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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case 3-4-1-7-02

Date of decision 15 July 2002

Composition of chamber of Chairman Uno Lõhmus, members Tõnu Anton, Lea Kivi, Ants Kull, Jüri Põld

Court case Petition of the Chancellor of Justice to declare §§ 31(1), 32(1) and 33(2)1) of the Local Government Council Election Act partly invalid.

Date of court session 26 June 2002

Persons participating at session Chancellor of Justice Allar Jõks, representative of the Riigikogu Indrek Meelak and Minister of Justice Märt Rask.

Decision **To declare unconstitutional the Local Government Council Election Act passed on 27 March 2002 to the extent that it does not enable citizens' election coalitions to participate in local government council elections.**

FACTS AND COURSE OF PROCEEDINGS

1. On 27 March 2002 the Riigikogu passed the Local Government Council Election Act (hereinafter “the the LGCEA”), which enabled a person to run as a candidate for local government council only in the list of a political party or as an individual candidate. The Act entered into force on 6 May 2002.

2. On 21 May 2002 the Chancellor of Justice proposed to the Riigikogu to bring the Local Government Council Election Act into conformity with §§ 11, 12 and 156(1) of the Constitution. The Chancellor of Justice found that this Act disproportionately restricted the exercise of free elections and general and uniform suffrage.

3. The Riigikogu discussed the proposal of the Chancellor of Justice on 23 May 2002 and disagreed with it.

4. On 30 May 2002 the Chancellor of Justice submitted a petition to the Supreme Court to declare §§ 31(1), 32(1) and § 33(2)1) of the Local Government Election Act to be in conflict with §§ 11, 12 and 156(1) of the Constitution and invalid to the extent that they do not enable persons with the right to run as candidates to participate in the elections of local government councils in the lists of citizens' election coalitions.

The Chancellor of Justice is of the opinion that the right of a person with the right to vote to participate in the elections of local government councils is violated. In brief the Chancellor of Justice justifies his opinion as follows:

a) On the basis of the Local Government Council Election Act passed in 1996 it was possible to run as a candidate in the lists of political parties, lists of citizens' election coalitions or as independent candidates. The regulatory framework of 2002 (§ 31(1), § 32(2) and § 33(2)2) which, in their conjunction, essentially form a whole) enables a person to run as a candidate only in the lists of political parties or as an independent candidate.

b) The possibility to become elected as an independent candidate is smaller than when participating in elections with a list. Thus, in comparison with a group of persons acting within the framework of a political party, those persons who wish to participate in deciding local matters jointly but who do not wish to or can not participate in the lists of political parties, are treated unequally.

c) In the Riigikogu the abolition of citizens' election coalitions was justified with the need to ensure more lasting political accountability on the local level and through this achieve the rise of confidence in the political system. The Chancellor of Justice is of the opinion that independent candidates and citizens' election coalitions, too, have election platforms. In the case of election coalitions the responsibility of the coalition as a whole functions similarly with the responsibility of a political party. It is not clear whether the participation of citizens' election coalitions in local elections has been a factor inhibiting the functioning of political responsibility on local level and whether the abolition of these would considerably strengthen political responsibility.

d) The Political Parties Act does not permit the formation of the so called local political parties for local elections. Political parties have the right to refuse to enter persons who do not have the status of a member of the political party into its list and to set a condition for entering a person in its list that he or she recognise the ideological principles of the political party. As the time of the next local government council elections is October 2002, those who wish to run as candidates have been left extremely short period to develop their political party preferences.

e) The preclusion of the possibility to run as a candidate for local government councils in the lists of citizens' election coalitions constitutes a disproportional restriction of possibilities to run as a candidate. It is not clear whether the abolition of election coalitions will guarantee greater political responsibility on the local level.

5. The Constitutional Committee of the Riigikogu argued in its submissions to the Supreme Court that the petition filed with the Supreme Court by the Chancellor of Justice differs essentially from his proposal to the Riigikogu of 21 May 2002. In the proposal the Chancellor of Justice disputed the Local Government Council Election Act in its entirety. The petition deals with individual sections of the Act and contains several new lines of reasoning. That is why the Riigikogu can not give its opinion concerning the petition submitted to the Supreme Court by the Chancellor of Justice. At the court session in the Supreme Court the representative of the Riigikogu agreed with the Minister of Justice and argued that the disputed Act was in conformity with the Constitution.

