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Constitutional judgment 3-4-1-3-07

JUDGMENT
OF THE SUPREME COURT EN BANC

No. of the case	3-4-1-3-07
Date of judgment	21 May 2008
Composition of court	Chairman Märt Rask and members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu.
Court Case	Petition of the Chancellor of Justice to declare unconstitutional the provisions of the Political Parties Act which do not provide for efficient supervision of the political party funding and to require that the Riigikogu set up a monitoring body meeting the minimum requirements.
Date of hearing	20 November 2007
Persons participating in the hearing	Chairman of the Constitutional Committee of the Riigikogu Väino Linde and head of secretariat-adviser to the Constitutional Committee Janek Laidvee; Chancellor of Justice Allar Jõks, Deputy Chancellor of Justice-Adviser Madis Ernits, adviser to the Chancellor of Justice Nele Parrest, and Minister of Justice Rein Lang.
Decision	**1. To dismiss the petition of the Chancellor of Justice**

FACTS AND COURSE OF PROCEEDING

1. The Riigikogu passed the Political Parties Act on 11 May 1994 and has amended the Act subsequently on several occasions on issues of principle.

2. On 30 September 2003, when a draft aiming at amending the system of funding of political parties was in the legislative proceeding of the Riigikogu, the Chancellor of Justice pointed out to the Riigikogu the problems related to funding of political parties in his report on the conformity of legislation of general application to the Constitution and the laws. The Chancellor of Justice argued that instead of prohibiting great importance should be attached to the transparency and control of funding.

3. On 18 December 2003 the Riigikogu adopted an Act amending the Political Parties Act and other related Acts, whishing to better regulate the issues related to political party funding and to prevent political corruption in the activities of the political parties. This Act substantially amended the regulatory framework of political party funding, by prohibiting to accept donations from legal persons, allowing political parties to take loans only from credit institutions, eliminating restrictions on donation of cash, changing the rules of financial control concerning disclosure of register of donations, and by changing the rules of reporting on election expenditure.

4. On 30 September 2004, in his report to the Riigikogu on the conformity of legislation of general application to the Constitution and the laws, the Chancellor of Justice pointed out that despite the changes introduced to the chapter on political party funding of the Political Parties Act there were still several problems concerning the funding of political parties. The Chancellor of Justice was of the opinion that because of weak control mechanisms and gaps in the regulation the then valid Political Parties Act did not serve the set purposes.

5. On 17 May 2006 the Chancellor of Justice submitted to the Riigikogu his proposal no 2 on bringing the Political Parties Act into conformity with the Constitution of the Republic of Estonia, because he was of the opinion that to the extent that the Political Parties Act did not provide for sufficiently effective supervision over the political party funding the Act was in conflict with the principle of democracy and the fundamental right of political parties as established in the Constitution.

6. The plenary assembly of the Riigikogu discussed the proposal of the Chancellor of Justice at its sitting of 31 May 2006, and decided to support the proposal.

7. On 4 December 2006, with the aim of changing the principles of control of political party funding, the Constitutional Committee of the Riigikogu initiated the draft Act (1060 SE) amending the Political Parties Act and other Acts. At its sitting of 4 January 2007 the Government of the Republic decided to support the draft in principle.

8. At its sitting of 11 January 2007 the Constitutional Committee decided to submit the draft to the plenary session of the Riigikogu for the first reading. The reading took place on 16 January 2007. The plenary assembly of the Riigikogu decided to submit the draft for the second reading. 5 February 2007 was set as the deadline for the submission of motions to amend. At the sitting of 6 February 2007 the Constitutional Committee of the Riigikogu decided to continue the legislative proceeding of the draft in the committee. By the present time the draft has been withdrawn from the legislative proceeding due to expiry of the term of office of the 10th Riigikogu.

9. On 16 February 2007 the Chancellor of Justice submitted a petition to the Supreme Court that it declare the Political Parties Act unconstitutional and invalid to the extent that it does not provide for effective control of the political party funding.

10. At the court session of the Constitutional Review Chamber of 8 May 2007 the Chancellor of Justice submitted the application that the constitutional review case be referred to the Supreme Court en banc if the Supreme Court considered it necessary to change its established opinion on the competence of the Chancellor of Justice to contest the activities of the legislator. The Chamber deliberated the application of the Chancellor of Justice and by its ruling of 28 May 2007, on the basis of § 3(3) of the Constitutional Review Court Procedure Act, referred the matter submitted by the Chancellor of Justice to the Supreme Court en banc for hearing.

11. 18 September 2007 was fixed as the date of the hearing of the Supreme Court en banc. On 10 September the Minister of Justice submitted an application for the adjourning of the hearing, because on the same date he would be performing his duties, representing Estonia on the international level. The Supreme Court en banc satisfied the application of the Minister of Justice.

12. The Supreme Court en banc deliberated the petition of the Chancellor of Justice at its session on 20 November 2007. At the court session the Chancellor of Justice amended his petition and requested that the provisions of the Political Parties Act which do not provide for effective control over the funding of political parties be declared unconstitutional and that the Court require that the Riigikogu set up a monitoring body meeting the minimum requirements. Proceeding from the assumption that in the unconstitutional situation caused by the legislator's failure to act the legislator may not start the execution of the court judgment, the Chancellor of Justice proposed that a deadline be set to the Riigikogu for bringing the regulatory framework of the Political Parties Act into conformity with the Constitution.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING

13. The Chancellor of Justice reasons in his petitions as follows.

The democracy provided for in § 10 of the Constitution is representation democracy, wherein the powers of state are vested in the people, yet they are exercised by different state authorities, authorised by the people. To guarantee the legitimacy of the activities of state authorities with implied competence, all activities of state authorities must be reducible to the will of the people, and controllable. The people exercise the supreme powers of state through citizens with the right to vote by electing the Riigikogu or at the referenda. In order that the will of the people as the supreme power could be realised through elections, this will has to be formed. This purpose is served in the society by political parties. The democracy of the constitution is at the same time democracy of political parties, and therefore political parties have a constitutional status, determining their role in the political system as well as their duties in the society.

The second sentence of § 48(1) of the Constitution expresses the fundamental right of political parties, which is composed of freedom of political parties and equality of political parties. The freedom of political parties contains both the freedom to establish political parties as well as the freedom of the political parties to act. The substance of the freedom to act is the freedom of a political party to determine its political objectives, freedom to disseminate its views and to rise funds for its activities. The essential nature of the equality of political parties is the equality of opportunities of political parties. This means that the rules of fair play must govern the process of formation of political will.

The duty of political parties is the moulding of the will of the people and nomination of candidates at the elections for the exercise of public authority, although a political party itself does not directly exercise public authority. Consequently, a political party belongs to the sphere of society and not to that of power. Political parties must have financial resources for the discharge of their functions. The constitutional status of political parties requires that their funding must be transparent.

Democratic process of formation of political will must be free and open. Only when the sources of political party funds are transparent will it be possible to assess who the supporters of political parties are, whose interests a political party represents, and what kind of influence the financers of a political party could exert on the decisions of the latter. The objective is to preclude the possibility of anonymous interest groups to covertly govern political processes. It is important to prevent corruption and the possibilities of organised crime to influence politics.

The transparency of political party funding is essential for the functioning of political liability. The electorate must be aware of not only the decisions to be implemented pursuant to political will, but also of the actual stimuli behind these decisions.

Effective control over the political party funding is a prerequisite of transparency of political party funding. The mere formal possibility of control, wherein the income and expenditure are disclosed and the public can access relevant data at any moment, can not be regarded effective. There must be a monitoring body, who is ex officio entitled and obliged to supervise the conformity of political party funding with the laws. The efficiency of a monitoring body must first and foremost be evaluated on the basis of its status, the object of

its scrutiny, the gauges it uses, the instruments of control, the time dimension, the intensity and output of the control. The body monitoring political party funding must be politically independent, substantive, active, competent, preventive and oriented at guaranteeing equal opportunities to political parties.

The principle of democracy, established in the Constitution, requires that the legislator provide for effective control over political party funding. Until this has not been done, there exists an unconstitutional gap.

The Political Parties Act provides for the requirements to and restrictions on the funding of political parties, as well as a control system. Supervision of the observance of the requirements of the Political Parties Act is exercised by an auditor and the Riigikogu select committee of the implementation of Anti-corruption Act. If the requirements of funding are violated the police shall interfere within the framework of proceeding of an offence. Neither separately nor in conjunction do the referred bodies effectively control the political party funding, so that it would meet the requirements of democracy and guarantee equal treatment of political parties.

