Constitutional judgment 3-4-1-7-08

JUDGMENT
OF THE OF THE SUPREME COURT *EN BANC*

No. of the case	3-4-1-7-08
Date of decision	8 June 2009
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, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu.
Court Case	Review of constitutionality of §§ 126(6), 129(1) and 129(2) of the Public Procurement Act.
Basis of proceeding	Judgment of the Tallinn Circuit Court of 19 May 2008 in civil case no. 3-08/516; ruling of the Constitutional Review Chamber of the Supreme Court of 2 October 2008 in case no. 3-4-1-7-08.
Court hearing	Written proceeding
DECISION	**1. To declare § 129(1) of the Public Procurement Act unconstitutional and invalid.** **2. To dismiss the petition of the Tallinn Circuit Court concerning §§ 126(6) and 129(2) of the State Procurement Act.**

FACTS AND COURSE OF PROCEEDING

1. On 30 November 2007, by publication of contract notice in the Public Procurement Register, the state agency Kagu Teedevalitsus [South-East Estonian Road Administration], administered by the Road Administration, opened the procurement procedure “Reconstruction of national road no. 45 Tartu-Räpina-Värska km 59.6 69.4, and other works incidental thereto” (registration number 102773).

2. By the date of submitting tenders, i.e. 24 January 2008, AS Turgel Grupp and Destia OY, and AS KPK Teedeehitus and OÜ Delgetec had submitted joint tenders for participation in the public procurement.

3. On the basis of § 47(1) and (2) of the Public Procurement Act (hereinafter "the PPrA), by its directive no. 11 of 5 February 2008 (hereinafter "the directive") the Kagu Teedevalitsus rejected the joint tenders of AS Turgel Grupp and Destia OY, and of AS KPK Teedeehitus and OÜ Delgetec, considering these to have been submitted in a consorted manner.

4. On 12 February 2008 the AS KPK Teedeehitus submitted a protest against the directive to the protest committee of the Public Procurement Office (hereinafter "the protest committee").

5. By its decision no. 13-08/102773 of 7 March 2008 (hereinafter "the protest committee's decision") the protest committee satisfied the protest. The protest committee ordered that the Kagu Teedevalitsus pay the state fee of 10 000 kroons paid by the person who submitted the protest, as an expense relating to the protest. The protest committee did not satisfy the application for the award of legal aid costs, because the committee was of the opinion that the award of such expenses was not in conformity with § 126(6) of the PPrA, which allows to award against the contracting authority only state fees and expert's fees.

6. On 14 March 2008 the AS KPK Teedeehitus filed an appeal with the Tallinn Circuit Court, applying for the repeal of the protest committee's decision to the extent that it failed to award the legal aid costs.

AS KPK Teedeehitus argued firstly that the procedure for compensating for procedure expenses established in the Code of Administrative Court procedure – allowing to award also the legal aid costs should, by analogy, be applied in the proceedings before the protest committee.

By way of another possibility the AS KPK Teedeehitus argued that the provisions of the Public Procurement Act (especially § 126(6) thereof), which do not allow to award legal aid costs, should be declared unconstitutional and not applied, because these violate the right of recourse to the courts, established in § 15 of the Constitution.

7. The Tallinn Circuit Court satisfied the appeal of AS KPK Teedeehitus in part, and annulled the protest committee's decision to the extent that it did not satisfy the application of AS KPK Teedeehitus for the award of legal aid costs. The circuit court declared unconstitutional and did not apply § 129(2) of the PPrA, to the extent that it does not allow the person submitting a protest to have recourse to the courts when the protest committee has refused to satisfy the person's application for the award of legal aid costs, and § 126(6) of the PPrA to the extent that it does not allow to award the legal aid costs incurred in the proceedings before the protest committee when the protest is satisfied; the court delivered the judgment to the Supreme Court, thus initiating a constitutional review proceeding.

8. By its ruling no. 3-4-1-7-08 of 2 October 2008 the Constitutional Review Chamber of the Supreme Court referred the matter to the Supreme Court *en banc* for adjudication.

9. When examining the case referred to it the Supreme Court *en banc* held that upon assessing the admissibility of the Tallinn Circuit Court request it was also necessary to review the constitutionality of § 129(1) of the PPrA. In order to hear the participants in the proceeding they were requested to submit their opinions on the constitutionality of this provision.

OPINIONS OF THE COURT AND PARTICIPANTS IN THE PROCEEING

10. The Tallinn Circuit Court was of the opinion that in order to hear the appeal of the AS KPK Teedeehitus it was first necessary to declare unconstitutional and not to apply § 129(2) of the PPrA, to the extent that it does not allow the person submitting a protest to have recourse to the courts when the protest committee has refused to satisfy the person's application for the award of legal aid costs. The circuit court was of the opinion that such a restriction of the right of recourse to the courts, established in § 15 of the Constitution,

was not necessary in a democratic society, because neither the Public Procurement Act nor the explanatory letter thereto indicate the legitimate aim of this restriction. Even when assuming that the aim of the restriction of the right of appeal is to preclude the filing of appeals with no prospect of success and avoid the increase of the courts' work-load, this restriction, nevertheless, is not reasonable and, thus, not proportional.

The circuit court is of the opinion that the prohibition to award legal aid costs, included in § 126(6) of the PPrA, violates a person's right to a remedy, the right of recourse to the courts and the right to receive compensation for unlawfully caused damage, as such a restriction is neither reasonable nor proportional to achieve the objectives of mandatory pre-trial proceedings.

11. AS KPK Teedeehitus points out in its opinion that it agrees with the reasoning and conclusions of the Tallinn Circuit Court.

