



Vallo Olle

*Docent of Administrative Law
University of Tartu, Estonia*

Settlement of Disputes Related to Election Rules for Local Government Councils: Judicial Practice of the Estonian Supreme Court

1. Introduction

According to the Constitution of the Republic of Estonia dated 1992¹ and the European Charter of Local Self-government as ratified by Estonia in 1994² (the ECLSG), our local government system derives from the base model of representative democracy. Hence, the existence and functioning of a representative body of the local government, elected by local people — that is, a local council — is an obligatory element under the Constitution. The first amendment of the 1992 Constitution relates to the elections of local government councils; made in 2003, it extended the term of authority of the representative body of a local government from the previous three years to four years, and a constitutional basis was provided for altering administrative-territorial organisation for the period between regular municipal elections.³ The municipal elections of a local government as a representative body of a constitutional institution are regulated by the Local Government Council Election Act⁴ (LGCEA), which, as a constitutional act, required the votes of a majority of the membership of the Riigikogu for its entry into force (Constitution the second sentence of § 104 (4)).

Since the restoration of independence in 1991, five local government elections have taken place in Estonia, held in 1993, 1996, 1999, 2002, and 2005.⁵ For the first two of them, the parliament established a new elections act⁶, the third elections were held on the basis of the previous Elections Act (as amended), and the fourth and the fifth elections were organised on the basis of the same Elections Act of 2002 (to which also several

¹ Eesti Vabariigi põhiseadus (RT 1992, 26, 349; RT I 2007, 33, 210 (in Estonian)) § 156 (1).

² European Charter of Local Self-government (RT II 1994, 26, 95 (in Estonian)), Article 3 (2).

³ Eesti Vabariigi põhiseaduse muutmise seadus kohaliku omavalitsuse volikogu valimiseks neljaks aastaks (Act to Amend the Constitution of the Republic of Estonia for Election of Local Government Councils for a Term of Four Years). – RT I 2003, 29, 174 (in Estonian).

⁴ Kohaliku omavalitsuse volikogu valimise seadus. – RT I 2002, 36, 220; 2007, 44, 316 (in Estonian).

⁵ For the relevant data, see the homepage of the National Electoral Committee. Available at <http://www.vvk.ee/kovindex.html> (08.11.2007) (in Estonian).

⁶ Kohaliku omavalitsuse volikogu valimise seadus (Local Government Council Election Act). – RT I 1993, 29, 505; 1995, 57, 981 (in Estonian); kohaliku omavalitsuse volikogu valimise seadus (Local Government Council Election Act). – RT I 1996, 37, 739 (in Estonian).

substantive amendments have been made).^{*7} During the above period, the Supreme Court (its Constitutional Review Chamber (CRC), or the Supreme Court *en banc* (SCeb)) has made several decisions concerning the constitutionality of the election rules for local government councils. Further to this, the decisions of the Supreme Court on the election rules of the Riigikogu are in many ways relevant to the municipal elections and *vice versa* (the same democratic principles of the right to vote apply both in parliamentary and in local government council elections), so that if we confine ourselves to the judicial practice regarding the constitutionality of the election rules of local government councils, the scope we have carved out for this discussion is to some extent artificial, which can be put down to the choice of the subject and the volume of the paper. This article discusses only the decisions that the highest national court has made on the election rules for local governments. In other words, the paper examines how the highest national court has, in decisions concerning the constitutionality of the election rules for local government councils within the framework of the constitutional review proceedings^{*8}, interpreted the democratic principles of the suffrage and furnished with content the autonomy of the local government as well as the principles for the representativeness of its representative body. Here it is important to specify that we will not discuss the decisions of the Constitutional Review Chamber of the Supreme Court by which the complaints and protests concerning the decisions and activities of the Electoral Committee have been settled — in other words, by which the Supreme Court has under § 2 10) of the Constitutional Review Proceedings Act^{*9} (CRPA) exercised its authority.^{*10}

2. Election rules and the Supreme Court as constitutional review court

The third paragraph of § 149 of the Constitution provides that the Supreme Court is also the court of constitutional review. According to the CRPA as currently in force, the Constitutional Review Chamber, or Supreme Court *en banc*, settles the matters placed within the competence of the Supreme Court by that act; this is set forth in § 3 (1). A similar regulation was contained in the previous CRPA (in § 9), adopted in 1993.^{*11}

In relation to the election rules, we have to keep in mind that the Supreme Court has two different spheres of competence. Thus, the Supreme Court settles, *inter alia*, petitions to verify the constitutionality of legislation of general application or the failure to adopt it (CRPA § 2 1)) as well as appeals and protests concerning the decisions and activities of the Electoral Committee (CRPA § 2 10)). While the former sphere of competence was described also in the earlier CRPA (§ 4 (1)), the situation has changed where the latter is concerned. The CRPA as applicable from 1993 to 2002 did not provide for the settlement of election complaints and protests by means of constitutional review proceedings.^{*12} As already noted in the introduction, this paper will not discuss the decisions of the Supreme Court that relate to election complaints and protests.