Auditor's supervision is a wide-scale accounting supervision over the financial activities of a political party. An auditor supervises formally whether the financial activities of a political party meet the requirements of the Political Parties Act. An auditor has no means to check the concealed funding of a political party or to investigate the origin of donations. Neither does the status of an auditor meet the requirements set to monitoring body of financing, because an auditor is a person in private law, chosen to conduct audit and paid by a political party itself. Therefore the activities of an auditor may not appear to be independent.

The Riigikogu select committee of the implementation of Anti-corruption Act exercises very limited control over political party funding, by checking only the spending of political parties on election campaigns and the origin of these funds. To detect concealed donations the committee needs to have an extensive overview of the income and expenditure of political parties, and thus in the majority of cases, due to lack of information, the committee fails to detect concealed donations. The committee can only ascertain if the expenses of a political party on election campaign formally meet the requirements of the Political Parties Act. The committee can not ascertain the origin of donations. The committee is composed of the representatives of the political parties represented in the Riigikogu. Setting up a supervisory body consisting only of the representatives of political parties rises the issue of the independence of that body from political interests and creates a danger of possible collusions. A monitoring body must not only be independent, it must also appear to be independent.

The police is an organisation which has to show initiative only if a violation is sufficiently probable. Although it is certain that offence proceedings have an effect preventing future infringements, the police does not exercise consistent control, aimed at preventing the emergence of possibilities for abuse in general. Secondly, the police authorities are not independent in the institutional sense, they are a part of the executive.

In addition to the referred bodies several other state authorities may come into contact with some other aspects of the issues of political party funding. None of these exercise control of the conformity of the funding to the Political Parties Act. Thus, for example, when the Estonian Centre Party issued debt instruments the Financial Supervision Authority checked the conformity of the issue solely to the requirements of the Securities Market Act. The compliance with the requirements of the Political Parties Act was not examined, because the Supervision Authority lacks relevant competence. In essence the ascertainment of the actual sources of donations should be within the competence of the Tax and Customs Board. Director General of the Tax and Customs Board has stated the following: "The task of watching over the legal and moral aspects of political party funding has not been imposed on the Tax Board. In a society based on the rule law the Tax Board can not assume this task on its own initiative, either."

Although the data concerning political party funding is disclosed and those who are interested, including journalists, can access this information and initiate supervisory proceedings of an inspection authority, all this does not guarantee efficient supervision of political party funding. Without an efficient inspection authority the public can not guarantee efficient supervision.

The supervision of political party funding is scattered between different authorities. There is no singe body exercising wide-scale, substantive, consistent, competent and independent control. The division of the control competence disperses liability and diminishes the efficiency of control.

This is why the Chancellor of Justice argues that the control of political party funding as established in the Political Parties Act is not efficient and does not meet the requirements arising from the constitutional principle of democracy. The lack of efficient control of political party funding results in unequal treatment of political parties and thus violates the fundamental right of political parties.

The Chancellor of Justice also addresses the procedural prerequisites necessary for the adjudication of the petition, and he justifies the permissibility of his petition by the fact that in case no 3-4-1-20-04 the Constitutional Review Chamber of the Supreme Court has accepted the Chancellor of Justice's right to contest the legislator's failure to act. The Supreme Court has held that a prerequisite of disputing the legislator's failure to act is that the norms to which reference is made in the petition and which do not exist ought to be included in the contested Act or be related to the Act by nature. The Political Parties Act regulates the political party funding and some elements of the control of the funding, imposing also liability for the violation of financing requirements. Consequently, the norms guaranteeing efficient control over political party funding ought to, by nature, be included in the Political Parties Act.

14. The Constitutional Committee of the Riigikogu is of the opinion that the Chancellor of Justice is contesting the failure to enact legislation of general application, although the Constitutional Review Court Procedure Act does not entitle him to do so.

The Constitutional Committee argues that the opinion of the Chancellor of Justice that only an independent body established specifically for that purpose would meet the constitutional requirements is not justified. It is for the legislator to decide how to build up the control system of political party funding.

The Riigikogu select committee of the implementation of Anti-corruption Act is composed of the representatives of all political parties represented in the parliament, which helps to prevent possible collusions, as all political parties being participants in the election process have an interest that political party funding be based on the rules of fair play. As the procedural laws guarantee the independence of pre-judicial authorities in their proceedings and preclude political guidelines, the police, too should be regarded as an appropriate control authority.

The Riigikogu select committee of the implementation of Anti-corruption Act, being a working body of the parliament, can not take administrative coercive measures, but in the case of suspicion of a criminal offence it can always refer the materials to an investigative body. The violations of the Political Parties Act have been criminalised to a rather broad extent.

The Constitution does not prohibit to discriminate between funding during election period and funding in between elections. It has to be taken into account that in their annual reports the political parties must also set out the funding during the period in between elections.

The Constitution does not require that a monitoring authority have but one single function, i.e. control of political party funding. The consistency and efficiency of the police control can not be excluded.

The Political Parties Act treats all political parties equally, guaranteeing the equality of the political parties before the laws as well as their substantive equality. Te organisation of control in itself can not result in differential treatment of political parties.

15. The Minister of Justice admits that the system of monitoring political party funding as established in the Political Parties Act may require improvement, but this does not mean that Estonian legal order in general lacks effective possibilities of control over the funding of political forces. The Political Parties Act establishes the obligation that the political parties disclose their annual reports, registers of donations and

statements of election expenditure. This guarantees the possibility for the public to check the economic activities of political parties. Also, the organisations related to political parties must disclose the donations received.

The political parties receiving allocations from the state budget are subject to auditing. The Riigikogu select committee of the implementation of Anti-corruption Act exercises supervision of election expenditure of political parties. Misdemeanour and criminal sanctions are prescribed for the violations of the rules of financing. In comparison to influencing political parties the inducing of officials to make biased decision is much more dangerous.

The existing control system can be significantly improved, first and foremost by extending the competence of the Riigikogu select committee of the implementation of Anti-corruption Act to include the funding outside election campaigns. Secondly, the supervisory powers of this body could be extended, and supervision could be made more efficient through other measures.

At the same time the existing drawbacks do not render the Political Parties Act unconstitutional. The Constitution does not refer to supervision of political party funding. The setting up of control mechanism of political party funding is within the political competence of the Riigikogu, and the Chancellor of Justice has no ground to interfere into it.

In several European states it is the parliament who exercises control over political party funding. The select committee of the implementation of Anti-corruption Act is under permanent public scrutiny, and the members thereof are politically liable for their activities. The committee can, if necessary, involve experts in its activities.

The Chancellor of Justice's timing of submitting to the Riigikogu the proposal to bring the Political Parties Act into conformity with the Constitution was unfavourable. Because of the complexity of the draft and the pre-election political situation the parliament had no possibility to adopt it within the period the Chancellor of Justice had in mind. There is no need to put pressure on the legislator by imposing deadlines for the adoption of laws.

16. The factions of the Estonian Green Party, the Social Democratic Party, the Estonian People's Union and of the Pro Patria and Res Publica Union share the opinion of the Chancellor of Justice that the existing control of political party funding is in conflict with the spirit of the Constitution, and they support the proposal to enhance the efficiency of monitoring the political party funding. The Estonian People's Union faction is of the opinion that because of the principles on which it is formed the Riigikogu select committee of the implementation of Anti-corruption Act can not possibly constitute an independent body supervising the political party funding. The faction of the Pro Patria and Res Publica Union adds further that it remains unclear to what extent exactly the Chancellor of Justice requests the declaration of unconstitutionality and invalidity of the Political Parties Act.

17. The faction of the Estonian Reform Party is of the opinion that the Chancellor of Justice has failed to convincingly reason his petition submitted to the Supreme Court, that the arguments presented are vague and indefinite and constitute subjective opinions. The petition of the Chancellor of Justice must not be satisfied, because the control of political party funding established by the law is not in conflict with the Constitution. The Estonian Reform Party faction underlines that it is up to the legislator to decide how to set up a monitoring body to supervise the political party funding. The arrangements of supervision of political party funding treat all political parties equally.

18. The Estonian Centre Party faction is of the opinion that the petition should not be satisfied. The existing procedure of political party funding is constitutional. The Centre Party faction points out to the Supreme Court that the Chancellor of Justice has based his petition on several material errors of discretion which can lead to wrong conclusions.

The interference of the state into the activities of political parties must be evaluated with the utmost caution. The Centre Party faction has doubts as to whether the amendment of the Act as requested will be constitutional and proportional to the desired aim. The fact that political parties are allocated substantial grants from the state budget does not entitle the state to regard political parties as so called state parties and to subject the individual members thereof as well as these organisations as legal persons to special state supervision. This infringes fundamental rights and the mechanisms of protection of democracy.

