Autoritatea Electorală Permanentă

EXPERT ELECTORAL

Special Edition / Édition spéciale / Ediție specială 2016

1st Scientific Electoral Experts Debates
Electoral Law and New Technologies: Legal Challenges

Bucharest, 12 – 13 April 2016

Premiers entretiens scientifiques des experts électoraux
Droit électoral et nouvelles technologies : défis juridiques

Bucarest, les 12 – 13 avril 2016

Prima ediție a dezbaterilor științifice ale experților din domeniul electoral
Legislația electorală și noile tehnologii: provocări legislative

București, 12 – 13 aprilie 2016

Journal indexed in:

INDEX COPERNICUS INTERNATIONAL

www.roaep.ro

Expert electoral

Revistă de studii, analize și cercetări electorale
editată de Autoritatea Electorală Permanentă
Publicație trimestrială

ISSN (print): 2286-4385
ISSN (online): 2393-3143
ISSN (L): 2286-4385

DTP: Monitorul Oficial

Redactor-șef – Daniel Duță
Redactor-șef adjunct – **Dr. Andrada-Maria Mateescu –** consilier, Direcţia management electoral

Autoritatea Electorală Permanentă
Str. Stavropoleos nr. 6, sector 3, Bucureşti
office@roaep.ro; expert.electoral@roaep.ro
Tel/Fax: (021)310.13.86
www.roaep.ro

Tipărit la:
MONITORUL OFICIAL

Următorul număr al revistei Expert electoral
va apărea în septembrie 2016.

ELECTORAL EXPERT REVIEW

Quarterly review of electoral studies, analysis and research

REVUE EXPERT ÉLECTORAL

Revue trimestrielle d'études, analyses et recherches électorales

---

REVISTA EXPERT ELECTORAL

Publicaţie trimestrială de studii, analize şi cercetări electorale

SPECIAL EDITION 2016

ÉDITION SPÉCIALE 2016

EDIŢIE SPECIALĂ 2016

Permanent Electoral Authority

Autorité Électorale Permanente

Autoritatea Electorală Permanentă

SUMMARY

1ST SCIENTIFIC ELECTORAL EXPERTS DEBATES

ELECTORAL LAW AND NEW TECHNOLOGIES: LEGAL CHALLENGES

BUCHAREST, 12 – 13 APRIL 2016

SOMMAIRE

PREMIERS ENTRETIENS SCIENTIFIQUES DES EXPERTS ÉLECTORAUX

DROIT ÉLECTORAL ET NOUVELLES TECHNOLOGIES : DÉFIS JURIDIQUES

BUCAREST, LES 12 – 13 AVRIL 2016

SUMAR

PRIMA EDIŢIE A DEZBATERILOR ŞTIINŢIFICE ALE EXPERŢILOR DIN DOMENIUL ELECTORAL

LEGISLAŢIA ELECTORALĂ ŞI NOILE TEHNOLOGII: PROVOCĂRI LEGISLATIVE

BUCUREŞTI, 12 – 13 APRILIE 2016

FOREWORD

Ana Maria PĂTRU
President of the Permanent Electoral Authority

The thundering technological evolution, specific to the contemporary world, has a great impact on human society, generating fundamental changes at all levels and in all fields. If there is a good approach and a proper management, the new tools and functionalities bring extra value to the systems where they are implemented.

Basically, the success depends on the ability of the organization to concentrate resources for implementing technological tools appropriate to the specific activities, related to ensuring balance between the technological component and the human resources, in relation to legislative provisions, which are often limiting, if not restrictive.

Their compatibility and a wide range of issues related to the obstacles that should be overcome in the implementation of new technologies in the electoral process were addressed in the first edition of the scientific debates of experts in the electoral field organized by the Venice Commission in partnership with the Permanent Electoral Authority (AEP).

The event, entitled *"Electoral law and new technologies: legal challenges"*, brought together renowned experts from 15 countries and representatives of prestigious international organizations active in the electoral field enabling the publication of this special edition of the "Electoral Expert" Review.

The publication comprises all the presentations delivered by the participants, the conclusions of the debates, as well as the main conceptual landmarks related to the electoral field, representing a valuable source of knowledge both for academia and practitioners.

AVANT-PROPOS

Ana Maria PĂTRU
Présidente de l'Autorité Électorale Permanente

L'évolution technologique fulminante spécifique au monde contemporain a un impact important sur la société humaine, engendrant des changements fondamentaux à tous les niveaux et dans tous les domaines d'activité. Approchés et gérés correctement, les nouveaux outils et fonctionnalités apparus apportent un plus de valeur aux systèmes dans lesquels ils sont mis en place.

Le succès dépend pratiquement de la capacité de l'organisation d'alouer des ressources pour la mise en place des outils technologiques adéquats pour les activités spécifiques, corrélée à la garantie de l'équilibre entre la composante technologique et les ressources humaines, par rapport aux dispositions législatives qui sont la plupart du temps limitatives, voire restrictives.

La première édition des entretiens scientifiques des experts électoraux, organisée par la Commission de Venise en partenariat avec l'Autorité Électorale Permanente (AEP), a discuté des modalités pour assurer la compatibilité de ces dispositions législatives, ainsi que d'une série ample d'aspects concernant les obstacles devant être surmontés dans la démarche de mettre en place des nouvelles technologies dans le processus électoral.

L'événement, qui a eu comme thème « *Le droit électoral et les nouvelles technologies : défis juridiques »,* a réuni des spécialistes réputés de plus de 15 pays et des représentants de certaines organisations internationales prestigieuses activant dans le domaine électoral, conduisant en même temps à la parution de cette édition spéciale de la revue « Expert Électoral ».

La publication comprend toutes les présentations des participants, les conclusions des entretiens, ainsi que les principaux repères conceptuels du domaine électoral, représentant une source de connaissances de valeur pour les théoriciens, ainsi que pour les praticiens.

CUVÂNT-ÎNAINTE

Ana Maria PĂTRU
Preşedintele Autorităţii Electorale Permanente

Evoluția tehnologică fulminantă specifică lumii contemporane are un impact deosebit asupra societății umane, generând schimbări fundamentale la toate nivelurile şi în toate domeniile de activitate. Abordate şi gestionate corect, noile instrumente şi funcționalități apărute aduc un plus de valoare sistemelor în care sunt implementate.

Succesul depinde practic de capacitatea organizației de a concentra resurse pentru implementarea instrumentelor tehnologice adecvate activităților specifice, corelată cu asigurarea echilibrului între componenta tehnologică şi cea a resursei umane, în raport cu prevederile legislative de multe ori limitative, dacă nu chiar restrictive.

Despre modalitățile de compatibilizare a acestora, precum şi cu privire la o serie amplă de aspecte referitoare la obstacolele ce trebuie surmontate în demersul de implementare a noilor tehnologii în procesul electoral s-a discutat în cadrul primei ediții a dezbaterilor ştiințifice ale experților din domeniul electoral, organizate de Comisia de la Veneția în parteneriat cu Autoritatea Electorală Permanentă (AEP).

Evenimentul, ce a avut ca temă *„Legislaţia electorală şi noile tehnologii: provocări legislative”,* a reunit reputați specialişti din peste 15 țări şi reprezentanți ai unor prestigioase organizații internaționale cu activitate în domeniul electoral, prilejuind totodată apariția acestei ediții speciale a revistei „Expert electoral”.

Publicația cuprinde toate prezentările participanților, concluziile dezbaterilor, precum şi principalele repere conceptuale circumscrise domeniului electoral, reprezentând o sursă valoroasă de cunoaştere atât pentru teoreticieni, cât şi pentru practicieni.

