

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 12 January 1994**

Review of the petition of the Chancellor of Justice, submitted under § 142(2) of the Constitution, for the declaration of invalidity of clause 2 of the Government of the Republic Regulation no. 223 of 23 July 1993, entitled "Approval of "Statutes of the Security Police Board" and "Temporary procedure for the application of special operative surveillance measures"" on the basis of § 152(2) of the Constitution.

The Constitutional Review Chamber sitting in panel presided over by the Chairman of the Chamber Rait Maruste and composed of the members of the Chamber, justices Tõnu Anton, Lea Kalm, Jaano Odar and Jüri Pöld, at its session of 5 January 1994, in the presence of the Secretary to the Chamber Ene Kull, reviewed the petition of the Chancellor of Justice no. 85 of 7 October 1993.

On 7 October 1993 the Chancellor of Justice submitted petition no. 85 to the Supreme Court. At a preliminary hearing of the Constitutional Review Chamber on 5 November 1993, the Chamber found that the documents submitted contained omissions and inaccuracies. The Chamber, on the basis of § 11(3) of the Constitutional Review Court Procedure Act, requested the Chancellor of Justice to supplement and specify the documents. The petition, meeting the requirements of law, was submitted by the Chancellor of Justice to the Supreme Court on 12 November 1993.

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

The Police Act of the Republic of Estonia, passed on 20 September 1990, established the main functions, duties, rights and liability of the police, the organisational bases of the police, and supervision over the activities of the police. § 10(4) of the Act assigned to the security police the tasks of safeguarding the constitutional order of the Republic of Estonia, its territorial integrity and state secrets, carrying out counterintelligence activities, and combating terrorism and corruption. § 13 (2)12) of the Act gave the police the right to apply operative surveillance measures, use technical equipment and other means to combat, ascertain or detect criminal offences.

Subindent 4 of Part II the Republic of Estonia Police Act Amendment Act, passed on 21 April 1993, established that the security police officers were temporarily authorised, until an Act regulating operative surveillance is passed, to use special operative surveillance measures in performance of their duties only upon written consent of a Supreme Court justice appointed for that purpose by the Chief Justice of the Supreme Court.

On the basis of the Police Act Amendment Act, the Government of the Republic, by its Regulation no. 233 of 23 July 1993, approved the Statutes of the Security Police Board, and the Temporary procedure for the application of special operative surveillance measures.

On 27 August 1993, on the basis of § 142(1) of the Constitution and § 15(1) of the Chancellor of Justice Activities Organisation Act, the Chancellor of Justice made a proposal to the Government of the Republic to bring clause 2 of Regulation no. 223 of 23 July 1993 into conformity with the Constitution.

The government left its Regulation in effect, unamended.

On the basis of § 142(2) of the Constitution and § 17 of the Chancellor of Justice Activities Organisation Act, the Chancellor of Justice made a proposal to the Supreme Court to declare clause 2 of the Government of the Republic Regulation no. 233 of 1993 invalid on the basis of § Article 152(2) of the Constitution. The Chancellor of Justice was of the opinion that clause 2 of the Government of the Republic Regulation no. 233 of 23 July 1993 was unconstitutional for the following reasons:

“1. Subindent 4 of Part II of the Republic of Estonia Police Act Amendment Act, on the basis of which the Government of the Republic has approved "Temporary procedure for the application of special operative surveillance measures" by its Regulation no. 233 of 23 July 1993, is itself in conflict with §§ 11, 3, 4, 13, 26, 33, 43, 59, 86 and 146 of the Constitution in their conjunction (...).

2. § 11 of the Constitution establishes that constitutional rights and freedoms may be restricted only in accordance with the Constitution. Therefore, pursuant to the Constitution, upon the application of operative surveillance measures rights may restricted only in the cases and pursuant to procedure provided by law

(§§ 26, 33, 43 of the Constitution). This is why the establishment of the cases and procedure for the application of special operative surveillance measures by a regulation of the Government of the Republic is in conflict with the Constitution.

3. Subindent 4 of Part II of the Republic of Estonia Police Act Amendment Act does not *expressis verbis* delegate to the Government of the Republic any right to establish the cases and procedure for the application of special operative surveillance measures, neither does the Government of the Republic have the authority to delegate the right referred to in the second indent of clause 2 of the referred Regulation to the National Security Police Commissioner. The legislator has delegated certain powers concerning the temporary procedure of the application of special operative surveillance measures to concrete subjects - officers of the security police are entitled to temporarily apply the special measures, the content of which has not been explained, upon a written consent of a Justice of the Supreme Court appointed by the Chief Justice of the Supreme Court.