The measures provided for the guarantee of transparency of political party funding are sufficient. Besides this there is the interest and influence of the press. Consequently, the existing system is a system wherein different elements complement each other and which prevents or balances possible excessive state interference. The requested amendment would create a possibility for the emergence of so called opinion police. The dispute about to what extent efficient supervision of funding could be told apart from efficient supervision of political parties and the members thereof would give a wrong signal to the public about the nature of democracy.

It is reasonable to assess the efficiency of the Political Parties Act and the related legislation in a consistent manner and amend these, if need be, but what is requested by the Chancellor of Justice is not the only possible solution, neither is it indisputably constitutional. The dangers inherent in the proposal of the Chancellor of Justice are bigger than the alleged benefits, threatening – contrary to what is desired – the principle of democracy.

CONTESTED PROVISIONS

19. The Chancellor of Justice regards §§ 12^1 to 12^4 of the Political Parties Act to be relevant. §§ 12^1 to 12^4 of the Political Parties Act read as follows:

"§ 12^1. Assets and funds of political parties
(1) Only membership fees established by the articles of association of a political party, allocations from the state budget received pursuant to this Act, donations of natural persons and income earned on the assets of the political party are the source of the assets and funds of the political party.
(2) Political parties shall not accept anonymous or concealed donations.
(3) The assignment of any goods, services, proprietary or non-proprietary rights to a political party under the conditions which are not available to other persons is deemed to be a concealed donation.
(4) A political party may enter into a loan agreement or credit agreement if the lender or creditor is a credit institution and the agreement is secured by the assets of the political party or by the suretyship of its member.

§ 12^2. Annual report
(1) In order to prepare an annual report, political parties which receive allocations from the state budget shall conduct an audit.
(2) The general meeting of a political party or, pursuant to the articles of association, a substituting body thereof, shall approve the annual economic activity report each year and shall publish the report also on the webpage of the political party. The annual report together with the annexes prescribed by law shall be published in the Riigi Teataja Lisa [Appendix to the State Gazette].

§ 12^3. Accessibility of donations
(1) A political party shall maintain a register of donations received by the political party. The political party shall publish the register of donations on its webpage.
(2) The register of donations shall set out the names of the donors, the details thereof and the value of the donations. In the case of a non-monetary donation, the value of the donation shall be determined by the donor.
(3) The accuracy of the information in a register of donations shall be ensured by the leadership of the political party.
(4) Political parties shall not accept anonymous donations or donations from legal persons. If possible,

political parties shall return such donations to the donor. In the absence of the possibility, political parties shall transfer the donations into the state budget within ten days where it is added to the funds to be allocated to political parties from the state budget in the following budgetary year.

§ 12^4. Accessibility of financing of election campaign
(1) Political parties shall submit, within one month after election day, a report to the committee specified in subsection 14 (2) of the Anti-corruption Act concerning expenses incurred and sources of funds used for the conduct of the election campaign in Riigikogu or local government council elections or elections to the European Parliament by the political party, non-profit associations specified in § 12^6 of this Act or persons who stood as candidates in the list of the political party.
(2) The committee specified in subsection (1) of this section has the right to demand additional documents concerning expenses incurred and sources of funds used by political parties, non-profit associations specified in § 12^6 of this Act or persons who stood as candidates."

OPINION OF THE SUPREME COURT EN BANC

20. In part I of the judgment the Supreme Court en banc shall adjudicate the issue of permissibility of the petition of the Chancellor of Justice and in part II the issue of whether the contested provisions are relevant. In part III of the judgment the Supreme Court en banc shall analyse the arguments of the Chancellor of Justice concerning the independence of the existing monitoring bodies, and in part IV the ability of the existing monitoring bodies, arising from the law, to supervise the political party funding. In part V of the judgment the Supreme Court en banc shall form an opinion on the petition of the Chancellor of Justice.

I.

21. The Chancellor of Justice requests that the Supreme Court declare unconstitutional those provisions of the Political Parties Act which no not provide for efficient control of political party funding, and that the Court require that the Riigikogu set up a monitoring body meeting the minimum requirements.

22. Consequently, the petition of the Chancellor of Justice contains two interrelated parts – a request that the Court establish unconstitutionality and a request that the Court require taking of measures. If the request is permissible pursuant to the procedural rules, the provisions related to the request to establish unconstitutionality are relevant and the request to establish unconstitutionality is to be satisfied, the Supreme Court en banc shall have to form an opinion concerning the request that the Court require taking of measures. Consequently, the first procedural prerequisite for the adjudication of the matter is that the Court ascertain the permissibility of the Chancellor of Justice's request to have unconstitutionality established.

23. What the Chancellor of Justice regards unconstitutional in his request to have unconstitutionality established is the legislator's failure to act, which – in his opinion – concisely consists in the fact that although the legislator has established legal regulation to check the sources of political party funding, it has chosen a mechanism which does not allow to ascertain the actual sources of political party funding. The Chancellor of Justice argues that the failure to establish a mechanism conforming to the constitutional requirements, i.e. a mechanism enabling to ascertain the actual sources of political party funding, constitutes the legislator's unconstitutional omission. To justify the permissibility of his petition the Chancellor of Justice argues that in its judgment of 2 December 2004 in case no 3-4-1-20-04 the Constitutional Review Chamber accepted the right of the Chancellor of Justice to contest the legislator's omissions.

24. The Constitutional Review Chamber had doubts, bearing in mind the competence given to the Chancellor of Justice by law, as to the permissibility of the request to establish unconstitutionality, when in 2007 the Chamber heard the petition of the Chancellor of Justice at its open hearing in the panel of five justices. It appears from the additional opinions submitted by the participants in the proceedings subsequent to the referral of the matter to the Supreme Court en banc that the Constitutional Committee of the Riigikogu and the Minister of Justice do not consider the petition of the Chancellor of Justice permissible, arguing that the Chancellor of Justice has no competence to contest a failure to pass legislation of general application

(paragraphs 12 and 13 of this judgment).

25. In regard to permissibility of the petition the following issues need to be addressed.

26. First, § 6(1) 1), 2) and 3) of the Constitutional Review Court Procedure Act entitle the Chancellor of Justice to petition the Supreme Court that it declare legislation of general application or a provision thereof issued by a legislative, executive or local government body, which has entered into force, invalid; to declare an Act which has been promulgated but has not entered into force unconstitutional; or to declare legislation of general application issued by an executive or local government body, which has not entered into force, unconstitutional. § 18(1) of the Chancellor of Justice Act establishes that if a body which passed legislation of general application has not brought the legislation or a provision thereof into conformity with the Constitution or the law within twenty days after the date of receipt of a proposal of the Chancellor of Justice, the Chancellor of Justice shall propose to the Supreme Court that the legislation of general application or a provision thereof be repealed.

Consequently, the laws explicitly provide for the competence of the Chancellor of Justice to contest the constitutionality of an existing regulation, but the laws are silent about the Chancellor of Justice's right to contest the inactivity of the body which has passed an Act.

27. Secondly, there is no doubt that when legislation of general application required by the Constitution has not be passed at all, this amounts to legislator's failure to act. The possibility to contest and declare the unconstitutionality of a failure to pass legislation of general application was clearly established for the first time by the State Liability Act and the Constitutional Review Court Procedure Act Amendment Act, passed by the Riigikogu on 28 April 2004. This was done in relation to amendment of § 14(1) of the State Liability Act (hereinafter "the STL").

The earlier wording of § 14(1) of the SLA provided for a person's possibility, under certain conditions, to claim compensation for the damage caused by legislation of general application, if the Supreme Court has declared a provision thereof unconstitutional or invalid. The new wording allows, under certain conditions, to claim compensation also for damage caused by the failure to pass legislation of general application. According to the explanatory letter to draft 357 SE the purpose of § 14(1) of the STL is to confer rights on individuals. In the explanatory letter to the draft the failure to pass legislation of general application was understood as follows: "On the national level the failure to pass legislation of general application means the cases when the legislator has not established a procedure required by the Constitution or when, despite of the existence of a provision delegating authority to adopt implementing legislation, the latter is not adopted."

28. The State Liability Act and the Constitutional Review Court Procedure Act Amendment Act amended the Constitutional Review Court Procedure Act (hereinafter "the CRCPA") all through.

§ 9(1) of the CRCPA was amended to the effect that the a court of first or second instance shall refer a relevant judgment or ruling to the Supreme Court also when it declares the failure to pass legislation of general application unconstitutional. The Administrative Law, Civil or Criminal Chambers, as well as the special ad hoc panel, were given the right to refer matters to the Supreme Court en banc also when a Chamber or the special panel has doubts as to the constitutionality of failure to pass legislation of general applications relevant in the adjudication of a case (§ 3(3) of the CRCPA). The competence of the Supreme Court in constitutional review court procedure was extended, in relation to the aforesaid, to include the right to declare failures to pass legislation of general application unconstitutional (§ 15(1)2^1) of the CRCPA.

