Constitutional judgment 3-4-1-3-97

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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 6 October 1997**

Review of the petition of the Valga County Court of 9 June 1997 to declare clause 3.19 of Part I of the Valga City Rules, approved by the Valga City Council Regulation no. 1 of 10 January 1996, partly invalid.

The Constitutional Review Chamber sitting in a panel
presided over by the Chairman of the Chamber Rait Maruste
and composed of the members of the Chamber Tõnu Anton, Lea Kalm, Jaano Odar and Jüri Põld,
at its session of 24 September 1997,
in the presence of the secretary to the Chamber Piret Lehemets,

reviewed the petition of the Valga County Court of 9 June 1997.

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

The Valga administrative judge, in the judgment of 2 June 1997 in administrative offence matter no. 2/19, did not apply clause 3.19 of Part I of the Valga City Rules, approved by the Valga City Council Regulation no 1 of 10 January 1996, to the extent that it prescribed for a restriction of the freedom of movement of persons under 16 years of age, and decided to initiate a constitutional review proceeding for the declaration of invalidity of the provision. Also, on the basis of § 218(1) of the Code of Administrative Offences the proceeding against Aleksander Zahhartšenko under §§ 142 and 143 of the Code of Administrative Offences was terminated due to the absence of the elements of an administrative offence.

On the basis of § 5 of the Constitutional Review Court Procedure Act the Chairman of the Valga County Court submitted a petition to the Supreme Court to declare invalid – because of conflict with § 34 of the Constitution - clause 3.19 of Part I of the Valga City Rules, approved by the Valga City Council Regulation no. 1 of 10 January 1996, to the extent that it prescribed for a restriction on the freedom of movement of persons under 16 years of age. Pursuant to court decision A. Zahhartšenko had been held liable, on the basis of § 142 of the Code of Administrative Offences, for having been, as a person of under 16 years of age, in a public place in Valga at 23:54, unaccompanied by an adult, and on the basis of § 143 of the Code of Administrative Offences because he had not obeyed the orders of a police officer to follow him for the preparation of a report concerning the administrative offence. Pursuant to the report concerning the administrative offence A. Zahhartšenko had violated clause 3.19 of Part I of the Valga City Rules, approved

by the Valga City Council the Regulation no. 1 of 10 January 1996. When adjudicating the administrative offence matter the judge found that clause 3.19 applicable in the case was in conflict with § 34 of the Constitution to the extent that it prescribed a restriction on the freedom of movement of persons under the age of 16 years. The judgment states that although the behaviour of A. Zahhartšenko had the characteristics described in clause 3.19 of the Rules and in § 142 of the Code of Administrative Offences, attending a public place unaccompanied by an adult is not unlawful, because clause 3.19 of the Rules, which forms the ground for responsibility, is in conflict with the Constitution and must not be applied. According to § 34 of the Constitution everyone who is legally in Estonia has the right to freedom of movement. The right may be restricted in the cases and pursuant to procedure provided by law to protect the rights and freedoms of others, in the interests of national defence, in the case of a natural disaster or a catastrophe, to prevent the spread of an infectious disease, to protect the natural environment, to prevent the leaving of a minor or a person of unsound mind without supervision and to ensure the administration of a criminal proceeding. In Estonia no cases or procedure have been established by law as to when and how to restrict the freedom of movement to prevent the leaving of a minor unsupervised. Thus, clause 3.19 of Part I of the Valga City Rules, approved by the Valga City Council Regulation no. 1 of 10 January 1996, to the extent that it restricts the freedom of movement of minors, is in conflict with § 34 of the Constitution.

In the written opinion submitted to the Court the Chancellor of Justice is of the opinion that the petition of the Valga County Court is justified and that clause 3.19 of Part I of the Valga City Rules, establishing restriction on the freedom of movement of minors, has been issued exceeding competence and is thus in conflict with § 34 of the Constitution. Pursuant to the Constitution the right to freedom of movement may be restricted in the cases and pursuant to procedure provided by law. In Estonia no cases or procedure have been established by law as to when and how to restrict the freedom of movement to prevent the leaving of a minor unsupervised. The Code of Administrative Offences includes a delegation norm pursuant to which the local governments are entitled to establish rules for public order, but the Code does not authorise the local governments to establish restrictions to prevent the leaving of a minor unsupervised. It is noted in the written opinion that as the majority of local governments have provided for analogous restrictions in the public order rules, the Chancellor of Justice had, on 5 September 1997, reported to the Riigikogu about the need to legalise the restrictions to avoid leaving minors unsupervised.

