



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA

RULING

ON THE COMPLIANCE OF PARAGRAPHS 3 AND 5 OF ARTICLE 45 OF THE REPUBLIC OF LITHUANIA'S LAW ON BAILIFFS WITH THE CONSTITUTION OF THE REPUBLIC OF LITHUANIA

7 January 2008

Vilnius

The Constitutional Court of the Republic of Lithuania, composed of the Justices of the Constitutional Court: Armanas Abramavičius, Toma Birmontienė, Egidijus Kūris, Kęstutis Lapinskas, Zenonas Namavičius, Ramutė Ruškytė, Vytautas Sinkevičius, Stasys Stačiokas, and Romualdas Kęstutis Urbaitis

The court reporter—Daiva Pitrenaitė

Seimas member Julius Sabatauskas, acting as the representative of the Seimas of the Republic of Lithuania, the party concerned

The Constitutional Court of the Republic of Lithuania, pursuant to Articles 102 and 105 of the Constitution of the Republic of Lithuania and Article 1 of the Law on the Constitutional Court of the Republic of Lithuania, in its public hearing, on 4 January 2008, considered case No. 44/06 subsequent to the petition of the Palanga City Local Court, the petitioner, requesting an investigation into whether Paragraphs 3 and 5 of Article 45 of the Republic of Lithuania's Law on Bailiffs to the extent that, according to the petitioner, the compulsory membership of all bailiffs in an association—the Bailiffs Chamber of Lithuania—as well as the corresponding duties to this association is established, are not in conflict with Article 35 of the Constitution of the Republic of Lithuania and the constitutional principle of a state under the rule of law.

The Constitutional Court

has established:

I

1. The Palanga City Local Court, the petitioner, considered a civil case. By its ruling, the court suspended the consideration of the case and applied to the Constitutional Court with the petition requesting an investigation into whether Paragraphs 3 and 5 of Article 45 of the Law on Bailiffs to the extent that, according to the petitioner, the compulsory membership of all bailiffs in an association—the Bailiffs Chamber of Lithuania (hereinafter also referred to as the Chamber)—as well as the corresponding duties to this association is established, are not in conflict with Article 35 of the Constitution and the constitutional principle of a state under the rule of law.

II

The petition of the Palanga City Local Court, the petitioner, is grounded on the fact that under Paragraph 1 of Article 35 of the Constitution, citizens have the right, but not a duty to form societies, political parties and associations, and they can do it freely, while under Paragraph 2 of this article, no one may be compelled to belong to any society, political party, or association. Meanwhile, Paragraphs 3 and 5 of Article 45 of the Law on Bailiffs establish the compulsory membership of all bailiffs in an association—the Bailiffs Chamber of Lithuania; in the opinion of the petitioner, it is forced membership; this means that bailiffs are compelled against their will to have certain duties to the Chamber. While substantiating its position, the petitioner quotes the Constitutional Court’s ruling of 21 December 2000, namely the official constitutional doctrine of freedom of associations formulated therein, whereby the constitutional provision that no one may be compelled to belong to any society, political party, or association is “a constitutional guarantee protecting individuals from belonging to any union against their will”; “the free will of an individual is a fundamental principle of his membership in various societies <...> and associations”, which “must be observed when founding all types of unions and regulating their activities and relations of their membership regardless of the fact as to what legitimate objectives these unions are trying to attain”; “no one, i.e. neither natural person nor formation of natural persons, may be forced to belong to any society, political party, or association”; “the principle of voluntariness of membership in the association means that the person has the right not to join the association, i.e. not to relate himself with the membership relationship in the association”.

III

1. In the course of the preparation of the case for the Constitutional Court’s hearing, written explanations were received from Seimas member J. Sabatauskas, the representative of the Seimas, the party concerned, in which it is maintained that the impugned legal regulation is not in conflict

with Article 35 of the Constitution and the constitutional principle of a state under the rule of law. The position of the representative of the Seimas, the party concerned is substantiated by the fact that, under the Law on Bailiffs, a bailiff shall be a person authorised by the state, empowered by it to perform the functions of enforcement of writs of execution, to make material ascertainment on factual circumstances, to serve proceedings and carry out any other functions provided by law; while discharging the functions established by law, the bailiff acts as a person empowered by the state and he has the right to make use of the compulsory measures established in the law; the Bailiffs Chamber of Lithuania as a “self-governance formation” of bailiffs and a union established on the professional basis is somewhat different from other associations, since one joins to them on the professional basis, it unites all bailiffs and it is the insurance payer of bailiffs’ compulsory civil liability insurance. In addition, the impugned provisions of the Law on Bailiffs are clear and comprehensible, therefore, they are in compliance with one of the essential elements of the constitutional principle of a state under the rule of law, i.e. with that of legal certainty and legal clarity.

