Constitutional judgment 3-4-1-33-09

JUDGMENT
OF THE SUPREME COURT EN BANC

No. of case	3-4-1-33-09
Date of judgment	1 July 2010
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Julia Laffranque, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu.
Court Case	Request of the Chancellor of Justice of 18 December 2009 to declare § 5^1 and § 71^1 of the European Parliament Election Act, § 6^1 and § 67^2 of the Local Government Council Election Act and § 5^1 and § 73^2 of the Riigikogu Election Act invalid.
Hearing	Written proceeding
DECISION	**To dismiss the request of the Chancellor of Justice.**

FACTS AND COURSE OF PROCEEDINGS

1. On 9 June 2005, the Riigikogu passed the Act to amend the European Parliament Election Act (EPEA), the Local Government Council Election Act (LGCEA) and the Riigikogu Election Act (REA) (RT I 2005, 37, 281). These Acts were amended by adding a provision which prohibits political outdoor advertising during active campaigning (§ 5^1 of the EPEA, § 5^1 of the REA and § 6^1 of the LGCEA). It prescribes liability for violation of the restriction on political outdoor advertising to a person who commissions, distributes or produces advertising and a person who presents, exhibits or transmits advertising to the public (§ 71^1 of the EPEA, § 73^2 of the REA and § 67^2 of the LGCEA).

2. On 6 September 2005, the Chancellor of Justice presented a report to the Riigikogu in which he made a proposal to re-analyse the restriction on political outdoor advertising and to amend the regulations in force, taking account of the principles provided for in the Constitution of the Republic of Estonia. At the sitting of the Constitutional Committee of the Riigikogu on 13 September 2005, the representatives of all factions

agreed with the problems presented in the report of the Chancellor of Justice. It was decided to discuss these problems again after the local government council elections which took place in October of the same year.

3. The Riigikogu discussed the prohibition on political outdoor advertising repeatedly during the years 2006 to 2008 (inter alia the draft Act to amend the Political Parties Act pertaining to the issue has been submitted to the Riigikogu for proceedings on 13 September 2007 (draft 111 SE of XI membership of the Riigikogu)), but did not amend the Acts providing for the prohibition. Therefore, on 9 June 2008, the Chancellor of Justice made a proposal to the Riigikogu to bring § 5^1 and § 71^1 of the EPEA, § 5^1 and § 73^2 of the REA and § 6^1 and § 67^2 of the LGCEA into conformity with the Constitution.

4. On 19 June 2008, the Riigikogu supported the proposal of the Chancellor of Justice with 59 votes in favour.
On 15 September 2008, the Constitutional Committee of the Riigikogu initiated a draft Act to amend the European Parliament Election Act, the Local Government Council Election Act and the Riigikogu Election Act (draft 338 SE of XI membership of the Riigikogu). The objective of the draft is to repeal the provisions under dispute. On 11-12 November 2008, the draft passed the first reading and is waiting for the second reading in the Riigikogu.

On 18 June 2009, the Estonian People's Union faction, the Social Democratic Party faction and the Estonian Green Party faction initiated a draft Act to amend the Political Parties Act (draft 549 SE of XI membership of the Riigikogu), which would oblige political parties to reflect advertising expenses in greater detail ("expenses for publications, television advertising, radio advertising and advertising in newspapers and magazines shall be set out separately, and unit price and volume shall be set out") and which would provide for a ceiling for election advertising (5 million kroons per year). On 24 November 2009, the draft passed the first reading and is waiting for the second reading in the Riigikogu.

5. As the Riigikogu failed to comply with the proposal of the Chancellor of Justice of 9 June 2008 within more than one and a half years, on 18 December 2009, the Chancellor of Justice filed a request with the Supreme Court to declare § 5^1 and § 71^1 of the EPEA, § 5^1 and § 73^2 of the REA and § 6^1 and § 67^2 of the LGCEA invalid. The request was received by the Supreme Court on 18 December 2009.

6. By a ruling of 8 April 2010, the Constitutional Review Chamber of the Supreme Court transferred the matter for adjudication to the Supreme Court *en banc*.

OPINIONS OF PARTICIPANTS IN PROCEEDINGS
(A) Opinion of Chancellor of Justice
7. The Chancellor of Justice finds that the prohibition on political outdoor advertising during active campaigning constitutes an intensive infringement of the electoral rights arising from § 57, § 60 and § 156 of the Constitution. The objectives in the name of which fundamental rights are restricted are important. The total prohibition on political outdoor advertising is not an effective measure to achieve these objectives, therefore this prohibition is not a moderate measure. Therefore, the prohibition is in conflict with § 57, § 60 and § 156 of the Constitution.

8. According to the Chancellor of Justice, the contested provisions of the Election Acts primarily restrict the right to stand as a candidate, the right to vote and the right to nominate candidates arising from § 57, § 60 and § 156 of the Constitution. The same applies to provisions which prescribe liability for the violation of the restrictions established on political outdoor advertising.

In addition to the electoral rights, these provisions may also restrict the fundamental right of political parties arising from the second sentence of § 48(1) of the Constitution (more precisely the freedom of activity included in the freedom of political parties) and the freedom of political expression included in the freedom of expression set out in § 45 of the Constitution. The right of everyone to freely obtain information disseminated for public use provided for in § 44(1) of the Constitution also relates to the abovementioned. The latter is important from the perspective of the voter.

The prohibition on political outdoor advertising and the punishment prescribed for the violation of the prohibition may also infringe the right of ownership prescribed in § 32 of the Constitution (the right of the owners of buildings, means of public transport, taxis etc. which can be used as outdoor advertising media to freely decide on the possession and use of the property belonging to them). At the same time, the prohibition may also infringe the right to engage in enterprise provided for in § 31 of the Constitution (the prohibition on outdoor advertising unfavourably influences the business of outdoor media enterprises). The prohibition may also infringe the freedom of contract included in the general right of freedom provided for in § 19(1) of the Constitution.

The Chancellor of Justice notes that he will not analyse separately the infringement of the fundamental rights provided for in § 48(1), § 45, § 44(1), § 32, § 31 and § 19(1) of the Constitution.

9. In the opinion of the Chancellor of Justice, the prohibition is established with the objective to reduce the role of money in the achievement of political power by reducing election campaign expenses, to increase the role of substantial political debate and to free the public space from excessive outdoor advertising which may cause public resentment towards political advertising and politics as a whole. These objectives arise from the explanatory memorandum for the Act and the positions expressed during the readings of the draft.

These are legitimate objectives as they are all related to the general principles of the electoral rights and can be traced to democracy as an important constitutional value.

10. In the opinion of the Chancellor of Justice, the prohibition is an appropriate measure in order to achieve the listed objectives. It is impossible to state that the total prohibition on outdoor advertising does not allow to achieve any of the listed objectives.

11. According to the request of the Chancellor of Justice, the necessity of the prohibition is questionable for the achievement of the objectives. Instead of a prohibition on political outdoor advertising, a restriction on political outdoor advertising and, secondly, a ceiling for the election campaign expenses or a more specific regulation of the expenses may be considered as possible alternative measures which would help achieve the aforementioned objectives, and would be as effective and less burdensome.

