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## Constitutional judgment 3-4-1-2-09

### JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

<b>No. of the case</b>	3-4-1-2-09
<b>Date of decision</b>	9 June 2009
<b>Composition of court</b>	Chairman Märt Rask, members Peeter Jerofejev, Hannes Kiris, Priit Pikamäe and Harri Salmann.
<b>Court Case</b>	Review of constitutionality of § 7(2)5), § 8(4) and § 9(2) of the Local Government Council Election Act.
<b>Bases of proceeding</b>	Request of the Tallinn City Council of 9 February 2009.
<b>Hearing</b>	14 April 2009 Representatives of the Tallinn City Council: city secretary Toomas Sepp, sworn advocates Jüri Raidla and Ants Nõmper; the Chancellor of Justice Indrek Teder and Deputy Chancellor of Justice-Adviser Madis Ernits.
<b>Persons participating in the hearing</b>	<b>1. To deny the request to the extent that it concerns § 8(4) and § 9(2) of the Local Government Council Election Act.</b>
<b>DECISION</b>	<b>2. To dismiss the request in regard to § 1(1) of the Act to Amend the Local Government Council Election Act and the Local Government Organisation Act (RT I 2008, 53, 293).</b>

### FACTS AND COURSE OF PROCEEDING

**1.** On 3 November 2008 the Chancellor of Justice made a proposal to bring § 8(4) (formation of electoral districts in Tallinn by city district), and § 9(2) (specific arrangements of distribution of mandates between electoral districts in Tallinn) of the Local Government Council Election Act (RT I 2002, 36, 220; 2007, 44, 316; hereinafter “the LGCEA”) into conformity with the Constitution, because he was of the opinion that

these provisions were in conflict with the principle of uniform elections, arising from the third sentence of § 156(1) of the Constitution and with the principle of proportionality of elections arising from §§ 10 and 156(1) of the Constitution.

2. On 10 December 2008, induced by the Chancellor of Justice's proposal, the Riigikogu passed the Act to Amend the Local Government Council Election Act and the Local Government Organisation Act, which was published in the Riigi Teataja [State Gazette] on 16 December 2008 (RT I 2008, 53, 53; hereinafter "the Amendment Act") and entered into force on 17 December 2008.

3. By its resolution no. 15 of 5 February 2009 the Tallinn City Council decided to submit to the Supreme Court a request to repeal § 7(2)5) and § 8(4), or § 7(2)5) and § 9(2), or § 7(2)5), § 8(4) and § 9(2) of the LGCEA, due to unconstitutionality thereof. The Supreme Court received the request on 10 February 2009.

## **JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING**

4. In regard to the admissibility of the request the Tallinn City Council argues that any change in the procedure of local government council elections infringes the constitutional guarantees of the local government. Therefore the request of the Tallinn City Council is admissible.

The applicant adds further that if the above argument is not accepted, the admissibility of the request arises – in any case – from the fact that the established procedure does not allow to organise the Tallinn City Council elections in conformity with the principles of uniform and proportional elections and the principles of democracy and non-discrimination, arising from the Constitution.

Furthermore, in addition to the aforesaid, pursuant to the judicial practice of the Supreme Court (judgment of the Constitutional Review Chamber of the Supreme Court of 16 January 2007 in case no. 3-4-1-9-06, paragraphs 19 20), the applicant – in any case has the right of appeal concerning the issues stipulated in the Local Government Organisation Act (RT I 1993, 37, 558; 2007, 44, 316; hereinafter "the LGOA"). At the court hearing the representative of the Tallinn City Council underlined that local government elections is not a national issue. Pursuant to § 22(1)13) of the LGOA the determination of the number, boundaries and common numeration of electoral districts, and determination of the number of mandates in each electoral district is within the exclusive competence of a local government council. In regard to the city of Tallinn the Local Government Council Election Act restricts this competence.

The admissibility of the request is further supported by the judgment of the Supreme Court *en banc* of 19 April 2005 in case no. 3-4-1-1-05, where the Supreme Court has held that the restrictions on the right to stand as a candidate may infringe the principle of local governments' autonomy.

As regards the admissibility of the request for declaration of invalidity of § 7(2)5) of the LGCEA the Tallinn City Council argues that as the application of this provision requires additional expenses, the provision infringes the principle of independence of local government budgets.

5. In regard to the substance of the request the Tallinn City Council points out firstly, that the Act to Amend the Local Government Council Election Act and the Local Government Organisation Act, which entered into force on 17 December 2008, did not eliminate the described conflict with the Constitution.

6. The Tallinn City Council is of the opinion that the special arrangements of formation of electoral districts in Tallinn (§ 8(4) of the LGCEA), and the special arrangements of distribution of mandates in Tallinn, which is a local government unit with several electoral districts, (§ 9(2) of the LGCEA) violate, due to conflict with the principle of uniform elections, both the active and the passive electoral rights.