1ST SCIENTIFIC ELECTORAL EXPERTS DEBATES

ELECTORAL LAW AND NEW TECHNOLOGIES: LEGAL CHALLENGES

BUCHAREST, 12 – 13 APRIL 2016

OPENING SESSION

Pierre GARRONE
Head of the Division of Elections and Political Parties
Secretariat of the Venice Commission, Council of Europe

Ladies and gentlemen,

Electoral problems and even the electoral law raise great interest from the public. Journalists and historians study the matter, but political analysts are those who have consecrated the most research on electoral systems and the effects they produce. This field is, of course, appreciated by mathematicians.

I almost forgot about the jurists.

However, elections are impossible without precise rules of law. These range from the fundamental principles of the electoral law, as enshrined in the Constitution and treaties, to the detailed rules for the voting procedure or elections management. We do not see elections to be organized spontaneously: this is a fact, but also arises from one of the central elements of the Rule of Law, the principle of legality, pointed out in the *Rule of Law Checklist* that the Venice Commission has just adopted, and whose purpose is to enable the assessment of the implementation of the Rule of Law in a particular country.

Numerous legal publications are dedicated to elections. Being involved in the electoral field for three decades – first in academia –, I could only assess the quality of the articles published in reputable journals, and the absence, at least in Europe, of a journal dedicated specifically to electoral law.

The exchange of experience is not achieved only in writing, so our two day meeting is important.

The European Conference of Electoral Management Bodies, annually organized by the Venice Commission, allows the exchange of experience between those involved in elections. The discussions in "Electoral Expert" debates have a different purpose: to analyze practical experiences in order to draw general conclusions. This leads us naturally to the idea of a publication related to the outcome of the discussions.

This is why the discussions comprised in "Electoral Expert" are intended to be perennial. It is desirable that the debates should take place regularly, i.e., annually. The commitment of the Permanent Electoral Authority of Romania team should allow for the achievement of this objective.

But coming back to the topic of our discussion: electoral law and new technologies. The first conclusion: to the already large multitude of professions concerned with the electoral matters henceforth, another one is added, again from science: we do not only have mathematicians "thoroughbred" – concerned with electoral systems, statisticians – who are focused more on identifying fraud, a topic to be developed, but also computer scientists. A second observation: the applications the latter develop do not operate in a legal vacuum. Once again, the Rule of Law principle applies. Clearly, it is applied to the detailed rules of the process of registration or electronic voting, for example, but also to fundamental principles of constitutional value.

The debates are dedicated to examining the application of these fundamental principles in the use of new technologies in electoral matters. Of course, this is not the first time that this issue is addressed. The Council of Europe was among the first in the field of electronic voting with the recommendation adopted in 2004. This recommendation begins with the principles of electoral law. At the same time, our conference – and the future publication – is devoted specifically to the application of principles to new technologies, and is, therefore, deeply original.

If the subject is not new, what will we talk about then? Firstly, about the fundamental principles of the electoral law. In particular, the universality, equality, freedom and secrecy of ballots required for electronic voting, and also other aspects of new technologies in elections: for example, the correct registration of voters is an essential element of universal suffrage and the free suffrage does not make sense without proper transmission of results. We know that many irregularities occur in these stages of the electoral process. As for electronic voting, the challenge is that computerization increases the risks instead of decreasing them, and in order to ensure that irregularities can be detected and corrected, the system should be at least as secure as the classic system.

These are challenges that we will analyze. We have here a precious opportunity to bring together specialists in the field, theoreticians and practitioners, coming from different horizons, not only professional, but also geographical. Although most participants come from Europe, we have among us several rapporteurs who have already addressed – and will address today – this topic even outside our continent. We will emphasize the Brazilian experience.

We will see that traditional constitutional principles are applicable to the use of new electoral technologies. So far, the emphasis was especially on the implementation of the specific principles of the electoral law to electronic voting. This is true in particular for constitutional courts, and we will see that their attitudes do not converge – but what connoisseur of constitutional justice might wonder? At the same time, we must go further than the electronic voting – especially to go beyond the principles of electoral law. The issues of constitutional law shall be addressed regarding the topic of our study: legality, separation of powers, and vertical distribution of powers within the federal and regional states. In our globalized world we must examine the role of international law, where the Council of Europe proved to be a pioneer – of course in the form of "soft law" – via the Recommendation of 2004, today under review.

This gathering would not have been possible without the involvement of the Permanent Electoral Authority of Romania and its representatives present here. I am not referring only to the organization of the current event, but especially to the hard work that has been accomplished in the past four years in order to make possible the publication of the "Electoral Expert" Review, a journal devoted to the electoral law. I would like to warmly thank the Permanent Electoral Authority for having allowed us to launch this cycle of debates. I equally thank all rapporteurs, who will share their vast experience on a subject still quite new.

PREMIERS ENTRETIENS SCIENTIFIQUES DES EXPERTS ÉLECTORAUX

DROIT ÉLECTORAL ET NOUVELLES TECHNOLOGIES : DÉFIS JURIDIQUES

BUCAREST, LES 12 – 13 AVRIL 2016

SÉANCE D'OUVERTURE

Pierre GARRONE
Chef de la Division « Élections et Partis Politiques »
Secrétariat de la Commission de Venise, Conseil de l'Europe

Mesdames et Messieurs,

Les questions électorales, et même le droit électoral, suscitent un large intérêt de la part du public. Journalistes comme historiens s'y attellent, mais ce sont surtout les politologues qui y consacrent de nombreuses recherches – aux systèmes électoraux et à leurs effets notamment – et ce terrain est aussi prisé des mathématiciens, bien évidemment. On tendrait à oublier les juristes.

Pourtant, les élections ne sont pas concevables sans règles de droit précises. Celles-ci vont des principes fondamentaux du droit électoral, tels que consacrés par les Constitutions et les traités, jusqu'aux règles de détail sur la procédure de vote ou l'administration des élections. On ne voit pas des élections s'organiser spontanément : cela relève à la fois d'une constatation de fait, mais aussi d'un des éléments centraux de l'État de droit, le principe de la légalité, comme le souligne la liste des critères de l'État de droit *(Rule of Law checklist)* que la Commission de Venise vient d'adopter, et qui vise à permettre d'évaluer le degré de respect de l'État de droit dans un pays donné.

Les publications juridiques consacrées aux élections ne manquent pourtant pas. Impliqué dans les questions électorales depuis trois décennies – et d'abord dans le milieu universitaire – je n'ai pu que constater à la fois la qualité des publications, y compris dans bon nombre de revues renommées, et l'absence, du moins en Europe, d'une revue spécifiquement dédiée au droit électoral.

Un vide devait donc être comblé – et il a été comblé grâce au dynamisme de l'Autorité Électorale Permanente de la Roumanie. Elle a enfin sauté le pas, en lançant une revue dédiée non seulement aux élections, mais aux élections sous leur aspect juridique.

Une revue juridique est le lieu idéal pour comparer les diverses expériences en la matière. Et c'est bien cela qui manquait et que l'Autorité Électorale Permanente de Roumanie a réalisé, en éditant la revue « Expert Électoral ».

Les expériences ne s'échangent cependant pas que par écrit, d'où l'importance de notre rencontre de ces deux jours.

La conférence européenne des administrations électorales organisée annuellement par la Commission de Venise permet des échanges d'expériences entre praticiens des élections. Les entretiens de l' « Expert Électoral » ont un but différent. Ils visent à analyser l'expérience pratique pour en tirer des conclusions générales. Cela conduit tout naturellement, dans un deuxième temps, à une publication consacrant les résultats des discussions.

C'est pour cela que les entretiens de l' « Expert Électoral » sont destinés à être pérennisés. Il est souhaitable qu'ils se tiennent sur une base régulière, ou plus précisément annuelle. L'engagement de l'équipe de l'Autorité Électorale Permanente de Roumanie devrait permettre de réaliser cet objectif.

