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

Review of the petition of the Viljandi County Court of 6 June 1997 to declare § 91 of the Custodial Officials Service Regulations invalid due to conflict with §§ 87 and 94 of the Constitution.

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 Pöld,
at its session of 24 September 1997,
with the representative of the Government of the Republic Toomas Pikamäe appearing,
and in the presence of the secretary to the Chamber Piret Lehemets
reviewed the petition of the Viljandi County Court, dated 6 June 1997.

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

The Viljandi County Court, in its judgment of 2 June 1997 in administrative matter no. 3-49/97, did not apply § 91 of the Custodial Officials Service Regulations, approved by the Government of the Republic Regulation no. 186 of 24 May 1994, due to conflict with §§ 87 and 94 of the Constitution.

It appears from the Viljandi County Court judgment of 2 June 1997 that M. Kanep had filed an action with the court against Directive no. 17-k, issued by the director of the Viljandi Prison on 31 March 1997, by which he was released from the post of a senior social inspector as of 31 March 1997 on the basis of § 90(6) of the Custodial Officials Service Regulations. Upon lay-off he was paid compensation amounting to his two months' salary, and compensation for the one month and 22 days that he was not given a due notice of his lay-off. According to the complainant this Directive was illegal as far as the amount of the paid compensation is concerned, because before his employment with the Prison Board he had been in service since 1980, first in the department of internal affairs, and after the reorganisation thereof, at the disposal of the Viljandi Police Prefecture. An official's service record has been maintained concerning him. According to the record the length of his service in the public service as at 1 January 1996 was 15 years three months and 8 days, plus one more year and 3 months from 1 January 1996 until 31 March 1997.

The complainant argued that the pertinent provisions of the Public Service Act should have been applied to him, because the Custodial Officials Service Regulations, which served as the ground for his release, were in

conflict with the Constitution. He claims that the Viljandi Prison has ignored the fact that the Public Service Act is in force since 1 January 1996, and pursuant to § 12(3) thereof the Act is extended to custodial officials insofar as not otherwise provided by or on the basis of the Constitution or specific laws. Pursuant to § 13 of the Public Service Act labour laws extend to officials insofar as the Public Service Act or Acts specifically regulating the public service do not provide otherwise. The Employment Contracts Act does not extend to officials. He was released on the basis of the Custodial Officials Service Regulations, not on the basis of the Code of Enforcement Procedure. § 17(1) the Code of Enforcement Procedure establishes that the rules of employment and remuneration of custodial officials shall be established by the Service Regulations.

The Custodial Officials Service Regulations were approved by the Government of the Republic Regulation of 24 May 1994. The complainant is of the opinion that this delegation is not in conformity with the Constitution and therefore his case should be resolved pursuant to pertinent provisions of the Public Service Act. He also refers to an opinion, expressed in law literature, that upon legal regulation of public service the constitutional requirement should be taken into account that the service may be regulated only by Acts.

On the basis of the foregoing the complainant requested that the Directive of the Viljandi Prison director no. 17-k be declared illegal to the extent that it concerns the compensation he was paid for his lay-off. At the court session M. Kanep, in addition to the request in his action, sought that also § 90 of the Custodial Officials Service Regulations, pertaining to release from custodial service, be declared unconstitutional.

The administrative judge of the Viljandi County Court considered the complainants requests justified and declared Directive no. 17-k of the Viljandi Prison director illegal in regard to the compensation for lay-off, and did not apply § 91 of the Custodial Officials Service Regulations, approved by the Government of the Republic Regulation of 24 May 1994, because of conflict thereof with §§ 87 and 94 of the Constitution.

According to the written opinion of the Chancellor of Justice the Custodial Officials Service Regulations were approved by a Regulation of the Government of the Republic, and therefore the constitutionality of the Regulations can be assessed on the basis of §§ 3 and 87(6) of the Constitution. Indeed, a norm delegating authority to establish the Service Regulations (as far as prison officials are concerned) does exist, but the Regulations, at least § 91 thereof, are no longer in conformity with the valid law. Thus, the conflict with the Constitution is indirect, through the conflict with law.

Having given a fair hearing to the representative of the Government of the Republic, who is of the opinion that § 91 of the Custodial Officials Service Regulations is in conflict with § 87(6) of the Constitution, **the Constitutional Review Chamber found that:**

I. § 87 of the Constitution establishes the competence of the Government of the Republic. This article consists of nine clauses. The judgment of Viljandi County Court does not specify with which clause of § 87 of the Constitution § 91 of the Service Regulations is in conflict. In its judgment the court should have pointed out the precise provision of the Constitution with which § 91 of the Service Regulations is in conflict. The right to issue regulations, with which in the opinion of the court the Custodial Officials Service Regulations is in conflict with, is established in clause 6) of § 87 of the Constitution. This constitutional provision establishes that the Government of the Republic shall issue regulations and orders on the basis of and for the implementation of law.

§ 94 of the Constitution provides for the establishment of ministries. According to this provision a minister shall issue regulations and directives on the basis and for the implementation of law. The Custodial Officials Service Regulations were approved by the Government of the Republic and that is why the Service Regulations do not pertain to § 94 of the Constitution, and the conflict of the Service Regulations with this article of the Constitution is excluded.

