Constitutional judgment 3-4-1-1-00

3-4-1-1-2000

**JUDGMENT
OF THE SUPREME COURT EN BANC**

of 17 March 2000

Review of the petition of the Chancellor of Justice to declare the "Supplementary Budget for 1999" Act partly invalid.

The Supreme Court *en banc*
presided over by the Chairman Uno Lõhmus
and composed of members justices Tõnu Anton, Jüri Ilvest, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull Lea Laarmaa, Jaak Luik, Jaano Odar, Jüri Põld Hele-Kai Remmel, Jüri Rätsep, Harri Salmann, Peeter Vaher and Triinu Vernik,
at its session of 17 February 2000,
with the Chancellor of Justice Eerik-Juhan Truuväli, the Deputy Chancellor of Justice-Adviser Aare Reenumägi and the representative of the Minister of Justice Priit Kama appearing,
and in the presence of the secretary to the Chamber Piret Lehemets
reviewed petition of the Chancellor of Justice of 5 November 1999.

I FACTS AND COURSE OF PROCEEDINGS

1. On 28 June 1999 the Riigikogu passed the "Supplementary Budget for 1999"Act.

2. On 24 September 1999 the Chancellor of Justice made a proposal to the Riigikogu that it bring the "Supplementary Budget for 1999"Act into conformity with the provisions of §§ 3(1) and 116(2) of the Constitution. The Chancellor of Justice argued that entry "for the implementation of Dwelling Act - 103 000 000" of subsection "Allocations to rural municipality and city budgets" of section 155 of the expenditure part of § 1, and entry "013.99.05. decreasing the surplus of State Forest Management Centre at the end of the budgetary year - 33 000 000" of section 013 of revenue part and § 4 of the "Supplementary Budget for 1999" Act were in conflict with the Constitution.

3. The Riigikogu discussed the Chancellor of Justice's proposal on 19 September 1999 and did not accept it.

4. On 5 November 1999 the Chancellor of Justice submitted a petition to the Supreme Court to declare entry "for the implementation of Dwelling Act - 103 000 000" of subsection "Allocations to rural municipality and city budgets" of section 155 of the expenditure part of § 1, and entry "013.99.05. decreasing the surplus of State Forest Management Centre at the end of the budgetary year - 33 000 000" of section 013 of revenue

part of the “Supplementary Budget for 1999” Act invalid. The Chancellor of Justice was of the opinion that entry “for the implementation of Dwelling Act - 103 000 000” of subsection “Allocations to rural municipality and city budgets” of section 155 of the expenditure part of § 1, and entry “013.99.05. decreasing the surplus of State Forest Management Centre at the end of the budgetary year - 33 000 000” of section 013 of revenue part and § 4 of the “Supplementary Budget for 1999” Act were in conflict with the provisions of §§ 3(1) and 116(2) of the Constitution. According 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. According to § 116(2) of the Constitution the Riigikogu shall not eliminate or reduce expenditure in the state budget or in its draft which is prescribed by other laws.

Pursuant to § 33(5) of the Dwelling Act resources for the construction or purchasing of dwellings are allocated by the state, if a local government entity is unable to provide a dwelling in return, whereas the procedure for applying for and allocating resources shall be established by the Government of the Republic. On 10 March 1999 the Government of the Republic issued order No. 315 k for the implementation of § 33(5) of Dwelling Act, by which it allocated 103 000 000 kroons from reserve capital to local government entities for construction or purchasing of dwellings. § 14 of the State Budget Act stipulates that upon including into draft budget amounts exceeding those provided by law, the Minister of Finance shall submit to the Government of the Republic, with the draft of the state budget, also the amendments to pertinent laws. Pursuant to § 16(2)3) of the same Act the Government of the Republic, when submitting the draft of the state budget to the Riigikogu, must also submit other drafts proceeding from § 14. As § 33(5) of the Dwelling Act has not been amended, the use of allocations made for the implementation of the Dwelling Act by the “Supplementary Budget for 1999”Act is in conflict with §§ 14 and 16(2)3) of the State Budget Act and with the provisions of §§ 3(1) and 116(2) of the Constitution.