Venons-en maintenant au thème de notre discussion : droit électoral et nouvelles technologies. Première constatation : à la

cohorte, déjà nombreuse, des professions intéressées aux questions électorales s'en ajoute désormais une autre, et encore dans le domaine scientifique : non seulement nous avons les mathématiciens « purs » – préoccupés des systèmes électoraux – ; les statisticiens – plus portés sur l'identification de la fraude, un thème à développer – ; mais aussi les informaticiens. Deuxième constatation : les applications que ceux-ci développent ne s'exercent pas dans un vide juridique : là encore, le principe de l'État de droit s'applique. Cela concerne évidemment les règles de détail sur le processus d'enregistrement ou de vote électronique, par exemple ; mais cela concerne aussi les principes fondamentaux, de valeur constitutionnelle.

C'est à l'examen de l'application de ces principes fondamentaux à l'usage des nouvelles technologies en matière électorale que les présents entretiens sont consacrés. Ce n'est certes pas la première fois que la question est traitée. Le Conseil de l'Europe a ainsi été à la pointe dans le domaine du vote électronique, dans sa recommandation adoptée en 2004 déjà. Cette recommandation commence par les principes du droit électoral. Cependant, notre conférence – comme la publication qui suivra – est spécifiquement consacrée à la question de l'application des principes aux nouvelles technologies, et, en cela, elle est profondément originale.

Si la question n'est pas nouvelle, de quoi allons-nous donc traiter ? D'abord, des principes fondamentaux du droit électoral. En particulier, le caractère universel, égal, libre et secret du suffrage s'impose au vote électronique, mais aussi aux autres aspects des nouvelles technologies dans le domaine électoral : par exemple, l'enregistrement correct des électeurs est un élément fondamental du suffrage universel, et le suffrage libre ne peut se comprendre sans transmission correcte des résultats. Or, il est bien connu que nombre d'irrégularités se produisent à ces stades du processus électoral. Comme pour le vote électronique, le défi est que l'informatisation minimise les risques plutôt qu'elle ne les augmente, et de s'assurer que les irrégularités puissent être détectées et corrigées : le système doit être au moins aussi sûr et fiable que le système classique.

Ce sont ces défis que nous allons examiner. Nous avons ici une précieuse occasion de réunir des spécialistes de la question, à la fois du point de vue théorique et pratique, en provenant d'horizons divers, non seulement professionnellement, mais aussi géographiquement. Même si la plupart des participants proviennent d'Europe, nous avons parmi nous plusieurs rapporteurs qui ont déjà abordé – et vont aborder aujourd'hui – la question bien au-delà de notre continent. Nous mettrons ainsi particulièrement l'accent sur l'expérience brésilienne.

Nous verrons que les principes constitutionnels classiques sont applicables à l'usage des nouvelles technologies dans le domaine électoral. L'accent a surtout été mis jusqu'à présent sur l'application au vote électronique des principes spécifiques au droit électoral. Cela est vrai en particulier pour les cours constitutionnelles, dont nous verrons que les attitudes ne convergent pas – mais quel connaisseur de la justice constitutionnelle s'en étonnerait ? Cependant, il faut aller bien au-delà du vote électronique – et surtout, bien au-delà des principes du droit électoral. Les grandes questions du droit constitutionnel se posent à l'objet de notre étude : légalité, séparation des pouvoirs, répartition verticale des compétences au sein des États fédéraux et régionaux. Dans notre monde globalisé, il faut aussi examiner le rôle du droit international, domaine dans lequel le Conseil de l'Europe s'est montré pionnier – certes sous forme de *soft law* – par sa recommandation de 2004, aujourd'hui en cours de révision.

Cette rencontre n'aurait pas été possible sans l'investissement de l'Autorité Électorale Permanente de Roumanie et de ses représentants ici présents. Je ne parle évidemment pas seulement de l'organisation du présent événement, mais aussi et surtout du travail de longue haleine qui a été mené ces quatre dernières années pour rendre effective l'ambition de publier l' « Expert Électoral », une revue dédiée au droit électoral. Je tiens à remercier chaleureusement l'Autorité Électorale Permanente d'avoir permis le lancement de ce cycle d'entretiens. Je remercie aussi tous les rapporteurs, qui vont nous faire part de leur grande expérience sur un sujet malgré tout encore assez neuf.

PRIMA EDIŢIE A DEZBATERILOR ŞTIINŢIFICE ALE EXPERŢILOR DIN DOMENIUL ELECTORAL

LEGISLAŢIA ELECTORALĂ ŞI NOILE TEHNOLOGII: PROVOCĂRI LEGISLATIVE

BUCUREŞTI, 12 – 13 APRILIE 2016

SESIUNEA DE DESCHIDERE

Pierre GARRONE
Şeful Diviziei „Alegeri şi partide politice”
Secretariatul Comisiei de la Veneţia, Consiliul Europei

Doamnelor şi domnilor,

Problemele electorale, şi chiar dreptul electoral, trezesc un real interes din partea publicului. Ziarişti şi istorici studiază subiectul, dar politologii sunt cei care i-au consacrat cele mai multe cercetări referitoare la sistemele electorale şi la efectele pe care le produc în principal, acest domeniu fiind, bineînțeles, apreciat şi de matematicieni.

Aproape că uităm de jurişti.

Totuşi, alegerile sunt de neconceput fără reguli de drept precise. Acestea merg de la principiile fundamentale ale dreptului electoral, aşa cum sunt consacrate de constituții şi tratate, până la regulile de detaliu despre procedura de vot sau administrarea alegerilor. Nu vedem alegeri care să se organizeze spontan: aceasta este o constatare reală, dar şi unul dintre elementele centrale ale statului de drept, principiul legalității, subliniat de altfel de lista criteriilor statului de drept *(Rule of Law Checklist)* pe care Comisia de la Veneția tocmai a adoptat-o, şi al cărei scop este să permită evaluarea gradului de respectare a statului de drept într-o țară anume.

Publicațiile juridice consacrate alegerilor sunt numeroase. Fiind implicat în domeniul electoral de trei decenii – mai întâi în mediul universitar –, nu am putut decât să constat calitatea articolelor publicate în multe reviste de renume, dar şi absența, cel puțin în Europa, a unei reviste dedicate în mod special dreptului electoral.

Schimbul de experiență nu se face doar în scris, de aceea întâlnirea noastră de-a lungul acestor două zile este importantă.

Conferința Europeană a Organismelor de Management Electoral, organizată anual de Comisia de la Veneția, permite schimbul de experiență între cei implicați în organizarea alegerilor. Discuțiile din cadrul primei ediții a dezbaterilor ştiințifice „Expert electoral” au un scop diferit. Acesta este de a analiza experiențele din practică pentru a trage concluzii generale. Ceea ce duce în mod natural la ideea unei publicații consacrate rezultatului discuțiilor.

Din această cauză, discuțiile din „Expert electoral” sunt destinate a fi perpetuate. Este de dorit ca acestea din urmă să aibă loc regulat, mai precis anual. Angajamentul luat de echipa Autorității Electorale Permanente din România ar trebui să permită realizarea acestui obiectiv.

Dar să revenim acum la tema discuției noastre: dreptul electoral şi noile tehnologii. Prima constatare: la mulțimea, deja numeroasă, a profesiunilor interesate de subiectele electorale se adaugă de acum înainte încă una, din nou în domeniul ştiințific: nu avem numai matematicieni „pursânge” – preocupați de sistemele electorale, statisticieni – axați mai degrabă pe identificarea fraudei, o temă de dezvoltat –, ci şi informaticieni. A doua constatare: aplicațiile pe care aceştia din urmă le dezvoltă nu funcționează într-un vid juridic. Încă o dată, principiul statului de drept se

aplică. În mod evident, se aplică regulilor de detaliu ale procesului de înregistrare sau de vot electronic, de exemplu, dar şi principiilor fundamentale, cu valoare constituțională.

Discuțiile de față sunt consacrate examinării modului de aplicare a acestor principii fundamentale la domeniul utilizării noilor tehnologii în materie electorală. Desigur, nu este prima oară când acest subiect este abordat. Consiliul Europei a fost în prima linie în domeniul votului electronic prin Recomandarea adoptată deja în 2004. Această recomandare începe cu principiile dreptului electoral. În acelaşi timp, conferința noastră – precum şi publicația care va urma – este consacrată în mod specific subiectului aplicării principiilor fundamentale la noile tehnologii şi este, din acest motiv, profund originală.

