Constitutional judgment 3-4-1-1-05

JUDGMENT
OF THE SUPREME COURT EN BANC

No. of the case	3-4-1-1-05
Date of judgment	19 April 2005
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Julia Laffranque, Jaak Luik, Jüri Põld, Harri Salmann, Tambet Tampuu and Peeter Vaher
Court Case	Petition of the Chancellor of Justice to declare § 701 of the Local Government Council Election Act and § 1(1), the first sentence of § 5(1) and § 6(2) of the Political Parties Act partly unconstitutional
Date of hearing	1 March 2005
Persons participating in the hearing	Chancellor of Justice Allar Jõks, Deputy Chancellor of Justice-Adviser Madis Ernits, adviser to Chancellor of Justice Nele Parrest; representative of the Ministry of Justice Kristjan Siigur and representative of the Riigikogu Urmas Reinsalu

DECISION

1. To satisfy the petition of the Chancellor of Justice partly.
2. To declare § 70^1 of the Local Government Council Election Act invalid.
3. To dismiss the request of Chancellor of Justice to declare §5(1) of the Political Parties Act invalid.

FACTS AND COURSE OF PROCEEDING

1. On 21 December 2004 the Chancellor of Justice filed a petition with the Supreme Court requesting that the court declare § 70^1 of the Local Government Council Election Act (hereinafter “the LGCEA”) and § 1(1), the first sentence of § 5(1) and § 6(2) of the Political Parties Act (hereinafter “the PPA”) to be in conflict with the Constitution and with the Treaty establishing the European Community, and invalid to the extent that the provisions do not allow to form election coalitions of citizens in local government council elections or political parties with the membership of less than 1 000 persons, for deciding and arranging local issues, to which also citizens of EU could belong. Previously, on 26 November 2004, the Chancellor of Justice had made a proposal to the Riigikogu “to bring § 1(1), the first sentence of § 5(1) and § 6(2) of the PPA in conjunction with § 70^1 of the LGCEA into conformity with the first sentence of § 48(1), § 156(1) of the Constitution, and Article 19 of the Treaty establishing the European Community, in their conjunction, by either providing for the institute of a local political party or by allowing election coalitions of citizens to participate in local government council elections”. On 14 December 2004 the Riigikogu decided to reject the proposal of the Chancellor of Justice.

2. § 6(2) of the PPA, contested by the Chancellor of Justice, establishing the prerequisite for the registration of a political party that it have at least 1 000 members, has been in force as of 16 July 1994. By way of exception, until the elections of the VIII Riigikogu, political parties could be founded and registered if they had at least 200 members (§ 13(2) of the PPA). The valid wording of §§ 1(1) and 5(1) of the PPA has been in force as of the same date.

3. The Local Government Council Election Act, contested by the Chancellor of Justice, entered into force on 6 May 2002. Differently from the previous regulation, the Act allowed persons to run as candidates in local government council elections only in the list of a political party or as independent candidates. On the basis of a petition of the Chancellor of Justice, in its judgment of 15 July 2002 in matter no. 3-4-1-7-02 (RT III 2002, 22, 251) the Constitutional Review Chamber of the Supreme Court declared the Local Government Council Election Act unconstitutional to the extent that it did not allow citizens' election coalitions to participate in the local government council elections.

4. On 30 July 2002 the Riigikogu amended the Local Government Council Election Act, allowing, in addition to political parties, also citizen's election coalitions to submit their lists in local government council elections. According to § 70^1 of the LGCEA, established by the amendment, the right of election coalitions to present the lists of candidates shall expire on 1 January 2005.

5. By its ruling of 18 January 2005 the Constitutional Review Chamber of the Supreme Court referred the matter to the Supreme Court *en banc* for hearing.

ARGUMENTS OF PARTICIPANTS IN THE PROCEEDING IN THE SUPREME COURT

6. The Chancellor of Justice is of the opinion that §§ 1(1) and § 6(2) of the PPA violate the fundamental right of political parties, established in § 48 of the Constitution.

6.1. The Chancellor of Justice is of the opinion that pursuant to § 1(1) of the Political Parties Act, the political parties are required to act both on national and local levels, i.e. the provision sets a restriction on the freedom of platform of political parties. § 6(2) of the same Act establishes the mandatory minimum number of members, i.e. it sets a restriction on the freedom of foundation of political parties. The referred restrictions have been imposed with the objective of increasing political liability. These are neither suitable, necessary nor proportional restrictions on the fundamental right of political parties, provided by the Constitution, pursuant to which the right of persons to voluntarily form non-profit political associations shall be guaranteed, if persons are interested in pursuing their common aims jointly, in the form of permanent organisations. These measures are not suitable, because there is no need to guarantee political liability through national political parties. Political liability on the local level is different from that on national level. It is necessary to ensure that local elections are focused on local issues and local autonomy. The representative nature of local bodies should be born in mind, taking into account participation of aliens in local elections. The liability on local level is first and foremost based on persons. It has also to be taken into account that the importance of political level is steadily increasing, and the fact that more and more people are admitted to political parties should guarantee political stability and preconditions for the emergence of political liability. The restrictions provided for in the Political Parties Act are not necessary, because the aim of increasing political liability could have been achieved by measures less encumbering on the fundamental right of political parties, such as election threshold or obligation to collect support signatures. The restrictions are not proportional in the narrow sense, because other aspects of the principle of democracy, primarily the independence of local governments in solving local issues and representative nature of representative bodies, calling for representation of different interests, play more important role than the need to ensure political liability.

6.2. The Chancellor of Justice is of the opinion that the unconstitutional restrictions upon establishing political parties, established in the Political Parties Act, also violate the right to stand as a candidate and the right to vote on local level, protected by § 156 of the Constitution. The right to stand as a candidate is

disproportionally restricted due to the fact that a candidate has no actual possibility on the local level to be elected, if he or she does not belong to a national political party and does not stand as a candidate in the list of such political party. The right to vote is disproportionally restricted, because the participation of only political parties in local elections may not guarantee an actual choice for the voters between different lists.

6.3. The Chancellor of Justice is of the opinion that § 5(1) of the PPA is in conflict with Article 19 of the Treaty establishing the European Community, pursuant to which every citizen of the Union shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. Proceeding from this the Republic of Estonia has an obligation to guarantee the citizens of European Union equal possibilities with Estonian citizens for exercising the right to vote and to stand as a candidate on municipal level. The prohibition to belong to political parties does not ensure equal possibilities, neither does the possibility to stand as an independent candidate. To ensure the principle of equal treatment it is possible, for example, to allow the EU citizens to participate in municipal elections in the list of election coalitions, or to allow the EU citizens to belong to political parties with the aim of participating in local elections. The Chancellor of Justice points out: "[…] Pursuant to § 2 of the Constitution of the Republic of Estonia Amendment Act, as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty. To guarantee the fulfilment of Estonia's obligations I consider it possible to interpret the second sentence of § 48(1) of the Constitution to the effect that the citizens of the European Union are allowed to belong to political parties with the aim of participating in local elections. This interpretation requires the amendment of the first sentence of § 5(1) of the PPA."