Pursuant to § 5 of the “Supplementary Budget for 1999” Act the revenue from forests in 1999 is 731 949 000 kroons. From this amount 604 289 000 kroons shall remain at the disposal of the State Forest Management Centre (hereinafter: the Centre) for the management of state forest and 36 628 000 kroons are the surplus at the end of the budgetary year of the Centre. Pursuant to § 50(2) of the Forest Act, 22 per cent of the charge for the sale of the right to cut standing crop sold for regeneration cutting and the income from the sale of timber received from regeneration cutting by the Centre shall be transferred to the state budget and 4 per cent to the Environmental Fund. By the Use of Environmental Use Proceeds Act, passed on 16 June 1999, this provision of the Forest Act was amended and § 50(2) was worded as follows: “26 per cent of the charge for the sale of the right to cut standing crop sold for regeneration cutting and the income from the sale of timber received from regeneration cutting by the Centre shall be transferred to the state budget”. According to § 50(3) of the Forest Act the revenue from forest not specified in §50(2) shall remain at the disposal of the Centre and shall be used for reforestation, tending of forest, use of forest and forest protection, and for the organisation of these activities. According to § 51(1) of the same Act the Government of the Republic shall, on the proposal of the Minister of the Environment, approve the budget of the Centre on the basis of the revenue from forests provided for in the State Budget Act, the part of the revenue from forests which is retained for the management of state forests, and the residual revenue from forests of the previous accounting year. Thus, the Forest Act establishes for the Centre a concrete basis of revenue and expenditure (revenue from forests as a part of it). It is established in § 4 of the “Supplementary Budget for 1999” Act that the surplus figure at the end of the budgetary year “36 628 000” in § 5 of the “State Budget for 1999” Act is replaced by “3 628 000”. Thus, entry 013.99.05 of § 1 and § 4 of the “Supplementary Budget for 1999” Act are in conflict with the provisions of § 50(3) and § 51(2)1) of the Forest Act and § 116(2) of the Constitution.

For the above reasons and proceeding from § 142(2) of the Constitution and § 18(1) of the Chancellor of Justice Act, the Chancellor of Justice made a proposal to the Supreme Court to declare invalid the entry “for the implementation of the Dwelling Act - 103 000 000” of subsection “Allocations to rural municipality and city budgets” of section 155 of the expenditure part of § 1, and entry “013.99.05. decreasing the surplus of State Forest Management Centre at the end of the budgetary year - 33 000 000” of section 013 of revenue part and § 4 of the “Supplementary Budget for 1999” Act.

5. On 5 January 2000 the Constitutional Review Chamber examined the petition of the Chancellor of Justice. Due to differences concerning issues of principle the Chamber decided to transfer the Chancellor of Justice's petition to the Supreme Court *en banc* for hearing.

LEGAL JUSTIFICATIONS

Justifications of participants

6. At the Supreme Court session the Chancellor of Justice stood by his petition. He emphasised that the valid positive law does not differentiate between laws in substantive and formal sense, that the concepts are partially overlapping and the differentiation is of no practical consequence. Overlapping consists in the fact that a law contains both general rules and individual rules. Legislation of general application is a general name for acts containing general rules, and a law may be dualistic by nature. A law may be dualistic in the sense that it has characteristics of a law in substantive sense as well as in formal sense. Those who proceed from the view that the State Budget Act is a law in formal sense, presume that the Act does not contain general rules. In Estonian legal practice the State Budget Act does contain general rules, consequently it is a law of dualistic character. The "State Budget for 1999" Act contains both general rules and individual precepts. Pursuant to the Chancellor of Justice Act the Chancellor of Justice is competent to review constitutionality and legality of any law.

7. According to the Minister of Justice the Chancellor of Justice's petition should not be satisfied as he has no competence to exercise review over the "Supplementary Budget for 1999" Act. The entries and § 4 of the supplementary budget contested by the Chancellor of Justice by way of constitutional review have to be regarded as a law in formal sense only. The Chancellor of Justice is not competent to review such laws, because pursuant to § 139(1) of the Constitution he shall review only legislation of general application. The Constitutional Review Court Procedure Act does not differentiate between substantive and formal laws, embracing both under constitutional review proceedings. Review of formal laws in the Supreme Court takes place on proposal by the President of the Republic and the courts. But if the Supreme Court should find that the Chancellor of Justice is competent to review a Supplementary Budget Act and the Supreme Court shall hear the petition, the contested entries of the "Supplementary Budget for 1999" Act are in conflict with §§ 116(2), 154(2) and 3(1) of the Constitution.

Opinion of the Supreme Court *en banc*

I.

8. In Chapter XII of the Constitution entitled "The Chancellor of Justice" the term "legislation of general application" is used in relation to constitutional review. Pursuant to § 139(1) of this chapter the Chancellor of Justice shall exercise the review of constitutionality and legality of legislation of general application. Pursuant to § 142(1), if the Chancellor of Justice finds that legislation of general application passed by the legislative or executive powers or by a local government is in conflict with the Constitution or a law, he or she shall propose to the body which passed the legislation to bring the legislation into conformity with the Constitution or the law.