7. § 8(4) and § 9(2) of the LGCEA violate the active electoral right due to their conflict with the principle of uniform elections firstly, because in the electoral districts formed pursuant to these provisions the voters' votes have different weight (see 7.1. below). Secondly, because there are no constitutional values requiring specific arrangements for the formation of electoral districts and distribution of mandates in Tallinn by city

district (see 7.2. below). Thirdly, even the existence of such constitutional values would not justify the violation of the principle of uniform elections (see 7.3. below). Fourthly, there exist constitutional values for the protection of which it is absolutely necessary to observe the principle of uniform elections (see 7.4. below).

**7.1.** In regard to different weight of votes the Tallinn City Council points out that all voters must have an equal possibility to influence the election results. In the local government electoral districts with equal number of mandates the number of electors with the right to vote must be as equal as possible, and vice versa. The special arrangements pursuant to which the number of electors significantly differs between electoral districts with the same number of mandates is in conflict with the principle of uniform elections. This opinion is shared by the commentaries to the Constitution, the Council of Europe, the Supreme Court and the Chancellor of Justice.

Formation of electoral districts on the basis of city districts, and the procedure for distribution of mandates established in § 9(2) of the LGCEA create a situation in Tallinn where the number of voters in city districts significantly differs, as is shown on the Tables appended to the request. The amendments to the Local Government Council Act, which entered into force on 16 December 2008, have not eliminated this drawback.

In order to distribute mandates between the number of residents in electoral districts as proportionally as possible the city of Tallinn should change the boundaries of city districts. Yet, the boundaries of city districts are determined on the basis of other considerations, not on the necessity to guarantee the principle of uniform elections. To require the change of city district boundaries solely for the purposes of elections is disproportional and violates the autonomy of local governments.

As an electoral district can not be formed of several city districts, and neither is it possible to form several electoral districts in one city district, the Tallinn City Council can not guarantee the equal weight of votes without changing the boundaries of city districts.

**7.2.** Next, the Tallinn City Council argues that there exist no constitutional values requiring the formation of electoral districts and distribution of mandates in Tallinn pursuant to a special procedure and on the basis of city districts.

The principle of uniform elections is worded without the reservation of subject to restriction by law, and that is why the principle may be restricted if the restriction serves to protect some other constitutional value. The need to protect the identity of city districts is not a value protected by the Constitution. Even if it were, the principle would not be applicable in a local government where the city districts do not observe the boundaries of historical settlements (including in Tallinn).

**7.3.** Should the Supreme Court, nevertheless, come to the conclusion that the preservation of the established identity of city districts is a constitutional value, the violation of the principle of uniform elections to achieve this would still not be proportional. The preservation of the identity of city districts can in no way be a value of the same importance as the legitimacy of elections in local government units.

**7.4.** Derogation from the principle of uniform elections could only be justified by sparse population or protection of minorities. Instead, the contested provisions of the Local Government Council Election Act bring about the discrimination of national minorities and is in manifest conflict with the Constitution.

It appears from the data submitted by the Tallinn City Council that in the elections of the Tallinn City Council the votes of non-Estonians have less weight than the votes of electors of Estonian nationality. This situation amounts to a violation of the prohibition to discriminate on the basis of nationality, established in § 12 of the Constitution.

This discrimination could be avoided by declaration of invalidity of §§ 8(4) and 9(2) of the LGCEA. When the restriction established by the former provision does not exist the local government can assess whether the formation of electoral districts by city districts guarantees the equal representation of voters. Declaration of

invalidity of § 9(2) of the LGCEA makes it possible to distribute mandates pursuant to the general procedure and, thus, guarantee equal weight to electors' votes and the representative nature of the council.

**8.** §§ 8(4) and 9(2) of the LGCEA violate the passive electoral right due to their unconstitutionality firstly, because in the electoral districts formed on the basis of these provisions the candidates have different possibilities to become elected (see 8.1. below). Secondly, because there are no constitutional values requiring the formation of electoral districts in Tallinn by city district (see 8.2. below). Thirdly, the existence of such constitutional values would not justify the violation of the principle of uniform elections (see 8.3. below). Fourthly, there exist constitutional values for the guarantee of which it is obligatory to observe the principle of uniform elections (see 8.4. below).

**8.1.** Equal possibilities of candidates to become elected inevitably depend on the weight of votes given in his or her favour, i.e. on the equal effect of every vote on the election results. The violation of the principle of uniformity, caused by the unequal weight of votes, results in the violation of passive electoral right.

**8.2.** The aim of protecting the identity of city districts is not a constitutional value that can be used to justify the procedure established in §§ 8(4) and 9(2) of the LGCEA and the violation of the principle of uniformity.

**8.3.** Even when considering that the preservation of the identity of city districts is a constitutional value, this value is, nevertheless, not important enough to justify the violation of the passive electoral right.

**8.4.** As the weight of electors' votes is smaller in those electoral districts where the proportion of electors belonging to national minorities is bigger, the national minorities are disproportionately less represented in the Council. The minorities residing on the territory of a local government unit can not be effectively protected when the minority can not send its representatives to the council.

**9.** In regard to the violation of the principle of proportionality the Tallinn City Council explains that due to different weight of votes, i.e. the violation of the principle of uniformity, the voting results are not proportional with the election results.

