RIIGIKOHUS
Published on *The Estonian Supreme Court* (https://www.riigikohus.ee)



# Constitutional judgment 3-4-1-54-13

**JUDGMENT**
in the name of the Republic of Estonia

| | |
|---|---|
| **Case number** | 3-4-1-54-13 |
| **Date of judgment** | 17 February 2014 |
| **Formation** | Chairman: Priit Pikamäe; members: Eerik Kergandberg, Lea Laarmaa, Jaak Luik and Ivo Pilving |
| **Case** | Review of the constitutionality of subsections 1, 3, 5 and 6 of § 377 of the Code of Criminal Procedure. |
| **Basis for procedure** | Request no. 13 of the Chancellor of Justice of 28 October 2013 |
| **Hearing** | Written proceedings |
| **OPERATIVE PART** | **To dismiss the request of the Chancellor of Justice.** |

## FACTS AND COURSE OF PROCEDURE

**1.** On 27 January 2011, the *Riigikogu* passed the Code of Criminal Procedure and Other Related Acts Amendment Act (RT I, 23.02.2011, 1), which entered into force on 1 September 2011. This Act also amended Chapter 14 “Special procedure for preparation of statement of charges and taking of certain procedural steps” of the Code of Criminal Procedure (CCP). The provisions of the Chapter are followed when preparing a statement of charges under subsection 1 of § 375 of the CCP and when taking procedural steps provided for in § 377 of the CCP in respect of top civil servants, incl. members of the *Riigikogu*.

**2.** The Chancellor of Justice analysed the legal situation that arose as a result of the amendments that entered into force on 1 September 2011 from the aspect of prosecution of members of the *Riigikogu* and came to the conclusion that subsections 1, 3, 5 and 6 of § 377 of the CCP are unconstitutional. On 21 March 2012, the Chancellor of Justice made proposal no. 14 to the *Riigikogu* for bringing subsections 1, 3, 5 and 6 of § 377 of the CCP into conformity with the Constitution.

**3.** At its session of 5 April 2012, the *Riigikogu* agreed to the Chancellor of Justice's proposal no. 14.

**4.** On 18 April 2012, the Constitutional Committee of the *Riigikogu* initiated the draft Status of Member of *Riigikogu* Act Amendment Act (215 SE) in order to bring the provisions concerning the immunity of a member of the *Riigikogu* into conformity with the Constitution (in order to fulfil the proposal of the Chancellor of Justice). On 12 March 2013, the Constitutional Committee of the *Riigikogu* withdrew draft 215 SE.

**5.** On 12 March 2013, the Constitutional Committee of the *Riigikogu* initiated the draft Status of Member of *Riigikogu* Act and Other Acts Amendment Act (396 SE). The draft has not been passed as an act yet.

**6.** On 28 October 2013, the Chancellor of Justice filed request no. 13 with the Supreme Court in which he asked to declare subsections 1, 3, 5 and 6 of § 377 of the CCP partially unconstitutional and partially repeal them.

**REQUEST OF CHANCELLOR OF JUSTICE**

**7.** According to the Chancellor of Justice, subsections 1, 3, 5 and 6 of § 377 of the CCP are in conflict with §§ 76 and 139 of the Constitution to the extent that they provide the Chancellor of Justice with competence for granting or refusing to grant consent for taking a procedural step in criminal proceedings as well as to the extent that they do not provide for the prior consent of an impartial decision-maker, who is independent of the Executive, for a search on the premises of a member of the *Riigikogu*.

**8.** The Chancellor of Justice notes that the purpose of § 76 of the Constitution – to safeguard the exercise of free mandate and the functioning of the *Riigikogu* as a whole, incl. to protect the opposition – covers both parliamentary privilege (the first sentence of § 76 of the Constitution) as well as criminal procedural immunity (the second sentence of § 76 of the Constitution). The immunity of a member of the *Riigikogu* that is safeguarded in the second sentence of § 76 of the Constitution is a procedural impediment for the period of criminal proceedings and, following the requirement for equality, cannot be permanent, but is removable. Parliamentary privilege has a wider meaning beyond criminal proceedings; also, prosecuting a member of the *Riigikogu* and safeguarding parliamentary privilege have a point of contact with steps that infringe personal liberty and are taken for the purpose of the maintenance of law and order as well as in misdemeanour proceedings. Parliamentary privilege of a member of the *Riigikogu* can be considered a security of personal liberty for the member of the *Riigikogu*. The Constitution requires that an act must provide for "barriers" to taking criminal procedural steps in respect of a member of the *Riigikogu*. A prerequisite for the exercise of a free mandate is, besides the physical liberty of a member of the parliament, also their protection against the risk of improper influence and control. Parliamentary privilege of a member of the *Riigikogu* also covers infringements that criminal procedural steps entail and which do not impede directly the exercise of a free mandate, but allow influencing thereof to a significant extent by interfering with the inviolability of the private life as well as home and property of a member of the *Riigikogu*.

**9.** Section 76 of the Constitution also allows other interpretations than the one according to which the consent of the *Riigikogu* (for prosecution) must be obtained for commencing criminal proceedings. Parliamentary privilege can be deprived of only with the consent of an impartial decision-maker who is independent of the Executive. It is in compliance with the Constitution if permission for a procedural step protected by parliamentary privilege is granted, instead of by the full composition of the *Riigikogu*, by a body of the *Riigikogu* or another decision-maker independent of the Executive. However, the Chancellor of Justice admits that the interpretation that complies best with the historical approach to immunity is one according to which the (full or partial) deprivation of immunity is decided by the Parliament. It is constitutional that only single required (urgent) procedural steps pursuant to the general procedure can be taken in respect of a member of the*Riigikogu* who was apprehended in the act of commission of a criminal offence in the first degree (*in delicto flagranti*).

