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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case	3-4-1-13-05
Date of decision	1 September 2005
Composition of court	Chairman Märt Rask, members Tõnu Anton, Eerik Kergandberg, Lea Kivi, Ants Kull
Court case	Petition of the President of the Republic to declare the Local Government Council Election Act Amendment Act, passed by the Riigikogu on 28 June 2005, unconstitutional
Date of hearing	23 August 2005-09-12
Persons participating at the hearing	Representative of the President of the Republic Arno Allmann; Deputy Chancellor of Justice-Adviser Aare Reenumäe, acting as Chancellor of Justice; Adviser to the Chancellor of Justice Nele Parrest; representative of the Ministry of Justice Kristjan Siigur; representative of the Riigikogu Urmas Reinsalu; Chairman of the National Electoral Committee Heiki Sibul and specialist of the national Electoral Committee Tarvi Martens
Decision	To dismiss the petition of the President of the Republic

FACTS AND COURSE OF PROCEEDING

1. On 27 March 2002 the Riigikogu passed the Local Government Council Election Act (hereinafter 'LGCEA'), enabling the voters holding a certificate for giving a digital signature to vote electronically on the webpage of the National Electoral Committee on the days prescribed for advance polls. § 74(5) of the Act establishes that Electronic voting is not applied before 2005.
2. On 12 May 2005 the Riigikogu passed the Local Government Council Election Act Amendment Act (hereinafter 'LGCEAAA'), specifying the norms of LGCEA regulating voting by electronic means. The Riigikogu supplemented LGCEA, inter alia, with § 50(6), which provided for a voter's right to change his or her vote, given by electronic means, either by a new vote by electronic means during advance polls, by a ballot paper during advance polls or by voting by a ballot paper on the day of voting until 16.00.
3. By its resolution No 847 of 25 May 2005 the President of the Republic refused to promulgate the Act due to the conflict thereof with the principle of uniformity of local government council elections, established in § 156(1) of the Constitution, as not all voters are guaranteed equal possibilities for the performance of the act

of voting. In his justifications the President of the Republic pointed out that a voter who has the possibility to vote by electronic means, has the right to change his or her vote given by electronic means either by voting again by electronic means or by a ballot paper, whereas other voters who use other voting channels have no possibility to vote again or to change their vote.

4. On 15 June 2005 the Riigikogu again passed the Local Government Council Election Act Amendment Act, which the President of the Republic had refused to promulgate, with amendments. Proceeding from the petition of the President of the Republic the Riigikogu decided to amend § 50(6) of the Local Government Council Election Act, enabling voters to change their votes given by electronic means by voting again either by electronic means or by a ballot paper from the sixth to the fourth day before the day of voting.

5. By his resolution No 873 of 22 June 2005 the President of the Republic refused to promulgate the Act due to the continued conflict thereof with the principle of uniformity of local government council elections, established in § 156(1) of the Constitution, as a voter voting by electronic means is accorded advantages in comparison to a voter using other voting channels.

6. On 28 June 2005 the Riigikogu again passed the Act, which the President of the Republic had refused to promulgate, unamended.

7. On 12 July 2005 the President of the Republic refused to promulgate the Act and had recourse to the Supreme Court for the declaration of unconstitutionality of the Act.

OPINIONS OF THE PRESIDENT OF THE REPUBLIC AND THE PARTICIPANTS IN THE PROCEEDING

8. In his petition the President of the Republic is of the opinion that the amendment to the Local Government Council Election Act, establishing the right of a voter to change his or her vote given by electronic means for unlimited number of times during the time allocated for advance polls, is in conflict with the principle of uniformity of local government council elections, established in § 156(1) of the Constitution, which requires that each person with the right to vote has one vote and that all persons have been given the possibility to vote in similar manner. The principle of uniformity means that a voter can vote but once, that his or her vote is taken into account but once when counting votes, and that the vote does not become distorted in the course of voting. Through the possibility to change the vote given for unlimited number of times the contested Act accords advantages to voters voting by electronic means in comparison to the voters using other voting channels, as the latter lack the possibility to vote again or vote differently.

The justification that the possibility to change the vote given by electronic means for unlimited number of times helps to prevent purchasing of votes when voting via the uncontrolled medium of Internet and guarantees the freedom of voting, is not appropriate. The possibility to change, during advance polls, for unlimited number of times the vote given by electronic means, established for the protection of the freedom to vote and secrecy of voting, must not infringe upon other electoral principles protected by the Constitution.