**10.** By way of an alternative to the repeal of §§ 8(4) and 9(2) of the LGCEA the Tallinn City Council requests the repeal of only § 8(4) of the LGCEA. In the case of invalidity of this provision it is not required to form electoral districts in Tallinn pursuant to the principle that one electoral district is formed in one city district. When this restriction does not exist it will be possible to form either one or several electoral districts (§ 8(1) and (2) of the LGCEA). In the case of one electoral district the uniformity and proportionality are guaranteed – the votes of all electors have equal weight and the Council will be representative of the local government unit as a whole.

**11.** By way of another alternative the Tallinn City Council requests the repeal of only § 9(2) of the LGCEA. In such a case the Council could distribute mandates between electoral districts pursuant to the general procedure established in § 9(1) of the LGCEA and according to the number of electors.

The Tallinn City Council considers the latter to be the best solution for the achievement of uniformity of elections and points out that the Constitutional Committee of the Riigikogu was of the same opinion when it initiated the amendment to the Local Government Council Election Act.

**12.** As regards the increase of the number of council members (§ 7(2)5) of the LGCEA) the Tallinn City Council argues that the aim of this amendment is not clear (see 12.1. below), and that this measure is not suitable (see 12.2. below), necessary (12.3. below) or reasonable (12.4. below) for the achievement of the aim.

**12.1.** The applicant points out firstly, that as no relevant analysis or explanatory letter exists concerning the amendment of § 7(2)5) of the LGCEA, the aim of the legislator upon enacting this amendment is not obvious.

**12.2.** If we were to consider that the legitimate aim of the increase of the number of council members is to render equal weight to votes, the above analysis shows that the amendments to the Local Government Council Election Act in their entirety do not bring about the implementation of the principle of uniformity. Consequently, the increase of the number of members of the council is not a suitable measure to achieve this aim. Neither is the measure suitable for the achievement of proportionality between the expression of the will of the voters and the composition of relevant representative body. Firstly, protection of the communal identity of city districts is not an aim in the name of which the number of council members could be increased, and secondly, the effect of this measure on better representation of city districts is not unambiguously clear. A measure the effect of which on the achievement of an aim is unclear can not be suitable for the achievement of the aim.

**12.3.** In any case, the measure is not necessary, either, because equal weight to votes can be rendered and proportionality between the expression of the voters' will and the composition of a representative body can be achieved by other more effective and more suitable measures. For example, it is possible to declare § 8(4) of the LGCEA invalid, or amend the principles of distribution of mandates, established in § 9 of the LGCEA.

**12.4.** The increase of the number of Council members is not a reasonable measure, either. Taking into account the economic crisis this measure causes unnecessarily big expenses to the city of Tallinn, without helping to achieve their aim. The declaration of invalidity of this provision would guarantee a situation where the city of Tallinn can elect to the council the same number of members as previously.

**13.** The applicant points out further that the principle of consultation, established in Article 5 of the European Charter of Local Self-Government (RT II 1994, 95; hereinafter "the Charter") was violated when amending the Local Government Council Election Act.

Furthermore, by enacting these provisions the principles of legal clarity and legal certainty were violated. The applicant is of the opinion that in order to eliminate the manifest and conclusive unlawfulness such amendments should enter into force at least one year before the next general elections. It is non-permissible to amend the legislation concerning elections so that the amendments enter into force during the time when the preparatory procedures to elections are already being performed.

**14.** On behalf of the Riigikogu the written opinion was submitted by the Constitutional Committee, the majority of which argue that the request of the Tallinn City Council is not admissible.

Pursuant to the judgment of the Constitutional Review Chamber of the Supreme Court of 21 February 2003, in case no. 3-4-1-2-03, § 7 of the Constitutional Review Court Procedure Act (RT I 2002, 29, 174) does not entitle local governments to submit constitutional review requests for the protection of subjective rights of persons. This request has been submitted for the protection of subjective rights of voters and, therefore, does not meet the requirements of the Act.

The procedure of local government council elections is not a local issue. The Constitution presumes that the rules on local elections shall be established by the legislator by such Acts that require the approval of the majority of the membership of the Riigikogu (§ 104(2)4) of the Constitution).

Neither can a local government contest the increase of local council membership on the basis of considerations of proportionality and expediency. The operational expenditure of a council is the question of self-administration, and should be guaranteed taking into account the economic resources of the local government.

Neither do the additional arguments presented by the Tallinn City Council (violation of the right to be consulted, legal clarity, legal certainty) indicate that the guarantees of the local government have been infringed. The fact that the period between the entering into force of the amendments to the Local Government Council Election Act and the elections remains too short is not a sufficient argument to prove that the legislation infringes the constitutional guarantees of the local government.

The minority of the Constitutional Committee argued that the request of the Tallinn City Council was admissible and justified. The conflict pointed out by the Chancellor of Justice could have been eliminated by the draft of the Act to Amend the Local Government Council Election Act (392 SE), initiated by the Constitutional Committee on 19 November 2008, which obtained unconstitutional character during the legislative proceeding and the amendments arising from the draft have now been contested by the Tallinn City Council, and with good reason. The administrative division of local governments is not within the competence of the legislator. The unnecessary increase of the number of council members constitutes a disproportional infringement of the competence of the local government.