As regards § 129(1) of the PPrA the AS KPK Teedeehitus argues that the conflict of this provision with § 15(1) and § 149(1) and (2) of the Constitution can not be related to the admissibility of the request of the Tallinn Circuit Court. §§ 126(6) and 129(2) of the PPrA are applicable even if the circuit court had no jurisdiction to adjudicate the matter.

Should the Supreme Court *en banc*, nevertheless, consider it necessary to examine the possible conflict of § 129(1) of the PPrA with § 15(1) and § 149(1) and (2) of the Constitution, the infringement should be deemed justified.

Firstly, the substitution of protest committee for the administrative court in adjudicating public procurement protests is justified by the necessity to ensure quick protest proceedings. Pursuant to the valid Public Procurement Act a protest goes through three instances – the protest committee, a circuit court, the Supreme Court. In case the conflict of § 129(1) of the PPrA with § 15(1) and § 149(1) and (2) of the Constitution is established, a fourth instance is added, namely an administrative court. This, in turn, extends the procedure of hearing the protests, probably making it longer than a proceeding of an ordinary administrative matter, which – bearing in mind the specific nature of public procurement – is not justified.

Secondly, the substitution of protest committee for an administrative court can be justified by the need of specialization. An administrative court applying the administrative law in its totality might not orient in the nuances of public procurement law on as good a level as a committee specialised in the adjudication of a specific type of disputes.

Thirdly, the competence of the Public Procurement Office's committee specialised in the adjudication of disputes is clearly derived from Article 2(9) of the Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33–35¸ hereinafter "directive 89/665"). The requirements established in the referred Article – giving of written reasons and possibility of judicial review – are fulfilled in the valid Public Procurement Act. Even when holding that the Constitution does not establish a ground to replace administrative courts with the protest committee, this ground can be derived from the referred EU legislation, which the Public Procurement Act must be in conformity with.

Fourthly, the Public Procurement Act guarantees the independence of the protest committee, which is the basic requirement set to (administrative) courts.

Fifthly, the Public Procurement Act was passed by majority vote of the whole membership of the Riigikogu, which guarantees strong legitimacy to the provisions regulating the protest proceedings.

Nevertheless, the AS KPK Teedeehitus admits that the protest proceedings have been regulated insufficiently. A solution fostering the principle of separate powers and meeting the general requirement of proportionality would not be the establishment of alleged unconstitutionality of § 129(1) of the PPrA, but attracting the attention of the legislator to the necessity of supplementing the regulatory framework of the

protest proceedings.

12. The Lõuna Teedekeskus (former Kagu Teedevalitsus) argues firstly, that § 129(2) of the PPrA is not a relevant norm, because this does not actually regulate the relationship or situation under discussion. § 126(6) of the PPrA is not in conflict with the Constitution.

In regard to § 129(1) of the PPrA the Lõuna Teedekeskus argues that the provision is in conflict with § 15(1) and § 149(1) and (2) of the Constitution.

The conflict of the referred provision of the Public Procurement Act with § 15(1) of the Constitution arises primarily from the insufficient regulation of the protest proceedings, due to which this procedure as a whole is in conflict with § 14 of the Constitution. As the Public Procurement Act does not sufficiently establish the rights and obligations of disputing parties, the exercise of the right of appeal in case of appeal to a circuit court is significantly more difficult, especially when the protest committee – on the basis of the Public Procurement Act does not adjudicate the matter on its merits.

This situation is possible due to §§ 69(1) and 121(1) of the PPrA in their conjunction, allowing to conclude a procurement contract before the term established for submitting protests has arrived, which in turn excludes the hearing of the protest by the protest committee. Thus, pursuant to § 69(1) of the PPrA the contracting authority is entitled to give the consent for the award of the public contract after 14 days from the forwarding of notice on the decision on declaring the tender successful, whereas the term for submitting protests is – pursuant to § 121(1) of the PPrA – seven working days from the day when the person submitting the protest became aware of or should have become aware of the violation of its rights or damaging of its interests, but not after the award of the public contract.

Due to the referred regulatory framework a matter is pending before the Tallinn Circuit Court in administrative case no. 3-09-95, where the 14 days required for entering into the public procurement contract lapsed before the seven working days allowed for the submission of a protest (because of the days off due to Christmas and the New Year), and the protest committee refused to hear the submitted protest on the basis of § 122(3)1) of the PPrA. As the Public Procurement Act does not contain a possibility to restore terms or to file protests against such decisions, and the protest committee itself can not refuse to apply an applicable norm because of the unconstitutionality thereof, an interested person can – in such a case – only file an appeal with a circuit court for further protection of its rights and do it on the basis of § 129(1) of the PPrA.

Although, in the described situation the appeal to a court was submitted on time, in the present case this can not substantively amount to an appellate proceeding because no decision on merits that could be appealed against has been made. As the protest committee is not a court, the circuit court can not, on the basis of §§ 45 or 46(1)3) of the Code of Administrative Court Procedure, refer the matter back for a new hearing to the court of first instance, and – thus – only one proceeding in which evidence is collected and facts are ascertained is guaranteed to an interested person, and only at the level of circuit courts. Such a situation is not in conformity with § 149(2) of the Constitution.

13. In the name of the Riigikogu the opinions were submitted by the Constitutional Committee and the Economic Affairs Committee, who are of the opinion that §§ 126(6) and 129(2) of the PPrA are constitutional.

