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## Constitutional judgment 3-4-1-3-99

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### JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT of 29 September 1999

#### **Review of the petition of the Tallinn City Court to declare invalid § 16 of the Notaries Disciplinary Action Act.**

The Constitutional Review Chamber sitting in a panel presided over by the Chairman of the Chamber Uno Lõhmus and composed of members of the Chamber, justices Tõnu Anton, Lea Kalm and Jüri Põld, at its open session of 15 September 1999, with the representative of the Riigikogu Jüri Adams and the Minister of Justice Märt Rask appearing, and in the presence of the secretary to the Chamber Piret Lehemets reviewed the petition of the Tallinn City Court of 24 May 1999.

#### **I. FACTS AND COURSE OF PROCEEDINGS**

- 1.** On 20 September 1995 the Riigikogu passed the Notaries Disciplinary Action Act by a majority of 49 votes.
- 2.** On 13 July 1998 the Minister of Justice imposed a fine as a disciplinary punishment on notary E. Paberit. On 14 August 1998 E. Paberit submitted a complaint to the Tallinn City Court, requesting that the disciplinary punishment imposed by the Minister of Justice be repealed.
- 3.** By its ruling of 21 August 1998 the Tallinn City Court refused to accept the complaint of E. Paberit on the grounds that the review of this complaint was not within the competence of a city court. The ruling explained to E. Paberit that she had the right of recourse to the Tallinn Administrative Court. The civil chamber of the Tallinn Circuit Court annulled the ruling of the city court by its ruling of 12 October 1998, and referred the complaint back to the city court for hearing.
- 4.** On 26 January 1999 E. Paberit submitted a petition to the Tallinn City Court, requesting that § 16 of the Notaries Disciplinary Action Act be not applied due to its conflict with the Constitution. E. Paberit argued the following:
  - 1) Pursuant to § 3(1)(1), § 4(1)1) and 2) of the Code of Administrative Court Procedure a complaint of a

notary against a disciplinary punishment is to be adjudicated by an administrative court. Nevertheless, § 16 of the Notaries Disciplinary Action Act places the adjudication of the complaint within the competence of the Tallinn City Court. By this the competence of administrative court, established by the Code of Administrative Court Procedure is, changed. The Riigikogu passed the Notaries Disciplinary Action Act by a majority of 49 votes. Thus, they violated the requirement that court procedure acts can only be amended by the majority vote of the membership of the Riigikogu, established by § 104(2)14) of the Constitution.

2) § 16 of the Notaries Disciplinary Action Act is also in conflict with § 102 of the Constitution, pursuant to which laws shall be passed in accordance with the Constitution.

3) Unlike the old Code of Civil Procedure, the new Code does not provide for the procedure of resolution of disputes in public law. Neither does civil court procedure guarantee a complainant the same protection as is guaranteed by administrative court procedure due to the application of the inquisitorial principle.

5. By its judgment in civil case no. 2/4/27-5683/98 of 24 May 1999 the Tallinn City Court declared § 16 of the Notaries Disciplinary Action Act unconstitutional and did not apply it. On the same day the Tallinn City Court, by its ruling, terminated the proceeding of the complaint of E. Paberit on the grounds that hearing of the dispute did not fall within the jurisdiction of the court.

6. The Tallinn City Court submitted a petition to the Supreme Court to declare § 16 of the Notaries Disciplinary Action Act invalid due to the conflict thereof with § 102 and § 104(2)14) of the Constitution.

## **II. LEGAL JUSTIFICATION**

### **Justifications of the parties**

7. The Tallinn City Court sets out the following reasoning in its petition:

1) Pursuant to § 3(1)1) of the Code of Administrative Court Procedure the hearing of complaints filed against a legislation of an official of the executive, stipulated in § 4 of the same Code, is also within the jurisdiction of an administrative court. Thus, pursuant to § 3 of the same Code, also a notary's complaint against a disciplinary punishment imposed by the Minister of Justice should fall within the competence of an administrative court. According to § 16 of the Notaries Disciplinary Action Act a notary can only file such a complaint with the Tallinn City Court.

2) According to §§ 2 and 3 of the Notaries Act a notary's office is an institution in public law, and a notary is a person in private law, to whom the state has transferred certain public law functions by law. Thus, public administration has been vested in a notary as a person in private law and a notary has no employment or service relationship with the Minister of Justice or the state. Pursuant to § 11(1) of the Notaries Act the state exercises supervision over management of the professional activities of notaries' offices. State supervision and imposition of disciplinary punishments on notaries by the Minister of Justice are measures in public law, and a dispute concerning a disciplinary punishment imposed on a notary is a dispute in public law.

3) Hearing of a dispute of this kind in a civil court instead of an administrative court constitutes a violation of general principles of division of competencies between civil and administrative courts. According to § 3(2)3) of the Code of Administrative Court Procedure the complaints that are heard pursuant to procedure established by codes of civil or criminal court procedure do not fall within the competence of administrative courts. As the Code of Civil Procedure does not provide for the procedure for hearing complaints from notaries, the dispute over a disciplinary punishment imposed on a notary is not a dispute specified in § 3(2)3) of the Code of Administrative Court Procedure.