The Supreme Court en banc points out that by the State Liability Act and the Constitutional Review Court Procedure Act Amendment Act, passed on 28 April 2004, also §§ 24(3), 31(2), 35(2) and 46(4) of the CRCPA were amended so that the Supreme Court has the right, in different types of cases which it adjudicates as the sole court instance by way of constitutional review procedure, declare a failure to pass legislation of general application unconstitutional.

29. The Supreme Court en banc is of the opinion that §§ 9(1) and 15(1)2^1) of the CRCPA are interrelated with § 14(1) of the SLA, and consequently have been meant to be applied only in relation to claims for compensation for damage caused by failure to pass legislation of general application. The Chancellor of Justice who exercises abstract norm control can not have claims arising from § 14(1) of the SLA. Such claims may be submitted to a first instance court by natural and legal persons, including local governments. As regards the local governments, the claims arising from § 14(1) of the SLA can be possible in the cases when the failure to pass legislation of general application violates the constitutional guarantees of local governments (e.g. the state budget fails to allocate finances for the performance of state functions) as well as in the cases when through failure to pass legislation of general application damage has been caused to a local government in some other way.

30. The Constitutional Review Court Procedure Act was not amended in regard to the competence of the Chancellor of Justice (§ 6), and the referred Act still does not provide for the competence of the Chancellor of Justice to contest in the constitutional review proceedings the failure to pass legislation of general application. Neither does the Chancellor of Justice Act confer such right on the Chancellor of Justice. In regard to the Chancellor of Justice the Supreme Court en banc has held in its judgment of 19 April 2005 in case no 3-4-1-1-05 that the Chancellor of Justice can only act pursuant to law (paragraph 49 of the judgment). Consequently, there is no ground in the valid law on the basis of which the Chancellor of Justice could, in constitutional review court procedure, contest the unconstitutionality of a situation wherein an Act required by the Constitution does not exist.

The Supreme Court en banc points out that § 7 of the CRCPA, regulating the competence of local government councils, was not amended, either. Thus, the law does not give a local government council, within abstract norm control, the competence to contest in the Supreme Court the failure to pass legislation of general application for the realisation of constitutional guarantees of local governments.

31. Thirdly, the permissibility of the petition of the Chancellor of Justice must be analysed because of the fact that in its judgment of 2 December 2004 in case no 3-4-1-20-02 (paragraphs 42 to 45) the Constitutional Review Chamber has made a reference to its judgment of 21 January of the same year in case no 3-4-1-7-03, and has found that in the latter judgment the Supreme Court has recognised the Chancellor of Justice's right to contest the legislator's failure to act. In the present matter the Chancellor of Justice has made a reference to this very judgment and has come to the conclusion that the Supreme Court has already accepted his corresponding competence.

32. The Supreme Court en banc is of the opinion that the reference made in the judgment of 2 December 2004 is inaccurate. In the judgment of 21 January 2004 the Constitutional Review Chamber has not formed a clear opinion that the Chancellor of Justice is competent to contest the unconstitutionality of the legislator's failure to act.

In the matter adjudicated by the judgment of the Constitutional Review Chamber of 21 January 2004 the dispute concerned a restricting norm of the Social Welfare Act, which established the conditions of compensation for housing expenses and did not allow for the compensation for certain housing expenses on the basis of this Act. On the basis of the petition of the Chancellor of Justice the Supreme Court declared the restricting norm of the Social Welfare Act unconstitutional. In essence both the Chancellor of Justice and the Supreme Court considered it necessary to have the norm amended so that the expenses previously excluded from the norm could be compensated for.

33. The Supreme Court en banc is of the opinion that the activity of the legislator as a result of which a regulation is enacted which excludes the exercise of a right can simultaneously be regarded as imposition of an unconstitutionally restricting regulation or as a failure to establish a regulation required by the Constitution. In such a situation the contesting of a restricting norm may mean contesting of the legislator's failure to act, which consists in failure to establish a regulation required by the Constitution.

34. §§ 6(1)1), 2) and 3) of the CRCPA and § 18(1) of the Chancellor of Justice Act, determining the competence of the Chancellor of Justice, enable the Chancellor of Justice to contest the failure to act of the body who has passed legislation of general application by the argument that the existing regulation is unconstitutional because it does not contain what is required by a fundamental right. It appears form the petition of the Chancellor of Justice that this is the case in the present matter. The competence of state bodies exercising supervision over political party funding is determined by norms which can simultaneously be regarded as norms conferring rights as well as norms prohibiting everything that is not allowed by these norms.

35. Consequently, the petition of the Chancellor of Justice that the Political Parties Act be declared partly unconstitutional is permissible under the of procedural law.

II.

36. Next, the Supreme Court en banc shall examine whether the norms of the Political Parties Act referred to by the Chancellor of Justice (paragraph 17 of the judgment) are relevant. The Chancellor of Justice argues that the Political Parties Act has chosen the measures which do not enable to ascertain the actual sources of political party funding.

The Supreme Court en banc is of the opinion that the control mechanism of the sources of political party funding may be established in different Acts. The substantive norms can be found in §§ 12^1, 12^2, 12^3 and 12^4 of the Political Parties Act as well as in other Acts. However, the Supreme Court en banc argues, too, that it is primarily the Political Parties Act that should see to it that the actual sources of political party funding could be ascertained. As the Political Parties Act is an Act regulating political parties and the funding thereof, it is upon adopting the Political Parties Act that the legislator must ensure the existence of a control mechanism reaching the actual sources of political party funding. If the Political Parties Act establishes that other Acts shall further specify the control of political party funding, the drawbacks of the control mechanism enacted by other Acts are the drawbacks of the Political Parties Act. If the control mechanism provided for in other Acts does not enable to ascertain the actual sources of political party funding, it must be concluded that the Political Parties Act is unconstitutional to the extent that it does not guarantee that the actual sources of political party funding are ascertained.

Consequently, the Supreme Court en banc is of the opinion that the Political Parties Act is a relevant Act.

III.

37. In his petition the Chancellor of Justice has questioned the independence of auditors, the Riigikogu select committee of the implementation of Anti-corruption Act, and of the police.

38. The Supreme Court en banc agrees with the Chancellor of Justice that monitoring bodies must not only be but also appear to be independent. The Supreme Court en banc points out that in regard to a body formed on political party bases, e.g. even in regard to a Riigikogu investigation committee formed on the basis of § 20 of the Riigikogu Rules of Procedure and Internal Rules Act, it is difficult to achieve the body’s apparent independence through legal regulation. Yet, the Supreme Court en banc argues that apparent dependence can not result in the unconstitutionality of the Act establishing the position of monitoring bodies.

39. The Chancellor of Justice argues that an auditor is a person in private law, chosen to conduct audit and paid by a political party itself, and therefore the activities of an auditor as a control body need not appear to be independent. Irrespective of the fact that the Chancellor of Justice alleges the apparent dependence of an auditor, the Supreme Court en banc shall analyse whether the legislator has enacted a regulation to guarantee the actual independence of auditors.

Auditors act on the basis of the Authorised Public Accountants Act (hereinafter “the APAA”), and according to § 43 of the Act an auditor and a client enter into an agreement, concerning – among other things the

auditor who performs the contract and the auditor in charge, their obligations, and their remuneration. The legal relationship between an auditor and a political party does not differ in any way from the relationship e.g. between an auditor and a company. The Supreme Court en banc can not conclude on the basis of the mere fact that an auditor is being remunerated on the basis of a contract entered into with a client, in this case with a political party, that the auditor's activities may not appear to be independent. The Supreme Court en banc is of the opinion that a sufficient guarantee of independent activities of an auditor is not the manner of remuneration but the requirements set to auditors in § 21 of the APAA, the restrictions on activities of auditors provided for in § 39 of the Act, the signing of the auditor's report by the auditor who performs a contract with a client and the auditor in charge (§ 33(2) of the Act), the possibility of suspension of professional activities of auditors on the basis of § 28(1)2) of the Act, the possibility of termination of professional activities of auditor on the basis of § 29(2)2) or 6), and disciplinary proceedings against auditors on the basis of § 45 of the Act.

40. The Riigikogu select committee of the implementation of Anti-corruption Act is composed of the representatives of the political parties represented in the Riigikogu.

The Chancellor of Justice argues that setting up a supervisory body consisting only of the representatives of political parties rises the issue of the independence of that body from political interests and creates a danger of possible collusions.