The Constitutional Committee of the Riigikogu submitted an opinion concerning § 129(1) of the PPrA, arguing that proceeding from the principle of separation of powers the Supreme Court should confine itself to the analysis of the issue raised by the Tallinn Circuit Court. Otherwise the Supreme Court would assess the constitutionality of a provision the review of which was not requested.

The Constitutional Committee also points out that judicial proceedings start at a higher instance in some other spheres, too. Thus, the review of the decisions and procedures of the National Electoral Committee has been placed within the jurisdiction of the Supreme Court because of the need to adjudicate quickly and

efficiently the disputes that could influence the election results and, thus, the legality of formation of representative bodies.

In regard to § 129(1) of the PPrA the Economic Affairs Committee of the Riigikogu pointed out that it stands by its opinion concerning the same issue, submitted to the Supreme Court in its letter of 16 June 2008.

14. The Minister of Justice is of the opinion that § 126(6) of the PPrA, pursuant to which it is not possible to award legal aid costs in the proceedings before the protest committee when a protest is satisfied, infringes the right to compensation for unlawful damage, arising from § 25 of the Constitution. The Minister of Justice is of the opinion that such an infringement is constitutional.

As regards § 129(1) of the PPrA the Minister of Justice argues firstly, that the review of constitutionality of this provision is not permissible.

The aim of concrete norm control is the effective protection of persons against unlawful activities of state authorities, including enactment of unconstitutional legislation (ruling no. 3-4-1-4-08 of the Constitutional Review Chamber of the Supreme Court of 28 May 2008, paragraph 15). In the present case, too, the Tallinn Circuit Court has established the unconstitutionality of § 126(6) of the PPrA at the request and in the interests of a participant in the proceeding – the legislation precluding the award of legal aid expenses by protest committee clearly violates the fundamental rights of persons.

The Supreme Court *en banc* has doubts as to the constitutionality of a provision the non-application of which upon adjudicating the matter does not help to guarantee the rights of participants in the proceeding. The fact that the concrete norm control proceeding of the person has been converted – on the court's initiative into abstract norm control means additional costs to the person, because the person as a participant in the proceeding is requested to submit a legally reasoned opinion. What is of decisive importance from the point of view of the rights of the participant in the proceeding is, instead, the fact that the declaration of unconstitutionality of § 129(1) of the PPrA within abstract norm control would also mean the declaration of inadmissibility of the concrete norm control request of the participant in the proceeding, because the request has been submitted by a non-competent court for the purposes of the Constitution.

Such an outcome could not be regarded as even remotely serving the interests of the participant in the proceeding, because the issue for the adjudication of which the person had recourse to the courts would still remain unresolved. Even if the Supreme Court declared § 129(1) of the PPrA unconstitutional and invalid, this would not eliminate the mandatory pre-judicial proceedings in the protest committee, nor would it eliminate § 126(6) of the PPrA, which does not provide for the award of legal aid costs.

A result like this would be in conflict with the nature of the fundamental right established in the first sentence of § 15(1) of the Constitution and would violate the fundamental rights of the participant in the proceeding. The competence of the judicial power, conferred to it by the Constitution, to declare legislation unconstitutional and invalid at the request of a person and within concrete norm control must be exercised by the courts bearing in mind the objective of the competence. Exceeding the limits set on concrete norm control by the Constitution would constitute non-permissible interference of the Supreme Court into the exercise of legislative power.

Nevertheless, the Minister of Justice expresses his opinion on the substantive constitutionality of § 129(1) of the PPrA and assesses the provision pursuant to the ordinary norm control scheme.

A prerequisite of the general fundamental right established in the first sentence of § 15(1) of the Constitution is that a protest, action or application is adjudicated by a court, which meets the requirements of § 146 of the Constitution, i.e. which has the competence to administer justice and which is independent and impartial. To guarantee fundamental rights without gaps it would be preferable to proceed from the viewpoint that the provisions establishing the principles of organization of the judicial system, too, belong into the sphere of protection of the general fundamental right to effective legal remedies and fair trial.

When we regard the principles of organization of the judicial system, established in §§ 148 and 149 of the Constitution, as belonging to the sphere of protection of the relevant fundamental right, we also have to admit that § 129(1) of the PPrA infringes these principles.

In regard to formal constitutionality of the infringement the Minister of Justice points out that a provision of law, which in substance regulates the organisation of judicial power for the purposes of § 104(2)14) of the Constitution but is not incorporated in an Act regulating judicial proceedings, is still within the sphere of implementation of § 104(2)14) of the Constitution. A legislative provision containing such a provision of law should be passed by the qualified majority vote required by the Constitution. As § 129(1) of the PPrA, which regulates judicial proceedings, meets these requirements, the provision is constitutional in the formal sense.

The general fundamental right to effective remedy and fair trial, established in the first sentence of § 15(1) of the Constitution, is a fundamental right which may be restricted by legislation ranking lower than parliamentary Acts. The infringements of such a fundamental right can be justified by the colliding fundamental rights of other persons or by constitutional values.

Other persons whose fundamental rights the legislator must bear in mind when shaping the public procurement procedure are first and foremost the other business operators participating in the procedure. Too extensive possibilities to protest against the decisions made within public procurement procedure constitute a burden not only on the contractor but also on other participants in the procurement procedure, primarily the one who submitted the best tender. As in the procurement disputes the possibility that protests are primarily submitted with the aim of injuring the competitors can not be precluded, the whole procedure must be formed so as to eliminate these risks. Consequently, the first justification of the infringement is the other persons' freedom of enterprise.

Among other constitutional values the first mention must be made of the speed and efficiency of proceedings, including both administrative and judicial proceedings.