Dacă subiectul nu este nou, despre ce vom discuta atunci? Întâi, despre aceste principii ale dreptului electoral. În particular, caracterul universal, egal, liber şi secret al sufragiului se impune votului electronic, dar şi altor aspecte ale noilor tehnologii în domeniul electoral: de exemplu, înregistrarea corectă a alegătorilor este un element fundamental al sufragiului universal, iar sufragiul liber nu are sens fără transmiterea corectă a rezultatelor. Se ştie faptul că numeroase iregularități se produc în aceste stadii ale procesului electoral. Ca şi pentru votul electronic, provocarea este ca informatizarea mai degrabă să reducă riscurile decât să le crească şi să ne asigurăm că iregularitățile pot fi detectate şi corectate, astfel încât sistemul să fie cel puțin la fel de sigur ca sistemul clasic.

Acestea sunt provocările pe care le vom analiza. Avem aici o ocazie valoroasă de a reuni specialişti în acest domeniu, atât din punct de vedere teoretic, cât şi practic, provenind din arii profesionale şi geografice diferite. Chiar dacă majoritatea participanților sunt din Europa, avem printre noi mai mulți raportori care au abordat deja – şi vor aborda şi azi – subiectul chiar din afara continentului nostru. Vom pune în mod particular accentul pe experiența braziliană.

Vom vedea că principiile constituționale clasice sunt aplicabile utilizării noilor tehnologii în domeniul electoral. Accentul a fost pus, până acum, pe aplicarea în cazul votului electronic a principiilor specifice dreptului electoral. Acest lucru este adevărat în mod special pentru curțile constituționale, ale căror abordări vom vedea că nu converg – dar care cunoscător al justiției constituționale s-ar mira? În acelaşi timp, trebuie să trecem dincolo de votul electronic şi chiar de principiile dreptului electoral. Marile întrebări ale dreptului constituțional se pun în ceea ce priveşte obiectul studiului nostru: legalitate, separarea puterilor, repartizarea verticală a competențelor în statele federale şi regionale. În lumea noastră globalizată trebuie să examinăm şi rolul dreptului internațional, domeniu în care Consiliul Europei s-a dovedit a fi pionier – desigur, sub formă de *soft law* – prin Recomandarea din 2004, care la momentul actual este în curs de revizuire.

Această întâlnire nu ar fi fost posibilă fără implicarea Autorității Electorale Permanente din România şi a reprezentanților ei prezenți aici. Nu mă refer doar la organizarea propriu-zisă a evenimentului de față, ci mai ales la munca susținută care a fost realizată în ultimii patru ani pentru a face posibilă publicarea revistei „Expert electoral”, dedicată dreptului electoral. Țin să mulțumesc călduros Autorității Electorale Permanente pentru că ne-a permis să lansăm acest ciclu de dezbateri. Le mulțumesc în egală măsură tuturor raportorilor, care ne vor împărtăşi vasta lor experiență în legătură cu un subiect totuşi destul de nou.

1ST SCIENTIFIC ELECTORAL EXPERTS DEBATES

ELECTORAL LAW AND NEW TECHNOLOGIES: LEGAL CHALLENGES

BUCHAREST, 12 – 13 APRIL 2016

OPENING SESSION

Csaba Tiberiu KOVACS
Secretary General
Permanent Electoral Authority

Dear guests,

Good afternoon everyone. I am Kovacs Csaba Tiberiu, Secretary General of the Permanent Electoral Authority, your host for this conference. Please allow me to give you the greetings of the president of the Permanent Electoral Authority, Mrs. Ana Maria Pătru, and to welcome you to Romania.

These days, we are attending an important event in the electoral domain: a scientific debate of electoral experts, the first one from a series inaugurated by the Venice Commission and organized in partnership with the Permanent Electoral Authority. It is an honor for Romania to host this premiere and for the Permanent Electoral Authority to be the partner of the Venice Commission in a scientific unprecedented demarche in the electoral domain.

We consider that such a format for the electoral experts meeting was necessary, since the seminaries, the regular assemblies of specialized associations and organizations have another goal – they facilitate experience exchange, provide national electoral radiographies, promote programs of electoral assistance, etc. The electoral domain must go hand in hand with the technological progress and the evolution of society, therefore, we need the researchers and specialists' contribution in electoral matters.

A scientific conference does not necessarily provide precise answers to the dilemmas and preoccupations which persist

at the level of electoral management bodies and of profile organizations, such a debate platform launches challenges, it proposes courageous solutions and, the most important, it encourages reform, innovation and creativity in a vital domain for democracy, such as the elections.

It is not by accident that this first debate has the theme: *"Electoral law and new technologies: legal challenges"*. At this stage, the electoral management must reconcile the tendency and the need of re-technologization of the electoral process with the specific legislation, in order to cope with the technological progress, but at the same time to ensure the enforcement of the electoral rights and of the constitutional provisions.

It is my great pleasure to share with you that, in this first scientific debate, amongst the participants, we have famous specialists from more than 15 countries and representatives of certain prestigious international organizations with an activity in the electoral domain, such as the Organization for Security and Cooperation in Europe/the Office for Democratic Institutions and the Human Rights (OSCE/ODIHR), the Network of Francophone Electoral Competences (RECEF), the Community of Democracies and the International Center for Parliamentary Studies.

During these two days, we will try to show to what extent and how the new technologies in elections can be used, what are the inherent risks in opening up the legislation to new technologies, what is the role of justice in supervising the technological instruments used in the electoral processes.

The second day of discussions will be mainly dedicated to the presentation of some national case studies concerning the use of new technologies in elections. Thus, Romania is the subject of the presentation wich will be held by **Mrs. Elena Simina Tănăsescu**, presidential counsellor at the Presidential Administration of Romania.

The study concerning Austria will be presented by **Mr. Gregor Wenda**, the Deputy Head of the Department for Electoral Affairs from the Austrian Federal Ministry of the Interior, the president of Ad Hoc Committee of Experts on Electronic Voting from the Council of Europe.

Mr. Oliver Kask, judge at the Court of Appeal from Tallinn, will talk about the electoral situation from Estonia, **Mr. Sebastian Seedorf**, the Deputy Head of Interior Policy Division from the German Federal Chancellery, will talk about the electoral situation in Germany. **Mr. Augusto Tavares Rosa Marcacini**, a professor from São Paulo, is going to present an electoral radiography of Brazil.

I want you to know that, when we have committed to collaborate with the Venice Commission for the organization and the accommodation of this event, we knew that the year 2016 will be an electoral one with two rounds of general elections: local and parliamentary. Two years after the use, in premiere, of the Electoral Register for the European Parliament elections in 2014, we can at last use a software program which helps us block any attempt of multiple voting and have turnout data in real time.

You are, therefore, in a country receptive to novelty, in which the electoral management body is, from various points of view, leading the way. Together, we hope to find the best technological solutions which meet the demands of free, correct, transparent elections, trusted by all people that cast their vote.

Thank you for your attention and I wish you successful debates.

PREMIERS ENTRETIENS SCIENTIFIQUES DES EXPERTS ÉLECTORAUX

DROIT ÉLECTORAL ET NOUVELLES TECHNOLOGIES : DÉFIS JURIDIQUES

BUCAREST, LES 12 – 13 AVRIL 2016

SÉANCE D'OUVERTURE

Csaba Tiberiu KOVACS
Secrétaire Général
Autorité Électorale Permanente

Chers invités,

Bonjour à tous. Je suis Kovacs Csaba Tiberiu, le Secrétaire Général de l'Autorité Électorale Permanente, votre hôte à cette conférence. Permettez-moi de vous transmettre les salutations de la présidente de l'Autorité Électorale Permanente, Madame Ana Maria Pătru, et de vous souhaiter la bienvenue en Roumanie.

