

**JUDGMENT
THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 2 November 1994**

Review of the petition of the Chancellor of Justice for the declaration of invalidity of § 7(1) of the Riigikogu Internal Rules Act.

The Constitutional Review Chamber sitting in 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 21 October 1994, with the Chancellor of Justice Eerik-Juhan Truuväli and the representative of the Riigikogu, member of the Riigikogu Kalle Kulbok appearing and in the presence of the secretary to the Chamber Kerdi Raud reviewed the petition of the Chancellor of Justice of 6 September 1994.

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

On 9 November 1992 the Riigikogu passed the Riigikogu Internal Rules Act and on 19 January 1993 the Riigikogu made some editorial modifications to the text of the Act. § 7(1) of the Act establishes that a member of the Riigikogu is considered to have assumed another state office if he or she serves in an office appointed by the Riigikogu, President of the Republic, Government of the Republic or some other government agency, except appointment to an administrative or supervisory board as a chairman or member thereof (including the Board of the Bank of Estonia, chairman or a member of a board of state enterprise or agency), regardless of the date of appointment.

On 27 October 1993, pursuant to § 142(1) of the Constitution and § 15(1) of the Chancellor of Justice Activities Organisation Act, the Chancellor of Justice proposed to the Riigikogu that it bring § 7(1) of the Riigikogu Internal Rules Act into conformity with the Constitution. The Chancellor of Justice was of the opinion that § 7(1) was not in conformity with § 63 of the Constitution, which establishes that a member of the Riigikogu may not hold any other state office.

On 25 November 1993 the Riigikogu discussed the proposal of the Chancellor of Justice and decided to bring the Riigikogu Internal Rules Act into conformity with the Constitution. On 15 December 1993 two drafts of the Riigikogu Internal Rules Act Amendment Act were submitted to the Riigikogu. On 15 February 1994 the first reading of both drafts was held and the Riigikogu decided to join the drafts. On 14 March 1994 and on 18 May 1994 the Riigikogu decided to extend the term of readings. Up to now the Riigikogu has failed to fulfil the proposal of the Chancellor of Justice and its own decision to bring § 7(1) of the Riigikogu Internal Rules Act into conformity with the Constitution.

Pursuant to § 142(2) of the Constitution and § 17 of the Chancellor of Justice Activities Organisation Act, the Chancellor of Justice submitted a petition to the Supreme Court requesting that it declare, under § 152(2) of the Constitution, § 7(1) of the Riigikogu Internal Rules Act invalid.

The Chancellor of Justice is of the opinion that § 7(1) of the Riigikogu Internal Rules Act is in conflict with §§ 4, 63(1), 64 (2)1) and 102 of the Constitution in their conjunction. The Riigikogu has also exceeded its authority for the purposes of §§ 161 to 168 of the Constitution and § 8 of the Constitution of the Republic of Estonia Implementation Act.

According to the reasoning of the petition § 7(1) of the Riigikogu Internal Rules Act enumerates the institutions - the Riigikogu, the President of the Republic, The Government of the Republic or a government agency - upon the appointment to office by who a member of the Riigikogu is considered to have assumed another state office. The same criterion is met if a member of the Riigikogu is appointed a chairman or a member of an administrative or supervisory board. The exception, stipulated in § 7(1) of the Riigikogu Internal Rules Act, not to consider appointment of a member of the Riigikogu a chairman or a member of an administrative or supervisory board as assuming another state office, is in conflict with § 63(1) of the Constitution, which establishes a categorical requirement that a member of the Riigikogu shall not hold any other state office. By establishing the exception the Riigikogu has interpreted § 63(1) of the Constitution differently from what the provision establishes, and this, in essence, constitutes an amendment to the Constitution.

The members of administrative boards of state enterprises get their authority from the Government of the Republic who approves the composition of administrative boards. Work on such boards is based on a

contract, concluded between the founder of the board (a Ministry) and the member of the Riigikogu. The founder (a Ministry) effects economic policy of the state through an administrative board and administrative boards implement state economic policy, pursuant to programmes for economic development of branches of the economy, developed by respective Ministries. The exception, established by § 7(1) of the Riigikogu Internal Rules Act, entitles a member of the Riigikogu to simultaneously exercise legislative and executive powers, which is in conflict with § 4 of the Constitution and violates the principle of separate and balanced powers.