9. During the hearing of the Chancellor of Justice's petition in the Supreme Court the Minister of Justice raised a question of his competence to dispute the "Supplementary Budget for 1999" Act, reasoning that this is a formal law. The Chancellor of Justice did not agree with the opinion of the Minister of Justice.

The Riigikogu discussed the Chancellor of Justice's proposal to bring the "Supplementary Budget for 1999" Act into conformity with the provisions of §§ 3(1) and 116(2) of the Constitution. The Riigikogu did not accept the proposal, neither did it dispute the Chancellor of Justice's competence to exercise review over the Budget Act or the Supplementary Budget Act. Also, at the session of the Constitutional Review Chamber the representative of the Riigikogu presented objections only to the content of the Chancellor of Justice's petition.

10. The Supreme Court *en banc* points out that the law valid in Estonia does not differentiate between laws in substantive and formal sense.

11. An Act is legislation of general application, containing legal rules. In Estonian legal practice there are Acts, which contain legal rules as well as regulations of single application. One of such Acts is the "Supplementary Budget for 1999" Act. This Act, in addition to establishing the state budget, also provides for a formulary to calculate allowances to local budgets, determines national pension and child benefits rates, and maximum rate of salary scale of state public servants, gives a permission to ministries and other state institutions to change certain categories of state budget expenditure, provides for the establishment of state pension insurance reserve and state health insurance reserve.

The Supreme Court *en banc* is of the opinion that the "Supplementary Budget for 1999" Acts is a supplement to the "State Budget for 1999" Act. Legal assessment of an Act concerning supplementary budget is impossible without discussing the State Budget for 1999 Act.

12. The Supreme Court considers an Act, which contains legal rules as well as regulations of single (specific) application, as legislation of general application. That is why the Supreme Court *en banc* is of the opinion that according to § 139(1) of the Constitution the Chancellor of Justice has the right to exercise review of constitutionality and legality of the state budget and the supplementary budget, and shall hear the Chancellor of Justice's petition.

II.

13. The Chancellor of Justice argues that entry "for the implementation of Dwelling Act - 103 000 000" of subsection "Allocations to rural municipality and city budgets" of section 155 of the expenditure part of § 1, and entry "013.99.05. decreasing the surplus of State Forest Management Centre at the end of the budgetary year - 33 000 000 (kroons)" of section 013 of revenue part and § 4 of the "Supplementary Budget for 1999" Act, by which the figure "36 628 000" indicating in kroons the surplus at the end of the budgetary year of the Centre in § 5 of the "State Budget for 1999" Act was replaced by figure "3 628 999" is in conflict with §§ 3(1) and 116(2) of the Constitution. By these provisions the Riigikogu eliminated or reduced expenditure in the state budget, prescribed by § 33(5) of the Dwelling Act and §§ 50(3) and 51(2)1) of the Forest Act.

According to § 3(1) of the Constitution the powers of state in Estonia shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. According to § 116(2) the Riigikogu shall not eliminate or reduce expenditure in the state budget or in its draft which is prescribed by other laws.

14. § 33 of the Dwelling Act provides for guarantees to tenants, with whom the lessor does not want to enter into new residential lease contract for the reason that the leased dwelling is needed for the lessor or his or her family members to live in, or the object of residential lease contract is excluded from the category of dwellings because of natural wear and tear, or if it was not retained, was significantly decreased or increased in the course of major repairs. On these grounds a tenant who has a lease contract in force at the time of return of a dwelling and persons living with him or her may be evicted only if a state agency or local government body grants the tenant and persons living with him or her another residential space or if a state agency, local government body or a lessor reach an agreement with the tenant and persons living with him or her concerning granting them other residential space suitable for them. Agreement may consist in financial compensation for vacating a dwelling. § 33(5) of the Dwelling Act provides that if a local government unit is unable to grant the tenant a residential space, the state shall allocate resources for the construction or purchase of pertinent residential space. The procedure for applying for and allocating resources shall be established by the Government of the Republic.

15. The Supreme Court *en banc* points out first, that refusal to enter into a new residential lease contract under § 33(1)2) and 3) of the Dwelling Act affects the interests of both the lessors of residential space returned in the course of ownership reform, and the tenants.