7. The Constitutional Committee of the Riigikogu is of the opinion that § 70^1 of the LGCEA and §§ 1(1) and 6(2) of the PPA are not in conflict with the Constitution. The Constitutional Committee argues that the representative nature of local representative bodies can be achieved without the participation of election coalitions in local elections. Even if in the smaller local governments an unconstitutional situation is ascertained, the existing regulation could not be declared unconstitutional, in an abstract manner, in regard to all local governments. The Constitution does not require that local political parties be allowed. The requirement that a political party have at least 1 000 members is justified with the objective of avoiding political disunion. The possible conflict of § 5(1) of the PPA with the Treaty establishing the European Community is not directly related to the issue of election coalitions. On 25 January 2005 the Constitutional Committee initiated the amendment to the Political Parties Act, the objective of which is to entitle the citizens of Union to belong to political parties.

8. The Minister of Justice does not concur with the petition of the Chancellor of Justice. The Minister of Justice argues that as compared to the judgment of the Supreme Court rendered in 15 July 2002 in regard to a similar issue, the social and political situation has changed. The number of votes in favour of political parties has been steadily growing. § 70^1 of the Local Government Council Election Act entered into force more than three years before the next municipal elections, which is a period long enough for getting adjusted to the changed situation. Due to their unstable nature the election coalitions are unable to carry political liability. Furthermore, they have no management bodies or permanent membership. The Minister of Justice does not consent to the interpretation of the Chancellor of Justice that § 48 of the Constitution guarantees the right to act as a political party on the local level. The Minister of Justice is of the opinion that for the purposes of Constitution only such associations can be regarded as political parties that guarantee the balanced development of both national and local interests on both levels of government, and are capable of creating consistency and stability, and are willing to guarantee the development of the state as a whole. Those associations that are active only on the local level do not meet these characteristics. There can be only one centre of power in the state; a political party acting only on the local level lacks necessary relations with the state power. The requirement of 1 000 members, assisting to avoid political disunion, is proportional, too. The Minister of Justice does not concur with the arguments of the Chancellor of Justice concerning the difference between local and national political levels. The Minister of Justice argues also that independent candidates are competitive in smaller municipalities. The Minister of Justice is of the opinion that § 1(1) and § 5(1) of the PPA should be amended to the extent that they preclude the citizens of EU from belonging to

political parties.

9. At the Court hearing the participants of the proceeding adhered to their opinions, submitted in writing.

PERTINENT PROVISIONS

10. The contested provisions of the Political Parties Act (RT I 1994, 40, 654; … 2003, 90, 601) read as follows:

"§1. Definition of political party
(1) A political party (political party [*partei*]) is a voluntary political association of Estonian citizens which is registered pursuant to the procedure provided for in this Act and the objective of which is to express the political interests of its members and supporters and to exercise state and local government authority."

„§5. Political party members
(1) An Estonian citizen with active legal capacity who has attained eighteen years of age may be a member of a political party. […]"

„§6. Foundation of political party
(2) A political party shall be registered if it has at least 1 000 members.

11. § 70^1 of the Local Government Council Election Act reads as follows:

"The right to present election coalitions for registration to a rural municipality or city electoral committee shall expire on 1 January 2005."

OPINION OF THE SUPREME COURT EN BANC

12. The Supreme Court *en banc* shall firstly examine the restriction on standing as a candidate in local government council elections (I) and then the part of the petition relating to § 48 of the Constitution (II). After that, the Supreme Court *en banc* shall decide whether to satisfy the petition of the Chancellor of Justice (III). Finally, the Supreme Court *en banc* shall analyse the competence of the Chancellor of Justice to review the conformity of § 5(1) of the PPA to the European Union law (IV).

13. The Chancellor of Justice contested the provisions of the Political Parties Act and of the Local Government Council Election Act only in the context of local government council elections (see paragraph 1 of the judgment), pointing out the fact that the valid legal regulation does not allow the political associations, the sole aim of which is the exercise of power on local level, to effectively form coalitions and become elected in local elections. Thus, the Supreme Court has no reason to analyse the restrictions on standing as a candidate on a more general level, including in the contexts of the elections to the Riigikogu and the European Parliament.

I.

14. The Chancellor of Justice is of the opinion that § 701 of the LGCEA and §§ 1(1) and 6(2) of the PPA violate the fundamental right of political parties, arising from § 48 of the Constitution. Furthermore, the Chancellor of Justice argues that the violation of the fundamental right of political parties results in the violation, on the local level, of active and passive electoral rights, protected by § 156 of the Constitution. The petition of the Chancellor of Justice is first and foremost focused on the participation of persons in local elections and on the restriction of the right to stand as a candidate. Although, formally, the reasoning the Chancellor of Justice emphasises the infringement of § 48 of the Constitution, the petition is primarily directed at achieving that the Supreme Court declare unconstitutional the requirements and restrictions for registering candidates in local elections (see paragraph 13 of the judgment). That is why the Supreme Court *en banc* shall firstly analyse the conformity of §§ 1(1) and 6(2) of the PPA and § 701 of the LGCEA to §

165 of the Constitution, taking into account the principle of autonomy of a local government, arising from § 154 of the Constitution, and thereupon, to § 48 of the Constitution.

15. § 156(1) of the Constitution establishes the following. “The representative body of a local government is the council which shall be elected in free elections for a term of three years. The elections shall be general, uniform and direct.” The principle of general election means, first and foremost, that no unjustified qualifications are applied in elections for restricting the active or passive electoral rights. The provisions of the Political Parties Act and of the Local Government Council Election Act, subject to analysis, do not contain such restrictions, because everyone has the right to stand as a candidate, irrespective of whether he or she is a member of a political party or not. It is possible to stand as an individual candidate or in the list of a political party, without the person being a member of the political party.

16. In conjunction with the principle of equal treatment, arising from § 12 of the Constitution, the principle of uniform elections means, in regard to passive electoral rights, ensuring equal possibilities to all candidates for standing as candidates and for being successful in the elections. As the proportional electoral system is used in Estonia’s local elections, the persons who stand as individual candidates and persons standing as candidates in the lists of political parties, are in different situations. The possibilities of an independent candidate to become elected, in comparison to a candidate in a political party list, are different in principle, because due to the possibility to transfer votes a candidate in the list may become elected with the votes given to the list, whereas an independent candidate can become elected only on the bases of votes given to him or her. It is neither reasonable nor possible to compare an individual candidate and a candidate in the list of a political party in this context. Under proportional electoral system the principle of uniform elections gives rise to the requirement that different groups of persons who wish to register lists of candidates must have equal possibilities for standing as candidates.

17. Imposition of restrictions on the right to stand as a candidate in local elections may also infringe upon the principle of autonomy of local governments. § 154 of the Constitution establishes that local governments shall resolve and manage all local issues independently. The independent resolution of issues means the autonomy of local governments, which is an underlying principle of the European Charter of Local Self-Government (ratified by the Riigikogu on 16 December 1994). The principle of local government autonomy exists in the interests of decentralising public authority and restricting and balancing authority of the state. The electoral system of local government councils should also be aimed at the protection of this constitutional value. It is possible to present a platform in local elections, based primarily on the local interests and aimed at independent resolution of local issues. The principle of independent resolution means that members of a local government council can take decisions independently from the central authority of the state and can prioritise local interests.