With a view to achieving independence from political party interests the Riigikogu select committee of the implementation of Anti-corruption Act is made up of representatives of all factions of the Riigikogu on a basis of parity. Presumably, political parties who politically compete with each other are interested that none of the political parties achieved a competitive advantage thanks to uncontrollable funds.

The Chancellor of Justice has not presented evidence enabling the Supreme Court en banc to conclude that the described manner of setting up the committee does not guarantee the actual independence thereof, and that the parliamentary factions which compete with each other in other political issues have a common interest not to have the actual sources of political party funding ascertained, rendering the discharge of the functions imposed on the committee impossible. Instead, the documents of this court case tend to indicate that the 11th Riigikogu, and thus also the select committee of the implementation of Anti-corruption Act set up by the 11th Riigikogu, do have the interest of ascertaining the actual sources of political party funding. Namely, The Estonian People's Union faction, the faction of the Social Democratic Party, Estonian Green Party faction and Pro Patria and Res Publica Union faction consider the control mechanism of political party funding established in the Political Parties Act unconstitutional.

41. The Chancellor of Justice argues that the police authorities are not independent in the institutional sense, that they form a part of the executive.

Police authorities are a part of the executive. However, this fact must not give rise to mistrust of the police as an institution. The Supreme Court en banc is of the opinion that in a state based on the rule law it must be presumed that in the proceeding of offences and misdemeanours police authorities are independent of the government formed on political bases and of the Minister of Internal Affairs appointed on political bases. If there are doubts that the executive has unlawfully interfered with the proceedings of a criminal offence or a misdemeanour matter, appropriate legal remedies must be used. Also, it is possible to use the measures of parliamentary control established in the Riigikogu Rules of Procedure and Internal Rules Act, namely to form a committee of investigation (§ 20), to initiate expression of no confidence (§ 133), to submit an interpellation to a member of the Government of the Republic (§ 139), to pose oral questions to a member of the Government of the Republic in Question Time (§ 143), to submit written questions to a member of the Government of the Republic (§ 147).

42. For the above reasons the Supreme Court en banc has no ground to hold that auditors, the Riigikogu select committee of the implementation of Anti-corruption Act, and the police, when exercising control of the legality of political party funding, are dependent on the political parties subject to control. The Supreme

Court en banc is of the opinion that the main issue is whether the competence of the bodies exercising control of political party funding allows, if need be, to ascertain the actual sources of political party funding.

IV.

43. Next, the Supreme Court en banc shall analyse the political party funding monitoring system in its entirety, i.e. the requirements set out in the Political Party Act (hereinafter "the PPA") on the disclosure of sources of political party funding, and the competence of the Riigikogu select committee of the implementation of the Anti-corruption Act, of the auditors, the Tax and Customs Board and the police to supervise political party funding. At that the Supreme Court en banc shall review the constitutionality of the regulatory provisions providing for the control of political party funding.

44. The Political Parties Act provides for general requirements for political party funding. According to § 12^1 of the PPA only membership fees established by the articles of association of a political party, allocations from the state budget received pursuant to this Act, donations of natural persons and income earned on the assets of the political party are the source of the assets and funds of the political party. Political parties are not allowed to accept anonymous or concealed donations. Whereas, the assignment of any goods, services, proprietary or non-proprietary rights to a political party under the conditions which are not available to other persons is deemed to be a concealed donation. Neither are political parties allowed to accept donations from legal persons and, if possible, political parties shall return such donations to the donor; in the absence of the possibility, political parties shall transfer the donations into the state budget within ten days where it is added to the funds to be allocated to political parties from the state budget in the following budgetary year (§ 12^3 (4) of the PPA). The restrictions to political parties upon acceptance of donations, as well as the requirements for the disclosure of donations also apply to non-profit associations in which the political party is a member (§ 12^6 of the PPA).

At the same time the Political Parties Act does not specify the term "donation". To substantiate the term the definition of concealed donation in § 12^1(3) of the PPA is important, pursuant to which "the assignment of any goods, services, proprietary or non-proprietary rights to a political party under the conditions which are not available to other persons" is deemed to be a concealed donation. It can be concluded from the list included in § 12^1(1) of the PPA that allocations from the state budget and membership fees are not deemed to be donations for the purposes of the Political Parties Act. Consequently, a donation for the purposes of the Political Parties Act can be defined as the assignment of any goods, services, proprietary or non-proprietary rights to a political party, with the exception of membership fees and allocations from the state budget.

45. The requirements concerning submission of financing reports form the bases for the control of political party funding. The Political Parties Act provides for measures to guarantee the accessibility of sources of political party funding during the election period and in between elections.

There is the principle that the donations accepted shall be accessible and that a political party shall maintain a register of donations received and shall publish the register of donations on its webpage (§ 12^3(1) of the PPA). The register of donations published on a political party webpage shall set out the names of the donors, the details thereof and the value of the donations, whereas in the case of a non-monetary donation, the value of the donation shall be determined by the donor (§ 12^3(2) of the PPA). The leadership of the political party is under the obligation to ensure the accuracy of the information in a register of donations (§ 12^3(3) of the PPA).

Each year the general meeting of a political party or, pursuant to the articles of association, a substituting body thereof, shall approve the annual economic activity report and shall publish the report also on the webpage of the political party; the annual report together with the annexes prescribed by law shall be published in the Appendix to the State Gazette (§ 12^2(2) of the PPA).

The Political Parties Act also establishes the obligation to submit reports concerning the funds used for the conduct of election campaigns. Thus, political parties shall submit, within one month after election day, a

report to the Riigikogu select committee of the implementation of the Anti-corruption Act concerning expenses incurred and sources of funds used for the conduct of the election campaign in Riigikogu or local government council elections or elections to the European Parliament by the political party, non-profit associations (non-profit associations in which the political party is a member) specified in § 12^6 of the Political Parties Act or persons who stood as candidates in the list of the political party (§ 12^4(1) of the PPA). The same reporting requirements are provided for in § 65 of the Riigikogu Election Act, § 59 of the Local Government Council Election Act, and § 63 of the European Parliament Election Act.

The Supreme Court en banc points out that the principle of accessibility constitutes an important institute, enabling to ascertain the actual sources of political party funding.

46. In order to prepare an annual report, political parties which receive allocations from the state budget shall conduct an audit (§ 12^2(1) of the PPA).

According to § 2(4) of the Authorised Public Accountants Act auditing means the examination of financial statements and the provision of an opinion pertaining thereto according to the auditing rules. According to the auditing rules an auditor has the duty to express an opinion on the annual financial statements. The auditor has to ascertain whether the accounting data and other information supporting the amounts and disclosures in the financial statements are reliable and sufficient for the preparation of financial statements.

The auditor controls whether the financial statements of a political party present fairly, in all material respects, the financial position of the political party. The auditor also checks whether the financial statements are in accordance with the requirements of the Political Parties Act. The auditor can check whether the statements reflect only the income received from the permissible sources enumerated in § 12^1(1) of the PPA. Also, the auditor can check whether the loan agreements or credit agreements of a political party meet the requirements provided for in § 12^1(4) of the PPA, i.e. whether the lender or creditor is a credit institution and the agreement is duly secured.

Within an audit it is possible, in principle, to ascertain whether a political party has received income which is not reflected in the annual report. From the point of auditing such cases amount to violations of accounting requirements.

The liability of auditors in auditing activities is provided for in § 44 of the APAA (supervision of activities of auditors) and § 45 of the APAA (disciplinary proceedings against auditors). The auditors' liability under penal law is established in § 279 of the Penal Code (an auditor or a person conducting a special audit who in a report fails to submit or incorrectly submits significant facts which became known to him or her in the conduct of an audit or special audit shall be punished by a pecuniary punishment or up to one year of imprisonment). In both cases liability is invoked upon the receipt of relevant information or other information indicating at the commission of a violation. Neither is the supervision of the management board of the Board of Auditors excluded on its own initiative.

It can be concluded on the bases of the above explanations that an auditor's supervision constitutes a wide-scale accounting supervision over the financial activities of a political party. For infringements upon auditing the auditor's liability is provided for pursuant to disciplinary or criminal procedure.

The Chancellor of Justice is of the opinion that in regard to conformity with the requirements of the Political Parties Act the auditor's activities are primarily confined to formal control, as the auditor can not check the concealed funding of a political party nor investigate the sources of donations. The Supreme Court en banc considers it important to examine the role of auditing in the preparation of a political party's annual report within the context of the political party funding control system as a whole. The actual sources of political party funding can not be ascertained solely through the activities of an auditor. As an auditor only audits the annual reports, the auditor's competence within the control of political party funding must be viewed in conjunction with the competence of other controlling bodies.