6. In his written opinion the Minister of Justice does not agree with the petition of the Chancellor of Justice. The Minister is of the opinion that neither the aim of the amendment of the Act, the means chosen for that aim nor the proportionality of the aim and the means are subject to judicial control. The conformity of the

Local Government Council Act to the Constitution is to be analysed, not the fact whether the Riigikogu had enough reason to change the electoral arrangements. Thus, the object of electoral control can be the conformity of the established electoral system to the Constitution. The principle of free and uniform elections established in § 156(1) of the Constitution pertains only to the formal equality of running as a candidate. Under the established regulatory framework there are no formal obstacles for persons to run as candidates in the elections of local government councils. Every person who wishes to run as a candidate in the elections, can do so. Thus, the right of a person with the right to run as a candidate to participate in the local government council elections freely and equally and uniformly with the others, has not been violated.

DISPUTED PROVISIONS

7. The Chancellor of Justice disputed the conformity of §§ 31(1), 32(1) and 33(2)1) of the Local Government Council Election Act to the Constitution.

§ 31(1) of the Local Government Council Election Act stipulates the following:

"§ 31. Political party

(1) A political party, which is entered into the non-profit organisations and foundations register at the latest by the last day for submitting candidates for registration, can participate in elections."

§ 32(1) of the same Act establishes:

"§ 32. Individual candidate

(1) Every person with the right to run as a candidate may present himself or herself for registration as an individual candidate and perform procedures necessary for registration (§ 5(5) and (6)). Other persons may be presented for registration as individual candidates and procedures necessary for registration may be performed, on the basis of a pertinent authorisation document, by any person with the right to vote according to subsections (1), (3) and (4) of § 5 of this Act."

§ 33(2)1) of the Act stipulates:

"§ 33. Documents for running as a candidate

.....

(2) In the application for running as a candidate a person shall:

1) express his or her will to run as a candidate in the list of a political party or as an individual candidate;"

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

8. On 27 March 2002 the Riigikogu passed the Local Government Council Election Act, according to which election coalitions of political parties and citizens may no longer run as candidates in the elections of local government councils on 20 October 2002. In these elections only political party lists and individual candidates may run as candidates. In this case the dispute is over whether discarding of citizens' election coalitions is in conformity with the Constitution.

9. The Chamber shall first deal with the assertion of the representative of the Riigikogu that the proposal of the Chancellor of Justice to the Riigikogu and his petition to the Supreme Court differ (see part I of this judgment). In part II of the judgment the Chamber shall describe the previous procedure for running as a candidate in local government council elections and how the present, disputed regulation was achieved. After that the Chamber shall analyse the constitutionality of the disputed provisions of the Local Government Council Election Act (part III of the judgment). In part IV of the judgment the Chamber shall express its opinion concerning the petition of the Chancellor of Justice.

I.

10. The representative of the Riigikogu asserted that the proposal of the Chancellor of Justice to the Riigikogu and his petition to the Supreme Court differ essentially. In his proposal the Chancellor of Justice disputed the Local Government Council Election Act in its entirety. The petition submitted to the Supreme Court deals with individual sections of the Act and presents several new lines of reasoning.

11. The Chamber does not agree with the assertion of the representative of the Riigikogu. The formal and essential differences of the proposal and the petition are not of such importance as to hinder the examination of the petition.

In his proposal to the Riigikogu the Chancellor of Justice requested that the Local Government Council Election Act be brought into conformity with §§ 11, 12 and 156(1) of the Constitution. In the reasoning of the proposal he asserted that §§ 31, 32 and 33 of the LGCEA were in conflict with the referred provisions of the Constitution. In his petition to the Supreme Court the Chancellor of Justice requests that due to conflict with §§ 11, 12 and 156(1) of the Constitution §§ 31(1), 32(1) and 33(2)1) of the LGCEA be declared partly invalid. On the basis of the minutes of the constitutional committee and the shorthand notes of the plenary meeting of the Riigikogu the Supreme Court comes to the conclusion that the people's representatives were aware of which regulation of the election Act the Chancellor of Justice considered unconstitutional and they expressed their opinion concerning this both orally and through voting.

Adding new arguments in a petition is not precluded. The representative had the possibility to dispute the arguments submitted in the petition both in written reply to the petition as well as at the Supreme Court session.

II.

12. The Act, which was passed on 27 March and became effective on 6 May 2002, is the third local government council election act during the period after the adoption of the Constitution.

13. The first of these was passed on 19 May 1993 and the elections were held according to that law in October of the same year. The Act gave the right to run as a candidate in local elections in the list of a political party, of an association with the right to present candidates, of a society or other organisation or as an individual candidate.

In October 1996 and October 1999 the local government councils were elected in accordance with the second Act, passed on 16 May 1996. This Act provided for three ways to exercise persons' passive right to vote. These were running as a candidate in the list of a political party (§ 24), running as a candidate in the list of an election coalition, whereas both political party and citizens' coalitions were allowed (§ 25), and as an individual candidate (§ 26).