2. In the course of the preparation of the case also a note was received from the representatives of the Seimas, the party concerned, who were V. Volčiok and V. Žiemelis, both of whom are Members of the Seimas, in which it was assented to the written explanations of Seimas member J. Sabatauskas, the representative of the Seimas, the party concerned.

IV

In the course of the preparation of the case for the Constitutional Court’s hearing written explanations were received from P. Koverovas, State Secretary of the Ministry of Justice of the Republic of Lithuania, and I. Karalienė, Chairperson of the Presidium of the Bailiffs Chamber of Lithuania.

V

At the Constitutional Court’s hearing, Seimas member J. Sabatauskas, the representative of the Seimas, the party concerned, virtually reiterated the arguments set forth in the written explanations and submitted additional explanations.

The Constitutional Court

holds that:

1. On 9 May 2002, the Seimas adopted the Law on Bailiffs, Article 50 whereof provides that the procedure of the entry into force and implementation of this law shall be defined by the Republic of Lithuania’s Law on the Entry into Force and Implementation of the Law on Bailiffs. Under Paragraph 1 of Article 1 of the Law on the Entry into Force and Implementation of the Law on Bailiffs, which was adopted by the Seimas on 9 May 2002, the Law on Bailiffs came into force

on 1 January 2003, save certain articles (paragraphs thereof) which came into force as from the publication of the Law on Bailiffs and which are applied with the reservations provided for in the Law on the Entry into Force and Implementation of the Law on Bailiffs. This exception did not cover Paragraphs 3 and 5 of Article 45 of the Law on Bailiffs, the compliance of which to the extent that, according to the petitioner, the compulsory membership of all bailiffs in an association—the Bailiffs Chamber of Lithuania—is established, with Article 35 of the Constitution and the constitutional principle of a state under the rule of law is impugned by the Palanga City Local Court, the petitioner in the constitutional justice case at issue.

2. Some articles (paragraphs thereof) of the Law on Bailiffs were amended, however, Paragraphs 3 and 5 of Article 45 thereof have not been amended.

3. Under the Law on Bailiffs (wording of 9 May 2002 together with its subsequent amendments), the bailiff shall be a person authorised by the state, empowered by it to perform the functions of enforcement of writs of execution, to make material ascertainment on factual circumstances, to serve proceedings and carry out any other functions provided by law (Paragraph 1 of Article 2). The winners of the tender shall have a right to engage in business as bailiffs provided they have been appointed bailiffs by the order of the Minister of Justice, and, under procedure laid down by the Law on Bailiffs, have sworn an oath and are covered by insurance against civil liability (Paragraph 1 of Article 8). A bailiff must enforce judicial decisions prescribed by law that are executory, make material ascertainment on factual circumstances, serve, by court order, written proceedings on natural and legal persons in the Republic of Lithuania and perform other functions prescribed by law (Paragraph 1 of Article 21); bailiffs may provide, under the procedure established by law, the following services: to keep/administer property during the process of execution (Item 1 of Paragraph 1 of Article 21); to make material ascertainment on factual circumstances, serve written documents on natural and legal persons in the Republic of Lithuania without court order (Item 2 of Paragraph 1 of Article 21); to provide legal assistance other than representation in courts and in relations with third parties (Item 3 of Paragraph 2 of Article 21); to sell pledged movable property as collateral in auction (Item 4 of Paragraph 2 of Article 21); to act as an agent in the performance of property obligations (Item 5 of Paragraph 2 of Article 21); however, provision of services must not interfere with the performance of the functions of bailiffs which have been established by law; in all cases the bailiff must give priority to the functions established by law (Paragraph 3 of Article 21). One of the principles of the activity of bailiffs is their independence (Paragraph 2 of Article 3). One of the requirements for the persons who wish to become bailiffs is their impeccable reputation (Paragraph 1 of Article 4, Article 5).

4. The Law on Bailiffs (wording of 9 May 2002 together with its subsequent amendments) consolidates self-governance of bailiffs; it is *expressis verbis* established in Paragraph 1 of Article

45 of the same law that self-governance of bailiffs shall be implemented by the Bailiffs Chamber of Lithuania.