Furthermore, financial economy is of great value, achievable through the restriction of the right of appeal. This aspect is especially important in procurement proceedings, one of the objectives of which is to save the public funds.

The necessity to establish effective procedure for the resolution of disputes is also underlined in the European Union legislation, serving as the basis of the part of the Public Procurement Act regulating protest proceedings; first and foremost Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. The referred directives establish the minimum requirements to legal remedies in the Member States. Article 2(9) of directive 89/665 requires that it is only in the final stage that it should be possible to have recourse to a court or another independent authority for the resolution of disputes that have arisen in procurement proceedings.

The restrictions on the recourse to the courts, established in § 129(1) of the PPrA, help to guarantee efficient judicial proceedings. Thus, the measure is a suitable one.

A question may arise in regard to § 129(1) of the PPrA whether it would not have been just as effective to establish a regulatory framework which, following the example of misdemeanour procedure, would have bypassed the second court instance. As the valid procedure has not – so far – caused any doubts in the Supreme Court, one can presume that the Supreme Court considers the procedure to be constitutional. Nevertheless, it is questionable whether the adjudication of disputes concerning public procurements by way of analogy with the adjudication of appeals against the decisions of a body conducting extra-judicial proceedings would be as effective in every sense as the presently valid procedure established in the Public Procurement Act. If the second instance, i.e. appellate procedure were to be left out of the three-level court

system, it is guaranteed that one judge sitting alone shall hear the protests of persons. This solution is much more doubtful and puts much more pressure on the cassation proceedings when compared to a situation where the guaranteed court instance is the circuit court in a panel of three judges.

The second possible example in reducing the instances of judicial proceedings would be the procedure for adjudicating electoral complaints. The decisions made upon hearing electoral complaints are subject to judicial review by the Supreme Court by way of constitutional review procedure. Essentially this amounts to one-level judicial control over extra-judicial administration of justice by an administrative agency. The Minister of Justice does not consider such a procedure to be expedient in public procurement matters.

Consequently, the measure is necessary for the achievement of the desired aim.

Bearing in mind the above examples about the fact that the three-level court system is not an absolute rule in Estonia and that in some proceedings it is constitutional to have only one-level judicial proceedings, the leaving out of one court instance can be considered a moderate infringement, not a serious one.

However, the aims that justify the infringement are significant and in their conjunction counterbalance the general right to judicial proceedings on all three levels. The norms regulating judicial organisation, established in § 149(1) and (2) of the Constitution can be regarded as absolute rules or as purely objective norms in regard to which any balancing is precluded or is not necessary.

The mandatory nature of three-level judicial proceedings is to be assessed in conjunction with § 24(5) of the Constitution, which establishes that everyone has the right of appeal to a higher court against the judgment in his or her case pursuant to procedure provided by law. The right of appeal may be restricted by law if it is necessary from the point of view of more efficient administration of justice. What is of primary importance is that a person must be guaranteed the right of appeal against the first judgment concerning him or her, and the Constitution does not establish that it is essential that all three court instances should be guaranteed in all judicial proceedings.

Thus, the Minister of Justice is of the opinion that § 149(1) and (2) of the Constitution can not be deemed such fundamental principles of Estonian legal order the balancing of which against other fundamental rights is excluded. These provisions rather describe the general structure of the judicial system and allow for exceptions.

15. The Minister of Finance points out in his opinion that the procedure for compensating for the expenses incurred in protest proceedings shall be specified by the draft Act to Amend the Public Procurement Act and the Structural Aid of 2007 2013 Act. § 1(58) of the referred draft Act will supplement the Public Procurement Act to the effect that the protest committee shall award to a third person other costs of the protest procedure and of legal representatives to the necessary and justified extent.

In his additional opinion the Minister of Justice presumes that the Supreme Court is competent to review the constitutionality of § 129(1) of the PPrA within the pending judicial proceeding.

The mandatory protest committee procedure within reasonable time, in regard to which the right of recourse to the courts – established in § 15(1) of the Constitution – is guaranteed even if for the purposes of § 129(1) of the PPrA “a court” is the circuit court, can not be regarded as a violation of the general right to have recourse to the courts. § 15(1) of the Constitution uses the word “court” in its functional meaning. § 129(1) of the PPrA guarantees the right of recourse to the courts.

Pursuant to § 149 of the Constitution only a county or city court can be the court of first instance. The original draft of the Public Procurement Act was based on this very principle and § 129 thereof established that the body to solve public procurement disputes in mandatory pre-judicial proceedings was the Public Procurement Office and also specified the administrative court procedure. The explanatory letter to the draft suggested as an alternative to consider the introduction of specific features to the administrative court procedure through an amendment to the Code of Administrative Court Procedure. The latter possibility

would have been more justified in the formal sense, because on the basis of § 104(2)14) of the Constitution the procedural laws are constitutional laws. At the same time it should be taken into account that in the interests of comprehensive regulation of the whole sphere, and if there exists the support necessary for the adoption of a constitutional law, it may prove justified to specify the constitutional laws by a specific Act.

The protest committee is an extra-judicial body for the resolution of disputes over public procurements, which was established with the aim of decreasing the work-load of the courts and to speed up the resolution of disputes. The explanatory letter stated that as the draft Act set up a separate protest committee to engage only in the adjudication of disputes concerning public procurements, it would be expedient to refer the appeals of the protests to circuit courts and, thus, to shorten the possible time of resolution of disputes. The Constitutional Review Chamber of the Supreme Court, too, has argued in paragraph 19 of the judgment of 9 April 2008 in case no. 3-4-1-20-07, that decreasing the courts' work-load and through this ensuring the efficiency of court system is a constitutional value, expressed in Chapter XIII of the Constitution, which can ensure the administration of justice within reasonable time and, consequently, fair trial and better protection of persons' rights.