**15.** The Minister of Justice is of the opinion that the request of the Tallinn City Council is not admissible. A local government council can not initiate constitutional review of legislation of general application with the objective of protecting the subjective rights of electors. Pursuant to § 104(2)4) of the Constitution it is the duty of the state to guarantee the equal weight of electors' votes and, thus, within the competence of the legislator.

As regards the increase of the number of council members, the Minister of Justice points out that the determination of the number of mandates in a council is within the competence of the legislator. The fact that local government units are authorised to form a council bigger than established in § 7(2) of the LGCEA does not mean that the determination of the number of council members is in the exclusive competence of the council. The determination of the number of mandates does not infringe the autonomy of the local government.

The fact that the local government was not consulted can not, by itself, serve as a ground for the declaration of unconstitutionality. This does not infringe the constitutional guarantees of the local government.

In the case of a legal act which is in conflict with the principle of legal clarity and legal certainty the council should explain how the lack of legal clarity damages some of the constitutional guarantees of the local government.

**16.** The Chancellor of Justice is of the opinion that the request is inadmissible in regard to §§ 8(4) and 9(2) of the LGCEA.

**16.1.** The restriction on standing as a candidate in local elections can not infringe the autonomy of the local government. In the elections the electors have the fundamental rights, which are the persons' constitutional subjective rights against the state. Local governments, on the other hand, have within the sphere of state administrative law an autonomy, the function and objective of protection of which are of objective and organisational nature.

The guarantee of the autonomy does not extend to electoral principles or principles of electoral procedures. The aim of the provisions concerning electoral procedures is to guarantee that throughout the state the general principles are observed in local government council elections. The democratic legitimisation of local government units throughout the state is a national issue. Pursuant to the Charter, too, the issues of electoral law are issues of external organisation of local governments and belong to the competence of the state.

The applicant's right of appeal can not arise from the fact that an issue is regulated by the Local Government Organisation Act. The catalogue of § 21(1) of the LGOA is to be understood to the effect that if a sphere referred therein is vested in the competence of local governments, it shall be in the competence of the council.

§ 8(4) of the LGCEA does not preclude the elimination or changing of the boundaries of city districts in Tallinn. That is why the provision does not pertain to the local government autonomy. This amounts to determination of the principles of formation of electoral districts for council elections.

Neither does the Tallinn City Council's right of appeal arise from the fact that § 8(4) of the LGCEA

establishes, *expressis verbis*, the procedure for the city of Tallinn. The legislator must be able to establish special arrangements in regard to special local government units.

§ 9(2) of the LGCEA is a provision concerning electoral procedures, and does not pertain to the autonomy of the local government.

**16.2.** As regards the increase of the number of council members the Chancellor of Justice argues that § 7(2)5) of the LGCEA may infringe the financial guarantee of the local government (§ 154(2) of the Constitution). The financial guarantee of the local government is infringed at least when, after the budget of the year has been adopted, a procedure is established which increases the expenditure of the local government. The financial guarantee may also be infringed when the state increases the expenditure of a local government through the increase of the volume of local government functions or state functions.

The Chancellor of Justice is of the opinion that § 7(2)5) of the LGCEA is constitutional in the formal sense. The duty to consult, arising from Article 5 of the Charter, is to be exercised when the legislator is conducting legislative proceedings of a draft which substantially changes the competences of local governments and the state, or a draft which imposes mandatory local government functions requiring big resources. In the present case we can speak of an effect concurrent with the amendment of electoral procedures. Quick legislative proceeding of a draft can not result in the conflict with the Constitution. The wording of this provision does not lack legal clarity.

Although the explanatory letter to the amendment of the provision under discussion does not set out the aim of the amendment, the Chancellor of Justice is of the opinion – on the basis of the motions to amend submitted in the Riigikogu – that the aim of the infringement caused by § 7(2)5) of the LGCEA is the creation of a representative body in Tallinn that would be more proportional in regard to whole of Estonia. The increase of the number of council members is a suitable, necessary and reasonable measure for the achievement of this aim. The legislator has a wide margin of appreciation upon determining the content of the financial guarantee and the size of the council.

**16.3.** As regards legal certainty the Chancellor of Justice points out that the changes of the electoral procedures entered into force on 17 December 2008, i.e. in good time before the elections. At the same time it is important to bear in mind that the time limit for changing electoral procedures protects subjective electoral rights and not the autonomy of the local government.

**16.4.** At the court hearing the Chancellor of Justice persevered with the opinions expressed in his written opinion.

**17.** The Association of Municipalities of Estonia points out in its letter that as the dispute concerns the special arrangements of local government council elections in Tallinn, the Association refrains from forming its opinion.

**18.** The Association of Estonian Cities (AEC) pointed out in its initial opinion that it considered it necessary and possible for the Supreme Court to adjudicate the matter on merits. Having examined the opinions of other participants in the proceeding the AEC submitted its additional opinion.

The AEC argues that the guarantees of the local government include also electoral procedures established by the Riigikogu. The same principle is expressed in the Charter. The elections of local government councils are not deemed the exercise of authority of the state.

