Constitutional judgment 3-4-1-3-96

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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 20 December 1996**

Review of the petition of the Administrative Law Chamber of the Supreme Court of 11 November 1996 to declare invalid clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486 of 28 December 1994 entitled "Amendments to the Government of the Republic Regulation no. 408 of 21 December 1993 and to the organisation of import, wholesale and retail of vodka", as well as clause 5 of the "Instructions for the organisation of import and export, production and sale of alcohol, tobacco and tobacco products", approved by the Government of the Republic Regulation no. 4 of 7 January 1994, because of the conflict thereof with § 87 (6) of the Constitution.

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 6 December 1996,
with the Chancellor of Justice Eerik-Juhan Truuväli appearing,
and in the presence of the secretary to the Chamber Piret Lehemets,

reviewed the petition of the Administrative Law Chamber of the Supreme Court of 11 November 1996.

The Minister of Justice and the representative of the Government of the Republic did not participate at the hearing.

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

The Administrative Law Chamber, in its ruling in administrative offence matter no. 3-3-1-29-96, dated 11 October 1996, did not apply clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486 of 28 December 1994 entitled "Amendments to the Government of the Republic Regulation no. 408 of 21 December 1993 and to the organisation of import, wholesale and retail of vodka", and clause 5 of the "Instructions for the organisation of import and export, production and sale of alcohol, tobacco and tobacco products", approved by the Government of the Republic Regulation no. 4 of 7 January 1994, because these were in conflict with § 87(6) of the Constitution.

On 13 November 1993, pursuant to § 5 of the Constitutional Review Court Procedure Act, the Administrative Law Chamber submitted a petition, initiating a constitutional review proceeding in the

Constitutional Review Chamber of the Supreme Court.

The Administrative Law Chamber set out the following reasons for the petition to declare invalid clauses 2 and 3 and the appendix to the Government of the Republic the Regulation no. 486 of 28 December 1994 entitled “Amendments to the Government of the Republic Regulation no. 408 of 21 December 1993 and to the organisation of import, wholesale and retail of vodka”, and clause 5 of the “Instructions for the organisation of import and export, production and sale of alcohol, tobacco and tobacco products”, approved by the Government of the Republic Regulation no. 4 of 7 January 1994:

§ 87(6) of the Constitution establishes that the Government of the Republic shall issue regulations and orders on the basis of and for the implementation of law. The same idea is expressed in the first sentence of § 5 of the Government of the Republic Act, passed on 10 October 1992, which was effective when the Government of the Republic issued its Regulation no. 486 of 28 December 1994. Pursuant to these provisions the Government of the Republic can issue a regulation only if an Act authorises it to do so. In a democratic society a provision delegating such authority can not be of a general character. To accept delegation of a general character would mean to admit that the Riigikogu may, with a single provision delegating authority, yield its compulsory legislative function to the Government of the Republic or to ministers.

The preamble of the Government of the Republic Regulation no. 486 of 28 December 1994 states that the Regulation is based on the Consumer Protection Act, without specifying which provision of the Act authorises the government to issue this Regulation. On 28 December 1994 the Consumer Protection Act, passed on 15 December 1993, did not contain provisions giving the government the authority to issue the referred Regulation.

Clause 2 of the Government of the Republic Regulation no. 486 of 28 December 1994 provided that the licences issued for the import of vodka be temporarily suspended as of 15 January 1995, until pertinent data, enumerated in clause 1 of the same Regulation, are stored in a data basis, with the exception of vodkas enumerated in the appendix to the same Regulation. In fact, the import for trade purposes of vodkas not listed in the appendix was prohibited. Clause 3 of the same Regulation prohibited, as of 31 March 1995, the sale of all vodkas not listed in the appendix, allowing for the sale only after the specifications of these vodkas had been stored in the data basis of alcoholic beverages and after a new licence for the import of these vodkas had been obtained. Thus, this provision established sale restrictions on alcoholic beverages.

§ 2 of the Consumer Protection Act provides the following: “Prohibitions and restrictions concerning advertising, sale or production of tobacco products, alcoholic beverages, weapons, ammunition, narcotic and psychotropic substances, medicinal products and other goods and services which damage or may damage consumers shall be provided by a separate Act.” It appears from the referred provision that the legislator reserved exclusive authority to prohibit the sale of alcoholic beverages.

