



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

SEPARATE OPINION of Justice of the Constitutional Court Gunārs Kusiņš in Riga on 29 December 2022 in Case No. 2021-36-01

“On Compliance of Para 2 of Section 7¹ (1) of the Law on Financing Political Organisations (Parties) with the first sentence of Article 91 of the *Satversme* of the Republic of Latvia”.

1. On 15 December 2022, the Constitutional Court delivered its judgement in case No. 2021-36-01 “On Compliance of Para 2 of Section 7¹ (1) of the Law on Financing Political Organisations (Parties) with the first sentence of Article 91 of the *Satversme* of the Republic of Latvia” (hereafter – the Judgement), by which it recognised Para 2 of Section 7¹ (1) of the Law on Financing Political Organisations (Parties) (in the wording that was in force from 1 January 2020 until 1 November 2022) (hereafter – the contested provision) as being compatible with the first sentence of Article 91 of the *Satversme* of the Republic of Latvia (hereafter – the *Satversme*).

I uphold the finding made in the Judgement that the contested provision is compatible with the first sentence of Article 91 of the *Satversme*. However, I cannot subscribe to the assessment made by the Constitutional Court that the political parties, which at the last *Saeima* election have acquired more than two per cent of votes, and the Applicant – the political party “Mēs – Talsiem un novadam” – are in different and incomparable circumstances.

2. Being aware of the role that the political organisations (parties) play in society and the need to regulate activities thereof, the *Saeima* has adopted several laws, and the rules on financing political organisations (parties) and alliances

thereof are included in the Law on Financing Political Organisations (Parties) (hereafter – the Party Financing Law). The contested provision is part of the legal regulation on the procedure of granting the State budget financing to political organisations (parties) and alliances therefore (hereafter – a political party).

Since 1 July 2020, Section 7¹ (1) of the Party Financing Law is in force in the following wording:

“The State budget financing shall be provided to a political organisation (party), for which more than two per cent of voters have voted in the last elections of the *Saeima*, (hereafter also – national-level political party) within a calendar year:

1) in the amount of EUR 4.50 for each vote acquired at the last *Saeima* election;

2) in the amount of EUR 0.50 for each vote acquired at the last election of the local government council;

3) in the amount of EUR 0.50 for each vote acquired at the last election of the European Parliament.”

Pursuant to the Party Financing Law, a political party, for which more than five per cent of electors have voted at the last *Saeima* election, is granted State budget financing in the amount of 100 000 EUR within a calendar year, as well as for each vote acquired at the *Saeima* election, the election of a local government council or the European Parliament election, in the amount stipulated in Section 7¹ (1) of the Party Financing Law. The State budget financing is not granted to a political party, for which more than two per cent of electors have not voted during the last *Saeima* election.

Eight lists of candidates were submitted for the election of the Talsi Regional Council of 2021, and the lists of candidates were submitted also by such political parties who were not the recipients of the State budget financing. The Applicant – the political party “Mēs – Talsiem un novadam” (hereafter also – the Applicant), substantially, saw a violation of the legal equality principle, included in the first sentence of Article 91 of the *Satversme*, in the fact that it participated in the election of the Talsi Regional Council just as those political parties, for which more than two per cent of electors had voted at the last *Saeima* election. However, the contested provision did not envisage the Applicant’s right to receive the State budget financing.

I am of the opinion that, in the present case, the Constitutional Court, in the framework of the methodology of constitutional review, had to find answers to two fundamental questions in the case:

1) whether, in the particular actual circumstances, the political parties, which in the last *Saeima* election had acquired more than two per cent of votes, and the Applicant are in similar and in accordance with certain criteria comparable circumstances;

2) whether the legislator has the right to establish such procedure for granting the State budget financing, in accordance with which a political party, for which more than two per cent of electors have voted at the last *Saeima* election, receives a certain amount of the State budget financing also for the votes acquired at the election of a local government council.