§ 2 of the Principles of Ownership Reform Act stipulates the purpose of ownership reform to be, *inter alia*, to undo the injustices caused by violation of the right to ownership and to create the preconditions for the transfer to a market economy. The provision pursuant to which return of property to or compensation of former owners or their legal successors for property in the course of ownership reform shall not prejudice the interests protected by law of other persons or cause new injustices, is to guarantee balancing of different interests and social justice.

Therefore, the state has the obligation not only to regulate relations between the owners and the tenants in returned dwellings, but it also has to see to it that law provisions are effective. The rights of owners and tenants were but illusory if the state did not allocate financial resources for the construction and purchase of residential space for the achievement of the purposes of ownership reform.

16. § 33(5) of the Dwelling Act obligates the state to allocate finances for the construction and purchasing of residential space but does not provide for the exact amount. It is possible to decide on the need for and amount of financial resources only on the basis of concrete facts or reasoned applications from local government bodies. On the basis of documents submitted to the Supreme Court the Supreme Court *en banc*, in the course of resolution of this constitutional case, can not assess whether the fact that sums allocated from 1999 state budget to rural municipality and city budgets for the implementation of the Dwelling Act were eliminated, *de facto* stopped the implementation of § 33(5) of the Dwelling Act for 1999. On these considerations the Supreme Court *en banc* can not agree with the Chancellor of Justice's claim that entry "for the implementation of Dwelling Act - 100 000 000" of subsection "Allocations to rural municipality and city budgets" of section 155 of the expenditure part of § 1 of the "Supplementary Budget for 1999" Act is in conflict with §§ 3(1) and 116(2) of the Constitution.

Nevertheless, the Supreme Court *en banc* is of the opinion that the state has the obligation to fulfil the obligations under § 33(5) of the Dwelling Act irrespective of whether the state budget provides for pertinent resources or not.

III

17. The Supreme Court *en banc* is of the opinion that entry "013.99.05. decreasing the surplus of State Forest Management Centre at the end of the budgetary year - 33 000 000" of § 1 of section 013 of revenue part and § 4 of the "Supplementary Budget for 1999" Act are not in conflict with § 50(3) and § 51(2)1) of the Forest Act.

It proceeds from § 50(3) of the Forest Act that the revenue from forests shall remain at the disposal of the Centre, except for the amount to be transferred to the state budget. Pursuant to § 50(2) of the same Act 26 per cent of the charge for the sale of the right to cut standing crop sold for regeneration cutting and the income from the sale of timber received from regeneration cutting by the Centre shall be transferred to the state budget. Pursuant to § 51(2)1) of the same Act the expenditure of the Centre shall be covered from the revenue from forests which remains at the disposal of the Centre. Under § 51(1) of the Forest Act the budget of the Centre shall be approved on the basis of residual revenue from forests of the previous accounting year.

Proceeding from the referred provisions the Forest Act establishes a concrete proportion of revenue from forests to be retained at the disposal of the Centre. The residual revenue from forests of the previous accounting year is transferred into the next year's budget and it would be in conflict with the Forest Act to take away this residual revenue.

The surplus at the end of the budgetary year of the Centre, stipulated in § 5 of the "State Budget for 1999" Act was not the revenue from forests to be retained to cover the expenditure of the Centre under §§ 50(3) and § 51(2)1) of the Forest Act (entered into force on 1 January 1999). The surplus consisted of funds of the Forest Foundation on the account of the Forestry Board, which were subject to be transferred to the Centre (§ 60(2) of the Forest Act). The Centre itself was formed by the merger of the Forest Economics and

Information Centre, forest districts administered by the Ministry of Environment, Sagadi Training Centre, Räpina Forestry School, Marna Forest Nursery and Kullenga Forest Nursery as at 1 January 1999 (§ 60(1) of the Forest Act).

Therefore the Supreme Court *en banc* is of the opinion that by entry "013.99.05. decreasing the surplus of State Forest Management Centre at the end of the budgetary year - 33 000 000" of section 013 of revenue part and by § 4 of the "Supplementary Budget for 1999" Act the expenditure provided for by §§ 50(3) and 51(2)1) of the Forest Act were not reduced.

18. According to § 115(1) of the Constitution the Riigikogu shall pass as a law the budget of all state revenue and expenditure for each year. Thus, the budget should also determine the expenditure of the Centre. The expenditure of the Centre was not determined by a pertinent entry in the expenditure part of the state budget neither in the "State Budget for 1999" Act nor in the "Supplementary Budget for 1999" Act. Consequently, the entry "013.99.05. reduction of surplus at the end of the budgetary year of State Forest Management Centre 33 000 000" in the revenue part of the "Supplementary Budget for 1999" Act could not eliminate or reduce expenditure in the state budget.