A reasoned petition for verifying the constitutionality of the LGCEA as legislation of general application may be submitted to the Supreme Court by the President of the Republic (Constitution § 107), the Chancellor of Justice (Constitution § 142), a local government council^{*13} (CRPA § 4 (2)), or the Riigikogu (CRPA § 4 (2)).^{*14} The court shall initiate proceedings by forwarding the decision or ruling to the Supreme Court (CRPA § 4 (3)).

The institute of electoral law is known to represent a set of constitutional provisions that forms an important part of constitutional law, an important institute thereof, and governs such important and politically highly sensitive social relationships as are created upon the election of state and local government bodies. On account of this, virtually all decisions in this area have also provoked rather active discussion in society. The issues of official language, citizenship, and suffrage constitute the main body of issues that have given rise to

⁷ See Note 4.

⁸ The decisions of the CRCSC and SCeb are available in English via the homepage of the Supreme Court, <http://www.nc.ee/> (10.11.2007).

⁹ Põhiseaduslikkuse järelevalve kohtumenetluse seadus. – RT I 2002, 29, 174; 2007, 44, 316 (in Estonian).

¹⁰ For the sake of practicability, the authority of the constitutional court in Europe is mostly confined to the election of the higher (central) bodies of authority. It is so in France, Austria, Germany, Greece, Portugal, etc. See R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse (Constitutionalism and Protection of Fundamental Rights and Freedoms). Tallinn: Juura 2004, p. 178 (in Estonian).

¹¹ Põhiseaduslikkuse järelevalve kohtumenetluse seadus. – RT I 1993, 25, 435 (in Estonian).

¹² See the ruling of the Administrative Law Chamber of the Supreme Court from 18 February 1994 in case III-3/11/94 (review of the appeal in cassation of the Electoral Committee of the Kihelkonna rural municipality due to the settlement of the election complaint in an incorrect court). – Riigikohtu lahendid 1993/1994 (Supreme Court Reports 1993–1994). Tallinn: Õigusteabe AS Juura 1995, pp. 62–63 (in Estonian).

¹³ If there is a conflict with the constitutional safeguards of the local government level (CRPA § 7).

¹⁴ The Riigikogu may submit to the Supreme Court a petition for the court to give its position on how to interpret the Constitution in conjunction with European Union law, if the interpretation of the Constitution is of decisive significance for the adoption of a draft act necessary for performing the duties of a European Union Member State (CRPA § 7').

great political tension in Estonia so far¹⁵ and that often have been accompanied by heightened international attention as well as political attacks from Russia. The Constitution as in force today does not comprise the suffrage as a fundamental right in its chapter on fundamental rights and freedoms (Chapter II), but it has been presented in §§ 57, 60, and 156 of the Constitution (the chapters entitled 'People', 'The Riigikogu', and 'Local Government', respectively). As it is a central institute of constitutional law, the Constitution (in § 104 second sentence (4)) also prescribes that the relevant legal regulation for electing local government shall be established by a constitutional act — the LGCEA.¹⁶

The first paragraph of § 156 of the Constitution provides that the representative body of a local government is the council, which shall be elected in free elections for a term of four years. The period of authority of a council may be shortened by an act as a consequence of a merger or division of local governments or the inability of the council to act.

The elections shall be general, uniform, and direct. Voting shall be secret (as specified in subsection 1) Similar democratic principles of the suffrage are prescribed by the ECLSG (Article 3 (2)), Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁷ (Article 3), and the International Covenant on Civil and Political Rights¹⁸ (Article 25¹ b). The legislative power has attempted to restrict the majority of these democratic principles of the right to vote by using various arguments (enhancement of political liability, etc.) when establishing election rules contrary to the Constitution. Problems have frequently occurred also in relation to the timing of the enactment of the election rules as such.

3. Judicial practice of the Supreme Court

3.1. The principle of *vacatio legis* in amendment of election rules

The Supreme Court has considered it very important to observe the principle of *vacatio legis* when making important amendments to the election rules. The court has declared unconstitutional those activities as the result of which the election rules are, immediately before the elections, amended such that certain political powers can benefit from them to the detriment of others.

On 12 May 2005, the Riigikogu adopted the Riigikogu Internal Rules Act Amendment Act, which was to enter into force on 17 October 2005 and abolish the prohibition, established in 2002, pursuant to which a member of the Riigikogu could not at the same time be a member of a rural municipality or town council. After the President of the Republic had refused to proclaim this act, the Riigikogu passed it unamended on 8 June that year. Here it is necessary to note that, in Estonia, the elections of local government councils are held on the third Sunday of October. Hence, the Riigikogu considerably amended the election rules three months before the elections of local government councils. The Constitutional Review Chamber of the Supreme Court (CRCSC) separately discussed in its decision on matter 3-4-1-11-05, of 14 October 2005¹⁹, whether the amendment made contained a reasonable term for its implementation. Although considering it impossible to say what would constitute a reasonable term for making amendments to the election rules, the CRCSC took the position that any amendment of the election rules that should enter into force at a time when under the CRPA a court action concerning the constitutionality of a regulation limiting the right to vote and stand as a candidate that has not been proclaimed by the President of the Republic could still be in progress has clearly been made too late. The chamber considered it a minimum requirement for amendment of the election rules that an act proposing a significant amendment be adopted such that it can enter into force well before the next elections and that both the voters and the candidates have enough time to examine the new rules and select a new way of action.²⁰ The CRCSC also stated that it considered the amendments made immediately before the elections, which could significantly transform the election results to the benefit of one or another political