18. Pursuant to the Constitution a local government is based on the idea of a community the duty of which is to resolve the problems of the community and manage the life thereof. If the possibilities to represent communal interests are made dependent on the decisions of political parties active on the national level, the representation of local interest may be jeopardised. This in turn may be in conflict with the principle of autonomy of local governments. In the case of a conflict of state and local interests a member of a local government council must have a possibility to resolve local issues independently and in the interests of his or her community. That is why the electoral system of local elections should guarantee those groups of persons who come from the local community and who have a common interest in resolving local issues, the possibilities to stand as candidates on an equal footing with those groups, such as political parties, who are also interested in exercising power on the national level.

19. On the basis of the aforesaid the Supreme Court *en banc* shall analyse whether the requirements for the submission of joint lists of candidates are reasonable and whether these requirements enable a group of persons from a rural municipality or a city to independently submit a list of candidates. Proceeding from the restriction established in § 70^1 of the LGCEA only political parties are entitled to submit lists of candidates in local elections. Thus, it is necessary to analyse whether the requirements set for the foundation and activities of political parties allow a group of persons on the territory of a local government, who have

common interest in resolving local issues, to submit lists.

20. The Political Parties Act establishes a number of requirements concerning the registration and activities of a political party. In order to act as a political party, an organisation founded for the achievement of political aims has to be registered as a political party. In order to be registered a political party must have at least 1 000 members (§ 6(2) of the PPA). As a political party acts in the form of a non-profit association, all requirements arising from the Non-profit Associations Act (hereinafter "the NPAA") are applicable to it, including the requirement to have management bodies (Chapter 4 of the NPAA) and to prepare annual reports (§ 36 of the NPAA). As a political party is a legal person, the requirements arising from Acts concerning taxes are extended thereto, for example the obligation to regularly submit tax returns (e.g. § 54 of the Income Tax Act). A political party must have its articles of association and platform (§ 7 of the PPA). The list of members of the political party shall be submitted to the registration department of the court of its location (§ 8^1 of the PPA). Only Estonian citizens may me members of political parties (§ 5(1) of the PPA). Several financing restrictions and obligations concerning public disclosure of financing are extended to political parties (Chapter 2^1 of the PPA).

21. The Chancellor of Justice is of the opinion that on the basis of § 1(1) of the PPA a political party must have the objective of exercising both state authority and local self government, and that the possibility of recognising a political association of persons as a political party is excluded if the association aims only at exercising local self-government on the level of a rural municipality or city. The Supreme Court *en banc* does not share this view. The wording of § 1(1) of the PPA does not set a strict limitation on the registration or activities of a political party, if the political party has an objective of exercising power only either on national or local level. Neither does the Political Parties Act contain any norms enabling to terminate the activities of or punish a political party if it does not set up candidates for elections on all levels of power. The possibility to set up its candidates and to participate in the exercise of power on national as well as on local level is a right of a political party, not an obligation.

22. Although the Political Parties Act does not prohibit the residents of a rural municipality or city to found a political party for exercising local power, the referred restrictions render it practically impossible to found a political party within the territory of a local government for setting up candidates and exercising local power. Due to the number of voters on the territory of a local government the requirement of 1 000 members for the registration of a political party constitutes an insurmountable obstacle (§ 6(2) of the PPA). In many Estonian local governments this requirement excludes the possibility of founding even one political party. The founding of a political party for the exercise of local power is practically impossible in the majority of local governments, not to mention the emergence of different political parties within one local government. The residents of one rural municipality or city, wishing to represent the autonomous interests of the community in local elections, are practically excluded from submitting a list. Thus, the rules established in the Political Parties Act in conjunction with § 70^1 of the LGCEA restrict the uniform right to vote (the right to stand as a candidate) on the local level. The principle of autonomy of local governments is being restricted, too (see judgment of Constitutional Review Chamber of 15 July 2002 in matter no. 3-4-1-7-02).

23. The procedure for financing political parties further obstructs the groups originating from a local community in being successful as candidates in local government council elections. Upon making allocations to political parties from the state budget, §12^5 (1) and (2) of the Political Parties Act primarily take into account those political parties that participate in the elections all over the state. As political parties, including those acting on the local level, are not allowed to accept donations of legal persons (§ 12^1 of the PPA) and there is no financing out of local government funds, it would be to a significant extent more difficult for local associations, as compared to political parties active on the national level, to conduct an election campaign.

24. Neither the principle of local autonomy nor the principle of equal right to stand as a candidate are absolute rules, the infringement of which would automatically result in an unconstitutional situation. The principle of general and uniform elections has been set out in the Constitution without being subject to reservation by law. The rights arising from these principles may be infringed if there exists a constitutional

value protected by the restriction and if the restriction is necessary in a democratic society. The infringement of the principle of local autonomy as a general constitutional principle is allowed, too, if it is justified by the achievement of an essential constitutional value. When fundamental rights are restricted, the Supreme Court analyses the suitability, necessity and proportionality in the narrower sense of these restrictions, against the background of the aims of the restrictions. The Supreme Court *en banc* is of the opinion that the same principles can be used upon assessing the restriction of the right to run as a candidate and of the principle of local autonomy.

25. The Minister of Justice and the Constitutional Committee of the Riigikogu are of the opinion that the restriction of the right to run as a candidate, on the basis of the Political Parties Act and the Local Government Council Election Act, so that only political parties are entitled to submit lists of candidates, is justified with the necessity of guaranteeing political liability.

26. The Supreme Court *en banc* agrees that guaranteeing political liability is a constitutional value. The principle of political liability proceeds from the principle of democracy, expressed in § 1 of the Constitution. The principle of democracy requires that a voter be able to choose between different election platforms and ideas, and the candidates and lists representing these. From the point of view of functioning of democracy it is essential that different social interests be represented in the process of political decision-making on the local level as far as possible. At the same time the principle of democracy requires also that the voters have a possibility to evaluate the activities of members of a local council who became elected, and how they fulfil the campaign promises. In this the political liability of members of a council to their voters is manifested. The more stable the composition of political forces standing as candidates, the more clear the political liability, because it is only in the next elections that the voters can express their judgment on the fulfilment of campaign promises made in the course of previous elections.

27. Due to the requirement established in the Political Parties Act the organisation of a political party is stable and their activities are aimed at longer period, thus making it easier for the voters to evaluate the activities of different associations during different election cycles. Even if one agrees with the argument of the Chancellor of Justice that political liability on the local level is of different nature than on the national level, it would not mean that restriction of the right to stand as a candidate, on the basis of the Political Parties Act and the Local Government Council Election Act, would not be a measure suitable for guaranteeing political liability.

28. In principle, giving the right of submitting lists only to political parties, on the basis of the Political Parties Act and the Local Government Council Election Act, is a measure necessary for guaranteeing political liability. It is impossible to point out one single measure that would guarantee political liability as effectively as giving the right to submit lists of candidates only to political parties. The possibilities for ensuring political liability, set out in the petition of the Chancellor of Justice (election threshold and support signatures) may indeed increase political liability, but it can not be argued that these measures are as effective as giving the right to submit lists only to political parties.

29. Next, the Supreme Court *en banc* shall examine whether the restrictions of the right to stand as a candidate and of the principle of local autonomy as measures for increasing political liability are sufficiently proportional in the narrow sense. Upon weighing this, it will be necessary to take into account the intensity of the restriction of the right to stand as a candidate and of the principle of local autonomy, and the weight of these values in comparison with the need to guarantee political liability.