Due to the restricted appeal proceedings model in Estonia the Code of Administrative Court Procedure does not sufficiently guarantee the procedural guarantees of persons filing appeals against the decisions of the protest committee (the restriction on submission of evidence and applications peculiar to appellate procedure), yet this does not mean that a legitimate aim has been implemented disproportionately. This rather amounts to deficiencies of the regulatory framework which has been established to serve a legitimate aim, i.e. in regard to appellate procedure there might exist an infringement of § 14 of the Constitution.

The legitimate aim of the restriction on the right of appeal, established in § 129(1) of the PPrA, is to decrease the work-load of courts, thus guaranteeing the efficiency of the judicial system and the prerequisites for more effective protection of persons' rights. The protest committee is a body which meets the characteristics of an independent and impartial tribunal, described in Article 6 of the European Convention on Human Rights. Members of the protest committee are independent and make decisions only on the basis of the laws and other legislation (§ 119(1) of the PPrA); members of the protest committee must meet the requirements set to judges and non-conformity with the requirements is the only ground for their release from office before the prescribed time (§ 119(5) of the PPrA); there is no supervisory control over members of the protest committee (§ 119(7) of the PPrA); members of the committee are required to be impartial (§ 120 of the PPrA). Fort the purposes of Article 2(9) of directive 89/655/EEC the protest committee is an independent pre-judicial body, competent to review procurement disputes instead of the courts.

Should the Supreme Court, when reviewing the constitutionality of § 129(1) of the PPrA, come to the conclusion that the objective of efficiency of the court system does not counterbalance the extent and intensity of interference with the fundamental rights, then instead of conflict with §§ 15(1) and 149(1) and (2) of the Constitution the problem may consist in insufficient regulation of appellate procedure (§ 14 of the Constitution) in the sphere of public procurement, arising from the restricted nature of appellate procedure, and § 129(1) of the PPrA would not be a relevant norm.

16. The Chancellor of Justice argues firstly, that § 129(2) of the PPrA is not a relevant norm, because it does not exclude the persons' the right of recourse to the courts against such decisions of the protest committee which satisfy the protests. The first sentence of § 126(6) of the PPrA is relevant only to the extent that it does not allow, when a protest is satisfied, to award the legal aid costs incurred in the proceeding before the protest committee – in the decision of the protest committee by which the matter is substantively resolved. The Chancellor of Justice is of the opinion that the first sentence of § 126(6) of the PPrA violates the right to organization and procedure, established in § 14 of the Constitution, and is therefore unconstitutional.

As regards the constitutionality of § 129(1) of the PPrA the Chancellor of Justice argues that this is not relevant in the present case. § 129(1) of the PPrA would be relevant when in the case of validity of the norm the Supreme Court *en banc* should decide the issue of admissibility of constitutional review differently than

in the case of invalidity of the norm.

What is problematic is whether the appeal was submitted to the court of the location of the contracting authority. The procurement was organized by the Kagu Teedevaalitsus, which is an agency under the administration of the Road Administration and is located in Võru. For the purposes of § 129(1) of the PPrA the territorial jurisdiction of the court should have been determined on the basis of the registered office of the Kagu Teedevalitsus. Therefore the appeal should have been filed with the Tartu Circuit Court.

Even when taking into account that the object of the judicial dispute in the Tallinn Circuit Court was not the activity or the decision of the contracting authority, but instead the decision of the protest committee (with the registered office in Tallinn) which allegedly violated the appellant's right irrespective of the object of the protest procedure, the jurisdiction is to be chosen according to the address of the contracting authority and not that of the protest committee.

When proceeding from the first sentence of § 8(1) of the Code of Administrative Court Procedure, which is a general provision in regard to § 129(1) of the PPrA, a doubt arises whether, in such a case, the appeal should not be under the jurisdiction of an administrative court of first instance. Irrespective of whether the Tallinn Circuit Court can be regarded as a court competent to adjudicate this administrative matter on the basis of the first sentence of § 8(1) of the Code of Administrative Court Procedure, this does not amount to application of § 129(1) of the PPrA; rather, in the case of an affirmative answer (i.e. when regarding the Tallinn Circuit Court as a competent court) this amounts to the (expanding) interpretation of § 8(1) of the Code of Administrative Court Procedure. The admissibility of constitutional review of § 126(6) of the PPrA would not depend on the validity of § 129(1) of the PPrA.

CONTESTED PROVISIONS

17. § 126(6) of the Public Procurement Act (RT I 2007, 15, 76; RT I 2008, 14, 92) reads as follows:

"(6) In termination of the protest procedure in case of the full satisfaction of the protest specified in clauses 3), 5) or 7) of subsection (1) of this section or the full satisfaction of an application for compensation for damage referred to in clause 6) the protest committee shall order with its decision payment from the contracting authority for the benefit of the person who submitted the protest the state fee paid by it in full in the protest procedure and the expert's fee paid or subject to payment to the extent that is necessary and justified. In case of partial satisfaction of the application for the compensation of damage or a protest, the protest committee makes a decision for payment of state fee and expert's fee from the contracting authority proportionally with the satisfaction of the protest or the application for the compensation for damage. When the protest procedure is terminated on the basis of clauses 2) or 4) of subsection (1) of this section the protest committee makes a decision requiring the person who submitted the protest to pay to the contracting authority or a third person, to the extent necessary and justified, the expert's fee already paid or subject to payment."