The fact that establishment of a prohibition would bring about many problems which need to be solved speaks against the first option. A total prohibition would bring about fewer problems. At the same time, establishment of more detailed restrictions which are in conformity with the Constitution is not precluded. Restrictions on outdoor advertising do not necessarily help achieve all the abovementioned objectives as effectively as the prohibition on outdoor advertising. For example, the impact on the reduction of election campaign expenses would probably be smaller, and restrictions on outdoor advertising do not free the public space to the same extent as the prohibition on outdoor advertising.

The second option would bring about the concealing of election expenses. The conformity of election campaign expenses with the Constitution depends on the particular limit which is set, the restrictions on expenses bring about restrictions more extensively also on the dissemination of information through other channels. The restrictions on expenses do not necessarily preclude the use of massive outdoor advertising and thereby reduce the resentment of voters towards political advertising and politics.

Therefore, it is impossible to state that instead of the prohibition on political outdoor advertising, there definitely exist measures which restrict the fundamental rights to a smaller extent and at the same time ensure achievement of the desired objectives with more certainty.

12. In the opinion of the Chancellor of Justice, the objectives of the prohibition on outdoor advertising are based on the idea of strengthening democracy and are, therefore, weighty, but the prohibition which has been chosen to achieve these objectives is not an effective measure therefor.

The prohibition does not necessarily make the persons who stand as candidates reduce their election

campaign expenses, bring about the reduction of the role of money in the achievement of power or make the persons who stand as candidates engage in more substantial provision of information. As only one form of advertising is prohibited, advertising may be transferred into other channels. As a result, the campaign expenses remain the same, political advertising in other channels increases, the outdoor advertising campaign may be shifted to the period before active election campaigning. As the reports on the election campaign expenses of political parties are extremely uneven, definite conclusions about the actual expenses related to advertising, including outdoor advertising, and the impact of the prohibition on outdoor advertising cannot be made. Advertising distributed in printed media, in the Internet and by post is not necessarily significantly more substantial than outdoor advertising with its display of photos, slogans etc.

The prohibition on political outdoor advertising is not an effective measure to free the public space from election advertising. As a result, the campaign may be shifted to an earlier time and transferred into other channels and be disturbing for the electorate just at some other time and in other places. The perception of election advertising as negative is very subjective. And it is also extremely questionable whether a candidate who wishes to propagate himself or herself or his or her views would knowingly and intentionally advertise himself or herself in a negative manner, contrary to his or her interests.

13. In the opinion of the Chancellor of Justice, interference with the electoral rights is intensive. The period prior to the elections is the most important time for communicating a message to voters. Prior to the elections, the free dissemination of information must be guaranteed. Therefore, the restriction on advertising during the period constitutes an intensive infringement of the electoral rights. Restriction of the freedom of speech cannot be justified by the objective to avoid public resentment and people’s disappointment in politics. The freedom of speech also includes the information and ideas which disturb the state or any part of its population. These requirements are set by pluralism and tolerance without which there is no democratic society. According to the research referred to by the Chancellor of Justice, outdoor advertising formed a great portion of the election campaign as a whole before the Riigikogu elections in 2003. Restriction of the specific advertising channel is therefore an important restriction. The fact that violation of the restriction brings about punishment for a misdemeanour also affects the intensity of the prohibition.

(B) Opinion of Constitutional Committee of Riigikogu

14. The Constitutional Committee of the Riigikogu notes that although the Riigikogu supported the proposal of the Chancellor of Justice of 9 June 2008, a situation has developed by now where some of the political forces represented in the Riigikogu support the existent prohibition, others wish to revoke the prohibition and yet others want to restrict political outdoor advertising. A political compromise on the issue is unlikely in the near future.

(C) Opinion of Minister of Justice

15. According to the Minister of Justice, the prohibition on political outdoor advertising is not proportionate in order to restrict the freedom of expression provided for in § 45 of the Constitution and is therefore in conflict with the Constitution.

16. In the opinion of the Minister of Justice, the prohibition on political outdoor advertising infringes the freedom of political expression set out in § 45 of the Constitution. Any advertising is an expression presented by a political party, an election coalition or an independent candidate by which they seek the support of a voter.

Directly, the prohibition on political outdoor advertising does not restrict the right to vote or the right to stand as a candidate arising from § 57, § 60 and § 156 of the Constitution. The impact of the contested provisions on the electoral rights is indirect. These provisions restrict the possibility of persons standing as candidates to introduce their positions to the electorate, and the information sources used by voters.

17. In the opinion of the Minister of Justice, the prohibition on political outdoor advertising has been established in order to protect values arising from the elementary principles of a democratic state. In the final stage, the objective to raise the substantial quality of election campaigns, reduce the inequality of persons

standing as candidates by reducing the role of money and to free the public space from political advertising perceived as negative serve the need to protect public order specified in § 45 of the Constitution, which also includes the elementary values arising from the principles of a democratic state.

18. In the opinion of the Minister of Justice, the prohibition concerned is not an appropriate measure to increase the quality of political debate. The prohibition does not restrict the contents of that expressed in political advertising. Persons standing as candidates may communicate slogans with poor contents also through other communication channels to an unlimited extent. The increase of substance in electoral campaigns after prohibiting political outdoor advertising has not been proved. The prohibition is also inappropriate in order to reduce the role of money in the formation of election results. Money that was previously spent on outdoor advertising will be transferred to other forms of advertising. It has not been proved that election campaign expenses would be reduced after the establishment of the prohibition. The prohibition on political outdoor advertising is appropriate only in order to free the public space from political advertising.

19. In the opinion of the Minister of Justice, the disputed prohibition without conditions is necessary because there exist no other more subtle measures to prevent political advertising in the public space. Partial restrictions are not equally effective in order to avoid social discontent which has arisen regarding political advertising.

20. In the opinion of the Minister of Justice, the prohibition on political outdoor advertising intensively restricts the freedom of political expression, as during the period immediately preceding elections, extensive guaranteeing of the right is extremely important. Protection of the society against the negative impacts of political outdoor advertising is a vague objective and is therefore not sufficiently weighty to justify the intensive infringement. The prohibition on political outdoor advertising is not a moderate measure to achieve its objectives. Therefore, the contested provisions are in conflict with § 45 of the Constitution.

(D) Opinion of National Electoral Committee

21. In the opinion of the National Electoral Committee, the provisions prohibiting political outdoor advertising have no sufficient legal clarity. Testing the limits of what is permissible has become usual. The definition and nature of political outdoor advertising has not been defined as precisely as necessary in order for the prohibition to be applied effectively.

Persons who participate in elections also post other notices in the public space, except for the election advertising. The prohibition on political outdoor advertising therefore restricts other possibilities for campaigning as it makes informing the voters of the activities of candidates complicated. For example, an invitation to an election meeting displayed in the public space may, depending on its design, be defined as outdoor advertising. At the same time, political outdoor advertising may be displayed as just another notice. Therefore, it is impossible for the candidates to know exactly their rights while campaigning. Such vagueness has significantly increased the work load of the police.

22. In the opinion of the National Electoral Committee, the prohibition on political outdoor advertising unfavourably affects election coalitions, independent candidates and small political parties for whom advertising in such advertising channels as radio, television and press is not within means. This particularly concerns the elections of local government councils. The candidates of national political parties can rely on the national campaign of their political parties which generally is not possible in the case of election coalitions. Therefore, the prohibition on advertising does not treat participants in elections equally and violates the principle of free and uniform elections.

