Constitutional judgment 3-4-1-7-11

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of case	3-4-1-7-11
Date of judgment	23 March 2011
Composition of court	Chairman Märt Rask and members Jüri Põld and Harri Salmann
Court Case	Complaint of Teet Raatsin for declaration of invalidity of the voting results of the Riigikogu elections 2011.
Hearing	Written proceeding
DECISION	**To dismiss the complaint of Teet Raatsin.**

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

1. Teet Raatsin filed a complaint to the National Electoral Committee on 9 March 2011 requesting declaration of invalidity of the voting results of the Riigikogu elections and based on that, to declare the Riigikogu elections null and void.

In that complaint T. Raatsin found that § 4(3) and § 22(3) of the Riigikogu Election Act (REA) and § 58 of the Constitution are not in compliance with §§ 1, 3, 10, 11 and 56 of the Constitution, with constitutional basic principles of the Republic of Estonia and with principles arising from international agreements, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) and the Charter of Fundamental Rights of the European Union. Namely, the European Court of Human Rights found in its judgment of 6 October 2005 in Case Hirst v the United Kingdom, and in judgment of 23 November 2010 in Case Greens and M. T. v the United Kingdom that the regulation applicable in the United Kingdom pursuant to which prisoners lack the possibility to vote while serving a sentence is in contradiction with the

Convention. The Republic of Estonia as a Contracting State must also take that judgment into account.

About his right to appeal T. Raatsin noted that since in the Republic of Estonia persons lack the option to acquaint themselves with judgments of the European Court of Human Rights because they have not been translated into the official language and therefore cannot, without help, be understood the same way as national legislation or case-law, he requests that the Supreme Court would not base its judgment on the requirement provided in the election act stating that the violation has to be clearly and directly related to the complainant. His subjective rights have been violated thereby that in elections, the possibility of a certain part of society to participate in free elections and to express political beliefs through voting has been restricted. Based on that, the Riigikogu elections as a whole cannot be legitimate.
Further, T. Raatsin emphasised that the e-voting software solution of the Riigikogu elections 2011 does not meet the security requirements provided in the Riigikogu Election Act and does not comply with the principle of legal clarity. T. Raatsin wished to support the opinions presented in the complaint of P. Pihelgas and added that e-voting violates the secrecy of elections.

2. The National Electoral Committee responded to the complaint of T. Raatsin with a letter of 14 March 2011 stating that the National Electoral Committee is not competent to verify the conformity of legislation of general application to the Constitution. The National Electoral Committee recommended to T. Raatsin to have recourse to the Chancellor of Justice based on § 15 of the Chancellor of Justice Act. Regarding support and supplements to the complaint of P. Pihelgas, the Riigikogu Election Act or the Constitutional Review Court Procedure Act do not prescribe an option for a third person to supplement a complaint filed by a complainant.

3. T. Raatsin filed on 17 March 2011 with the Supreme Court through the National Electoral Committee a complaint with an accompanying letter requesting to verify whether § 4(3) and § 22(3) of the REA and § 58 of the Constitution are in compliance with Article 3 of the Protocol No. 1 of the Convention and with its supplementing judgments of the European Court of Human Rights, with Article 25 of the UN International Covenant on Civil and Political Rights, and with the provisions of the Code of Good Practice in Electoral Matters adopted by the Council of Europe Venice Commission. In case of a contradiction he requests the voting results of the Riigikogu elections 2011 to be declared invalid and based on that, the Riigikogu elections null and void.

Further, T. Raatsin emphasised that the e-voting software solution of the Riigikogu elections 2011 does not meet the security requirements provided in the Riigikogu Election Act and does not comply with the principle of legal clarity. E-voting violates the secrecy of elections (§ 1(2) of the REA). In a situation where a person wishes to vote by means of e-voting, the IP address of the person's computer will be tied to the person’s candidate selection. This means that the way the person voted can be visible to certain authorities upon necessity. It cannot be ruled out that during the election process, such a receipt of e-votes can be monitored, changed or affected in any other way. By e-voting a person lacks the opportunity to receive objective and official confirmation about whether the electronic vote cast by him or her has been delivered to the specified destination and whether it has been received. A person cannot verify nor contest that.
Finally, T. Raatsin noted that since the National Electoral Committee has regarded his complaint as a letter, his complaint has not been reviewed altogether because based on the Riigikogu Election Act, the National Electoral Committee can either satisfy the complaint, dismiss the complaint or satisfy the complaint partially. Since the National Electoral Committee has not adopted any of these resolutions regarding the complaint of T. Raatsin, his complaint has not been adjudicated to this date. The latter is an independent violation committed by the National Electoral Committee.