In the written opinion submitted to the Court the Chairman of the Valga County Court is of the opinion that the petition is justified, as pursuant to § 34 of the Constitution the right to freedom of movement may be restricted in the cases and pursuant to procedure provided by law. In Estonia no cases or procedure have been established by law as to when and how to restrict the freedom of movement to prevent the leaving of a minor unsupervised. That is why clause 3.19 of Part I of the Valga City Rules, establishing restriction on the freedom of movement of minors, is in conflict with § 34 of the Constitution. It is pointed out in the written opinion that a new draft of the Valga City Rules, not containing the referred provision, was being worked out by the Valga City Government.

Having examined the submitted documents **the Constitutional Review Chamber found that:**

I. Clause 3.19 of Part I of the Valga City Rules establishes that it is prohibited “for persons under the age of 16 to be in public places from 23:00 – 6:00 unaccompanied by an adult. The directors of ordinary and vocational schools are under the obligation to end the gatherings for the youth so that minors under the age of 16 would be able to get home by 23:00 the latest.”

Freedom of movement is an accepted and legally protected value in a democratic society, and it is closely related to other constitutional values, such as personal liberty, public security and order, rule of law and the rights and freedoms of other people. On these grounds both the Constitution and international law provide for the possibility to restrict the freedom of movement. Also, § 14 of the Constitution establishes that the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. Although the guarantee of rights and freedoms is the duty of local governments, they are to fulfil this obligation lawfully. § 13(1) of the Constitution provides that the law shall protect everyone from the arbitrary exercise of state authority. Local government bodies also exercise state authority. § 3(1) of the

Constitution establishes that the powers of state shall be exercised solely pursuant to the Constitution and laws, which are in conformity therewith. Thus, the principle that public power should be exercised observing the principle of legality, which is recognised in democratic rule-of-law states, is also valid for Estonia. Power must be exercised legally, this applies to the content of legislation as well as to the procedure and form of exercising power.

A person exercises his freedom of movement both in time and in space. If we presume that the restrictions on the freedom of movement do not embrace the possibility to restrict a person's stay in certain places at certain hours, this would mean that it would be impossible to legally assess the imposition of official closing time or a curfew on the basis of § 34 of the Constitution. This would hardly be compatible with the purpose of § 34 of the Constitution. Thus, the requirement that from 23:00 till 6:00 a person under the age of 16 years is only allowed to stay in a public place if accompanied by an adult, can be viewed as a restriction on the freedom of movement for the purposes of § 34 of the Constitution.

Due to the psychological and social immaturity of a minor he may, in certain circumstances, cause harm to himself and others more easily than an adult. Due to immaturity a minor, unlike the majority of adults, has limited legal liability. This justifies the need to impose on minors such legal restrictions that are usually not imposed on adults. § 34 of the Constitution allows for the restriction of minors' freedom of movement to prevent the leaving of a minor unsupervised. Certainly, at night the probability of leaving a minor unsupervised is greater than during daytime. That is why it is not excluded that it might be reasonable to restrict the minors' freedom of movement in certain cases to prevent the leaving of a minor without supervision.

It is possible to restrict the minors' freedom of movement if the restriction is justified with the need to prevent the leaving of a minor unsupervised, if it is proportional with the desired goal and it is impossible to achieve the desired goal by other means. A restriction must be enforceable and reasonable and necessary in a democratic society.

§ 34 of the Constitution provides for the possibility to restrict the freedom of movement in the cases and pursuant to procedure provided by law. In this constitutional provision the law means a law in its formal sense and not just any legislative act. The judgment of the Constitutional Review Chamber of the Supreme Court of 12 January 1994 deals with the rights guaranteed by §§ 11, 26, 33 and 43 of the Constitution and states that the rights and freedoms may be restricted solely in accordance with the Constitution and in the cases and pursuant to procedure provided by law. In another judgment, rendered by the same Chamber the same day, it is underlined that the possible restrictions on basic rights and freedoms may be imposed only by legislative acts having the force of law. The Chamber found in its judgment of 2 November 1994 that locking a wheel of a car, which has been parked improperly or without a valid ticket, constitutes both a local issue and restriction of ownership, and as there was no law giving local governments the right to restrict ownership by such means, the pertinent acts of local government were unconstitutional. Pursuant to the judgment of 21 December 1994 the procedure for restricting basic rights and freedoms must be established by law. In the latter decision reference is made to § 34 of the Constitution, which regulates the freedom of movement. Thus, the Constitutional Review Chamber has consistently been of the opinion that the rights established in Chapter II of the Constitution, which have been pointed out in the referred judgments, may be restricted solely in accordance with the law. The wording of § 34 of the Constitution gives no ground to conclude that the term "law" used in this provision might have another meaning in regard to minors. Furthermore, it is underlined in the judgment of 21 December 1994 that in such extreme situations as a natural disaster or a catastrophe and to prevent the spread of an infectious disease the law must establish the procedure for restriction of the freedom of movement.