3. It is validly noted in the Judgement, referring to the findings consistently made in the Constitutional Court's judicature that, in assessing whether a legal provision complies with the first sentence of Article 91 of the *Satversme*, it should be established:

1) whether and which persons (groups of persons) are in similar and according to certain criteria comparable circumstances;

2) whether the contested norm envisages similar or differential treatment of these persons (groups of persons);

3) whether this treatment has been established by a legal norm adopted in the procedure set out in regulatory enactments;

4) whether there are objective and reasonable grounds for this treatment, i.e., whether it has a legitimate aim and whether the principle of proportionality has been complied with (*see Para 14 of the Judgement*).

To establish, whether and which groups of persons are in similar and in accordance with certain criteria comparable circumstance, the main feature that unites these groups must be determined (*see Judgement by the Constitutional Court of 23 November 2015 in Case No. 2015-10-01, Para 17*).

I am of the opinion that, in particular, in cases that have been initiated on the basis of a constitutional complaint, the features that unite groups of persons can be determined accurately only in close connection with the actual circumstances of the case because the differential treatment manifests itself therein. Therefore, there are no grounds for examining and comparing persons (groups of persons) in abstract way or in isolation from the actual circumstances of the particular situation. In such cases, all uniting features that can be objectively determined should be examined and there are no grounds for limiting it to the determination of one feature.

The Constitutional Court, in its judicature, assessing whether persons (groups of persons) are in similar and in accordance with certain criteria comparable circumstances, substantially has given a decisive role to the actual circumstances. For example, in Case No. 2015-11-03, the Constitutional Court validly concluded that both groups of persons were comparable because they could be identified in accordance with certain criteria, i.e., an essential totality of features uniting them, the subjects belonging to both groups were capital companies operating in the same market, i.e., the market of providing services of trading in cash, the services provided by them were mutually replaceable, and they had to be considered as being competitors (*see Judgement by the Constitutional Court of 2 March 2016 in Case No. 2015-11-03, Para 18 and 19*).

It is concluded in the Judgement that the Applicant and political parties, which have acquired more than two per cent of votes at the last *Saeima* election, are in different and incomparable circumstances because their functions in creating sustainable politics and reinforcing democracy differ. It is noted in the judgement that the political parties, for which more than two per cent of electors have voted at the last *Saeima* election, differ by offering to voters a comprehensive model of society (*see Para 15.2. of the Judgement*). However, it was essential in the present case that all political parties, which submitted lists of candidates for the election of the Talsi Regional Council in 2021, competed for gaining representation at the Talsi Regional Council and, undoubtedly, could be deemed to be competitors.

The decision made by political parties, which at the last *Saeima* election have acquired more than two per cent of votes, to participate in the election of a particular local government and their aim to acquire representation in a local government council are not related to their representation in the *Saeima* and the proposal made during the *Saeima* election.

Thus, the particular actual circumstances have not been taken into account in the Judgement and the totality of arguments, included in the judgement, does not substantiate the conclusion that, in the case of local government election, the Applicant and the political parties, which have acquired more than two per cent of votes at the last *Saeima* election, are in different and incomparable circumstances.

4. The decision to participate in the local government election is the choice made by each political party. When making the decision to participate in the election of a local government council, also those political parties, which at the last *Saeima* election had acquired more than two per cent of votes, by submitting the respective

list of candidates, expresses a proposal to the electors of the respective council and submits a pre-election programme with respect to exactly the local government where it is standing for election.

In the objectively identifiable actual circumstances, it can be established that those political parties, for which more than two per cent of electors had voted at the last *Saeima* election, as well as the Applicant, by participating in the election of the Talsi Regional Council, submitted a concrete list of candidates for the seats of local government councillors for the election of the Talsi Regional Council, as well programme intended exactly for the election of the Talsi Regional Council. Thus, in the particular circumstances, there is a totality of significant uniting features, i.e., the subjects belonging to both groups are registered political parties, they have submitted lists of candidates for the councillor's seats for the election of the Talsi Regional Council, have annexed the required documents to the list of candidates, including the pre-election programme, signed by candidates included in the list exactly for the election of the Talsi Regional Council (*see: 2021. gada 5. jūnija pašvaldību vēlēšanu Talsu novadā kandidātu sarakstus un priekšvēlēšanu programmas. Available: cvk.lv*), and they should be regarded as competitors.