**10.** Taking into account the principle of parliamentary privilege of a member of the *Riigikogu* and the

provisions of criminal procedural immunity in the Constitution, their purpose and interpretation in conjunction with other provisions of the Constitution, subsection 1 and, following therefrom, also subsections 3, 5 and 6 of § 377 of the CCP are unconstitutional firstly to the extent that the conduct of a search on the premises of a member of the *Riigikogu* has been excluded from the protection of immunity (as a part of parliamentary privilege). A step covered by parliamentary privilege of a member of the *Riigikogu*, which, under § 76 of the Constitution, cannot in general be taken prior to the receipt of consent from a body independent of the Executive, is also searching the premises that are directly and closely connected with everyday activities of the member of the *Riigikogu* (incl. the obligation to be present at taking the procedural step and communicating to the public a suspicion about criminal conduct that the search may entail). A search may be one of the most effective means for harming the reputation of a political opponent and for influencing their activities. When keeping in mind not only the historical background of the institute of parliamentary privilege, but also its purpose in the modern political system, then it is not possible to justify full preclusion of search from the scope of the parliamentary privilege protected by the Constitution.

**11.** Secondly, § 377 of the CCP is unconstitutional due to the function imposed on the Chancellor of Justice. Providing the Chancellor of Justice with final decision-making competence for taking a procedural step that intensively infringes parliamentary privilege is incompatible with the nature of the institution of the Chancellor of Justice and thereby also with the Constitution. If the Chancellor of Justice must, on the basis of subsection 1 of § 377 of the CCP, assess the admissibility of single procedural steps, this may, at least theoretically, cause motivational pressure upon fulfilling the function arising from the second sentence of § 76 of the Constitution, i.e. on the *Riigikogu* upon considering the request for the deprivation of parliamentary privilege, following the consents or refusals granted earlier.

**OPINIONS OF PARTIES**

**12.–18.** [Not translated.]

**CONTESTED PROVISIONS**

**19.** Subsections 1, 3, 5 and 6 of § 377 “Special procedure for taking procedural steps” of the Code of Criminal Procedure (RT I, 04.10.2013, 5):

“(1) The President of the Republic, a member of the Government of the Republic or the *Riigikogu*, the Auditor General, the Chief Justice or a Justice of the Supreme Court may be detained as a suspect and preventive measures may be applied with regard to them, seizure and physical examinations of property may be conducted with regard to them, if the Chancellor of Justice has granted consent thereto at the request of the Chief Public Prosecutor.

[---]

(3) A person specified in subsection 1 or 2 of this section may be detained as a suspect and preventive measures may be applied with regard to them, seizure and physical examinations of property may be conducted with regard to them without the consent of the Chancellor of Justice or the President of the Republic if the person was apprehended in the commission of a criminal offence in the first degree.

[---]

(5) If necessary, the President of the Republic or the Chancellor of Justice will examine the materials of the criminal file when granting consent for the procedural step.

(6) The President of the Republic or the Chancellor of Justice will grant their consent for taking the procedural step or return the request within 10 days of receipt of the request. If the request is returned, the reasons must be provided.”

**OPINION OF CHAMBER**

**20.** First, the Supreme Court will examine the mutual connection between the first and the second sentence of § 76 of the Constitution (I). Thereafter, the Chamber will review whether the provisions of the Code of Criminal Procedure contested by the Chancellor of Justice are in conflict with the second sentence of § 76 of the Constitution (II). To that end, it is necessary to examine, when it is possible to talk about prosecution for the purposes of the second sentence of § 76 of the Constitution in the criminal procedural law in force (A), and to settle the issue of whether taking any of the procedural steps set out in the request of the Chancellor of

Justice against a member of the *Riigikogu* can be regarded as prosecution of a member of the *Riigikogu* (B). Next, the Supreme Court will assess the compliance of the provisions contested by the Chancellor of Justice with the first sentence of § 76 and with § 139 of the Constitution (III). To that end, the Chamber will explain the substance of parliamentary privilege of a member of the *Riigikogu* (A), review whether it is in conflict with the aforesaid and § 139 of the Constitution that preliminary examination of taking the procedural steps set out in subsection 1 of § 377 of the CCP in respect of a member of the *Riigikogu* has been granted to the sole competence of the Chancellor of Justice (B), and explain whether parliamentary privilege of a member of the *Riigikogu* is violated by the fact that the law does not provide for any preliminary examination by an impartial decision-maker of searches to be conducted on the premises of a member of the Riigikogu (C). Finally, the Chamber will sum up the results of the proceedings (IV).

**I**

**21.** Section 76 of the Constitution provides: "A member of the *Riigikogu* enjoys parliamentary privilege. They may be prosecuted only on a proposal of the Chancellor of Justice and with the consent of a majority of the members of the *Riigikogu*."

**22.** The Chamber holds that the first sentence of § 76 of the Constitution provides for general parliamentary privilege of a member of the*Riigikogu*, leaving for the Legislature wide discretion when it comes to the specification of the substance and scope thereof. However, the second sentence of the same section specifies that parliamentary privilege of a member of the *Riigikogu* on one specific occasion – when prosecuting them – means the requirement for majority consent of the members of the *Riigikogu* in order for such a step to be taken. However, parliamentary privilege of a member of the *Riigikogu* does not become exhausted only with the prohibition on prosecution thereof without the consent of the Chancellor of Justice and the *Riigikogu*. Otherwise the first sentence of § 76 of the Constitution would become devoid of substance. A wider meaning of the first sentence of § 76 of the Constitution is also confirmed by § 85, subsection 1 of § 101, § 138, § 145 and § 153 of the Constitution. These provisions establish a special procedure for prosecution analogous to that provided for in the second sentence of § 76 of the Constitution for the President of the Republic, a member of the Government of the Republic, the Auditor General, the Chancellor of Justice and justices, but the Constitution does not specify, unlike it has done in the event of members of the*Riigikogu*, that these officials enjoy parliamentary privileges.