14. In 2001 the Government of the Republic submitted a new draft of the Local Government Council Election Act to the Riigikogu. The draft provided for the possibility to run as a candidate in the lists of political parties, election coalitions or as an individual candidate. The draft provided that after 1 January 2005 it would be possible to run as a candidate only in the list of a political party or as an individual candidate. During the legislative proceeding in the Riigikogu the draft was changed to the effect that a person may not run as a candidate in an election coalition already in the first local government council elections which take place after the Act enters into force. Under the Local Government Council Election Act, which entered into force on 6 May 2002, it will only be possible to run as a candidate in the list of a political party (§ 31) or as an individual candidate (§ 32) in the local government council elections of 2002. According to the second sentence of § 2 of the Act the election day of a council is the third Sunday in October in an election year, i.e. in year 2002 it is the 20 October.

III.

15. The discarding of election coalitions was justified by the necessity to increase the political responsibility of persons elected to local government councils.

The Chamber is of the opinion that the set aim to achieve greater political responsibility of persons elected to local government councils is a legitimate one. The Chamber is of the opinion that also the means employed discarding of election coalitions can be legitimate. But the Chamber is of the opinion that prohibition of citizens' election coalitions in the present legal and social context is not constitutional, considering this to constitute a disproportional restriction of the right to vote and run as a candidate. The Chamber justifies its view with the following reasoning.

16. It is § 156 in the Constitution that regulates the election of local government councils and it provides for the following:

"The representative body of a local government is the council which shall be elected in free elections for a term of three years. The elections shall be general, uniform and direct. Voting shall be secret.

In elections to local government councils, persons who reside permanently in the territory of the local government and have attained eighteen years of age have the right to vote, under conditions prescribed by law."

17. In regard to subjective electoral right three aspects can be distinguished: right to run as a candidate, right to vote and right to present candidates. These three rights have been and still are distinguished by all presently and previously valid Acts concerning elections in Estonia The Riigikogu Election Act and the Local Government Council Election Act.

18. The bearers of the subjective electoral right are established in the Local Government Council Election Act.

The right to run as a candidate is stipulated in § 5(5) of the LGCEA: "Every Estonian citizen and citizen of European Union, whose place of permanent residence is in the corresponding rural municipality or city on 1 August of the election year at the latest, shall have the right to run as a candidate". The provision regulating the right to run as a candidate of the citizens of European Union has not yet entered into force. Under § 74(4) of the same Act the European Union citizens shall attain the right to run as a candidate upon Estonia's accession to the European Union.

The right to vote is established by § 5(1) and (2) of the LGCEA. § 5(1) reads as follows: "Estonian citizens and citizens of the European Union who have attained eighteen years of age by the day of election and whose permanent residence, that is the place of residence the address data of which has been entered into Estonian population register (hereinafter "the population register") is in the corresponding rural municipality or city, shall have the right to vote." § 5(2) gives the right to vote also to a foreigner, who meets the requirements set out in subsection (1) and who resides in Estonia on the basis of a permanent residence permit and who has legally resided in the corresponding rural municipality or city for at least the preceding five years. Under § 74(4) of the Act a European Union citizen shall attain the right to run as a candidate upon Estonia's accession to the European Union.

Authorised representatives of political parties have the right to present candidates (§ 31(4) and (5) of the LGCEA). Every person with the right to run as a candidate may present himself or herself for registration as an individual candidate. Other persons may be presented to be registered as candidates by any person with the right to vote (§ 32 the LGCEA).

Under § 25(1) of the Local Government Council Election Act passed in 1996 Estonian citizens could form citizens' election coalitions. The number of persons with the right to form an election coalition was not determined. Under the presently valid law there is no right to form election coalitions.

19. § 156 of the Constitution not only guarantees the right to vote but also the right to run as a candidate and to present candidates. The principles stipulated in § 156(1) of the Constitution are extended to all these subjective rights.

§ 156 of the Constitution does not and can not guarantee equal possibility to every candidate to become elected or the possibility for everyone to present candidates with equal prospects. This provision guarantees formal equality. For example, for an elector the formal equality means equal treatment of all electors, while taking into consideration his or her vote upon distribution of mandates; for the candidates it means equal treatment upon distribution of mandates; for those who present candidates equal treatment upon formalising and recognising their initiative.

§ 156 of the Constitution has to be interpreted so that its scope of application is not confined to ensuring the formal equality established within the framework of electoral law. The Chamber is of the opinion that § 156 does not exist in isolation from all other provisions and principles of the Constitution. Upon interpreting § 156 one must also proceed from the nature of local government and the principles of democracy.