19. It was determined by § 5 of the "State Budget for 1999" Act that revenue from forest for 1999 was 731 949 000 kroons, of which 604 289 000 kroons were to be retained to the Centre for management of state forests and 36 628 000 kroons as surplus at the end of the budgetary year of the Centre. With entry 013.99.05. of revenue part of § 1 of the "Supplementary Budget for 1999" Act the surplus at the end of the budgetary year of the Centre was reduced by 33 000 000 kroons. Thus, the known revenue from forests in the amount of 731 949 000 kroons and expenditure related to management of state forests in the amount of 604 289 000 kroons have not been entered in the revenue and expenditure of the state budget for 1999.

The entry of § 1 of the "Supplementary Budget for 1999" Act concerning the reduction of surplus at the end of the budgetary year of the Centre has to be regarded as the reduction of this revenue which had not been entered into records and is not reflected in the state budget. The essence of the referred contradiction is the violation of the principles of comprehensiveness, unity and transparency of budget, prescribed by § 115(1) of the Constitution.

The state budget for 1999 does not contain all revenue and expenditure. The prohibition of § 116(2) of the Constitution presupposes a situation where the principles stipulated in § 115(1) of the Constitution have been observed.

Proceeding from § 19(1)1) of the Constitutional Review Court Procedure Act the Supreme Court *en banc* has decided:

To dismiss the Chancellor of Justice's petition to declare invalid entry "for the implementation of Dwelling Act - 103 000 000" of subsection "Allocations to rural municipality and city budgets" of section 155 of the expenditure part of § 1, and entry "013.99.05. decreasing the surplus of State Forest Management Centre at the end of the budgetary year - 33 000 000" of section 013 of revenue part and § 4 of the "Supplementary Budget for 1999" Act.

The judgment is effective as of pronouncement, is final and is not subject to further appeal.

U. Lõhmus
Chief Justice of the Supreme Court

Concurring opinion
of justice Jüri Põld

joined by justices Tõnu Anton, Henn Jõks, Ott Järvesaar,
Ants Kull, Jaano Odar, Harri Salmann

I do not agree with the reasoning of the judgment of the Supreme Court *en banc*, stating that the Chancellor of Justice is competent to dispute how individual issues are regulated in the State Budget Act (paragraphs 8 to 12). I agree with the decision.

I am of the opinion that the Chancellor of Justice had no competence to dispute the entries and § 4 of the "Supplementary Budget for 1999" Act. I substantiate my opinion as follows:

1. In order to determine the competence of the Chancellor of Justice to initiate constitutional review court proceedings two questions have to be answered. Firstly, what is legislation of general application and secondly, does the Chancellor of Justice dispute legislation of general application or a provision of law contained therein?

2. Determining the competence of state bodies to pass legal acts the Constitution uses the following terms: "law" and "resolution" (§ 65(1)), "decree" (§ 78(7)), "regulation" and "order" (§ 87(6)), and "regulations" and "directives" (§ 94(2)). §§ 139(1), 142(1) and 143 of the Constitution, determining the competence of the Chancellor of Justice, use the term "legislation of general application".

3. It proceeds from the systematic interpretation of the Constitution that under legislation of general application we should understand a general act or a normative act, that is a legal act which contains legal provisions - universally obligatory rules of conduct, the fulfilment of which is guaranteed by the possibility of state coercion. In Estonian legal theory the prevailing viewpoint is that legislation of general application means a general act (normative act).

4. It is certain that the Constitution presumes that legal acts are drafted according to legislative requirements. This means that legislation of general application (law, decree, regulation) contains only legal provisions and legislation of specific application (resolution, order, directive) contains only regulations of specific individual cases. The only exceptions are the cases when the Constitution itself provides that individual issues are to be regulated in the form of a law. The state budget is one of such exceptions, the passage of which as a law is required by § 115(1) of the Constitution.

In reality these principles have not always been observed. There are cases when a law or a regulation contains not only legal provisions but also regulations of individual cases. There are also resolutions, directives and orders, which contain not only regulations of individual cases but also legal provisions. Sometimes a legal act passed as legislation of general application contains regulations of individual cases. Sometimes, a legal act passed as legislation of specific application contains only legal provisions. The mixed character of legal acts is inherent especially to legal acts passed by ministers and bodies of cities and rural municipalities.

