2005/01/19 - PL. ÚS 10/03: ELECTION CONTRIBUTION

HEADNOTES

The basic criterion of constitutionality when setting the minimum threshold for payment of a regular contribution for activities to a political party consists of ensuring the openness of the political system – thus, this threshold must be considerably lower than the closing clause in the proportional system.

The purpose of state financing of political parties is to support equal opportunity to participate in a pluralist democratic political system. The individual forms of this financing pursue different aims, i.e. they support different activities of the parties. The aim of paying for election expenses is to permit parties which meet the condition of "seriousness of effort of competing parties," or "seriousness of election intentions of parties" to participate in the electoral competition. Whereas the Constitutional Court, in judgment file no. Pl. ÚS 30/98, saw the threshold of this "seriousness" in obtaining "about 1%" of the total number of valid votes, the legislature set that threshold in the valid legal regulation at 1.5%. The contribution per seat won reflects the tasks of political parties which are related to their legislative activities. The condition for providing it is being elected in elections to the Chamber of Deputies or to the Senate (§ 20 par. 5 of Act no. 424/1991 Coll.), i.e. it applies only to parliamentary political parties.

The regular contribution is a form of financing parliamentary and non-parliamentary political parties. For that reason, a condition for its constitutionality is ensuring the openness of the political system; therefore, the threshold for providing it must be significantly lower than the level of the closing clause of the proportional voting system. A threshold of 3% of valid votes received in elections, i.e. a threshold 40% lower than the closing clause, can be considered such a significantly lower threshold. If the statutory regulation of the regular contribution meets the constitutional requirement of guaranteeing the openness of the political system, then, in view of the different function of the regular contribution for activities of parties and payment of political parties' election expenses, there are no grounds for setting them at an equivalent level.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, after hearings on 19 January 2005, decided on a petition from the petitioner SNK s. n., with its registered office in T., represented by JUDr. D. D., attorney, seeking the annulment of § 20 par. 4, 5 and 6, and in paragraph 7 of the words "per deputy or senate seat is 900,000 CZK per year and" or possibly the entire § 20 of Act no. 424/1991 Coll., on Association in Political Parties and Political Movements, as amended by later regulations, filed together with a constitutional complaint against another intervention by a body of public authority – an official letter from the Ministry of Finance file no. 143/133437/2002 of 9 December 2002 – as follows:

1. The petition to annul § 20 par. 1, 2, 3, 5, 7 to 11 of Act no. 424/1991 Coll., on Association in Political Parties and Political Movements, as amended by later regulations, is denied.
2. The petition to annul § 20 par. 4 and § 20 par. 6 of Act no. 424/1991 Coll., on Association in Political Parties and Political Movements, as amended by later regulations, is denied.

REASONING

I.

In its constitutional complaint, the petitioner, with reference to a claimed violation of Art. 22 of the Charter of Fundamental Rights and Freedoms (the "Charter") and Art. 5 of the Constitution of the Czech Republic seeks to have the Constitutional Court issue a finding which would forbid the Ministry of Finance from continuing to violate its right to payment of a regular contribution under § 20 of Act no. 424/1991 Coll., on Association in Political Parties and Political Movements, as amended by later regulations ("Act no. 424/1991 Coll.") in the amount of 200,000 CZK for every 0.1% or part thereof of votes received in elections to the Chamber of Deputies of the Parliament of the Czech Republic.

In its constitutional complaint, the petitioner stated, that, as a political movement, it received a total of 2.78% of valid votes in elections to the Chamber of Deputies of the Parliament of the Czech Republic in June 2002. Therefore, on 20 November 2002, it filed a request to the Ministry of Finance for payment of a regular contribution under Act no. 424/1991 Coll.; the Ministry, however, rejected it in official letter file no. 143/133437/2002 of 9 December 2002, stating that the statutory condition for payment of a regular contribution under § 20 par. 4 and par. 6 of the cited Act had not been met, that is, that the political movement Sdružení nezávislých [Association of Independents] did not receive at least 3% of votes in elections to the Chamber of Deputies. In the petitioner's opinion the refusal to pay this regular contribution amounts to a so-called "other" intervention by a body of public power, which violated its fundamental rights regarding the question of its active standing; concerning the filing of a constitutional complaint and the general conditions for filing it, it then referred to the allegedly analogous situation

addressed in Constitutional Court judgment no. 243/1999 Coll. (Collection of Decisions of the Constitutional Court of the Czech Republic, volume 16, judgment no. 137).

The petitioner believes that the threshold for payment of a regular contribution, 3% of votes received in elections to the Chamber of Deputies, discriminates against smaller political parties (where the term "political party" is used here, it is understood to also include a political movement, unless the context indicates otherwise), although it also stated that it is not evaluating whether the amount of the contribution is appropriate. However, it considers unconstitutional in particular the fact that a regular contribution is paid only to parties which were relatively successful in the competition for seats in the Chamber of Deputies, but is not paid to parties which are successful in Senate, regional, or municipal elections. The petitioner attempted to document the alleged inequality in conditions for political competition by comparing its election results and those of the political part Unie svobody-Demokratické unie [Freedom Union – Democratic Union "US-DEU"]. In this regard, it stated, among other things, that in elections to the Chamber of Deputies, US-DEU, in a coalition with KDU-ČSL, received 14.41% of votes and 9 seats; however, in elections to the Senate US-DEU only received a single seat, while the petitioner received two, and in municipal elections US-DEU received 617 seats in all representative bodies, while the petitioner received 3,131 seats. Upon comparing these results, it is claimed that the fact that US-DEU receives 10 million CZK a year in regular contributions, while the petitioner receives nothing, cannot be upheld. The total state contributions to the petitioner in 2003 are allegedly 6,300,000 CZK and those to US-DEU 42 million CZK, which, in the petitioner's opinion, is in gross disproportion to the election results. The petitioner does not hide the fact that payment of a regular contribution of 200,000 CZK for every 0.1% of votes would significantly improve its financial situation (as the amount of 5.6 million CZK per year for the 2.78% of votes it received approaches its current state contribution of 6.3 million CZK, which the petitioner receives for 2 senate seats and 18 seats in regional representative bodies); however, the main motive for filing the petition is said to be an effort to change the existing legal regulation of financing political parties, which, in its opinion, provides too much taxpayer money to parliamentary parties and disproportionately little or nothing at all to other (non-parliamentary) parties and movements.

For these reasons, the petitioner – in accordance with § 74 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, (the "Act on the Constitutional Court") – joined its constitutional complaint with a petition to annul certain provisions of Act no. 424/1991 Coll., specifically § 20 par. 4, 5 and 6 and in paragraph 7 the words "for a deputy or senate seat shall be 900,000 CZK per year and." In the alternatively, it proposed that the Constitutional Court annul the entire § 20 of the Act; it stated that by formulating such a broad proposed judgment it "wishes to create room for the Constitutional Court, in its discretion, to annul either the individual provisions of § 20 or the entire regulation of financing of political parties" and it "believes that the Constitutional Court will also be sensitive in choosing when its derogative decision will go into effect," in particular because several parties and movements not represented in the Chamber of Deputies are allegedly financially dependent on state contributions allocated for seats in regional

representative bodies.

In its extensive petition, the petitioner finds the legal framework for financing political parties to be unconstitutional particularly in the following claims, into which it has divided its specific objections:

1. contributions for a deputy or senate seat (i.e. in the amount of 900,000 CZK) are allegedly unjustifiably high; it also considers the threshold for entitlement to a contribution "for votes" in elections to the Chamber of Deputies under § 85 of Act no. 247/1995 Coll., on Elections to the Parliament of the Czech Republic, as amended by later regulations to be disproportionately high (in these cases its arguments referred to Constitutional Court judgments no. 243/1999 Coll., no. 64/2001 Coll. and no. 98/2001 Coll.).