**23.** Thus, in order to assess whether the provision that allows taking a criminal procedural step in respect of a member of the *Riigikogu* is in compliance with § 76 of the Constitution, it must first be explained whether the step concerns prosecution of a member of the *Riigikogu*within the meaning of the second sentence of § 76 of the Constitution. If the answer to this question is positive, the step must be preceded by the consent of a majority of the members of the *Riigikogu* granted on the proposal of the Chancellor of Justice. An act that allows taking a step that can be considered prosecution without the consent of the Chancellor of Justice and a majority of the members of the *Riigikogu* is unconstitutional. However, if a procedural step does not qualify for prosecution within the meaning of the second sentence of § 76 of the Constitution, it is necessary to assess whether the procedure that has been set out in law for taking the step in respect of a member of the *Riigikogu* does not violate the general parliamentary privilege of the member of the *Riigikogu*, i.e. the first sentence of § 76 of the Constitution.

**II**

**24.** First, the Chamber will review whether the provisions of the Code of Criminal Procedure contested by the Chancellor of Justice are in conflict with the second sentence of § 76 of the Constitution.

**(A)**

**25.** The criminal procedural law or penal law in force does not use the term "prosecution". According to the present understanding, it is not possible to talk about prosecution of a person prior to entry into force of a

judgment of conviction in respect of the person. Due to historical reasons and a higher degree of abstractness, the substance of the term used in the Constitution may differ from the substance of the same word in general language or in single fields of law (see the judgment of the Supreme Court *en banc* of 17 March 2003 in case no. 3-1-3-10-02, point 25, and the judgment of 23 February 2009 in case no. 3-4-1-18-08, point 18). Prosecution within the meaning of the second sentence of § 76 of the Constitution must be interpreted following the purpose of the provision and taking into account the historical context of the provision. The procedure for criminal proceedings – incl. the substance of one or another procedural stage or procedural status – has changed in time and may also change in the future. The question of from which procedural stage or step provided for in the criminal procedural law it is possible to consider prosecution within the meaning of the second sentence of § 76 of the Constitution must be answered not on the basis of the name of the procedural stage or step, but on the basis of the procedural stage or step which complies best with the idea of the second sentence of § 76 of the Constitution.

**26.** The idea of the second sentence of § 76 of the Constitution is to safeguard the proper functioning of the Legislature, preventing the use of criminal proceedings as a means of political struggle. This provision must in the first place stop the politically motivated selective administration of justice over members of the *Riigikogu*. The latter might be used, for instance, for influencing the Parliament or for political revenge. The second sentence of § 76 of the Constitution also deprives other branches of power of the opportunity to change the composition of the *Riigikogu* without the consent of the Chancellor of Justice and the *Riigikogu*. It must be kept in mind that the conviction of a member of the *Riigikogu* terminates the mandate of the member of the *Riigikogu* under clause 2 of subsection 2 of § 64 of the Constitution. In such a manner the second sentence of § 76 of the Constitution also directly safeguards the principle of democracy.

**27.** According to the Chamber, the wording of the second sentence of § 76 of the Constitution has been affected by the Estonian SSR Criminal Code of 1961 that was in force at the time of drafting the Constitution. Subsection 1 of § 121 of the Code laid down that if there is sufficient evidence to provide a basis for charging a person with a criminal offence, the investigator will promptly prepare a reasoned order on charging such person with the criminal offence. This provision was interpreted based on the understanding that an order on charging a person with a criminal offence will be made if, based on evidence gathered during the investigation, it is possible to consider one of the versions of the investigation, namely the one according to which this very person is the criminal offender, considerably more likely than all the other versions. According to the spirit of law, making an order on charging a person with a criminal offence does not mean that the investigator deemed this version fully proven and that therefore all the other versions should have lapsed. In the course of further investigation, the gathering of evidence was to continue and all the versions, including the most likely one, according to which the criminal offender is the accused person, as well as all the other versions, were to be examined and additional versions were to be given besides those already explored, if necessary. (See V. Raudsalu (ed.). Eesti NSV Krminaalprotsessi koodeks. Kommenteeritud väljaanne. Tallinn 1965, § 121 comment 2). Thereby, the legal theory made a distinction between criminal liability and prosecution: criminal liability for the purposes of substantive law meant conviction of a person; however, in terms of procedure this concerned procedural steps such as preparing an order on charges and bringing charges against a person. These steps meant prosecution, but criminal liability did not start yet with taking such steps. (See J. Sootak. Kõrgemate riigiametnike kriminaalvastutusele võtmise korra seadused. Juridica, 1995, no. 10, pp. 426–428, as well as the judgment of the Criminal Chamber of the Supreme Court of 12 March 1996 in case no. 3-1-1-32-96.)

**28.** In light of the above, it may first be concluded that both the teleological as well as historical interpretation argument do not support equalising prosecution within the meaning of the second sentence of § 76 of the Constitution with the making or entry into force of a judgment of conviction regarding a member of the *Riigikogu*. Unlike for instance clause 2 of subsection 2 of § 64 of the Constitution, the second sentence of § 76 of the Constitution does not talk about convicting but about prosecuting a member of the *Riigikogu*, which had a clearly different meaning at the time of drafting the Constitution. According to the Chamber, such a difference in the use of the term in §§ 64 and 76 of the Constitution is not accidental. The effect of the second sentence of § 76 of the Constitution extends to an earlier stage of criminal proceedings

than the entry into force of a judgment. In order to function efficiently, a legal mechanism whose idea is to prevent the selective administration of justice must engage prior to referring a criminal case to the court.