5. The competence of the Chancellor of Justice to exercise constitutional review is not determined by the name given to an act by the body which issued the act. The fact that an act contains legal provisions alongside individual regulations is not a decisive factor in determining the competence of the Chancellor of Justice, either.

Overestimation of the referred factors would bring about a situation where a lapse of the body which adopted legislation will affect the constitutional review competence of the Chancellor of Justice.

6. The next question is: does the Chancellor of Justice dispute an Act, a provision thereof, or a legal provision?

Grammatical interpretation of the text of the Constitution may produce the impression that the Chancellor of Justice disputes legislation or a provision thereof. Pursuant to the Constitution the Chancellor of Justice is

competent to review “the legislation of general application for conformity with the Constitution and the laws” (§ 139(1)). § 142(1) gives the Chancellor of Justice competence to propose to the body which passed the legislation to bring the legislation into Conformity with the Constitution or the law, if he finds that “legislation of general application is in conflict with the Constitution or a law”. According to § 143 of the Constitution the Chancellor of Justice shall present an annual report to the Riigikogu on “the conformity of legislation of general application with the Constitution and the laws”.

The expression “disputes legislation” is on the same level with the phrases “observes a law” or “violates a law” or a provision thereof, found in laws and in common usage. On a deeper level a man either observes or violates a legal provision, fixed in a law, not a law itself or a provision thereof. Speaking of observing or violating a law or a provision of law, one actually bears in mind observing or violating a legal provision. We speak of violation of law or a provision of law for merely practical reasons, as it is unpractical to describe a legal provision every time when we mean a norm that is either observed or violated. It is more economical to refer to a law or a provision of law, which contains the rule born in mind.

Also, the Chancellor of Justice does not dispute legislation of general application, instead he disputes a legal provision within such document. He claims that a legal provision within legislation of general application ranking lower than Constitution is not in conformity with the provision of law within the Constitution. What is actually meant in the Constitution is disputing a legal provision, not legislation.

The conclusion that the Chancellor of Justice disputes legal provisions is in accord with theoretical view on norm control. The conclusion is also in conformity with our understanding of the mechanism of legal regulation. Human behaviour is regulated by legal provisions, not by documents in which the rules are formally fixed.

7. Pursuant to the prevailing view in legal theory the entries of expenditure in a state budget are regulations of individual cases. Expenditure entries do not contain legal provisions. The same is admitted in paragraph 11 of the judgment of the Supreme Court *en banc*, observing that the “Supplementary Budget for 1999” Act contains both legal provisions and regulations of individual cases.

8. The “State Budget for 1999” Act is a bulky document, covering 95 pages as published in the Riigi Teataja. The entries concerning predicted revenue fill slightly more than two pages of the Act. Entries concerning expenditure, that is regulations of individual cases, make up 91 pages. On the rest one and a half pages we can find legal provisions in §§ 2 to 12. Only §§ 2, 3, 9, 10 and 11 of these actually contain provisions of law. § 2 provided for a formulary for 1999, pursuant to which allocations from support fund to local budgets were to be calculated. § 3 established national pension rate and maximum rate of salary scale of state public servants for 1999, from which, pursuant to a special law, the salaries of several categories of state public servants were calculated. §§ 9 and 10 established the state pension insurance reserve and state health insurance reserve to be managed by the Minister of Finance. § 11 gave permission to ministries and other state institutions, pursuant to § 53 of the Public Service Act, to cover the expenses related to forgiveness of educational loan from the resources allocated for wages and social tax.

Thus, the proportion of legal provisions in the “State Budget for 1999” Act was insignificant. The majority of the rules were of implementation character and it was not absolutely necessary to establish the rules in a state budget act. The rules could have been established by other laws. § 115(1) of the Constitution refers only to state revenue and expenditure as the content of the state budget.

9. The few legal provisions in the budget of the year Act can not give the Chancellor of Justice the right to dispute the entries in the budget which regulate individual cases and make up more than nine tenth of the “State Budget for 1999” Act.

The Supreme Court *en banc* is of the opinion, though, that as the State Budget Act contains legal provisions, the Chancellor of Justice can dispute not only these provisions of law but also individual regulations within the Act. Consequently, if the Riigikogu in the future will not include legal provisions in the State Budget

Act, the Chancellor of Justice will lose his competence to dispute regulations of individual cases therein. This approach is inconsistent and difficult to justify.

The Competence of the Chancellor of Justice can not depend on the discretion of the body which passed legislation.