¹⁵ See CRCSCd 11.08.1993, III-4/A-2/93 (Review of the petition of the Chancellor of Justice, pursuant to § 142, second paragraph of the Constitution, seeking to declare the resolution of the Narva City Council No. 15/163 dated 28 June 1993, entitled Regarding the Position on the Foreigners Act, to be null and void). – RT I 1993, 59, 841 (in Estonian); 6.09.1993, III-4/A-3/93 (Review of the Petition of the Chancellor of Justice pursuant to § 142, second paragraph of the Constitution, seeking to declare the resolution of the City Council of Sillamäe dated 6 July 1993, entitled Regarding the Execution of the Directions of the Participants of the Meeting of 30 June 1993, null and void). – RT I 1993, 61, 890 (in Estonian).

¹⁶ In relation to this, see also section 3.4 below.

¹⁷ Inimõiguste ja põhiwabaduste kaitse konventsiooni (täiendatud protokollidega nr. 2, 3, 5 ja 8) ning selle lisaprotokollide nr. 1, 4, 7, 9, 10 ja 11 ratifitseerimise seadus. – RT II 1996, 11–12, 34 (in Estonian).

¹⁸ Kodaniku- ja poliitiliste õiguste rahvusvaheline pakt. – RT II 1993, 10–11, 12 (in Estonian).

¹⁹ CRCSCd 14.10.2005, 3-4-1-11-05 (the petition of the President of the Republic to declare the Riigikogu Internal Rules Act Amendment Act unconstitutional). – RT III 2005, 31, 308 (in Estonian).

²⁰ *Ibid.*, para. 23.

power, to be in conflict with the principle of democracy arising from §10 of the Constitution.^{*21} The CRCSC had, in effect, expressed an analogous position three years before, in its decision on matter 3-4-1-7-02, on 15 July 2002^{*22} (paragraphs 26–28).

3.2. Freedom of elections and secrecy of ballot

The decision of the CRCSC of 1 September 2005 on matter 3-4-1-13-05^{*23}, which centred on the principle of the uniformity of the elections under the conditions of electronic voting (for discussion of this, see section 3.3 below), discussed also the principles of the freedom of elections and secrecy of ballot under the conditions of such an innovative voting method. The President of the Republic did not contest the LGCEA because of the violation of the principle of freedom of elections; however, it is clear — and this was also admitted by the court — that in the case of electronic voting (i.e., when the voter uses the Internet environment outside the polling place), it is more difficult to ensure national elections that are free of external influence and that maintain the essence of a secret ballot than it is in the case of voting in a voting booth in the polling place, where voters are alone.^{*24} On the basis of the principle of the freedom of elections, the state must, besides avoiding interference with the freedom of election of an individual, also guarantee the protection of the voter from persons attempting to influence his or her choice. The court stated that, in such a situation, the possibility of the voter to change his or her electronic vote submitted during the advance polls — such an opportunity had been prescribed by law — provided an important additional safeguard for the observance of the principles of freedom of elections and secrecy of the ballot. The CRCSC highlighted both the retrospective and preventive functions of the reversion of one's vote as exercised by an individual using the electronic voting system. The former concerns the possibility of later altering a vote cast under pressure, and the latter relates to decreased motivation to exert illegal influence on the voter. In relation to the preventive significance of penal measures, the court correctly stated that, unlike making use of the possibility to alter one's electronic vote, later punishment cannot eliminate the violation of the freedom of elections and secrecy of ballot.^{*25}

3.3. Uniformity of elections

The Supreme Court has analysed the principle of uniformity in relation to the election of local government councils in several cases. Firstly, we will examine the position of the court in relation to the right to revert a vote already made, as granted to voters by the legislator in the LGCEA, during an ordinary vote^{*26}. Here it must be emphasised that the court has not assumed a position regarding the general compliance of electronic voting with the Constitution, and it cannot be ruled out that the constitutionality of electronic voting will be contested in the future. In essence, electronic is an innovative voting method that is recommended also by the Congress of Local and Regional Authorities of the Council of Europe, besides other measures (voting by post, voting by proxy, extension of the opening hours of polling places, etc.) to increase the participation rate and enhance the involvement of those social groups that have participated to a lesser degree thus far.^{*27} On 30 September 2004, the ministerial committee of the Council of Europe adopted a recommendation addressed to the member states — Rec(2004)11 — on the legal, operational, and technical standards of electronic voting.^{*28} Estonia has used electronic voting twice now: in the election of the local government councils in 2005 and in the elections of the Riigikogu in 2007. The voter ticks the name of the candidate in the electoral district of his or her residence for whom he or she votes, then confirms the vote by providing his or her digital signature on the basis of the certificate entered in the identity card and allowing for digital signing.^{*29} According to the National Electoral Committee, more than 9000 people used the electronic voting option in the elections of local government councils in 2006, and 12,000 used it in the election of the Riigikogu in 2007.^{*30}

²¹ *Ibid.*, para. 22.