CONTESTED PROVISIONS

23. § 6^1 of the LGCEA, § 5^1 of the REA and § 5^1 of the EPEA provide for the following:

"Prohibition on political outdoor advertising

Advertising of an independent candidate, a political party or a person standing as a candidate in the list of a political party [an election coalition or a person standing as a candidate in the list of an election coalition –

only § 61 of the LGCEA], or their logo, another distinctive mark or programme on buildings or structures or on the inside or outside of means of public transport or taxis, and other political outdoor advertising is prohibited during active campaigning."

24. § 67^2 of the LGCEA, § 73^2 of the REA and § 71^1 of the EPEA provide for the following:
"Violation of restrictions established on political outdoor advertising
(1) Violation of the restrictions established on political outdoor advertising is punishable by a fine of up to 300 fine units.
(2) The same act, if committed by a legal person, is punishable by a fine of up to 50 000 kroons.
(3) The following persons who fail to comply with the requirements or restrictions established for political outdoor advertising shall be held liable as advertisers pursuant to the procedure provided for in this Act:
1) persons who commission advertising if the advertising commissioned by such persons violates the requirements for or restrictions on advertising established by this Act, except in the cases provided for in clauses 2) and 4) of this subsection;
2) persons who distribute or produce advertising if the distributors' or producers' activities violate the requirements for restrictions on advertising established by this Act;
3) persons who present, exhibit or transmit advertising to the public if such persons' activities violate the restrictions on publication of advertising established by this Act;
4) publishers of advertising specified in clauses 1)–3) of this subsection solidarily if their activities violate the requirements for or restrictions on advertising established by this Act and it is not possible to ascertain their separate liability.
(4) The provisions of the General Part of the Penal Code (RT I 2001, 61, 364; 2002, 86, 504; 82, 480; 105, 612; 2003, 4, 22; 83, 557; 90, 601; 2004, 7, 40; 46, 329; 54, 387; 56, 401; 88, 600; 2005, 20, 126) and of the Code of Misdemeanour Procedure (RT I 2002, 50, 313; 110, 654; 2003, 26, 156; 83, 557; 88, 590; RT III 2004, 9, 96; RT I 2004, 46, 329; 54, 387 and 390; 56, 403) apply to proceedings regarding the misdemeanours provided for in subsections (1) and (2) of this section.
(5) Police prefectures shall conduct extra-judicial proceedings in the matters of misdemeanours provided for in subsections (1) and (2) of this section.
(6) County or city courts shall hear misdemeanour matters provided for in subsections (1) and (2) of this section."

OPINION OF SUPREME COURT EN BANC

25. The Chancellor of Justice states that § 6^1 of the LGCEA, § 5^1 of the REA and § 5^1 of the EPEA which prohibit political outdoor advertising during active campaigning are in conflict with § 57, § 60 and § 156 of the Constitution in conjunction with § 11 of the Constitution.

According to these provisions, prohibited political outdoor advertising during active campaigning means advertising of an independent candidate, a political party or a person standing as a candidate in the list of a political party and, in the case of local government council elections, an election coalition or a person standing as a candidate in the list of an election coalition, or their logo, another distinctive mark or programme on buildings or structures or on the inside or outside of means of public transport or taxis, and other political outdoor advertising.

According to § 6 of the LGCEA, § 5 of the REA and § 5 of the EPEA, the period of active campaigning is the period from the last day for the registration of candidates until the election day.

26. Additionally, the Chancellor of Justice states that for the same reasons, liability according to the penal law for violation of the restrictions established regarding political outdoor advertising provided for in § 67^2 of the LGCEA, § 73^2 of the REA and § 71^1 of the EPEA is in conflict with the same provisions of the Constitution.

27. First, the Supreme Court *en banc* ascertains which fundamental rights are infringed by the prohibition on political outdoor advertising provided for in the Local Government Council Election Act and the Riigikogu Election Act (I), and thereafter which fundamental rights are infringed by the prohibition on political

outdoor advertising provided for in the European Parliament Election Act (II). Further, the Supreme Court *en banc* assesses the conformity of the prohibition on political outdoor advertising with the Constitution (III) and the constitutionality of providing for liability according to the penal law for violation of the prohibition on political outdoor advertising (IV) and resolves the request of the Chancellor of Justice (V).

I

28. In the opinion of the Supreme Court *en banc*, the provisions of the Local Government Council Election Act and the Riigikogu Election Act prohibiting political outdoor advertising and prescribing a punishment for violation of the prohibition, first of all, infringe the electoral rights arising from § 57, § 60 and § 156 of the Constitution. Additionally, these provisions also infringe the freedom of expression arising from § 45 of the Constitution and the right to engage in enterprise arising from § 31 of the Constitution, the fundamental right of ownership arising from § 32 of the Constitution and the freedom of activity of political parties arising from the second sentence of § 48(1) of the Constitution.

29. The right of an Estonian citizen of at least 18 years of age to vote at Riigikogu elections and referendums arises from § 57 of the Constitution. § 60(2) of the Constitution grants every Estonian citizen who has attained twenty-one years of age and has the right to vote, the right to stand as a candidate for the Riigikogu. The right to vote and the right to stand as a candidate at local government council elections arise from § 156 of the Constitution. The electoral rights also include the right to nominate candidates for the Riigikogu and local government council elections. The electoral rights are among the main rights through the exercise of which individuals can participate in the decision-making regarding social affairs, including participation in the exercise of the power of the state within the meaning of § 1(1) and § 56(1) of the Constitution.

30. The right to vote is related to the obligation of the state to create the necessary conditions for the periodical exercising of that right, which depart from the principle of free, uniform, general and direct elections and of secret ballot. The exercise of the right to vote is unthinkable without a framework regulating, on the one hand, voting and, on the other hand, standing as candidate. The obligation to organise elections which conform to certain requirements is also provided for in Article 3 of Protocol No. 1 annexed to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter Convention) “Right to free elections”. According to the Article, the Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Creation of conditions necessary for the exercise of the right to vote means, first of all, providing for the voting procedure. Additionally, it means the obligation of the legislature to ensure dissemination of information which is necessary in order to make a free and informed election decision.

Primarily, the right to vote protects the voter from the interference of the state in the expression of his or her free will. In conjunction with § 44(1) of the Constitution according to which everyone has the right to freely obtain information disseminated for public use, the right to vote also includes the possibility of citizens with the right to vote to receive information on the political views of candidates in order to form their election decision. This, at the same time, means the possibility to form their informed selection free from influences the objective of which is to manipulate the will of voters without providing substantial information on the political programme and intentions and without involving the voters in the discussion.

Political outdoor advertising may be one of the channels for the communication of information to voters regarding political parties, election coalitions and independent candidates and their views. By the establishment of restrictions regarding political outdoor advertising, the legislature shapes the conditions for the exercise of the right to vote. If substantial information on political intentions is communicated through outdoor advertising, a prohibition thereon during the period of active campaigning restricts the possibility of voters to receive information for forming their election decision. By performing the obligation to create the necessary conditions for the periodical exercise of the right to vote, the legislature has also infringed the freedom to receive information for forming the election decision, which is included in the right to vote.

31. The right to stand as a candidate is related to the obligation of the state to create the necessary conditions for exercising that right, which depart from the electoral principles specified in the previous paragraph. The obligation to establish the necessary conditions for the exercise of the right to stand as a candidate, inter alia, means the obligation to provide for how candidates and political associations (election coalitions and political parties) may organise and finance their election campaigns.