30. Restrictions of the right to stand as a candidate prevents persons from participating in the elections. The right to be elected is one of the basic principles of democracy. According to the Constitution of Estonia, the principle of local autonomy, too, is one of the basic principles of democracy. That is why the reason for establishing restrictions on the exercise of electoral rights in local elections must be especially weighty.

31. The fact that, in principle, everyone still has the possibility to stand as an independent candidate, does not render the restrictions established in the Local Government Council Election Act and the Political Parties

Act less intensive. In the context of proportional election system it is not reasonable to compare an independent candidate with a list. The election results, too, indicate that only a very small number of candidates achieve the simple quota required for being elected. One list submitted by a political party, in which the candidates receive at least 5% of the votes, is sufficient for the list to be given all compensation mandates, whereas all the votes given to individual candidates who did not reach the simple quota, will be lost. The Supreme Court *en banc* does not agree with the argument of the Minister of Justice that in the future the individual candidates would probably receive a substantial number of votes in local government units.

32. The fact that only political parties stand as candidates in local elections jeopardises the representative nature of local bodies of self-government (cf. judgment of Constitutional Review Chamber of the Supreme Court of 15 July 2002 in matter no. 3-4-1-7-02, paragraph 21). According to the non-disputed data submitted by the Chancellor of Justice, in 2002 there were 14 local government units where no political party lists were submitted to stand as candidates. Only one political party was represented in 46 local governments. In the local elections of 2002 the Estonian People's Union was represented with a list in 159 local governments, the Estonian Centre Party in 157, the Union for the Republic - Res Publica in 117 local governments. The election lists of other political parties were represented in less than 60 local government units. Thus, it is not guaranteed that in a local government unit the voters will be able to choose between different lists.

33. The possibility to stand as a candidate in a list of a political party, even if the person is not a member of the political party, does not considerably decrease the intensity of the restriction of the right to stand as a candidate. Nothing guarantees that a political party will accept a person to its list, if the person so wishes. Furthermore, such person has no possibility to influence the decision of the political party through internal procedures of the political party.

34. It proceeds from the aforesaid that the restriction of the right to stand as a candidate and of the local autonomy is intensive. Although guaranteeing political liability is a constitutional value (see paragraph 26 of the judgment), it is not a primary value arising from the principle of democracy. Besides political liability, the requirement that different political interests be represented as widely as possible in political decision-making, is vital for the functioning of democracy in Estonia's political system. Also, what has to be taken into consideration is the principle of separate powers, which does not give any political force or institution full power the exercise of which could be easily assessed by the people in next elections.

35. The Minister of Justice argues that it is necessary to give only the political parties the right to submit election lists also in order to ensure that there is a connection between a local government and the state power, and to avoid the conflict of local and national interests. The Minister of Justice is of the opinion that there can be only one actual centre of power in the state. The Supreme Court *en banc* does not agree with this opinion of the Minister of Justice, because realisation of local interests on the local level, even in conflict with the interests of the central power, if necessary, is inherent to the principle of autonomy of local self-governments (see paragraph 17 of the judgment).

36. As a result of weighing the above arguments the Supreme Court *en banc* comes to the conclusion that in the current legal and social context of Estonia the aim of ensuring political liability does not justify the restriction of the principle of local autonomy and of the equal right to stand as a candidate in the elections of local government councils. That is why § 6(2) of the PPA and § 70^1 of the LGCEA in their conjunction, preventing the residents of a local government unit to independently submit lists in local government council elections, are unconstitutional.

II.

37. The Chancellor of Justice has also contested the conformity of § 70^1 of the LGCEA and §§ 1(1) and 6(2) of the PPA to § 48 of the Constitution ("Only Estonian citizens may be members of political parties."), which – according to the Chancellor of Justice – gives rise to a fundamental right of political parties. The

Chancellor of Justice argues that this fundamental right is related to the principle of democracy, free self-realization and freedom of association. Pursuant to the petition of the Chancellor of Justice, a political party, for the purposes of the Constitution, is any association acting with the aim of achieving political objectives, and the restrictions imposed on such associations amount to infringements into the fundamental right of political parties.

38. On the basis of § 48(1) of the Constitution the legislator has been granted the right to define the content of a "political party". It does not proceed from the Constitution that all associations, formed for achieving political objectives, should have the right to be regarded as political parties. § 48 of the Constitution highlights political parties among all other associations in order to underline the specific character thereof, at the same time considering those as a category of non-profit associations. The legislator is entitled to establish more specific requirements for registering an association as a political party, thus shaping the legal institute of a political party.

39. Just like upon shaping other legal instruments, the legislator must not define a political party arbitrarily. Bearing in mind the significant role of political parties in the political life, the rules imposed by the legislator concerning political freedom of association in the form of political parties must be reasonable. Besides, it has to be taken into consideration that the rights given to political parties are of the nature of special rights – the more extensive the special rights guaranteed to political parties, the more justified the requirements for forming political parties should be. The fact that those who potentially want to associate, can not fulfil the requirements set to political parties, does not mean that they are deprived of the freedom of association. They can, for the fulfilment of their aims, form an ordinary non-profit organisation or act as a civil law partnership (§ 2(2) of the NPAA).

40. Unreasonable restrictions on the registration of political parties would primarily be those which materially jeopardise the founding of political parties, bearing in mind that political parties have been given important rights in the political system. One of the most essential special rights of political parties is the right to participate in the elections to the Riigikogu and in local elections with their lists of candidates. Other persons and organisations do not have the possibility to submit lists of candidates. That is why it would be unreasonable, if the founding of a political party were made dependent, for example, on the discretion of the executive or if so strict restrictions were established for the foundation of political parties that they would make it practically impossible to found one.

41. The Chancellor of Justice contests, on the basis of § 48 of the Constitution, primarily § 1(1) of the PPA, pursuant to which the objective of a political party is to exercise state and local government authority. The Chancellor of Justice argues that this amounts to a restriction of the freedom of platform. The Supreme Court *en banc* dos not concur with this opinion. It proceeds from paragraph 21 of the judgment that § 1(1) of the PPA does not prevent the political parties from acting on the local level only.

42. On the basis of § 48 of the Constitution the Chancellor of Justice also contested § 6(2) of the PPA. The Supreme Court *en banc* has already concluded (paragraph 36 of the judgment) that the requirement of at least 1 000 members for the registration of a political party unconstitutionally restricts the right to stand as a candidate and the autonomy of local governments, taking into account that political parties are the only associations who are allowed to submit their lists in local elections. If the legislator guaranteed a possibility to participate in local elections to other associations, or guaranteed the possibility to register, in all local governments, political parties acting on local level, the requirement of 1 000 members for a political party active on the national level may prove justified.

III.

43. The Chancellor of Justice requests that the Supreme Court *en banc* declare partly unconstitutional and invalid § 1(1) and § 6(2) of the PPA, and § 70^1 of the LGCEA. As § 1(1) of the PPA does not obligate political parties to act on the national level (see § 21 of the judgment), the request of the Chancellor of

Justice concerning the declaration of invalidity of this norm shall not be satisfied.

