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## Constitutional judgment 3-4-1-3-02

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

**No. of the case** 3-4-1-3-02

**Date of judgment** 10 May 2002

**Composition of chamber** Chairman Uno Lõhmus, members Tõnu Anton, Lea Kivi, Ants Kull, Jüri Pöld

**Court case** Petition of Tallinn Circuit Court to declare § 20(2) of the National Opera Act invalid.

**Date of court session** 13 March 2002

**Persons participating at session** Representative of the Riigikogu Paul-Eerik Rummo, representative of the Chancellor of Justice Aare Reenumägi and representative of the Minister of Justice Enno Loonurm

**Decision** 1. To declare § 20(2) of the National Opera Act invalid.

### FACTS AND COURSE OF PROCEEDINGS

1. On 17 August 1993 the state performing arts institution Estonia Teater as commercial lessor and the AS Freesia (with new business name the Ooperi Restorani AS) as commercial lessee concluded a commercial lease contract, according to which the rooms located in the building of theatre Estonia with the total space of 385 square metres were commercially leased to the public limited company until 31 December 2018. Under § 20(2) of the National Opera Act passed on 2 December 1997 the commercial lease contracts concluded by the national performing arts institution Estonia Teater before entering into force of the Act were considered to be terminated before the prescribed time.

2. The Ooperi Restorani AS argued that the Riigikogu had not been competent to pass an Act by which the

commercial lease contract was terminated before the prescribed time and unilaterally. The public limited company filed an action with the Tallinn City Court, requesting the recognition of the validity of the commercial lease contract and asking to declare unconstitutional and not to apply §§ 20(2) and 21 of the National Opera Act as these are in conflict with §§ 3, 10, 11, 13, 32 and 102 of the Constitution. The Tallinn City Court decided to dismiss the action.

3. The Tallinn Circuit Court allowed the appeal of the Ooperi Restorani AS, set aside the judgment of the Tallinn City Court and rendered a new judgment by which it satisfied the action, recognised the validity of the commercial lease contract and obligated the National Opera Estonia to avoid any further breaches of the commercial lease contract. The circuit court did not apply § 20(2) of the National Opera Act and submitted a petition to the Supreme Court requesting that § 20(2) of the National Opera Act be declared invalid because of conflict with § 146 of the Constitution.

## **JUSTIFICATIONS OF PARTIES**

4. The circuit court in its judgment explains the unconstitutionality of § 20(2) of the National Opera Act with the fact that according to § 146 of the Constitution justice shall be administered solely by the courts. The Riigikogu set out to administer justice, considering concrete civil law transactions to be terminated before the prescribed term. § 20(2) of the National Opera Act confuses legal regulation and is in conflict with the principle of rule of law, pursuant to which the legislator is competent to prescribe the grounds for terminating commercial lease contracts before the prescribed term, but only courts may declare that a concrete contract is terminated. That is why § 20(2) of the National Opera Act is in conflict with the constitutional idea that the Republic of Estonia is founded on the principle of rule of law, and with § 146 of the Constitution, according to which justice shall be administered solely by the courts. §§ 4 and 5 of the National Opera Act Amendments Act, which provide for compensation of damage caused by termination of commercial lease contracts referred to in § 20(2), have no independent regulative meaning.

5. The Riigikogu sent to the Supreme Court documents concerning the legislative proceeding of the National Opera Act Amendment Act, without submissions concerning the petition of the circuit court. At the open session of the Chamber the representative of the Riigikogu was of the opinion that § 20(2) of the National Opera Act is not in conflict with the Constitution.

6. The Minister of Justice is of the opinion that §§ 20(2) and 21 of the National Opera Act are in conflict with §§ 10, 11, 12 and 31 of the Constitution but are not in conflict with § 146 of the Constitution. The Minister reasons as follows:

1) The Republic of Estonia Commercial Lease Act (hereinafter "the Commercial Lease Act) provides the conditions for unilateral termination of commercial lease contracts. A parliamentary Act is not a correct tool for termination of commercial lease relations. Contracts should be terminated under the conditions and in the manner provided in the Commercial Lease Act. The conditions for terminating commercial lease relations provided in the National Opera Act are more encumbering than those provided by general procedure. That is why §§ 20(2) and 21 of the National Opera Act are not in conformity with the principle of proportionality, proceeding from § 11 of the Constitution, pursuant to which the measures restricting rights must be necessary and encumbering the subjects of law as little as possible.

2) By §§ 20(2) and 21 of the National Opera Act the Riigikogu has terminated legal relations differently than provided by the Act previously in force. The objective of the new regulation may have been finding a new commercial lessee, in order to earn more income from rent or to offer a better service in a reputable cultural institution. But all Acts must conform to the principle of proportionality established in § 11 of the Constitution. Immediate termination of commercial lease relationships without just compensation is not in balance with the expectation to gain more profit or to offer a better quality service to the public.