²² CRCSCd 15.07.2002, 3-4-1-7-02 (petition of the Chancellor of Justice to partly repeal §§ 31 (1), 32 (1), and 33 (2) 1) of the Local Government Council Election Act). – RT III 2002, 22, 251 (in Estonian).

²³ CRCSCd 1.09.2005, 3-4-1-13-05 (petition of the President of the Republic to declare unconstitutional the Local Government Council Election Act Amendment Act, adopted in the Riigikogu on 28 June 2005). – RT III 2005, 26, 262 (in Estonian).

²⁴ *Ibid.*, para. 28.

²⁵ *Ibid.*, paras 27–30.

²⁶ See Note 23.

²⁷ See Recommendation 182 (2005) on public participation in local affairs and elections. Available at [https://wcd.coe.int/ViewDoc.jsp?Ref=REC\(2005\)182&Sector=secCongress&Language=lanEnglish&Ver=original&BackColorInternet=e0cee1&BackColorIntranet=e0cee1&BackColorLogged=FFC679](https://wcd.coe.int/ViewDoc.jsp?Ref=REC(2005)182&Sector=secCongress&Language=lanEnglish&Ver=original&BackColorInternet=e0cee1&BackColorIntranet=e0cee1&BackColorLogged=FFC679) (08.11.2007).

²⁸ Available at <https://wcd.coe.int/ViewDoc.jsp?id=778189> (last accessed on 8 November 2007). See also CRCSCd 3-4-1-13-05, p. 17.

²⁹ LGCEA, § 50 (4).

³⁰ See <http://www.vvk.ee/elektr/index.html> (8.11.2007)

The LGCEA, as adopted by the Riigikogu on 27 March 2002, entitled voters holding a certificate for giving a digital signature to vote electronically on a Web page of the National Electoral Committee during the term prescribed for advance polling. Pursuant to the act (§ 74 (5)), electronic voting was not to be applied before 2005. On 12 May 2005, the Riigikogu amended the LGCEA, specifying the provisions of the act governing electronic voting. The amendments, inter alia, prescribed the right of voters to alter their electronically cast vote by submitting a vote by electronic means again during advance polling, voting by ballot paper during advance polling, and voting by ballot paper until 4:00 pm on the polling day. The President of the Republic perceived here a conflict with the principle of uniformity of elections and refused to proclaim the act. The Riigikogu made an amendment to the act, enabling voters to alter the electronically given votes by voting by electronic means again or voting via ballot paper from the sixth to the fourth day preceding the election day. The President of the Republic refused again to proclaim the act, as he continued to perceive a conflict with the principle of the uniformity of elections — a voter submitting his or her vote by electronic means gains an advantage over those voters using other methods of voting. As Parliament adopted the act that the President had refused to proclaim, doing so without amendment, the President appealed to the Supreme Court to declare said act unconstitutional.

The CRCSC did not agree to the arguments of the President of the Republic concerning the conflict of the legal regulation of electronic voting with the principle of uniformity of elections, for the following reasons:

- 1) In the electronic voting system, the registration of one vote is ensured by a system similar to the so-called two-envelope system used for voting outside a person's residence; the electronic vote does not influence the election results to a greater degree than those voters who use other voting methods.
- 2) The right of an individual casting an electronic vote to change his or her vote an unlimited number of times, which may be regarded as a restriction of the right to equality and the principle of uniformity, is not intensive enough to outweigh the aim of increasing the participation in elections and introducing new technological solutions. That is, the principle of uniformity does not mean that absolutely equal possibilities for performing the voting act in equal manner should be guaranteed to all people with the right to vote. People using different voting methods (those taking part in advance polls, people voting in a foreign state, people voting at home, etc.) are objectively in different situations.^{*31}

In its decision on matter 3-4-1-1-05 of 19 April 2005^{*32}, the Supreme Court *en banc*, inter alia, tackled the principle of the uniformity of elections in conjunction with the principle of equal treatment derived from § 12 of the Constitution with regard to the right to be elected and defined it as a guarantee of equal possibilities to all candidates for standing as candidates and for being successful in the elections. The decision sets out that, since a proportional electoral system is used for election of local government councils in Estonia, independent candidates and people running on lists are in a different situation and their comparison in such a context is neither reasonable nor possible.^{*33}

3.4. Constitutionality of a state language requirement imposed on council members as limitation of generality of elections

The applicable Local Government Council Election Act, dating from 2002 and amended several times since, does not impose a language qualification on the members of councils, but in the second half of the 1990s the requirement to know the state language had been prescribed for the members of a council^{*34} at the level of an act.^{*35} In November 1997, the Riigikogu adopted the Language Act and the State Fees Act Amendment Act, providing that the Government of the Republic was to establish the description of the level of proficiency in the Estonian language required for one to be a member of a council. The President of the Republic contested the conformity of the act with the Constitution in the Supreme Court. The President, inter alia, indicated that such a precept gave the Government of the Republic disproportionately extensive powers to decide on the language skills of members of local government councils.

