Constitutional judgment 3-4-1-3-98

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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 14 April 1998**

Review of the petition of the President of the Republic of 10 March 1998 to declare the Clemency Procedure Act unconstitutional.

The Constitutional Review Chamber sitting in a panel
presided over by the Chairman of the Chamber Rait Maruste
and composed of members of the Chamber,
justices Tõnu Anton, Lea Kalm, Jaano Odar and Jüri Põld,
at its open session of 1 April 1998,
with the representatives of the President of the Republic Mall Gramberg and Urmas Reinsalu, the representative of the Riigikogu Daimar Liiv and the representative of the Minister of Justice Heiki Loot appearing,
and in the presence of the secretary to the Chamber Piret Lehemets
reviewed the petition of the President of the Republic of 10 March 1998.

From the documents submitted to the Constitutional Review Chamber **it appears, that:**

On 22 January 1998 the Riigikogu passed the Clemency Procedure Act and the President of the Republic refused to proclaim it by his resolution no. 281 and referred it back to the Riigikogu for a new debate and decision. The President argued that the referred Act was in conflict with §§ 4 and 78 19) of the Constitution.

On 25 February 1998 the Riigikogu again passed the Clemency Procedure Act, unamended, and on 10 March 1998, under § 107(2) of the Constitution, the President of the Republic petitioned the Supreme Court to declare the Clemency Procedure Act unconstitutional. In the petition submitted to the Supreme Court the President of the Republic argues that § 5 and § 10(1) in conjunction with § 8(2) of the Clemency Procedure Act are in conflict with the Constitution.

The President of the Republic argued that the Clemency Procedure Act did not either directly arise from the Constitution or was in conformity therewith. Although pursuant to § 65 16) of the Constitution the Riigikogu shall resolve other national issues which the Constitution does not vest in the President of the Republic, this does not exclude the exercise of the right of self-organisation vested in the President of the Republic. The right of the President of the Republic to self-organisation regarding the issues of clemency proceeds from § 78 19) and § 4 of the Constitution, which establish the principle of separation of powers.

§ 5 of the Clemency Procedure Act provides for the establishment and composition of the clemency committee of the President of the Republic, although the Constitution does not provide for the establishment of such a consultative body. Pursuant to the right of self-organisation, proceeding from the Constitution, the President of the Republic may choose his or her advisers himself or herself.

According to § 10(1) of the Clemency Procedure Act the President of the Republic shall decide to grant pardon or not to satisfy an appeal for pardon after he or she has received a proposal from the clemency committee. Pursuant to § 8(2) of the Act the clemency committee shall not examine renewed appeals for pardon if less than one year has passed since the same convicted offender had submitted an appeal for pardon for the same criminal case and if no new circumstances are stated in it. The President of the Republic argued that the referred provisions in their conjunction restrict the right given to the President by § 78 19) of the Constitution, because, in this case, the clemency committee will not submit a proposal to the Head of State concerning the appeal for pardon.

In addition, the President of the Republic argued that the norm provided by § 9(1) of the Clemency Procedure Act, pursuant to which the Secretary General of the Office of the President has the obligation to communicate the proposal of the clemency committee to the President within three working days is not applicable in practice, as the schedule of the President may not allow for it.

For the above reasons and proceeding from §19(1)4) of the Constitutional Review Court Procedure Act, the President of the Republic is requesting the declaration of unconstitutionality of the Clemency Procedure Act, passed by the Riigikogu on 25 February 1998.

The representative of the Riigikogu argued at the court session that the Clemency Procedure Act was in conformity with the Constitution.

The representative of the Ministry of Justice was of the opinion that the contested Act as a whole was in conformity with the Constitution, but admitted that the wording of § 8(2) thereof was not good.