2. Likewise, in the petitioner's opinion, the threshold of 3% for entitlement to payment of a regular contribution under § 20 par. 4 and par. 6 of Act no. 424/1991 Coll. is unjustifiably high, and it considers it unconstitutional that it is derived solely from the results of elections to the Chamber of Deputies, as both houses of parliament have legislative power. In this regard it gave a hypothetical example where a party which would receive 2.9% of votes in elections to the Chamber of Deputies, but would occupy all the Senate seats and receive the highest number of seats in representative bodies of regions and municipalities, would not be entitled to a contribution. A number of political parties receive no support at all from the state, and yet these are not only parties of negligible importance, but also parties which have existed for a long time, although they have been unsuccessful in national elections, or parties which see their role only at the municipal or regional level, where they are quite successful (the petition cites examples, including Strana pro otevřenou společnost [Party for an Open Society], Volba pro město [Choice for the City], Demokratická regionální strana [the Democratic Regional Party], Hnutí nezávislých za harmonický rozvoj obcí a měst [Movement of Indpendents for Harmonious Development of Municipalities and Cities], and others). The state does not even reimburse these parties for expenses which it causes itself through its requirements, such as preparation of an annual financial report and a compulsory audit of financial statements. The petitioner concluded that it does not see a solution for these issues merely in lowering the threshold for entitlement for a regular contribution, but in "creating a completely different structure," which would ensure an appropriate contribution for their activities to all parties, regardless of whether they are involved in political competition at the parliamentary, regional, or municipal level.

3. In the petitioner's opinion, it is also unconstitutional to condition the contribution for a seat in a regional representative body on winning at least one deputy or senate seat. A party which wins a number of seats in regional representative bodies but has no deputy or senator is thus not entitled to a contribution for the seat in the regional representative body (note: although in fact the Ministry of Finance allegedly does pay these contributions to parties which have no deputy or senator). Finally, the petitioner protests against the fact that the state pays contributions for votes received only in elections to the Chamber

of Deputies (100,- CZK per vote), or newly also in votes to the European Parliament. However, no contributions are paid for votes received in elections to the Senate, in elections to regional representative bodies, or in elections to municipal representative bodies. This again creates a marked advantage for parties which are successful in elections to the Chamber of Deputies, which new parties or parties which limit themselves to regional politics are disadvantaged.

The petitioner also stated that the allocation of contributions among political parties does not correspond to the support which these parties have in society; state contributions to political parties represented in the Chamber of Deputies in 2003 allegedly exceed 95%, which contributions to other parties are only 4.6%. Thus, parties that are not represented in the Chamber of Deputies must obtain money practically exclusively from private sources, "in a situation where it is precisely the parliamentary parties … which caused the fact that financing political parties, which is considered … a socially beneficially activity in developed democratic countries … has in the Czech Republic acquired the flavor" of a dubious activity. The total amount of state contributions appears to the petitioner to be unjustified and markedly in excess of parties' expenses for participation in election contests and the needs of financing their basic activities; the petitioner finds no reason why even the most successful political party should receive over 100 million CZK for its activities every year. Thus, according to the petitioner, the entire statutory framework for financing political parties is aimed at providing complete financial support of parliamentary political parties from the state budget and blocking or at least considerably limiting access to state contributions for non-parliamentary political parties.

The petition also considers unconstitutional the formulation of § 20 par. 8 of Act no. 424/1991 Coll., under which a contribution per seat for an entire term of office goes only to a party on whose candidate list the deputy, senator or member of regional representative body was elected. Although the legislature's aim was – according to the petitioner – a legitimate attempt to prevent the entitlement to a state contribution transferring to another party with a deputy, senator or representative body member who changes to another party during a term of office; however, this overlooked the fact that a change in party membership may happen not only individually, but also collectively, through the merger or parties. The legal framework, which penalizes those political parties or movements which decided to integrate, thus restricts the free competition of political forces.

The petitioner closed its extensive arguments with its own specific proposal for how to regulate the financing of political parties and movements in order for it to be consistent with Art. 5 of the Constitution and Art. 22 of the Charter. It claims this would be best met by a system in which contributions for votes received in elections to the Chamber of Deputies, the Senate, the European Parliament, representative bodies of regions and representative bodies of municipalities would be given to parties which participate seriously in election competition, i.e. they receive more than a certain minimum percentage of votes (e.g., for the Chamber of Deputies it proposes 0.5 to 1% of votes, for the Senate 4-6% of votes in a given electoral district); minimum contributions would be paid to those parties which proved their significance as organized political forces by a

sufficiently wide involvement in election competition (regardless of result), and an increased contribution to those parties which, in elections to all representative bodies, had proportionate success in at least some regions. The total scope of state contributions to political parties should not exceed 100 to 150 million CZK per year, because, in the petitioner's opinion, an amount of around 20 million CZK must be sufficient for even the largest political party to cover all its ordinary activities.

II.

By resolution of panel I of the Constitutional Court of 5 May 2003, file no. I. ÚS 59/03, proceedings on the constitutional complaint were suspended under § 78 of the Act on the Constitutional Court, and the petition to annul the abovementioned paragraphs of § 20 of Act no. 424/1991 Coll., or perhaps the entire provision, was referred to the Plenum of the Constitutional Court for a decision under Art. 87 par. 1 let. a) of the Constitution of the Czech Republic.

III.

In accordance with § 69 of the Act on the Constitutional Court, the Court sent the petition to open proceedings to the parties to the proceedings – the Chamber of Deputies and the Senate of the Parliament of the Czech Republic.

The statement from the Chamber of Deputies, signed by its Chairman, PhDr. L. Z., states, regarding the point of the petition that seeks the annulment of § 20 par. 4 to 6 of Act no. 424/1991 Coll., that restricting political parties in their participation in elections, in access to the media, in freedom of speech, in the right of assembly, and so on, would certainly be inconsistent with Art. 22 of the Charter. However, no such restrictions are contained in the text of paragraphs 4 to 6 of the cited Act. Concerning another point in the petition, seeking the annulment of the part of the sentence in § 20 par. 7 concerning the amount of contribution per seat (900,000 CZK), the Chamber of Deputies stated that it was fully in the jurisdiction of the legislative body to set its amount by statute. Before Act no. 424/1991 Coll., was amended by Act no. 170/2001 Coll., the amount of the contribution was 1,000,000 CZK; in reducing it the legislature responded to the Constitutional Court judgment published as no. 98/2001 Coll. Insofar as the amount of this contribution was set at 500,000 CZK in 1991, 12 years later the current level of the contribution is not something which should violate the constitutional criteria of free competition of political forces and which could generally be considered disproportionate. According to the Chamber of Deputies' statement, if the alternative proposal to annul the entire § 20 of the Act were granted, political parties would be placed on substantially the same level as civic associations created under the Act on Association of Citizens. However, state participation in financing political parties is standard in the laws of European democratic states. Annulment of the cited provision would create a need for immediate amendment of the

law; according to the statement it is difficult to imagine “not again taking into account an exact and just criterion which divides political parties into those that have real significance for political events in the state thanks to their voter base and those that represent practically nobody and are thus unsuccessful in elections, often repeatedly.” In the opinion of the Chamber of Deputies, the fundamental rules of free competition of political forces are really guaranteed in practice, and the legal order in no way prevents the creation of new political entities and their entry into Parliament, which depends only on the ability of these groups to attract the necessary number of voters. A state contribution can never replace this ability, or, on the contrary, inability. The framework for financing political parties is necessary in the legal order also in order to limit the existence of entities which would be aimed primarily at obtaining state contributions without real influence on political life in the Czech Republic. The Chamber of Deputies concluded that the entire proposal from the political movement Sdružení nezávislých [Association of Independents] is based on a simplified thesis – which basically is not related in any way to Art. 22 of the Charter – that without the existence of financial support for all parties and movements by the state one can not have unrestricted and free competition among them.

