

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 21 December 1994**

Review of the petition of the President of the Republic for the declaration of unconstitutionality of the Peacetime National Defence Act, passed on 8 November 1994.

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 7 December 1994, with the representative of the President of the Republic Ivar Ranne, representative of the Riigikogu Jaanus Betlem 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 15 November 1994 for the declaration of unconstitutionality of the Peacetime National Defence Act.

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

On 28 September 1994 the Riigikogu passed the Peacetime National Defence Act. The President of the Republic, with his resolution no. 406 of 14 October 1994, refused to proclaim it.

On 8 November the Riigikogu again adopted the Peacetime National Defence Act, unamended, and on 22 November 1994, pursuant to § 107(2) of the Constitution, the President of the Republic made a proposal to the Supreme Court to declare the Peacetime National Defence Act unconstitutional. The President of the Republic argues that § 14(2) of the Peacetime National Defence Act, which gives the Government of the Republic the right to issue orders to the Commander of the Defence Forces to employ the defence forces in case of a natural disaster, or a catastrophe, or to prevent the spread of an infectious disease, or for the liquidation of an armed terrorist group, or for guaranteeing national security, is in conflict with §§ 87, 78 and 127 of the Constitution. § 87 of the Constitution does not authorise the Government of the Republic to order the Commander of the Defence forces as to how these forces should be used. It follows from the provisions and spirit of the Constitution that only the President of the Republic, as the supreme commander of national defence, is entitled to order the Commander of the Defence Forces as to the use of the defence forces. The government's orders to the Commander of the Defence Forces to liquidate an armed terrorist group, or to use the defence forces for guaranteeing national security, constitute overtaking the competence of the supreme commander of national defence, and require that the Government of the Republic be entitled to view the peacetime situation, at its discretion, as a state of emergency, and to use the defence forces and order the commander of these forces accordingly. This in itself is in conflict with the Constitution. Pursuant to § 104(16) of the Constitution organisation of a state of emergency must be determined by a separate Act.

At the court hearing the representative of the Chancellor of Justice supported the petition of the President of the Republic. The representative of the Riigikogu argued that the Peacetime National Defence Act was not unconstitutional.

Having examined the documents submitted and having listened to the explanations of the representatives of the President of the Republic and the Riigikogu and to the opinion of the representative of the Chancellor of Justice, the Constitutional Review Chamber found, that:

I. According to § 1 of the Constitution, Estonia is a democratic Republic. Democracy, in contrast to autocracy, implies the exercise of power with the people's participation and making important management decisions on a basis as broad and harmonized as possible. It is characteristic of a democratic society that state power is divided and balanced between its separate branches. Thus, § 4 of the Constitution establishes that the activities of the President of the Republic and the Government of the Republic shall be organised on the principle of separate and balanced powers.

The use of defence forces in time of peace affects constitutional order, fundamental rights and freedoms, and, thus, the whole nation. Decisions pertaining to this field should be unambiguous, precisely regulated and in conformity with the Constitution. Pursuant to § 14 of the Constitution it is the duty of the legislative, executive and judicial powers and local governments to guarantee fundamental rights and freedoms.

§ 14(2) of the Peacetime National Defence Act prescribes, that "The Government of the Republic shall, in peacetime, give orders to the Commander of the Defence Forces to use the defence forces: 1) in the case of a natural disaster or a catastrophe or for the prevention of the spread of an infectious disease; 2) for the

liquidation of armed terrorist groups; 3) for guaranteeing national security.” According to § 3 of the same Act the defence forces consist of the Defence Forces and the National Defence League, who defend the state by their military activities.

II. Pursuant to § 14(2) of the Peacetime National Defence Act the defence forces shall be used in the case of a natural disaster or a catastrophe, or for the prevention of the spread of infectious disease.