³¹ CRCSC 1.09.2005, 3-4-1-13-05 paras 19, 20, 21, 23, 24, 28, 30, and 32.

³² SCeb 19.04.2005, 3-4-1-1-05 (the petition of the Chancellor of Justice to partly repeal § 70¹ of the Local Government Council Election Act and § 1 (1), the first sentence of § 5 (1), and § 6 (2) of the Political Parties Act). – RT III 2005, 24, 249 (in Estonian).

³³ *Ibid.*, para. 16.

³⁴ Also for the members of the Riigikogu, but this is not separately addressed in this paper.

³⁵ See I. Tomusk. Keeleseaduse muutmise ja täiendamise lugu (Story of the Amendment and Supplementation of the Language Act). Presentation at the seminar International Standards upon the Implementation of the Language Act, on 8 and 9 November 2001. – *Õiguskeel* 2001/5, pp. 9–15 (in Estonian).

In its decision from 5 February 1998 in case 3-4-1-1-98³⁶, the CRCSC admitted: “Pursuant to the second sentence of § 104 the election acts are among the laws which may be passed only by a majority of the membership of the Riigikogu. To decide on the right to vote and to establish the conditions for elections are the competencies of the legislative power which may not be delegated to the executive power. The Government of the Republic issues regulations on the basis of and for the implementation of law, and it is not allowed to establish the use of the right to vote by the decisions of the executive power. To do this would mean ignoring the principle of separated powers.”³⁷

The language skill requirement is an election qualification for a member of a representative body and affects the right to be elected. The court referred to § 8 of the ECLSG (on administrative supervision of local authorities’ activities) and pointed out that § 156 of the Constitution requires qualifications concerning the right to vote but fails to regulate the right to be elected for a local government council member. The CRCSC stated that regulation of the relationships falling within the area of regulation of the LGCEA (§ 104 second sentence (4) of the Constitution) as a constitutional act by means of ordinary legislative acts (the Language Act being an ordinary legislative act) is unconstitutional. In constitutional laws, neither the norms referring to simple legislation, nor delegation norms allowing the executive to issue general acts in matters which essentially belong to the sphere of regulation by constitutional laws, are allowed. Consequently, the requirement concerning the level of language skills may be imposed only by the LGCEA.³⁸ The Supreme Court declared the Language Act and the State Fees Act Amendment and Supplementation Act unconstitutional.

In its decision from 4 November 1998 in case 3-4-1-7-98³⁹, the CRCSC referred to its decision described above, noting that, on the grounds indicated in the decision, the Language Act (§ 5 (1)) was in conflict with the Constitution (§ 104 second sentence (4)) both as regards the determination of the level of language skills and as regards the powers given to the Government of the Republic to establish a procedure for supplying the description of the level of these language skills. The Supreme Court invalidated certain provisions of the LGCEA also in part where the provisions of this constitutional act referred to an ordinary legislative act and where the establishment of the description of the level of language skills was delegated to the Government of the Republic. Regulation 188 of the Government of the Republic, of 16 July 1996 (titled ‘Establishment of the Description of the Level of Estonian Language Skills Required for Working on a Local Government Council’), was repealed to the extent that it established the description of the level of the knowledge of Estonian necessary for working in a local government council.

It is important to emphasise that the Supreme Court did not call into question in either of the decisions the legitimacy of the requirement for knowledge of Estonian as a national language as such in respect of council members. Quite to the contrary, the court noted that the conformity of the language qualification derived from the preamble to the Constitution, according to which one of the goals of the Republic of Estonia was to guarantee the preservation of the Estonian nation and culture through the ages. As the Estonian language is an essential component of the Estonian nation and culture, without which the preservation of the Estonian nation and culture is not possible, the enacting of electoral qualifications guaranteeing the use of Estonian via the LGCEA is constitutionally justified.⁴⁰

3.5. Election rules and representativeness of representative bodies of local government

The issue of the representativeness of the representative bodies of local government had been raised already in the Constitutional Assembly. It is not a coincidence that the right to vote provided for in § 156 of the Constitution is related not to citizenship but to status as a permanent resident. The Supreme Court has had to address the problem of the representativeness of councils in another context.

Election rules have a very important role in determining the composition of the representative bodies of local governments. Also the ECLSG confirms in its preamble that the local authorities are one of the main foundations of any democratic regime. Section 1 of the Constitution declares that Estonia is a democratic republic. Legal acts establishing the election rules must be aimed at ensuring democracy and general well-being. The language qualification imposed for the election of a local government council, as described above, and the

³⁶ CRCSCd 5.02.1998, 3-4-1-1-98 (review of the petition of the President of the Republic of 30 December 1997 to declare the Language Act and the State Fees Act Amendment and Supplementation Act unconstitutional). – RT I 1998, 14, 230 (in Estonian).

³⁷ *Ibid.*, para. III.

³⁸ *Ibid.*, para. IV.