Ces jours-ci, nous participons à un événement important dans le domaine électoral : un débat scientifique des experts électoraux, le premier d'une série inaugurée par la Commission de Venise et organisée en partenariat avec l'Autorité Électorale Permanente. C'est un honneur pour la Roumanie d'héberger cette première et pour l'Autorité Électorale Permanente d'être le partenaire de la Commission de Venise dans une démarche scientifique sans précédent dans le domaine électoral.

Nous considérons qu'on avait besoin d'un tel format pour les rencontres des experts électoraux, puisque les séminaires, les réunions périodiques des associations et des organisations de profil ont un autre but – ils facilitent l'échange d'expérience, ils fournissent des radiographies électorales nationales, ils promeuvent des programmes d'assistance électorale, etc. Le domaine électoral doit aller de concert avec le progrès technologique et avec l'évolution de la société et, pour ce faire, nous avons besoin de l'apport des chercheurs et des spécialistes dans le domaine électoral.

Une conférence scientifique n'offre pas nécessairement de réponses précises aux dilemmes et aux préoccupations qui persistent au niveau des organismes de management électoral et des organisations du domaine, une telle plateforme de débats lance des défis, elle propose des solutions courageuses et, ce qui est le plus important, elle encourage la réforme, l'innovation et la créativité dans un domaine vital pour la démocratie, celui des élections.

Ce n'est pas par hasard que ce premier débat a comme thème « *Droit électoral et nouvelles technologies : défis juridiques* ». À présent, le management électoral doit concilier la tendance et le besoin de la retechnologisation du processus électoral avec la législation spécifique, de sorte qu'elle doit se tenir à jour avec le progrès technologique, mais qu'elle assure le respect des droits électoraux et des dispositions constitutionnelles.

J'ai le grand plaisir de vous annoncer qu'à ce premier débat scientifique participent des spécialistes renommés de plus de 15 pays et des représentants de prestigieuses organisations internationales activant dans le domaine électoral, comme l'Organisation pour la sécurité et la coopération en Europe/le Bureau des institutions démocratiques et des droits de l'homme (OSCE/BIDDH),

le Réseau des compétences électorales francophones (RECEF), la Communauté des démocraties et le Centre international pour les études parlementaires.

Ces deux jours, nous allons essayer de montrer à quel point et comment on peut utiliser les nouvelles technologies dans les élections, quels risques comporte l'ouverture de la législation électorale aux nouvelles technologies, quel sera le rôle de la justice dans la surveillance des outils technologiques utilisés dans les processus électoraux.

Le deuxième jour de discussion sera dédié, en grande partie, à la présentation de certaines études de cas nationaux concernant l'utilisation des nouvelles technologies dans les élections. Ainsi, la Roumanie fait l'objet de la présentation de **Madame Elena Simina Tănăsescu**, conseiller présidentiel à l'Administration présidentielle de la Roumanie.

L'étude de cas concernant l'Autriche sera présentée par **Monsieur Gregor Wenda**, directeur adjoint du Département pour l'administration électorale au sein du Ministère fédéral de l'Intérieur, président de la Commission ad-hoc d'experts concernant le vote électronique au sein du Conseil de l'Europe.

C'est **Monsieur Oliver Kask**, juge à la Cour d'appel de Tallinn, qui nous parlera de la situation électorale en Estonie, et de celle de l'Allemagne ce sera **Monsieur Sebastian Seedorf**, directeur adjoint au sein de la Chancellerie fédérale. Une radiographie électorale du Brésil nous sera faite par **Monsieur Augusto Tavares Rosa Marcacini**, professeur, São Paulo.

Je veux que vous sachiez que, lorsque nous nous sommes engagés à collaborer avec la Commission de Venise pour l'organisation et l'accueil de cet événement, nous savions que l'année 2016 allait être une année électorale avec deux types d'élections générales : locales et parlementaires. Deux ans après l'utilisation, pour la première fois, du Registre électoral aux élections europarlementaires en 2014, nous pouvons enfin utiliser une application informatique qui nous aide à bloquer toute tentative de vote multiple et à avoir en temps réel la preuve de la présence au vote.

Vous vous trouvez donc dans un pays réceptif à la nouveauté, où l'institution de management électoral est, de plusieurs points de vue, un pionnier. Nous espérons qu'ensemble nous trouverons les meilleures solutions technologiques qui répondent aux exigences des élections libres, correctes, transparentes, auxquelles tous ceux qui sont attendus aux urnes puissent faire confiance.

Je vous remercie de votre attention et je vous souhaite des débats fructueux.

PRIMA EDIŢIE A DEZBATERILOR ŞTIINŢIFICE ALE EXPERŢILOR DIN DOMENIUL ELECTORAL

LEGISLAŢIA ELECTORALĂ ŞI NOILE TEHNOLOGII: PROVOCĂRI LEGISLATIVE

BUCUREŞTI, 12 – 13 APRILIE 2016

SESIUNEA DE DESCHIDERE

Csaba Tiberiu KOVACS
Secretarul general al
Autorităţii Electorale Permanente

Stimați invitați,

Bună ziua tuturor. Sunt Kovacs Csaba Tiberiu, secretarul general al Autorității Electorale Permanente, gazda dumneavoastră la această conferință. Permiteți-mi să vă transmit salutul preşedintelui Autorității Electorale Permanente, doamna Ana Maria Pătru, şi să vă urez bun venit în România.

Participăm în aceste zile la un eveniment important în domeniul electoral: o dezbatere ştiinţifică a experţilor electorali, prima dintr-o serie inaugurată de Comisia de la Veneția şi organizată în parteneriat cu Autoritatea Electorală Permanentă. Este o onoare pentru România să găzduiască această sesiune în premieră şi pentru Autoritatea Electorală Permanentă să fie partenerul Comisiei de la Veneția într-un demers ştiinţific fără precedent în domeniul electoral.

Considerăm că era nevoie de un astfel de format pentru întâlnirile experţilor electorali, întrucât seminariile, reuniunile periodice ale asociațiilor şi organizațiilor de profil au alt scop – facilitează schimburi de experiență, furnizează radiografii electorale naționale, promovează programe de asistență electorală etc. Domeniul electoral trebuie să țină pasul cu progresul tehnologic şi cu evoluția societății şi, pentru aceasta, avem nevoie de aportul cercetătorilor şi specialiştilor în materie electorală.

O conferință ştiinţifică nu oferă neapărat răspunsuri precise la dilemele şi preocupările care persistă la nivelul organismelor de management electoral şi al organizațiilor de profil, o astfel de platformă de dezbateri lansează provocări, propune soluții curajoase şi, cel mai important, încurajează reforma, inovația şi creativitatea într-un domeniu vital pentru democrație, cum este cel al alegerilor.

Nu întâmplător, această primă dezbatere are ca temă *„Legislaţia electorală şi noile tehnologii: provocări legislative”*. În acest moment, managementul electoral trebuie să împace tendința şi nevoia tehnologizării procesului electoral cu legislația specifică, astfel încât aceasta să țină pasul cu progresul tehnologic, dar în acelaşi timp să asigure respectarea drepturilor electorale şi a prevederilor constituționale.

Am deosebita plăcere să vă anunț că la această primă dezbatere ştiinţifică participă reputați specialişti din peste 15 țări şi reprezentanți ai unor prestigioase organizații internaționale cu activitate în domeniul electoral, precum Organizația pentru Securitate şi Cooperare în Europa/Oficiul pentru Instituții Democratice şi Drepturile Omului (OSCE/ODIHR), Rețeaua de Competențe Electorale Francofone (RECEF), Comunitatea Democrațiilor şi Centrul Internațional pentru Studii Parlamentare.

Vom încerca în aceste două zile să arătăm în ce măsură şi cum pot fi folosite noile tehnologii în alegeri, ce riscuri prezintă dechiderea legislației electorale către noile tehnologii, care va fi rolul justiției în supravegherea instrumentelor tehnologice utilizate în procesele electorale.