44. The Chancellor of Justice has requested that § 70^1 of the LGCEA and § 6(2) of the PPA be declared invalid on two grounds. Firstly, the Chancellor of Justice argues that these norms should be declared invalid to the extent that they do not allow to form citizen's election coalitions in the local government council elections. Secondly, the Chancellor of Justice argues that the norms should be declared invalid to the extent that they do not allow to found political parties with less than 1 000 members for the resolution and management of local issues. The petition of the Chancellor of Justice to the Supreme Court has been worded in a cumulative way ("and also"). On 26 November 2004 the Chancellor of Justice made a proposition to the Riigikogu that it bring the referred norms into conformity with the Constitution, "by either providing for the institute of a local political party or by allowing election coalitions of citizens to participate in local government council elections". Thus, the Chancellor of Justice made a clearly alternative proposal to the Riigikogu. From the reasoning of the Chancellor of Justice's petition submitted to the Supreme Court it also appears that he does not request that both § 70^1 of the LGCEA and § 6(2) of the PPA be declared invalid simultaneously, irrespective of the fact that the unconstitutional situation has been created by these norms in their conjunction. Thus, the Supreme Court *en banc* is of the opinion that the Chancellor of Justice has submitted an alternative request to the Supreme Court.

45. The Supreme Court *en banc* is of the opinion that in principle the legislator has several possibilities to eliminate the unconstitutional situation. The legislator can eliminate the unconstitutional situation, caused by the provisions contested by the Chancellor of Justice in their conjunction, using other possibilities than declaring § 70^1 of the LGCEA invalid and allowing citizen's election coalitions to participate in local elections, at the same time observing the principles of the right to stand as a candidate, autonomy of local government and freedom of association. What is important, is that the freedom to independently resolve local issues must be preserved without the mandatory requirement to participate in the formation of national policies. Nevertheless, the Supreme Court *en banc* is of the opinion that in the local government units with small number of residents allowing to set up candidates in the lists of political parties only would not be constitutional even if the requirement of 1 000 members, imposed on political parties, were decreased for example tenfold. In many local government units it would be impossible, even in the case of the requirement of 100 members, to found several local political parties.

46. The Constitutional Committee of the Riigikogu argues that the prohibition of election coalitions can not be declared unconstitutional in an abstract manner in regard to all local governments, because in the larger local governments the restriction that only political parties may submit lists may be justified. The Supreme Court has no possibility to decide in which local governments only political party lists should be allowed in local elections and in which local governments not. Even if the Supreme Court *en banc* were to ascertain that in certain larger local governments the restriction of local autonomy and the right to stand as a candidate is justified with the objective of ensuring political liability, it is the legislator who can establish a specific number of residents on the basis of which we could speak of a local government with sufficiently large number of residents.

47. The Supreme Court *en banc* is of the opinion that proceeding from the principle of legal certainty it is impossible, in this dispute, to be confined to declaration of unconstitutionality of § 70^1 of the LGCEA and § 6(2) of the PPA in their conjunction, and to declaration of invalidity of § 70^1 of the LGCEA. § 70^1 of the Local Government Council Election Act can be declared invalid irrespective of the fact that in principle the Riigikogu is entitled to prohibit the participation of election coalitions in local elections, by establishing sufficient guarantees to the exercise of the right to stand as a candidate by other means. First and foremost the Supreme Court *en banc* shall take into account the time remaining until local elections. If § 701 of the Local Government Council Election Act were declared invalid, it would be unambiguously clear who will be able to participate in the forthcoming local elections, provided that the legislator will not establish other rules. In principle, the legislator will then have a possibility to bring the whole regulation of the Local Government Council Election Act and of the Political Parties Act into conformity with the Constitution. The Supreme Court *en banc* does not consider it possible that the right to stand as a candidate and the principle of local autonomy would be guaranteed in the forthcoming elections by declaring § 6(2) of the PPA invalid

and by imposing the requirement of lesser number of members for the registration of political parties (see also paragraph 45 of the judgment). The Political Parties Act gives rise to a number of additional requirements for the foundation of political parties, the correct and due fulfilment of which before the forthcoming elections would not be feasible in many local governments to the persons interested in resolving local issues. Neither would it be feasible for the legislator to reorganise the system of electing local government councils, or that during the time remaining until the forthcoming elections local governments would merge to form larger local government units enabling the residents thereof to fulfil the requirements established for the foundation of political parties without any difficulty.

IV.

48. The Chancellor of Justice is of the opinion that § 5(1) of the PPA is in conflict with Article 19 of the Treaty establishing the European Community and with the Council of the European Union directive 94/80/EU implementing the provision. From among constitutional provisions the Chancellor of Justice refers to § 2 of the Constitution of the Republic of Estonia Amendment Act and § 48 of the Constitution, and also to the principle of equal treatment.

The Supreme Court *en banc* is of the opinion that irrespective of the reference to constitutional norms, the Chancellor of Justice has, in essence, contested § 5(1) of the PPA on the basis of the European Union law.

49. The Chancellor of Justice can only act on the basis of the law. Neither the Chancellor of Justice Act nor the Constitutional Review Court Procedure Act give the Chancellor of Justice the competence to request that the Supreme Court declare an Act unconstitutional on the ground that it is in conflict with the European Union law. There are different possibilities for bringing national law in conformity with the European Union law, and neither the Constitution nor the European Union law provide for the existence of constitutional review proceedings for this purpose. The European Union law has indeed supremacy over Estonian law, but taking into account the case-law of the European Court of Justice, this means the supremacy upon application. The supremacy of application means that the national act which is in conflict with the European Union law should be set aside in a concrete dispute (see also joint cases C-10/97 until C-22/97, Ministero delle Finanze vs. IN.CO.GE.'90 [1998] ECR I-6307). Pursuant to Article 226 of the Treaty establishing the European Community, the Commission, if it considers that a Member State has failed to fulfil an obligation under this Treaty, including not bringing national law into conformity with the European Union law, may bring the matter before the Court of Justice. This does not mean that such abstract review procedure over national law should exist on the national level. Thus, the Supreme Court will not be able to examine the petition of the Chancellor of Justice to the extent that the Chancellor of Justice requests, on the basis of Article 19 of the Treaty establishing the European Community and directive 94/80/EC, that § 5(1) of the PPA be declared invalid.

50. The legislator is competent to decide whether it wants to regulate the procedure for declaring invalid Estonian legislation which is in conflict with the European Union law, just as the legislator is free to choose whether it will or will not give the Chancellor of Justice the right to review the conformity of national legislation with the European Union law.

51. As the Supreme Court *en banc* has no possibility, on the basis of a request of the Chancellor of Justice, to declare national legal acts invalid because of conflict with the European Union law, the petition of the Chancellor of Justice regarding § 5(1) of the PPA shall be dismissed.

Dissenting opinion of justice Julia Laffranque
to the judgment of the Supreme Court en banc
in case no. 3-4-1-1-05,
joined by justices Tõnu Anton, Peeter Jerofejev,
Hannes Kiris, Indrek Koolmeister and Harri Salmann

I agree with the majority of the Supreme Court *en banc* that there is no formal legal ground empowering the Chancellor of Justice to contest the conformity of Estonian law to that of the European Union. However, the Supreme Court *en banc* should have examined the petition of the Chancellor of Justice from the point of view of constitutionality of § 5(1) of Political Parties Act, and should have declared the first sentence of § 5(1) of Political Parties Act invalid due to the unconstitutionality thereof, or should have asked the European Court of Justice for a preliminary ruling for the interpretation of Article 19 of the Treaty establishing the European Community, to be able, with the help of the preliminary ruling, to interpret § 48(1) of the Constitution in conjunction with § 2 of the Constitution of the Republic of Estonia Amendment Act and to take a final decision on the conformity of the first sentence of § 5(1) of the Political Parties Act with the Constitution and the Amendment Act.

