Constitutional judgment 3-4-1-1-96

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JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 10 May 1996

Review of the petition of the President of the Republic of 9 April 1996 for the declaration of unconstitutionality of the Non-profit Associations Act, passed on 1 April 1996.

The Constitutional Review Chamber sitting in a panel presided over by 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 session of 29 April 1996, with representative of the President of the Republic Mall Gramberg, representative of the Riigikogu Tiit Käbin, the Minister of Justice Paul Varul, and the Deputy Chancellor of Justice-Adviser Aare Reenumäe appearing.
and in the presence of the secretary to the Chamber Kerdi Raud,
reviewed the petition of the President of the Republic of 9 April 1996.

From the documents submitted **it appears, that:**

The President of the Republic, with his resolution no. 689 of 13 March 1996, declined to proclaim the Non-profit Associations Act, which was passed by the Riigikogu on 21 February 1996, and instead sent it back to the Riigikogu for a new debate and decision.

In the resolution of 13 March 1996 the President argued that § 16(2) of the Act was not in conformity with §§ 11, 40 and 48 of the Constitution, and Article 15(1) of the UN Convention on the Rights of the Child. The President pointed out that § 16(2) of the draft Act provided that a member of a non-profit association may be excluded from an association “for failure to fulfil a decision of … other body”, and this creates the possibility of interfering with the activities of a non-profit association on the basis of decisions of state authorities. First of all, this provision could not be applicable to religious societies, the membership of which is based on one’s religion, which no authority can oblige an individual to surrender. This is in conflict with §§ 11 and 40 of the Constitution, because the restrictions imposed by the Act distort the nature of the rights and freedoms of members of non-profit associations, including religious societies, and are not necessary in a democratic society. The President also argued that §§ 5 and 26(2) of the draft Act were in conflict with § 48 of the Constitution, which establishes that everyone has the right to form non-profit undertakings and unions, as well as with Article 15(1) of the UN Convention on the Rights of the Child, which makes it a duty of the States Parties to recognise the rights of the child to freedom of association. The aforesaid provisions of the Act provide only persons with active legal capacity may found non-profit associations and belong to

the leadership thereof, and this excludes the possibility of children to form associations.

On 1 April 1996 the Riigikogu again passed the Non-profit Association Act, unamended, and on 9 April 1996, on the basis of § 107(2) of the Constitution, the President of the Republic made a proposal to the Supreme Court to declare the Non-profit Associations Act unconstitutional.

In the introductory part of the petition submitted to the Supreme Court the President of the Republic explained that he had based his refusal of 13 March 1996 on the fact that the Non-profit Associations Act was in conflict with the UN Convention on the Rights of the Child, to which Estonia acceded on 26 September 1991. Pursuant to the spirit of § 123 of the Constitution international agreements and conventions have supremacy over national law. The President of the Republic also takes the position that the conflict of the Act with the European Union legal system is just as serious but has even more devastating effect on Estonia's status as a society governed by the rule of law. He is of the opinion that the Act does not take into consideration the sacred structure of churches, and instead treats a church as a special type of non-profit association. He also refers to the fact that the Act is in conflict with a Europe Agreement, proclaimed on 17 August 1995, on the basis of which (Article 68) Estonia is seeking to gradually harmonise its legislation with that of the European Community.

The President pointed out in his petition that the exclusion of a member of a non-profit association from an association "for failure to fulfil a decision of … other body", established in § 16(2) of the Act, creates the possibility of interfering with the activities of a non-profit association by discretionary decisions of state authorities. This provision can not be applied to religious societies. Being a member of such a society, i.e. a congregation, is a matter of religion. No authority can oblige a person to surrender his or her religion. The established restriction distorts the nature of the rights and freedoms of members of non-profit associations, including religious societies, is not necessary in a democratic society, and is in conflict with §§ 11 and 40 of the Constitution.

§§ 5 and 26(2) of the Act are in conflict with § 48 of the Constitution, which establishes that everyone has the right to form non-profit undertakings and unions, and also with Article 15(1) of the UN Convention on the Rights of the Child, which makes it a duty of the States Parties to recognise the rights of the child to freedom of association. The referred provisions of the Act provide that only persons with active legal capacity may set up and belong to the leadership of non-profit associations. According to § 9(1) of the General Part of the Civil Code Act a person with active legal capacity is, as a rule, a person who has attained 18 years of age. Thus, the Act excludes children's right to found associations and participate in the leadership thereof.