Primarily, the right to stand as a candidate provides protection from the preconditions or censuses established regarding standing as a candidate. Upon standing as a candidate for a representative body, the freedom of a candidate to disseminate and introduce his or her views is important. According to the first sentence of § 45(1) of the Constitution, everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. In conjunction with the freedom of expression provided for in § 45 of the Constitution, the right to stand as a candidate also includes the right of candidates to introduce their political views to voters and to participate in political discussion.

The prohibition on political outdoor advertising which is one of the conditions for the exercise of the right to stand as a candidate, restricts the right of candidates to introduce themselves and also the association they represent. Therefore the prohibition infringes the right to stand as a candidate provided for in § 60(2) and § 156 of the Constitution in conjunction with the freedom of expression provided for in § 45 of the Constitution. Here, the state has also, at the same time, infringed the right upon performance of the obligation which is related to the right to stand as a candidate.

32. The provisions and regulations prohibiting political outdoor advertising during active campaigning which prescribe liability for violation of the restrictions established regarding political outdoor advertising, also restrict the right to engage in enterprise provided for in § 31 of the Constitution. The right to engage in enterprise protects persons from the interference of the state with activities carried out by them in order to generate income. The protection area of the right to engage in enterprise has been infringed if the public authority influences it unfavourably. The prohibition on outdoor advertising influences the business of outdoor media enterprises unfavourably as it precludes the production and exhibiting of outdoor advertising as a possibility to earn income.

33. According to the fundamental right of ownership set out in § 32 of the Constitution, everyone has the right to freely possess, use, and dispose of his or her property. The prohibition on political outdoor advertising infringes the right of the owners of buildings, structures, means of public transport, taxis etc. which can be used as outdoor advertising media, to freely decide on the possession and use of the property belonging to them.

34. In the opinion of the Supreme Court *en banc*, in addition to the freedom to form political parties as associations which are intended to compete at elections, the freedom of activity of political parties also arises from the second sentence of § 48(1) of the Constitution. The freedom of activity of political parties includes the freedom of a political party to determine its political objectives, disseminate its ideas and collect financial resources for its activities. The freedom of a political party to disseminate its ideas means the freedom to select means for gathering the votes of the electorate, determine the forms, place and time of election advertising.

The prohibition on political outdoor advertising affects the freedom of activity of political parties unfavourably as this precludes one form of election advertising during a certain period of time.

35. Thus, the prohibition on political outdoor advertising set out in the Local Government Council Election Act and the Riigikogu Election Act infringes the right to vote, the right to stand as a candidate in conjunction with the freedom of expression, the right to engage in enterprise, the fundamental right of ownership and the freedom of activity of political parties, which are all related to the election of these representative bodies.

II

36. The Chancellor of Justice finds that the provisions of the European Parliament Election Act which prohibit political outdoor advertising and prescribe a punishment for the violation of the provisions are in conflict with § 57, § 60 and § 156 of the Constitution in conjunction with § 11 of the Constitution.

The provisions referred to by the Chancellor of Justice or other provisions of the Constitution do not prescribe clearly any rights to participate in elections to the European Parliament. These rights are granted to the citizens of the European Union by the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (together Foundation Treaties) (see paragraph 37 below). Arising from the Constitution of the Republic of Estonia Amendment Act (CAA), the specified legal instruments are a part of the Estonian legal order. The rights related to the election of the European Parliament arise for the citizens of Estonia also from Chapter III of the Constitution (see paragraphs 39 and 40 below).

37. According to Article 10(1) of the Treaty on European Union, the functioning of the Union shall be founded on representative democracy. Citizens are directly represented at Union level in the European Parliament (Article 10(2) of the TEU). The first sentence of Article 10(3) of the TEU provides for that "Every citizen shall have the right to participate in the democratic life of the Union". The central way to participate in the democratic life of the Union is to elect the members of the European Parliament. According to Article 14(3) of the TEU, the members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

According to Article 20(2)b) of the TFEU, the citizens of the European Union shall have, *inter alia* the right to vote and to stand as candidates in elections to the European Parliament. These rights are repeated by Article 39 of the Charter of Fundamental Rights of the European Union. This Article should be applied to the electoral rights in other Articles of the Foundation Treaties and under the conditions and within the boundaries provided for in legislation passed on the basis thereof (in this regard see Article 52(2) of the Charter).

The right of the citizens of the European Union to vote and to stand as candidates in elections to the European Parliament belongs to them regardless of whether they wish to vote and stand as candidates in or outside of the Member State of their citizenship.

38. As of Estonia's accession to the European Union, the citizens of Estonia also acquired the citizenship of the European Union (see Article 20(1) of the TFEU). The rights specified in the previous paragraph therefore also belong to the citizens of Estonia. Arising from § 2 of the CAA, the state of Estonia shall ensure its citizens the possibility to exercise these rights provided for in the Foundation Treaties.

39. Additionally, the rights of an Estonian citizen to participate in the elections to the European Parliament also arise from the Constitution of the Republic of Estonia. Recognition of the rights to participate in the elections to the European Parliament as rights arising from the Constitution of the Republic of Estonia is required by the principle set out in § 1(1) of the Constitution according to which Estonia is a democratic republic wherein the supreme power of state is vested in the people.

Arising from § 2 of the CAA according to which as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia is applied taking account of the rights and obligations arising from the Accession Treaty, § 3(1) of the Constitution should be interpreted so that the power of state is exercised also on the basis of the law of the European Union (i.e. on the basis of the Foundation Treaties approved by Estonia and the secondary legislation in conformity with the Foundation Treaties). The European Parliament establishes the law of the European Union within the limits of competence granted thereto by the Foundation Treaties. Together with the Council of the European Union, the European Parliament is the legislature and the body approving the budget of the European Union. According to the conditions prescribed in the Foundation Treaties, the European Parliament also performs the functions of political control and consultation. The European Parliament elects the president of the European Commission who primarily

exercises executive power. Thus, the European Parliament has an important role in shaping the decisions of the European Union which also influence Estonia and people living here. Democracy presumes that voters, by their preferences and votes, can influence the decisions of the public authority which are made in respect of them. At the elections to the European Parliament, Estonian citizens elect a representative body which approves regulations mandatory to them and shapes the policies which affect their lives. The right to participate in the elections of the representative body is ensured to Estonian citizens by the Constitution.

40. Taking account of § 3(1) of the Constitution according to which the power of state is exercised also according to the law of the European Union (i.e. on the basis of the Foundation Treaties approved by Estonia and the secondary legislation in conformity with the Foundation Treaties) and the principle set out in § 1(1) of the Constitution, then Chapter III of the Constitution "The People" and § 56 of the Constitution should, in the opinion of the Supreme Court *en banc*, be interpreted so that upon participation in the elections to the European Parliament, people exercise the supreme power of state. The fundamental rights of Estonian citizens to vote and stand as candidates at the elections to the European Parliament also arise from this Chapter.

41. Taking account of the previous explanations, the request of the Chancellor of Justice must be considered as a request to declare the provisions of the European Parliament Election Act establishing a prohibition on political outdoor advertising and a punishment for the violation of the prohibition invalid due to the conflict with the right to vote and the right to stand as a candidate at the elections to the European Parliament which, in the manner explained above, arises from Chapter III of the Constitution of the Republic of Estonia in conjunction with § 11 of the Constitution.