In the following I shall explain why, in my opinion, the petition of the Chancellor of Justice should have been examined (I) and how this could have been done (II).

I.

1. Since 1 May 2004 every Estonian court and judge is the court and judge of the European Union, and therefore we have the duty to apply, in addition to Estonian law, also the European Union law. Equally, proceeding from § 152(2) of the Constitution, the Supreme Court still has the duty to interpret the Constitution of the Republic of Estonia.

2. As regards the competence of the Chancellor of Justice to contest the conformity of Estonian law to the European Union law, the valid law (the Chancellor of Justice Act, the Constitutional Review Court Procedure Act) does not give the Chancellor of Justice such competence.

3. Neither does the valid Estonian law answer the question of whether Estonian law should be declared invalid, for example within a constitutional review court procedure, if the conflict thereof with EU law is ascertained.

I agree with the opinion of the Supreme Court *en banc* that the EU law, including case-law of the European Court of Justice, does not prescribe that the Member States should declare national law invalid if it is in conflict with EU law, the supremacy of the application of EU law is enough. Thus, the Estonian legislator has an option to choose whether it wants or does not want to provide for and regulate a procedure for declaring invalid the Estonian laws that are in conflict with EU law, in order to ensure legal certainty and legal clarity and to avoid possible actions against Estonia in the European Court of Justice.

The legislator could, for example, specify the powers of the Chancellor of Justice, giving the latter an expressis verbis right of recourse to the Supreme Court if Estonian law is in conflict with that of EU.

Nevertheless, the Chancellor of Justice as a person applying law has to take into account the supremacy of application of EU law, irrespective of whether Estonian law grants him pertinent competence or not. In a situation where great bulk of Estonian legislation originates in the institutions of European Union it is inevitable for the Chancellor of Justice to review the conformity of Estonian law to EU law.

4. Even if the Chancellor of Justice has no competence to address the Supreme Court with the request to review the conformity of national norms with the EU law, the Chancellor of Justice can petition that unconstitutional legislation of general application be declared invalid. Within the framework of pertinent

review the Supreme Court has the right and – on the basis of the Constitution of the Republic of Estonia Amendment Act – an obligation, upon interpreting the Constitution, to take into account the principles of law generally recognised in the European Union law, if these are not in conflict with the basic principles of Estonian Constitution.

Thus, there is no doubt that the Supreme Court *en banc* should have examined the petition of the Chancellor of Justice to the extent that the Chancellor of Justice contested the conformity of the first sentence of § 5(1) of the Political Parties Act to the Constitution, which has to be interpreted in conformity with the EU law.

5. In paragraph 96 of his petition the Chancellor of Justice refers to the principle of equal treatment and to § 2 of the Constitution Amendment Act, and considers it possible to interpret the second sentence of § 48(1) of the Constitution to the effect that with the aim of participating in the elections of local government councils also other European Union citizens may belong to political parties.

Similarly, the Minister of Justice, too, interprets the second sentence of § 48(1) of the Constitution in conformity with § 2 of the Constitution Amendment Act and the Treaty establishing the European Community. The Constitutional Committee of the Riigikogu argues, too, that the citizens of the European Union may belong to Estonian political parties in accordance with the EU law and the Constitution Amendment Act, and the Committee has initiated a pertinent amendment of the Political Parties Act (regarding the arguments of participants in the proceeding see also the last sentences of paragraphs 6.3., 7 and 8 of the judgment).

6. Yet, the majority of the Supreme Court *en banc* totally ignored the interpretation of the Constitution given by the participants in the proceeding, prompted by adoption of the Constitution of the Republic of Estonia Amendment Act by a referendum and Estonia's accession to the European Union, and as regards this issue the Supreme Court *en banc* did not fulfil its function as the interpreter of the Constitution.

It is regrettable that the highest court of the state, who has the obligation to interpret the Constitution, did not explain the meaning and implications of the Constitution of the Republic Amendment Act, and did not give the foundations for interpreting the Constitution on the basis of the Act. Herewith the Supreme Court promotes legal vagueness. The Constitution of the Republic Amendment Act does not constitute a mere permission for Estonia to accede to the European Union. It is just as important that within the context of EU membership the Constitution must be interpreted on the basis of the Amendment Act. Unlike the Constitutions of many other EU Member States, the Constitution of the Republic of Estonia Amendment Act regulates the relationship between Estonia and the EU very laconically, thus rendering further interpretation of the Constitution by the Supreme Court indispensable.

It is important to interpret the Constitution and the Amendment Act thereof also because Estonia is preparing to take a final decision on approving the Treaty establishing a Constitution for Europe.

II.

7. The Supreme Court *en banc* should have analysed whether the failure to give the citizens of other EU Member States the possibility to belong to political parties is in conformity with the second sentence of § 48(1) of the Constitution, interpreting the provision in accordance with § 2 of the Constitution Amendment Act and with the principle of equal treatment arising from the Constitution.

8. Pursuant to § 2 of the Constitution of the Republic of Estonia Amendment Act the Constitution shall be interpreted taking account of the rights and obligations arising from the Accession Treaty. Pursuant to Article 1(2) of the Accession Treaty the Act concerning accession conditions constitutes an inseparable part of the Treaty. Pursuant to Article 2 of the Act, from the date of Estonia's accession, the provisions of the original Treaties of European Community shall be binding on Estonia. On the basis of the EC Treaty all other valid EU legislation is also binding on Estonia. According to Article 19 of the Treaty establishing the

European Community, as well as § 5(5) of the Local Government Council Election Act, and directive 94/80/EC of the Council of 19 December 1994 establishing a detailed procedure on the basis of which EU citizens residing in a Member State but who are not citizens of the state can exercise the right to vote and stand as a candidate in the local elections of that state, the citizens of Union and of other Member States have the right to stand as candidates in local elections in Estonia.

9. Although neither Article 19 of the Treaty establishing the European Community nor Directive 94/80/EC explicitly obligate a Member State to guarantee the possibility to belong to political parties also to other citizens of the European Union, the objective of the electoral rights of EU citizens, according to the interpretation of EU law, is the political and social integration of EU citizens and the guarantee of equal possibilities for participation in the exercise of local power. In local elections the criteria applicable to candidates who are citizens of other EU Member States must be the same as those applicable to the citizens of the state. The same principle applies in regard to election campaigns and possibilities to participate in these. The same applies to citizens of other EU Member States standing as candidates to the European Parliament from Estonia. The right to belong to and found political parties on all levels is enumerated in Article 12(1) of the EU Charter of Fundamental Rights (Article II-72(1) of the Treaty Establishing the Constitution for Europe).

According to the set case-law of the European Court of Justice the restrictions on the general principles of EU law, as exceptions, are always interpreted narrowly, and national law is always interpreted in as close conformity with the objectives of EU as possible.

To guarantee equal possibilities and equal treatment upon standing as a candidate it is not enough if the citizens of other EU Member States can stand as individual candidates or in the list of a political party without belonging to the party, even allowing EU citizens to form election coalitions would not be enough.