**29.** At the same time the Chancellor of Justice and the *Riigikogu* need information about the alleged criminal offence and circumstances of the proceedings in order for them to assess adequately whether the criminal proceedings conducted in respect of a member of the *Riigikogu*are impartial and with appropriate purpose. However, such information is often insufficient at a very early stage of criminal proceedings. Also, it would not serve the purpose of § 76 of the Constitution if the subjection of a member of the *Riigikogu* to any procedural step that is taken for the purpose of examining the initial suspicion about criminal conduct (e.g. interrogation of the member of the *Riigikogu* as a suspect) calls for the consent of the Chancellor of Justice and the *Riigikogu*. This would give rise to a situation where the Chancellor of Justice and the *Riigikogu* should often decide on the basis of very insufficient information whether to accept the prosecution of a member of the *Riigikogu* and thus forfeit the substantial examination opportunity at a later procedural stage or to stop any further investigation of a suspicion about criminal conduct that has arisen in respect of the member of the *Riigikogu* (taking procedural steps in respect of the member of the *Riigikogu* that are required to that end). It would also be, without doubt, unreasonably cumbersome for a member of the *Riigikogu* if, for instance in order to give statements regarding the (initial) suspicion about criminal conduct arisen in respect of them – and possibly to substantially refute the suspicion by their statements – they should go through public immunity proceedings beforehand. Thus, keeping in mind the purposes of the second sentence of § 76 of the Constitution, it would not be correct to attribute the status of suspect to a member of the *Riigikogu* (subsection 1 of § 33 of the CCP) in order to prosecute them within the meaning of the second sentence of § 76 of the Constitution.

**30.** Taking into account these considerations, the Chamber holds that, in the criminal procedural law in force, prosecution commences, for the purposes of the second sentence of § 76 of the Constitution, as from the moment when a statement of charges is prepared with regard to a member of the *Riigikogu* (subsection 1 of § 226 of the CCP) or a settlement is reached with them in settlement proceedings (§ 245 of the CCP). These procedural steps follow the completion of pre-litigation proceedings – and thus also the gathering of evidentiary information – and directly precede the referral of the criminal case to the court. A person becomes an accused when a statement of charges is prepared in respect of the person or when a settlement has been reached with the person (subsection 1 of § 35 of the CCP). By that time there is, on one hand, sufficient information about the facts and course of procedure of the criminal offence for assessing the political impartiality of criminal proceedings and, on the other hand, the central and most public part of the criminal proceedings (i.e. judicial proceedings) has not started yet.

**31.** However, prosecution for the purposes of the second sentence of § 76 of the Constitution cannot be equalised merely with the preparation of a statement of charges in respect of a member of the *Riigikogu* or with reaching a settlement with a member of the *Riigikogu* as one procedural step. Taking such a procedural step does not have in itself any significant impact on the exercise of the free mandate of the member of the *Riigikogu*. What is actually important is that the preparation of a statement of charges or the reaching of a settlement will open a way for the following judicial proceedings, which may, in turn, result in the conviction and penalisation of the member of the *Riigikogu*. Judicial proceedings alone may significantly affect the fulfilment of the functions of a member of the *Riigikogu*. Conviction of a member of the *Riigikogu* , however, means the end of their mandate (clause 2 of subsection 2 of § 64 of the Constitution).

**32.** It follows from the aforesaid, that prosecution of a member of the *Riigikogu* for the purposes of the second sentence of § 76 of the Constitution must be regarded as a process in time, which starts with the preparation of a statement of charges in respect of the member or with the reaching of a settlement and ends with the entry into force of a judgment or the termination of criminal proceedings. This means that if a person is already a member of the *Riigikogu* at the time the pre-litigation proceedings are completed, the consent of a majority of the members of the *Riigikogu* granted on the proposal of the Chancellor of Justice is required for the preparation of a statement of charges in respect of the person or for reaching a settlement with the person. However, if the person does not yet belong to the *Riigikogu* at the time of the preparation of a statement of charges or reaching a settlement, but their mandate as a member of the *Riigikogu* arises before

the end of the following criminal proceedings (judicial proceedings), the prosecution of the member of the *Riigikogu* for the purposes of the second sentence of § 76 of the Constitution will start with the first step that the body who conducts the proceedings takes after the creation of the mandate of the accused member of the *Riigikogu*. Thus, taking such a step requires the consent of the *Riigikogu* that has been granted on the proposal of the Chancellor of Justice (this does not clearly concern the steps taken by the body who conducts the proceedings in connection with commencing public immunity proceedings). Otherwise, this would result in a situation where a person who holds the office of a member of the *Riigikogu* would be put on trial and the person could be convicted without any consent for their prosecution granted by the Chancellor of Justice and the *Riigikogu*. Such a result would be in conflict with the general meaning and purpose of the second sentence of § 76 of the Constitution, incl. also for the reason that other branches of power could change the composition of the *Riigikogu* without the consent of the Chancellor of Justice and the *Riigikogu*.

**33.** According to the Chamber, it is possible to interpret §§ 378-381 of the CCP in conformity with the Constitution. This means that in a situation where the accused becomes a member of the *Riigikogu* only after the preparation of a statement of charges in respect of them or after a settlement is reached with them, but prior to the end of criminal proceedings, the procedure provided for in the aforesaid sections of the Code of Procedure is also applicable in order for the Chancellor of Justice and the *Riigikogu* to be able to decide whether or not to make a proposal and grant consent for continuing criminal proceedings (judicial proceedings) in respect of the member of the *Riigikogu*.

**34.** The interpretation, according to which the consent of a majority of the members of the *Riigikogu* granted on the proposal of the Chancellor of Justice is also required in order to continue criminal proceedings in respect of a person who became a member of the *Riigikogu*only after the preparation of a statement of charges in respect of the person is in compliance with the current practice in the application of the second sentence of § 76 of the Constitution and §§ 378-381 of the CCP (see proposal no. 3 of the Chancellor of Justice of 30 August 2005 and the discussion of the proposal at the 6th session of the 10th *Riigikogu* on 15 September 2005).