By the exception established by § 7(1) of the Riigikogu Internal Rules Act, the Riigikogu has created a situation where the categorical restriction of § 63(1) of the Constitution is ineffective and the effect of § 64 (2)1) of the Constitution is suspended in respect to such members of the Riigikogu who have been appointed to administrative boards of state enterprises. § 64 (2)1) of the Constitution establishes that the authority of a member of the Riigikogu shall terminate prematurely upon his or her assumption of another state office. By establishing the exception by § 7(1) of the Riigikogu Internal Rules Act, the Riigikogu has amended § 63(1) of the Constitution through interpretation. The Constitution can only be amended pursuant to the procedures established by § 161 to 168 of the Constitution or § 8 of the Constitution of the Republic of Estonia Implementation Act.

As § 7(1) of the Riigikogu Internal Rules Act is in conflict with §§ 4, 63(1), 64 (2)1) and 161 to 168 of the Constitution, is also in conflict with § 102 of the Constitution, which provides that laws shall be passed in accordance with the Constitution.

In his written opinion the Minister of Justice Urmas Arumäe supports the Chancellor of Justice's petition. At the court session the Chancellor of Justice abandoned his request to declare § 7(1) of the Riigikogu Internal Rules Act invalid with respect to the supervisory boards and the Board of the Bank of Estonia, and requested that the above provision be declared invalid with respect to administrative boards and boards of state enterprises and agencies.

Having examined the documents submitted and the written opinion of law professor Heino Siigur and having heard the explanations of the Chancellor of Justice and the representative of the Riigikogu, the Constitutional Review Chamber found the following:

1. § 7(1) of the Riigikogu Internal Rules Act employs the wording "appointment to an administrative or supervisory board as a chairman or a member thereof (including the Board of the Bank of Estonia, chairman or a member of a board of state enterprise or agency)". Logically, it follows from this that the concepts of "administrative board" and "supervisory board" include "the Board of the Bank of Estonia" and "the boards of state enterprises and agencies". Such an approach is, though, erroneous, as the concepts of "administrative board" and "supervisory board" do not embrace the notions of the Board of the Bank of Estonia and boards of state enterprises and agencies. "Administrative board" is a term denoting only an organ set up by a regulation of the Government of the Republic. As an Act may not be interpreted in a manner that renders the Act or its provisions meaningless, the Constitutional Review Chamber is of the opinion that the Riigikogu Internal Rules Act bears in mind five boards - administrative boards, supervisory boards, the Board of the Bank of Estonia, boards of state enterprises and boards of state agencies.

Pursuant to § 7(1) of the Riigikogu Internal Rules Act a member of the Riigikogu shall not be considered to have assumed another state office if he or she is appointed: 1) chairman or a member of an administrative board; 2) chairman or a member of a supervisory board; 3) member of the Board of the Bank of Estonia; 4) member of the board of a state enterprise; 5) member of the board of a state agency.

2. On 29 December 1990 the Government of the Republic issued regulation no. 264 entitled "Reorganisation of organisational forms of state enterprises, owned by the Republic of Estonia", by which "The Statutes of an Administrative Board of a State Enterprise" (RT 1991, 2, 21) were approved.

On 6 July 1992 the Government of the Republic amended the above regulation and the Statutes of an Administrative Board of a State Enterprise by its regulation no. 198 (RT 1992, 33, 436). The regulation entitled "Reorganisation of organisational forms of state enterprises, owned by the Republic of Estonia" (hereinafter "regulation") prescribes that the list of state enterprises and the composition of the administrative boards thereof shall be approved by the Government of the Republic. According to clause 3 of the regulation state enterprises shall be set up by the Ministries of the Republic of Estonia or organisations possessing state assets.

Clause 1 of "The Statutes of an Administrative Board of a State Enterprises" (hereinafter "the statutes") establishes that the founder of a state enterprise shall be its highest organ who shall implement state economic policy through the administrative board. Pursuant to clause 3 the members of administrative boards shall be appointed on the proposal by a Ministry or a state executive agency. Pursuant to clause 5

the members of administrative boards shall be remunerated for their work on such boards in accordance with the contracts concluded with them. The amount of the salary to be paid to a member of an administrative board shall be determined by the founder and shall be included within the administrative expenses of the enterprise.