On the basis of the aforesaid and pursuant to § 19(1)4) of the Constitutional Review Court Procedure Act, the President of the Republic requested that the Supreme Court declare the Non-profit Associations Act, passed by the Riigikogu on 1 April 1996, unconstitutional.

The Deputy Chancellor of Justice-Adviser argued at the court session that the President's petition was justified and should be satisfied. The representative of the Riigikogu was of the opinion that the Act was not in conflict with the Constitution and considered the alleged defects to be only defects of legislative drafting. The Minister of Justice was of the opinion that the Act was not in conflict with the Constitution but admitted that the Act had several internal inconsistencies and intrinsic problems.

Having examined the materials submitted and having heard the explanations of the representatives of the President of the Republic and the Riigikogu, and the opinions of the Chancellor of Justice and the Minister of Justice, **the Constitutional Review Chamber found, that:**

I. According to §§ 1(1) and 40(1)3) of the Non-profit Associations Act a non-profit association is a voluntary association of persons the main activity of which shall not be the earning of income from economic activity. Thus, the goal of such an association is of non-profit character. To achieve this goal an association does not have to have the status of a legal person in private law.

§ 48 of the Constitution expresses the idea of freedom of association, recognised by international law. § 48(1) of the Constitution establishes the following: *"Everyone has the right to form non-profit undertakings and unions."*

According to international law and the Constitution, "everyone" means all natural persons (individuals) who are under the jurisdiction of an Act. Pursuant to § 9(2) of the Constitution the rights, freedoms and duties set out in the Constitution may be extended to legal persons. The Constitution does not make active civil legal capacity a condition for an individual's right to associate into non-profit undertakings. Thus, pursuant to § 48(1) of the Constitution the right to form associations must be guaranteed also to minors.

The Constitution treats non-profit associations and unions as manifestations of the exercise of the right of association. § 2(1) of the Non-profit Associations Act recognises non-profit associations that have the status of a legal person in private law, and § 5 of the same Act provides that only natural or legal persons with active legal capacity may be the founders of such associations. Thus, the Act restricts the freedom to form associations established by the Constitution and international agreements. The Act does not allow persons under 18 years of age to found non-profit associations and thus does not give them the possibility to exercise their constitutional right to freedom of association. Persons of full age who do not want to associate as private law legal persons, or who, because of their religion, can not form associations as private law legal persons, are also deprived of the possibility to fully exercise their constitutional right to freedom of association. The Act deprives the freedom of association of the referred persons of constitutional protection.

Exercising the freedom of association for the purposes of the Constitution implies the existence of various legal types of non-profit associations, which reflect the associating persons' legal status, as well as the goals and purposes of forming associations. The "right of association" referred to in § 48 also means the right to form non-profit associations and their unions. Moreover, the right of association means the right to associate with an appropriate legal foundation, and to form associations which either have or do not have the status of a legal person.

The first sentence of § 2(2) of the Non-profit Associations Act establishes the following: *"Associations of persons with non-profit characteristics which are not entered in the register are not legal persons and the provisions for civil law partnerships apply to them."* According to § 97 of the same Act *"[t]he provisions of §§ 438–441 of the Estonian SSR Civil Code apply to the civil law partnerships referred to in § 2(2) of this Act."* These provisions of the Civil Code still regulate contracts of joint operation. According to §§ 438(1) and 438(2) such contracts pursue a joint economic goal, or seek to satisfy common everyday needs. The scope of these goals is narrower than suggested by § 48 (1) of the Constitution. According to §§ 10 and 11 of the General Part of the Civil Code Act a minor has no right to make decisions pertaining to entering into contracts of joint operation. Thus, the form of civil law partnerships provided for by the Non-profit Associations Act does not fully correspond to the requirements of § 48(1) of the Constitution.

§ 1(3) of the Non-profit Associations Act admits that exceptions concerning foundation, activities and dissolution of particular types of non-profit associations may be provided by law. This special regulation (except for the inadequate reference to civil law partnerships) has not been provided by law. Such regulation in the Act is misleading, as specific features of only such non-profit associations that have the status of a legal person in private law have been dealt with.