In the statement from the Senate of the Parliament of the Czech Republic, signed by its Chairman, Doc. JUDr. P. P., the Senate stated that, for the proceedings on the petition to annul § 20 of Act no. 424/1991 Coll., the most significant discussions were those on the draft of Act no. 170/2001 Coll., on the National Bond Issue to Cover Obligations Arising from the Treaty between the Government of the Czech Republic, the Government of the Slovak Republic, and the Government of the Federal Republic of Germany on Ending Mutual Accounting in Convertible Rubles and Settling Mutual Obligations and Claims which Arose as a Balance of Convertible Rubles to the Benefit of the Federal Republic of Germany, Amending Act no. 407/2000 Coll., on the State Bond Issue for Partial Compensation of Damages to Agricultural Entities Damaged by Drought in 2000, and Amending Act no. 424/1991 Coll., on Association in Political Parties and Political Movements, as amended by later regulations (“Act no. 170/2001 Coll.); the draft contained, among other things, a news statutory framework for contributions for the activities of political parties and movements, as a response to the Constitutional Court judgment published as no. 98/2001 Coll., in which the Constitutional Court annulled part of § 20 par. 4 and 7 of Act no. 424/1991 Coll. After being passed by the Chamber of Deputies, the draft Act was passed on to the Senate. In committee discussion on the draft Act it was stated that this amendment of Act no. 424/1991 Coll. was, in this case, non-systematically joined to text concerning the state bond program, where delay in the approval process could have negative economic and political effects. The Senate Constitutional Law Committee therefore recommended returning the draft Act to the Chamber of Deputies with an amending proposal, which limited the validity of the proposed amendment only to the period to the end of 2001. The aim was to allow sufficient time for Parliament, in the interim period, with knowledge of the conclusions contained in the judgment of the Constitutional Court, to prepare an amendment to the regulation for financing political parties that would address the matter comprehensively, including contributions for election expenses, regulated in § 85 of the Act on Elections to the Parliament. However, another committee which reviewed the draft Act – the Committee for the Economy, Agriculture and Transport- on the contrary recommended that the Senate not discuss the draft, in particular in view

of the gravity and urgency of the existence of a legal framework for the state bond program . In the end the Senate expressed its will not to consider the draft act. The statement from the Senate of the Parliament of the Czech Republic concludes by stating that it leaves the decision on the constitutionality of the contested statutory provisions to the consideration of the Constitutional Court.

The statement from the Ministry of the Interior of the CR, which the Constitutional Court also requested in this matter, states briefly that the contested Act in no way violates equal conditions for the free competition of political parties under Art. 5 of the Constitution and Art. 22 of the Charter; the success of political entities is decided primarily by the votes of voters, and not by financial contributions from the state. The Ministry stated that the petitioner's criticisms concern an area of legal regulation which was reflected in the law based on proposals from deputies, as the original version of the provision in question anticipated only state contributions to cover for election results.

IV.

The Constitutional Court always first reviews whether all the necessary procedural requirements have been met in order for it to consider the merits of a petition to annul a statute or its individual provisions In this case, it is evident from the petition that the petitioner basically seeks revision of the entire current system of financing political parties, not only parliamentary parties, but also on the regional or municipal level, and that it is not contesting only the extensive § 20 of Act no. 424/1991 Coll., but that in the reasoning of the petition (not the proposed judgment) it also protests against the regulation of contributions to cover election expenses under Act no. 247/1995 Coll., on Elections to the Parliament of the Czech Republic. The same also applies to the petitioner's extensive presentation at a hearing (which was also submitted to the Constitutional Court in written form). However, the contested official letter from the Ministry of Finance of 9 December 2002 file no. 143/133 437/2002 indicates that the Ministry refused to pay the petitioner a regular contribution with reference to § 20 par. 4, 6 of Act no. 424/1991 Coll., which ties entitlement for a regular contribution to those parties which received 3% of votes in elections to the Chamber of Deputies. Thus, the other contested provisions, i.e. § 20 par. 1 to 3, 5, 7 to 11, were not directly applied in any proceedings that preceded the filing of the constitutional complaint, so, as far as they are concerned, the conditions under which a petition to annul a statute (§ 74 of the Act on the Constitutional Court) can be filed – together with a constitutional complaint – have not been met. Therefore the Constitutional Court had no choice but to deny this part of the petition as a petition filed by a person obviously not entitled to do so[§ 43 par. 1 let. c) of the Act on the Constitutional Court], which also applies to the alternative petition to annul the entire § 20 of the Act.

V.

The Constitutional Court then, in accordance with § 68 par. 2 of the Act on the Constitutional Court considered the question of whether the statute which is claimed to be unconstitutional was passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

As regards Act no. 424/1991 Coll., (in the original version), the Constitutional Court did not examine whether it was passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner, because with legal regulations issued before the Constitution of the Czech Republic the Court is only authorized to review whether they are substantively consistent with the constitutional order at the time, but not whether the procedure by which they were created is constitutional or whether norm-creating authority was observed (cf. e.g., judgment file no. Pl. ÚS 9/99, Collection of Decisions of the Constitutional Court, volume 16, p. 14). Thus, in this case the Constitutional Court concentrated on the amendment of Act no. 424/1991 Coll., which concerns the contested § 20.

This was Act no. 117/1994 Coll., which amends and supplements Act no. 424/1991 Coll., which introduced the 3% threshold for an entitlement to a regular contribution in elections to the Chamber of Deputies. In this regard, the Constitutional Court determined from the appropriate Chamber of Deputies publications, stenographic records and data on voting, that the Chamber of Deputies approved the draft of this act at its session held on 29 April 1994. After being signed by the President of the Republic and the Prime Minister, the act was duly promulgated in the Collection of Laws, in part 37, as number 117/1994 Coll. The Act was thus passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

VI.

In its existing case law, the Constitutional Court has fundamentally addressed the constitutional safeguards for democratic formation of the Parliament. In the present context, judgment file no. Pl. ÚS 25/96, which reviewed the constitutionality of the so-called “closing” clause for elections to the Chamber of Deputies, must be considered relevant. In it, the Court defined the fundamental framework for applying elements which integrate the political organization of the Chamber of Deputies in a proportional electoral system: “in terms of the principle of representative democracy it is permissible to build into the electoral mechanism itself certain integrative stimuli where there are serious reasons for it, in particular on the assumption that an unrestricted proportional system would lead to fragmentation of votes among a great number of political parties, to unlimited ‘overpopulation’ of political parties, and thereby to endangering the functionality and ability to act, as well as the continuity of the parliamentary system.”

When evaluating the limits of acceptability of integrative stimuli, the Constitutional Court consistently began with the principle of proportionality: “Of course, increasing the threshold of the limiting clause may not endanger the democratic substance of elections. It is always necessary to also weight whether this restriction of equality in voting rights is a minimum measure needed in order to enable a majority to be formed in the Chamber of Deputies, which is necessary for making decisions and creating a government. Thus, the principle of minimizing state intervention in relation to the intended aim also applied to the limiting clause.”

This legal opinion was then confirmed by other decisions, in particular by judgment file no. Pl. ÚS 42/2000.

The fundamental element of a democratic, pluralist political system is not only plurality by itself, but also the openness of the system, i.e. the possibility for new entities to enter the political scene, the ability to found political parties and political movements, i.e. the free and voluntary formation of and free competition among political parties (Art. 5 of the Constitution, Art. 20 of the Charter, of Act no. 424/1991 Coll.). The reality, i.e. not only the fiction, of the openness of the political system is then, among other things, also tied to the formation of an adequate system for financing political parties and movements.

A number of safeguards for the formation of such a system arise from the constitutional order. The Constitutional Court has articulated these in many of its decisions.

In judgment file no. Pl. ÚS 26/94 the Court defined the most general principles in this regard. Although, according to the Court, the constitutional order does not contain support for a rejection in principle of financial support of political parties by the state, “that, however, does not mean that state financing of political parties and political movements does not have limits … financial support of political parties and movements may not exceed a degree which respects the general limit in Art. 20 par. 4 of the Charter, under which political parties and political movements are separate from the state.”

The Court then analyzed these limits in terms of two principles: the principle of integration and the principle of representativeness (which was formulated in judgment file no. Pl. ÚS 3/96: “The principle of representativeness means above all that the composition of a representative body is derived from the political structure of a civil society. However, it also contains a requirement for minimum representation of entities (political parties and movements) which participate in political competition.”). In judgment file no. Pl. ÚS 30/98 the Constitutional Court annulled the condition of receiving at least 3% of the total number of valid votes received in elections to the Chamber of Deputies for purposes of a contribution for covering election expenses; in doing so, it gave priority, in issues of state financing of political parties, in the conflict between the principle of integration and the principle of pluralism in a democratic society (Art. 5 of the Constitution a Art. 22 of the Charter), to the latter principle. It formulated the criterion for limiting the contribution for payment of election expenses in terms of the “seriousness of the efforts of competing

parties," or the "seriousness of the election intentions of parties," which it expressed as the degree of their representativeness. The legal opinion thus expressed was subsequently confirmed in judgment file no. Pl. ÚS 42/2000.