In his written opinion the Chancellor of Justice argues that the opinion of the President of the Republic concerning the conflict of §§ 5, 8(1) and 10(1) of the Act with the Constitution are disputable, although he supported the President's view that § 8(2) of the contested Act restricts the President's constitutional right to decide, and the Chancellor of Justice is of the opinion that the drawbacks, which have been pointed out, can be eliminated by amendment of the wording of the Act.

Having examined the materials submitted and having given a fair hearing to the representatives of the President of the Republic, the Riigikogu and the Ministry of Justice, **the Constitutional Review Chamber found, that:**

I.

According to the legal theory clemency is a one-time exceptional individual act of mercy of state power, and traditionally this has been a privilege of the sovereign (head of state). In its classical historical sense pardon is granted to a person who has committed a crime and has been convicted by a court. A pardon releases the guilty person partially or totally from the consequences of the commission of a crime. At the same time, a pardon does not question the legality and justifications of a judicial decision, and does not affect other persons who have committed other analogous acts. Pardon, unlike amnesty, requires individual appeal for it.

§ 77 of the Constitution of the Republic of Estonia establishes that the President of the Republic is the head of state of Estonia. Pursuant to § 78 19) of the Constitution the President of the Republic shall, "by way of clemency, release or grant commutation to convicted offenders at their request". Thus, the Constitution treats clemency in its traditional sense with the differentiation that it gives the head of state also the right to grant commutation to convicted offenders.

According to the information from the Office of the President of the Republic, since the entry into force of the Constitution until now 1584 appeals for pardon have been submitted to the President of the Republic, and 58 of these have been satisfied. So far the appeals for pardon have been examined by the President of the Republic pursuant to the procedure established by the President himself. The President of the Republic has, by Directive no. 25 of 3 December 1997, approved the Procedure for Hearing Appeals for Pardon (RT I 1997, 88, 1481).

II.

Estonia is a parliamentary democracy, wherein the spirit and provisions of the Constitution are equally binding on all constitutional subjects, including the Riigikogu and the President of the Republic. According to § 3 of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith.

The President of the Republic argues in his petition that the Clemency Procedure Act does not directly proceed from the Constitution and is not in conformity therewith. From this it can be concluded that the general provisions of the Constitution and the rules regulating the competencies of the Riigikogu and the President of the Republic do not provide for the establishment of the Clemency Procedure Act and thus the regulation of the field by law is unconstitutional and restricts the competence of the President. The Supreme Court is of the opinion that this argument of the President is correct in part.

It is true that on the basis of the list of the competence of the Riigikogu in issuing laws, provided by §§ 65 16) and 104(2) of the Constitution, it can be concluded that the Constitution treats clemency as a field which "the Constitution vests in the President of the Republic". Otherwise the Clemency Procedure Act should have been included in the list of Acts determining the competencies of constitutional institutions. If the Constitution treated the competence of the legislator as unlimited, § 65 16) would not contain a restrictive clause "issues which the Constitution does not vest in the President of the Republic, the Government of the Republic, other state bodies or local governments".

The fact that the Constitution does not expressis verbis provide for the passing of the Clemency Procedure Act, does not give rise to the conclusion that the legislator has no right to regulate the release from serving a sentence, including granting pardon. To find answers to the problem other constitutional provisions have to be taken into account, as well as the valid law, legal theory and the traditions of Estonia's legal practice.

§ 13(2) of the Constitution states the obligation that the law shall protect everyone from the arbitrary exercise of state authority, and the provision puts an obligation on all institutions of state power to guarantee rights and freedoms. The subjective right of the convicted to submit an appeal for pardon proceeds from § 78 19) of the Constitution and § 49 of the Criminal Code. § 46 of the Constitution gives everyone the right to address state agencies, local governments, and their officials with memoranda and petitions, and provides that the procedure for responding shall be provided by law. This constitutional norm can be regarded as a norm of general application for the purposes of assessing the normative level of the legal regulation of appeals for pardon and the procedure for examining these appeals. There are grounds to assume that if the procedure for responding to memoranda and petitions has to be provided by law, the clemency procedure should also be provided by law. The justifications of the Riigikogu to regulate clemency procedure by law also proceed from §§ 59 and 65 1) of the Constitution, pursuant to which the legislative power is vested in the Riigikogu.