18. § 129(1) of the PPrA reads as follows:

"(1) An appeal against the decision of the protest committee is filed with the circuit court of the location of the contracting authority and the provisions of the Code of Administrative Court Procedure concerning appeals shall be applied with the specifications stipulated in this chapter. The administrative courts are not competent to review the appeals concerning the matters referred to in § 117(2) and (3) of this Act as the first instance."

19. § 129(2) of the PPrA reads as follows:

"(2) Subsequent to the termination of protest procedure an appeal against a decision of the protest committee may be filed by the following:

1) the persons who submitted the protest, if the protest committee has made the decision on partial

satisfaction of a protest against the decision referred to in § 126(1)4), of the decision referred to in § 126(1)5) or the application referred to in § 126(1)6) of this Act;

2) a third person, if the protest committee has made the decision referred to in § 126(1)5) of this Act;

3) the contracting authority, if the protest committee has made the decision referred to in § 126(1)(5) or (6) of this Act."

OPINION OF THE SUPREME COURT EN BANC

20. When examining the case referred to it by the Constitutional Review Chamber, the Supreme Court *en banc* had doubts that in addition to the provisions declared unconstitutional by the Tallinn Circuit Court also § 129(1) of the PPrA could be unconstitutional, too. To hear the participants in the proceeding they were requested to submit their opinions concerning this issue, and so they did. Bearing in mind the aforesaid the Supreme Court *en banc* shall fist analyse whether the Supreme Court can review the constitutionality of § 129(1) of the PPrA within the present proceeding (I). Thereafter the Supreme Court *en banc* shall review the constitutionality of § 129(1) of the PPrA (II). Lastly, the Supreme Court *en banc* shall decide on the validity of this provision and on the hearing of the request of the Tallinn Circuit Court (III).

I.

21. The second sentence of § 15(1) of the Constitution entitles everyone, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional. § 15(2) of the Constitution establishes the competence of the courts and their obligation to establish the unconstitutionality of laws, other legislation or procedures. Proceeding from § 15(2) of the Constitution the courts have the obligation to observe the Constitution and to declare unconstitutional any law, other legislation or procedure which is in conflict with the Constitution because of the violation of the rights or freedoms established therein or in some other way.

This means that every court, when adjudicating a case, must review the constitutionality of applicable law, if relevant doubts arise. The courts must do this also on their own initiative and not only when a participant in the proceeding so requires. Consequently, a court adjudicating a case, as well as the Supreme Court as the court of constitutional review, is competent – for the purposes of the second sentence of § 149(3) of the Constitution – to review the constitutionality of also such provisions the constitutionality of which has not been questioned by the participants in the proceeding.

22. The Supreme Court, being the court of constitutional review, has the obligation, among other things, to verify whether the request for constitutional review was submitted by a competent court, person or body. Although the participants in a proceeding may submit objections as to the admissibility of the request, the Supreme Court must examine the procedural admissibility of the request primarily on its own initiative. In doing this the Court must proceed from the valid procedural laws, as well as from the Constitution. Upon deciding procedural issues the Court is bound by the obligation to adhere to the Constitution and the laws that are in conformity therewith, and must – among other provisions – bear in mind the first sentence of § 3(1), § 14, § 15(2), the second sentence of § 146 and § 152 of the Constitution.

Consequently, the Supreme Court must be convinced that the provision which entitles a person to submit a request for constitutional review is in conformity with the Constitution. If such a norm is not in conformity with the Constitution, the Supreme Court is not allowed the hear the request. If the Supreme Court did not have the right to review the constitutionality of the norm entitling a person to submit a request the Court would also have to hear – if the norm is valid – a request for declaration of invalidity submitted by e.g. an extra-judicial dispute solving body.

23. Within the judicial system it is the court who is entitled to adjudicate the main dispute that has the competence to initiate a constitutional review proceeding for concrete norm control. The provision, which allows a concrete court to hear an action or an appeal filed with it on its merits, also empowers the same

court not to apply the unconstitutional legislation when adjudicating the case and to initiate a constitutional review proceeding. If, due to unconstitutionality of such a provision, an action or an appeal can not be heard, there exists no dispute within which it would be possible to submit a request for constitutional review.

The Supreme Court has the right and the obligation to verify whether the request which was submitted to it was admissible pursuant to procedural provisions.

24. In the concrete court case which serves as the basis of this constitutional review matter it was § 129(1) of the PPrA that served as the basis for regarding the appeal against the decision of the protest committee as an appeal to an appellate court, and for accepting it by the circuit court. It was this very provision – which is a specific provision in comparison to the general provisions of the Code of Administrative Court procedure on recourse to the courts that gave the circuit court the competence to adjudicate this appeal.

25. As there was no other provision except § 129(1) of the PPrA allowing the circuit court to adjudicate the appeal against the decision of the protest committee, the circuit court should have refused to accept such an appeal if the provision were unconstitutional. If § 129(1) of the PPrA did not exist the appeal against the decision of the protest committee should have been adjudicated by an administrative court.

26. In this court case the Supreme Court *en banc* did have doubts as to the constitutionality of § 129(1) of the PPrA. The Supreme Court *en banc* is of the opinion that the referred provision might not be in conformity with the provisions on the organisation of the judicial system as established in Chapter XIII of the Constitution. The Supreme Court *en banc* argues that the purpose of the latter provisions is to describe, from the constitutional point of view, the procedure for fair and effective protection of persons' rights, the existence of which is one of the characteristics of a state based on the rule of law. Thus, a prerequisite of a fair and effective judicial proceeding is the conformity thereof with the procedure established in the Constitution. The Supreme Court *en banc* has the obligation to examine this conformity.