10. On the basis of the aforesaid, according to § 2 of the Constitution Amendment Act, the principle of equal treatment included in § 12 of the Constitution, and the interpretation of EU law, the second sentence of § 48(1) of the Constitution should be interpreted to the effect that EU citizens must be guaranteed the possibility to belong to political parties with the aim of standing as candidates in local government council elections. In Germany, for example, Article 9 of the Basic Law, pursuant to which the freedom of association is applicable only to citizens (to Germans, "*alle Deutschen*"), is interpreted to the effect that within the scope of EU law a citizen of another Member State is equivalent to a German citizen.

The absolute prohibition of the citizens of other EU Member States to belong to political parties, included in the first sentence of § 5(1) of the Political Parties Act of Estonia, is in conflict with the interpretation of the Estonian Constitution, constituting an unacceptably intensive infringement of the passive electoral rights of the citizens of other EU Member States. Unequal treatment of this kind has no reasonable and appropriate justification.

11. If the Supreme Court would not have reached the above referred conclusions because it had doubts as to the content of pertinent EU law provisions, and thus, also as to the interpretation of Estonian Constitution, the Supreme Court should have suspended the proceeding concerning the right of the citizens of other EU Member States to belong to political parties, and it should have asked the European Court of Justice for a preliminary ruling concerning Article 19 of the Treaty establishing the European Community and Directive 94/80/EC giving meaning to the latter. According to the case-law of the European Court of Justice the relevance of the question, concerning which a preliminary ruling is asked, is an issue to be decided primarily by a national court, and therefore the European Court of Justice has also accepted referrals for interpretation of EU laws which are the objects of abstract norm control in national proceedings.

Dissenting opinion of justice Lea Kivi

The Chancellor of Justice filed a petition with the Supreme Court requesting that the court declare § 70^1 of the Local Government Council Election Act (LGCEA) and § 1(1), the first sentence of § 5(1) and § 6(2) of the Political Parties Act (PPA) to be in conflict with the Constitution and with the Treaty establishing the European Community and invalid to the extent that the provisions do not allow to form election coalitions of citizens in local government council elections or political parties with the membership of less than 1 000 persons, for deciding and arranging local issues, to which also citizens of EU could belong.

The Supreme Court *en banc* decided to partially satisfy the petition of the Chancellor of Justice, refusing to examine the request to declare the first sentence of § 5(1) of the PPA invalid, and declared § 70^1 of the LGCEA invalid.

The Supreme Court *en banc* came to the conclusion that § 6(2) of the PPA and § 70^1 of the LGCEA, which prevent the residents of a local government from submitting independent lists in the local government council elections, are unconstitutional in their conjunction (paragraph 36 of the judgment). Although the Supreme Court *en banc* does not state it clearly, it can be gathered from paragraphs 15 and 17 of the judgment, that the Supreme Court *en banc* is of the opinion that the contested provisions are in conflict with §§ 154 and 156 of the Constitution.

My dissenting opinion is firstly prompted by the opinion expressed in the judgment of the Supreme Court *en banc* that the petition of the Chancellor of Justice to the Supreme Court is an alternative one (paragraph 44 of the judgment). Both in the petition and in the reasons thereof the Chancellor of Justice gives a reasoned opinion that the unconstitutional situation was brought about by § 70^1 of the LGCEA and § 6(2) of the PPA in their conjunction, and he petitioned that both contested provisions be declared unconstitutional as well as invalid. That is why the argument in the judgment of the Supreme Court *en banc* that "it is impossible, in this dispute, to be confined to declaration of unconstitutionality of § 70^1 of the LGCEA and § 6(2) of the PPA in their conjunction" (paragraph 47 of the judgment), is misleading. The Chancellor of Justice did not petition the Supreme Court that it only declare the provisions unconstitutional. Moreover, the Supreme Court *en banc* has reasoned the unconstitutionality of § 70^1 of the LGCEA on the basis of disproportional nature of the restrictions included in the Political Parties Act, which interfere with the autonomy of local governments, and has, for this reason, declared the pertinent provision of the LGCEA invalid.

Secondly, the Supreme Court *en banc* did not concur with the opinion of the Chancellor of Justice that § 1(1) of the PPA was unconstitutional, because it prevents the political parties from acting solely on the local level (paragraph 41 of the judgment). Thus, the Supreme Court *en banc* considered the formation of political parties active on the territory of a local government for the exercise of local power, legal. Next, the Supreme Court *en banc* stated that "if the legislator guaranteed a possibility to participate in local elections to other associations, or guaranteed the possibility to register, in all local governments, political parties acting on local level, the requirement of 1 000 members for a political party active on the **n a t i o n a l** level (*emphasis added*) may prove justified" (paragraph 42 of the judgment).

I support the argument of the Chancellor of Justice that, as a rule, the requirement of 1 000 members for the registration of a political party, established in § 6(2) of the PPA, excludes the possibility of registration of political parties in local governments. Taking into account the small number of residents in the majority of local government units, the restriction established in § 6(2) of the PPA is manifestly disproportional, because it is not reasonable. It is stated in paragraph 45 of the judgment that in the local government units with small number of residents, allowing to set up candidates in the lists of political parties only would not be constitutional even if the requirement of 1 000 members, imposed on political parties, were decreased for example tenfold. Thus, having ascertained the unconstitutionality of the situation, the Supreme Court has, primarily taking into account the time remaining until local elections (paragraph 47 of the judgment), nevertheless, decided to let the unfortunate unconstitutional situation continue and failed to declare § 6(2) of the PPA invalid.

Dissenting opinion of justice Jüri Põld

1. I do not concur with the decision part of the judgment of the Supreme Court *en banc*, although I admit that the decision supported by the majority of votes in this matter is reasonable. The decision that received the majority of votes can be explained by the fact that the petition submitted to the Supreme Court by the Chancellor of Justice can be regarded as an alternative one (see paragraph 44 of the judgment) and in the decision part of the judgment the Supreme Court *en banc* resolved one of the alternatives of the petition. What is also in favour of the decision, is the fact that bearing in mind how much time elaboration and proceeding of law drafts takes, it would not probably be possible to consider and establish such a regulation for the forthcoming elections of local government councils (in the autumn of 2005) that would enable local political parties to participate in local elections as an alternative to election coalitions or together with election coalitions. Bearing in mind the time factor it would be clearly impossible to found viable local political parties, even if the legislator managed to enact a pertinent amendment to the Act (see also paragraph 47 of the judgment). I am of the opinion that even if the Riigikogu managed to enact pertinent regulation, a local political party formed in a hurry would not essentially differ from an election coalition.

2. Irrespective of the aforesaid I do not consent to the opinion of the majority of the Supreme Court *en banc*, expressed in the decision and in paragraph 47 of the reasoning of the judgment, that proceeding from the principle of legal certainty it would be impossible, within the context of this dispute, to declare § 70^1 of the LGCEA and § 6(2) of the PPA unconstitutional in their conjunction, and that therefore only § 70^1 of the LGCEA should be declared invalid. Nevertheless, in paragraph 36 of the reasoning of the judgment the Supreme Court *en banc* declared the unconstitutionality of § 6(2) of the PPA and of § 70^1 of the LGCEA in their conjunction.

First of all, I argue that this judgment should not bear in mind only the local government council elections due in the autumn of 2005. Differently from the case heard by the Supreme Court in 2002, adjudicated by the Constitutional Review Chamber of the Supreme Court on 15 July 2002 (no. 3-4-1-7-02), this constitutional review matter is related not only to the forthcoming elections, instead it has more general significance. The awareness of the more general significance of this matter is implied by the reasoning of the judgment of the Supreme Court*en banc*, too.