Hence, I am of the opinion that the political parties, which participated in the election of the Talsi Regional Council in 2021 and had acquired more than two percent of votes at the last *Saeima* election, and the Applicant, which participated in the election of the Talsi Regional Council in 2021, are in similar and comparable circumstances. The contested provision, in turn, envisages differential treatment of these groups of persons.

5. Differential treatment may be established only by a legal provision that has been adopted in procedure set out in regulatory enactments.

In view of information received in the course of preparing and reviewing the case, I do not have doubts that the contested provision has been adopted and promulgated in the procedure set out in the *Satversme* and the Rules of Procedure of the *Saeima*, is accessible in compliance with the requirements defined in regulatory enactments and has been worded with sufficient clarity, allowing a person to understand the content of rights and obligations that follow from it and foresee the consequences of application thereof.

Thus, I am of the opinion that the differential treatment, envisaged in the contested provision, has been established by law.

6. Differential treatment of persons who are in similar and comparable circumstances must have a legitimate aim (*see Judgement by the Constitutional Court of 29 June 2018 in Case No. 2017-28-0306, Para 15*).

The *Saeima* has noted that the differential treatment, caused by the contested provision, has legitimate aims – protection of democratic state order and protection of public welfare. The Ombudsman upholds this. Whereas the Applicant holds that the differential treatment, established by the legislator, lacks a legitimate aim.

The granting of State financing to political parties is aimed at reinforcing the system of political parties. Namely, reinforcing of the system of political parties is aimed at protecting the democratic state order and can be recognised as the legitimate aim in establishing differential treatment (*see Judgement by the Constitutional Court of 5 February 2015 in Case No. 2014-03-01, Para 20.1.*).

Thus, I am of the opinion that the differential treatment has at least one legitimate aim – protection of the democratic state order.

7. To assess whether, in establishing differential treatment, the proportionality principle has been respected, it must be verified: 1) whether the measures used by the legislator are suitable for reaching the legitimate aim; 2) whether such action is necessary, i.e., whether the aim cannot be reached by other measures, less restrictive upon an individual's rights and lawful interests; 3) whether the legislator's action is appropriate, i.e., whether the benefit that society gains outweighs the damage inflicted upon an individual's rights and lawful interests (*see Judgement by the Constitutional Court of 5 February 2015 in Case No. 2014-03-01, Para 21*).

7.1. Measures, chosen by the legislator, are suitable for reaching the legitimate aim if this aim is attained by the particular regulation (*see, for example, Judgement by the Constitutional Court of 7 February 2014 in Case No. 2013-04-01, Para 26*).

The granting of State budget financing to political parties reinforces the system of political parties and, hence, the contested norm is aimed at protecting the democratic state order. By granting State budget financing to such political parties, which have acquired more than two per cent of votes at the last *Saeima* election, those political parties, which receive greater citizens' support at the *Saeima* election, are strengthened. the granting to those political parties, which have acquired more than two per cent of votes at the last *Saeima* election, State budget financing also for local government election, gives them additional impetus to

participate in local government elections and be active also in the period between the *Saeima* elections. If such political parties participate in local government elections and acquire votes therein, they can reckon with receiving additional State budget financing for each vote acquired at the local government election.

Hence, I hold that the measure chosen by the legislator is suitable for reaching the legitimate aim of differential treatment.

7.2. In assessing, whether the legislator's action, in envisaging by the contested provision differential treatment of comparable groups of persons, was necessary it must be determined whether the legislator could have reached the legitimate aim of such treatment by measures that are more lenient with respect to an individual's rights and lawful interests (*see Judgement by the Constitutional Court of 29 April 2008 in Case No. 2007-25-01, Para 13*).