According to § 87(8) of the Constitution the Government of the Republic shall, in the case of a natural disaster or a catastrophe, or to prevent the spread of an infectious disease, declare an emergency throughout the state or in a part thereof. Therefore, according to §§ 34 and 47 of the Constitution, in the case of a natural disaster or a catastrophe and to prevent the spread of an infectious disease, the right to freedom of movement or the right to assemble peacefully and conduct meetings may be restricted in the manner and in the cases prescribed by law. The Peacetime National Defence Act does not provide when and under which conditions the defence forces shall be used with or without military activity. The Chamber admits that the defence forces may be used in time of peace in the case of a natural disaster or a catastrophe or to prevent the spread of an infectious disease without any military activity (e.g. for rescue work, to regulate traffic, etc.). This may imply restriction of fundamental human rights and freedoms. However, the emergency referred to in the Constitution has not been regulated by any law. The procedure for restricting fundamental rights and freedoms in the case of a natural disaster and a catastrophe and to prevent the spread of an infectious disease must be established by law.

§ 14(2) of the Peacetime National Defence Act allows for the use of defence forces in the case of a natural disaster or a catastrophe or to prevent the spread of an infectious disease without the prior declaration of emergency by the Government of the Republic. Therefore the provision is in conflict with § 87(8) of the Constitution, irrespective of who gives orders to use the defence forces.

III. § 14(2)(2) of the Peacetime National Defence Act provides for the use of defence forces for liquidation of an armed terrorist group.

Liquidation of a terrorist group may involve restriction of other persons’ fundamental rights and freedoms, such as the restriction of the right to the inviolability of private and family life or home, or the right to inviolability of dwelling, real or personal property under a person’s control, or place of employment, as established by §§ 26 and 33 of the Constitution.

The police activities for the apprehension and arresting of criminal offenders are regulated by the Police Act. The use of special equipment and firearms is regulated by §§ 14, 15 and 151 of the same Act. The Code of Criminal Procedure establishes the cases and procedure for the restriction of fundamental rights and freedoms, which may be involved in apprehending criminal offenders. The military activities of defence forces in apprehending and arresting terrorists, and the restrictions on fundamental rights and freedoms which may be involved therewith, have not been regulated by any Act. According to § 10(4) of the Police Act it is the duty of the security police to combat terrorism. There is no Act regulating the common activities of the security police and the defence forces for liquidation of terrorist groups.

IV. It follows from the foregoing that the use of defence forces as established in § 14(2)(1) and 2) of the Peacetime National Defence Act may involve restrictions of everyone’s fundamental rights and freedoms. Pursuant to § 11 of the Constitution these rights and freedoms may be restricted only in accordance with the Constitution. Therefore, § 14(2)(1) and 2) of the Peacetime National Defence Act are in conflict with § 11 of the Constitution, irrespective of who gives the orders to use defence forces.

V. Pursuant to § 14(2)(3) of the Peacetime National Defence Act the defence forces may be used in time of peace to guarantee national security.

Safeguarding national security with the help of defence forces’ military or non-military activities must be in conformity with §§ 129, 130 and 131 of the Constitution. § 129(1) of the Constitution provides for the possibility to declare a state of emergency throughout the state, in the case of a threat to the Estonian constitutional order. Protection of Estonian constitutional order implies guaranteeing national security.

The Peacetime National Defence Act does not sufficiently regulate the activities of the state authorities in cases when the use of defence forces for guaranteeing national security is necessary. § 129(2) of the Constitution requires that the organisation of a state of emergency be provided by law. Pursuant to clauses (16) and (17) of § 104 of the Constitution this has to be a specific law - the State of Emergency Act - and not the Peacetime National Defence Act.

The first sentence of § 130 of the Constitution prescribes that during a state of emergency the rights and freedoms of a person may be restricted, and duties may be placed upon him or her in the interests of national security and public order, under conditions and pursuant to procedure prescribed by law. The provision speaks of restrictions and duties imposed in addition to ordinary restrictions and duties. The second sentence of the same Article enumerates the rights and freedoms which must not be restricted even during a state of emergency. The Constitution does not provide for the possibility of imposing special

restrictions in the cases when defence forces are used for the protection of national security, without prior declaration of a state of emergency. The activities of the defence forces for guaranteeing national security without imposing the restrictions allowed by § 130 of the Constitution constitute a threat to fundamental rights and freedoms. Imposition of such restrictions without declaring a state of emergency is in conflict with § 130 of the Constitution.

Pursuant to § 129(1) of the Constitution a state of emergency may not be declared for longer than three months. The Peacetime National Defence Act imposes no time-limits for the use of the defence forces for the protection of national security.