20. Estonia ratified the European Charter of Local Self-Government on 16 December 1994 without a reservation. The Charter entered into force for Estonia on 1 April 1995. Thus, Estonian state is under the obligation to fully observe the principles of the Charter.

The preamble of the Charter contains the following essential principles of formation of local self-governments: 1) local authorities are one of the main foundations of any democratic regime, 2) the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe, 3) it is at local level that this right can be most directly exercised, 4) existence of local authorities with real responsibility can provide an administration which is both effective and close to the citizen, 5) safeguarding and reinforcement of local self-government in the different European countries is an important contribution to the construction of a Europe based on the principles of democracy and the decentralisation of power, 6) this entails the existence of local authorities endowed with democratically constituted decision-making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfilment.

The principle of democracy in forming representative bodies of local governments is aimed at achieving sufficiently representative bodies. Each elector and group of electors must be guaranteed a possibility to influence the formation of the composition of the representative body. The Charter, too, requires direct, equal and universal suffrage (Article 3).

21. The principles of democracy in themselves do not exclude reasonable restrictions on subjective electoral rights. For example, it is allowed to demand a security to discourage non-serious associations and individual candidates, to require a certain number of support signatures for the presentation of a candidate. The restrictions must not prevent persons and groups who have real supporters from running as candidates. Such restrictions would violate both the right to run as candidate and the right to vote and present candidates and – in the end – would prejudice the foundations of local government through the fact that the representative body will not be capable of becoming sufficiently representative.

22. The Chamber points out that in the case the acts performed and decisions made by electoral committees during electoral process are disputed in court it is not always possible to ascertain whether an act or a decision has substantially effected the voting results. That is why it is checked whether an act or a decision could have substantially affected the voting results. Accordingly, § 46(2) of the Constitutional Review Court Procedure Act which entered into force on 1 July 2002 makes it possible to declare the results of elections which have already taken place invalid not only when violation of law substantially affected the voting results but also when the violation could have substantially affected the voting results. That is why within the scope of abstract norm control it is not always possible to adamantly claim that disputed regulation will

substantially affect the result of future elections.

In the present proceeding, in the form of abstract norm control, the Supreme Court is checking whether the application of the new regulatory framework is capable of prejudicing the representative quality of local government councils. On 4 November 1998 in its judgment in case no. 3-4-1-7-98 the Constitutional Review Chamber pointed out that an electoral law must not violate the principle of representative quality of forming local government councils (RT I 1998, 98/99, 1618, part IV of the judgment).

To assess this danger the Chamber shall take into consideration the competitiveness of individual candidates as compared to lists of candidates, previous preferences of electors and the time when the Local Government Council Election Act should enter into force and when the local elections are to be held.

23. In Estonia such local government council elections where political parties, political party election coalitions, citizens' election coalitions and individual candidates have competed with one another have taken place twice - in 1996 and 1999.

Local elections of 1999 took place in 247 local government units. All in all 768 lists of candidates competed. Among these 180 were political party lists, 18 lists of political party election coalitions and 570 lists of citizens' election coalitions. There were 120 local government units where only lists of citizens' election coalitions ran as candidates. The local elections of 1996 took place in 254 local government units. The total of 773 lists of candidates participated. Among these 112 were political party lists, 30 lists of political party election coalitions and 621 lists of citizens' election coalitions. There were 154 local government units where only citizens' election coalitions ran as candidates.

24. Election theory, supported by Estonia's previous election practice, proves that individual candidates can not compete with lists of candidates.

In the local elections of 1999 the political parties gathered 220,426 votes all over Estonia (43% of valid votes), political party election coalitions got 32,068 votes (6%), citizens' election coalitions 259,965 votes (50%) and individual candidates 6,087 (1%). In the local elections of 1996 pertinent figures were the following: 115,766 (25%), 57,552 (13%), 267,566 (59%) and 15,979 (3%).

In the local elections of 1999 the mandates were distributed as follows: political parties got 640 mandates (19% of the mandates distributed), political party election coalitions 87 (less than 3%), citizens' election coalitions 2,605 (78%) and individual candidates 23 mandates (less than 1%). In the local elections of 1996 pertinent figures were as follows: 405 (12%), 178 (5%), 2,755 (80%) and 115 (3%).

In 1999 local elections in Tallinn the political parties and political party election coalitions got 83%, citizens' election coalitions 17% and individual candidates 0% of valid votes. In bigger cities (Tartu, Narva, Kohtla-Järve, Pärnu) there figures were, respectively: 73%, 27% and 0%. In other cities, respectively: 41%, 58% and 1%. In rural municipalities, respectively: 13%, 85% and 2%.