**(B)**

**35.** Under subsection 1 of § 377 of the CCP, the President of the Republic, a member of the Government of the Republic or the *Riigikogu*, the Auditor General, the Chief Justice or a Justice of the Supreme Court may be detained as a suspect, preventive measures may be applied with regard to them, their property may be seized and they may be physically examined if the Chancellor of Justice has granted consent thereto at the request of the Chief Public Prosecutor. In the present case the Chancellor of Justice contests the constitutionality of the provision only to the extent that concerns a member of the *Riigikogu*.

**36.** Taking any of the procedural steps set out in subsection 1 of § 377 of the CCP cannot be considered prosecution of a member of the*Riigikogu* for the purposes of the second sentence of § 76 of the Constitution. Thus, taking these procedural steps in respect of a member of the *Riigikogu* does not call for the consent of a majority of the members of the *Riigikogu* granted on the proposal of the Chancellor of Justice. Hence, subsection 1 of § 377 of the CCP does not violate the second sentence of § 76 of the Constitution.

**37.** For similar reasons, it is not in conflict with the second sentence of § 76 of the Constitution that the Code of Criminal Procedure does not require prior consent of an impartial decision-maker, who is independent of the Executive, for searching on the premises of a member of the*Riigikogu*.

## III

**(A)**

**38.** The purpose of general parliamentary privilege of a member of the *Riigikogu* (the first sentence of § 76 of the Constitution) is to safeguard the proper functioning of the Legislature and hinder improper interference by other branches of power with the work of the Parliament. The first sentence of § 76 of the Constitution must prevent arbitrary subjection of members of the *Riigikogu*, which is based only on

decisions of representatives of the Executive, to such coercive measures of the state that may pose significant hindrances to the fulfilment of their functions. Above all, parliamentary privilege protects personal liberty of members of the *Riigikogu*.

**39.** In general, parliamentary privilege of a member of the *Riigikogu* means the prohibition of imposing certain coercive measures of the state on the member of the *Riigikogu* or on doing that without any preliminary or follow-up examination of a decision-maker who is independent from the imposer of the measure. The Constitution does not explain the substance of general parliamentary privilege in greater detail, leaving the Legislature with a sufficiently wide discretion when it comes to the issue of which coercive measures and according to which procedure may be imposed in respect of a member of the *Riigikogu*. However, the discretion of the Legislature upon providing substance to parliamentary privilege of a member of the *Riigikogu* is still not unlimited. On one hand, the first sentence of § 76 of the Constitution does not allow establishing parliamentary privilege of a member of the *Riigikogu* in so strict or inefficient terms that this would distort the nature of parliamentary privilege, leaving the core of the institute unprotected. Thereby, the Chamber shares the opinion of the Chancellor of Justice that the provision of substance to parliamentary privilege of a member of the *Riigikogu* cannot be based on the presumption that this applies in a situation where no misuse of criminal proceedings takes place. In critical situations, the procedure for parliamentary privilege must safeguard the prevention of abuses. On the other hand, the principles and fundamental rights of a state with democratic rule of law and state authority do not allow making members of the *Riigikogu* immune with the help of the institute of parliamentary privilege or granting them rights that disproportionately harm the public order or the rights and interests of other persons. The question of whether the institute of general parliamentary privilege of a member of the *Riigikogu* as developed by the Legislature remains within the discussed limits, is subject to the examination by the constitutional review court.

**40.** Parliamentary privilege of a member of the *Riigikogu* may cover protection against very different coercive measures both in as well as outside criminal proceedings. The fulfilment of the functions of a member of the *Riigikogu* can be hindered first and foremost by such coercive measures of the state, which entail deprivation or restriction of their personal liberty. In the law in force, such measures include, for instance, taking into custody (§ 130 of the CCP), compulsory placement of a suspect or an accused in a medical institution for a medical examination (§ 102 of the CCP), detention of suspect, a person subjected to compelled attendance or a person subject to proceedings (§ 217 and subsection 5 of § 139 of the CCP and § 44 of the Code of Misdemeanour Procedure) or imposition of arrest on a person (§ 48 of the Penal Code, subsection 1 of § 138 of the CCP), but also, for instance, involuntary emergency psychiatric care (§§ 11-13 of the Mental Health Act). This list is not exhaustive. Parliamentary privilege of a member of the *Riigikogu* as safeguarded by the first sentence of § 76 of the Constitution may also cover a situation where a member of the *Riigikogu* is obligated to personally participate in a procedural step (e.g. upon interrogation thereof as a suspect or a witness) at the time when this hinders their participation in the work of the bodies of the *Riigikogu*. This would be so, for instance, in an imaginary situation where, for the period when the *Riigikogu* starts to decide on a motion of censure on the Government of the Republic, the Prime Minister or an individual minister (clause 13 of § 65 of the Constitution), one or more of the members of the *Riigikogu*, whose votes decide the result of the motion of censure, are called to give statements as witnesses in criminal proceedings. An act that would allow that would probably be in conflict with the first sentence of § 76 of the Constitution.

**41.** However, the previous point does not mean parliamentary privilege of a member of the *Riigikogu* could not sometimes also extend to events that are not related to deprivation or restriction of their personal liberty.