Ziua a doua a discuțiilor va fi dedicată, în cea mai mare parte, prezentării unor studii de caz naționale privind folosirea noilor tehnologii în alegeri. Astfel, România face obiectul prezentării susținute de **doamna Elena Simina Tănăsescu**, consilier prezidențial, Administrația Prezidențială a României.

Studiul de caz privind Austria va fi prezentat de **domnul Gregor Wenda**, director adjunct al Departamentului pentru Administrație Electorală din cadrul Ministerului Federal de Interne, preşedintele Comitetului Ad Hoc de Experți privind Votul Electronic din cadrul Consiliului Europei.

Despre situația electorală din Estonia va vorbi **domnul Oliver Kask**, judecător la Curtea de Apel din Tallinn, despre cea din Germania, **domnul Sebastian Seedorf**, director adjunct în cadrul Cancelariei Federale. O radiografie electorală a Braziliei ne va face **domnul Augusto Tavares Rosa Marcacini**, profesor, São Paulo.

Vreau să ştiți că, atunci când ne-am angajat să colaborăm cu Comisia de la Veneția pentru organizarea şi găzduirea acestui eveniment, ştiam că anul 2016 va fi un an electoral cu două rânduri de alegeri generale: locale şi parlamentare. La doi ani de la utilizarea, în premieră, a Registrului electoral la alegerile europarlamentare din 2014, putem în sfârşit să folosim o aplicație informatică care ne ajută să blocăm orice tentativă de vot multiplu şi să avem în timp real evidența prezenței la vot.

Vă aflați, aşadar, într-o țară receptivă la nou, în care instituția de management electoral este, din multe puncte de vedere, un deschizător de drumuri. Sperăm ca împreună să găsim cele mai bune soluții tehnologice care să răspundă exigențelor unor alegeri libere, corecte, transparente, în care să aibă deplină încredere toți cei care sunt aşteptați la urne.

Vă mulțumesc pentru atenție şi vă doresc dezbateri fructuoase.

NEW TECHNOLOGIES: INESCAPABLE BUT CHALLENGING

Ardita DRIZA MAURER
Jurist Ll.M., Independent Consultant

1. New Technologies and Elections

The invention of the *World Wide Web* in 1989 by Tim Berners-Lee at CERN in Geneva initiated a development that would profoundly change the way governments, business and people operate, interact and think their relations.

At the end of the 1990's, as individual homes were getting increasingly connected to the internet thanks to broadband lines, governments took up the challenge and, from digitally blind, started to develop digital strategies addressing not only *how-to-cope-with* but also *how-to-benefit-from* questions.

The way technologies were going to affect democracy and the way democracy could benefit from the advantages they offered was one of the very first issues that was considered. Many efforts and hopes poured on e-voting or the use of electronically-backed solutions to cast the vote in political elections. E-voting became a keyword for the deployment of ICT in the field of democracy. Efforts focused on developing electronically based solutions that allowed voters to vote via Internet or on electronic devices at polling stations (including direct-recording-electronic machines or DREs and optical scanners).

E-voting risks were acknowledged but e-voting also brought big promises with it. By easing participation, it was hopefully going to increase turnout. Voters may still need to go to the polling station, but the use of electronics would make the exercise of their duty as citizens easier, quicker and more appealing. In addition, it would make life much easier for polling station workers and election administration in general. The Government was getting ready for the future. However, demand, embrace and actual use were going to be decisive. So would be security concerns.

Those hoping for increased turnout disenchanted soon. E-voting did not increase participation and did not push younger voters to vote. Hopes were (dis)placed on e-voting's capacity to stop a trend of continuing decrease in participation. Since the advent of social media in 2005 (Facebook, Twitter, YouTube and the like) and their

extensive use by millions of individuals throughout the world, the mobilizing effect of new technologies has however regained momentum.

Today, however, the accent is less on e-voting and more on data-driven voter-targeted election campaigns, political mobilization in big protest movements that make extensive use of social media and the use of data to make local governance more efficient and more democratic.[1]

E-voting security concerns and warnings took the center stage in recent years. Academia has been very active at least on two fronts: denouncing security holes in the design and implementation of e-voting systems used in practice, on one side, and in proposing solutions to specific challenges. States like Ohio, California, and Florida in the U.S.A. have commissioned over a dozen independent scientific assessments of their electronic voting systems (e-voting machines and Internet voting). Published reports have documented deficiencies related to these systems.[2] Research has proposed methods for verifying results on voting machines such as VVPAT.[3] Prominent e-voting IT specialists signed the 2007 Dagstuhl Accord advocating the use of end-to-end verifiable e-voting systems.[4] Verifiability solutions and e-voting systems built by researchers are regularly discussed at major e-voting conferences. Technical research has been very cautious and has insisted on the challenges that e-voting poses and which are not yet effectively addressed.

More recent revelations about those surveillance practices by democratically-elected governments (Snowden's revelations), or by less democratic ones (intrusions in security-sensitive systems attributed to Chinese or Russian hackers) certainly do not contribute to build trust in electronically-backed solutions (although no direct relation to e-voting has been alleged so far). For instance, an e-Government monitor survey conducted in Germany, Switzerland, Austria, UK, USA and Sweden in 2013 showed that users were losing confidence in e-government services following Snowden's revelations.[5] Also Internet voting in Switzerland seemed to suffer from the NSA spying affair.[6]

Closer to elections and more recently, projectors have turned on the abusive use of big data (in combination with social media), to influence voters' opinions. Recent revelations of fraud in electoral campaigns were probably triggered by political turbulences of the ongoing presidential campaign in America.[7] In parallel, big data and social media are also being used to do well: improvement of local governance through public participation and political mobilization to influence decision-making even beyond national boundaries are two examples. Once again, technology seems to prove to us that it is *neither good, nor bad; nor is it neutral*.[8]

Two questions still remain. Is technology in elections as we know it today a novel issue, linked to electronics and the Internet? What does history, including recent one, teach us about the challenging character of new technology in elections?

2. Voting Technology Progresses with Democracy and Society

Few scholars have researched the historical evolution of voting methods with

[1] *The Economist,* special report *Technology and politics*, Print edition, 26 March 2016.

[2] For a thorough review of these studies under a legal perspective see Hoke, C., Judicial protection of popular Sovereignty: redressing voting technology, *Case Western Reserve Law Review*, Vol. 62, 2012. The author deplores that, to a very few and limited exceptions, no election law scholar has considered the legal import of these findings from top scientists.

[3] Also called Mercuri's method, VVPAT stands for Voter Verified Paper Audit Trail.

[4] http://www.dagstuhlaccord.org/index.php

[5] http://www.heise.de/newsticker/meldung/NSA-Affaere-Nutzer-verlieren-Vertrauen-ins-E-Government-2056450.html

[6] http://www.tdg.ch/suisse/evoting-souffre-affaires-despionnage/story/11165459

[7] *How to hack an election*, featured in Bloomberg Businessweek, 4 April 2016: http://www.bloomberg.com/features/2016-how-to-hack-an-election/

[8] Melvin Kranzberg cited by *The Economist*, see footnote 1.

the aim of better understanding e-voting.[9] The recent history of voting methods basically starts at the end of the 18th century, when democracy based on citizen participation as we know it today started to be introduced following American and French Revolutions.

Research shows that there have been several waves of technological change in voting, both in America and Europe, from early 19th century mechanical ballot boxes, to mechanical voting machines, to the rise of electronic computers in the 1960s, up to the introduction of DREs and Internet voting in the 1990s and 2000. Interestingly, the main reason for introducing technology was to fight fraud, quite extended especially in the 19th and in the first half of 20th century. Corrupted jurisdictions in the USA for instance resisted the introduction of voting machines.[10] The motivation for e-voting introduction was different though – it was to increase citizen participation. This time, technology is feared to open the door to fraudulent interventions.[11] Which explains the emergence of a rather recent phenomenon, the *auditing* of elections (keywords: election audits; verifiability methods).