In judgment file no. Pl. ÚS 53/2000 the Constitutional Court directly reviewed the constitutionality of part of the text § 20 par. 4 of the Act on Political Parties, in a petition to annul the provision under which a party which had already become entitled to a regular contribution but did not exceed the closing clause for entry to the Chamber of Deputies set forth by the Election Act, would not receive the contribution in subsequent elections. Thus, the Court considered conditioning provision of a regular contribution to a political party (movement) on reaching the closing clause in subsequent elections to be inconsistent with the constitutional order. In other words, it connected the openness of the political system with a permanently lower threshold for providing the contribution than that of the closing clause set by statute and confirmed as constitutional by the previously cited judgment of the Constitutional Court. As the threshold of 3% was not contested in the matter, within the framework of rationis decidendi the Court did not consider it, but also did not cast doubt on the threshold even in possible consideration of obiter dictum.

In the petitioner's opinion, the inconsistency of § 20 par. 4 and par. 6 of Act no. 424/1991 Coll. with the constitutional order in the matter of the threshold 3% of valid votes cast in elections to the Chamber of Deputies of the Parliament of the Czech Republic for entitlement to payment of a regular contribution for the activities of political parties, arises because of its unjustified level, as well as the unjustified deriving of the regular contribution only from the results of elections to the Chamber of Deputies, because the legislative power is a Parliament composed of two chambers - the Chamber of Deputies and the Senate.

The basic criterion of constitutionality when setting the minimum threshold for payment of a regular contribution for activities to a political party consists of ensuring the openness of the political system – thus, this threshold must be considerably lower than the closing clause in the proportional system.

State financing of political parties provides only part of the income of political parties (§ 17 par. 4 of Act no. 424/1991 Coll.). This part consists of, on the one hand, a contribution for payment of election expenses (§ 85 of Act no. 247/1995 Coll., on Elections to the Parliament of the Czech Republic, as amended by later regulations, § 65 of Act no. 62/2003 Coll., on Elections to the European Parliament and Amending Certain acts), and on the other, the contribution to the activities of a political party, which includes a regular contribution and a contribution per seat won (§ 20 of Act no. 424/1991 Coll.). Parliamentary political parties are also financed indirectly, through the payment of deputy salaries, support for parties' parliamentary organizations, cost-free provision of materials for parties' parliamentary organizations, etc.

The purpose of state financing of political parties is to support equal opportunity to participate in a pluralist democratic political system. The individual forms of this financing pursue different aims, i.e. they support different activities of the parties. The aim of paying for election expenses is to permit parties which meet the condition of "seriousness of effort of competing parties," or "seriousness of election intentions of parties" to participate in the electoral competition. Whereas the Constitutional Court, in judgment file no. Pl. ÚS 30/98, saw the threshold of this "seriousness" in obtaining "about 1%" of the total number of valid votes, the legislature set that threshold in the valid legal regulation at 1.5%. The contribution per seat won reflects the tasks of political parties which are related to their legislative activities. The condition for providing it is being elected in elections to the Chamber of Deputies or to the Senate (§ 20 par. 5 of Act no. 424/1991 Coll.), i.e. it applies only to parliamentary political parties.

The regular contribution is a form of financing parliamentary and non-parliamentary political parties. For that reason, a condition for its constitutionality is ensuring the openness of the political system; therefore, the threshold for providing it must be significantly lower than the level of the closing clause of the proportional voting system. A threshold of 3% of valid votes received in elections, i.e. a threshold 40% lower than the closing clause, can be considered such a significantly lower threshold. If the statutory regulation of the regular contribution meets the constitutional requirement of guaranteeing the openness of the political system, then, in view of the different function of the regular contribution for activities of parties and payment of political parties' election expenses, there are no grounds for setting them at an equivalent level.

This statement changes nothing about the Constitutional Court's general position regarding the question of constitutionality of the entire system of financing political parties, expressed in judgment file no. Pl. ÚS 53/2000. In it, the court stated: "If the free competition of political parties under equal conditions is not respected, and if there is an attempt to create different conditions for large or larger parties and thus to form, directly or indirectly, political parties with a better or worse position, and thus also citizens with different conditions for their movement in the political system, such steps cannot be described as constitutional. We cannot neglect the fact that a democratic society is characterized precisely by the free competition of political parties, whose activities in the administration of public affairs is derived from the free choice exercised by voters." The Constitutional Court evaluated maximum equality in the positions of political parties, ensuring their free and fair competition, as well as the openness of the political system to according to the value of seriousness of election intentions of political parties, as "measured" by their minimum representativeness (file no. Pl. ÚS 3/96, Pl. ÚS 42/2000), as well as by the aims of individual forms of state financing of parties (file no. Pl. ÚS 53/2000).

In its decisions, the Constitutional Court pointed to the viewpoint of balancing the share of state financing of political parties and the shares of other forms of financing, independent of the state (Pl. ÚS 26/94). In its derogative finding, file no. Pl. ÚS 53/2000, it took a critical position on the existing level of state financial support for political parties, and

pointed to the endangerment of the constitutional principle of separating parties from the state (Art. 20 par. 4 of the Charter).

In the Constitutional Court's settled opinion, the court is bound in its decision making by the scope of the filed petition, and can not step out of its boundaries (ultra petitum) in its decision (see, e.g., the decisions file nos. Pl. ÚS 16/94, Pl. ÚS 8/95, Pl. ÚS 5/01, Pl. ÚS 7/03). For this reason, it is not authorized in the adjudicated matter to consider the constitutionality of the entire system of state financing of political parties, and thus it has not choice but to appeal to the democratic legislature to accept the legal opinion contained in the cited judgments file nos. Pl. ÚS 26/94 and Pl. ÚS 53/2000.

However, lowering the threshold for providing a regular contribution to the activities of political parties below the threshold of 3% of votes received in elections not only does not solve the cited problem, but, on the contrary, expands the circle of contribution recipients, and in consequence means further growth of the state share in financing political parties, i.e. a shift in the direction with which the Constitutional Court did not agree in its previous case law. Apart from increasing the demands on the state budget, such a shift would conflict with the principle of political parties being rooted in civil society, a principle which is expressed above all in voluntary support of political parties by citizens, based on their consideration and selection according to their affinity for parties' programs.

Insofar as the petitioner argues on the basis of unjustified derivation of the regular contribution only from results of elections to the Chamber of Deputies, such a framework could be considered unconstitutional only in the event of it being arbitrary, i.e. in the absence of a rational connection between the legal framework and the aim pursued.

The constitutional order the of the Czech Republic and its statutory system do not contain an explicit legal definition of a political party (political movement). Thus, a political party's constitutional nature, nature as a subject of law, purpose and aim must be derived from its overall constitutional and general legal framework.

Political parties are a key subject of a democratic pluralist political system; they perform the function of representatives of pluralist, differing interests. Their aim is to achieve these interests through the means of a democratic constitutional system, i.e. by representation in representative assemblies, in particular in the Parliament and in the representative bodies of municipalities and regions (Art. 5 of the Constitution, Art. 20 par. 2 and Art. 22 of the Charter, Act no. 247/1995 Coll., on Elections to the Parliament of the Czech Republic, as amended by later regulations, Act no. 491/2001 Coll., on Elections to the Representative Bodies of Municipalities and Amending Certain Acts, as amended by later regulations, Act no. 130/2000 Coll., on Elections to the Representative Bodies of Regions and Amending Certain Acts, as amended by later regulations). The foregoing indicates that the Czech constitutional and legal system does not recognize a special category of regional political parties; their functioning is connected to the formation of all

representative assemblies.

Under the Czech Republic's constitutional system, the two chambers of Parliament do not have the same powers and do not participate in the same degree in the legislative process; thus, they do not have symmetrical positions. It is exclusively the Chamber of Deputies which creates the government and declares lack of confidence in it; as a rule, in the area of legislative authority it has the final decision-making power. The Senate has the position of a controlling brake, a counter-balance, vis-à-vis the Chamber of Deputies. If the legal framework derives allocation of regular contribution for activities from the results of elections to the Chamber of Deputies, this reflects the real position of a political party in the state's constitutional system, in particular the degree of its participation, or, for non-parliamentary parties, potential participation, in the legislative power, as well as in the formation of the supreme body of executive power – the government. If this framework is not also derived from the results of elections to municipal or regional representative bodies, it then reflects the conceptual characteristics of a political party (movement) in the significance of a statewide, not only regionally, relevant political entity.