9. The Constitutional Committee of the Riigikogu, expressing its opinion on behalf of the Riigikogu, points out that the possibility to change electronic votes serves the aim of guaranteeing the freedom to vote and of guaranteeing the uniformity of voting through preventing the purchasing of votes.

The principle of uniformity means that all voters have equal possibilities to affect the voting results, i.e. an equal number of votes will be taken into account per voter. The principles of uniformity and generality in their conjunction require that the participation in voting, guaranteed to voters, be as convenient as possible. New voting channels serve the aim of increasing the participation in voting and thus protecting the representative nature of representative bodies.

The principle of uniformity does not mean that all votes should vote using exactly the same channel. All those who use different channels of voting are, in fact, in a somewhat different situation, and so far this has not been deemed to be in conflict with the principles of democratic elections. From the point of view of

democracy it is important that only one vote per voter be taken into account. In regard to voting by electronic means the taking into account of one vote per voter shall be guaranteed by the same methods, which are used when counting the votes given outside the polling divisions of one's residence.

Proceeding from the principle of uniformity the state shall take measures to prevent the purchasing of votes, otherwise it would be possible to obtain more than one vote either in consideration for benefits or under the influence of a threat. Purchasing of an electronic vote becomes less reasonable only when an electronic vote can be changed by another electronic vote or by a ballot paper.

10. The Chancellor of Justice is of the opinion that § 15 of the LGCEAAA, contested by the President of the Republic, is constitutional.

Proceeding from the principle of uniform elections the state shall enact regulations enabling all voters to vote in equal manner. By the contested Act the state has guaranteed all voters a legal possibility to vote in similar manner, including the right to vote by electronic means and to change the vote given by electronic means. According to the valid law it is possible to change a vote given by a ballot paper outside the polling division of one's residence during advance polls. The principle of uniformity can not be interpreted as a requirement that all voters must in fact vote in a similar manner. Uniformity means, first and foremost, the requirement that all voters have equal possibilities to influence the voting result.

If uniformity were interpreted as the prohibition to change one's vote during voting, the restriction of the principle of uniformity would be justified with the principles of freedom to vote and secret voting. The possibility to change the vote given by electronic means renders the influencing of the will of a voter by illegal means useless and pointless, and is thus an additional guarantee, supplementing the measures of penal law, for guaranteeing the principle of free voting when voting by electronic means. To those persons who did not vote secretly the possibility to change one's vote gives an essential remedy for restoring the secrecy of voting.

Bearing in mind the values underlying different electoral principles and the weight thereof, the apparent infringement of the principle of uniformity is justified by the need to protect the principles of freedom to vote and secrecy of voting.

11. The Minister of Justice does not concur with the position of the President of the Republic and is of the opinion that the contested Act is not unconstitutional.

The principle of uniformity means that all voters have an equal number of votes and that the votes of voters of different electoral districts have more or less the same weight. The principle of uniformity does not require absolute equalisation of voting conditions and procedures. Estonian electoral law recognises different methods of voting, which are all deemed to be in conformity with the principle of uniformity. Uniformity is meant to protect a voter against unequal treatment upon considering the influence of his or her vote on voting results. The possibility to change one's vote does not increase the influence of the vote in comparison to the vote of a person voting through any other channel. At local government council elections there is the possibility to change one's vote both upon voting by electronic means as well as upon voting by a ballot paper at a polling division.

Even if we considered the possibility to change votes as a restriction to the principle of uniformity, the restriction still serves a reasonable aim and is a proportional one. The aim of the contested Act is to sufficiently guarantee the secrecy of voting, and through this, the freedom to vote. When there is a possibility to change one's vote, the influencing of voters in an uncontrolled voting medium becomes pointless. In the present case the highest possible degree of equal treatment of voters using different voting channels is guaranteed, a degree that can be considered compatible with the requirements to voting via uncontrolled medium, proceeding from the principle of freedom of voting.