27. The review of constitutionality of § 129(1) of the PPrA is not precluded by the fact that the institutional framework for the resolution of public procurement disputes is also regulated by the referred directive 89/665 and the Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14–20).

These directives leave to the Member States a wide margin of appreciation upon the choice of institutions competent to resolve public procurement disputes and upon establishing the review procedure, and in exercising this right the legislator is bound by the Estonian Constitution. The procedure for the resolution of public procurement disputes should, in addition to the EU law, be in conformity with the Estonian Constitution, too (see in this regard the Constitutional Review Chamber of the Supreme Court ruling of 26 June 2008 in case no. 3—4-1-5-08, paragraph 36).

28. On the basis of the above the Supreme Court *en banc* is of the opinion that the review of constitutionality of § 129(1) of the PPrA is both possible and justified in the present case.

II.

29. § 129(1) of the PPrA establishes the specifications of administrative court procedure for adjudication of public procurement disputes. This is a sphere which, by nature, is an object of regulation of procedural laws. § 104(2)14) of the Constitution refers to procedural laws as constitutional laws, which may be passed and amended only by a majority of the membership of the Riigikogu. Pursuant to § 3(6) of the Constitution of the Republic of Estonia Implementation Act the "majority of the membership of the Riigikogu" means more than one-half of the membership of the Riigikogu votes in favour.

30. Neither the Public Procurement Act nor the object of regulation thereof are referred to in the list included in § 104(2) of the Constitution. The majority of the membership of the Riigikogu is not required for passing

the Act. Nevertheless, it was explained in the explanatory letter to the Public Procurement Act that as the draft interferes with the administrative court procedure, the draft requires pursuant to § 104(2)14) of the Constitution the majority of the membership of the Riigikogu. At the final vote of the draft of the Public Procurement Act 67 members of the Riigikogu voted in favour of passing the draft as an Act. Consequently, the Act was passed by a majority of the membership of the Riigikogu.

Consequently, as regards § 129(1) of the PPrA, the procedural requirement arising from § 104(2)14) of the Constitution is fulfilled. In the interests of clarity it would be more preferable, though, if this regulation were to be found directly in the legislation regulating court procedure.

31. Yet, § 129(1) of the PPrA is in conflict with § 149(2) of the Constitution, pursuant to which [c]ircuit courts are appellate courts and shall review judgments of the courts of first instance by way of appeal proceedings".

§ 129(1) of the PPrA obligates the circuit courts to adjudicate the public procurement disputes referred to in § 117(2) and (3) of the PPrA as a court of first instance. Such a procedure is not in conformity with the constitutional status of circuit courts as appellate courts.

Furthermore, this provision obligates to review the decisions of the protest committee by way of appeal proceedings. The protest committee is not a court of first instance, referred to in § 149(2) of the Constitution, the judgments of which shall be reviewed – as the Constitution prescribes - by circuit courts by way of appeal proceedings. The protest committee is an extra-judicial dispute-solving administrative authority. Although the Supreme Court *en banc* is of the opinion that it is not unconstitutional to impose the resolution of certain administrative disputes on administrative authorities, an administrative authority like this is not a part of the judicial system described in § 148 of the Constitution. Similarly with judges the members of the protest committee are independent in their decision-making, and the guarantees of their independence partly overlap with those of judges (see § 119 of the PPrA), nevertheless, they can not be deemed judges for the purposes of § 147 of the Constitution. Members of the protest committee are not appointed for life. Furthermore, independence from the executive is not guaranteed upon their appointment, as it is guaranteed – under § 150 of the Constitution in regard to judges. The administrative proceedings conducted in the protest committee are not comparable to judicial proceedings as regards the procedural guarantees of participants in the proceedings, either.

32. § 129(1) of the PPrA is also in conflict with § 149(1) of the Constitution, which establishes that "[c]ounty and city courts, and administrative courts are courts of first instance". § 129(1) of the PPrA excludes the recourse to the courts in the public procurement matters referred to in § 117(2) and (3) of the PPrA. That is why the court cases concerning public procurement start in the appellate courts. The exclusion of administrative courts from the adjudication of public procurement disputes does not meet the principle, expressed in § 149(1) of the Constitution, pursuant to which all court cases start in the courts of first instance.

33. The exclusion of courts of first instance from the adjudication of public procurement disputes is also in conflict with the first sentence of § 146 in conjunction with § 4 of the Constitution. Pursuant to the first sentence of § 146 of the Constitution justice shall be administered solely by the courts. § 4 of the Constitution expresses the principle of separate and balanced powers. The passing of an Act by which administrative courts are excluded from the adjudication of concrete court cases so that instead of administrative courts these cases are heard by an administrative agency means, essentially, the restriction of the constitutional competence of the judicial power.

III.

34. On the basis of the above the Supreme Court *en banc* declares § 129(1) of the PPrA unconstitutional and invalid.

This decision does not prejudice the submission of protests against the activities of a contracting authority in

mandatory pre-judicial procedure to the protest committee or the regulatory framework concerning submission of appeals against the protest committee's decisions to the courts, established in § 129 (2), (3) and (4) of the PPrA.

35. Due to the unconstitutionality of § 129(1) of the PPrA the circuit court was not competent to review the appeal filed against the decision of the protest committee. That is why the circuit court was not competent, when adjudicating the appeal on its merits, to submit this request for constitutional review, either. In this situation, pursuant to § 11(2) of the Constitutional Review Court Procedure Act, the Supreme Court*en banc* can not review the request to review the constitutionality of the provisions declared unconstitutional and not applied in the judgment of the Tallinn Circuit Court.