The Supreme Court *en banc* notes that such a conclusion does not change the position expressed in paragraph 49 of the judgment of the Supreme Court *en banc* of 19 April 2005 no. 3-4-1-1-05 that the Supreme Court *en banc* is not able to examine the request of the Chancellor of Justice if the Chancellor of Justice requests declaration of legislation of general application of Estonia invalid on the ground that an Act is in conflict with the European Union law. Differently from the decision referred to (see paragraph 48), the Supreme Court *en banc* finds in the present matter that the electoral rights at the elections to the European Parliament also arise from the Constitution of the Republic of Estonia.

Therefore, in the opinion of the Supreme Court *en banc*, the Chancellor of Justice has contested the conformity of the prohibition on political outdoor advertising applied at the elections to the European Parliament, precisely to the electoral rights at the elections to the European Parliament which arise from the Constitution of the Republic of Estonia.

42. Before assessing the constitutionality of the prohibition on political outdoor advertising established by the European Parliament Election Act, the Supreme Court *en banc* shall verify whether the law of the European Union regulates political outdoor advertising in the course of campaigning for the elections to the European Parliament. It is necessary as, generally, verification of the constitutionality of a provision of legislation of general application of Estonia which is related to the EU law, and declaration of invalidity of the provision is not within the competence of the Supreme Court (in this regard see ruling of the Constitutional Review Chamber of the Supreme Court of 26 June 2008 in case no. 3-4-1-5-08, paragraph 30).

The Foundation Treaties prescribe the electoral rights but clearly provide for that the Council establishes the legislation necessary for the exercise of these rights (Article 22(2) of the TEU (previous Article 19(2) of the TEC) and Article 223(1) of the TEU (previous Article 190(4) of the TEC)). In order for the electoral rights to be exercised at the European Parliament elections provided for in the Foundation Treaties, the Council of the European Union has passed two legal instruments. First, the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, which has been annexed to Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 and which has been amended by the Council Decision 2002/772/EC, Euratom of 25 June and 23 September 2002; secondly, Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of

which they are not nationals.

In the law of the European Union, only Article 2(b) of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage concerns the organisation of election campaigns and permits each Member State to set a ceiling for candidates' campaign expenses. The first sub-indent of Article 7 reads that "(s)ubject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions". Until present, the European Union has not harmonised the organisation of election campaigns to detail. Regulation thereof (including political outdoor advertising) has remained within the competence of Member States.

43. Therefore, the law of the European Union did not prevent the Riigikogu from prohibiting political outdoor advertising for the period of campaigning for the elections to the European Parliament. As, presently, the law of the European Union does not regulate the area under dispute, verification of the constitutionality of the prohibition is definitely within the competence of the Supreme Court.

44. The prohibition on political outdoor advertising established for the period of active campaigning for the elections to the European Parliament infringes the right to vote and the right to stand as a candidate related to elections to the European Parliament in conjunction with the freedom of political expression arising from § 45 of the Constitution. At the same time, the prohibition also infringes the right to engage in enterprise provided for in § 31 of the Constitution, the fundamental right of ownership provided for in § 32 of the Constitution and the freedom of activity of political parties arising from the second sentence of § 48(1) of the Constitution.

III

45. The rights and freedoms which are infringed by the prohibition on political outdoor advertising established in the Election Acts may, according to § 11 of the Constitution, be restricted only in accordance with the Constitution. These restrictions have to be necessary in a democratic society and must not distort the nature of the rights and freedoms which are restricted.

46. The National Electoral Committee found in its opinion that the prohibition on political outdoor advertising is in conflict with the principle of legal clarity arising from § 13(2) of the Constitution (see paragraph 21 above). The Supreme Court *en banc* does not agree with the opinion.

47. According to the principle of legal clarity arising from § 13(2) of the Constitution, legal instruments must be sufficiently clear and comprehensible, so that a person could foresee the activities of the state with reasonable accuracy and adjust his or her activities in accordance with this. The Supreme Court has noted regarding legal clarity earlier that a citizen "must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable (see judgment of the Supreme Court*en banc* of 28 October 2002 in case no. 3-4-1-5-02, paragraph 31). The required level of specificity or legal clarity of a regulation is not the same in the case of all regulations. The regulations which enable to restrict persons' rights and to impose obligations on persons must be more clear and precise (judgment of the Constitutional Review Chamber of Supreme Court of 20 March 2006 in case no. 3-4-1-33-05, paragraph 22).

48. The Election Acts do not give exhaustive definitions for outdoor advertising or political outdoor advertising. The definition of political outdoor advertising is not explained in other Acts either. Though, in the regulation providing for the prohibition, the legislature has presented a sample list of political outdoor advertising. Upon application of the prohibition provided for in § 6^1 of the LGCEA, the Constitutional Review Chamber of the Supreme Court has found that (see judgment of 14 November 2005 in case no. 3-4-1-27-05, paragraph 12) the specified section prescribes four acts which are prohibited during active campaigning, and has explained application of the elements present in an act in paragraphs 13-18 of the same judgment. The National Electoral Committee, county courts and the Supreme Court have later also

repeatedly applied the prohibition concerned. Taking account of the circumstances, persons to whom the prohibition is directed and who may be punished for violation of the prohibition may foresee, to a reasonable extent, which activities are deemed to be prohibited political outdoor advertising and may, therefore, bring about punishment under penal law. With reasonable effort and applying different ways of interpretation, state bodies applying the prohibition are able to determine a functioning code of behaviour from these provisions and the objectives of the prohibition, for the ignoring of which, a punishment is prescribed or, for the violation of which, it may be necessary to assess the impact of the violation on the election results.

49. The provisions establishing the prohibition are not rendered legally unclear by the activities of the addressees of the prohibition which test the boundaries of permitted behaviour. With the help of court practice and by applying different ways of interpretation, state bodies and courts are, also in ambiguous situations, able to determine which activity is permitted and which prohibited.

50. The regulations providing for the prohibition on political outdoor advertising set out in the Election Acts cannot be considered so unclear as to constitute a reason for considering these provisions to be in conflict with the principle of legal clarity arising from § 13(2) of the Constitution.

51. The Chancellor of Justice has assigned three main objectives to the establishment of the prohibition on political outdoor advertising: to reduce the role of money in the achievement of political power by reducing election campaign expenses, to increase the role of substantial political debate and to free the public space from excessive outdoor advertising which may cause public resentment towards political advertising and politics as a whole. These objectives arise from the explanatory memorandums for the draft Act to amend the European Parliament Election Act, the Local Government Council Election Act and the Riigikogu Election Act (draft 620 SE of the X membership of the Riigikogu), the arguments expressed during the readings and from the explanatory memorandums for other drafts concerning election advertising (see paragraphs 3 and 4 above).

In its earlier practice (see judgment of the Constitutional Review Chamber of the Supreme Court of 14 November 2005 in case no. 3-4-1-27-05, paragraph 11), the Supreme Court has found that the objective of the prohibition on political outdoor advertising is, primarily, to ensure the equality of political parties, individual candidates and election coalitions through reduction of the expenses incurred by political parties on election campaigns and the role of money in the achievement of political power.

In addition to the listed objectives, in the opinion of the Supreme Court *en banc*, the objective to reduce the inappropriate influencing of voters (manipulating the will of voters without communicating substantial information on the political programme and intentions, without involving voters in the discussion) with the influencing methods used in outdoor advertising may also be seen behind the prohibition.