The earlier conflict with the Constitution has not been eliminated. The argument of the Chancellor of Justice that in the case of the new electoral system it is impossible to assess the effect of the town-wide compensation mandates is certainly not an argument convincing that the constitutionality of the legislation has been achieved. To eliminate the violation of the Constitution, already ascertained, such amendments must be introduced which clearly show that the violation has been eliminated.

The request submitted by the Tallinn City Council, especially the arguments concerning the admissibility of the request, are based on the judicial practice of the Supreme Court. This is clearly admitted also by the Chancellor of Justice when he states that he does not agree with the opinion of the Supreme Court that the restriction on standing as a candidate in local elections may infringe also the autonomy of the local government. The AEC argues that the judicial practice of the Supreme Court is correct and there is no need to change it. Consistency is important in interpreting the Constitution.

Legitimate organisation of local government council elections is a local issue. A provision that affects this issue is certainly within the sphere of influence of the guarantees of the local government. Otherwise the local governments would have no guarantees.

## **CONTESTED PROVISIONS**

**19.** § 7(2)5) of the Local Government Council Election Act (RT I 2002, 36, 220; RT I 2009, 2, 5) reads as follows:

“A council shall have at least seven members. The number of members shall be determined on the basis of the information held in the population register, according to the number of residents in the rural municipality or city as at 1 June of the election year as follows:

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5) a council of not less than 79 members for more than 300,000 residents.”

**20.** § 8(4) of the LGCEA reads as follows:

“In Tallinn, the council shall form electoral districts by city district, based on the principle that one electoral district shall be formed in one city district.”

**21.** § 9(2) of the LGCEA reads as follows:

“In a local government with several electoral districts, half of the mandates shall be divided equally among the electoral districts, taking account of the principle that the number of district mandates is the smallest whole number which can be divided by the number of the electoral districts which is at least half of all the mandates. The remaining mandates shall be divided in accordance with the provisions of subsection (1) of this section.”

## **OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER**

**22.** Pursuant to § 7 of the Constitutional Review Court Procedure Act (RT I 2002, 29, 174; hereinafter “the CRCPA”) a local government council may submit a request to the Supreme Court to repeal an Act which has entered into force or a provision thereof if it is in conflict with constitutional guarantees of the local government.

**23.** Consequently, the Supreme Court can adjudicate on the merits only such requests that meet the following three requirements: firstly, the request must be submitted by a local government council; secondly, the request must argue that legislation referred to in § 7 of the CRCPA or provision thereof is in conflict with constitutional guarantees of the local government, and thirdly, the infringement of the constitutional guarantees of the local government by the contested legislation or a provision thereof must be possible (see the judgment of the Constitutional Review Chamber of the Supreme Court of 16 January 2007 in case no. 3-4-1-9-06, paragraph 16).

**24.** The Chamber shall assess firstly, whether the requests of the Tallinn City Council to declare § 8(4) and 9(2) of the LGCEA unconstitutional and invalid can be heard on merits, i.e. if these requests are admissible



(I). Thereafter the Chamber shall evaluate the request concerning § 7(2)5) of the LGCEA (II).

## I.

**25.** With regard to §§ 8(4) and 9(2) of the LGCEA the first two requirements referred to in paragraph 23 are met. The request to the Supreme Court was submitted by the Tallinn City Council who argues that the referred provisions are in conflict with the constitutional guarantees of the local government. However, the Chamber is of the opinion that the third requirement is not fulfilled. The contested provisions can not infringe, i.e. adversely affect the independent resolution and management of local issues.

**26.** The wording of § 8(4) of the LGCEA, valid at the time of submission of the request, established that in Tallinn, the council shall form electoral districts by city district, based on the principle that one electoral district shall be formed in one city district. Subsequent to the submission of the request of the Tallinn City Council the Riigikogu has amended this provision by the Act to Amend the Local Government Council Election Act (RT I 2009, 23, 144), which entered into force on 1 May 2009. The amendment enacted § 8(4) of the LGCEA in the wording which was in force before the contested wording, and supplemented § 8(4)<sup>1</sup> to the LGCEA. As the participants in the proceeding have submitted no request to the Supreme Court concerning the referred amendments the Chamber shall proceed from this wording of the contested provision that was valid at the time of submission of the request. Consequently, this judgment does not prejudice the constitutionality or validity of this wording of the provision that entered into force on 1 May 2009.

**27.** § 8(4) of the LGCEA establishes the formation of electoral districts in Tallinn. § 9(2) of the LGCEA establishes the procedure for distribution of mandates in local government units with several electoral districts.

**28.** The Tallinn City Council argues that as local government council elections is a local issue, any amendment to the procedure of these elections infringes the constitutional guarantees of the local government. Consequently, the contested provisions, too, infringe these guarantees.