Paragraphs 3 and 5 of Article 45 of the Law on Bailiffs, whose compliance (to the specified extent) with the Constitution is impugned in the constitutional justice case at issue, also provide: bailiffs of the Republic of Lithuania shall unite into the Bailiffs Chamber of Lithuania, whose seat shall be in Vilnius (Paragraph 2); every bailiff shall be a member of the Chamber (Paragraph 3); the Chamber shall be a public legal person. The activities of the Chamber shall be regulated by the Law on Associations to the extent the Law on Bailiffs does not provide otherwise, and by the Statute of the Bailiffs Chamber of Lithuania (Paragraph 4); activities of the Chamber shall be financed from the dues paid by bailiffs. The rate of such dues shall be determined by a bailiffs' meeting (Paragraph 5).

Under Paragraph 1 of Article 46 of the Law on Bailiffs, the Chamber shall have the following functions: co-ordination of bailiffs' activity (Paragraph 1); representation of bailiffs' interests at state institutions, international and foreign organisations (Paragraph 2); drafting legal acts on the issues relating to bailiffs' practice and submission thereof to the Ministry of Justice (Paragraph 3); monitoring bailiffs' practice under the procedure defined by the Law on Bailiffs and other legal acts (Paragraph 4); organisation and implementation of in-service training for bailiffs and assistant bailiffs (Paragraph 5); administering, under the procedure prescribed by the Minister of Justice, of the records of bailiffs whose powers have expired (Paragraph 6); other functions defined by the Law on Bailiffs (Paragraph 7). For instance, disciplinary proceedings against a bailiff or his assistant may be instituted by the Presidium of the Chamber (Paragraph 2 of Article 13); the Chamber is the insurance payer of the compulsory civil professional insurance of bailiffs (Paragraph 3 of Article 17). The Chamber may also perform other functions set forth in the Statute of the Bailiffs Chamber of Lithuania (Paragraph 2 of Article 46).

Thus, it needs to be held that the Chamber, as an institution of self-governance of all bailiffs of the Republic of Lithuania, while ensuring the unity of the profession of the bailiff, uniform standards of the professional activity and control over the activity of bailiffs, discharges the functions established in the Law on Bailiffs (wording of 9 May 2002 together with its subsequent amendments), i.e. public functions.

5. As mentioned before, the Palanga City Local Court, the petitioner, requests an investigation into whether Paragraphs 3 and 5 of Article 45 of the Law on Bailiffs to the extent that, according to the petitioner, the compulsory membership of all bailiffs in an association—the Bailiffs Chamber of Lithuania—as well as the corresponding duties to this association is established, are not in conflict with Article 35 of the Constitution of the Republic of Lithuania and the constitutional principle of a state under the rule of law.

It is clear from the arguments of the Palanga City Local Court, the petitioner, that it is requested that the Constitutional Court investigate whether Paragraph 3 of Article 45 of the Law on Bailiffs, the provision “Activities of the <...> Chamber <...> shall be financed from the dues paid by bailiffs” of Paragraph 5 of the same article are not in conflict with Paragraph 1 of Article 35 of the Constitution, under which citizens shall be guaranteed the right to freely form societies, political parties and associations, provided that the aims and activities thereof are not contrary to the Constitution and laws, with Paragraph 2 of the same article, which provides that no one may be compelled to belong to any society, political party, or association, and with the constitutional principle of a state under the rule of law.

6. In the opinion of the Palanga City Local Court, the petitioner, by the impugned legal regulation, forced membership of bailiffs in the Chamber is consolidated, while bailiffs are compelled against their will to have certain duties to the Chamber. It has been mentioned (in Section II of the fact-establishing part of this ruling of the Constitutional Court) that, while substantiating its position, the petitioner quotes the Constitutional Court’s ruling of 21 December 2000, namely the official constitutional doctrine of freedom of associations formulated therein, whereby the constitutional provision that no one may be compelled to belong to any society, political party, or association is “a constitutional guarantee protecting individuals from belonging to any union against their will”; “the free will of an individual is a fundamental principle of his membership in various societies <...> and associations”, which “must be observed when founding all types of unions and regulating their activities and relations of their membership regardless of the fact as to what legitimate objectives these unions are trying to attain”; “no one, i.e. neither natural person nor formation of natural persons, may be forced to belong to any society, political party, or association”; “the principle of voluntariness of membership in the association means that the person has the right not to join the association, i.e. not to relate himself with the membership relationship in the association”.

In this context it needs to be mentioned that the provisions of this official constitutional doctrine of freedom of associations were further developed in the Constitutional Court’s ruling of 1 July 2004 and, in a certain aspect, in the Constitutional Court’s ruling of 8 July 2005 as well.

7. In the context of the constitutional justice case at issue, it needs to be noted that the state may exercise its functions not only through a system of corresponding institutions, which encompasses both state and municipal institutions (as a rule, it is what the state does), but also to a certain extent through other (non-state) institutions, which are assigned (entrusted) according to the laws with exercising particular state functions or which participate in exercising state functions in particular forms and manners defined in the laws (the Constitutional Court’s rulings of 13 December 2003, 21 December 2006, and 20 March 2007).