4. The National Electoral Committee forwarded T. Raatsin's complaint of 17 March 2011 to the Supreme Court on 18 March 2011. The National Electoral Committee requested not to review the complaint and explained additionally that it is not a complaint for the purposes of § 68 of the REA. The complainant has not contested a resolution or an act of electoral committee, but has requested verification of compliance of the provisions of the Riigikogu Election Act and the Constitution with the Constitution, the Convention and judgments of the European Court of Human Rights.

Pursuant to § 72(1) of the REA and § 37(1) of the Constitutional Review Court Procedure Act (CRCPA), an electoral complaint shall be filed for the protection of the complainant's subjective rights. None of the arguments described in the complaint concern a violation of the complainant's subjective rights, rather the complaint has been filed in public interests.

Arguments regarding the electronic voting software solution are general in nature and are not related to violation of the complainant's rights. The concept of secrecy of voting does not comprise a prohibition that the voting organiser cannot ascertain the fact of voting. To avoid repeated voting, a note on every voter regarding the fact of voting is entered in the polling list.

The National Electoral Committee responded on 14 March 2011 in writing to the complainant's address, titled as a complaint, of 9 March 2011. Since the address did not contest any resolutions or acts of the National Electoral Committee, the National Electoral Committee could not review it as a complaint. The National Electoral Committee recommended to the complainant to have recourse to the Chancellor of Justice based on § 15 of the Chancellor of Justice Act.

OPINION OF THE CHAMBER

5. First, the Chamber deems it necessary to note that the National Electoral Committee should have regarded T. Raatsin's complaint 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 appeared from the complaint addressed to the National Electoral Committee that the complainant requested declaration of invalidity of the voting results of the Riigikogu elections because his rights were violated thereby that contrary to the Convention and its interpretations by the European Court of Human Rights, persons convicted of a crime by a court and serving a prison sentence could not participate in the Riigikogu elections pursuant to § 4(3) and § 22(3) of the REA. According to § 61(2) of the REA, the National Electoral Committee shall prepare a record concerning the voting results. The said record is a resolution of the National Electoral Committee for the purposes of § 72 of the REA and can therefore be contested in the Supreme Court. Failing to forward T. Raatsin's complaint of 9 March 2011 does not, however, preclude the Supreme Court from forming an opinion on the complaint addressed to it.

6. In the assessment of the Chamber, the Supreme Court cannot satisfy the complaint of T. Raatsin in the part in which it requests declaration of invalidity of the voting results because persons convicted of a crime and serving a prison sentence were not able to participate in the voting. Ascertainment of the voting results cannot violate the rights of T. Raatsin for the reasons hereunder.

7. Pursuant to § 72(1) of the REA, an interested person who finds that an act of a division committee, a resolution or act of a county electoral committee or a resolution or act of the National Electoral Committee violates his or her rights, may file an appeal with the Supreme Court pursuant to the procedure prescribed in the Constitutional Review Court Procedure Act. § 70(1) of the REA deems an interested person as an individual, a candidate or a political party. Based on § 72(1) and § 70(1) of the REA, a person can file a complaint only for the protection of the person's own violated rights.

8. It does not appear from the complaint of T. Raatsin that he ran as a candidate in the elections or that voting for him was hindered or that he was not able to vote. It also does not appear from the complaint that T. Raatsin is convicted of a crime and serving a prison sentence. His complaint has been filed for the protection of other persons' subjective rights. The Chamber cannot satisfy such a complaint. Also, the Chamber cannot expand T. Raatsin's right to appeal in a way requested by him. That would be in contradiction with § 72(1) of the REA and § 37(1) of the CRCPA.

9. Regarding the argument of T. Raatsin about the non-safety of the e-voting, a hypothetical possibility that someone has monitored, changed or affected in any other way his voting during the election process, as well as a similar hypothetical possibility that the electronic vote cast by him has not been delivered to the specified destination or has not been received, cannot be the reason for satisfaction of the complaint of T. Raatsin even if he himself voted electronically. A prerequisite for declaring the voting results invalid is an

established violation of the voter's rights.

10. Therefore, the complaint of T. Raatsin shall be dismissed based on § 46(1)2) of the CRCPA.

11. However, the Supreme Court notes that the fact that pursuant to § 4(3) and § 22(3) of the REA, a person who is convicted of a crime by a court and who is serving a prison sentence cannot participate in voting may be in a contradiction with § 58 of the Constitution and Article 3 of the Protocol No. 1 of the Convention as interpreted by the European Court of Human Rights. Upon reviewing the complaint of T. Raatsin, the Chamber is not procedurally able to establish that contradiction or declare the provisions of the Riigikogu Election Act invalid. Therefore, it is the obligation of Riigikogu to react to this possible contradiction.

Märt Rask, Jüri Põld, Harri Salmann