**29.** The basic guarantee of the local government is established in § 154(1) of the Constitution, pursuant to which all local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law. This provision gives rise to the right of the local government to self-management. The essence of the right of self-management is the local government's discretion to decide and to choose when resolving local issues (the judgment of the Constitutional Review Chamber of the Supreme Court (hereinafter "the CRC") of 16 January 2007 in case no. 3-4-1-9-06, paragraph 22). From the point of view of substantial criteria local issues are the issues that arise from local community and pertain to local community, and which – from the point of view of formal criteria – are not or have not been constitutionally attributed to the competence of a state agency (the judgment of the CRC of 8 June 2007 in case no. 3-4-1-4-07, paragraph 12). The mere fact that a certain issue is, pursuant to the Constitution, subject to determination by law can not give rise to the conclusion about whether the issue is substantially a local or a national one.

**30.** Independent resolution of local issues means that the members of a local government council can make decisions independently from the central authority and put local interests first. In the case of a conflict between the interest of the state and local interests a member of the council must have the possibility to decide local issues independently and in the interests of his or her community (the judgment of the Supreme Court *en banc* (hereinafter "the SCeb") of 19 April 2005 in case no. 3-4-1-1-05, paragraphs 17 and 18).

**31.** § 156(1) of the Constitution gives the local council as a democratically elected body the general competence to resolve local issues. Consequently, it is first and foremost the council who must be able to exercise the right of self-management of local governments independently from the state authority and without the state interference in the decision-making process.

**32.** That is why it will be necessary to assess in this court case whether the establishment of the procedure for the local government council elections is a local issue, to which the right of self-management of local

governments is applicable. The central authority of the state may interfere with the right of self-management only with such measures that are proportional and bear in mind a clearly defined lawful objective.

**33.** The procedure of local council elections pertains first of all to electoral law relationships between the members of a local community and the local government as an independent subject of law, and secondly the external organisation of the local government. These provisions constitute a framework on the basis of which a council i.e. the body who shall exercise the right of self-management, is formed.

The Chamber is of the opinion that the local government's right to self-management does not extend to the provisions determining council elections, which are provisions establishing the external organisation of the local government. The principles of the electoral system of councils arise from § 156 of the Constitution. The establishment of a detailed procedure for elections, based on the principles of electoral system, is a national issue. It is the obligation of the state to ensure that elections are carried out in all local government units pursuant to uniform and comparable rules, which are based on the principles established in § 156 of the Constitution.

In Estonia, the legal framework necessary for the election of councils can not be established by a local government unit on its own and independently from the state. If every local government could decide on the rules pursuant to which the council shall be elected in that local government unit, a situation might arise where representation democracy functions very differently in different local governments. Such a situation would essentially mean the creation of units, independent from the state, alongside of the state. Such units would rather resemble the subjects of a federation and not local governments units, which rank lower than the state level, yet are as close to people as possible and perform public functions. A solution like this would not conform to the principle of unitary state, which arises from § 2 of the Constitution and pursuant to which Estonia is politically a unitary state, the land, territorial waters and airspace of which are an inseparable and indivisible whole. In a unitary state there can not exist units of territorial autonomy, having general legislative competence. The idea of territorial autonomy is in conflict with the spirit of the Constitution (see in this regard the judgment of the CRC of 6 September 1993 in case no. III-4/1-3/93). In a unitary state there is a direct connection between the people and the state. The people elect the representative body of the state, which in turn establishes – bearing in mind the restrictions established in the Constitution – the rules concerning the functioning of local governments. The local government units do exist in the interest of decentralisation of public authority and restriction and balancing of state authority (see the judgment of the SCeb of 19 April 2005 in case no. 3-4-1-1-05, paragraph 17), however, for the purposes of the Constitution they are not to be “states within the state”, having the possibility to establish the bases of formation of bodies of power by themselves. The fact that local government units are meant to act on a level lower than that of the state is indicated by § 154 of the Constitution, pursuant to which local governments are subject to the requirement of legality. This principle means that a local government unit must – in its activities observe the laws established by the state authority and can not refuse to apply these arguing their unconstitutionality. Consequently, the establishment of an all-Estonian regulatory framework of local government council elections, which is based on uniform principles and is comparable, constitutes a national issue.

The Chamber agrees with the Tallinn City Council that the conduct of council elections is a local issue. The state authority has the obligation to establish for council elections a uniform national regulatory framework, on the basis of which local governments organise elections. As long as the provisions within this framework are not declared unconstitutional and invalid, it is lawful to conduct elections on the basis thereof.

**34.** As the establishment of procedures of local government council elections is not a local issue, the local government's right of self-management does not include the issues resolved by the referred provisions. These provisions are not capable of directly infringing the right of self-management of the local government. By establishing §§ 8(4) and 9(2) of the LGCEA the legislator has not resolved or interfered with the management of local issues.

**35.** Neither do §§ 8(4) and 9(2) of the LGCEA affect the independence in resolution of local issues indirectly. No way can these provision restrict the council members' possibilities to decide local issues

independently from the state authority and without state interference in the decision-making process. The council members have the right of independent decision-making both in a local government with one electoral district and in a local government with several electoral districts. Neither does the procedure for the distribution of mandates, established in § 9(2) of the LGCEA, affect the independence upon decision-making.

**36.** The Tallinn City Council argues further that the contested provisions infringe the constitutional guarantees of the local government due to the fact that they violate the principles of uniform and proportional local government council elections.