8. While deciding, subsequent to the petition of the Palanga City Local Court, the petitioner, requesting an investigation into whether Paragraph 3 of Article 45 of the Law on Bailiffs, the provision “Activities of the <...> Chamber <...> shall be financed from the dues paid by bailiffs” of Paragraph 5 of the same article are not in conflict with Paragraphs 1 and 2 of Article 35 of the Constitution and the constitutional principle of a state under the rule of law, it needs to be noted that, under the Law on Bailiffs (wording of 9 May 2002 together with its subsequent amendments), bailiffs discharge the functions which must be ensured by the state. The ensuring of the discharge of these functions is a public interest and an obligation of the state. Bailiffs are not state (municipal) servants and they are engaged in autonomous professional (private) activity, however, their functions, other activities and empowerments are defined by law. In this context it also needs to be mentioned that the bailiff shall be held liable as a state servant for commission, during the performance of his functions, of violations of laws and other legal acts involving him in criminal or administrative liability (Paragraph 2 of Article 16 of the Law on Bailiffs).

Summing up, it needs to be held that the profession of the bailiff is a profession controlled by the state, i.e. such performing of the functions that ensure the public interest, where this is done by persons (for pay), who are engaged in professional (private) activity, while the state, which has delegated them to perform these functions, must exercise control as to how these functions are performed.

9. It is universally recognised (and not only in Lithuania) that such state-controlled professions as the bailiff etc. (by the way, such professions are not only legal professions) imply self-regulation of the corresponding profession and a corresponding system of self-governance, which encompasses all that profession (all persons who are engaged in its activities) and ensure, *inter alia*, the representation of this profession (the persons who are engaged in its activities) in relations with state and self-government institutions and on international level, arrangement of qualification improvement, uniform standards of professional ethics and control over their observance as well as other control over the activity of persons of that profession as required by law. If there were not any such self-regulation and self-governance system, the delegation of corresponding functions (the performance of which must be ensured by the state) into private hands would be unreasoned not only from the standpoint of expediency, but also it could be unjustifiable constitutionally. Also it would be unjustifiable from the standpoint of expediency, and, perhaps unreasonable constitutionally, if certain persons, who are engaged in a certain state-controlled profession, were “at the side of” the aforesaid system of professional self-governance, and who not only did not contribute to its working, but also could avoid corresponding control over their professional activity, *inter alia*, the control whether these persons observe the uniform standards of professional ethics.

It goes without saying, the persons who are engaged in the corresponding state-controlled profession must have certain duties related with the ensuring of the functioning of the said system of self-governance.

10. The Constitutional Court, while construing Article 48 of the Constitution in a systemic manner (in the context of other provisions of the Constitution), Paragraph 1 whereof provides that each human being may freely choose a job or business, has held that the legislature, while creating legal preconditions for implementing the right to freely choose a job or business, has the powers to establish, while taking account of the character of the job, the conditions for the implementation of the right to freely choose a job (the Constitutional Court's rulings of 25 November 2002, 4 July 2003, 13 December 2004, 29 December 2004, and 13 August 2007).

In the context of the constitutional justice case at issue, it needs to be noted that, under the Constitution, the legislature has the powers to establish, by means of a law, the legal regulation whereby the persons who are engaged in a certain state-controlled profession should belong *ex lege* to a certain association, which would secure the self-governance of this profession, *inter alia*, the uniform standards of professional ethics and the supervision of their observance. Thus, the law can establish the legal regulation whereby being a member of such an association would be a necessary condition for engaging in the corresponding professional activities.

11. It also needs to be noted that the same position is upheld in the jurisprudence of the European Court of Human Rights, in which it is held that the “regulatory bodies of the liberal professions” are not associations within the meaning of Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Paragraph 1 of which provides, *inter alia*, that everyone has the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests), since the object of these bodies, established by legislation, is to regulate and promote the professions, whilst exercising important public law functions for the protection of the public, therefore, the state may establish a duty to the persons who engage in the activity of state-controlled profession to be a member of the corresponding body (decision of the European Court of Human Rights of 3 April 2001 on admissibility in case *O.V.R. v. Russia* ((*O. V. R. c. Russie (déc.)*, n° 44319/98, *CEDH 2001-V*), judgment of 23 June 1981 in the case *Le Compte, Van Leuven and De Meyere v. Belgium* (*Le Compte, Van Leuven et De Meyere c. Belgique*, arrêt du 23 juin 1981, série A n° 43)).