10. In the present case the Chancellor of Justice disputed the entries and § 4 of the Supplementary Budget for 1999 Act, that is regulations of individual cases. Due to the fact that the Chancellor of Justice is not competent to dispute individual regulations within a State Budget Act he can not be competent to dispute the part of the Supplementary Budget Act which amends individual regulations of the Budget Act, either.

Dissenting opinion
of justices Jüri Ilvest, Eerik Kergandberg, Jüri Rätsep

With its judgment of 17 March 2000 the Supreme Court *en banc* dismissed the Chancellor of Justice's petition to declare, by way of constitutional review, entry "for the implementation of Dwelling Act - 103 000 000" of subsection "Allocations to rural municipality and city budgets" of section 155 of the expenditure part of § 1, and entry "013.99.05. decreasing the surplus of State Forest Management Centre at the end of the budgetary year - 33 000 000" of section 013 of revenue part and § 4 of the "Supplementary Budget for 1999" Act invalid. The Chancellor of Justice was of the opinion that the referred amendments to the budget were in conflict with the provisions of §§ 3(1) and 116(2) of the Constitution.

We have a dissenting opinion concerning the judgment of the Supreme Court *en banc* of 17 March 2000 on the following considerations.

1. We find that the Chancellor of Justice, when invoking in his petition §§ 3(1) and 116(2) of the Constitution, in fact posed a wider and deeper issue than it might be apparent at first glance from the text of the petition. Namely, the question of how seriously should one take laws which have already been enacted in Estonia? Or, in other words: to what extent does Estonian state in fact value legal order and the stability thereof? Pursuant to the first indent of § 3 of the Constitution the attitude should be more serious and state power should not take any steps, including law creating steps, which deviate from constitutional legal order. § 116(2) of the Constitution specifies the provisions of § 3(1) in relation to drafting and passing of the state budget. We find that the objective of the provisions of § 116(2) of the Constitution is to guarantee the stability of national and social development and to avoid too radical changes in national developments, which may accompany the change of governments.

2. In his petition and in his address at the Supreme Court *en banc* session, the Chancellor of Justice emphasised that in accordance with § 116(2) of the Constitution and pursuant to provisions of § 14 of State Budget Act the draft "Supplementary Budget for 1999" Act should have been appended with the draft amendments of all these laws the implementation of which was either excluded or limited by the supplementary budget. We agree with the Chancellor of Justice in his opinion that as the draft amendment to § 33(5) of the Dwelling Act was not appended to the draft "Supplementary Budget for 1999" Act, the reduction of amounts provided for the construction of residential space by 103 000 000 kroons by the supplementary budget is in conflict with the procedural principles proceeding from the spirit of § 116(2) of the Constitution, and thus with§ 116(2) in its entirety.

3. It is difficult to agree with the statement in paragraph 16 of the Supreme Court *en banc* judgment that as § 33(5) of the Dwelling Act does not provide for the exact amounts for the construction or purchasing of residential space, it is not possible to tell whether the passage of supplementary budget *de facto* stopped the implementation of the provision. We are of the opinion that the provisions of § 116(2) of the Constitution and § 14 of the State Budget Act have to be taken into consideration in regard to all laws without any exceptions and irrespective of whether § 33(5) of the Dwelling Act provided for concrete amounts or not.

Let us also emphasise that the provision of concrete amounts in laws is not typical.

CONCURRING OPINION

of justice U. Lõhmus

I voted for the recognition of the Chancellor of Justice's competence to contest the Supplementary Budget Act, but I am of the opinion that we should have used a different reasoning.

As it is referred to in the judgment, the issue of the Chancellor of Justice's competence to contest the entries of the state budget for 1999 was raised by the Minister of Justice before the Supreme Court. He is of the opinion that legislation of general application should be understood as an act containing legal rules or as a normative act or general act of law. Legislation of general application of the legislative power has to be understood as parliamentary law in the substantive sense. A law in the formal sense is a precept of a legislative body, issued pursuant to legislative procedure and having the form of a law. As a rule, a State Budget Act for a certain year, as well as a Supplementary Budget Act, do not contain legal rules, instead these contain individual precepts. The entries of the Supplementary Budget Act contested by the Chancellor of Justice are law in formal sense. The Minister of Justice argues that the Chancellor of Justice has no competence to review the constitutionality of a Supplementary Budget Act as a formal law.