The right of the Riigikogu to regulate clemency procedure also proceeds from the fact that in its essence clemency has to do with the administration of justice, as it ex post facto terminates or changes the execution of single punitive decisions. Criminal punishment and its execution are objects of regulation of the criminal law, criminal procedural law and law on enforcement procedure. Pursuant to § 104(2)14) of the Constitution the passing of the Acts concerning procedural law is within the sole competence of the majority of the members of the Riigikogu.

III.

From the point of view of constitutional law pardon is, on the one hand, an administrative decision, on the other hand it is a procedure consisting of several phases. This includes the drafting and submission of an appeal for pardon, the communication thereof, preparation for its examination, decision to grant pardon, announcement of the decision and the enforcement thereof. The procedure involves different state agencies and officials, including those in relation to which the President of the Republic has no right to establish rules (e.g. prison administration). Pursuant to the traditions of a democratic rule of law state and Estonian legal practice not only the court procedure but also the bases of administrative proceedings have to be regulated by law. On the basis of the aforesaid the Chamber is of the opinion that the clemency procedure, too, is to be established by law.

The Chamber admits the limited regulative quality of relevant parts of the Code of Enforcement Procedure, concerning the preliminary and follow-up proceedings of clemency. Neither does the contested Act sufficiently regulate the issues outside the Office of the President. At the same time the Act contains general regulation concerning the Office of the President. The regulation of the clemency procedure would serve the interests of precise determination of rights and freedoms and legality of the exercise of power.

IV.

The competence of the legislator to regulate clemency may infringe the constitutional right of the President of the Republic to grant pardon. Thus, the objective is to guarantee a substantiated balance between the constitutional right of the head of state to grant pardon and the legislative competence of the Riigikogu. Its is a principle of constitutional jurisdiction that when assessing the conflicting rights or competencies a solution has to be found that does not damage constitutional stability, that would restrict rights as little as possible, and would maintain the constitutional nature of law, and guarantee a justified and constitutional exercise of rights.

It proceeds from the separation of powers, general principles of law of a democratic rule of law state and § 65 16) of the Constitution that the branches of state power and constitutional institutions must have autonomy in the exercise of the competencies given to them by the Constitution expressis verbis. As a rule, they have the right to determine the internal organisation and procedure for the exercise of their competencies, including consultation and the terms thereof. In connection with the problem one of the most outstanding theoreticians of administrative law in Estonia, A.-T. Kliimann, has stated that “even within the internal limits of free discretion an official is bound by law : it has to strive for the objectives of the norm and determine the means of enforcement thereof, being guided only by a general interest” (A.- T. Kliimann. “Vaba kaalutlus” ja selle kohtulik kontrollimine.[“Free discretion” and the judicial review thereof] – Õigus, 1928, no. 3, p. 86). The institutions having constitutional authorisation are independent and competent to establish the procedure for the exercise of their competencies to the extent that the Constitution does not give this, expressis verbis, to the competence of some other constitutional institution (in this case to the Riigikogu).

The right of self-regulation, i.e. in the present case the discretion to decide means first and foremost that a relevant official or agency has the right to decide whether or not to apply a legal consequence. The Chamber finds it necessary to underline that the right of self-regulation includes only the competence to establish the so called internal rules, i.e. is the internal rules of an office or agency. Thus, in the case under dispute, the right of self-regulation of the President of the Republic extends to establishing the internal procedure for the activities of his office. In doing this, the President is restricted by the principles, objectives and values of the Constitution and by the laws.

V.