E-voting technology appears to have kept pace with social needs (combating fraud, improving electoral processes, enabling voters to participate) and technical knowledge and possibilities. To conclude on the question of the ineluctable use of contemporary technology in elections, we would say that, in a context of democratic citizen participation, to borrow from research, the *question is not if e-voting will be used in the future, but rather when it is going to be used.* [12]

3. Multiple Challenges

Challenge is never in short supply in an e-voting context. It's even the very first commodity an e-voting project delivers, well before any of the promised advantages shows up. New technologies challenge the way the Parliament, the Government, the judge and the voter think about and deal with elections.

A look at the history of parliamentary interventions on e-voting in Switzerland,[13] an early but cautious adopter of Internet voting,[14] shows what the main preoccupations of the e-voting legislator (and supervisor) have been and how they evolved over the past twenty years.[15]

[9] In Europe, Robert Krimmer's 2012 doctoral thesis – *The Evolution of E-voting: Why Voting Technology is Used and How it Affects Democracy* – deals with this issue from a broader international perspective. Philipp Richter's 2012 doctoral thesis and book – *Wahlen im Internet rechtsgemäss gestalten* – dedicates a chapter to the history of voting in Germany. In the USA the two notable examples include Roy G. Saltman's 2006, 2008 – *The history and politics of voting and technology – In Quest of Integrity and Public Confidence* and Douglas W. Jones and Barbara Simon's 2012 – *Broken Ballots – Will Your Vote Count?* Other historical elements are provided in the chapters respectively dedicated to Germany, Brazil, India, France, Mexico and Australia, in Driza Maurer, A. and Barrat, J. (eds.), *E-Voting Case Law. A Comparative Analysis,* Routledge, Ashgate, 2015.

[10] Jones, D. W., Simon, B., *Broken Ballots – Will Your Vote Count?,* 2012, p. 38ff.

[11] There are also cases where e-voting technology was adopted to fight fraud and succeeded in doing so. See the discussion of the Venezuelan case by Rubén Martinez Dalmau, Finding the Relationship between E-Voting and Democracy, in *E-Voting Case Law* (footnote 9).

[12] See Krimmer, R. (2012), fn. 9, p. 28.

[13] See more detailed comments on e-voting development in Switzerland on my page www.electoral-practice.ch

[14] Switzerland introduced Internet voting in 2002 for a limited part of the electorate with the aim of testing this technology. It's indeed the cantons who introduced operation voting methods. Switzerland is a direct democracy where people are invited to vote on average four times a year in local, cantonal and federal questions in addition to elections. Postal voting is generalized, meaning all voters receive voting material at their domicile (no need for justification) and can decide whether to go to the polling station or return it by post. Some 90% of voters regularly choose the post. More on Government motivations to introduce e-voting can be found in their 2002 report https://www.bk.admin.ch/themen/pore/evoting/07977/index.html?lang=en

[15] All mentioned interventions can be found on the page of the Swiss federal Parliament: https://www.parlament.ch/fr

At the turn of the millennium, the preoccupation of MPs was to develop an information society identified as a value added to the country's competitiveness, a way to reinforce and personalize the relation between the State and citizen and a possibility to amplify voters' involvement in governance.[16] An e-government strategy was introduced and e-voting was part of that development.

As e-voting started to function on a regular although restricted basis, parliamentarians looked at it as a solution for all sorts of identified needs. For instance, the Government was invited to promote e-voting and to add other interactive tools as a way to promote youth participation.[17] No significant increase in youth participation through e-voting has been registered so far, however other improvements were made. *Easyvote.ch,* a voting information platform, was created. It targets youth and explains complex questions submitted to popular vote in plain, youth-like, language. In particular, on the eve of federal elections it creates events to mobilize youth vote.

Another target group that mobilizes MPs attention is the Swiss abroad, a constantly growing group of an increasingly mobile population. They are allowed to participate at least at federal votes and elections and, depending on the canton, at cantonal and even local voting events. Government has been regularly asked to invite cantons to develop e-voting solutions for this part of the electorate.[18] The alternative postal voting does not ensure that their vote arrives in time and there is no *"voting at the embassy"* possibility for Swiss expatriates.

A third group with a major interest in the development of e-voting platforms are the sight-impaired. Here again, the federal Government has been asked to find means, among them e-voting, to ensure that they can participate in voting and their right to a secret vote is respected.[19] The challenge is to develop solutions for sight-impaired without lowering security standards. MPs have also called for the development of e-voting's potential to improve other democratic processes, such as the collection of signatures in popular referendums and initiatives.[20]

The Government's strategy of a step-by-step introduction of e-voting was occasionally challenged by MPs. The pace of its introduction[21] and the limitations in place (of 10% of federal electorate) were questioned in particular with a view to its costs.[22]

Around 2007/2008, several e-voting initiatives in Europe experienced difficulties and were stopped for example in Ireland, the United Kingdom, the Netherlands or Germany.[23] Swiss MPs became more attentive to the constitutional conformity of e-voting, which was also reflected in their interventions. E-voting triggered a reflection on voting procedures, especially on distant voting. Issues such as transparency of procedures,[24] risk of electoral fraud,[25] reliability of the results of voting from uncontrolled environments[26] were brought forward.

Since, e-voting risks and related security measures have taken central stage

[16] For an example see motion 00.3298, *E-Switzerland. Modifications législatives, calendrier et moyens.*

[17] Parliamentary initiative 06.3538, Häberli-Koller, *Stimmbeteiligung Jugendlicher.*

[18] For an example see Motion 07.3197, Leutenegger Oberholzer, *Vote électronique, notamment des Suisses de l'étranger.*

[19] For an example see Interpellation 07.3630, Pascale Bruderer, *Accessibilité des sites Internet. Mettre en oeuvre la loi sur l'égalité pour les handicapés.*

[20] For an example see Motion 08.3908, Jacqueline Fehr, *Renforcer la démocratie. Autoriser la récolte électronique de signatures.*

[21] For an example see Question 07.5076, Guisan Yves, *Vote électronique. Introduction aux calendes grecques?*

[22] For an example see Question 07.5237, Graf-Litscher, *Vote électronique.*

[23] For a summary of developments at the regional level see Driza Maurer, A., *Report on the possible update of the Council of Europe Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting, 29 November 2013*, 2013.

[24] For an example see Parliamentary Initiative 08.486, Joseph Zisyadis, *Inscription de la transparence de vote dans la Constitution fédérale.*

[25] See Postulat 09.3174, Rennwald, *Votations et élections. Attention à la fraude.*

[26] See Interpellation 09.3573, Baettig, *Légitimité et fiabilité du vote par correspondance et du e-voting.*

in parliamentary debates.[27] The Government has been invited to reflect on the introduction of open source solutions,[28] transparency of audit reports, publication of source code, etc. Most issues are of cantonal competence, however federal guidance and minimum common requirements are needed.

More recently, alleged hacking and other incidents have been questioned.[29] In addition to transparency, open source,[30] verifiability has entered the debate.[31] There is even an invitation to the Government to organize a mock vote and invite the community to hack the systems.[32] The implementation of the OSCE/ODIHR recommendations following the 2011 and 2015 federal elections is also discussed.[33]

Cooperation with private actors that provide e-voting services (and trust placed in them) gained momentum last year. A number of interventions question the meaning of a public voting system and its transparency,[34] or the fact that some private providers are based abroad.[35]

A decision of the federal Court basically leaving it to the political system, informed by academia, to decide on the merits of e-voting[36] has prompted parliamentary reaction.[37] It was suggested that cantons set-up bodies for reviewing appeals related to the way an e-voting system is designed.