52. In the opinion of the Supreme Court *en banc*, the Constitution does not preclude restriction of the fundamental rights and freedoms under observation for the objectives listed in the previous paragraph. Behind all these objectives, there is the obligation of the state to provide for the necessary conditions for the exercise of the right to vote and the right to stand as a candidate arising from the principle of free, uniform, general and direct elections and of secret ballot. The possibility to exercise the electoral rights is the main characteristic of democratic political order. The democratic nature of the Estonian political order is a very important constitutional principle. In order to promote the principle, the Riigikogu may provide for the conditions also for the exercise of the electoral rights. Although, the Constitution does not grant the Riigikogu the authority to restrict the right to vote and the right to stand as a candidate, these are not fundamental rights not to be restricted (see judgment of the Supreme Court *en banc* (SCEB) of 19 April 2005 in case no. 3-4-1-1-05, paragraph 24). If, at first glance, the fundamental rights not to be restricted may be restricted in the interests of the functioning of democracy, then, for the same reason, the freedom of expression arising from § 45 of the Constitution, the right to engage in enterprise arising from § 31 of the Constitution, the fundamental right of ownership arising from § 32 of the Constitution and the freedom of activity of political parties arising from the second sentence of § 48(1) of the Constitution may also be restricted.

53. The prohibition on political outdoor advertising must be appropriate for the achievement of the objectives for which it was established. The Riigikogu may not restrict fundamental rights with measures which in no case favour achievement of the established objectives.

54. In the opinion of the Supreme Court *en banc*, the prohibition on political outdoor advertising is appropriate in order to reduce the role of money in the achievement of political power by reducing election campaign expenses, to increase the role of substantial political debate, to free the public space from excessive outdoor advertising which may cause public resentment towards political advertising and politics as a whole, and to reduce the inappropriate influencing of voters.

55. The contested prohibition may conform to the Constitution as appropriate for achieving legitimate objectives only when there exist no other measures which would be as effective but less restrictive on the fundamental rights.

56. On the basis of the request of the Chancellor of Justice, first, restrictions on political outdoor advertising instead of the prohibition thereon and, secondly, establishment of a ceiling for election expenses may be treated as the possible alternative measures.

57. For the better regulation of election campaigns, restrictions on the time and place of political outdoor advertising and the size of advertisements have been established e.g. in some cantons in Switzerland, in Slovenia and Belgium.

A detailed restriction would restrict fundamental rights also in Estonia less than a general uniform prohibition. For the achievement of several objectives, a restriction on outdoor advertising is not as effective a measure as a prohibition imposed on all political outdoor advertising. First, in the opinion of the Supreme Court *en banc*, imposition of a uniform prohibition is simpler and cheaper. Secondly, the specified restrictions do not facilitate, to the same extent, the reduction of campaign expenses or freeing of the public space from political advertising with the objective of reducing the resentment of voters towards political advertising and politics as a whole.

58. Setting a ceiling for election expenses is also a widely used measure to prevent corruption upon supporting candidates and political parties and financing of elections. In one way or another, a ceiling for election expenses has been established in several Member States of the European Union. In the opinion of the Supreme Court *en banc*, providing for a ceiling for election campaign expenses may, also in Estonia, be an effective measure primarily in order to reduce the role of money in the achievement of power, and for the prevention of corruption. The effectiveness of the ceiling set for election campaign expenses depends, first, on how low the ceiling is set. The restriction on such expenses is not necessarily as effective as the prohibition in force in order to preclude the use of political outdoor advertising and thereby reduce the resentment of voters towards political advertising and politics as a whole. A ceiling for election expenses does not necessarily help make the political debate more substantial or reduce the inappropriate influencing of voters to the same extent.

59. The prohibition on political outdoor advertising is, therefore, necessary for achieving the established objectives. Therefore, the Supreme Court *en banc* shall, next, assess the moderation of the prohibition or whether the prohibition has been established for the achievement of objectives which are sufficiently weighty, taking account of the infringement of the fundamental rights.

60. When assessing the intensity of the prohibition on political outdoor advertising, first, it must be noted that the prohibition does not restrict the part of the right to vote or the right to stand as a candidate, or of the freedom of political expression linked to the right to stand as a candidate, or of the freedom of activity of political parties, which needs the strongest protection. The prohibition does not deprive the voters of the possibility to participate in elections or vote in favour of the candidate they support. The prohibition does not prevent anyone from standing as a candidate at elections. The prohibition does not deprive candidates,

election coalitions or political parties of the possibility to introduce their views or prohibit public discussion on particular subjects. This does not preclude the introduction of views or programmes in channels other than outdoor advertising.

61. It is impossible for the Supreme Court *en banc* to assess the intensity with which the prohibition restricts the right to vote and the right to stand as a candidate in conjunction with the freedom of political expression or the freedom of activity of political parties. The impact of the prohibition, as the Chancellor of Justice admits, is not clear. There exists no reliable information on how the prohibition has influenced electoral behaviour in Estonia or the activities of political parties, election coalitions and individual candidates upon finding supporters for their views. In abstract proceedings regarding the review of regulations, it is not clear in which way and how strongly the prohibition affects the equal opportunities of candidates, election coalitions and political parties to organise election campaigns and thereby the uniform right to stand as a candidate.

62. It is true that the prohibition does not necessarily constitute an effective measure to reduce election campaign expenses and promote substantial provision of information. The prohibition on political outdoor advertising may bring about the shift of advertising to an earlier time and/or increase of advertising in other advertising channels. In the opinion of the Supreme Court *en banc*, such ineffectiveness arises because the prohibition is a single stand-alone measure which the Riigikogu has not supplemented with other measures suitable for regulating the political playing-field (e.g. establishment of a ceiling for election expenses). The possible ineffectiveness of the prohibition on political outdoor advertising cannot be the basis for declaring the prohibition unconstitutional. In the opinion of the Supreme Court *en banc*, it rather speaks for the low intensity of the prohibition.

63. The fact that political outdoor advertising is not permitted during the period of active campaigning, i.e. during the period when the interest of members of the society is directed towards political discussion due to the forthcoming elections also does not make interference with the right to vote, the right to stand as a candidate, the freedom of political expression and the freedom of activity of political parties intensive.

The prohibition does not render distributing political information during the period of campaigning impossible. The prohibition does not restrict the circle of topics on which an opinion may be expressed publicly during the period of campaigning. Restrictions which would prohibit public discussions on certain topics would be very intensive. The prohibition on political outdoor advertising does not hinder the dissemination of political views and discussion on social affairs in any other manner (e.g. at election meetings, through personal contact with voters, print media, television, radio, direct mail, indoor advertising, so-called new technologies). The prohibition only directs political discussions into other channels where there is more likelihood that they become more substantial than the slogans and pictures displayed in outdoor advertising. At the same time, in these channels, there are less possibilities to influence voters inappropriately. The prohibition does not deprive voters of the possibility to obtain information from other channels in order to make an informed election decision.

64. In the opinion of the Supreme Court *en banc*, there is no significant interference with the right to engage in enterprise. The display of advertising with a definite content is precluded during a short period of time.

65. There is no significant interference with the fundamental right of ownership. The prohibition extends during a short period of time to a single manner of use of such property which can, inter alia, be used as outdoor advertising media.

66. In order to ensure adherence to the prohibition, the legislature has prescribed a punishment for a misdemeanour for the violation of the prohibition. This sanction also influences the intensity of the infringement caused by the prohibition, but the constitutionality of the sanction must be assessed separately from the prohibition (see Part IV below).