Due to the foregoing, the Constitutional Court did not find the statutory framework of a threshold of 3% of valid votes received in elections to the Chamber of Deputies of the Parliament of the Czech Republic for allocation of a regular contribution for the activities of a political party, contained in § 20 par. 4, 6 of Act no. 424/1991 Coll., to be inconsistent with Art. 5 of the Constitution and Art. 20 par. 2 and Art. 22 of the Charter, wherefore it denied the petition to annul the cited statutory provisions.

Instruction: Decisions of the Constitutional Court can not be appealed.

Brno, 19 January 2005

Dissenting Opinion
of Judges JUDr. Vojen Güttler and JUDr. František Duchoň in the matter Pl. US 10/03

The undersigned judges have a dissenting opinion to verdict point 2 of the judgment of the Constitutional Court of 19 January 2005, file no. Pl. ÚS 10/03, which denied the petition to annul § 20 par. 4 and § 20 par. 6 of Act no. 424/1991 Coll., on Association in Political Parties and Political Movements, as amended by later regulations.

It is based on the following reasons.
1) A democratic law-based state – which is required to protect and support a pluralist, open society in which a free individual can best develop – constitutionally guarantees room for the formation of various interest groups, which then, as individual political parties or movements, attempt to put forth their ideas by obtaining a share of power in the free

competition of political forces. In general, political parties are basically legal entities under private law, and are therefore subject to Art. 2 par. 3 of the Charter of Fundamental Rights and Freedoms, under which they can do that which is not prohibited by law, and may not be compelled to do that which is not imposed on them by law. The state and its bodies may interfere in their activities only on the basis of law and within its bounds. However, the Constitutional Court, in the first of its judgments concerning the issue of financing political parties (judgment file no. Pl. ÚS 26/94, Collection of Decisions of the Constitutional Court of the Czech Republic, volume 4, judgment no. 62, promulgated as no. 296/1995 Coll.) has said, in particular (among other things), that the constitutional law position of these parties may not be defined only as the simple consequence of a determination that they do not have the status of a state body and that as a result of that they are nothing more than private associations. After World War II, developed democracies recognized a certain public status, i.e. a role which political parties have in the state and vis-à-vis the state, without, however, themselves being the state, or having a state, public-law nature. This ambivalent nature of political parties gives rise to a number of problems connected to the interpretation of their position, function and relationship to the state. Political parties, in accordance with the constitution, fulfill certain public roles which are essential for the life of a state founded on representative democracy. The public interest in a state which is, under the constitution, a democratic law-based state (Art. 1), also being legitimated in a democratic manner (i.e. in elections, based on the competition of political parties) is undoubtedly of a public nature. From this public (general) interest we can derive a requirement that the state enable and support the fulfillment of these tasks, which are essential for the functioning of the state. The framework for financing political parties by a democratic state, which resulted in the contribution for activities of political parties and in the contribution for payment of their election costs, also corresponds to this.

The existing financing of political parties in the Czech Republic – as elsewhere in the world – can be divided into state financing and financing from private sources. Direct state financing is connected primarily to elections. Under § 85 of Act no. 247/1995 Coll., on Elections to the Parliament of the Czech Republic and Amending and Supplementing Certain Other Acts, as amended by later regulations ("Act no. 247/1995 Coll.") a political party which received at least 1.5% of the total number of valid votes in elections will be paid 100 CZK from the state budget for each vote received (the contribution for payment of election expenses, or the so-called contribution "for votes"). Act no. 424/1991 Coll., on Association in Political Parties and Movements, as amended by later regulations, in § 20 regulates the so-called contribution for activity, which includes a regular contribution for a party which received at least 3% of votes in elections to the Chamber of Deputies (6 to 10 million CZK per year) and a contribution for the seat of a deputy or senator (900,000 CZK per year), or for the seat of a member of a representative body of a region and a member of the representative body of the capital city of Prague (250,000 CZK per year). This is an expression of a certain privilege for political parties vis-à-vis other types of associations, in view of their abovementioned importance for a democratic state (in the expert literature, cf. Filip, J.: Ústavní právo [Constitutional Law], Brno, Masarykova univerzita, 1997, in particular p. 257).

The Constitutional Court has already spoken distinctly several times – apart from the cited judgment no. 296/1995 Coll. – on the serious issues of financing political parties and their particular role in a democratic law-based state (specifically, judgments no. 243/1999 Coll., no. ;64/2001 Coll. and no. 98/2001 Coll. Collection of Decisions of the Constitutional Court volume 16, judgment no. 137 a volume 21, judgments no. 16 and no. 36). In the first of these judgments the Constitutional Court granted the petition of the political part Demokratická unie [Democratic Union] to annul part of § 85 of Act no. 247/1995 Coll., on Elections to the Parliament of the Czech Republic (the contribution for payment of election expenses being tied to receiving at least 3% of the total number of valid votes). It considered the same provision in the next judgment, in which it stated that in the context of all relevant circumstances, even the lowering of the threshold from three to two percent, given the simultaneous lowering of compensation for every vote received from 90 to 30 CZK, can change nothing in the conclusions stated in the previous judgment. In the last case (judgment no. 98/2001 Coll.) the Constitutional Court considered Act no. 424/1991 Coll., on Association in Political Parties and Political Movements – whose provisions are also subject to review in the present matter – where it annulled the then second sentence of § 20 par. 4 (a party which reached the threshold of 3% of votes cast and became entitled to a regular contribution would not receive the contribution if it did not, in subsequent elections, receive the number of votes necessary for representation in the Chamber of Deputies) and part of § 20 par. 7 (a contribution for the seat of a deputy or senator in the amount of 1,000,000 CZK per year). In the present adjudicated matter, the dissenting judges also found no reason for the Constitutional Court to diverge from its previously expressed opinion on this issue. Therefore, in their opinion it is necessary to re-emphasize – with reference to the cited judgments – the conclusions already stated, which concentrate the essence of the position of political parties in the Czech Republic and formulate the principles of financing them, consistently with the constitutional order.

Political parties and political movements are institutions which are constituted on the basis and within the framework of a constitutional state, whose principles and rules bind both the parties, and the state. They include Article 5 of the Constitution, which enshrines the free and voluntary creation and free competition of those political parties which respect the fundamental democratic principles, Art. 2 par. 3 of the Constitution, under which state authority serves all citizens, and Art. 20 par. 2, 4 of the Charter of Fundamental Rights and Freedoms, which guarantees the right the right to form political parties and political movements and to associate in them, and also provides that political parties and political movements are separate from the state. Parties serve as an intermediary link between citizens and the state: they serve for their participation in the political life of the society, in particular in forming legislative assemblies and local government bodies. In their basic function – the creation of political will in the state – political parties (their results) predetermine the forming of state bodies. In other words, in order for democratic state bodies to be created at all, they must be preceded by free competition among autonomous political parties independent of the state, because it is only the results of that competition which form the political contours and proportions of the state.

In this regard it must be stated that neither the Constitution of the Czech Republic nor the Charter of Fundamental Rights and Freedoms, nor international treaties under Art. 10 of

the Constitution, as amended, provide support for the state to refuse, in principle, financial support for political parties. However, that does not mean that the financing of political parties and political movements by the state has no thresholds. A state which made financial support for political parties and political movements a means for influencing their activities, or even a tool for manipulating them, could cease to fulfill the task of supporting parties and movements in their constitutional (Art. 5 of the Constitution) and statutory functions. Therefore, financial support of political parties and movements may not exceed a degree which respects thee general threshold in Art. 20 par. 4 of the Charter of Fundamental Rights and Freedoms, under which political parties and political movements are separate from the state. Of course, in view of the need for partial balancing of their chances, a certain financial support for political parties by the state is acceptable. Generally, however, one must begin with the fact that the more political parties are subsidized by the state, the less they feel the need to seek support for their activities from other legal sources. Therefore, contributions for the activities of political parties should not weaken the efforts of political parties to obtain political and material support from their voters and supporters. Political parties can not fulfill their function if they are left to the mercy of the state or rely on state support more than on the support of citizens (judgment no. 296/1995 Coll.).