The Chamber points out that the referred principles do not create rights for local governments, instead they create rights for the members of local communities. The purpose of these principles is to protect the subjective electoral rights – the active and passive electoral rights proceeding from § 156(2) of the Constitution. Pursuant to § 7 of the CRCPA a local government council is not entitled to submit constitutional review requests for the protection of subjective rights of persons (see the judgment of the CRC of 21 February 2003 in case no. 3-4-1-2-03, paragraph 13). Neither can the existence of such a right of local governments be derived from the fact that persons might not have other effective possibilities for the judicial protection of their rights. If a person is of the opinion that he has no other effective possibility to exercise the right of judicial protection, guaranteed by § 15 of the Constitution, the person himself can have recourse to the Supreme Court (see the judgment of the SCeb of 17 March 2003 in case no. 3-1-3-10-02, paragraph 17).

**37.** With regard to the provisions under discussion no infringement of the constitutional guarantees of the local government can be derived from paragraph 17 of the judgment of the Supreme Court on 19 April 2005 in case no. 3-4-1-1-05. Pursuant to this paragraph “[i]mposition of restrictions on the right to stand as a candidate in local elections may [...] infringe upon the principle of autonomy of local governments”.

The circumstances and facts of this court case significantly differ from those that served as the basis of the referred judgment. The quotation related to the restrictions on the right to stand as a candidate in local government council elections, which arose from the requirement that only national political parties could nominate their lists of candidates in those elections. As this requirement made the representation of communal interest dependent on the decisions of national political parties, the Supreme Court considered this as a threat to the representation of local interest and, therefore, saw a possible conflict with the principle of local government autonomy (the referred judgment no. 3-4-1-1-05, paragraph 18). As regards the provisions concerning the formation of electoral districts and distribution of mandates the Chamber is of the opinion that these do not diminish the independence of the persons who stand as candidates or who become elected to independently resolve and manage local issues.

**38.** Bearing in mind what has been said it is not possible to infringe the constitutional guarantees of the local government by §§ 8(4) and 9(2) of the LGCEA. Consequently, in regard to these provisions the Tallinn City Council request is not admissible and the Chamber shall not hear it.

## **II.**

**39.** With regard to § 7(2)5) of the LGCEA the Chamber points out firstly, that as the purpose of the Tallinn City Council’s request is the repeal of the increase of the number of council members from 63 to 79, it is necessary to read § 1(1) of the contested Amendment Act (hereinafter “the provision increasing the number of council members”). It was by this provision that the number of city council members was increased. If § 7(2)5) of the LGCEA, referred to in the request, were to be repealed, § 7(2)4) of the Act would be applicable to the city of Tallinn, and this allows to form a council of 31 members as the minimum.

**40.** The Tallinn City Council argues that the request is admissible with regard to the provision increasing the number of council members, because the provision infringes the principle of independence of the local budget, established in § 154 of the Constitution.

**41.** Before analysing this allegation the Chamber considers it necessary to explain of which rights the

financial guarantee of the local government consists of, i.e. what are the rights that the Constitution provides in order to guarantee the economic possibilities of local governments to perform public functions. Also, it is necessary to explain how these rights relate to the right of self-management of the local government. The rights guaranteeing economic performance must be interpreted taking account of the Charter, especially of Article 9 thereof entitled “Financial resources of local authorities”.

**42.** Pursuant to § 154 of the Constitution the duties of local governments can be divided into duties inherently belonging to local governments (resolution and management of local issues) and the duties of the state, which can be imposed on a local government either pursuant to law or by agreement with the local government. Proper performance of both, the duties of local governments and the duties of the state, requires that a local government has sufficient resources for that (the judgment of the SCeb of 19 April 2004 in case no. 3-3-1-46-03, paragraph 21).

Consequently, § 154(1) of the Constitution gives rise to the right to have sufficient financial resources, allowing the local government to resolve and manage both mandatory and voluntary local government issues. The same right is also established by Article 9(1) and (2) of the Charter. Pursuant to the referred subsections local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers. Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law.

§ 154(2) of the Constitution gives rise to the right of the local government to require that the expenses relating to performance of duties of the state, imposed by the law, be covered from the state budget. The content of this right, too, must be determined taking into account Article 9(2) of the Charter, which requires that financial resources should be commensurate with the responsibilities imposed on local governments by the constitution and the law.

To the rights referred in two previous sub-indentents corresponds the obligation of the state to guarantee sufficient financial resources to local governments for the performance of national as well local duties (see in this regard the referred judgment of the SCeb no. 3-3-1-46-03, paragraphs 20-24). In the performance of this obligation the state must take into consideration the requirements arising from Article 9 of the Charter.

The basic guarantee of the local government established in § 154(1) of the Constitution, i.e. the right to independently resolve and manage local issues, is inevitably accompanied by the necessity to have an independent budget. And the Constitution, indeed, does clearly provide the right to an independent budget and does it in § 157(1) and not in § 154(1), as referred to by the applicant. Pursuant to § 157(1) of the Constitution a local government shall have an independent budget for which the bases and procedure for drafting shall be provided by law.

In addition to the rights enumerated above a local government has the right – proceeding from § 157(2) of the Constitution – to levy and collect taxes and to impose duties on the basis of law.