**42.** Different coercive measures of the state hinder the fulfilment of functions of a member of the Parliament to a very different extent. Therefore, a different substance of parliamentary privilege of a member of the *Riigikogu* in the event of different coercive measures is in full compliance with the first sentence of § 76 of the Constitution. In other words: protective measures (special proceedings) for safeguarding parliamentary privilege of a member of the *Riigikogu* may be – and in some events must be – different in the event of different coercive measures. It depends, on one hand, on the manner in which and the extent to which a specific measure hinders the fulfilment of the functions of a member of the Parliament and, on the other

hand, on the nature and purpose of the measure, whether any and if so, which special procedure must be created for the imposition of one or another coercive measure on a member of the *Riigikogu* in order for the requirements of the first sentence of § 76 of the Constitution to be met. The larger the extent in which a measure affects the fulfilment of the functions of a member of the *Riigikogu* and, thus also, the work of the *Riigikogu*, the higher the requirements that must be set for the preliminary and/or follow-up examination concerning the imposition of the measure in order to safeguard parliamentary privilege. At the same time parliamentary privilege of a member of the *Riigikogu* may not cause any unreasonable harm to the achievement of the measure's purposes.

**43.** In agreement with the aforesaid, the Chamber also points to the fact that, in accordance with § 76 of the Constitution, the proposal of the Chancellor of Justice and the consent of a majority of the members of the *Riigikogu* is required only for the prosecution of a member of the*Riigikogu*. If a member of the *Riigikogu* is subjected to any such coercive measure, which does not indicate the commencement of prosecution of the person, then the safeguarding of parliamentary privilege of a member of the *Riigikogu* (the first sentence of § 76 of the Constitution) does not require any prior consent of a majority of the members of the *Riigikogu* granted on the proposal of the Chancellor of Justice.

**(B)**

**44.** Under subsection 1 of § 377 of the CCP, a member of the *Riigikogu* may be detained as a suspect, preventive measures may be applied with regard to them, their property may be seized and they may be physically examined if the Chancellor of Justice has granted his consent thereto at the request of the Chief Public Prosecutor.

**45.** According to the Chancellor of Justice, providing the Chancellor of Justice with final decision-making competence for taking a procedural step in respect of a member of the *Riigikogu* that intensively infringes their parliamentary privilege is incompatible with the nature of the institution of the Chancellor of Justice and thereby also with §§ 76 and 139 the Constitution. According to the appellant, if the Chancellor of Justice must, on the basis of subsection 1 of § 377 of the CCP, assess the admissibility of single procedural steps, this may, at least theoretically, cause motivational pressure upon fulfilling the function arising from the second sentence of § 76 of the Constitution.

**46.** The Chamber notes that, under subsection 1 of § 139 of the Constitution, the Chancellor of Justice is an independent official who exercises supervision over the constitutionality of legal instruments of general application issued by the Legislature, the Executive and local authorities and their compliance with other acts. Under subsection 3 of § 139 of the Constitution, in the events specified in the Constitution the Chancellor of Justice will make a proposal for prosecution of a member of the *Riigikogu*, the President of the Republic, a member of the Government of the Republic, the Auditor General, the Chief Justice of the Supreme Court or a Justice of the Supreme Court.

**47.** The Supreme Court has held that imposition of additional functions on a constitutional institution is not unconstitutional if the additional functions do not restrict the competence granted to the institution in the Constitution, these functions are intrinsic to the institution and do not harm the fulfilment of its key function and there are weighty reasons for imposing the additional functions (the judgment of the Constitutional Review Chamber of the Supreme Court of 19 March 2009 in case no. 3-4-1-17-08, point 49).

**48.** The Chamber holds that granting permission for taking a procedural step in respect of a member of the *Riigikogu* in criminal proceedings does not distort the competence provided to the Chancellor of Justice in the Constitution. The Constitution provides the Chancellor of Justice with competence for making a proposal to the *Riigikogu* for prosecuting several top civil servants (subsection 3 of § 139, the second sentence of § 76, § 85, subsection 1 of § 101, § 138 and subsection 2 of § 153 of the Constitution) and the *Riigikogu* will decide on granting consent for prosecution. The role of the Chancellor of Justice is to mediate the request of the Prosecutor's Office in the form of a proposal to the*Riigikogu*.

**49.** According to the purpose of parliamentary privilege of a member of the *Riigikogu*, the task of the

Chancellor of Justice is to assess whether prosecution would be politically biased or clearly unjustified for any other reason. Although the Chancellor of Justice may, if necessary, examine the materials of a criminal file, the Chancellor of Justice does not evaluate or assess the evidence gathered in criminal proceedings or take the place of the court.

**50.** The Chancellor of Justice also performs, in principle, a similar role when granting permission for the step in criminal proceedings specified in § 377 of the CCP. In such an event the Chancellor of Justice likewise does not take the place of the body conducting criminal proceedings and does not thus become the subject of the criminal proceedings. The task of the Chancellor of Justice is based on the purpose of immunity and consists of giving an assessment of whether the step in criminal proceedings is politically motivated or clearly unjustified for any other reason.

**51.** The constitutionality of the disputed competence of the Chancellor of Justice is also supported, among other things, by the independence of the Chancellor of Justice from other branches of power (§ 4 and subsection 1 of § 139 of the Constitution and subsection 1 of § 1 of the Chancellor of Justice Act).