³⁹ CRCSCd 4.11.1998, 3-4-1-7-98 (review of the petition of the Harju County Court to partly repeal § 3 (3) and § 26 (7) 1) of the Local Government Council Election Act, § 5 (1) of the Language Act, and Regulation No. 188 of the Government of the Republic of 16 July 1996: Establishment of the Description of the Level of the Estonian Language Required for Working in the Riigikogu and a Local Government Council). – RT I 1998, 98/99, 1618 (in Estonian).

⁴⁰ CRCSCd 4.11.1998, 3-4-1-7-98, section III.

general requirement for knowing Estonian, which is constitutionally justified as repeatedly confirmed by the Supreme Court, must not damage fulfilment of the requirement arising from the first sentence of § 154 of the Constitution that all local issues be resolved and managed by local governments, which shall operate independently, pursuant to the law. The election qualification ensuring the use of the Estonian language, as justified by the Constitution, may at the same time be in conflict with the provision indicated in the Constitution because of the extent of the restriction, or it may undercut the principle of representativeness for a representative body of local government. Section 11 of the Constitution provides that any restrictions of rights and freedoms (including also conditions for election) must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted.^{*41}

On 27 March 2002, the Riigikogu adopted the LGCEA, which no longer provided for the possibility of election coalitions of political parties and citizen election coalitions running in elections held in October of the same year. The right to stand as a candidate was reserved only for the lists of political parties and independent candidates. The decision to forego election coalitions was justified in terms of the need to increase the political liability of the people elected to local government councils. The Chancellor of Justice proposed that the Riigikogu bring the act into conformity with the Constitution, the Riigikogu did not agree with the position of the Chancellor of Justice, and the latter appealed to the Supreme Court to settle the legal dispute. To provide complete information, it must be noted that at two municipal elections — held in 1996 and 1999 — the majority of the voters in rural municipalities and towns voted for citizen election coalitions and the candidates also preferred to belong to citizen coalitions. The situation was different, however, in larger local government units at that time, where people preferred political party lists.

In its decision from 15 July 2002^{*42} in case 3-4-1-7-02, the CRCSC considered the goal set by the legislator — to maintain the greater political accountability of the people elected to local government councils — as legitimate in itself and admitted that the measure used, that being the decision to forego election coalitions, may be legitimate. The CRCSC did not, however, consider it constitutional not to allow citizen election coalitions in the given legal and social situation, regarding it instead as a disproportional restriction of the right to vote. Thus, the court left it open that, in a different situation, a similar legal solution may be constitutional. This also left open the possibility that the question of whether the legal and social situation may have changed after a certain time to the extent that elimination of the election coalitions from the election process is justified might be addressed again, later on. In 2005, the Supreme Court had to process the petition by the Chancellor of Justice, which had, *inter alia*, been motivated by the legislator's intention to disallow the election coalitions in the elections of local government councils.^{*43} The question of the permissibility or impermissibility of the participation of election coalitions in the election process cannot in fact be answered metaphysically, apart from in terms of the social and legal reality of the relevant period.

Under the facts and reasons set forth for the decision, the CRCSC noted that § 156 of the Constitution might be interpreted such that its sphere of influence is not limited solely to ensuring formal equality established within the framework of the elections act. Section 156 of the Constitution does not exist in isolation from the other provisions and principles of the Constitution. The nature and the principles of democracy must be taken as the bases when one interprets § 156 of the Constitution. Referring to the preamble to the ECLSG as an international agreement containing important principles of local government, the court emphasised that the principle of democracy of forming a representative body for a local government was aimed at achieving sufficient representativeness of the body. The possibility of influencing the development of the composition of the representative body must be guaranteed to all voters and voter groups. The principles of democracy in themselves do not preclude reasonable restriction of the right to vote. For example, it is allowed to impose a threshold to discourage non-serious associations and independent candidates, in the form of requiring a certain number of signatures for nomination of a candidate. The restrictions must not, however, prevent individuals and groups having actual support from running in the elections. Restrictions running counter to this principle would damage both the right to stand as a candidate and the right to vote, and not just the right to nominate a candidate, and it would ultimately damage the bases for local government if the representative body were unable to be sufficiently representative.^{*44} Having analysed the election statistics, the court admitted that independent candidates were not on a competitive footing with the people in the election lists. The CRCSC also noted that there was no efficient alternative to the local election lists of national political parties for voters and candidates.^{*45} The court declared the LGCEA as adopted in 27 March 2002 unconstitutional to the extent that it did not allow for the participation of citizen election coalitions in local government elections.

⁴¹ *Ibid.*

⁴² See Note 22.

⁴³ For discussion of this, see section 3.6 below.

⁴⁴ *Ibid.*, para. 21.

⁴⁵ *Ibid.*, paras 29–30.