12. The National Electoral Committee points out that the preclusion of several votes by one voter, i.e. the

uniformity in the context of voting by electronic means, is guaranteed by a system similar to the system of two envelopes, employed upon voting outside the polling division of one's residence at advance polls. Upon voting by electronic means a voter makes his or her choice, which shall be encoded. At the end of the voting procedure the voter shall approve the choice by his or her digital signature, which means that personal data is added to the encoded vote. The personal data and the encoded vote shall be stored together until the counting of votes on the election day, with the aim of ascertaining that the person has given only one vote. The personal data of a voter and the vote given by the voter shall be separated before the counting of votes, after the fact that the voter has given only one vote has been checked. As it is not possible to transfer the votes together with personal data into the computer counting the votes, the secrecy of voting is also guaranteed.

The system of electronic voting is completed, it has undergone repeated laboratory trials and was publicly tested during a poll of inhabitants of Tallinn in January 2005.

CONTESTED PROVISIONS

13. The President of the Republic is of the opinion that it is § 15 of the Local Government Council Election Act Amendment Act, not promulgated by him, that is in conflict with the Constitution. The provision amends § 50 of the Local Government Council Election Act. Subsection (6) provides for the right of a voter, during the time allocated for advance polls, to change the vote given by electronic means for unlimited number of times. § 15 of the Local Government Council Election Act Amendment Act provides as follows:

" § 50 shall be amended and worded as follows:

"§ 50. Electronic voting

[...]

(6) A voter has the right to change the vote given by electronic means by

1) voting again electronically during the time provided for in § 44(2)3) of this Act;

2) voting by a ballot paper from the sixth to the fourth day before the election day, pursuant to procedure provided from in §§ 46-49 or § 51 of this Act." "

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

14. The President of the Republic does not contest and the Chamber shall not, in the present case, examine the general conformity of electronic voting with the Constitution of the Republic of Estonia. According to § 50(1) of the Local Government Council Election Act all persons with the right to vote, holding a certificate for giving a digital signature, may vote electronically via Internet on the webpage of the National Electoral Committee at the local government council elections of 2005. On the basis of the petition of the President of the Republic the Chamber shall review the conformity of the possibility provided for in § 15 of the contested Act, to change one's vote, given by electronic voting, with the principle of uniformity of elections.

15. The President of the Republic is of the opinion that § 15 of the Local Government Council Election Act Amendment Act, which supplements § 50 of LGCA with subsection (6), establishing the right of a voter to change, during the time allocated for advance polls, the vote given by electronic means for unlimited number of times, is in conflict with the principle of uniformity of local government council elections, established in § 156(1) of the Constitution. The President argues that the principle of uniformity, upon guaranteeing the active right to vote, requires that each person with the right to vote have one vote and that all persons be given the possibility to vote in a similar manner. This means that a voter can vote but once, that upon counting votes his or her vote is taken into account but once and that the vote does not become distorted in the course of voting.

16. The principle of uniformity of local government council elections is established in the second sentence

of § 156(1) of the Constitution, pursuant to which the elections of a local government council shall be general, uniform and direct. The principle of uniform elections, being one of the pillars of democratic statehood, means that all voters must have equal possibilities to influence the voting results. In the context of active right to vote the principle of uniformity primarily means that all persons with the right to vote must have equal number of votes and that all votes must have equal weight upon deciding the division of seats in a representative body.

17. Pursuant to Recommendation Rec(2004)11 of the Council of Europe Committee of Ministers to member states on legal, operational and technical standards of e-voting (hereinafter 'Standards of e-voting') the principle of uniform suffrage in the context of e-voting means four requirements. Firstly, it should be guaranteed that a voter shall be prevented from inserting more than one ballot into the electronic ballot box, and that a voter shall be authorised to vote only if it has been established that his/her ballot has not yet been inserted into the ballot box (§ 5). Secondly, the e-voting system shall prevent any voter from casting a final vote by more than one voting channel (§ 6). Thirdly, every vote deposited in an electronic ballot box shall be counted, and each vote cast in the election or referendum shall be counted only once (§ 7). Fourthly, where electronic and non-electronic voting channels are used in the same election or referendum, there shall be a secure and reliable method to aggregate all votes and to calculate the correct result (§ 8). All the requirements are aimed at guaranteeing that only one vote per voter is taken into account upon electronic voting. Although the Recommendation of the Council of Europe is not a legally binding document, it summarises the understanding of the democratic states of Europe of the conformity of electronic voting with the election principles inherent to democratic states, and it is thus an appropriate tool for interpreting the Constitution.