II. The Government of the Republic Regulation no. 186 of 24 May 1994, which approved the Custodial Officials Service Regulations, refers to § 14 (2) of the Code of Enforcement Procedure as the basis for this regulation.

In the reasoning of the administrative court judgment it is pointed out that pursuant to § 29 of the Constitution an Estonian citizen has the right to freely choose his or her sphere of activity, profession and place of work and “conditions and procedure for the exercise of this right may be provided by law”. That is why, pursuant to the administrative court judgment, the Government of the Republic may not provide for the pertinent conditions and procedure even if an Act delegates it to do so. According to the administrative court judgment the conditions of work and remuneration of custodial officials may only be provided for by an Act, and that is why § 91 of the Custodial Officials Service Regulations is in conflict with § 87 of the Constitution.

According to § 17 of the Code of Enforcement Procedure the procedure for the remuneration of custodial officials’ work had to be established by the Custodial Officials Service Regulations. The question is whether the procedure for remuneration for work also embraces the determination of the amounts of redundancy compensation. The Supreme Court holds that the bases for remuneration of work form a separate institute and do not embrace either the bases for termination of labour or service relations, or the guarantees and bases for compensation established in relation to termination of labour or service relations.

The Supreme Court has earlier expressed its opinion on whether the basis of remuneration of work and determination of compensation for lay-off fall under § 29 of the Constitution. Pursuant to this opinion the subjective right to freely choose a sphere of activity, profession and place of work, established in § 29 of the Constitution, does not embrace an already existing labour or service relationship or the termination thereof. The Constitutional Review Chamber of the Supreme Court came to his conclusion in its judgment no. 3-4-1-1-97 of 11 June 1997. Pursuant to this judgment, the words “the exercise of this right” in the second sentence of § 29 (1) of the Constitution mean the right to freely choose a sphere of activity, profession and place of work. But this provision does not regulate already existing labour or service relationships. The legislator’s constitutional right (“...may be provided by law...”) to regulate the conditions and procedure for the exercise of this right does not restrict the subjective right to choose. That is why it is impossible to use § 29 of the Constitution to substantiate the conflict of § 91 of the Custodial Officials Service Regulations with § 87 of the Constitution, and the conclusion of the Viljandi County Court is erroneous.

III. The Code of Enforcement Procedure entered into force on 31 July 1993. At that time the Public Service Act had not been enforced yet. It took effect on 1 January 1996. The Employment Contracts Act was in force as of 1 July 1992. The Government of the Republic approved the Custodial Officials Service Regulations with its Regulation of 24 May 1994. The Government of the Republic was entitled to do so on the basis of the delegation of authority by § 14(2) of the then valid Code of Enforcement Procedure (now § 10 (5) in regard to prison officials). At that time § 91 of the Service Regulations, as far as it established that the compensation for custodial officials released from service was to be paid pursuant to the procedure prescribed in the Employment Contracts Act, could not have been in conflict with § 87 (6) of the Constitution. According to § 12(3)(6) of the Public Service Act the provisions of the Act extended to custodial officials (except bailiffs) as of the date the Act entered into force. Section 13 of the Public Service Act explicitly provides that the Employment Contracts Act shall not extend to officials. Thus, after 1 January 1996, the Employment Contracts Act to which § 91 of the Custodial Officials Service Regulations refers could not serve as the basis for calculating the compensation for lay-off of custodial officials. The basis for calculating compensations is § 131 of the Public Service Act.

According to the presently valid wording of § 10(4) of the Code of Enforcement Procedure, the Public Service Act shall extend to prison officials and bailiffs in accordance with the specific features springing from the Code of Enforcement Procedure. The fact that § 91 of the Custodial Officials Service Regulations was in conformity with the Constitution at the time it was enacted does not mean that this provision of the Service Regulations is still in conformity with the Constitution.

IV. Pursuant to § 3 of the Constitution the powers of state in Estonia are exercised solely pursuant to the Constitution and laws which are in conformity therewith. That is why § 87(6) of the Constitution means the obligation of the state power to guarantee not only that its regulations are in conformity with the

Constitution and laws at the time of their issuance but also the obligation to see to it that the issued regulations are in conformity with new laws. When the Public Service Act took effect on 1 January 1996, § 91 of the Custodial Officials Service Regulations was no longer in conformity with § 87(6) of the Constitution. The Government of the Republic did not harmonise § 91 of the Custodial Officials Service Regulations with §§ 12(3)6 and 13(1) of the Public Service Act. The Service Regulations have not been brought into conformity with the law despite the fact that already as early as 20 December 1995 the Public Service Act was explicitly extended to custodial officials with the Amendment Act to the Public Service Act.

For the above reasons § 91 of the Custodial Officials Service Regulations is in conflict with §§ 3 and 87(6) of the Constitution.

Pursuant to § 152 (2) of the Constitution and § 19(1)2) of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber of the Supreme Court has decided:**

To satisfy the petition of the Viljandi County Court of 6 June 1997, and to declare § 91 of the Custodial Officials Service Regulations invalid.

The judgment is final and is not subject to further appeal.

Rait Maruste
Chairman of the Constitutional Review Chamber

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