3) §§ 20(2) and 21 of the National Opera Act are in conflict with the principle of rule of law proceeding from § 10 of the Constitution, as they violate the legitimate expectation of subjects of rights that legal norms

forming the basis of legal relations will remain in force, or to immediate and just compensation if legitimate expectations are violated. Also, the provisions interfere with the right of the commercial lessee to engage in enterprise (§ 31 of the Constitution), as they make an unjustified exception to principles of private law proceeding from the law and from the valid legal norms forming the basis of commercial lease relations. Furthermore, the provisions are in conflict with the principle of equal treatment (first sentence of § 12 of the Constitution). The state has unfoundedly preferred the economic interests of its own or those of an emerging legal person in public law to the economic interests of any other commercial lessor or, from another angle, has encumbered one commercial lessee differently from all other commercial lessees.

4) §§ 20(2) and 21 of the National Opera Act are not in conflict with § 146 of the Constitution. Administration of justice by the courts should be regarded as giving a legal assessment, on the basis of valid law, to a concrete life situation. In essence the Riigikogu set out to resolve a single case, but it did not resolve a legal dispute on the basis of the valid law. The Riigikogu wanted to create a new law according to which one should act in one concrete situation of life.

7. The Chancellor of Justice is of the opinion that § 20(2) of the National Opera Act is in conflict with §§ 11 and 13 and with the second sentence of § 32 (1) of the Constitution. The Chancellor of Justice reasons in his opinion as follows:

1) The Constitutional Review Chamber has stated in its judgment of 21 December 1994 that invalidation of transactions by parliamentary Acts confuses legal regulation and is in conflict with the principle of rule of law, according to which the legislator is competent to prescribe the grounds for terminating commercial lease contracts before the prescribed term, but only courts may declare that a contract is terminated.

2) The termination of the commercial lease contract before the prescribed term interferes with the commercial lessee's right to possess and use property. § 24(1) of the Commercial Lease Act provides that protection of the rights of commercial lessee is guaranteed on the same basis as the protection of rights of the owner of the commercially leased property. The sphere of protection of constitutional right to ownership is not confined to ownership in the civil law meaning. § 32 of the Constitution protects property in the broadest sense. § 20(2) of the National Opera Act is an act of expropriation, depriving the addressee of fundamental rights of the subjective right guaranteed by commercial lease contract, safeguarded by § 32 of the Constitution.

3) Expropriation is an extreme measure which, under § 11 of the Constitution, is allowed only if there are not any less encumbering measures available to achieve an objective that meets the general interests. A problem arising on the basis of a commercial lease contract is solved, under §§ 16 and 17(2) of Commercial Lease Act, primarily with an agreement between the parties or by recourse to the courts on the basis of § 23(2). Thus, there existed means less encumbering on the rights of the commercial lessee in order to guarantee expedient use of the building of the National Opera, if the objective was not guaranteed by the valid commercial lease contract. Termination of the commercial lease contract by parliamentary Act was neither a necessary nor an appropriate measure.

4) In the commercial lease contracts concluded with state performing arts institution Estonia Teater the commercial lessor was the state. One party to the contract has unilaterally terminated the commercial lease contract in his own interest and in the interest of the National Opera, exercising the legislative power vested with it. Such termination of commercial lease contracts before the prescribed term is an arbitrary action by the state and violates § 13 of the Constitution.

## **DISPUTED PROVISION**

8. The Tallinn Circuit Court requests that § 20(2) of the National Opera Act (RT I 1997, 93, 1558) that provides the following, be declared invalid:

...

"(2) The commercial lease contracts concluded by the national performing arts institution Estonia Teater before entering into force of the Act are considered to be terminated before the prescribed time upon entering into force of this Act."

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

### **I.**

**9.** The circuit court did not apply § 20(2) of the National Opera Act on the ground that the provision was in conflict with the principle of state based on rule of law, according to which the legislator is competent to provide the grounds for termination of commercial lease contracts before the prescribed time. A concrete commercial lease contract may be terminated only by courts. The circuit court argues that the Riigikogu set out to administer justice, as it considered concrete transactions in civil law to be terminated before the prescribed time. The circuit court considered such activity to be in conflict with § 146 of the Constitution, pursuant to which justice shall be administered solely by the courts.

From the materials of the civil case it also appears that in 1995 the Theatre Estonia had filed an action with the Tallinn City Court against the Ooperi Restorani AS requesting that the commercial lease contract be declared invalid. The Tallinn City Court dismissed the action on 11 October 1996. The theatre Estonia did file an appeal against the judgment, but later on discontinued it, after which the appeal proceedings were terminated in April 1997.

As the National Opera Act declared that only commercial lease contracts of rooms were to be considered as terminated before the prescribed time, a justified question arises of whether the intent of the disputed provision was to revise the judicial decision unfavourable to the theatre Estonia.

