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## Constitutional judgment 3-4-1-6-11

### **RULING OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT**

<b>No. of case</b>	3-4-1-6-11
<b>Date of judgment</b>	23 March 2011
<b>Composition of court</b>	Chairman Märt Rask and members Jüri Pöld and Harri Salmann
<b>Court Case</b>	Complaint of Henn Põlluaas for annulment of electronic votes cast in the Riigikogu elections 2011.
<b>Hearing</b>	Written proceeding

**DECISION**                      **To return the complaint of Henn Põlluaas without review.**

#### **FACTS, COURSE OF PROCEEDINGS AND JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING**

1. Henn Põlluaas filed a complaint to the National Electoral Committee on 9 March 2011 requesting annulment of the e-voting results because during the e-elections, not every voter in the polling division no. 3 (Mustamäe and Nõmme) had the possibility to vote in favour of him, i.e. the independent candidate Henn Põlluaas (no. 887).
2. According to the complaint of H. Põlluaas, Aivar Silma informed him and the National Electoral Committee on 25 February 2011 of problems regarding the e-voting. The National Electoral Committee said that it is an isolated incident and that there is nothing they can do about it. The fault was not rectified by the end of the e-elections.
3. Pursuant to the complaint, the National Electoral Committee admitted in the letter of 2 March 2011 that the programme used in elections encounters an error when using some of the resolutions and fonts of the

operating system Windows 7 which is why the list of candidates was only partly visible on the computer screen – names of independent candidates at the end of the list (in district no. 3 H. Põlluaas and R. Nurmik) were concealed. The list of candidates could not be scrolled up.

**4.** In the assessment of H. Põlluaas, it is the state's responsibility to ensure proper operation of the programme used in e-elections regardless of which computer, operating system, resolution or font the voter uses. If that cannot be done, it is not possible to organise e-elections. Because the names of some of the candidates were not always visible on the computer screen, the equal treatment principle in respect of the candidates has been violated to the detriment of the independent candidates, and the election results have been distorted.

**5.** The National Electoral Committee did not regard in its letter of 14 March 2011 the complaint of H. Põlluaas as a complaint since it was filed belatedly. The e-elections took place from 24 February 2011 to 2 March 2011. Pursuant to § 38(1) of the Constitutional Review Court Procedure Act (CRCPA), the complaint shall be filed within three days as of the contested act being performed. The term for filing complaints began on 3 March 2011 and ended on 5 March 2011.

**6.** About the contents of the complaint of H. Põlluaas the National Electoral Committee noted that it analysed thoroughly the display problems of the indicated voter application, and explained the essence of the problem in its response to H. Põlluaas. The final analysis established that the display problem of the voter application occurred on three identified cases. All three voters noticed the problem, rectified it and were able to vote. The cause of the problem was not the operating system or the voter application, but the changes the users had made in the operating system settings. In these cases the entire lower part of the voter application was partly concealed which is why it was obvious to the voters that the voter application was not displayed correctly. Therefore the extent of the described problem was not such which could have affected or would have affected the voting results. Since H. Põlluaas failed to present new information about the case, and the usability of the voter application had already been analysed, the National Electoral Committee did not deem it necessary to additionally monitor the alleged problems regarding the use of the voter application of the electronic voting.

**7.** On 16 March 2011, H. Põlluaas filed a complaint with the Supreme Court against the response of 14 March 2011 of the National Electoral Committee. He found that his complaint was timely. The elections are an undivided activity – the pre-elections and the main elections are not two different things. Since the elections ended on 6 March 2011 and the final results were declared on 7 March 2011, the three-day term for filing complaints began namely as of that date.

**8.** About the contents of the complaint H. Põlluaas added that the position of the National Electoral Committee stating that the fault lay with the voters who did not know how to use the computer is not accurate. The fact that the fault was in the voter application was also confirmed by Antti Andreimann, a lecturer in IT College, who stated that solving the problem is not feasible by a regular user and presents quite a challenge also for a skilled computer user.

## **OPINION OF THE CHAMBER**

**9.** To adjudicate the complaint of H. Põlluaas, it has to be decided whether it has been filed within the term provided in § 38(1) of the CRCPA.

**10.** Before dealing with that issue the Chamber deems it necessary to note that the National Electoral Committee should have regarded the letter of H. Põlluaas of 9 March 2011 addressed to the National Electoral Committee as a complaint against the Committee's own activity and should have forwarded it together with explanations to the Supreme Court (§ 38 of the CRCPA). It clearly appears from the letter that it contests the activity of the National Electoral Committee and requests annulment of the e-voting results. Its procedural shortcoming does not preclude the Supreme Court from forming an opinion on the filed complaint.

**11.** In the assessment of the Supreme Court, the complaint of H. Põlluaas is not timely. Technical impediments which do not allow the voter to vote for a specific candidate violate that candidate's right to candidate provided in § 60(2) of the Constitution. The complaint of H. Põlluaas has been filed against the activity of the National Electoral Committee regarding the e-elections from 24 February 2011 to 2 March 2011 because due to technical problems, it was not possible to cast a vote in favour of H. Põlluaas during the e-voting. Acts performed and resolutions adopted during e-voting may be contested prior to adoption of resolutions on final voting results. Pursuant to § 38(1) of the CRCPA, a complaint against a resolution of the National Electoral Committee shall be filed within three days as of the resolution or act of the National Electoral Committee being announced or performed. It appears from the complaint of H. Põlluaas that he became aware of the possible violation of his right to candidate on 25 February 2011. The term for filing a complaint against the activity of the National Electoral Committee began at the latest on 2 March 2011 when the final response to the letters of H. Põlluaas and A. Silma was delivered from the National Electoral Committee's e-voting project manager Tarvi Martens. The three-day term for filing a complaint was therefore expired by 9 March 2011. Therefore, the complaint of H. Põlluaas shall be returned without review based on § 40(2) of the CRCPA.

**12.** The Chamber adds that upon organising e-voting, it is the state's responsibility to ensure the compatibility of the software used in elections with the most common hardware, operating systems, screen resolutions or fonts. However, achieving such compatibility may be complicated in isolated cases. In case of problems, the voter has the possibility to seek advice from the e-voting technical support. If the technical problems arising during e-voting cannot be eliminated in isolated cases, the voter has the possibility to vote by means of a ballot paper.

Märt Rask, Jüri Pöld, Harri Salmann

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