The freedom of association is one of the basic international human rights and constitutional freedoms. Legal protection against violations of the exercise of this freedom is necessary. § 16(2) of the Non-profit Associations Act provides the following:*"Regardless of the provisions of the articles of association, a member may be excluded from a non-profit association due to failure to adhere to the articles of association, failure to fulfil a decision of general meeting, management board or other body, or for significantly damaging the association, or with some other good reason."* This provision is not in conformity with the obligation of the legislative power to guarantee the rights and freedoms of every person, as referred to in § 14 of the Constitution, because the regulation provided by the Act is inconsistent and ambiguous. The

provision makes it possible to exclude members from an association on the basis and pursuant to the procedures that have not been stipulated by the Act or by the articles of association. Such a possibility of interference with the freedom of association is inconsistent with the nature of this right in a democratic society. § 16(2) distorts the nature of the rights and freedoms of the members of religious societies for the purposes of § 40(2) of the Constitution, which provides that everyone may freely belong to churches and religious societies.

For the aforesaid reasons the Supreme Court concludes that §§ 5 and 16(2) of the Non-profit Associations Act are in conflict with §§ 14, 40(2) and 48(1) of the Constitution.

II. The President of the Republic also contested the conformity of the Non-profit Associations Act to the UN Convention on the Rights of the Child.

The Republic of Estonia acceded to the Convention on the Rights of the Child on 26 September 1991 (RT 1991, 35, 428). The accession became effective in regard to Estonia on 20 November 1991. The text of the Convention has still not been published in the Riigi Teataja. Clause 5 of the resolution of the Supreme Council of the Republic of Estonia of 26 September 1991 on accession to international treaties, the depository of which is the UN Secretary General, reads: *"To publish in the Riigi Teataja the UN Charter, the Statute of the International Court and the texts of all the treaties and declarations included in the appendices 1, 2 and 3 of this resolution."* So far, the Convention on the Rights of the Child has not been published. Currently used Estonian texts of the Convention are unofficial translations. Thus, the resolution of the Supreme Council on publishing international acts has not been executed. According to Article 24(1) of the Vienna Convention on the Law of Treaties (RT II 1993, 13/14) an international treaty enters into force in such manner and upon such conditions as established by the treaty. Thus, publication of a foreign treaty is not a precondition for its entry into force, and the Convention on the Rights of the Child is binding on Estonia, irrespective of the fact that it has not been published in the Riigi Teataja.

Article 15(1) of the Convention on the Rights of the Child provides that States Parties recognise the rights of the child to freedom of association, which embraces the freedom to form associations, and freedom of peaceful assembly. According to Article 1 of the Convention a child means every human being below the age of 18 years. According to Article 3 of the Convention in all actions concerning children, whether undertaken by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. With the accession to the Convention Estonia has recognised the rights of the child to freedom of association, and the obligation of the state authority to establish pertinent legal mechanisms in national legislation. On the basis of the aforesaid, § 5 of the Non-profit Associations Acts is in conflict with Article 15(1) of the Convention.

III. § 3(1) of the Constitution requires that state power be exercised solely on the basis of the Constitution and laws which are in conformity therewith. Functioning as the exerciser of the judicial power, and proceeding from the public law nature of constitutional review and from the principle of autonomy of administration of justice, and from the requirement of integrity of legal analysis, the Constitutional Review Chamber considers it necessary, in addition to what has been referred to in the petition of the President of the Republic, to add the following:

§ 98 of the Non-profit Associations Act establishes the following: *"Non-profit associations which possess weapons, are militarily organised or perform military exercises may be founded only by law."* It follows from this provision that each shooting sports society should be established by the Riigikogu with a corresponding Act. This interpretation is in conflict with § 48(2) of the Constitution, which provides that the establishment of organisations and unions which possess weapons, are militarily organised, or perform military exercises requires prior permission, for which the conditions and procedure of issuance shall be provided by law. A prior permission means administrative legislation of specific application. A parliamentary Act as legislation of general application can not substitute a permission, which is administrative legislation of specific application.

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 declare the Non-profit Associations Act, passed on 1 April 1996, unconstitutional.

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

Rait Maruste
Chief Justice of the Supreme Court