The principle of free competition among political parties includes the state's obligation to respect equal chances for them – in terms of the legal regulation of conditions for the competition and regulation of the participants' entitlements – because basically this involves application of the general principle of equality, guaranteed both by constitutional regulations and by international acts. Any interference in these conditions by the legislature is interference by the state, and should be guided by the public interest. The percentage limitation for paying the contribution for payment of election expenses of political parties can not be the result of arbitrariness or suitability evaluated only in terms of the interests of established parties. However, this conclusion has general significance, and therefore also applies to the so-called regular contribution under Act no. 424/1991 Coll. When regulating the area of creation of political will, the legislature must respect the fact that it has been given a narrow range in this field and that it is denied the opportunity for differential treatment of parties which is not based on a particularly serious reason. The purpose of an election contribution may not be to limit the freedom of election competition, but to ensure its seriousness. If a modern representative democracy takes into account the functioning of a parliamentary system and accepts, in a limited degree, the integrational stimulus for the system of allocating seats, this does not mean that integrational viewpoints can have fundamental priority over the principle of free competition among electoral parties. That free competition is a direct expression of the pluralist nature of a democratic society, and it is precisely protection of political pluralism in political life which is of primary importance for its very existence. Therefore it is markedly protected by Art. 5 of the Constitution and Art. 22 of the Charter of Fundamental Rights and Freedoms. Any direct or indirect limitation of the equality of parties in election competition may not, individually or as an accumulation of measures, which differentially disadvantage or advantage particular parties, a priori make impossible the very participation of political parties in election competition. The accumulation of financial support for only certain parties has as a consequence the simultaneous accumulation of de facto financial penalties for other parties, and therefore it must be carefully weighted

whether the purpose of such measures has not been exceeded (judgment no. 243/1999 Coll.).

The term “free competition of political forces” under Art. 22 of the Charter of Fundamental Rights and Freedom emphasizes the part of the political competition process which precedes the establishing of parties in the positions they have achieved, i.e., emphasizes above all the free entry of political forces into election competition. “The free competition of political parties is thus undoubtedly a value which must be given precedence by the statutory regulation of state financing of political parties.” The concentration of state financial aid for only those parties represented in Parliament (or for strong, established parties) limits the economically equal participation of parties in election competition (Art. 5 of the Constitution) and fails to respect the principle of Art. 20 par. 4 of the Charter of Fundamental Rights and Freedoms, which enshrines the separation of parties from the state. The high threshold for a contribution for a seat neglects the fundamental criterion for state support, that is, the number of votes received by parties, and concentrates state financial support on parliamentary activity to a constitutionally unacceptable extent (judgment no. 98/2001 Coll.).

2) In the opinion of the dissenting judges, these conclusions must also be applied – in view of the need for a comprehensive review of the matter – to the adjudicated case.

With reference to the cited arguments, repeatedly emphasized by the Constitutional Court, the dissenting judges conclude that the contested § 20 par. 4 and part of § 20 par. 6 of Act no. 424/1991 Coll., in their present form, are – if the existing statutory framework for financing political parties is evaluated comprehensively – unconstitutional. Thus, this unconstitutionality can not be seen only in the cited provisions themselves, in other words in the fact that an entitlement to a regular contribution would be tied to reaching the 3% threshold or its level would be in and of themselves inconsistent with the constitutional order of the Czech Republic. Objective evaluation of the filed petition requires not only isolated weighing of one kind of state contribution, but evaluation of it in the aggregate, the resulting effect of all relevant factors, that is, in particular – as has already been stated – the contribution for payment of election expenses under § 85 of Act no. 247/1995 Coll. and the contribution for a deputy or senate seat under Act no. 424/1991 Coll. The need for such an aggregate view arises from the nature of the matter itself. Such a view is also the duty of the Constitutional Court as a guarantor of constitutionality in a democratic state. The Constitutional Court has already demonstrated the inequality of allocation of budget funds to political parties – based on the then-existing legal framework – in the fictitious example of two political parties, one of which received 2% of votes in elections and the other 6% (judgment no. 98/2001 Coll.). A party which was only three times more successful would receive roughly 25 times more from the state coffers. The Constitutional Court then stated that disproportion thus arise which are inconsistent with the purpose and aims of financing political parties from public funds, that is, with enabling free competition among them. If free competition among political parties under comparable conditions is not respected, and if there is a tendency to create different conditions for large or larger parties and thus to directly or indirectly form political parties with a better or worse position – and thus also citizens with different conditions for their movement in

the political system – such steps can not be considered constitutional (see the cited judgment).

At the present time that disproportion between established political parties (note: of course, even the term "established party" is deceptive to a certain degree, because in a democratic state no political entity should be so established that it would lead to doubts about the free competition of political forces) and non-parliamentary parties has lessened somewhat, but I still too high. The lessening of this disproportion was helped by lowering the threshold for entitlement to a contribution fro payment of election expenses under Act no. 247/1995 Coll., as amended, to 1.5%, with the simultaneous increase of that contribution to 100 CZK, which can clearly be considered a positive step; however, it is evident that in comparison with the income of parliamentary parties it is not sufficient. If we take an analog of the abovementioned hypothetical example – without having to go into detail in a perfectionist manner – we can determine through simple mathematical operations, that a party which does not exceed the threshold of 3% for entitlement to a regular contribution under Act no. 424/1991 Coll., even if it is only one third or one half less successful than a party which barely got into the Chamber of Deputies, receives only the contribution for payment of election expenses (§ 85 of Act no. 247/1995 Coll. as amended), whereas the parliamentary part also receives an annual regular contribution and an annual contribution per seat, and in consequence is therefore "compensated" for the electoral term more than ten times better (cf. also Collection of Decisions of the Constitutional Court, volume 21, file no. Pl. ÚS 53/2000, p. 324).

Thus, in the opinion of the dissenting judges, in order to find a constitutional solution it is necessary – while observing the abovementioned general principles, previously stated by the Constitutional Court – also to allocate the relevant financial resources more fairly among the weaker (although not fragmentary political parties); it would likewise be appropriate not to give so much preference to the importance of elections to the Chamber of Deputies, but, in an appropriate manner to take also into account the successes of political parties in other elections. It is surely suitable and fair – as stated in the statement from the Chamber of Deputies – for parties which, thanks to their voter base, have a more real importance for political events in the state, to receive more, but the disproportion between parliamentary and non-parliamentary parties in that regard should not be as high as it is at the present time. Insofar as the statement from the Chamber of Deputies speaks of the "need to take into account an exact and fair criterion," we cannot but agree, provided that smaller political entities are also taken into consideration, if their importance cannot be considered quite negligible (e.g. around 2% of votes received). The principle of fairness should be a guiding idea of every democratic society. The seriousness and dignity of elections, as well as the honesty of intent of political parties can not be secured only or primarily by revenues for the most successful, in particular in a situation where the curve of financial profit rises disproportionately in comparison with only slightly less successful parties or movements. In this regard, however, the dissenting judges point to the danger of further increasing the financial dependence of political parties on the state; state financing should never significantly exceed the financing of parties form private sources, because that – as was already stated above – would violate the principle of separation of political parties from the state, enshrined in Art. 20 par. 4 of the Charter of

Fundamental Rights and Freedoms.

3) In the opinion of the dissenting judges, the Constitutional Court evaluated the present issue from a too narrow viewpoint (although, in formal terms, solely in relation to the contested provisions, basically correctly); as was already repeatedly emphasized, the existing statutory framework for financing political parties should, however, be evaluated comprehensively and in the aggregate, particularly in relation to the contribution for payment of election expenses under § 85 of Act no. 247/1995 Coll. and the contribution for a deputy or senate seat under Act no. 424/1991 Coll. This is also related to the fact that the previous judgments to which the Constitutional Court refers, and the trend of its case law in general, leans more toward granting the petition – and thus for the position of the dissenting judges – than against it.

The dissenting judges also do not agree with the majority opinion insofar as the judgment of the Constitutional Court overly emphasizes the more important position of the Chamber of Deputies in relation to the Senate in the constitutional system of the Czech Republic. It is their belief – even if the Senate, conceived as a stabilizing and controlling actor understandably has different powers and does not participate in the legislative process to the same degree as the Chamber of Deputies – that there are no reasonable grounds for such a different approach to elections to the two parliamentary chambers in relation to state financing, which is established by a valid legal framework. The dissenting judges also do not see a reason to ignore the results of elections to municipal and regional representative bodies; nationwide political parties which have more than merely regional importance are also often successful in these elections, as the Constitutional Court argues.