**52.** According to the Chamber, the doubt of the Chancellor of Justice that granting permission for taking any of the steps set out in subsection 1 of § 377 of the CCP in respect of a member of the *Riigikogu* (sentence 1 of § 76 of the Constitution) may later cause motivational pressure in the Chancellor of Justice when making a proposal for prosecuting the member of the *Riigikogu* (sentence 2 of § 76 of the Constitution) is hypothetical and does not provide a reason for declaring the contested provision unconstitutional. When making the proposal specified in the second sentence of § 76 of the Constitution and in § 379 of the CCP to the *Riigikogu*, the Chancellor of Justice is not bound legally or in any other manner by their earlier opinions on granting permission for the procedural step. When deciding on whether to make a proposal for prosecuting a member of the *Riigikogu*, the Chancellor of Justice presumably has considerably more information at their disposal than upon deciding whether to grant consent for some of the procedural steps laid down in subsection 1 of § 377 of the CCP. In a situation where the Prosecutor's Office considers it possible to address the Chancellor of Justice with a request to submit the proposal specified in the second sentence of § 76 of the Constitution and in § 379 of the CCP, probably significantly more evidence has been gathered as a result of pre-litigation proceedings than in a situation where the Chancellor of Justice was addressed with a request to grant consent for taking any of the procedural steps listed in § 377 of the CCP in respect of a member of the *Riigikogu*. Therefore, it cannot be concluded from a decision of the Chancellor of Justice to grant consent for prosecuting a member of the *Riigikogu* or to refuse to grant consent therefor that the consent granted earlier in the same matter for taking the procedural step specified in subsection 1 of § 377 of the CCP or for refusing to take the same was incorrect. Hence, the allegation of the Chancellor of Justice that in the law in force the Chancellor of Justice faces the risk of motivational pressure is unfounded.

**(C)**

**53.** The Chancellor of Justice is of the opinion that subsections 1, 3, 5 and 6 of § 377 of the CCP are also unconstitutional to the extent that these provisions do not provide for the prior consent of an impartial decision-maker, who is independent of the Executive, for searching on the premises of a member of the *Riigikogu*. According to point 62 of the request, the Chancellor of Justice keeps in mind any search on the premises that are directly and closely connected with everyday activities of a member of the *Riigikogu*. The Chancellor of Justice submits that the conduct of a search may be one of the most effective means for harming the reputation of a political opponent and for influencing their activities therethrough. When keeping in mind not only the historical background of the institute of parliamentary privilege, but also its purposeful substance in the modern political system, then, according to the Chancellor of Justice, it is not possible to justify full preclusion of this procedural step from the scope of parliamentary privilege protected by the Constitution.

**54.** The Chamber does not agree to such an opinion of the Chancellor of Justice. Parliamentary privilege does not protect, at least in general, a member of the *Riigikogu* against harm to reputation. An opposite interpretation would make parliamentary privilege of a member of the*Riigikogu* too wide. Like the Chamber explained above – and like the Chancellor of Justice also finds in his request – parliamentary privilege also

has a meaning outside criminal proceedings. Thus, when considering a search on the premises of a member of the *Riigikogu* pursuant to the general procedure as breach of their parliamentary privilege for a reason that a search could harm the reputation of the member of the*Riigikogu*, the breach of parliamentary privilege could also be considered in situations outside criminal proceedings where the reputation of a member of the *Riigikogu* may presumably be at an equivalent risk. This would, however, result in an overflow in the fields of law with restrictions imposed to safeguard parliamentary privilege of a member of the *Riigikogu* that could disproportionately infringe both the principle of a democratic rule of law as well as the fundamental rights. Regardless of the aforesaid, the Chamber holds that there is no basis for considering a search as a procedural step that is exceptionally harmful to reputation. The Prosecutor's Office correctly submits that the stigmatising impact of criminal proceedings is not so much related to one or another procedural step, but to the proceedings as a whole and there is no reason to presume that a search harms the reputation of a member of the *Riigikogu* to a larger extent than, for instance, interrogation of the member of the *Riigikogu* as a suspect. In addition, it must be taken into account that, from the aspect of harming the reputation of a member of the *Riigikogu*, taking a procedural step cannot be equalised with disclosure of information concerning the step (§ 214 of the CCP). There is no basis for stating that a search should automatically entail the communication of a suspicion about criminal conduct to the public. The constitutionality of taking a step in respect of a member of the *Riigikogu* and of the conditions and procedure for disclosure of respective information must be assessed separately.

**55.** According to the Chamber, a member of the *Riigikogu* is usually protected against a search conducted pursuant to the general procedure at sites related to the member outside the core of parliamentary privilege of the member of the *Riigikogu*. A search does not pose, at least in general, any direct and significant hindrances to the fulfilment of the functions of a member of the Parliament. This procedural step does not restrict personal liberty of a member of the *Riigikogu*. The statement of the Chancellor of Justice, as if the obligation of a person to be present at a search conducted on their premises arose from § 91 of the CCP, is incorrect. A search in a building, room, vehicle or enclosed area related to a member of the *Riigikogu* may also be connected with a suspicion about criminal conduct that does not concern the member of the*Riigikogu* themselves or a search may be conducted with an aim to solve a criminal offence that was committed against a member of the*Riigikogu*. The purpose of a search may be finding an object that is not related to the fulfilment of the functions of a member of the *Riigikogu*(e.g. search for the whereabouts of a dead body). Taking into account the nature of the search, it is also difficult to find a general criterion in order to distinguish the sites and cases in the event of which, according to the first sentence of § 76 of the Constitution, the search must always be covered by parliamentary privilege of a member of the *Riigikogu* from the sites in the event of which the search need not be covered by parliamentary privilege. To this end, the specification "Premises directly and closely connected with everyday activities of a member of the *Riigikogu*" used in the request of the Chancellor of Justice is too vague and wide. In the present abstract constitutional review procedure the Chamber does not consider it possible to assess whether any single events may exist, where the lack of a special procedure for the conduct of a search on the premises of a member of the *Riigikogu* is in conflict with the first sentence of § 76 of the Constitution.