By clause 4 of its regulation no. 198 of 6 July 1992 entitled "On partial amendment of the Government of the Republic of Estonia regulation no. 264 of 29 December 1990", the Government of the Republic required that the Ministry of Labour, the Ministry of Finance and the Ministry of Justice of the Republic of Estonia work out, by 20 July 1992, a standard form of contract to be concluded with the members of administrative boards, determining the duties, competence, liability and conditions for remuneration of the members of such boards. The following principles were to be observed when preparing the standard contract form: the liability was to be determined pursuant to the principles of the Republic of Estonia Code of Administrative Liability; salaries were to be dependent on official minimum wage and the performance of the enterprise, whereas precise amounts were to be established by the founder depending on the size and specific features of the enterprise; premature termination of contracts had to be foreseen for the cases when the employee has violated the contractual requirements set by the founder, or the rules for privatisation.

In response to the inquiry of the Supreme Court the Ministry of Justice and the Ministry of Social Affairs (reorganised Ministry of Labour) admitted that no standard form of contract had been worked out. The Ministries were of the opinion that participation in administrative boards and management boards could not be regarded as a contractual relationship and it had to be deemed a relationship under administrative law. The Ministries informed the Government of the Republic of their opinion.

Chapter II of the Statutes of an Administrative Board of a State Enterprise establishes the rights and obligations of administrative boards. An administrative board is entitled and obliged to appoint the executive director of the enterprise, to conclude a contract with him or her and to release him or her prematurely; organise the auditing of the activities of the enterprise; approve the annual statement, balance sheet and sharing of profits and the annual budget of the enterprise; determine the transactions to be made with the assets and resources of the enterprise; implement state economic policy in accordance with the development programme of the branch of economy developed by the respective Ministry; organise and guarantee the elaboration of the enterprise's development programmes; make decisions pertaining to long-term loans, setting up agencies and affiliate offices and selling the set of assets thereof, and making investments; make proposals to the founder for covering of loss by the state; elaborate and submit to the founder proposals about the amendment of the Statutes, reorganisation or termination of activities of the enterprise; make proposals to the founder pertaining to privatisation of the assets of the state enterprise.

According to clause 12 of the Statutes the chairman and deputy chairmen of the board and members of the board are liable for fulfilling their duties pursuant to the procedures established by the Acts and other legislation of the Republic of Estonia and pursuant to the contracts concluded with them. A member of the board is exempt from his or her liability only if he or she, in written form, informs the legal person, who had concluded the contract with him or her, of having made a wrong decision or of not having made the right decision.

It follows from the foregoing that a member of an administrative board is appointed by the Government of the Republic on proposal by a government agency - a Ministry - and is approved by a regulation of the Government of the Republic, that is - the members of administrative boards obtain their authority from the executive branch of state power. Through an administrative board a Ministry effects national economic policy, on the basis of the development programme for respective branch of economy, elaborated by the Ministry. Economic policy is a part of state's domestic and foreign policies and according to § 87(1) of the Constitution falls within the competence of the Government of the Republic as the executive power. Fulfilling the duties of a member of an administrative board constitutes holding an office fulfilling state administrative functions, for what persons are entitled to remuneration and are liable before the highest organ of the state enterprise - the Ministry. Thus, being a member of an administrative board means holding state office.

§ 59 of the Constitution establishes that legislative power is vested in the Riigikogu. Members of the Riigikogu participate in exercising legislative power, which constitutes holding state office, because § 63(1) of the Constitution prescribes a categorical requirement that a member of the Riigikogu shall not hold any other state office. The restriction established in § 63(1) of the Constitution is one of the guarantees of the principle of separate and balanced powers established by § 4 of the Constitution.

Pursuant to the principle of separate and balanced powers the legislative, executive and judicial powers are to balance each other and thus, in a sense, they have opposing interests. This is necessary for the distribution of authority of the state and - through this - for strengthening democracy and the principle of the rule of law. If a person simultaneously fulfils the functions of two branches of state power and is

remunerated by both, it may give rise to conflict of ethics and interests between the functions of these powers to be fulfilled and, consequently, between the personal and public interests. A conflict of interests as a situation where a state official simultaneously implements essentially opposing functions and strives for opposing aims, may give rise to forfeiture in fulfilling his duties and may create preconditions for corruption. Conflicts of interests must be avoided in every state office.