47. The Riigikogu select committee of the implementation of the Anti-corruption Act is set up on the basis of § 14(2) of the Anti-corruption Act primarily for the performance of the duties arising from the Anti-corruption Act and for contributing to the taking of uniform measures for the prevention of corruption. The Riigikogu select committee of the implementation of the Anti-corruption Act also has the duty to ensure the accessibility of election campaign funding. Political parties shall submit, within one month after election day, a report to the select committee concerning expenses incurred and sources of funds used for the conduct of the election campaign in Riigikogu or local government council elections or elections to the European Parliament by the political party, non-profit associations specified in § 12^6 of the Political Parties Act or persons who stood as candidates in the list of the political party (§ 12^4(1) of the PPA). The same obligation is established in the election laws the Local Government Council Election Act (hereinafter "the LGCEA"), the Riigikogu Election Act, and the European Parliament Election Act. For example, according to § 59(1) of the LGCEA a political party shall submit a report on the expenditure relating to its election campaign and the sources of the funds used to the Riigikogu select committee of the implementation of the Anti-corruption Act within one month after election day. The report shall set out the date of receipt of the funds, the type of funds, the value of the funds in kroons, and the name and personal identification code or registry code of the person who allocated the funds (§ 60(1) of the LGCEA). § 6082) of the LGCEA enumerates the types of funds a political party is allowed to receive. These are membership fees established by the articles of association of the political party, donations by natural persons, allocations from the state budget, income earned on the assets of the political party, and loans or credit received under the conditions provided in § 12^1 (4) of the PPA.

The work of the select committee is regulated by § 22(1) of the Riigikogu Rules of Procedure and Internal Rules Act, according to which the committee has the right to demand information necessary for the performance of its functions from the Government of the Republic and agencies of executive power, demand that a member of the Government of the Republic participate in a committee sitting in order to obtain information on matters within the powers of the member of the Government, and to invite officials of government agencies and other persons to participate in a committee sitting in order to inform and advise the committee. Also, the Riigikogu select committee of the implementation of the Anti-corruption Act has the right to demand additional documents concerning expenses incurred and sources of funds used by political parties, non-profit associations specified in § 12^6 of the Political Parties Act or persons who stood as candidates (§ 12^4(2) of the PPA).

The role of the Riigikogu select committee of the implementation of the Anti-corruption Act, too, must be evaluated within the control system of political party funding. Namely, the Riigikogu select committee of the implementation of the Anti-corruption Act addresses only some of the issues of political party funding, i.e. reports concerning election expenditure. That is why the competence of the Riigikogu select committee of the implementation of the Anti-corruption Act within the control of political party funding must be viewed in conjunction with the competence of other monitoring bodies.

48. According to § 7(2) of the Statutes of the Tax and Customs Board the functions of the Board include state tax proceedings, verification of the correctness of the calculation and payment of state taxes, and monitoring the payment of taxes and implementation of tax incentives in the amount and pursuant to the procedure provided by law, as well as calculation and assessment of the tax amounts and interests payable.

Consequently, a tax authority monitors compliance with the Taxation Act (hereinafter "the TA") and with Acts concerning taxes within the limits of the competence granted to the tax authority by law (§ 10(1) of the TA). Whereas the duties of a tax authority are the following: 1) to verify the correctness of the calculation and payment of taxes and to monitor the payment of taxes and the application of tax incentives in the amount and pursuant to the procedure provided by law, 2) to calculate and make an assessment of tax and interest due in the cases provided by law and to return overpaid amounts and amounts to be compensated for, 3) to collect tax arrears, 4) to impose coercive measures and punishments permitted by law on persons who violate an Act concerning a tax (§ 10(2) of the TA).

According to § 27(1) of the Income Tax Act (hereinafter "the ITA") a resident natural person has the right to deduct gifts and donations of which there is documented proof and which are made during a period of taxation to persons included in the list specified in § 11 (1) of the ITA or to a political party specified in § 11(10) of the ITA from the income which the resident natural person receives during the period of taxation. A political party included in the list specified in § 11(1) of the ITA is required to submit declarations to a regional structural unit of the Tax and Customs Board concerning the gifts and donations received during a calendar year and concerning the use of such gifts, donations and other income (§ 57^1(3) of the ITA).

According to § 27(1)7) of the TA the tax authorities may disclose to anyone without the consent of or without having informed a taxable person the information concerning the income of a political party entered in the list of non-profit associations including the gifts and donations made to such political party, and information concerning the use of the gifts and donations. Consequently, § 27(1)7) of the TA allows for the control of the public of the donations made to political parties and the use thereof. At the same time the provision does not give rise to the liability of the tax authority for the accuracy of the information or to its duty to verify the accuracy thereof.

49. The liability for the violation or requirements and restrictions concerning political party funding is established in chapter 2^2 "Liability" of the Political Parties Act (two misdemeanours in §§ 12^{14} and 12^{15}), and in Chapter 21 division 8 "Offences relating to Political Parties" of the Penal Code.

According to § 12^{14} of the PPA a violation of the procedure for the registration and disclosure of donations to a political party is punishable by a fine of up to 300 fine units; the same act, if committed by a legal person, is punishable by a fine of up to 50 000 kroons. According to § 12^{15} of the PPA a violation of the procedure for the disclosure of the annual economic activity report, a quarterly statement of funds received by a political party and financing of the election campaign of a political party is punishable by a fine of up to 300 fine units; the same act, if committed by a legal person, is punishable by a fine of up to 50 000 kroons.

According to § 402^1 of the Penal Code a violation of the restrictions established on the economic activities or assets of a political party is punishable by a pecuniary punishment; the same act, if committed by a legal person, is punishable by a pecuniary punishment. According to § 402^2 of the Penal Code accepting a donation made to a political party by an anonymous, concealed or legal person is punishable by a pecuniary punishment; the same act, if committed by a legal person, is punishable by a pecuniary punishment.

The extra-judicial body which conducts proceedings in matters of misdemeanours provided for in the Political Parties Act is a police prefecture (§ 12^{16}(2) of the PPA). Pre-trial proceedings in criminal matters are conducted by the Police Board, in certain cases also by the Security Police Board (§ 212(1) of the Code of Criminal Procedure – hereinafter "the CCP"). The activities of the police in proceeding offences are regulated by the Code of Misdemeanour Procedure (hereinafter "the CMP") and the Code of Criminal Procedure.

Pursuant to the principle of mandatory criminal proceedings (§ 6 of the CCP) the investigative bodies and Prosecutors' Offices are required to conduct criminal proceedings upon the appearance of facts referring to a criminal offence. Criminal proceedings are commenced when there exist reasons and grounds for criminal proceedings a report of a criminal offence or other information indicating that a criminal offence has taken place (§ 194(1) of the CCP), in which the existence of criminal elements is ascertained (§ 194(2) of the CCP). Information released in the press indicating that a criminal offence has taken place, received by a Prosecutor's Office or an investigative body, may be the reason for the commencement of criminal proceedings (§ 197(1) of the CCP), also information indicating that a criminal offence has taken place, received by an investigative body or a Prosecutor's Office in the performance of the duties thereof, may be the reason for the commencement criminal proceedings (§ 197(2) of the CCP).

Consequently, both a report of a criminal offence and other information indicating that a criminal offence has taken place including a complaint of crime, information released in the press indicating that a criminal

offence has taken place, received by a Prosecutor's Office or an investigative body, and information indicating that a criminal offence has taken place, received by an investigative body or a Prosecutor's Office in the performance of the duties thereof may serve as reasons for the commencement of criminal proceedings. The reasons for commencement of criminal proceedings include also information from an auditor, the Riigikogu select committee of implementation of the Anti-corruption Act and the Tax and Customs Board. In regard to reasons for commencement of misdemeanour proceedings the referred provisions are applicable (§ 2 of the CMP).

The police has an obligation to commence proceedings if it receives information in which the police ascertains the elements of a misdemeanour provided for in §§ 12^{14} or 12^{15} of the PPA or the criminal elements provided for in §§ 402^{1} or 402^{2} of the Penal Code. In this way, within misdemeanour proceedings, the police exercises control of conformity of the political party funding to the requirements of the law.

The Supreme Court en banc proceeds from the presumption that state officials who exercise control duties in different spheres inform competent state authorities if elements of an offence become apparent, to ensure the conduct of proceedings concerning the doubts pursuant to the law.

50. On the basis of the above the Supreme Court en banc is of the opinion that the competences of the Riigikogu select committee of the implementation of the Anti-corruption Act, the auditors, the Tax and Customs Board and the police in their conjunction, and bearing in mind the requirement arising from the Political Parties Act to maintain a register of donations and submit annual financial reports which are disclosed, the whole control system of political party funding and the competence of control bodies in their conjunction are sufficient for finding out the actual sources of political party funding.