I do not think that the petition of the Chancellor of Justice, worded in an alternative way, renders it impossible to assess, in the decision part of the judgment, the constitutionality of the entirety of the pertinent regulation of the Local Government Council Election Act and of the Political Parties Act. An opinion concerning the constitutionality of a legal regulation, set out in the reasoning of a court judgment, is not – in the strict sense – binding on the body that has adopted pertinent legislation. Giving an opinion, in the decision part of a judgment, on the entirety of the regulation established by the Acts, would stimulate the legislator to re-consider the problems promptly and to weigh all possible choices, and it would in fact reinforce legal certainty by decreasing the possibility that the Supreme Court will once again have to adjudicate a case originating on the basis of local elections and the fundamental right of political parties related to these. Such a solution would have stimulated the Riigikogu in good time to analyse the European Parliament Election Act, chapter 6 of which, in conjunction with the Political Parties Act, may give rise to problems related to citizens of the European Union standing as candidates in the next elections to the European Parliament.

I am of the opinion that, as far as possible, it is the parliament that should be given the possibility to make a choice concerning such sensitive issues as the fundamental right of political parties and electoral rights, instead of resolving the issue by a court judgment. The time left until local elections enables to transfer the matter to the Riigikogu for resolution. Yet, the majority of the Supreme Court *en banc* has resolved the matter instead of the parliament, without allowing the parliament to take additional steps.

Bearing in mind the aforesaid I argue that it was not reasonable for the Supreme Court *en banc* to be bound

by the alternative petition submitted by the Chancellor of Justice at the Supreme Court hearing.

3. I hold that there were at least three more options of decision in this matter.

In my opinion there are no flawless versions of decision, considering the time (19 December 2004) when the Chancellor of Justice submitted the petition, the complexity of the matter and the inevitable time spent on the proceeding of the matter in the Supreme Court (in this case the four-month limit prescribed by § 13(1) of the Constitutional Review Court Procedure Act has been observed), and the time left until the local government elections in the autumn of 2005. From among the following versions of decisions I consider the first one (see paragraph 4) to be the worst and the second one (see paragraph 5) the best.

4. One of the possibilities would have been to exercise the competence given to the Supreme Court expressis verbis by § 15(1)2) and § 58(3) of the Constitutional Review Court Procedure Act, and to declare – in the decision of the judgment – § 70^1 LGCEA and pertinent regulation of the Political Parties Act invalid in their conjunction, and to give the legislator reasonable time for bringing the regulation into conformity with the Constitution.

According to § 58(3) of the Constitutional Review Court Procedure Act, a reasonable time may be as long as six months. Yet, bearing in mind the time left until the local elections of 2005 the allowing of a six-months' term would not be realistic. I find that bearing in mind the complexity of the problem and the time left until elections it is not at all possible to prescribe to the legislator a period that would be reasonable and would guarantee the conduct of the forthcoming elections at the time fixed.

If the legislator would not manage – by the time prescribed by the judgment – to establish a new and constitutional regulation instead of the one declared invalid by the judgment, then pursuant to this decision the local elections would take place with the participation of election coalitions. But declaration of invalidity of the regulation of the Political Parties Act, establishing the requirement of 1 000 members for the founding of a political party, would result in a negative consequence upon entering into force of the judgment, namely that the judgment would abolish the minimum number of members required for the registration of a political party. I do not consider this would be in conformity with the spirit of the second sentence of § 48(1) of the Constitution, pursuant to which a political party is an association based on membership and the legislator is competent to establish the number of members of such associations. I am of the opinion that the Supreme Court must not create a situation in which a political party could be founded with any number of members.

5. The referred negative consequence and the possible reproach that the Supreme Court has interfered with politics and with the competence of the parliament without good reasons could have been avoided by a decision part of the judgment pursuant to which § 70^1 of the LGCEA and the pertinent regulation of Political Parties Act in their conjunction is declared unconstitutional, not invalid.

This decision would have transferred the resolution of the sensitive issue of electoral rights and fundamental right of political parties to the parliament.

Now, the Supreme Court *en banc* has, with a court judgment and without a pressing need, restored election coalitions at the time when the parliament would still have had the time to resolve the issue. Being pressed for time the Riigikogu could, for example, have opted for the solution allowing election coalitions. In this context I want to point out that after the judgment of 15 July 2002, concerning election coalitions, the Riigikogu managed to make pertinent amendments to Acts, permitting elections coalitions, and that in the autumn of 2002 the elections took place on schedule. It is true that in July of 2002 the issue boiled down only to establishing a regulation reinstating election coalitions and taking a political decision necessary for the autumn elections. The present situation is more complex.

Nevertheless, I have to admit that upon recognising, in the decision part of a judgment, the unconstitutionality of the regulation of the Acts there is a theoretical possibility that the Riigikogu would not bring the regulation of the Local Government Council Election Act and the Political Parties Act into

conformity with the Constitution within a reasonable time. This is what has happened to the judgment concerning § 7(3) of the Principles of Ownership Reform Act, rendered on 28 October 2002 (no. 3-4-1-5-02). But I do think that in the present matter it is feasible that the Riigikogu would find a solution supported by the majority of its membership. Besides, the legislator itself has now enacted legal remedies for "reprimanding" the parliament in the case of inactivity, which I consider to be effective, although these have not been applied so far. Namely, § 9(1) and § 15(1)2^1 of the Constitutional Review Court Procedure Act provide for a possibility to declare the failure to adopt a legal act unconstitutional. In the present case a person could contest the legislator's failure to act either on the basis of the Local Government Council Election Act when filing a complaint against an election committee, or when filing an action against non-registration of a political party managing local issues, depending on the nature of the dispute. In my opinion the State Liability Act provides for a possibility of imposing serious sanctions in such cases. In the worst case the referred theoretical possibility would mean that voting results would be declared invalid on the basis of § 46(2) of the Constitutional Review Court Procedure Act and § 67 of the Local Government Council Election Act.

I do not think that the fact that the Supreme Court, in the decision of the judgment, confines itself to recognition of unconstitutionality of a regulation instead of declaring it invalid could be regarded as exceeding the competence or another, smaller, violation of procedural law, instead it would amount to appropriate self-restraint of the Supreme Court. We could speak of exceeding the competence if the Supreme Court did more than is allowed to it. It is only by exceeding its competence that the Supreme Court would interfere with the sphere of activities of another branch of power.

6. In the case of a more distrustful approach to the legislator another version of the decision would have been possible instead of the one set out in paragraph 5 of my dissenting opinion, namely a decision declaring the pertinent regulation of the Political Parties Act and § 70^1 of the LGCEA unconstitutional in their conjunction and, in addition, § 70^1 of the LGCEA invalid. In the case of such a solution it would have been necessary, on the basis of § 58(3) of the CRCPA, to give the legislator time to bring the regulation, declared unconstitutional, into conformity with the Constitution. If the judgment would not have been enforced by the time indicated, § 70^1 of the LGCEA would have become invalid and the elections of 2002 would be possible with the participation of election coalitions. However, even a decision like that would not exclude the possibility of disputes upon registration of political parties, based on the fundamental right of political parties.