The exception established by § 7(1) of the Riigikogu Internal Rules Act - pursuant to which the appointment of a member of the Riigikogu chairman or a member of an administrative board by the Riigikogu, the President of the Republic, the Government of the Republic or a government agency - gives the members of the Riigikogu the possibility to simultaneously participate in the exercise of the legislative power in the Riigikogu and the executive power in administrative boards. As the exercise of the executive power in administrative boards constitutes holding a state office, the provision of § 7(1) of the Riigikogu Internal Rules Act to the effect that a member of the Riigikogu may be appointed chairman or a member of an administrative board, is in conflict with § 63(1) of the Constitution. Simultaneous exercise of legislative and executive powers by a member of the Riigikogu is in conflict with the principle of separate and balanced powers established by § 4 of the Constitution. The Supreme Court agrees with the opinion of the Chancellor of Justice that the spirit of § 64(2)1) of the Constitution was not observed by the Riigikogu when they provided for the exception in § 7(1) of the Riigikogu Internal Rules Act.

3. In his petition to the Supreme Court the Chancellor of Justice also regarded the work of the members of the Riigikogu on supervisory boards as holding another state office. Presently, there is no legislation of general application regulating supervisory boards, the competence thereof, the powers, duties and liability of the members thereof. That is why the Supreme Court can not give a legal opinion on whether appointing a member of the Riigikogu a chairman or a member of a supervisory board constitutes assuming another state office and, thus, also a violation of § 63(1) of the Constitution. Nevertheless, the Constitutional Review Chamber is of the opinion that appointing a member of the Riigikogu chairman or a member of a supervisory board should be assessed in the light of the Supreme Court's opinion on membership in administrative boards.

4. In his proposal to the Riigikogu to bring § 7(1) of the Riigikogu Internal Rules Act into conformity with the Constitution the Chancellor of Justice only dealt with the membership or chairmanship of administrative and supervisory boards and not with the membership of the Board of the Bank of Estonia, the boards of state enterprises or agencies. Thus, the Chancellor of Justice's proposal to the Riigikogu did not presuppose that § 7(1) of the Riigikogu Internal Rules Act be declared invalid in its entirety. But the Chancellor of Justice requested in his petition to the Supreme Court that it declare § 7(1) of the Riigikogu Internal Rules Act invalid in its entirety. Thus, the request to the Supreme Court is more extensive than the proposal made to the Riigikogu. Pursuant to the spirit of §§ 15(1) and 17 of the Chancellor of Justice Activities Organisation Act the petition to the Supreme Court may not be broader in scope than the proposal to the body which passed the legislation to bring it into conformity with the Constitution and the law. The body which had passed the legislation is given the opportunity to bring the legislation, on proposal by the Chancellor of Justice, into conformity with the Constitution or the law. The right of the Chancellor of Justice to petition the Supreme Court depends on the refusal to satisfy or failure to reply to his proposal by the organ which had passed the legislation. As the petition to the Supreme Court may not be broader in scope than the proposal made to the Riigikogu, the Supreme Court shall satisfy the Chancellor of Justice's petition in part.

5. According to § 64(2)1) of the Constitution the authority of the member of the Riigikogu shall prematurely terminate upon his or her assumption of another state office. Thus, the authority of those members of the Riigikogu who work on administrative boards, would terminate as of the Supreme Court judgment becoming effective, that is on the day the judgment is pronounced. Considering the necessity to guarantee the stability of state power and considering the general principle that legislation is effective as long as it is amended or declared null and void in a prescribed manner, the Supreme Court considers it right that the members of the Riigikogu should determine their relationship with the Riigikogu and the administrative boards within one month as of the day this judgment becomes effective.

Pursuant to § 152(2) of the Constitution and § 19(1)2) of the Constitutional Review Court Procedure Act, the Constitutional Review Chamber has decided:

- 1. To partly satisfy the petition of the Chancellor of Justice to declare § 7(1) of the Riigikogu Internal Rules Act invalid.**
- 2. To declare invalid § 7(1) of the Riigikogu Internal Rules Act, to the extent that it does not regard appointment of a member of the Riigikogu chairman or a member of an administrative board as assuming another state office.**
- 3. The members of the Riigikogu, who belong to administrative boards, shall have to determine their status in the state offices they hold by 2 December 1994 at the latest.**

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

Rait Maruste
Chief Justice of the Supreme Court