Dissenting opinion of justice Jüri Ilvest
to the Supreme Court *en banc* judgment
no. 3-4-1-7-08 of 8 June 2009-06-28

I can not agree with the opinion of the Supreme Court *en banc* concerning the relevance of § 129(1) of the Public Procurement Act, for the following reasons.

As I understand, every dispute about the constitutionality of any norm should be oriented at ensuring efficient protection to persons' rights, in order to preclude the deformation of constitutionally guaranteed rights by legislation ranking lower than the Constitution. That is why in the present case the main issue is the issue of compensating for legal aid costs, which the Supreme Court undertook to examine, on the basis of the Tallinn Circuit Court ruling, by way of concrete norm control.

Irrespective of the fact that § 129(1) of the PPrA establishes jurisdiction differing from the ordinary jurisdiction of courts, any court adjudicating the matter and deciding on the issue of compensation for legal aid costs in the future should proceed from § 126(6) of the PPrA, pursuant to which an application for compensation for legal aid costs incurred in protest procedure shall not be satisfied, and from § 129(2), which does not allow to submit appeals concerning this issue. These are the provisions that are relevant for the adjudication of this concrete administrative case and which – in the opinion of the participant in the proceeding – are in conflict with the rights guaranteed by the Constitution.

The path chosen by the Supreme Court *en banc* in this case creates another dimension, which is not directly related to this administrative matter, namely the question of integrity of the three-level court system and non-permissibility of exceptions, and –as I see it – this amounts to excess activism.

I find support to this argument in the fact that as a result of this construction the request for concrete norm control, submitted by the circuit court in the interest of the appellant, turned into a non-admissible one and was dismissed. Consequently, the recourse of the person to the administrative court was fruitless because the circuit court raised the issue of constitutionality of the legal provisions restricting the person's rights and the Supreme Court *en banc* exceeded the limits of the matter by undertaking to resolve more global issues.

Dissenting opinion of justices
Lea Kivi, Peeter Jerofejev, Henn Jõks and Tambet Tampuu
to the Supreme Court *en banc* judgment in case no. 3-4-1-7-08

1. Unlike the majority of the Supreme Court *en banc* we do not agree with the decision of the Supreme Court *en banc* not to adjudicate substantively the request of the Tallinn Circuit Court for the review of constitutionality of § 126(6) and § 129(2) of the PPrA, and to declare – on its own initiative - § 129(1) of the PPrA unconstitutional; we do not agree for the following reasons.

2. Pursuant to § 4(1) of the Constitutional Review Court Procedure Act the Supreme Court shall verify the conformity of legislation of general application on the basis of a reasoned request, court judgment or ruling. It is true that the Supreme Court is not bound by the reasons of the request, court judgment or court ruling; yet, in the adjudication of the matter on the basis of a court judgment or court ruling the Supreme Court may repeal or declare to be in conflict with the Constitution legislation of general application, an international agreement or a provision thereof which is relevant to the adjudication of the matter (§ 14(1) and (2) of the Constitutional Review Court Procedure Act).

3. Pursuant to the earlier judicial practice of the Supreme Court the norm, which is of decisive importance to the adjudication of a matter, can be relevant. A norm is of decisive importance if in the case of unconstitutionality of the norm the court should make a different decision than in the case of constitutionality of the norm. Only such norms can be regarded as relevant which are applied in regard to a person and which actually regulate the relationship or situation under discussion. If a provision is not relevant, the concrete norm control initiated by a court ruling or judgment is not admissible and the request is to be dismissed without a hearing.

4. The case under discussion was examined by the Supreme Court *en banc* by way of concrete norm control, the objective of which is "first and foremost to serve the interests of fundamental rights of participants in a proceeding" – see the Constitutional Review Chamber of the Supreme Court ruling of 28 May 2008 in case no. 3-4-1-4-08, paragraph 15. The Tallinn Circuit Court initiated constitutional review in regard to §§ 129(2) and 126(6) of the PPrA, having established the unconstitutionality of these on the request and in the interests of a participant in the proceeding, because the legislation excluding the possibility of awarding legal aid costs by the protest committee violates the fundamental rights of the person. The Tallinn Circuit Court did not initiate constitutional review in regard to § 129(1) of the PPrA; this was done by the Supreme Court en banc itself, by initiating – in essence – abstract norm control within concrete norm control.

5. As already pointed out, when adjudicating a constitutional review case on the basis of a court judgment or ruling the Supreme Court can not go beyond the provisions that are relevant to the adjudication of the case. This procedural restriction is necessary for effective protection of persons' rights. In this constitutional review proceeding the relevant norm was the one which does not provide for the award of legal aid costs to the person, i.e. § 126(6) of the PPrA. The admissibility of constitutional review of § 126(6) of the PPrA does not depend on the validity of § 129(1) of the PPrA.

6. Consequently, by declaring § 129(1) of the PPrA - as the norm regulating the competence of circuit courts - unconstitutional, the Supreme Court *en banc* ignored the requirement of relevance of provisions (which is procedurally non-permissible by way of concrete norm control). It must be pointed out that the declaration of unconstitutionality and invalidity of § 129(1) PPrA substantially damaged the interests and rights of the participant in the proceeding, in whose interests the constitutional review proceeding was initiated. In addition to the fact that the issue of legal aid costs in the protest committee for the resolution of which the person had recourse to the court in the first place, remained unresolved, the person probably incurred new costs due to the additional enquiries of the Supreme Court, relating to the examination of constitutionality of § 129(1) of the PPrA.