3.6. Election rules and local government autonomy

Local government autonomy is the core of the constitutional guarantee of the local government. This autonomy does not exist outside the legal or social situation of the relevant period. Election rules naturally have an important influence on local government autonomy either by enhancing it or, on the other hand, by weakening it. When speaking about local autonomy, we must keep in mind that it applies to relations between local government and the state; that is, in furnishing and construing election rules in a certain way, the natural core of local government — independence in deciding on local issues and their organisation — may be damaged by its excessive limitation for the benefit of the state. It would be *sancta simplicitas* to think that the political forces shaping the election rules lack sufficient argument to justify such activities.

The Supreme Court analysed the impact of the election rules for local government councils on local government autonomy in its *en banc* decision of 19 April 2005. Namely, the Chancellor of Justice submitted to the highest court of the state a petition to declare certain provisions of the LGCEA and the Political Parties Act (PPA) to be not in conformity with the Constitution and the Treaty establishing the European Communities⁴⁶ and thus to be invalid to the extent to which they did not allow for forming citizen election coalitions for local government council elections or allow political parties having fewer than one thousand members to be involved in deciding and managing local life issues, whose members could include citizens of the European Union. Before that, the Riigikogu had rejected the proposal of the Chancellor of Justice to bring the act into conformity with the Constitution.

It should already be considered of value that the highest court of the state has clearly and unambiguously stated that, according to the Constitution, a local government is based on the idea of a community, the duty of which is to resolve the problems of the community and manage the life thereof.⁴⁷ The court has also considered the principle of local government autonomy to be one of the underlying principles of the idea of democracy as contained in the Estonian Constitution.⁴⁸ Such a view is in compliance with the ECLSG, the preamble to which states that the local authorities are one of the main foundations of any democratic regime and that such local authorities are required as are 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 Supreme Court considers the natural content of local government autonomy to be the realisation of local interests on the local level, even in conflict with the interests of the central power.⁴⁹ This also is a clear rejection of the centralistic and state-focused perception according to which the state has one and only one centre of power. In the second half of the 1930s, the history of Estonia was characterised by an authoritarian period dominated by such ideas founded on the centralisation of power. The Supreme Court *en banc* does not consider local government autonomy to be an end in itself; rather, it defines as the goal of local government autonomy the decentralisation of public authority and the serving of the interests of restricting the state's authority and the counterbalancing thereof. The electoral system applied for local government councils should also be aimed at the protection of this constitutional value.⁵⁰ At the same time, the principle of local autonomy is not absolute, and its restriction is allowed, in fact, if justified for the realisation of an important constitutional value.⁵¹ In this case, the Minister of Justice and the Constitutional Committee of Parliament argued for the restriction of the right to stand as a candidate (the restriction of the suffrage derived from granting only political parties the right to submit lists) in terms of the need to ensure political liability. The Supreme Court *en banc* defined political liability as arising from the principle of democracy expressed in § 1 of the Constitution and specified as a possibility of evaluation of the activities of members of a local council once they have been elected, as well as assessment of how well they have fulfilled their campaign promises.⁵² The SCeb qualified political liability as a constitutional value and thus a goal legitimating restriction of the general principle of the Constitution. After that, the Supreme Court *en banc* assessed the proportionality of restriction of the principles of local autonomy and the equal right to stand as a candidate in consideration of the goal of political accountability, applying a familiar scheme: suitability — necessity — proportionality in a narrower sense.⁵³ But what constituted the restriction of the principle of autonomy arising from the constraint on the right to stand as a candidate at municipal elections from the point of view of the SCeb? The SCeb defined it as follows: “If the possibilities to represent communal interests are made dependent on the decisions of political parties active on the national level, the representation of local interests may be jeopardised. This, in turn, may be in conflict

⁴⁶ The issue of conformity with the Treaty establishing the European Communities is not considered in this paper.

⁴⁷ SCeb 19.04.2005, 3-4-1-1-05, p. 18.

⁴⁸ *Ibid.*, para. 30.

⁴⁹ *Ibid.*, para. 35.

⁵⁰ *Ibid.*, para. 17.

⁵¹ *Ibid.*, para. 24.

⁵² *Ibid.*, para. 26.

⁵³ Only local autonomy is tackled below, although the SCeb used the same arguments also in relation to restriction of the right to stand as a candidate.

with the principle of autonomy of local governments. In the case of a conflict of state and local interests, a member of a local government council must have an opportunity to resolve local issues independently and in the interests of his or her community. That is why the electoral system of municipal elections should guarantee those groups of persons who come from the local community and who have a common interest in resolving local issues the possibility of standing as candidates on an equal footing with those groups, such as political parties, who are interested in exercising power also on the national level.”⁵⁴