18. Pursuant to § 1(2) of the Local Government Council Election Act each voter shall have one vote. Pursuant to § 17 of the Contested Act the LGCEA shall be supplemented with § 53¹, subsection (1) of which establishes that when a voter has given several votes electronically, the last vote shall be taken into account. Pursuant to subsection (4) of the same section, if a voter has voted both electronically and by a ballot paper, the ballot paper shall be taken into account (the principle of supremacy of ordinary voting).

19. Within the system of electronic voting the taking into account of only one vote per voter is guaranteed by a system similar to the so called system of two envelopes, used upon voting outside the polling division of one's residence during advance polls. Upon voting by electronic means a voter makes his or her choice, which shall be encoded (placed in a so called inner envelope). Thereafter the voter shall approve the choice by his or her digital signature, which means that personal data is added to the encoded vote (so called outer envelope). The personal data and the encoded vote shall be stored together until the counting of votes on the election day, with the aim of ascertaining that the person has given only one vote. The personal data of a voter and the vote given by the voter shall be separated after the fact that the voter has given only one vote has been checked and repeated votes have been eliminated. It is possible to open the so called inner envelope only after the personal data added to encoded vote have been separated with the help of a key given only to the members of the National Electoral Committee, after the polling divisions have been closed. Thus, the system of electronic voting guarantees that only one vote per voter shall be taken into account, ensuring, at the same time, that the voting remains secret.

20. Upon weighing the effect of the possibility to change an electronic vote on the weight of the vote given by a voter, the Chamber points out that in the case of repeated voting the votes given earlier shall be annulled. Despite the repeated electronic voting a voter has no possibility to affect the voting results to a greater degree than those voters who use other voting methods. A vote given by electronic means shall be counted as one vote and from the point of view of voting results this vote is in no manner more influential than the votes given by voters using other voting channels.

21. Pursuant to the petition of the President of the Republic the violation of uniformity of voting also consists in the fact that a voter voting by electronic means is accorded advantages - through the possibility to change the vote for unlimited number of times - in comparison with the voters voting through other channels, as the latter lack the possibility to vote again or vote differently. This interpretation renders the

principle of uniform elections a special case of general right to equality, established in § 12 of the Constitution.

22. Through legislation concerning suffrage the legislator has guaranteed all voters the legal possibility to vote in a similar manner. In the legal sense the system of electronic voting is equally accessible to all voters at local government council elections. Pursuant to § 5(1) and § 6(1) of Identity Documents Act, the identity card (ID-card) necessary for electronic voting is mandatory both for an Estonian citizen staying permanently in Estonia and an alien staying permanently in Estonia on the basis of a valid residence permit. Thus, the state has created no legal obstacles to anyone to electronic voting, including to changing ones vote during the time prescribed for advance polls.

23. The Minister of Justice and the Chancellor of Justice refer to the possibility that the fact that due to factual inequality the possibility to change one's vote through electronic voting is not equally accessible to all voters can be regarded as an infringement of the general right to equality and the principle of uniformity. The Chamber also examines this allegation and points out that the existence of such infringement of the general right to equality and the principle of uniformity does not amount to an unconstitutional violation of the referred electoral principles. In order to answer the question of whether the possibility to change the vote given by electronic means amounts to an unconstitutional infringement of the right to equality and the principle of uniform voting, it shall be necessary to weigh whether the intensity of the infringement, consisting in the different treatment of the voters using electronic voting channels upon electing the local government councils, is proportionally related to the weight of the aims pursued.

24. The principle of equal treatment in the context of electing representative bodies does not mean that absolutely equal possibilities for performing the voting act in equal manner should be guaranteed to all persons with the right to vote. In fact, those who use the different voting methods provided by law (advance polls, voting outside the polling division of residence, voting in custodial institutions, home voting, voting in a foreign state, etc) are in different situations. For example, the voters who have to use the possibility of advance polls, are in a situation different from that of the voters who can exercise their right to vote on the election day. The guarantee of absolute actual equality of persons upon exercising the right to vote is infeasible in principle and not required by the Constitution.

25. The decision to allow electronic voting at the elections of local government councils was taken by the Riigikogu upon passing the Local Government Council Election Act on 27 March 2002, with the aim of increasing the participation in elections, that is the democratic participation of people in making decisions pertaining to communal life. Bearing in mind the principle that elections shall be general, the aim is a legitimate one. Pursuant to the principle that elections shall be general all persons with the right to vote must be guaranteed a possibility to participate in voting. The measures the state takes for guaranteeing the possibility to vote to as many voters as possible are justified and advisable.