Insofar as the Constitutional Court states that parliamentary political parties also receive indirect state financing (e.g., in the form of payment of deputies salaries, support for parliamentary organizations, etc., which, of course, is not unconstitutional in and of itself), this can be considered another substantive argument supporting the opinion of the dissenting judges, because – again, looking at the issue comprehensively – this leads to a further increase in the disproportion between parliamentary and non-parliamentary parties, as well as to further weakening of the principle of thorough separation of political parties from the state (Art. 20 par. 4 of the Charter of Fundamental Rights and Freedoms).

In conclusion, the dissenting judges again emphasize that their dissenting opinion does not intend to support fragmentary political parties and movements, which often do not even want to seriously participate in political life and election competition, and not infrequently pursue only financial aims. They have in mind those political parties and movements that take their participation seriously, often have existed for a number of years, and have a certain non-negligible voter base.

For all the foregoing reasons, the dissenting judges have concluded that § 20 par. 4 and § 20 par. 6 of the contested Act are inconsistent with Art. 22 of the Charter of Fundamental Rights and Freedoms and with Art. 5 of the Constitution, and therefore in this regard the petition should be granted. As the Constitutional Court, which, as a “negative legislature,”

could not in this case decide otherwise than by partial derogation, which, however, given the nature of the matter, could not be a systematic solution, there would be no choice but to also decide on an appropriate delay before the decision went into effect, so that the legislature would have sufficient time to prepare a new legal framework.

Brno, 19 January 2005

Dissenting Opinion
of Judge JUDr. Eliška Wagnerová, Ph.D. in the matter Pl. US 10/03

I am led to disagree with the majority opinion expressed in point II. of the judgment Pl. ÚS 10/03 by the following reasons:
1. The judgment departs from the existing case law on state financing of political parties in terms of the methods used to address the matter.
2. It also departs from it in terms of the criteria selected for reviewing the matter.
3. It reaches speculative conclusions which ignore the mutual conditions between law and reality, so characteristic precisely for the area of financing political parties, not only by the state.
4. Deriving state financing of political parties only from one of the chambers of Parliament, i.e. from the Chamber of Deputies, which does not correspond to the constitutional framework.

Re 1.
In my opinion, there are only three previous relevant judgments of the Constitutional Court on state financing of political parties. The basis of the solution is contained in a judgment which addressed the issue of the contribution for election expenses (Pl. ÚS 30/98), the second judgment addresses, among other things, the issue of a contribution for votes (Pl. ÚS 42/2000), and finally there is a judgment concerning primarily the issue of a contribution per seat and the issue of a regular contribution (Pl. ÚS 53/2000).

In all these cases, the Constitutional Court did not evaluate the specifically contested form of financing political parties separately; it always viewed it in the context of other instruments for state financing of political parties. So, for example, in judgment Pl. ÚS 30/98, after putting the contribution for payment of election expenses into context with other methods of state financing, it stated: “The accumulation of a number of financial burdens on small parties (and thus financial advantages for larger parties) is presently so extensive that there is a priori “suffocation” of these small parties which do not have sufficient financial resources to conduct an election campaign and pay deposits. With awareness of that, potential voters for these parties in actual voting turn their votes otherwise if “their” party does not have enough funds to make itself visible in competition with others. The higher the threshold for small parties, the less number of votes cast for them express their true significance and the weaker the reliability of election results. However, voters’ votes are supposed to be an expression of free decision in free competition among parties and the integrative factor is supposed to have an effect only after completion of free election competition.”

The level of a contribution per seat was evaluated equally markedly in context. Judgment Pl. ÚS 53/2000 states: “However, it is precisely comparing the amount of the contribution per vote cast with other forms of funding political parties, that is, in particular, the contribution for a deputy or senate seat discussed in this matter, as well as with the amount of a contribution for a seat in a regional representative body (which is not questioned in the adjudicated matter but we cannot abstract from it) supports the opinion of the Constitutional Court that there is a clear tendency against free competition of all political forces, as increasing the support of parliamentary parties is accompanied by simultaneous restriction of less successful parties. Thus disproportions arise which are inconsistent with the purpose and aim of financing political parties from public resources, i.e. with facilitating their free competition.”

I completely agree with this contextual method for evaluating individual forms of financing political parties. The majority opinion abandoned it, shielding itself behind the doctrine which forbids deciding “ultra petitum,” which, however, the contextual method respects and does not exceed.

Re 2.
The majority opinion states that the in the past the Constitutional Court searched for the threshold for state financing of a political party in terms of two principles, the principle of integration and the principle of representation. These were supposed to have been found in judgment Pl. ÚS 3/96, which denied a petition to cancel election deposits. This reference is irrelevant to me for two reasons. For one thing this was a judgment which expressed the majority of only a minority of seven judges (which is called a “relevant” minority), while in 1996 eight judges were of the opposite opinion. The later, and in my opinion only, relevant opinion, which overruled the cited minority opinion, was expressed in judgment Pl. ÚS 42/2000, which cancelled the deposits. Its reasoning states, among other things, that since the Constitutional Court’s last decision-making social changes have occurred, e.g. characterized by strong pressure in the direction of integrationist stimuli.” However, I consider it an important fact that when addressing the issue of a regular contribution one can not rely on opinions expressed on the issue of deposits, because, after all, deposits were not an issue of direct state financing of political parties.

Of course, what appears most important to me is the fact that the present majority opinion has not dealt at all with the quite fundamental opinion of the Constitutional Court expressed in judgment Pl. ÚS 30/98, under which: “In a representative democracy, integrative stimuli are permissible in a limited extent only after the end of the process of free competition between legally equal political parties, i.e., after adding the votes for the parties, in a certain differentiation in allocating seats, not, however, by a priori financial stimulation of certain parties and disadvantaging of other parties, as this would lead to modification and stylization in a number of votes cast for political parties.” At that time the Constitutional Court also said: “Any direct or indirect restriction of the equality of parties in election competition may not individually or cumulatively, in provisions which differentiate the detriment or advantages a particular party, a priori suppress the very participation of political parties in election competition. The accumulation of financial support for only certain parties is, in its consequences, also an accumulation of de facto financial sanctions for other parties. Therefore, it is necessary to consider carefully

whether the purpose of such measures has not been exceeded. This purpose must be only the seriousness of the efforts of the competing parties, which is not aimed at goals other than participation in political representation and promotion of their own program in it."

It must be pointed out that the Constitutional Court expressed these considerations in connection with evaluating the contribution for payment of election expenses. In the issue of state financing of parties it thus clearly and distinctly shifted the deliberation on the competing principles of integration and representation from one side to the level of the principle of equal opportunity in elections, which is to be provided to all electoral parties who have demonstrated the seriousness of their programs and proposals through election results of about 1% of votes cast, i.e. distinctly lower than are the 3% of votes cast on the other side. On the contrary, the integration principle was expressly rejected as inapplicable for the phase which precedes allocation of the seats obtained in elections.

In my judgment, the generality in the cited judgment requires that it also be "brought into the game" when evaluating the current matters today, i.e. the regular contribution to the activities of a political party. Where the majority opinion today evaluated the threshold of 3% of votes received in elections, it certainly did not use the criterion of seriousness, defined by receiving about 1% of votes cast. It refuses to break the 3% threshold, referring to the demands on the state budget. Moreover, it adds that such a shift would contradict the principle of political parties being rooted in civil society. In other words, of course, it thereby justifies, inconsistently with the cited case law of the Constitutional Court, an upward shift of the percentage for acknowledging the seriousness of political parties' activities, without providing principles to justify this shift. I will add peripherally that, of course, nothing prevents the total amount provided to political parties from being limited for fiscal reasons. However, the topic for evaluation now is the fair allocation of that amount so as to respect the principle of equal opportunity for those parties which are seriously competing in elections. Incidentally, the German Federal Constitutional Court proceeded analogously (decision BVerfG of 9 April 1992).

Moreover, it is evident that all activities of political parties, including in the period between elections, is ultimately aimed at seeking success in elections. Similarly, the decision of the German Constitutional Court, BVerfG of 19. 6. 1966, which even cancelled the contribution for activities of political parties on the grounds of that form of financing being in conflict with the principle of a free and open process of formation of opinions and the will of the voters, i.e. with out state contributions. Thanks to this decision, state financing of political parties shifted to merely compensating elections expenses, understood, of course, in the abovementioned broad sense.