25. On the basis of the election results of the local elections of October 1999 it can be concluded that in the majority of local government units the electors voted for citizens' election coalitions and that the candidates preferred to belong to citizens' election coalitions. Only in bigger local government units the political party lists were preferred. There is no data to verify that election coalitions would not have a strong potential support in the elections of 2002.

26. The disputed Act entered into force on 6 May 2002. Pursuant to the second sentence of § 2 of the LGCEA the election day of a council is the third Sunday in October in an election year. Thus, in 2002 the local government council election day is 20 October. Pursuant to § 35(1) and (2) of the Local Government Council Election Act the presentation of candidates for registration will start 60 days before the election day.

Thus, slightly more than three months will remain from the entering into force of the disputed law until the beginning of registration of candidates. The Chamber has to take a stand whether this period is sufficient and

does not prejudice the principles of democracy of local government.

27. The Constitution does not provide for an *expressis verbis* prohibition to make essential amendments in election rules immediately before the elections. The Chamber does not consider that such amendments to electoral rules, made immediately before elections, which may substantially affect election results in favour of one or another political power, are democratic. Electoral law must guarantee democracy and thus serve the general well-being.

28. To evaluate the constitutionality of amendments made immediately before elections the Chamber shall also examine whether the electors and the candidates have a reasonable alternative to the local lists of candidates of national political parties.

29. An alternative could be formation of a local political party and running as a candidate in the list thereof.

Pursuant to § 6(2) of Political Parties Act for the registration of a political party it must have at least 1000 members. It is possible to fulfil this requirement of forming a local political party only in bigger local government units. At the same time there are local government units where the total number of residents is less than one thousand.

According to the National Electoral Committee in one hundred and one local government units the number of persons with the right to vote in the local government council elections is 1001 to 2000. Pursuant to § 5(1) and (2) of the LGCEA also such persons who are not Estonian citizens have the right to vote. Pursuant to the second sentence of § 48(1) of the Constitution only Estonian citizens may belong to political parties. The Chamber is of the opinion that in such local government units the formation of competitive local political parties would be highly unreal. In fifty eight local government units the formation of local political parties would be totally impossible because in these cities and rural municipalities the number of persons with the right to vote is less than one thousand. Upon assessing the probability of forming local political parties in the rest of local government units the probable participation rate in elections has to be taken into consideration. Thus, in the local elections of 1999 the participation in local voting was less than 50%. Bearing mind the political activeness of electors the probability of forming local political parties is small also in such local government units where the number of persons with the right to run as a candidate is much more than two thousand.

30. The second alternative would be to run as a candidate in the list of candidates of a political party as a non-party candidate or as a member of another political party. Electoral law does not preclude this but in this case it would be the political party who decides on the right to run as a candidate.

31. On the basis of the above reasoning the Chamber concludes that the Local Government Council Election Act disproportionately narrows the right to present candidates, to run as a candidate and to vote, and is thus in conflict with § 156(1) in conjunction with § 11 of the Constitution, to the extent that it does not enable participation of citizens' election coalitions in local elections.

IV.

32. The Constitutional Review Court Procedure Act, passed on 5 May 1993, on the basis of which the Chamber is reviewing this case, gives the Chancellor of Justice the right to petition the Supreme Court that it declare a legislative act invalid partly or wholly. And the Chancellor of Justice has requested that three provisions of the Local Government Council Election Act be declared unconstitutional and invalid "to the extent that they do not allow persons with the right to run as a candidate to participate in local government council elections in the lists of citizens' election coalitions".

33. The Chamber is of the opinion that the disputed provisions do not enable persons to run as candidates in the lists of election coalitions. The declaration of invalidity of the Act in the extent requested by the Chancellor of Justice will not re-create the provisions regulating citizens' election coalitions and will not

give persons the right to run as candidates in the lists on citizens' election coalitions. That is why the Chamber confines itself to declaration of unconstitutionality of the Local Government Council Election Act to the extent that it does not allow citizens' election coalitions to participate in local elections.

34. Enforcement of the judgment of the Supreme Court will require the amendment of valid regulatory framework in order for the local elections to be constitutional. Here the legislator has the possibility to weigh different solutions. Re-creation of election coalitions is not the only possible way to overcome the drawbacks of the present regulation. Yet it is probable that to permit the election coalitions again is the only way capable of ensuring the conduct of local government council elections on the fixed date.

Uno Lõhmus

Chief Justice of the Supreme Court

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