Even if prevention of the leaving of a minor without supervision is a local issue, the local government may not impose restrictions on minors' freedom of movement, because § 34 of the Constitution unambiguously states that the right to freedom of movement may be restricted solely in the cases and pursuant to procedure provided by law. When the law provides for possible cases and procedure for restricting the minors' freedom of movement, the local government may be entitled to determine the enforcement of the restrictions on its

territory.

Thus, the petition of the Valga County Court is justified and has to be satisfied. Clause 3.19 of Part I of the Valga City Rules, to the extent that it restricts the freedom of movement of persons under the age of 16 years, is in conflict with § 34 of the Constitution and is to be declared invalid.

II. The Constitutional Review Chamber considers it necessary to point out that the conclusion of the Valga Administrative Court judgment of 9 June 1997 does not make a reference to the provision of the Constitution with which clause 3.19 of Part I of the Valga City Rules is in conflict. Both the motivation of the administrative judge and the petition of the Valga County Court refer to the conflict of this provision with § 34 of the Constitution, but this reference is not sufficient. Pursuant to the spirit of § 5 of the Constitutional Review Court Procedure Act the conclusion of a court judgment must contain a reference to the specific provision of the Constitution with which the legal act, which the court refused to apply, is in conflict.

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 Valga County Court of 9 June 1997 to declare clause 3.19 of Part I of the Valga City Rules, approved by the Valga City Council Regulation no. 1 of 10 January 1996, invalid to the extent that it restricts the freedom of movement of persons under the age of 16 years.

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

Rait Maruste
Chairman of the Constitutional Review Chamber

DISSENTING OPINION
of justice Rait Maruste
to the judgment of the Constitutional Review Chamber no. 3-4-1-3-97

§ 14 of the Constitution establishes that the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. But § 154 of the Constitution entitles the local governments to manage independently all local issues. Thus, the Constitution imposes on local governments the duty to guarantee rights and freedoms (including the right to security) and entitles them to decide and manage all local issues independently. Legal order is one of the most important local issues. As the legislator – *the Riigikogu* - has not unambiguously regulated the issue of minors' supervision by a legal act having the rank of a law (for example by the Protection of the Child Act), we have to conclude that the issue has temporarily, until the issuance of pertinent legislation, been left for the local governments to decide and manage. Proceeding from the Constitution as a law and from its supremacy, the local governments have been fulfilling their constitutional duty correctly in essence and in accord with the spirit and goals of the Constitution.

At the same time, the restriction of the freedom of movement of minors in Valga by the Valga City Council has not been imposed by a legislative act having the rank of law, i.e. by primary legislative act, as prescribed by § 34 of the Constitution. From this aspect the Valga City Council has formally not acted in conformity with the Constitution. On this basis the petition is to be satisfied. It is necessary to admit, though, that a legislative act having formal characteristics of law provides high quality protection to fundamental rights and freedoms and is thus more in conformity with the constitutional principle of legality.

The conclusion of the Valga County Court, the Valga City Council, the Chancellor of Justice and the Supreme Court that the Valga City Council has not acted on the basis of law and has thus acted in conflict

with the Constitution, is correct in the formal sense but not substantively. Firstly, the legal basis and competence to restrict the freedom of movement is provided by the Constitution and the European Convention on Human Rights. Secondly, when attaching meaning to the concepts of rights and freedoms one should proceed from the European Human Rights Court treatment of the concept of law. Pursuant to the latter, the rights and freedoms may be restricted also on the basis of a legal act, which does not possess the formal characteristics of law, if such act has the general characteristics of a legal act. The disputed act of the Valga City Council possesses these general characteristics.

The principle of legality, especially its formal meaning, is not the only constitutional principle, nor is it a primary one. Constitution has to be read coherently, as a whole. The protection of rights and freedoms is also a constitutional duty of courts. Courts should avoid prejudicing the existing legal situation and protection of rights and freedoms without a justified and pressing need. In order to guarantee certainty of law and proceeding from the need not to prejudice the existing legal regulation, I do not consider it right to declare the disputed act invalid as of the pronouncement of the judgment. I consider it right to follow the view taken in the case concerning administrative boards, and to give the legislator time to prepare and adopt necessary legislative amendments. That is why I consider it right to suspend the entering into force of the judgment until 1 January 1998. This approach would be in conformity also with the method of resolving constitutional disputes used by the European Court of Justice, e.g. on 07.07.92 in case no. C 295/90 where, on the basis of Article 174(2) of the EC Treaty, directive 90/366 EEC of 28 July 1990 was annulled. The effects of the annulled Directive were maintained until the entry into force of a directive adopted on the appropriate legal basis.