**43.** The most important constitutional guarantee of the local government is, nevertheless, the right of self-management, established in § 154(1) of the Constitution. A local government must have sufficient financial resources primarily for independent resolution and management of all local issues on the basis of law. Consequently, the rights relating to the financial guarantee are of secondary nature and oriented at the creation of necessary conditions for the exercise of the right of self-management.

**44.** In this court case the Tallinn City Council has not argued that the establishment of the minimum number of council members infringes the right of self-management, however, bearing in mind the primary importance of the right of self-management the Chamber considers it necessary to deal with this aspect, too. Similarly with the provisions relating to procedure for council elections, the establishment of the minimum size of councils constitutes also a part of the external organisation of local governments. The establishment of the minimum size of councils is a national issue, so that throughout the state there would be conditions to

form efficient councils of comparable size in all different local governments. The provision under dispute actually determines the minimum size of a council only in Tallinn. This is justified by the fact that the number of residents in Tallinn is substantially higher than that of the rest of the local governments.

**45.** As the establishment of the minimum number of council members is not a local issue, the right of self-management of local governments is not extended to it. Consequently, the establishment of the minimum number of council members does not directly infringe the right of self-management. The legislator has not resolved or interfered with the resolution of local issues by establishing the minimum number of council members. Neither can the establishment of the minimum number of council members indirectly affect the right of self-management – a local government council can independently resolve issues in the composition of 63 as well as 79 members.

**46.** However, the resolution of national issues may affect the financial situation of local governments by infringing a right belonging among the financial guarantees. So the applicant argues that as the increase of the number of council members requires additional expenditure, this infringes the right of the local government to have an independent budget.

**47.** The Chamber is of the opinion that the provision increasing responsibilities and causing additional expenditure may, instead, infringe the right to have sufficient financial resources for the performance of mandatory local government functions. Any change in the resources allocated to or duties imposed on local governments inevitably results in the necessity to amend the budget of the local government. As the right to an independent budget and the right to sufficient financial resources arise from different provisions of the Constitution, the sphere of protection of these rights must be differentiated, too. The right to an independent budget does not include substantial issues relating to expenditure or obligations which inevitably result in the necessity to amend local governments' budgets. The budgetary law only concerns the separation of the budget of the local government from that of the state budget, as well as the procedure for drafting, passing and execution of budgets.

**48.** The right to have sufficient resources for the performance of local government functions can not be deemed infringed merely because the financial situation will probably change due to the adoption of legislation of general application. This would give the local government too broad a right of appeal and would thus enable to contest any legislation which affects the financial situation of the local government to any extent, being at the same very loosely related to independent resolution of local issues. As already pointed out above the existence of sufficient resources is not an independent end in itself. The right to have sufficient resources has been established in order to guarantee the existence of sufficient resources for the resolution of local issues. Thus, the right at issue is infringed when the contested measure decreases the income of a local government or increases the volume of mandatory local functions without allocating additional financial resources, and thus renders the performance of the local duties more difficult.

**49.** The covering of the operational expenditure of the council is, no doubt, the duty of the local government. On the one hand, a local government can not withdraw from covering the expenses of the council, which is a body referred to in § 156 of the Constitution; on the other hand, the state can not disproportionately interfere with the covering of the operational expenditure of councils. The increase of the number of council members brings about the increase of the expenses required for the performance of the referred mandatory duties of the local government and may, thus, render the performance of these duties more difficult. Consequently, the provision which increases the number of council members may also infringe the right to have sufficient resources. Consequently, in this regard the request is admissible.

**50.** Nevertheless, to establish such an infringement the Chamber must ascertain that the contested provision is not only capable of rendering the performance of the local government's duties more difficult but that it actually has this effect. That is why the local government must point out the local government functions the performance of which is rendered more difficult by the additional obligations or decrease of income. The Supreme Court *en banc* has held before that when a local government unit alleges that its right to have sufficient resources is violated, it must show which of the functions it may fail to perform due to lack of

finances (see in this regard the referred judgment of the SCeb no. 3-3-1-46-03, paragraphs 35 and 36). In this court case the Tallinn City Council has requested the repeal of the provision which concerns only the city of Tallinn; so much the more should it show which of the functions of the local government it may fail to perform due to the increase of the number of council members.

**51.** The Tallinn City Council argues that the securing of bigger premises for the council sessions, development of new IT-systems and increase of the personnel and administrative expenditure will bring about the outgoings in the amount of at least 6 million kroons. The Chamber has no way of verifying the truthfulness of this amount. It does not appear from the request of the city of Tallinn which are the functions of the local government the performance of which shall be hindered by the expenditure incurred due to the increase of the number of council members. In the light of the size of the budget of the city of Tallinn the inability to perform some local government functions due to the increase of the number of council members is not obvious, either.

**52.** Taking into account the considerations set out above the Chamber can not come to the conclusion that the provision increasing the number of council members infringes the right of the local government to have sufficient resources for the performance of the duties of the local government. Consequently, the request of the Tallinn City Council concerning § 1(1) of the Amendment Act is to be dismissed.

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