26. Another aim of allowing electronic voting is the modernising of voting practices, that is the introduction of new technological solutions. The ever growing number of Internet users among Estonia's inhabitants and the spread of services offered through electronic means (see TNS EMOR monitoring survey of 2005 - <http://www.riso.ee/et/?q=node/136> [1]), as well as the introduction of mandatory ID-card, have created favourable conditions for the introduction of electronic voting. Also, the preamble of "Standards of e-voting", enumerating the aims of allowing e-voting, refers, inter alia, to facilitating the casting of the vote by the voter, increasing voter turnout by providing additional voting channels, bringing voting in line with new technologies and reducing, over time, the overall cost of conducting an election. Pursuant to this document the members states (of the Council of Europe) need to take account of the new information and communication technologies, which are increasingly being used in day-to-day life, in their democratic practice. The constitution does not prohibit the modernisation of electoral practices, and thus it is a legitimate justification of the infringement of the right to equality and principle of uniformity.

27. The Chamber is of the opinion that the introduction of electronic voting without allowing to change the vote given by electronic means may endanger the principles of free voting and secret voting.

The principle of free elections is established in the first sentence of § 156(1) of the Constitution, pursuant to which a local government council is elected in free elections. The secrecy of voting as a sub-principle of freedom of elections is a prerequisite of free elections. Pursuant to the principle of free elections both the participation in elections as well as the choice to be made are voluntary. In addition to the obligation that the state refrain from interfering with the freedom of choice of persons, the principle gives also rise to the obligation of the state to guarantee the protection of voters against the persons who try to influence the voter's choices. Pursuant to this principle the state must create necessary conditions for conducting free voting and protect voters from such influences that prevent the voter to give or not to give his or her vote in the manner he or she wishes.

28. The most effective way to guarantee the freedom of the voters from any external influences is to allow for voting only in polling divisions and in voting booths, where a voter enters alone. It is clear that in the case of electronic voting in an uncontrolled medium, that is via Internet outside a polling division, it is more difficult for the state to guarantee that voting is free of external influence and secret.

29. In accordance with § 162 of Penal Code (violation of freedom of election or voting), preventing a person to freely exercise his or her right to elect or be elected at an election or to vote at a referendum, if such prevention involves violence, deceit or threat or takes advantage of a service, economic or other dependent relationship of the person with the offender is punishable by a pecuniary punishment or up to one year of imprisonment.

30. The voter's possibility to change the vote given by electronic means, during the advance polls, constitutes an essential supplementary guarantee to the observance of the principle of free elections and secret voting upon voting by electronic means. A voter who has been illegally influenced or watched in the course of electronic voting can restore his or her freedom of election and the secrecy of voting by voting again either electronically or by a ballot paper, after having been freed from the influences. In addition to the possibility of subsequently rectifying the vote given under influence, the possibility of voting again serves an important preventive function. When the law guarantees a voter, voting electronically, to change the vote given by electronic means, the motivation to influence him or her illegally decreases. There are no other equally effective measures, besides the possibility to change the vote given by electronic means, to guarantee the freedom of election and secrecy of voting upon electronic voting in an uncontrolled medium. The penal law sanctions do have their preventive meaning but subsequent punishment - differently from the possibility of changing one's electronic vote - does not help to eliminate a violation of the freedom of election and secrecy of voting.

31. The Chamber is of the opinion that there is no reason to presume that the possibility to vote again either electronically or by a ballot paper will be used on a wide scale for changing given votes for any other reason than for eliminating of possible violations of freedom of election and secrecy of voting.

32. The Chamber is of the opinion that the infringement of the right to equality and of uniformity, which the possibility of electronic voters to change their votes for unlimited number of times can be regarded as amounting to, is not sufficiently intensive to outweigh the aim of increasing the participation in elections and introducing new technological solutions. The Chamber is of the opinion that the possibility to change one's electronic vote is necessary for guaranteeing the freedom of elections and secrecy of voting upon electronic voting. The Chamber is of the opinion that upon passing the contested regulation the legislator, having weighed different principles and the values underlying these, has appropriately balanced all electoral principles arising from the Constitution.

Märt Rask, Tõnu Anton, Eerik Kergandberg, Lea Kivi, Ants Kull

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