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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 13 June 1994**

Review of the petition of the President of the Republic to declare § 2(2) of the President of the Republic Rules of Procedure Act, passed on 3 May 1994, to be in conflict with § 109 of the Constitution.

The Constitutional Review Chamber sitting in a panel
presided over by the Chairman of the Chamber, Chief Justice Rait Maruste,
and composed of members of the Chamber, justices Tõnu Anton, Lea Kalm, Jaano Odar and Jüri Pöld,
at its session of 6 June 1994,
with the representative of the President of the Republic Vahur Glaase and the Chancellor of Justice Eerik-Juhan Truuväli appearing,
and in the presence of the Secretary to the Chamber Kerdi Raud,
reviewed the petition of the President of the Republic of 9 May 1994.

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

On 23 March 1994 the Riigikogu passed the President of the Republic Rules of Procedure Act, which the President of the Republic refused to promulgate by his resolution no. 309 of 10 April 1994. On 3 May 1994 the Riigikogu again passed the President of the Republic Rules of Procedure Act, unamended. On the basis of § 19 (1)4) of the Constitutional Review Court Procedure Act the President of the Republic is requesting that § 2(2) of the President of the Republic Rules of Procedure Act be declared to be in conflict with § 109 of the Constitution.

The President of the Republic is of the opinion that § 2(2) of the President of the Republic Rules of Procedure Act, which entitles the Prime Minister to determine whether an issue amounts to a matter of urgent state need, is in conflict with § 109 of the Constitution. According to § 109 of the Constitution the President of the Republic has the right, in matters of urgent state need, to issue decrees which have the force of law and which shall bear the countersignatures of the Chairman of the Riigikogu and the Prime Minister. The Constitution does not give the Prime Minister the right to make a preliminary decision as to whether there is a matter of urgent state need. According to § 109 of the Constitution the Prime Minister as well as the Chairman of the Riigikogu can express their position with respect to a decree by giving or refusing to give the countersignature.

Having heard the explanations of the representative of the President of the Republic and having heard the Chancellor of Justice, the Constitutional Review Chamber finds the following:

§ 109 of the Constitution is included in the Chapter entitled "Legislation", after the general provisions governing legislative procedure. The structure of the chapter and content of its norms indicate that this provision establishes a special legislative procedure to be followed in exceptional occasions. The exceptional character of the legislation of the President of the Republic is indicated by the limitations established in § 109 of the Constitution.

The right of the President of the Republic to issue decrees is necessary for ensuring the continuity of functioning of legislative power in the situations where ordinary law-making is hindered.

The Constitution establishes two prerequisites for the President of the Republic for issuing decrees. Firstly, that the Riigikogu is unable to convene; secondly, that there are matters of urgent state need.

Many constitutions of other states have given the head of state the right to issue decrees while the parliament is in recess. What is meant in the Constitution, however, is not the interim period between sessions of the Riigikogu, but the inability of the Riigikogu to convene for a session or a sitting.

Urgent state need is associated with the concept of danger. The danger must be objective, the evidence thereof must be reliable and the degree thereof such that, without issuing a decree, the state would suffer irreparable damage.

§ 2(1) of the President of the Republic Rules of Procedure Act reiterates the first indent of § 109 of the Constitution. § 2(2) and (3) of the Act read as follows:

"(2) The decision that the Riigikogu is unable to convene shall be made by the Chairman of the Riigikogu after determining that the Riigikogu, convened for an extraordinary session, lacks a quorum. The resolution as to the existence of urgent state needs shall be made by the Prime Minister. The Chairman of the Riigikogu and the Prime Minister shall inform the President of the Republic of their decisions in writing. (3) The decree signed by the President of the Republic shall be submitted to the Chairman of the Riigikogu and the Prime Minister for countersigning. The Chairman of the Riigikogu and the Prime Minister shall make a final decision whether to countersign the decree no later than one day after the receipt of the decree for countersigning. In the case of refusal to countersign, the reasons for refusal shall be appended in writing to the text of the decree which is returned."

From the above it appears that § 2(2) of the President of the Republic Rules of Procedure Act imposes two additional restrictions on the constitutionally established prerequisites of the law-making power of the President of the Republic. Pursuant to the first limitation, the decision that the Riigikogu is unable to convene is made by the Chairman of the Riigikogu after it appears that the Riigikogu, convened for extraordinary session, lacks a quorum. Pursuant to the second limitation, the decision as to the existence of urgent state need is made by the Prime Minister.

According to § 109 of the Constitution the President of the Republic shall issue decrees which have the force of law. Although these are the decrees of the President of the Republic, they must bear the countersignatures of the Chairman of the Riigikogu and the Prime Minister. Upon countersigning the Chairman of the Riigikogu and the Prime Minister determine whether the constitutional prerequisites for issuing a decree have been met, and they evaluate the legality and reasonableness thereof. In the absence of countersignatures the decree has no legal effect.

It follows from the second and third sentences of § 2(2) and from § 2(3) of the President of the Republic Rules of Procedure Act that decisions of the Chairman of the Riigikogu and the Prime Minister will be made before the President of Republic submits to them the draft of a decree for countersigning. Otherwise the third sentence of § 2(2) would be meaningless. Since the Act bears in mind a preliminary determination by the Chairman of the Riigikogu and the Prime Minister, this amounts to unconstitutional extension of their competences. The role of the Chairman of the Riigikogu and the Prime Minister in deciding on the issuing of

decrees is limited to countersigning. Thus, § 2(2) of the President of the Republic Rules of Procedure Act has unconstitutionally deprived the President of the Republic of his right to independently decide on the initiation of decrees and, therefore, the Act is in conflict with § 109(1) of the Constitution.

Within the review of a matter referred to in § 107 of the Constitution it is not possible to declare an Act, which has not been promulgated, partly unconstitutional.

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 President of the Republic Rules of Procedure Act, passed by the Riigikogu on 3 May 1994, unconstitutional.

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

Rait Maruste
Chairman of the Constitutional Review Chamber

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