12. It has been mentioned that the persons who are engaged in the corresponding state-controlled profession must have certain duties related with the ensuring of the functioning of the said system of self-governance.

Thus, the persons who engage in a certain state-controlled profession and who belong *ex lege* to a certain association securing the self-governance of this profession must have certain duties

related with the maintenance of the corresponding association.

13. The fact that, under the Constitution, the legislature enjoys the powers to establish, by means of a law, the legal regulation whereby the persons who are engaged in a certain state-controlled profession must belong *ex lege* to a certain association securing the self-governance of this profession does not mean that the persons who are engaged in a certain state-controlled profession cannot freely join into associations of a different character or, if such associations are founded by other persons engaged in a corresponding profession, cannot belong to such associations.

14. The Law on Bailiffs (wording of 9 May of 2002 together with its subsequent amendments) precisely consolidates the system of self-governance of bailiffs, *inter alia* the institution of self-governance of bailiffs—the Bailiffs Chamber of Lithuania. The system of self-governance of bailiffs is based on membership of all bailiffs of the Republic of Lithuania in the Chamber and their obligation to secure the activity of the Chamber also by their contributions. The Law on Bailiffs (wording of 9 May of 2002 together with its subsequent amendments) consolidates also other institutions which, though they are not named as the ones implementing self-governance of bailiffs, discharge the functions without which this self-governance would not be a full-fledged one: these are the Bailiffs' Meeting and the Bailiffs' Court of Honour (part of their members are appointed by the Minister of Justice and the President of the Supreme Court of Lithuania).

15. It needs to be emphasised that the establishment of the Chamber stems not from the free willpower of bailiffs, but *ex lege*. The *raison d'être* of the Chamber is the fact that it is a union as well as such an association, which is entrusted, by the Law on Bailiffs (wording of 9 May of 2002 together with its subsequent amendments), with the self-governance of bailiffs as a state-controlled profession.

By the way, the Law on Bailiffs employs the formulations “bailiffs of the Republic of Lithuania shall unite into the Bailiffs Chamber of Lithuania” (Paragraph 2 of Article 45) and “the activities of the Bailiffs Chamber of Lithuania shall be regulated by the Law on Associations to the extent this Law does not provide otherwise, and by the statute of the Bailiffs Chamber of Lithuania” (Paragraph 4 of Article 45), however, it does not mean at all that the Chamber could be equalled to unions founded on the initiative of natural or legal persons, which are established and which operate while implementing the freedom of associations consolidated in Article 35 of the Constitution.

16. All this implies that the legal regulation entrenching the compulsory membership of bailiffs in the Chamber and the duties related with the maintenance of the Chamber should be assessed not only on the sole basis of Paragraphs 1 and 2 of Article 35 of the Constitution, but on a wider basis, in the context of other provisions of the Constitution, *inter alia*, Paragraph 1 of Article 48 thereof. It needs to be held that the compulsory membership of bailiffs in the Chamber and the

duties related with the maintenance of the Chamber are *ex lege* inseparable from the free decision of the person to be a bailiff and discharge the functions established in the Law on Bailiffs (wording of 9 May of 2002 together with its subsequent amendments) and other laws, as well as to pursue other activities and have the corresponding powers.

17. Taking account of the arguments set forth, the conclusion should be drawn that Paragraph 3, the provision “activities of the Bailiffs Chamber of Lithuania shall be financed from the dues paid by bailiffs” of Paragraph 5 of Article 45 of the Law on Bailiffs are not in conflict with Paragraphs 1 and 2 of Article 35 of the Constitution and the constitutional principle of a state under the rule of law.

Conforming to Articles 102 and 105 of the Constitution of the Republic of Lithuania and Articles 1, 53, 54, 55 and 56 of the Law on the Constitutional Court of the Republic of Lithuania, the Constitutional Court of the Republic of Lithuania gives the following

ruling:

To recognise that Paragraph 3, the provision “activities of the Bailiffs Chamber of Lithuania shall be financed from the dues paid by bailiffs” of Paragraph 5 of Article 45 (Official Gazette *Valstybės žinios*, 2002, No. 53-2042) of the Republic of Lithuania’s Law on Bailiffs are not in conflict with the Constitution of the Republic of Lithuania.

This ruling of the Constitutional Court is final and not subject to appeal.

The ruling is pronounced in the name of the Republic of Lithuania.

Justices of the Constitutional Court:

Armanas Abramavičius

Toma Birmontienė

Egidijus Kūris

Kęstutis Lapinskas

Zenonas Namavičius

Ramutė Ruškytė

Vytautas Sinkevičius

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