§ 131 of the Constitution establishes that during a state of emergency the Riigikogu, the President of the Republic, and the representative bodies of local governments shall not be elected, nor shall their authority be terminated. Free elections are not guaranteed in the circumstances where no state of emergency has been declared, yet the defence forces are being used to guarantee national security.

Therefore, § 14(2)3) of the Peacetime National Defence Act, which allows for the use of defence forces (with military activities) to guarantee national security, without declaring a state of emergency and establishing the procedure for the restriction of fundamental rights and freedoms, is in conflict with the Constitution, irrespective of who gives orders as to the use of the defence forces.

VI. In peacetime the national defence is organised by the Riigikogu, the President of the Republic, the Government of the Republic, and the Commander of the Defence Forces. Pursuant to § 78(16) and 127(1) of the Constitution the President of the Republic is the supreme commander of national defence.

§ 78 of the Constitution enumerates the duties which fall within the competence of the President of the Republic. Clause 16) of the list establishes that the President of the Republic is the supreme commander of the national defence of Estonia. This provision constitutes a separate item in the list and can not be included in the meaning of clauses 11), 14), 15), 17) and 18), which also determine the president's authority in the sphere of national defence. The clause is independent, its content differs from that of other clauses. Since § 78(16) of the Constitution establishes that the President of the Republic is the supreme commander of national defence, the President must have appropriate powers, which are not enumerated in other clauses of this Article. Giving orders to subordinates is one of the manifestations of fulfilling the function of a leader. A supreme leader of a field of activity should have the right to give specific orders within this field. An order to use defence forces for military activities in peacetime may not be issued bypassing the constitutional supreme commander of national defence. Therefore, the exclusive right of the Government of the Republic to give orders to the Commander of the Defence Forces, as prescribed in § 14(2) of the Peacetime National Defence Act, is not in conformity with §§ 78(16) and 127(1) of the Constitution.

VII. The President of the Republic argues in the petition that the right of the Government of the Republic to give orders to the Commander of the Defence Forces is in conflict with § 87 of the Constitution, and as - pursuant to the provisions and spirit of the Constitution - only the President of the Republic is entitled to give such orders, this right is not consistent with the spirit of the Constitution. The President of the Republic is of the opinion that § 87 of the Constitution does not authorise the Government of the Republic to give orders as to the use of defence forces.

The Constitutional Review Chamber is of the opinion that this argument can not be used to substantiate the allegation that § 14(2) of the Peacetime National Defence Act is in conflict with the Constitution, because § 87 of the Constitution does not provide an exhaustive list of the powers of the Government of the Republic. According to § 86 of the Constitution the executive power is vested in the Government of the Republic. § 87(1) of the Constitution authorises the Government of the Republic to execute domestic and foreign policies, including national defence of the state. Pursuant to § 87(2) of the Constitution the Government of the Republic shall direct and co-ordinate the activities of all government agencies in the area of national defence. The Ministry of Defence has been established for the administration of this area of government. Both, the Defence Forces and the National Defence League are within the area of government of the Ministry of Defence. According to § 87(9) of the Constitution the Government of the Republic shall perform other duties which the Constitution and the laws vest in the Government of the Republic. The constitutional functions and political responsibility of the Government of the Republic must be taken into consideration when organising the management of the defence forces. Unlike the Government of the Republic, which is politically responsible, the President of the Republic must, pursuant to § 84 of the Constitution, suspend his or her membership in political parties. The National Defence Council is only an advisory body to the President and its decisions are not binding on him or her.

It is not consistent with the spirit of the Constitution that the President of the Republic gives orders to the Commander of the Defence Forces bypassing the Government of the Republic, who is entitled to execute the domestic and foreign policies of the state. The use of defence forces in peacetime for the protection of national security is a political question, which can not be decided bypassing the Government of the Republic.

The principles established by §§ 1 and 4 of the Constitution, and the functions and authority vested in the Government of the Republic and in the President of the Republic by the Constitution, require balanced co-operation of these two institutions.

On the basis of the foregoing 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 Peacetime National Defence Act, passed by the Riigikogu on 8 November 1994, unconstitutional.

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

Rait Maruste

Chief Justice of the Supreme Court