The President of the Republic has argued that the establishment of a clemency committee as an advisory

body and determination of its composition by law does not proceed from the Constitution and is not in conformity therewith. The Supreme Court is of the opinion that a consultative body to assist the President is not in itself unconstitutional. An assisting and consultative body may be necessary for the purposes of preparation of examination and processing of the appeals for pardon, as well as for the purposes of thorough reasoning of decisions, general interests, and the essential objective of clemency as an act of mercy.

A constitutional problem may arise proceeding from who has the constitutional right to provide for the establishment of such a committee, and from the competencies of the committee and the determination of the composition thereof. The Constitutional Review Chamber does not regard it unconstitutional that the committee has been provided for by § 5(1) of the Clemency Procedure Act. The Chamber refers to the fact that the President himself has provided for such a committee with his directive. As for the competencies of the committee the Chamber is of the opinion that the decision of the clemency committee may not contain a preliminary ruling binding on the President, and that the committee may not prevent an appeal for pardon from reaching the President of the Republic. The right to grant pardon, vested only with the President, requires that all appeals, including those that do not meet formal requirements, should only be decided on by the President. Similar conclusions have been expressed by the Chamber in its judgment of 18 February 1994 concerning state orders and decorations.

According to § 5(1) of the Act the clemency committee shall be an advisory body to the President of the Republic. Pursuant to § 10(1) the President has the right to disregard the decision of the committee. At the same time it has to be pointed out that the wording of § 8(2) of the contested Act contains two conditions for the admissibility of petitions for pardon : 1) one year after the previous appeal for pardon from the same convicted, and 2) the appeal for pardon presents new circumstances. As, pursuant to § 10(1) of the same Act, the President of the Republic shall decide to grant pardon or not to satisfy the appeal for pardon after he has received the proposal from the clemency committee, the Act provides for the possibility that some appeals which, in the opinion of the committee do not contain any new circumstances, do not reach the President at all. The provision for such a possibility has to be regarded as a preliminary decision restricting the presidential right to grant pardon, and this is in conflict with § 78 19) of the Constitution.

§ 5(2) of the Act provides that the committee shall have six members, the appointment of one of whom, namely the representative of the Office of the President, is the competence of the President. The Supreme Court agrees with the view of the President of the Republic that the President himself should have the right to choose his advisors. Thus, the provision of the composition of the committee by law infringes the presidential right of discretion, and is thus in conflict with §§ 78 19) and 65 16) of the Constitution.

VI.

The President of the Republic also argues that it is practically impossible to implement the norm established by § 9(1) of the Act, pursuant to which the Secretary General of the Office of the President has the obligation to present the proposals of the clemency committee to the President within three working days, irrespective of whether the president’s schedule allows to do so or not. This regulation in itself pertains to the internal regulation of work of the Office of the President. The President has not raised the issue before the Supreme Court from the point of view of constitutionality.

§ 8(1) sets a categorical term of two months for the clemency committee to submit its reasoned proposals, without providing for any exceptions. This can not be regarded to be justified. The appeals for pardon have to be examined within a reasonable time. The establishment of reasoned and clear formal requirements is justified and in conformity with general views and practice of procedural law. This is also necessary to avoid manifest abuse of the right of appeal.

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 declare the Clemency Procedure Act unconstitutional.

The judgment is effective from the date of its pronouncement, is final and is not subject to further appeal.

R. Maruste
Chairman of the Constitutional Review Chamber

CONCURRING OPINION

of justice Jüri Põld

I agree with the final conclusion of the judgment that the Clemency Procedure Act is unconstitutional. I also agree with most of the reasoning of the judgment. I do not agree with the viewpoint, stated in the judgment, that the Riigikogu was competent to prescribe for the existence of a clemency committee to the President of the Republic by § 5(1) of the Clemency Procedure Act. The establishment of a clemency committee by a law means that the President of the Republic must have such a committee and that he has no right to decide whether to establish such a committee or not.

I will justify my opinion that § 5(1) of the Clemency Procedure Act is unconstitutional, too, with the following arguments.