4) The fact that the dispute concerning a disciplinary punishment imposed on a notary was placed within the competence of the Tallinn City Court changed court procedure which, pursuant to § 104(2)14) of the Constitution can only be amended by the majority vote of the membership of the Riigikogu. It appears from the vote results of the Riigikogu on 20 September 1995 that 49 members of the Riigikogu voted in favor of

passing the Notaries Disciplinary Action Act. Thus, upon passing the law, the Riigikogu did not meet the requirement of § 104(2)14) of the Constitution. Consequently, § 16 of the Notaries Disciplinary Action Act is also in conflict with § 102 of the Constitution, pursuant to which laws shall be passed in accordance with the Constitution.

**8.** At the court session the representative of the Riigikogu argued that § 16 of the Notaries Disciplinary Action Act was in conformity with the Constitution. He reasoned as follows:

1) Over the years the Riigikogu has developed a custom that if there is a justified claim that it is necessary to pass a law by the majority vote of the membership of the Riigikogu, such claims are fulfilled. In this case the question did not arise. Consequently, upon passing the Act the Riigikogu adopted the interpretation that the majority of votes of the membership of the Riigikogu is not necessary for the adoption of the Act.

2) A notary's offence in his or her official capacity is related to civil law norms. In order to be competent to resolve a dispute concerning a disciplinary punishment for an offence one has to be familiar with civil law and the work of a notary. For the purposes of proper resolution of such disputes it would be expedient to place the hearing of such disputes within the competence of the Tallinn City Court, as this court is engaged in adjudication of civil matters.

**9.** At the court session the Minister of Justice argued that the provision was in conflict with the Constitution. The Minister of Justice was of the opinion that § 16 of the Notaries Disciplinary Action Act amended the court procedure. Pursuant to the Constitution the norms amending court procedure should be passed by a majority of at least 51 votes. As the Notaries Disciplinary Action Act was passed by the Riigikogu by less than 51 votes, § 16 of the Act is in conflict with § 104(2)14) of the Constitution.

**10.** In his written opinion submitted to the Supreme Court the Chancellor of Justice is of the opinion that the petition of the Tallinn City Court is justified, because § 16 of the Notaries Disciplinary Action Act is a provision regulating court procedure.

### **The opinion of the Constitutional Review Chamber**

**11.** § 4 of the Notaries Disciplinary Action Act stipulates that the Minister of Justice is entitled to impose disciplinary punishments on notaries. Upon imposing a punishment the Minister of Justice is exercising public powers.

**12.** According to § 3(1)1) of the Code of Administrative Court Procedure, passed on 21 June 1993, an administrative court is competent to hear complaints filed against the officials of the executive, specified in § 4 of the Code. The Minister of Justice is an official of the executive specified in § 4 of the Code. Pursuant to these provisions the hearing of a complaint against a disciplinary punishment imposed on a notary falls within the jurisdiction of an administrative court.

**13.** According to § 3(2) of the Code of Administrative Court Procedure the complaints that are adjudicated pursuant to procedure provided by codes of civil or criminal procedure do not fall within the jurisdiction of administrative courts. This provision makes it possible to place the hearing of certain types of disputes in public law within the competence of county or city courts.

**14.** The Code of Civil Procedure, passed on 19 May 1993, does not make a reference to disputes concerning disciplinary punishments imposed on notaries among disputes which fall within the competence of county and city courts. Neither are disputes of this kind mentioned in the Code of Civil Procedure, passed on 22 April 1998. § 1(4) of the old Code of Civil Procedure established only that courts shall adjudicate other matters which are placed within their jurisdiction by law and which pursuant to law are subject to hearing pursuant to civil procedure. § 1(3) of the Code which is presently in force has the same content.

**15.** § 16 of the Notaries Disciplinary Action Act excludes the possibility of hearing complaints concerning disciplinary punishments imposed on notaries by an administrative court and places the hearing of such

complaints within the jurisdiction of the Tallinn City Court. The provision determines not only the jurisdiction of court but also the procedure for hearing notaries' complaints. Namely, in the Tallinn City Court a notary's complaint is heard by way of civil procedure, to which the principles of *ius dispositivum* are inherent. In an administrative court a complaint is heard by applying the inquisitorial principle.

**16.** Provisions of law regulating competence and jurisdiction of courts are, in essence, provisions regulating court procedure. According to § 104(2)14) of the Constitution court procedure Acts can only be amended by the majority of the membership of the Riigikogu. The purpose of the provision is to ensure the stability of court procedure. The means to this end is to establish a more complex procedure for amending the rules of court procedure.

**17.** According to § 73 of the Constitution, as a rule, legislation of the Riigikogu shall be passed by a majority of votes in favor. One exception is laws stipulated in § 104(2), which can only be amended by the majority of the membership of the Riigikogu. § 3(6) of the Constitution of the Republic of Estonia Implementation Act provides that in the Constitution "the majority of the membership of the Riigikogu" means more than one-half of the membership of the Riigikogu votes in favor. A law is passed by the majority of the membership of the Riigikogu if at least fifty one members of the Riigikogu vote in favor. The Notaries Disciplinary Action Act was passed by the Riigikogu by 49 votes in favor. Thus, the Tallinn City Court was justified to declare in its petition that § 16 of the Notaries Disciplinary Action Act which changes the court procedure was in conflict with § 104(2)14) of the Constitution.

On the basis of the aforesaid, and pursuant to § 152(2) of the Constitution and § 19(1)4) of the Constitutional Review Court Procedure Act **the Constitutional Review Chamber**

**has decided:**

**To satisfy the petition of the Tallinn City Court and to declare § 16 of the Notaries Disciplinary Action Act invalid.**

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

U. Lõhmus  
Chairman of the Constitutional Review Chamber

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