Thus, clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486 of 28 December 1994 have been issued exceeding the limits of competence of the government and are in conflict both with § 87(6) of the Constitution and § 8(2) of the Consumer Protection Act.

By its Regulation no. 4 of 7 January 1994 the Government of the Republic approved the “Instructions for the organisation of import and export, production and sale of alcohol, tobacco and tobacco products”. Clause 5 of the Instructions establishes the following: “It is prohibited for natural persons to sell alcohol, tobacco and tobacco products to legal and natural persons”. This provision of the Instructions does not speak of alcoholic beverages, the import of which to Estonia is not allowed, instead it establishes a general prohibition for natural persons to sell alcohol. The Instructions, approved by the Regulation of the Government of the Republic of 7 January 1994, clause 5 of which prohibits natural persons to trade in alcohol, does not refer to an Act which gives the government the authority to issue this Regulation. Thus, this provision is in conflict with § 87(6) of the Constitution and with § 8(2) of the Consumer Protection Act for the same reasons as clauses 2 and 3 of the Government of the Republic Regulation no. 486 of 28 December 1994.

On 26 June 1996 “The Government of the Republic Act and Legal Acts Related to the Implementation thereof Amendment Act” was passed. § 30 of the Act amended § 11 of the Consumer Protection Act. The first sentence of § 11(3) of the Consumer Protection Act establishes: “In order to safeguard the consumer rights provided for in this Act the Government of the Republic shall establish the general rules for shops, the general rules for catering, the rules for the labelling of foodstuffs and goods, the rules for the import and export and production and sale of alcohol, tobacco and tobacco products, the health protection rules for the production, storage, transport and sale of foodstuffs, as well as other rules for safeguarding the consumer rights in other cases stipulated by law”.

The Government of the Republic Act and Legal Acts Related to the Implementation thereof Amendment Act took effect on 26 July 1996, and had no retroactive effect. § 30 of this Act did not provide that § 1 (3) of the Consumer Protection Act shall retroactively approve the earlier regulations of the government. In a democratic law-based society the legislator can not retroactively approve administrative legislation of general application restricting individuals’ rights and freedoms, the implementation of which is guaranteed by punishments. § 11(3) of the Consumer Protection Act, in the wording of 26 July 1996, forms a legal basis for the Government of the Republic to issue regulations which regulate the import of alcohol only as of the date the amendments to the Act took effect. Thus, the Government of the Republic Act and Legal Acts Related to the Implementation thereof Amendment Act did not legalise, for the purposes of § 87(6) of the Constitution, clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486 of 28 December 1994, and clause 5 of the Instructions approved by the Government of the Republic Regulation no. 4 of 7 January 1994.

Having given a fair hearing to the Chancellor of Justice, who is of the opinion that the petition of the Administrative Law Chamber should be satisfied, and having examined the submitted materials, **the Constitutional Review Chamber found, that:**

I. Pursuant to the Constitution, the constitutional and democratic exercise of public authority should be based on law (preamble), and on the principles of separate and balanced powers (§ 4), democratic society based on rule of law (§ 10) and legality (§ 3(1)). For the purposes of observance of the referred principles and for the protection of every person’s fundamental rights and freedoms, the legislative and administrative functions must be differentiated and strictly determined, and these functions must be exercised in conformity with the Constitution and the principles recognised in legal theory. The ambiguity of competence, as well as exceeding the limits of competence, hampers general legal certainty and gives rise to the danger that the constitutional state-building principles and everyone’s rights and freedoms may be prejudiced. When interpreting the concept of legality, the European Court of Human Rights said in *Malone v. United Kingdom* (1984), that “it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference”.