Thus, the referred Act leaves it up to discretion of the security police officers and a justice of the Supreme Court to decide 1) what is to be deemed a special operative surveillance measure;

2) what are the cases and procedure for application of those special measures which have not been regulated by the law. Thus, the principle laid down in § 11 of the Constitution, which is not subject to restriction even in the cases established in § 130 of the Constitution, has been ignored.

4. When an Act, which is in conformity with the Constitution, has established specific cases and the procedure for the implementation of the Act, the Government of the Republic has a basis, pursuant to § 87(3) and (6) of the Constitution, to organise the implementation of the Act and pass regulations and orders on the basis of and for the implementation of that Act. Then we would be dealing with an *intra legem* regulation. However, by filling the gaps in law concerning the cases and the procedure, the Government of the Republic has in effect passed a *praeter legem* regulation, for which it lacked direct authorisation from the legislator. Furthermore by establishing the temporary procedure for the application of special operative surveillance measures the Government of the Republic has created a legal situation, the consequence of which is a procedure, concurrent with the established pre-trial criminal investigative procedure and yet independent, and which after the amendment of the Police Act is in conflict even with the provisions of the same Act (§§ 3, 10(3,4,5), 12(1)(4,5), 13(1)(12), 21(1,2) of the referred Act and subindent 4 of Part II in their conjunction). Thus, we may conclude that the Government of the Republic Regulation no. 233 of 23 July 1993, by the virtue of clause 2 thereof, has in addition to the qualities of a *praeter legem* regulation - also some characteristics of a *contra legem* regulation. Consequently, the Government of the Republic has exceeded its constitutional authority (§ 87 (3) and (6) of the Constitution)."

Having examined the documents submitted and having given a fair hearing to the Chancellor of Justice and having heard the Minister of Justice, **the Constitutional Review Chamber found the following:**

The special operative surveillance measures and the procedure for their application, as established by "Temporary procedure for the application of special operative surveillance measures", approved by the Government of the Republic Regulation no. 223 of 23 July 1993, allow for the restriction of constitutional rights and freedoms – e.g. the right to inviolability of family and private life (§ 26), home (§ 33), secrecy of messages delivered and received through commonly used means (§ 43).

Pursuant to § 11 of the Constitution the rights and freedoms may be restricted only in accordance with the Constitution. § 26 of the Constitution prohibits state agencies, local governments and their officials from interfering with the private or family life of any person except under the circumstances and pursuant to the procedure provided by law. The same principle that possible restrictions on fundamental rights and freedoms may be imposed solely by legislation having the force of law has also been expressed in § 33 and 43 of the Constitution. The Constitution does not provide for any other possibilities for the establishment of restrictions on fundamental rights and freedoms. This is an absolute principle, excluding the possibility of imposing restrictions on fundamental rights and freedoms by legislation ranking lower than parliamentary Acts.

According to § 65(1) of the Constitution the laws shall be passed by the Riigikogu. According to § 87(6) of the Constitution the Government of the Republic shall issue regulations and orders on the basis of and for the implementation of laws. The aforesaid reflects the constitutional hierarchy of legal acts and the conclusion that the executive is not allowed by *praeter legem* acts to regulate spheres, which, pursuant to the Constitution, have to be regulated by legislation having the force of law.

Consequently, clause 2 of the Government of the Republic Regulation no. 233 of 23 July 1993, by which the temporary procedure for the application of special operative surveillance measures was approved, is in conflict with §§ 11, 26, 33 and 43 of the Constitution, because possible restrictions on rights and freedoms may only be imposed by parliamentary Acts.

On the basis of the foregoing and pursuant to § 152(2) of the Constitution and § 19(1)(2) of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber has decided:**

to satisfy petition no. 85 of the Chancellor of Justice of 7 October 1993, and to declare clause 2 of the Government of the Republic Regulation no. 223 of 23 July 1993, entitled "Approval of "Statutes of Security Police Board" and "Temporary procedure for the application of special operative surveillance measures"", invalid.

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

Rait Maruste

Chief Justice of the Supreme Court