The Supreme Court en banc is of the opinion that the control bodies of political party funding are independent (see paragraphs 37 to 42 of the judgment). The competence thereof is sufficient supervising political party funding (see paragraphs 46 to 49 of the judgment), and the disclosure of the political party funds is ensured (see paragraph 45).

Even if we admitted that the regulatory provisions concerning the control of political party funding are not perfect, this in itself would not give rise to conflict with the Constitution. Not everything imperfect is unconstitutional.

V.

51. On the basis of the above the Supreme Court en banc dismisses the petition of the Chancellor of Justice requesting that the provisions of the Political Parties Act which do not provide for efficient control of political party funding be declared unconstitutional and that the Riigikogu be required to set up a monitoring body meeting the minimum requirements.

Dissenting opinion
of justice Jüri Põld to judgment in case no 3 4 1 3 07,
joined by justices Peeter Jerofejev, Hannes Kiris, Lea Kivi and Jaak Luik

1. I agree with the reasoning and the conclusions of the Supreme Court en banc set out in parts I, II and III of the judgment.

2. I also consent to the fact that in part IV the Supreme Court en banc focused on the norms establishing the control mechanism of political party funding (paragraph 43 of the judgment), leaving aside the administrative capacity of the monitoring bodies. Namely, I am of the opinion that as a rule the incapacity of a state authority to implement an Act does not constitute a reason to doubt the constitutionality of the Act. As a general rule, when a state authority is incapable of implementing an Act, the efficiency of the activities of the authority need to be enhanced. In my mind the constitutionality of an Act can depend on

administrative capacity only in the case when it is clear that the Act can not be implemented with existing administrative capacity, whereas it is clear that the administrative capacity can not be promptly enhanced to meet the requirements necessary for the implementation of the Act. In such a case the legislator would be at fault (the legislator has chosen the measures which are unsuitable for the achievement of an aim) An Act resulting from such activities may prove unconstitutional under certain conditions.

3. What I can not consent to is the conclusion and the decision set out in the first passage of paragraph 50 of the judgment. Namely, what is not convincing to me is the reasoning in part IV of the judgment, approved by the majority of the Supreme Court en banc, about the correctness of the conclusion set out in the first passage of paragraph 50, stating that "on the basis of the above the Supreme Court en banc is of the opinion that the competences of the Riigikogu select committee of the implementation of the Anti-corruption Act, the auditors, the Tax and Customs Board and the police in their conjunction and bearing in mind the requirement arising from the Political Parties Act to maintain a register of donations and submit annual financial reports which are disclosed, the whole control system of political party funding and the competence of control bodies in their conjunction are sufficient for ensuring a constitutional control mechanism over political party funding, including finding out the actual sources of political party funding".

4. To clarify my opinion I shall specify my idea of a regulatory framework enabling to ascertain the actual sources of political party funding.

As a matter of course no Act can guarantee that in the course of supervision all actual financers of all political parties are ascertained. In like manner, no regulatory framework of tax Acts of a democratic state can guarantee the detection of absolutely all violations of tax law. Nevertheless, the law must provide for such competence and structure of controlling bodies that would enable, in principle, to detect every single donor of each political party. No source of political party funding, like no type of income subject to taxation, should be excluded from control just because a controlling body lacks competence. What I also consider a part of a control mechanism is the obligations imposed on political parties by the law, such as the obligation to disclose their sources of funding. This is my idea of a regulatory framework enabling to detect the actual sources of political party funding.

5. I shall now analyse how the Supreme Court en banc came to the conclusion set out in the first passage of paragraph 50 of the judgment (paragraphs 6 to 8 of the dissenting opinion), and thereafter I shall give the reasons why I do not consider the justifications and the reasoning of the Supreme Court en banc convincing (paragraphs 9 to 12 of the dissenting opinion).

6. I find that when leaving aside the references to different Acts, which make up the bulk of part IV of the judgment, the reasoning of the Supreme Court en banc can briefly be summarised as follows:

1) the principle of accessibility constitutes an important institute, enabling to ascertain the actual sources of political party funding (last passage of paragraph 45);

2) the actual sources of political party funding can not be ascertained solely through the activities of an auditor. As an auditor only audits the annual reports, the auditor's competence within the control of political party funding must be viewed in conjunction wit the competence of other controlling bodies (sentences 2, 3 and 4 of the last passage of paragraph 46);

3) the role of the Riigikogu select committee of the implementation of the Anti-corruption Act, too, must be evaluated within the system of control of political party funding. Namely, the committee addresses only some of the issues of political party funding, i.e. reports concerning election expenditure.

4) a tax authority monitors the implementation of the Taxation Act (hereinafter "the TA") and other Acts concerning taxes (first sentence of the second passage of paragraph 48);

5) as the tax authorities may disclose to anyone without the consent of or without having informed a taxable person the information concerning the income of a political party entered in the list of non-profit

associations including the gifts and donations made to such political party, and information concerning the use of the gifts and donations, § 27(1)7) of the TA allows for the control of the public of the donations made to political parties and the use thereof. At the same time the provision does not give rise to the liability of the tax authority for the accuracy of the information or to its duty to verify the accuracy thereof (fourth passage of paragraph 48);

6) the police has an obligation to commence proceedings if it receives information in which the police ascertains the elements of a misdemeanour provided for in §§ 12^{14} or 12^{15} of the PPA or the criminal elements provided for in §§ 402^{1} or 402^{2} of the Penal Code. In this way, within misdemeanour proceedings, the police exercises control of conformity of the political party funding to the requirements of the law (seventh passage of paragraph 49);

7) “The Supreme Court en banc proceeds from the presumption that state officials who exercise control duties in different spheres inform competent state authorities if elements of an offence become apparent, to ensure the conduct of proceedings concerning the doubts pursuant to the law.” (last passage of paragraph 49 of the judgment.)

7. It appears from the above that the Supreme Court en banc is of the opinion that the public has an important role in detecting the actual sources of political party funding, that the competence of an auditor and of the Riigikogu select committee of the implementation of the Anti-corruption Act do not suffice to find out the actual sources of political party funding. Nevertheless, the whole system, encompassing the police, enables to detect the actual sources of political party funding.

8. I agree with the majority of the Supreme Court en banc that the competences of an auditor and the Riigikogu select committee of the implementation of the Anti-corruption Act do not enable to ascertain the actual sources of political party funding.

9. I do not consent to the majority of the Supreme Court en banc that § 27(1)7) of the TA allows for the control of the public of the donations made to political parties. The problems is not so much in the fact that the Taxation Act does not give rise to the tax authority’s liability for the accuracy of the information or to its obligation to verify the accuracy of the information. It can be concluded from the wording of § 27(1)7) of the TA that only the information contained on form INF9 is being born in mind, which means that the names of donors must not be disclosed. This would relate to tax secrecy of concrete persons.

That is why I am of the opinion that § 27(1)7) of the TA does not allow for an effective control of the public of the donations made to political parties. Moreover, I argue that a control mechanism enabling to ascertain the actual sources of political party funding ought to be a system institutionalised on the state level. The control of the public over the donations made to political parties could only supplement such a system.

10. I can not consider the opinion, that political methods enable to detect the actual sources of political party funding, convincing. The police is not a monitoring body, who is commencing control proceedings on its own initiative to find out the lawfulness of the cash-flow of political parties. The methods available to the police can only be used to check whether the information concerning this or that possible criminal offence or misdemeanour was true, i.e. whether a misdemeanour has been committed. The police commences proceedings on the basis of information received accidentally. I argue that an effective and permanently functioning control system can not be set up proceeding from the assumption that the state officials who exercise control in different spheres and the citizens shall inform competent state authorities, in this case the police, when they discover elements of offences. Furthermore, no Act provides for the obligation to inform the police of the offences related to political party funding.

11. On the basis on the logic of the majority of the Supreme Court en banc the Tax and Customs Board could only determine which taxes are payable and the determination of the amounts thereof could be the duty of the police. In this context I would like to pose the following question: would it be possible to argue the efficiency of a control system for the detection of violations of tax laws, wherein the tax authority is

deprived of e.g. the right to check on its own initiative the accuracy of payments of certain taxes and the tax authority is forced to function on the basis of applications submitted by citizens and state officials?

12. In the third passage of paragraph 50 of the judgment the majority of the Supreme Court en banc poses an opinion, which is surprising within the context of the reasoning of the judgment and to which I would not want to consent. The majority of the Supreme Court en banc is of the following opinion: “Even if we admitted that the regulatory provisions concerning the control of political party funding are not perfect, this in itself would not give rise to conflict with the Constitution.”