II. § 87(6) of the Constitution establishes that the Government of the Republic “shall issue regulations and orders on the basis of and for the implementation of law”. The same principle in relation to ministers’ regulations is repeated in § 94(2) of the Constitution. The referred provisions express that the executive is bound by law, and this means that under Estonian Constitution the executive must not perform acts which are contrary to the laws. The principle of superiority of laws springs from the referred § 3(1) of the Constitution, as well as from § 139, pursuant to which the Chancellor of Justice shall review the legislation of the legislative and executive powers and of local governments for conformity with the Constitution and the laws. In the system of Estonian legal acts only the Decrees of the President of the Republic, which are issued in accordance with § 109 of the Constitution, can be regarded as the executive’s independent legislation of general application.

The purpose of the right to issue regulations, vested in the Government of the Republic, is to decrease the

legislator's workload, and to transfer the function of technical elaboration of norms to the government, in order to guarantee flexibility of administrative activity and to avoid overloading the laws with useless regulations of individual matters. At the same time, it is necessary to restrict the authority of the executive by laws, to ensure that state power is exercised democratically, to guarantee general legal certainty, and to protect constitutional rights and freedoms.

Pursuant to the referred provisions and principles of the Constitution the executive is, as a rule, authorised to issue only intra legem regulations, i.e. regulations which specify laws. The Constitutional Review Chamber has referred to this principle in its judgments of 12 January 1994 and of 7 December 1994.

III. According to legal theory a law must contain a norm delegating pertinent authority for the executive to be able to issue legislation of general application. Such provision must specify the administrative body authorised to issue legislation as well as the clear purpose, content and extent of the right to issue regulations. In addition, a provision delegating authority may establish other norms to bind the executive or to restrict its legislative function. It is necessary to determine the purpose, content and extent of authorisation by law, so that everyone could understand which administrative legislation of general application can be issued.

In case of an *intra legem* regulation a law must contain a norm, which clearly states that an administrative body is entitled to issue administrative legislation on the basis of the law. The same principle is expressed in § 27(2) of the Government of the Republic Act. The purpose, content and extent of authorisation may, as far as *intra legem* regulations are concerned, be derived from law by interpreting it. Nevertheless, the subject of the law, when reading it, must be able to be sure that in matters regulated by the law the executive is entitled to issue administrative legislation of general application. At the same time an *intra legem* regulation must not exceed the scope regulated by the Act containing the provision delegating authority.

Proceeding form the principle of separate powers, according to which the legislative function is vested in the legislator, an administrative legislation of general application exceeding the scope regulated by law is considered to be either a *praeter legem or contra legem* regulation. A constitution of a country may give the legislator the right to authorise an administrative body to issue *praeter legem* regulations. The provision, which gives authorisation to issue regulations pertaining to spheres not regulated by law, i.e. *praeter legem* regulations, must contain clear permission that the executive is entitled to issue such regulations on the basis of this provision. The government, when acting *praeter legem*, appropriates a part of the legislator's competence, and this can be done only when the legislator has expressis verbis authorised it to do so. The provision delegating the right to issue *praeter legem* regulations must contain, in addition to a clear permission, also the name of the authorised administrative body and must specify the purpose, content and extent of the pertinent regulation.

Contra legem regulations amend and quash laws. In Estonia, pursuant to the principle of separate powers, *contra legem* regulations are excluded by the Constitution.

The Constitutional Review Chamber is of the opinion that clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486 of 28 December 1994, as well as clause 5 of the Instructions approved by the Government of the Republic Regulation no. 4 of 7 January 1994 do not meet the requirements concerning delegation of authority, and have the essential characteristics of *contra legem* regulations.

IV. In order to resolve this legal dispute it is necessary to discriminate between two regulatory frameworks and respective legal situations arising from them. Firstly, what was regulated by laws at the time when the Government of the Republic Regulation no. 486 of 1994 was passed and the Instructions were approved by Regulation no. 4 of 7 January 1994; and secondly, the regulatory situation after amendments to § 11 of the Consumer Protection Act were enacted as of 26 July 1996.

The preamble of the Government of the Republic Regulation no. 489 of 28 December 1994 states that this

Regulation is based on the Consumer Protection Act, but does not specify which provision or provisions it is based on. The Government of the Republic Regulation no. 4 of 7 January 1994, approving the Instructions for import and export, organisation of production and sale of alcohol, tobacco and tobacco products, contains no reference as to on the basis of and for the implementation of which Act the Regulation was issued. § 1(2) of the then effective Consumer Protection Act established that "in questions which are not regulated by this law other legal acts shall be applied". This provision is a reference norm, which can not be regarded as a norm delegating authority.