**10.** The Constitutional Review Chamber is of the opinion that there is no conclusive evidence to prove that the insertion of the disputed provision into the Act was induced by the court decision unfavourable to theatre Estonia.

The National Opera Act regulates the objective, tasks, legal standing and organisation of management and activities of one institution. A new legal person in public law was created by the Act. As this is an Act pertaining to a concrete legal person in public law, it is understandable that it also regulates some concrete matters. It is worth adding that the Act provided for termination of all commercial lease contracts before the prescribed time.

### **II.**

**11.** The review of constitutionality of § 20(2) of the National Opera Act can not be confined to the above conclusion. The Chamber considers it necessary to identify the fundamental right, which was infringed by § 20(2) of the National Opera Act, and to assess the lawfulness of the infringement.

**12.** As appears from the materials of the case, the AS Freesia (with business name the Ooperi Restorani AS) provided catering services, using the rooms commercially leased from theatre Estonia. Thus, the company was engaged in enterprise. On 2 December 1997 the Riigikogu passed the National Opera Act, § 20(2) of which declared commercial lease contracts concluded by the theatre Estonia invalid. The Ooperi Restorani AS filed an action with the Tallinn City Court, requesting that the court recognise the validity of the commercial lease contract concluded until 31 December 2018, declare unconstitutional and not apply §§ 20(2) and 21 of the National Opera Act, because these are in conflict with §§ 3, 10, 11, 13, 32 and 102 of the Constitution. Although § 31 is not referred to in the statement of claim, it appears from the materials of the case that the Ooperi Restorani AS wanted to continue its business - provision of catering services - in the same rooms under the commercial lease contract.

**13.** The words "Estonian citizens have the right to engage in enterprise" of the first sentence of § 31 of the Constitution establish the freedom to engage in enterprise. This freedom is extended also to legal persons

under § 9(2) of the Constitution. The court finds that with the disputed provision the legislator has interfered with the freedom of the Ooperi Restorani AS to engage in enterprise, guaranteed by the Constitution.

**14.** The second sentence of § 31 of the Constitution, which provides that conditions and procedure for the exercise of the freedom to engage in enterprise may be provided by law, gives the legislator wide freedom to regulate the conditions of exercise of freedom to engage in enterprise and to impose restrictions thereon. Any reasonable ground is sufficient for the restriction of the freedom to engage in enterprise. Such a ground must follow from public interest or necessity to protect the rights and freedoms of others, it must be weighty and, certainly, lawful. The more intense the infringement into the freedom to engage in enterprise, the stronger must be the grounds justifying the infringement.

**15.** Bearing in mind the above principles it is necessary first of all to find out on what considerations § 20(2) was inserted into the National Opera Act, or in other words, in favour of what rights of others or collective benefits the legislator decided to restrict the right of a person to engage in enterprise. After that the Chamber will be able to assess whether the freedom to engage in enterprise was restricted in observance of § 11 of the Constitution, which permits to restrict rights and freedoms only if the restrictions are necessary in a democratic society and do not distort the nature of the rights and freedoms restricted.

**16.** The Chamber faced difficulties when ascertaining the causes behind the termination of commercial lease contracts before the prescribed time.

The original draft of the National Opera Act, submitted to the Riigikogu by the Government of the Republic in September 1997, did not include the disputed provision. It appears from the shorthand notes of the session of the Riigikogu of 2 December 1997 that the provision was suggested by two members of the Riigikogu and that the Government of the Republic, who had initiated the draft law, supported the amendment proposal. According to the explanation of the representative of the Government the amendment proposal was made in order to enable the National Opera to start with a “clean slate”. The Riigikogu supported the amendment proposal and on the same day the Act was passed.

The Riigikogu did not submit to the court any explanations as to the necessity of the provision. The representative of the Riigikogu, one of the initiators of the inclusion of § 20(2) into the National Opera Act, could not explain it at the court session, either. He only admitted that the reason for terminating the commercial lease contract by law may have been dissatisfaction with the commercial lessee and the fact that the commercial lease contract had been concluded for a long period.

**17.** Thus, only commercial lease contracts were declared to be terminated before the prescribe time by the National Opera Act. Other contracts in private law, concluded by the theatre Estonia remained in force also for the National Opera. It remains unclear for the Chamber why it were the commercial lease contracts that were terminated before the prescribed time. But due to the lack of explanations of the Riigikogu, the Chamber can not speculate whether the termination of commercial lease contracts was caused by dissatisfaction with the commercial lessee and the provider of catering services or by some other reason.

**18.** On the basis of the above the Chamber can not weigh whether the infringement into the freedom to engage in enterprise by § 20(2) of the National Opera Act was necessary in a democratic society and did not distort the nature of the freedom to engage in enterprise. The Court can not consider such infringement into the freedom to engage in enterprise as constitutional and therefore declares § 20(2) of the National Opera Act invalid.

Uno Lõhmus  
Chief Justice of the Supreme Court