When applying the proportionality test (assessment of the restriction of local government autonomy in respect of the goal of strengthening political liability), the SCeb did not perceive any problems concerning the suitability and necessity of the restriction, but it did find issue in the case with proportionality (in its narrower sense). The question was that the restriction of the right to stand as a candidate that restricted also upon local government autonomy as one of the underlying principles of democracy presumed that the goals of the restriction are particularly significant.⁵⁵ The SCeb assessed the guaranteeing of political liability to be a constitutional value but only a non-primary, or secondary, value arising from the principle of democracy, since, besides political liability, the requirement that different political interests be represented as widely as possible in political decision-making is vital for the functioning of democracy in Estonia’s political system; the principle of separation of powers must also be taken into consideration.⁵⁶ On the other hand, the SCeb qualified the restriction as intensive for local autonomy⁵⁷ and arrived thus at the conclusion that in the current legal and social context of Estonia the aim of ensuring political liability does not justify the restriction of the principle of local autonomy and the equal right to stand as a candidate in the election of a local government council.⁵⁸ Hence, the Supreme Court *en banc* assessed as unconstitutional the relevant provisions of the PPA and LGCEA that in their conjunction prevent the residents of a local government jurisdiction from independently submitting lists in local government council elections.⁵⁹ However, only the contested provision of the LGCEA (§ 70¹) was repealed. The reason is that the SCeb assumed the position that the Chancellor of Justice had made an alternative petition to the Supreme Court⁶⁰: (1) to declare the provisions of the LGCEA and PPA invalid to the extent that the provisions do not allow forming of election coalitions of citizens in local government council elections and (2) to declare the provisions invalid to the extent that the provisions do not allow forming political parties with a membership of fewer than 1000 persons for deciding and arranging local issues.⁶¹ The Supreme Court *en banc* referred to the principle of legal certainty as the reason for its need to go beyond mere declaration of unconstitutionality of the provisions of the LGCEA and PPA in their conjunction. The Supreme Court *en banc* pointed out the small amount of time remaining before municipal elections. Upon the invalidation of the relevant provision of the LGCEA, it would be unambiguously clear who would be able to participate in the forthcoming local elections, provided that the legislator were not to establish other rules. In principle, the legislator should then have an opportunity to bring the whole body of regulation of the Local Government Council Election Act and of the Political Parties Act into conformity with the Constitution.⁶² The fact that the SCeb (or, strictly speaking, the majority of its panel) did not because of the principle of legal certainty consider it possible to simply declare the provisions of the LGCEA and PPA invalid in their conjunction (although the court admitted this in its argument) and that it invalidated only the relevant provision of the LGCEA and thereby decided on the question for the parliament also provided grounds for the dissenting opinion of one Justice of the Supreme Court.⁶³ The opinion he expressed, according to which it is the parliament that should be given the possibility of making a choice of legal regulation — as much as possible — concerning such sensitive issues as the fundamental right of political parties and suffrage rights instead of the court resolving the issue via a judgement for the Parliament, addresses what is, by nature, an issue of judicial activism and deserves to be discussed separately. We may still agree with the remark offered in the dissenting opinion that there were no flawless versions of decision possible in the situation that had evolved.

⁵⁴ *Ibid.*, para. 17.

⁵⁵ Here it must be noted that paragraph 30 of the reasons of the SCeb decision is worded incorrectly. It states: “That is why the reason for establishing restrictions on the exercise of suffrage in local elections must be especially weighty.” In fact, it is not the restriction as such but the goal justifying its imposition that must be weighty.

⁵⁶ *Ibid.*, para. 34.

⁵⁷ *Ibid.*, paras 31–34.

⁵⁸ *Ibid.*, para. 36.

⁵⁹ *Ibid.*

⁶⁰ Not all of the members of the panel of the Supreme Court *en banc* agreed that the Chancellor of Justice had made an alternative petition. See the dissenting opinion of Justice Lea Kivi, which is available in English at <http://www.nc.ee/?id=391>.

⁶¹ *Ibid.*, para. 44.

⁶² *Ibid.*, para. 47.

⁶³ See the dissenting opinion of Justice Jüri Põld. Available in English at <http://www.nc.ee/?id=391>.

4. Conclusions

The Supreme Court in the Constitutional Review Chamber of the Supreme Court, or Supreme Court *en banc*, has at several times assessed the constitutionality of the rules established for the election of local government councils in the course of constitutional review proceedings, filling out and shaping in their decisions the electoral law and its democratic principles that form an important institute of constitutional law. The principle of *vacatio legis* that serves as such a key element of a state based on the rule of law and the principles of the representativeness and autonomy of local government councils have been furnished and developed further in the judicial practice of the Supreme Court. As a whole, the judicial practice of the Supreme Court in the area of suffrage — and, naturally, not in that area alone — has definitely strengthened a democratic statehood of Estonia based on the rule of law. The positions expressed by the highest national court in defence of the principles of local government autonomy and the representativeness of its representative body are of lasting value for the guarantee of this constitutional institution that is closest to its citizens. Since the election rules have often been amended immediately before municipal elections, the Supreme Court itself has certainly felt the pressure of time in making the relevant decisions, but its lines of argument in the sphere of the suffrage as a whole are pertinent and the judgements supplied with sufficient reasoning.

Abbreviations

RT	<i>Riigi Teataja</i> (State Gazette)
CRCSC	Constitutional Review Chamber of the Supreme Court
CRCSCd	decision of the Constitutional Review Chamber of the Supreme Court
SCCCd	decision of the Criminal Law Chamber of the Supreme Court
SCeb	Supreme Court <i>en banc</i>
SCebd	decision of the Supreme Court <i>en banc</i>
ALCSCd	decision of the Administrative Law Chamber of the Supreme Court