**56.** For the aforesaid reasons, the first sentence of § 76 of the Constitution does not impose any obligation on the Legislature to provide for a special procedure (preliminary examination by an impartial decision-maker) for all the searches conducted at sites related to a member of the*Riigikogu*. However, taking into account the Legislature's wide discretion upon the provision of substance to parliamentary privilege of a member of the *Riigikogu*, it would not be unconstitutional if the law provided for an independent preliminary examination for searching at least some of the sites related to a member of the *Riigikogu*. The first sentence of § 76 of the Constitution justifies the establishment of such provisions, since although the core of parliamentary privilege of a member of the *Riigikogu* does not cover protection against a search, a search may still affect the fulfilment of the functions of a member of the *Riigikogu*. This is the case, for instance, when a search is conducted on the working premises of the *Riigikogu*; if any data media, which contain information essential for the fulfilment of their functions, are taken away from a member of the *Riigikogu* during the search; or if any information, which is not related to the criminal offence being investigated and which can later be used to influence a political process, might be obtained during the search. At the same time, a special procedure

established for the conduct of a search on the premises of a member of the *Riigikogu* could be considered constitutional only if this does not pose an unreasonable risk to the purpose of the procedural step (see also points 39 and 42 of this judgment).

**IV**

**57.** For the aforesaid reasons and following clause 6 of subsection 1 of § 15 of the Judicial Constitutional Review Procedure Act, the Supreme Court dismisses the request of the Chancellor of Justice.

---

**Dissenting opinion of Justice Ivo Pilving on the Constitutional Review Chamber judgment of 17 February 2014 in case no. 3-4-1-54-13**

**1.** I agree with the opinions of the majority of the panel expressed in points 21 to 52 of the judgment. However, unlike the majority, I find that the Code of Criminal Procedure (CCP) is in conflict with the first sentence of § 76 of the Constitution to the extent that it allows for a search on the premises of a member of the *Riigikogu* without the prior consent of a decision-maker independent of the Executive on the basis of subsection 21 of § 91 of the CCP.

In this respect the request of the Chancellor of Justice should have been granted. In other respects the Chamber was correct to dismiss the request.

**2.** A search may hinder the exercise of the mandate of a member of the *Riigikogu* to a significant extent. This risk is also acknowledged by the majority of the Chamber (point 56 of the judgment). A search infringes the very core of parliamentary privilege of a member of the *Riigikogu*at least in the event that the data media which are taken from the member during the search contain information essential for the fulfilment of their functions (e.g. information disclosing abuses of representatives of the Executive) or information that can be used for influencing decisions of the member of the *Riigikogu*. Such situations are not so unlikely that they should be ignored in the context of abstract constitutional review (point 55 of the judgment). In its case law the Chamber has presumed the existence, not the absence, of infringement in the conditions of the uncertainty that abstract constitutional review entails (cf. the judgment of 16 December 2013 in case no. 3-4-1-27-13, point 57).

**3.** Taking into account these circumstances, I find that a search on the premises closely connected with a member of the *Riigikogu* merely on the basis of a decision by representatives of the Executive cannot be permitted in general. However, since the prior knowledge of a member of the *Riigikogu* about the planned search on their premises would, in high probability, make the achievement of the objective impossible, no consent for the search needs to be granted by the *Riigikogu* or a body thereof. To safeguard parliamentary privilege, it suffices to subject a search to preliminary examination by an impartial decision-maker independent of the Executive – for instance, by the court or the Chancellor of Justice.

**4.** Under subsection 2 of § 91 of the CCP, a search on the premises of both members of the *Riigikogu* as well as of any other persons is usually conducted at the request of the Prosecutor's Office and on the basis of an order of a preliminary investigation judge or a court order. However, subsection 21 of § 91 of the CCP states that a search may be conducted on the basis of an order of the Prosecutor's Office, except for searches on the premises of a notary's office, law firm or persons processing information for journalistic purposes, if there is reason to believe that: 1) the suspect uses or used the searched site or vehicle at the time of commission of a criminal act or during the pre-litigation proceedings, or 2) a criminal offence was committed at the searched site or vehicle or it was used when preparing to commit or while committing a criminal offence. Subsection 3 of § 91 of the CCP sets out that in urgent events a search may be conducted on the basis of an order of an investigative body without the permission of the court, but in such an event a preliminary investigation judge must be notified thereof through the Prosecutor's Office or, in the event specified in subsection 21 of the section, the Prosecutor's Office must be notified thereof within 24 hours, and the preliminary investigation judge or the Prosecutor's Office will decide whether to authorise the search.

**5.** I also find it constitutional that the Code of Criminal Procedure does not provide for any special procedure for the conduct of a search on the premises of a member of the *Riigikogu* on the basis of a court (incl. a preliminary investigation judge's) order. The core of parliamentary privilege of a member of the *Riigikogu* is protected if the organisation of a search on the premises of a member of the *Riigikogu* has been subjected to preliminary judicial examination that takes place pursuant to the general procedure. It is an intensive but also reasoned infringement of parliamentary privilege if, in urgent events, a search is conducted on the premises of a member of the *Riigikogu* under subsection 3 of § 91 of the CCP on the basis of an order of an investigative body without the permission of the court, but a preliminary investigation judge is notified thereof within 24 hours.

However, it is not constitutional if a search on the premises of a member of the *Riigikogu* is conducted without the permission of the court or another independent body in the events provided for in subsection 21 of § 91 of the CCP. This subsection sets out very extensive exceptions to the requirements of preliminary judicial examination. These exceptions are not necessary for the effective functioning of criminal proceedings involving members of the *Riigikogu*. It is remarkable that the Legislature has felt that there is no need for subsection 21 of § 91 of the CCP when searching the premises related to attorneys, notaries and journalists. I cannot see any reason why parliamentary privilege of a member of the *Riigikogu* should not be protected in the context of a search with a guarantee that extends at least equally to attorneys, notaries and journalists. Granting at least equal parliamentary privilege to members of the *Riigikogu* would not pose any unreasonable risk to the purpose of the search. Hence, the application of subsection 21 of § 91 of the CCP to the conduct of a search on the premises of a member of the *Riigikogu* is disproportionate.

The difficulties in legislative drafting referred to in point 55 of the judgment cannot justify depriving the premises related to a member of the*Riigikogu* of the safeguard arising from the first sentence of § 76 of the Constitution.

---