

## **Dissenting opinion by Supreme Court Justice Vahur-Peeter Liin in constitutional review case No 5-25-3**

1. I do not concur with the Chamber's final conclusion concerning denial of the complaint. I think that the complaint should have been granted and the applicant's removal from the meeting of the National Electoral Committee declared unlawful.

2. I agree with the majority of the Chamber that, in line with § 12(3) of the Riigikogu Election Act, a meeting of the National Electoral Committee must be public. Unlike, for example, in the case of procedural codes, the Riigikogu Election Act does not lay down grounds or the possibility to declare a meeting (partially) closed. I fully agree with the opinion of the Chamber that the requirement of the public nature of meetings of the National Electoral Committee fulfils a compelling purpose in a democratic system of government, ensuring that organisation of elections is transparent and the election process is legitimate. Any derogation from this would require a clear and reasoned basis in a law. At present, the legislator has not laid down such a basis. It cannot be § 35 of the Public Information Act, which regulates the grounds for classifying information as internal but not the public nature of a meeting.

3. However, I disagree with the majority of the Chamber that the public nature of a meeting is influenced by its form. The Chamber referred to the clauses of the Working Procedure of the National Electoral Committee which allow a meeting to be held also electronically or by means of information exchange. However, this should not lead to the possibility of derogating from the statutory requirement of the public nature of the meeting. This has also been expressed in clause 7.4 of the Working Procedure, according to which the State Electoral Office must create an opportunity to follow the meeting for persons who have notified their wish to participate in an electronic meeting. At the same time, no distinction has been drawn between partially and fully electronic meetings. In the present case, the meeting was partially electronic. In my opinion, in a situation where the working procedure of the National Electoral Committee lays down a possibility to follow a partially electronic meeting electronically, the possibility of following such a meeting electronically must not be restricted more than following the meeting on site. I think that, in principle, the approach proposed by the majority of the Chamber that partially electronic meetings could only be followed on site would not be contrary to the requirement of the public nature of the meetings. However, that would presume that this rule be clearly written down in the working procedure and that a person who has expressed a wish to follow the meeting be informed that they would have the opportunity to follow the meeting on site if they wish. At the moment, however, the applicant was allowed to attend the meeting electronically and was unexpectedly removed from the meeting only during the meeting.

4. Of course, the problem remains as to how to reconcile the public nature of the meeting with the fact that the agenda of the meeting includes issues based on restricted information. Firstly, the public nature of the meeting does not mean that all the materials discussed at the meeting should be shared with the persons following the meeting. Secondly, as noted in paragraph 18 of the Chamber's judgment, the necessity of a restriction on access must be considered on a case-by-case basis and, under § 38(4) of the Public Information Act, in certain cases it is possible to grant access to information even to persons outside the agency. I believe that special caution should be exercised in imposing restrictions on access to information related to the organisation of elections. The mere hypothetical possibility that disclosure of information may entail a risk of attacks on the electoral system should not automatically be the basis for imposing an access restriction. The potential threat of attacks is balanced by public awareness of threats. In other words, in a situation where potential threats are known, election observers can also pay more attention to those threats. At the same time, in a situation where the e-election system would have such serious security vulnerabilities as to

involve a real risk of influencing the election results, such a system should not in any case be put to use in elections, and actually hiding those problems would be dangerous.

(signed digitally)