67. The prohibition has been established as one of the conditions for the exercise of the right to vote and the

right to stand a as candidate which the legislature is obliged to provide for according to the Constitution. Behind the prohibition on political outdoor advertising, the wish to increase voter turnout, raise the quality of democratic discussion, prevent the manipulation of voters and reduce the role of money in the achievement of political power can be seen. All these objectives, as correctly noted by the Chancellor of Justice and the Minister of Justice, are based on the idea of strengthening democracy. According to § 1(1) of the Constitution, Estonia is an independent and sovereign democratic republic wherein the supreme power of state is vested in the people. Democracy is one of the most important principles of organisation of the Estonian state. Thus, the prohibition is supported by a very weighty constitutional principle.

In the opinion of the Supreme Court *en banc*, the right to vote and the right to stand as a candidate, the freedom of activity of political parties, and the freedom of political expression as fundamental rights without which democracy would be impossible, have been restricted in the interests of exercise of the same rights in order to ensure better functioning of the democratic decision-making processes.

Provision of information directed at raising the knowledge of voters and measures for raising voter turnout which, in turn, should promote wider representation of different social-political views in representative bodies, are important and necessary for securing democracy. It is presumed by the principle of democracy that voters have the possibility to make an informed choice between different election programmes and ideas, and candidates and lists representing these programmes and ideas.

68. Taking account of the nature of the restriction (see paragraphs 58-63 above), the Supreme Court *en banc* finds that the established objectives are so weighty (see previous paragraph) that they justify restriction of the right to vote and the right to stand as a candidate, the freedom of political expression, the right to engage in enterprise, the fundamental right of ownership and the freedom of activity of political parties by the prohibition on political outdoor advertising.

69. In the opinion of the Supreme Court *en banc*, taking account of the above considerations, the electoral rights, the right to engage in enterprise, the fundamental right of ownership and the freedom of activity of political parties which are important in a democratic society have been restricted in accordance with the Constitution and to the extent permitted in a democratic society. The restrictions do not distort the nature of these rights and freedoms.

70. The prohibition on political outdoor advertising is permissible according to the Constitution. This does not mean that the Constitution requires establishment of such prohibition. The Riigikogu is free to abolish the prohibition, to establish restrictions on the time, place and size of political outdoor advertising and to set a ceiling for election expenses which, on the one hand, would reduce the role of money in the achievement of power and, on the other hand, would ensure the candidates equal opportunities upon organisation of an election campaign. As regards the elections to the European Parliament, Article 2(b) of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage directly grants Member States the possibility to set a ceiling for candidates' campaign expenses.

71. Additionally, it must be noted that although, in proceedings regarding the abstract review of provisions, the prohibition proves to be constitutional, this does not preclude any particular review of provisions.

IV

72. As the prohibition on political outdoor advertising is in conformity with the Constitution, it is necessary to assess separately whether declaration of violation of the prohibition to be punishable by way of misdemeanour proceedings in § 67^2 of the LGCEA, § 73^2 of the REA and § 71^1 of the EPEA is also in conformity with the Constitution.

73. Above (see paragraph 63), the Supreme Court *en banc* noted that a punishment for a misdemeanour upon violation of the prohibition is a necessary sanction in order to ensure adherence to the prohibition. The legislature has a wide margin of appreciation upon imposition of punishments corresponding to offences (see

judgment of the Supreme Court *en banc* of 27 June 2005 in case no. 3-4-1-2-05, paragraph 57 and judgment of the Supreme Court *en banc* of 12 June 2008 in case no. 3-1-1-37-07, paragraph 23). In the opinion of the Supreme Court *en banc*, the Riigikogu has not abused its discretion upon prescribing a punishment for a misdemeanour for violation of the prohibition on political outdoor advertising. The punishments prescribed in the provisions under dispute (a fine in the amount of up to 300 fine units and, in the case of legal persons, up to 50 000 kroons) have been established bearing in mind the same objectives as with the prohibition, and are clearly not excessive.

V

74. For the considerations presented, the Supreme Court *en banc* finds that the provisions prohibiting political outdoor advertising in § 6^1 of the LGCEA, § 5^1 of the REA and § 5^1 of the EPEA, and the provisions providing for liability for the violation of the prohibition in § 67^2 of the LGCEA, § 73^2 of the REA and § 71^1 of the EPEA, are not in conflict with the Constitution. The request of the Chancellor of Justice must be dismissed.

Dissenting Opinion of Justice of Supreme Court Jüri Põld regarding Judgment of Supreme Court *en banc* in Constitutional Review Matter no. 3-4-1-33-09, joined by Justices of Supreme Court Jüri Ilvest, Jaak Luik and Märt Rask

In my opinion, the request of the Chancellor of Justice should have been satisfied. The provisions of the Riigikogu Election Act, the Local Government Council Election Act and the European Parliament Election Act prescribing a total prohibition on outdoor advertising during the whole period of active campaigning should have been declared to be invalid due to their conflict with the Constitution.

I

In my opinion, the regulation provided for in the Election Acts according to which political outdoor advertising is totally prohibited during the whole period of active campaigning constitutes, in the case of elections to the Riigikogu and local government council elections, a disproportionate interference with the electoral rights guaranteed by § 57, § 60 and § 156 of the Constitution and with the freedom of expression guaranteed by § 45 of the Constitution. None of the objectives set out in paragraph 51 of the judgment by the Supreme Court *en banc* justifies interference with the electoral rights and the freedom of expression.

I think that this way will not lead to reduced election campaign expenses and will not reduce the role of money in the achievement of political power by political parties. It is reasonable to presume that competing political parties exhaust all the available resources, including financial resources, in the election campaign. Money which cannot be used for outdoor advertising during the period of active campaigning will presumably be used for other purposes in the election campaign during that period.

It seems that due to the prohibition on political outdoor advertising during the period of active campaigning, political outdoor advertising of political parties and, therefore, also the expenses on political outdoor advertising are, in Estonia, made prior to the period of active campaigning. In the latter case, the incurring of expenses on political outdoor advertising is simply shifted to an earlier period and a total prohibition on political outdoor advertising during the period of active campaigning presumably cannot reduce the role of money in politics. Rather, in this case, the role of money in the achievement of political power may even increase as the period during which one can introduce himself or herself to voters by active outdoor advertising and other measures becomes longer as the displaying of political outdoor advertising is shifted to an earlier period.

In order to reduce election campaign expenses and the role of money in politics, it is possible to set a reasonable ceiling for election campaign expenses.

The Supreme Court *en banc* sees the freeing of the public space from excessive political outdoor advertising which may cause public resentment towards political advertising and politics as a whole, as one of the objectives of the specified prohibition. I think that in order to achieve this objective, more subtle measures can be used instead of the total prohibition on political outdoor advertising, e.g. to permit political outdoor advertising during the period of active campaigning but restrict the duration of display of political outdoor advertising, restrict the size of the posters used and the places of display etc. during that period.

I think that a total prohibition on political outdoor advertising during the period of active campaigning forces one to search for other possibilities to influence voters in the public space which may make the definition of political outdoor advertising, and of what is permitted and prohibited by law even vaguer and, eventually, also result in the decrease of the general respect for public order.