As pursuant to §§ 139(1) and 142(1) of the Constitution the Chancellor of Justice has the right to contest legislation of general application, the question of the meaning of legislation of general application inevitably arises. These articles of the Constitution which determine the competence of state bodies, refer to concrete legislation that a body is competent to pass. Thus, the Riigikogu shall pass laws and resolutions (§ 65(1)), and the government shall issue regulations and orders on the basis of and for the implementation of law (§ 87(6)). The Constitution does not specify which of these acts are legislation of general application and which are not.

Neither do legal scholars agree on the meaning of legislation of general application (see I. Rebane. Õigustloovatest aktidest Eesti Vabariigi Põhiseaduse järgi (*Legislation of general application according to the Constitution of the Republic of Estonia*), Juridica 1993, p 12; H. Schneider. Õiguskantsler: tema koht riigiorganite süsteemis, EAÕS aastaraamat (*The Chancellor of Justice: his position in the system of state bodies, EALS yearbook*) 1991 -- 1992, Tartu 1995, pp 19, 21; K. Merusk. Kehtiv õigus ja õigusakti teooria põhiküsimusi, 2.tr., (*Valid law and basic issues of the theory of legal acts, 2nd ed.*,) Tartu 1995, p 8).

The justifications of the majority of the justices of the Supreme Court concerning the law-creating character of the Supplementary Budget for 1999 Act are set out in paragraphs 11 and 12 of the judgment. We can conclude from what is written in these paragraphs that a law containing legal rules as well as a law containing both legal rules and individual regulations can be treated as legislation of general application. As the Supplementary Budget Act has to be viewed in conjunction with the state Budget for 1999 Act, it contains, in addition to individual regulations, also legal rules. The wording leads us to the conclusion that a law, which does not contain legal rules, is not legislation of general application and it is justified to differentiate between laws in the formal and the substantive sense.

When the Constitution gives the Riigikogu the right to pass laws and resolutions, and the government the right to issue regulations and orders, it bears in mind the need to differentiate between acts of general and specific application. One of these is an act of general application (a law, a regulation), containing general rules, and another is an act of specific application (resolution, order), containing rules of specific application. This is *expressis verbis* stated in the Government of the Republic Act (RT I 1995, 94, 1628). Pursuant to the Act a regulation is legislation of general application (§ 27(1)), and an order is legislation of specific application (§ 30(1)). Unfortunately, the inner logic of the Constitution has not always been observed in constitutional law practice.

The Constitutional Assembly understood the term “õigustloov akt” (law-creating act or legislation of general application) as a synonym to “seadusandlik akt” (legislative act) (Põhiseadus ja Põhiseaduse Assamblee (*Constitution and Constitutional Assembly*), Tallinn 1997, p 765.) L. Hänni, speaking on behalf of editorial committee noted that an amendment of principle was made in the chapter concerning the Chancellor of Justice. “Namely, the competence of the institution of the Chancellor of Justice has been determined more specifically, whereas the idea of the previous draft that the Chancellor of Justice should review the activities of legislative and executive powers and local governments was replaced by the idea that he should review the constitutionality and legality of legislation of general application of these bodies. Thus, he has been deprived of the review over activities and this has been replaced by the review of the development of legislation and legal system.” The term “seadusandlik akt” (*legislative act*) allows to construe legislation as exercising all functions of legislative power, including budgeting.

Thus, taking into consideration the genesis and the system of the Constitution, there is no need to use “law” in different meanings when defining legislation of general application. The Constitution can be interpreted so that the concept of legislation of general application covers all laws passed by the Riigikogu.

One more argument can be added in this context. There would be a gap in our present constitutional review system if the Chancellor of Justice could not dispute all laws. A law, which contains individual legal provisions, may be in manifest conflict with the Constitution without a possibility to ascertain the fact. At the same time it would be possible to have recourse to courts against legislation of specific application of the executive state power and local governments.

One of the objectives of §§ 193(1) and 142(1) of the Constitution is, *inter alia*, to guarantee the constitutionality of laws, enabling to have recourse to the Supreme Court if laws are unconstitutional. The constitutionality of laws can only be guaranteed if there is a possibility to dispute any legal act containing the word "seadus" (Act) in the title. The viewpoint is shared by the Riigikogu, who on 29 September 1999 considered the Chancellor of Justice’s proposal to bring the “Supplementary Budget for 1999” Act into conformity with the provisions of §§ 3(1) and 116(2) of the Constitution. The Riigikogu did not satisfy the proposal, that is true, but it did not dispute his right to exercise review over the budget of the year Act, either. Also, at the Supreme Court session, the representative of the Riigikogu presented objections concerning only the content of the Chancellor of Justice’s petition.