Pursuant to clauses 1) and 16) of § 65 of the Constitution the Riigikogu is competent to regulate certain aspects of clemency as a procedure. Pertinent law must not contain regulation, which infringes upon the right of self-regulation of the President of the Republic or provides for obligatory preliminary decisions or for restriction on the will of the President. As I understand it, the present wording of the Constitution does not allow for the Riigikogu to regulate the procedure for and organisation of the exercise of the will of the President of the Republic.

Pursuant to clauses 1) and 16) of § 65 of the Constitution the Riigikogu shall pass laws and resolutions, and shall resolve other national issues which the Constitution does not vest in the President of the Republic, the Government of the Republic, other state bodies or local governments. Under § 78 19) of the Constitution the President of the Republic is to decide on clemency. The right to regulate issues pertaining to clemency by a law can not be deducted from § 3 of the Constitution, which stipulates that the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Namely, § 78 19) of the Constitution does not specify that the President of the Republic shall grant pardon pursuant to law. In this aspect § 78 19) differs from many other provisions of the Constitution, which specify that this or that state body shall act pursuant to law. For example, § 112 of the Constitution stipulates that the Bank of Estonia shall act pursuant to law; § 120 provides that the procedure for the relations of the Republic of Estonia with other states and with international organisations shall be provided by law: § 126(2) establishes that the organisation of the Estonian Defence Forces and national defence organisations shall be provided by law: § 137 stipulates that the organisation of the State Audit Office shall be provided by law; § 144 provides that the organisation of the activities of the Chancellor of Justice and the organisation of his or her office shall be provided by law. As for local governments, § 154 of the Constitution establishes, inter alia, that these shall operate independently pursuant to law. If the wording “pursuant to law” were meant to extend to clause 19) of § 78, it would not be clear why in many other provisions of the Constitution it has been found necessary to point out that this or that issue shall be regulated by a law. The number of such provisions makes it is impossible to conclude that an accidental normative-technical mistake has occurred. That is why I find that the competence of the President of the Republic in the sphere of clemency springs solely and directly from § 78 19) of the Constitution.

The competence of the Riigikogu, established by clauses 1) and 16) of § 65 of the Constitution is restricted by the competence of the President of the Republic in the sphere of clemency. This means that the Riigikogu, when exercising its competence to legally regulate issues of clemency, has the obligation to take into consideration the competence of the President of the Republic, and must not infringe the spheres which

only President may legally regulate. The competence of the President in the sphere of clemency does not only include the freedom to decide whether to grant pardon or not, but it also includes the freedom to regulate the procedure for the formation of his will and the internal organisation of this procedure within the Office of the President. The right of self-regulation includes the right to form such a clemency committee by the President of the Republic which obviously cannot be treated as a structural unit of the President's Office. Thus, the decision to establish or not to establish a clemency committee should be for the President of the Republic to make. Similarly, the President of the Republic must have the competence to determine the composition of the committee, the rules of procedure thereof, whether the decisions thereof are binding on the President, and other similar issues.

It is worth pointing out that the Constitution refers to only one advisory body to the President of the Republic (§ 127(2)), namely the National Defence Council, the composition and tasks of which shall be provided by law, as the constitutional provision stipulates.

For the above reasons I am of the opinion that § 5(1) of the Clemency Procedure Act, which stipulates that a clemency committee shall be an advisory body to the President of the Republic in the issues of clemency, is unconstitutional, too. This provision is in conflict with the competence of the President of the Republic in the sphere of clemency, which springs from § 78 19) of the Constitution, and with the competence of the Riigikogu which springs from clauses 1) and 16) of § 65 of the Constitution. Analogous view was expressed in the expert opinion of Max Planck Institute given submitted in regard to an analogous provision of the earlier version of the Clemency Procedure Act.

I admit that it would be possible to regulate the competence of the President of the Republic in the sphere of clemency, if the Constitution established that the President of the Republic shall grant pardon to the convicted offenders at their request pursuant to law.