The *Saeima* has noted that aim of the contested provision and the Party Financing Law in general is to ensure greater financial support to political parties and a stable system of political parties (*see Para 3 of the Judgement*). The Ministry of Justice also noted at the court hearing that the criteria of the Party Financing Law had been developed to facilitate the possibilities of those political parties, which participate in the *Saeima* election, to qualify for the State financing (*see Transcript of the court hearing of 16 November 2022*).

In assessing whether the legislator could have reached the legitimate aim of differential treatment by measures that are more lenient towards an individual's rights and lawful interests, it should be taken into account that a more lenient measure is not any other measure but only such that allows reaching the legitimate aim in at least the same quality (*see, for example, Judgement by the Constitutional Court of 15 June 2017 in Case No. 2016-11-01, Para 21.1.*) I hold that another, alternative procedure for granting State budget financing would be contrary to the aims of financing political parties, defined by the legislator and, thus, the legitimate aim of differential treatment would not be reached in at least the same quality.

Hence, I am of the opinion that the legislator could not have met the legitimate aim of differential treatment with other measures, less restrictive upon an individual's rights and lawful interests.

7.3. In determining whether differential treatment is proportionate or appropriate, the Constitutional Court verifies whether the benefit that society gains from such differential treatment outweighs the damage inflicted upon a person's rights and lawful interests (*see Judgement by the Constitutional Court of 18 October 2018 in Case No. 2017-35-03, Para 17*).

In reviewing the constitutionality of a contested provision, the branch of law to which it belongs should be taken into account. The legislator may have broader or narrower discretion in regulating the particular matter, and the Constitutional Court must assess, whether the scope of discretion, exercised by the *Saeima*, complies with the provisions made in the *Satversme* (compare, see *Judgement by the Constitutional Court of 8 November 2006 in Case No. 2006-04-01, Para 15.2. and 15.3.*).

Pursuant to the data of the Enterprise Register, there are more than 50 political parties in Latvia and at least 10 of them are undergoing liquidation procedure (see: *Informācija par politisko partiju biedru skaitu. Available: ur.gov.lv*). I am of the opinion that the legislator's obligation to finance from the State budget each political party that has been established and ensure State budget financing for maintaining the activities of all political parties, including the political party “” Mēs – Talsiem un novadam”, cannot be derived from the *Satversme*, in particular, Article 91 or Article 102 of the *Satversme*.

The State budget revenue is constituted not by contributions made by the taxpayers located on the territory of one local government but by contributions made by taxpayers of the entire country. In such circumstances, the legislator has the right to choose, on the basis of law policy considerations, to strengthen from the State budget national-level political parties. I.e., those political parties, which have proven at the *Saeima* election that they have a sufficient level of public support.

The Judgement includes valid references to the findings made by the European Commission for Democracy Through Law (Venice Commission) and the United Nations High Commissioner for Human Rights on granting State financing to those political parties, which have gained representation in the parliament or demonstrated significant results in the parliamentary elections. Also the system of financing parties in the majority of Member States of the European Union is linked to this criterion – representation in the parliament (see *Para 15.1. of the Judgement*).

The legislator's choice, based on law policy considerations, of the political parties to be financed from the State budget resources, comprises also certain discretion with respect to the procedure for financing them. The solution, chosen by the legislator, that the political party, for which more than two per cent of electors have voted at the last *Saeima* election, receives a certain amount of financing also for the votes received at the election of a local government council, is based on objective and reasonable considerations. This solution provides the opportunity for society to ascertain, also in the period between the *Saeima* elections, whether these

political parties have the electors' support, and for granting additional State financial resources for their activities. Thus, the benefit that this solution gives to society outweighs the damage inflicted upon an individual's rights and lawful interests.

In establishing differential treatment in the procedure for granting State budget financing to political parties, the legislator has complied with the proportionality principle and has not violated the principle of legal equality, included in the first sentence of Article 91 of the *Satversme*.

Hence, I hold that the contested provision complies with the first sentence of Article 91 of the *Satversme*.

Justice of the Constitutional Court

Gunārs Kušīņš