Re 3.
The majority opinion tried to differentiate in defining the purposes (aims) of individual forms of state financing of political parties. I can not agree with this fragmentary view of the purpose of state financing of political parties, because, particularly when defining the purpose of the state-provided contribution per seat, this is obvious mixing of the state and political parties, which is forbidden by Art. 20 par. 4 of the Charter. In my judgment, Parliament's legislative activity is sufficiently secured by financing that state institution and compensating the political representatives who are active in it. As regards work on

legislative proposals performed within individual political parties, there is no reason to distinguish between parliamentary and non-parliamentary parties, as this is an activity which, in my judgment, can not be mixed with the activities of deputy and senate factions. Otherwise, the difference between a political party as a component of civil society and the parliamentary chambers as state bodies would be erased. In other words, there would be impermissible state interference in political parties, moreover only in some, that is, those which are represented in Parliament. However, in my opinion the purpose of state financing of political parties is to enable and support the formation of plural opinions in society with the aim of effectively presenting them in elections. In my eyes, the individual forms of financing are only a technique which reflects, or should appropriate reflect, the support for individual opinions presented by the parties in society.

The fragmentation of the aims of individual forms of state financing in reality completely erases the ability to verify whether the difference between financing parliamentary and non-parliamentary parties is proportionate, because the majority opinion implicitly removes state support for non-parliamentary parties in their preparations for electoral jousting in the form of preparing legislative programs. All this despite the fact that, as I mentioned above, the Constitutional Court recognized the seriousness of election intents of parties which achieved election results around 1% of votes cast, and there are no reasonable grounds to differentiate between parliamentary and non-parliamentary parties.

If we consider that the contribution per seat (set at 900,000 CZK in a curious and, I do not hesitate to say, constitutionally quite incorrect process), has remained practically at the level which the Constitutional Court described as conflicting with the purpose of a state financial contribution to political parties (Pl. ÚS 53/2000), the difference thus established between parliamentary and non-parliamentary parties, which, of course, benefit from the bonus of "seriousness of election intentions," appears to me to be quite unjustifiable. This evident disproportion makes parliamentary political parties into parties rooted in the state, not in the society. Insofar as the majority opinion then states that breaking the threshold of 3% of votes received for provision of a regular contribution would mean increased demands on the state budget, yet does not taking into account the quite inappropriate disproportions between the over-financing of parliamentary parties and non-financing of non-parliamentary parties which, however, have proved the seriousness of their programs and thus their being rooted in society, this is a self-serving position, lacking a constitutional law dimension which consists precisely in reviewing the justification of differences, or in reviewing the proportionality of differences thus established.

The situation created by the amount of the state contribution per seat is not only inconsistent with Art. 20 par 4 of the Charter, but is fundamental for evaluating the quality of democracy in the Czech Republic. As a state body, the Parliament is supposed to be the result of serious election competition of private entities (political parties) representing various interests in society. It is incompatible with democracy for the state, by giving financial preference to certain entities, to eliminate other, authentic entities rooted in the society, with results of about 1% of votes cast in elections, from real and fair election competition. It is no accident that the Constitutional Court (Pl. ÚS 53/2000) appealed to

the legislature to, after the Constitutional Court canceled the contribution per seat, use the space created to implement a new model for state financing of political parties "in such a way that the proportion between positions attained through subsidies and subsidies for success in election campaigns will change markedly in the favor of valuing the number of votes gained in the elections."

In my opinion, it is also necessary to interpret from the viewpoint of this appeal the absence of comment by the Constitutional Court in the cited judgment to the threshold of 3% of votes cast for entitlement to a regular contribution, which the majority opinion points out, and thereby considers that threshold to have been unquestioned by the Constitutional Court in the past. However, I do not share this conclusion, because in the cited judgment the Constitutional Court went farther, in terms of its opinion on state financing of political parties, than just to the 3% threshold for entitlement to a regular contribution. The fact that it was disregarded, just as in the case of the contribution per seat, is testimony to the internalization of constitutional values by members of political elites, here, members of Parliament, both if I consider the clarity of the constitutional imperative that decisions of the Constitutional Court are binding (Art. 89 par. 2 of the Constitution), and if I take into account the reality abroad. For example, in Germany, decisions of the Federal Constitutional Court on the financing of political parties were always accepted by the legislature in their entirety, or statutes on financing of political parties were formed on the bases of those decisions, including, of course, their reasoning (see, e.g. Stationen der Parteienfinanzierung im Spiegel der Rechtsprechung des Bundesverfassungsgerichts, Sebastian Lovens, Zeitschrift für Parlamentsfragen 2/2000, p. 284-299).

In any case, the binding nature of the Constitutional Court's decisions, including the material grounds stated in the reasoning, has heightened significance in the case of judgments on financing of political parties generally, and especially financing by the state. This is because reality indicates that parliamentary parties, when passing statues on the financing of political parties, are deciding "in their own case," although the constitutional construction of a deputy or senate seat is different (deputies and senators have an unrestricted mandate, which they exercise in the interest of all the people, according to their best knowledge and conscience, and they also commit to respecting the Constitution – Art. 23 par. 3 of the Constitution). On the contrary, however, the Constitutional Court, institutionally and in terms of personnel demonstrates elements of impartiality (the prohibition on membership in political parties for judges of the Constitutional Court – § 4 par. 4 of the Act on the Constitutional Court). Therefore it appears to be the appropriate body to determine the principles on which the financing of political parties should be based. In doing so it draws from the Constitution and the constitutional order as a whole. The test of the contested provision applied by the Constitutional Court should be stricter; it should not threshold itself merely to a mathematical comparison of the 5% closing clause with the threshold of 3% of votes received in elections and be satisfied with the finding that 3 is less 5.

Re 4.
On the one hand the majority opinion states that there is no legal definition of a political party. I see this fact as a plus, because of the previously mentioned dynamic interconnection and smooth mutual influencing of law and reality in the area of financing of political parties. Materially, constitutional references to political parties (in particular Art. 5 of the Constitution, Art. 20 of the Charter) can be understood, from a constitutional law viewpoint, as an institutional guarantee for the exercise of individual political rights, in particular the right to vote (Art. 21 of the Charter, Art. 6 of the Constitution). In any case, if there is no legal definition of a political party as such, it is only logical that there is also no legal definition of a regional party. However, one can not conclude from this without anything further (as the majority opinion does), that "the constitutional and legal system does not recognize a special category of regional political parties; their functioning is connected to the formation of all representative assemblies." Such a claim contradicts reality and the material understanding of a political party (e.g. Strana pro otevřenou společnost – SOS [Party for an Open Society], Volba pro město - VPM [Choice for the City], and others). The fact that such a political party is not state financed is another, in my view problematic matter; nonetheless there is no doubt that it is still a political party.

The majority opinion develops from a construction of the what is called the "real" position of a political party in the constitutional system of the state, which it ties exclusively to the presence of the party in the Chamber of Deputies. This construction seems artificial to me. If it uses the functional interconnection of the Chamber of Deputies with the government to conclude that the lower chamber is more important compared to the upper chamber – the senate (apparently thanks to the real power of the government), in my opinion this deliberation has no support in the Constitution. Art. 15 par. 2 of the Constitution describes the Parliament as one entity. In other provisions of the Constitution the powers of both chambers of Parliament are developed in such a way that, if the Chamber of Deputies is a "partner" to the government, the Senate, apart from the exercise of safeguards in relation to the Chamber of Deputies (e.g. in terms of the legislative process, continuity of the legislative power, etc.), is characterized by its position of "partner" to the other branch of the dually-established executive, i.e. to the President of the Republic and with him also to the Constitutional Court. This position of the Senate is evident in particular in granting consent with the naming of a judge of the Constitutional Court by the president. The fact that this is a very real Senate power (if I apply the logic of the majority opinion on the real position of the parliamentary chambers in the constitutional system of the state), is proved by the efforts, now on-going for more than a year and a half, to appoint judges to the Constitutional Court, as well as the role of the Constitutional Court in the constitutional system. Finally, it is the Constitutional Court, in whose formation the Senate participates, which is the guarantor of the constitutional exercise of all state power, regardless of which state body exercises it. The position of the Constitutional Court in the constitutional system (although it governs neither by sword nor by purse) is undoubtedly strong thanks to the integrative constitutional guiding and influencing of the uses of power of individual elements which exercise power in the state. Insofar as the Senate take part in creating it, this testifies to its real, equal status with the Chamber of Deputies. The majority opinion overlooked this aspect.

Brno, 19 January 2005