It remains unclear to me why it is necessary to free the public space from political outdoor advertising exactly during the period of active campaigning but permit political outdoor advertising before that period. If political outdoor advertising, indeed, causes resentment toward politics, this effect should presumably be the same regardless of when the outdoor advertising is displayed. I am not convinced that political outdoor advertising which presently is prohibited by law can cause the resentment of voters towards politics contrary to other forms of public political advertising which are presently not prohibited. I think that if it is understood that a particular type of political advertising causes resentment among the electorate, then the self-regulation of the forces engaged in politics will begin – as soon as it is understood that a measure of influencing voters causes resentment towards the influencers, the measure of influencing which causes resentment will be discarded.

The Supreme Court *en banc* sees the enhancement of political debate also as an objective of the chosen measure. The objective to enhance political debate is commendable. But until it is presumably possible to influence voters in the desired direction with empty propaganda, the prohibition on political outdoor advertising does not help enhance political debate in the election process. Advertising packed with slogans and empty promises are, to a large extent, simply transferred to a different information space, e.g. to advertising spaces purchased from print media, to television, radio, post boxes and halls of supermarkets. The role of political debate can rise if the political forces participating in the election process find for themselves that well-reasoned presentation of opinions is more effective than advertising. Therefore, I consider a total prohibition on political outdoor advertising in the election campaign during the period of active campaigning in order to enhance political debate to be an inappropriate measure and an interference with the fundamental rights which does not help achieve the desired objective.

As a total prohibition on political outdoor advertising during the period of active campaigning cannot ensure the enhancement of political debate and since shallow political campaign is most likely transferred into other channels, then, in my opinion, a measure which has been considered constitutional by the majority of the Supreme Court *en banc* cannot reduce the inappropriate influencing of voters (manipulating the will of voters, failure to communicate substantial information on the political programme and intentions).

In the judgment, the majority of the Supreme Court *en banc* points out that, earlier, the Supreme Court has seen ensuring the equality of political parties, individual candidates and election coalitions by reduction of the expenses incurred by political parties on election campaigns and the role of money in the achievement of political power as the objective of the prohibition on political outdoor advertising during the period of active campaigning. I justified above why I think that the chosen measure does not reduce the role of money and expenses in the case of political parties. Therefore, the measure cannot, in my opinion, help attain the equality of political parties and other candidates.

When assessing the equality of political parties, election coalitions and independent candidates, their actual possibilities to introduce their views must also be taken into consideration. As regards the introduction of views, political parties, election coalitions and independent candidates are already by nature in an unequal position. A political party exists already before the registration of lists of candidates and, as a political party,

can communicate information through political outdoor advertising already before the period of active campaigning. Election coalitions and individual candidates appear only upon their registration in an electoral committee.

At local elections, individual candidates or election coalitions may not be able to effectively introduce their programmes as documents by means other than outdoor advertising during the period of active campaigning. Usually, there are no local public television channels. Access to local private radio and print media, if existent, need not necessarily be guaranteed.

I think that a prohibition on political outdoor advertising during the period of active campaigning gives a preference to “veteran politicians" and may present an obstacle for the emerging of new politicians competing with them.

Therefore, the actual inequality of political parties, election coalitions and individual candidates cannot be eliminated by a total prohibition on political outdoor advertising during the period of active campaigning. The specified prohibition rather deepens their actual inequality.

I consider unconvincing the position of the majority of the Supreme Court *en banc* that, in this case, the electoral rights and the freedom of expression without which democracy would be impossible, have been restricted by the Election Acts in the interests of exercise of the same rights in order to ensure better functioning of the democratic decision-making processes (see paragraph 67 of the judgment).

II

I agree with the majority of the Supreme Court *en banc* that the law of the European Union does not prevent the Riigikogu from prohibiting political outdoor advertising for the period of campaigning for the elections to the European Parliament and that verification of the constitutionality of the prohibition is within the competence of the Supreme Court (see paragraphs 42 and 43 of the judgment).

I hold an opinion that, in the case of elections to the European Parliament, the constitutionality of the prohibition can be assessed only on the basis of § 45 of the Constitution which provides for the freedom of expression. In my opinion, the restriction provided for in § 51 of the European Parliament Election Act is a disproportionate interference with the freedom of expression guaranteed by § 45 of the Constitution generally for the same reasons which have been presented in Part I of this dissenting opinion.

Differently from the majority of the Supreme Court *en banc*, I think that assessment of the constitutionality of § 5^1 of the European Parliament Election Act on the basis of § 57 and § 60 of the Constitution is impossible. § 57 and § 60 of the Constitution regulate electoral rights only upon exercise of the power of state of Estonia. § 2 of the Constitution of the Republic of Estonia Amendment Act according to which as of Estonia’s accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty, did not bring changes to the application of § 57 and § 60 of the Constitution. Persons elected to the European Parliament from Estonia do not exercise the power of state of Estonia. In the legal sense, they represent the common interest of the European Union similarly with a member of the European Commission who is from Estonia, a judge of the European Court of Justice and a judge of the court of first instance of the European Court of Justice.

In my opinion, the legality of interference with electoral rights at the elections to the European Parliament can and must be assessed on the basis of the legislation of the European Union specified in paragraphs 36, 37 and 42 of the judgment of the Supreme Court *en banc*, without applying a provision of the law of Estonia which is in conflict with the law of the European Union upon adjudication of the matter, arising from the principle of superiority of the law of the European Union.

III

I recognise the freedom of activity of political parties as a right of freedom protected by the Constitution.

The right to form political parties would be empty if political parties did not have the right to act. I think that the freedom of activity of political parties arises from § 48 (1), (3) and (4) of the Constitution.

Differently from the majority of the Supreme Court *en banc*, I do not see interference with the freedom of activity of a political party in the case of the disputed provisions of the Election Acts. I think that the freedom of activity of a political party does not include the freedom of expression. In the case of political parties and other non-profit associations, natural persons and companies, the freedom of expression is protected by § 45 of the Constitution.

In the case of all holders of fundamental rights, the freedom of expression is protected by § 45 of the Constitution which provides for the fundamental right with a qualified law reservation. It would not be in accordance with the meaning of the Constitution if, e.g. the freedom of expression of a press undertaking engaged in economic activity was protected by § 31 of the Constitution which provides for the fundamental right with a simple law reservation.

Dissenting Opinion of Justices of Supreme Court Peeter Jerofejevi and Tambet Tampuu

We agree with the third and fourth sub-indent of Part II of the dissenting opinion of Jüri Põld according to which 1) it is impossible to assess the constitutionality of § 5^1 of the European Parliament Election Act on the basis of § 57 and § 60 of the Constitution; 2) the legality of interference with the electoral rights at the elections to the European Parliament can and must be assessed on the basis of the legislation of the European Union specified in paragraphs 36, 37 and 42 of the judgment of the Supreme Court *en banc*, without applying a provision of the law of Estonia which is in conflict with the law of the European Union upon adjudication of the matter, arising from the principle of superiority of the law of the European Union.

Dissenting Opinion of Justice of Supreme Court Julia Laffranque

I agree with the reasoning in Part I of the dissenting opinion of the justice of the Supreme Court Jüri Põld regarding the judgment of the Supreme Court *en banc* in the constitutional review matter no. 3-4-1-33-09. I think that the same reasoning applies to the elections to the European Parliament. I hold the opinion that the request of the Chancellor of Justice should have been satisfied and the provisions prescribing a total prohibition on outdoor advertising during active campaigning in the Riigikogu Election Act, the Local Government Council Election Act and the European Parliament Election Act should have been declared invalid due to their inconformity with the Constitution. I agree that it is possible to use more subtle measures instead of a total prohibition during active campaigning.