§ 8(2) of the Consumer Protection Act provided that "prohibitions and restrictions concerning advertising, sale or production of tobacco products, alcoholic beverages, weapons, ammunition, narcotic and psychotropic substances, medicinal products and other goods and services which damage or may damage consumers shall be provided by a separate Act." Thus, the legislator has expressed its clear will to regulate the referred sphere itself and – consequently - not to delegate it to the Government of the Republic.

For the above reasons clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486 of 28 December 1994, as well as clause 5 of the Instructions approved by the Government of the Republic Regulation no. 4 of 7 January 1994 have been issued exceeding the limits of competence and are in conflict with the Constitution.

§ 11(3) of the Consumer Protection Act, in the wording in force since 26 June 1996, establishes the following: "In order to safeguard the consumer rights provided for in this Act the Government of the Republic shall establish the general rules for shops, the general rules for catering, the rules for the labelling of foodstuffs and goods, the rules for the import and export and production and sale of alcohol, tobacco and tobacco products, the health protection rules for the production, storage, transport and sale of foodstuffs, as well as other rules for safeguarding the consumer rights in other cases stipulated by law". This norm can be treated as a norm delegating special authority in regard to matters regulated by clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486 of 28 December 1994, as well as by clause 5 of the Instructions approved by the Government of the Republic Regulation no. 4 of 7 January 1994. Thus, the legislator has, as of 26 July 1996, authorised the Government of the Republic to issue regulations. This delegation of authority is not retroactively extended to the regulations the government has issued before 26 July 1996. Consequently, the Consumer Production Act did not and could not retroactively legalise either clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486, or clause 5 of the Instructions approved by Regulation no. 4, which had been issued without relevant authority. It is not possible to retroactively legalise regulations, the implementation of which is guaranteed by enforcement by state or punishment. Moreover, § 8(2) of the Consumer Protection Act remained in force, requiring the regulation of the sphere by Acts.

V. This constitutional review case is based on an administrative offence matter, in which § 1374 of the Code of Administrative Offences was applied. This provision provides for administrative liability on two different grounds: firstly, for the infringement of the instructions for the production, sale, storage or transport of alcohol, tobacco or tobacco products; secondly, for acts punishable pursuant to administrative procedure, enumerated in the same provision. The absence of the referred instructions or invalidation of some of the referred instructions means that § 1374 is only partly ineffective. Subsections 1(3) and 2(3) of § 1374, which provide for administrative liability for not providing documents certifying the origin and quality, and consignment and sale documents when checked during the production, sale, storage or transportation of alcohol, tobacco and tobacco products, are still applicable.

VI. State alcohol policy is related to the exercise of fundamental rights and freedoms. Trading in alcohol is related to the revenue in the state budget, tax fraud, crime, general legal order and public health. For these reasons, alcohol policy, including production, sale and import, should be regulated not by administrative acts, but with legal acts having the status of law, that is by an Alcohol Act, as required by clause 6 of the Government of the Republic Regulation of 28 December 1994 and by § 8(2) of the Consumer Protection Act. Establishing alcohol policy by an Act would provide a correct basis for administrative and criminal liability, because according to § 11 of the Constitution rights and freedoms may be restricted only in

accordance with the Constitution.

Proceeding from the aforesaid clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486 of 28 December 1994, and clause 5 of the Instructions approved by the Government of the Republic Regulation no. 4 of 7 January 1994 are in conflict with §§ 3(1), 4, and 87(6) of the Constitution.

On the basis of the aforesaid and proceeding from § 19(1)2) of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber has decided:**

to satisfy the petition of the Administrative Law Chamber of the Supreme Court of 11 November 1996 in administrative matter no. 3-3-1-29-96, and to declare invalid clauses 2 and 3 and the appendix to the Government of the Republic Regulation no. 486 of 28 December 1994, as well as clause 5 of the Instructions approved by the Government of the Republic Regulation no. 4 of 7 January 1994.

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

Rait Maruste
Chairman of the Constitutional Review Chamber
