2000 in matter no. 3-4-1-10-2000 – RT III 2001, 1, 1*).

**18.** A bailiff performs the functions of the state, which the state has decided to entrust to an independent person. Irrespective of the fact that a bailiff is not a state official, he or she performs duties in public law (§ 2(1) of the BaA). The activities of a bailiff are regulated by norms of public law and he or she acts in public-law relationships, utilising the authority vested in him or her by the state (*see judgment of the Special Panel of the Supreme Court of 15 March 2002, in matter no. 3-3-4-3-02 – RT III 2002, 10, 98*).

The performance of the duties of the state must be financed first and foremost out of state taxes and fees. Proceeding from the duties of a bailiff and from the nature of a bailiff's fee, the Supreme Court is of the opinion that for the purposes of § 113 of the Constitution a bailiff's fee is an obligation in public law. The rates of a bailiff's fee shall be established by the state and these can not be altered on the application of persons participating in the proceedings of a bailiff.

**19.** As a bailiff's fee is within the sphere of protection of § 113 of the Constitution, such a fee must be established by an Act. Thus, the wording of § 21(2) of the BaA, which was in force from 1 March 2001 until 13 October 2003, was in conflict with the Constitution.

The delegation of the right to establish obligations in public law to the executive may be permissible on the condition that this is prompted by the nature of the financial obligations and that the legislator determines the extent of discretion, for example by establishing the minimum and maximum fees or the principles of calculating the amounts of fee by law.

**20.** Pursuant to § 94(2) of the Constitution a minister shall issue regulations on the basis and for the implementation of law. The Minister of Justice has established the rates of bailiff's fees by his Regulation. The Regulation was based on an unconstitutional provision delegating authority. As § 21(2) of the Bailiffs Act was in conflict with the Constitution, Regulation no. 16 of the Minister of Justice, issued on the basis of the norm on 16 February 2001, was unconstitutional, too.

**21.** The Chamber points out that the declaration of unconstitutionality of § 21(2) of the BaA and of the Minister of Justice Regulation no. 16 of 16 February 2001 does not result in the obligation to return the bailiff's fees which have already been paid. Only those obligors who in due course have contested the lawfulness of the decision on collecting a bailiff's fee are entitled to recover the fees paid in enforcement

proceedings.

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