

Votes without ballots

Observer report on e-voting at 2023 elections in Estonia

Märt Pöder, 4.12.2023

The observation episodes of electronic voting at 2023 parliamentary elections in Estonia disclosed miscounting of electronic ballots in informal procedures without legal recourse possible. The underlying lack of definition of electronic vote in relevant Election Act and systemic omission of ballots have led to erosion of principles of ballot secrecy and observability of elections. The rushed announcement of the results and failure to legally explain counting invalid ballots raises fundamental questions about the legitimacy of the elected parliament. The absence of essential safeguards, reliance on *ad hoc* decisions, and the erosion of principles of the democratic elections call for a constitutional review before proceeding with electronic voting in Estonia.

Summary of the findings

There are no *mere technical issues* in e-voting, because every issue also has legal implications. Any issue related to the counting of the votes is of utmost legal importance, because it directly affects the ascertaining of the election results and the legitimacy of the elected parliament.

Miscounting of votes

During the 2023 parliamentary elections in Estonia there were five issues brought out by the observers that would have had direct impact on the election outcome:

1. Electoral bodies removed from the electronic ballot box three vote containers presumably containing invalid ballots without decrypting the ballots as required by the Election Act¹.
2. Electoral bodies failed to remove from the electronic ballot box a vote container that was submitted after the end of the electronic voting period and should not have been processed.

¹ Election legislation in Estonia is duplicated in four very similar laws for different types of elections and referendums, the one relevant for parliamentary elections is Riigikogu Election Act.

3. Vote containers were processed in the wrong order, removing at least one legitimate ballot, which according to the Election Act should have been processed and counted.
4. The voting application produced electronic votes that failed to indicate the electoral district in ballot text as required by the electronic vote form stipulated by the National Electoral Committee.
5. The voting application produced vote containers that failed to have valid digital signatures as required by the electronic vote form for 2023 parliamentary elections and the Election Act.

Arguably, issues 1-3 would have had only a negligible effect on the final outcome of the election. Yet, they were brought up in legal complaints, which the authorities failed to discuss or dismissed.² In this respect, they constitute violations of voting rights of individual voters, which in the case of issues 2-3 was by the electoral authorities explained to be deliberate.

In accordance with the Estonian law, incorrect counting of votes in an election is a criminal offence.

Issues 4-5 related to missing district codes and invalid digital signatures affect all electronic votes submitted by the official voting application and would have had a major impact on the election result. Electoral authorities are legally allowed to announce the election results only after there are final decisions for all the election complaints.

Misguidedly referring to the Supreme Court judgement in case 5-21-31, which allowed declaring the election results if the complaint *does not affect the election results*, the electoral authorities rushed into announcing the results without processing the complaint about the ballots not conforming to the law, considering it “not an obstacle”.

As a consequence, the parliament convened on the basis of the announced results is lacking legitimacy as 22 out of the total 101 members have received their mandate from invalid ballots.

² Issue 1 was discussed by the Supreme Court case 5-23-11, but in paragraphs 31-34 was not informed about missing district codes in ballot text as indicated in issue 4 and failed to address the problem. Issues 2-3 and 4-5 were dismissed by the Supreme Court cases 5-23-22 and 5-23-26 because of missing the deadline. Issue 4 was previously brought to attention in the Supreme Court case 5-23-24, but was not addressed. Issues 2-5 were submitted to the police in accordance with § 163 of the Penal Code as offence report 23221000023 about incorrect counting of the votes. Explaining “no reason to distrust” the electoral authorities, the Bureau of Corruption Crimes refused to investigate, subsequent appeals to Prosecutor’s Office and District Court dismissed. Issues 4-5 were submitted as a complaint to the European Court of Human Rights after all domestic legal remedies had been exhausted in Estonia.

Legal safeguards missing

Since its inception in 2005, electronic voting in Estonia has gone through iterations of legal, technical and procedural changes, which have not always been pursued in a coordinated manner.

This has led to a situation of conflicting requirements, where the authorities have to rely on informal decisions and trust relations to run the elections, waiving some of the essential safeguards:

- The guidelines describe the means to make sure that there is no malware present in key generation and the vote counting system, but this is not being followed in practise.
- Vote counting procedures are highly irregular, involving informal sessions, and repeat counts are either partial or not carried out even if announced.
- Vote privacy, as described in law, is not provided in practice, as voters can obtain digitally signed proof of their actual choice in elections.
- Initial procedures for observing the election have been diminished in promise of end-to-end verifiability, which according to reports is not delivered by the current election protocol.
- Errors are denied and arbitrary decisions are made by the electoral authorities to obfuscate the situation instead of proper legal steps to overcome the issues.
- Substantial issues are not detected by contracted auditors, the electoral authority is not capable of testing and certifying the system before deployment in real elections.

The reliance on informal procedures, dismissal of election complaints and the accompanying lack of accountability mobilised election observers after the 2023 election to petition the Constitutional Committee of the parliament, demanding “electronic voting to be rendered meaningfully observable”.

In a concurring opinion to the Supreme Court case 5-23-20 regarding issues with electronic voting the Chief Justice underlined the need for initiating a constitutional review procedure of *at least* the responsibilities of electoral bodies, but *maybe also* the appeal process of electoral complaints as such.

Conclusions

Based on the observations of this report it can not be said that electronic voting in 2023 parliamentary elections in Estonia was conducted in accordance with the law and in an accountable manner, or *if in its current form this would be even possible*.

The electronic voting experiment in Estonia appears to be made possible by misleading the public and the voters about the properties of the voting protocol and its implications to the principles of elections, which can be described as *ontological gerrymandering*.

Lack of definition of the electronic vote in the Election Act and systemic omission of ballots as the designated medium to convey the votes have led to *ad hoc* counting procedures and erosion of constitutional principles of secret ballot and observability of elections.

In 2005, the Supreme Court in its constitutional judgment 3-4-1-13-05, which was pivotal for establishing electronic voting, explicitly stated that it would not assess “the general conformity of electronic voting with the Constitution of the Republic of Estonia.” Although the question of constitutionality has been voiced by at least two consecutive Chancellors of Justice in the past, the actual assessment has been postponed for more than twenty years now.

The sole recommendation of this report is to get that constitutional review done before continuing with electronic voting in Estonia.³

Full report: <https://infoaed.ee/evote2023>

³ In essence the report comes back to the recommendation of the OSCE/ODIHR observation mission from 2007 repeating its overall assessment: “Unless the challenging issues pertaining to Internet voting outlined in this report can be effectively addressed, the authorities should carefully reconsider whether Internet should be widely available as a voting method, or alternatively whether it should be used only on a limited basis or at all.”