From the wording of the first sentence of the passage referred to it can be concluded that the majority of the Supreme Court en banc regards the regulatory framework of political party funding control mechanism perfect. How else could the phrase “even if we admitted that the regulatory provisions concerning the control of political party funding are not perfect…” be understood? In this wording the opinion of the majority of the Supreme Court en banc exceeds the highest expectations of the most ardent proponents of the existing control mechanism and constitutes the pearl of the judgment.

13. I am convinced that the existing control mechanism of political party funding is not sufficient to enable to detect the actual sources of political party funding and can not achieve the aims for which the control mechanism of political party funding is necessary (paragraph 10 of this dissenting opinion). Naturally, I am far from arguing that the existing control system does not enable to ascertain any of the sources of political party funding.

Let me point out in this context that the Government of the Republic and the GRECO (the Group of States Against Corruption), either, consider the existing control mechanism of political party funding capable of enabling to detect the actual sources of political party funding. The points of view of the Government are set out in the “Anti-corruption strategy for 2008 2012” and the implementation plan thereof, approved by the Government of the Republic order no 164 of 3 April 2008 (RTL 2008, 29, 433). The Strategy, Chapter VII of which is devoted to prevention of corruption in political party funding, and the implementation plan thereof are published on the webpage of the Ministry of Justice (http://www.korruptsioon.ee/34953 [1]). On the same webpage the Ministry of Justice has also published the recommendations concerning political party funding set out in the III report of the GRECO (http://www.korruptsioon.ee/34941 [2]).

14. As I agree with the majority of the Supreme Court en banc that the competence of an auditor and the competence of the Riigikogu select committee of the implementation of the Anti-corruption Act do not enable to ascertain the actual sources of political party funding, and as I also argue that the disclosure of donations and the police do not help to achieve the desired aim, there is no need to explain further why I am of the opinion that the existing control mechanism of political party funding does not enable to detect the actual sources of political party funding.

Nevertheless, trying to avoid major repetitions I would still point out the following aspects in regard to inefficiency of the existing control mechanism of political party funding.

15. First, I shall quote two passages from chapter VII of the anti-corruption strategy, approved by the Government of the Republic.

15.1. “The Money Laundering and Terrorist Financing Prevention Act does not cover the activities of political parties or other non-profit associations. This creates a situation wherein, if one goes to a political party office carrying cash, the political party has no obligation to identify the person in the case of a cash transaction involving a sum of more than 100 000 kroons, or to forward information to the Financial Intelligence Unit in the event of a suspicious transaction (with the exception of obligation arising from § 123 of the Political Parties Act to disclose the name of the donor).”

15.2. “At present the Political Parties Act and the election Acts provide for a very limited competence of the Riigikogu select committee of the implementation of the Anti-corruption Act. In essence the committee is

competent only to collect reports concerning election expenditure and donations, and to evaluate the formal legality thereof. But the committee has no competence to monitor the political party funding outside election campaigns and the reports concerning donations. Neither does the committee have any powers to exercise effective supervision. Thus, for example, the committee lacks administrative coercive measures for the enforcement of its orders."

16. It is not only the sphere to be monitored by the Riigikogu select committee of the implementation of the Anti-corruption Act in regard to political party funding that is limited. The rights of the committee in the sphere subject to control are limited, too.

The select committee has the rights provided for in § 22(1) of the Riigikogu Rules of Procedure and Internal Rules Act, i.e. the rights conferred to the standing committees as well as to committees of investigation. In addition to this the Riigikogu select committee of the implementation of the Anti-corruption Act has the right to demand, on the basis of § 12^4(2) of the Political Parties Act, additional documents concerning expenses incurred and sources of funds used by political parties, non-profit associations specified in § 12^6 of the Act or persons who stood as candidates.

A select committee has more limited rights than a committee of investigation, because § 22(2) of the Riigikogu Rules of Procedure and Internal Rules Act is not applicable to a select committee; the provision reads as follows: "A committee of investigation has the right to summon persons to appear before the committee and to demand information and documents necessary for the performance of its functions. A summoned person is required to appear, provide explanations and reply to questions. The information and documents demanded by the committee shall be submitted by the due date specified by the committee." Let me point out, though, that the Act does not provide for sanctions for the cases when the summoned person fails to appear before the committee of investigation.

Consequently, the Riigikogu select committee of the implementation of the Anti-corruption Act, exercising the rights it has, can not detect the actual sources of political party funding even within the sphere in which it has the monitoring competence.

17. In addition to what has been stated in regard to the Tax and Customs Board in paragraph 48 of the judgment and in paragraph 9 of the dissenting opinion, I consider it necessary to dwell upon the competence of the Board.

17.1. § 10(1) of the Taxation Act states unambiguously that a tax authority shall monitor compliance with the Taxation Act and with Acts concerning taxes. It is only the tax incentives of donors that are within the sphere of regulation of the Taxation Act. The Acts concerning taxes do not establish a prohibition on political parties to accept concealed donations or the corresponding obligation of the tax authority to check who made donations. The tax authority can only verify whether the person who has declared a tax incentive related to a donation has done it correctly (i.e. whether the person has made a donation). The tax authority can not monitor those donors who have not declared their tax incentives. If a donor alleges having made a donation and a political party confirms the receipt thereof and no other person claims the making of that donation, the tax authority has no competence to perform any other supervisory procedures. The competence of a tax authority can be realised through a concrete administrative act, administrative operation or imposition of a punishment for a misdemeanour. As regards the donations a tax authority can prohibit the deduction of a donation in the tax return and adjust the calculation of income tax accordingly. The competence to monitor the donations made to political parties requires concrete norms on competence, because the monitoring activities restrict the rights of a political party as a legal person, as well as the rights of a donor or of a person who is suspected of having made a concealed donation. This means that there have to be specific norms establishing which monitoring procedures are permissible, which information is to be submitted by who, etc..

17.2. The competence of the Tax and Customs Board to monitor political parties is thus confined to tax liability thereof. Acceptance of a concealed donation does not create tax liability to a political party.

Consequently, at present the Tax and Customs Board lacks the competence and the interest to ascertain the actual donors. In the case of a concealed donation the donor's tax liability may arise (e.g. expenses not related to enterprise, sale of goods or services at a price different from market price, a gift; see §§ 49, 51 and 52 of the Income Tax Act). This is something that the Tax and Customs Board can check, but then this check will concern one specific donor and all concealed donations of that donor, and not only the donations made to a political party.

18. I do not think that the deficiencies in the Acts regulating the control system of political party financing, not enabling to detect the actual sources of political party funding, automatically render the Political Parties Act unconstitutional. The Political Parties Act could be declared party unconstitutional after the conflict of the Act with the Constitution is ascertained.

19. To review whether the control mechanism provided for in the Acts, which do not enable to detect the actual sources of political party funding, is unconstitutional, it has to be ascertained why it is necessary to detect the actual sources of political party financing.

I am of the opinion that the law should provide for an effective control mechanism of political party funding in order to

1) ensure the equality of political parties in the sense that all political parties use "honest money", i.e. that political parties have equal opportunities in the political competition through the rules of fair play (political party equality as a component of the fundamental political party right arising from § 48(1) of the Constitution);

2) prevent political decisions being controlled by anonymous money, i.e. to prevent political corruption (principle of democracy of § 1 of the Constitution);

3) ensure that the electors can trust that a political party participating in elections is funded legally (active suffrage in §§ 57 and 156 of the Constitution);

4) ensure that a candidate can trust that the political party in whose list of candidates he or she participates is funded legally (passive suffrage in § 60(2) of the Constitution).

20. Thereafter it could be analysed whether the control mechanism that does not reach the actual sources of political party funding is constitutional in the light of each of the above aims. Bearing in mind how far the majority of the Supreme Court en banc went in its reasoning, there is no need for such thorough analysis in this dissenting opinion. Therefore I confine myself to the statement that in my opinion the Political Parties Act is unconstitutional to the extent that it does not provide for effective supervision of political party financing. I see a conflict with the equality of political parties arising from § 48(1) of the Constitution, and disproportionate interference with the active and passive suffrage, consequently a conflict with §§ 57, 156, and 60(2) of the Constitution. I find also that to the extent under discussion the Political Parties Act is in conflict with the principle of democracy, established in § 1 of the Constitution, as it does not prevent corruption to a sufficient extent.

21. Considering the existing control system of political party funding unconstitutional, I am of the opinion – unlike the Chancellor of Justice – that the insufficient competence of the existing monitoring bodies does not mean that the legislator is obliged to set up a new state authority with a new competence. I find that it is up to the legislator to decide whether to set up such a body or to supplement the competence of the existing monitoring authorities (primarily the Riigikogu select committee of the implementation of the Anti-corruption Act and/or the Tax and Customs Boars).

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[1] http://www.korruptsioon.ee/34953
[2] http://www.korruptsioon.ee/34941