Costs remain an issue[38] as well as offering e-voting to all Swiss abroad in the near future.[39] The Government has been reticent to force the hand of cantons and to oblige them to introduce e-voting for specific groups. It has instead put the accent on improving the federal regulatory framework and on supporting cantons willing to do e-voting (half of them) to develop their systems towards second-generation ones that offer individual and universal verifiability. The Government is now examining conditions for putting an end to the long period of trials (with binding results) of e-voting which started in 2002. As an MP recently put it, e-voting will eventually come, no use then of making it compulsory.

4. Future's Yet to Come

Very much depends on how e-voting will be framed and controlled by Parliaments,

[27] Examples are Interpellation 10.3251, Luc Recordon, *Risques démocratiques inhérents au vote électronique;* Interpellation 12.3262, Luc Recordon, *Fiabilité et crédibilité du vote électronique.*

[28] For examples see Interpellation 12.3288, Jean-Christophe Schwaab, *Vote électronique. Stimuler l'innovation pour garantir la sécurité*; Interpellation 09.3495, Christian Wasserfallen, *Projets de cyber-administration. Utilisation de logiciels libres*.

[29] For a summary of developments and related parliamentary interventions in 2013, see my post http://www.electoralpractice.ch/2013/09/client-side-viruses-and-internet-voting. For a more recent example see Question 15.5151, Maximilian Reimann, *Votation populaire fédérale du 8 mars 2015. Panne lors du dépouillement des suffrages électroniques exprimés par des Suisses de l'étranger.*

[30] See Motion 15.4237, Lukas Reimann, *Vote électronique. Transparence indispensable.*

[31] See Motion 13.3808, Jean Christophe Schwaab, *Pas de précipitation en matière d'extension du vote électronique,* and Motion 13.3812, Balthazar Glättli, *Kein unsicheres E-Voting. Nur Systeme mit Verifizierbarkeit und offenem Source Code zulassen*.

[32] Question 15.5372, Jean-Christophe Schwaab, *Pour un test grandeur nature à blanc du vote électronique.*

[33] For a recent example see Interpellation 15.4167, Masshardt Nadine, *Missions d'observation électorale de l'OSCE. Mise en oeuvre des recommandations*. See also Interpellation 15.3331, Kiener Nellen, *Où en est la mise en oeuvre des recommandations de la mission d'évaluation électorale du BIDDH de l'OSCE dans la perspective des élections fédérales de 2015?*

[34] Motion 15.3492, Christian Darbellay, *Pour un système de vote électronique public et transparent*; Question 15.5466, Cédric Wermuth, *Engagement de la Poste dans le développement d'une plate-forme de vote électronique.*

[35] Question 15.5463, Peter Keller, *Le Conseil fédéral doit-il vraiment subventionner un système de vote électronique supplémentaire réalisé avec des collaborateurs étrangers?*

[36] See the discussion on this case in the chapter on Switzerland, by Beat Kuoni in *E-Voting Case Law* (footnote 9).

[37] Parliamentary initiative 15.412, Reimann Lukas, *Les modalités du vote électronique doivent pouvoir faire l'objet d'un examen juridique.*

[38] Interpellation 15.3634, Christian Levrat, *Vote électronique.*

[39] Instead of many, see Motion 15.4260, Filippo Lombardi, *Introduction du vote électronique pour tous les Suisses de l'étranger d'ici à 2019 au plus tard.*

how it will be piloted by Governments and how public-private cooperation in this area evolves. It will further depend on whether voters show interest to check the results and make use of verifiability techniques that are being offered to them. So far, as research shows, laws have not kept pace with the enormous changes in how elections are being run.[40] This is true for the region and this is true not only for legislation, but also for other aspects.[41] Given the sensitive character of the election procedures, any changes in this area, be it in terms of legislation, authorities' practice or voters' habitudes will take time.

Authorities in charge of studying or introducing e-voting look for benchmarks. With this regard, pioneering work of the Council of Europe in establishing soft law standards for e-voting in the region is a welcomed step forward.[42] The Recommendation of the Committee of Ministers to Member States on legal, operational and technical standards for e-voting, also known as Rec(2004)11, was adopted more than ten years ago by the Committee of Ministers. In 2010, two Guidelines were elaborated providing additional requirements on certification and transparency issues, only briefly dealt with in the Recommendation. The update of all these documents is now being considered by CAHVE – the Ad Hoc Committee of Experts on E-Voting set up by the Council of Europe in 2015.[43]

Researchers note that the fundamental problems faced by election officials over the past 150 years have not changed. As each new voting technology is adopted, there is an initial period of enthusiasm before flaws begin to emerge.[44] E-voting is no exception. With such multiples challenges present, one is tempted to ask: is the game worth the candle? Is it worth pursuing e-voting or more broadly new technology in elections or should we forget about them? Let's put the question a bit differently: do we really have a choice?

Back to Switzerland. It is considered one of the most democratic countries because the direct democracy institutions of referendum and initiative are well developed and extensively used at three levels: federal, cantonal and local. 90% of voters use the postal voting channel. Participation in votes is relatively low (between 40 and 50%), but given the fact that voters are invited to vote on average four times a year, on often very complex questions, this is not bad. Switzerland is also one of the countries with the highest Internet penetration rates. The Post, which transports vote envelopes, has become a private company and is transferring most of its activities online. Does the Swiss Government really have the choice to ignore the e-voting method (knowing that this method is explored in a step-by-step manner, placing security before speed and using e-voting only as an additional voting channel)?

This is certainly not an invitation to succumb to pressure exercised by e-voting vendors. Neither it is an invitation to precipitate the introduction of e-voting as a way for governments to appear modern. The answer is more complex. Probably it's to be found in the country's project for democracy. A lot will then depend on specific local needs and developments. High-technology *can* be designed to help that project.

[40] Jones and Simons, fn. 9, p. 7.

[41] Driza Maurer, A., *Update of the Council of Europe Recommendation on Legal, Operational and Technical Standards for E-Voting – A Legal Perspective*, Tagungsband IRIS, 2016.

[42] Wenda, G., *CAHVE: Das neue Ad-hoc-Komitee des Europarates für E-Voting*, Tagungsband IRIS, 2016.

[43] More on CAHVE: http://www.coe.int/t/DEMOCRACY/ELECTORAL-ASSISTANCE/news/2015/CAHVE2910_en.asp
The author of this paper is the nominated leading legal expert of the Ad Hoc Committee of Experts on E-Voting (CAHVE) created in April 2015 at the Council of Europe.

[44] Reference fn. 10, p. 7.

About the author:

Ardita DRIZA MAURER is a jurist based in Switzerland. She specializes in political rights and new voting technologies and works as an independent consultant. Ardita was previously a member and director of the Swiss Federal Internet voting project at the Swiss Federal Chancellery. She currently provides legal expertise to ongoing work on the update of the Council of Europe Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting.

E-mail: info@electoralpractice.ch

References:

- Driza Maurer, A., Barrat, J. (2015) (eds.). *E-Voting Case Law. A Comparative Analysis*. Routledge, Ashgate.
- Driza Maurer, A. (2013). *Report on the possible update of the Council of Europe Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting, 29 November 2013*.
- Driza Maurer, A. (2016). *Update of the Council of Europe Recommendation on Legal, Operational and Technical Standards for E-Voting – A Legal Perspective*. Tagungsband IRIS.
- Hoke, C. (2012). *Judicial protection of popular Sovereignty: redressing voting technology*, Case Western Reserve Law Review, Vol. 62.
- Jones, D. W., Simon, B. (2012). *Broken Ballots – Will Your Vote Count?*
- Krimmer, R. (2012), doctoral thesis. *The Evolution of E-voting: Why Voting Technology is Used and How it Affects Democracy*.
- Richter, P. (2012). *Wahlen im Internet rechtsgemäss gestalten.*
- Saltman, R. G. (2006, 2008). *The history and politics of voting and technology – In Quest of Integrity and Public Confidence*.
- Wenda, G. (2016). *CAHVE: Das neue Ad-hoc-Komitee des Europarates für E-Voting*, Tagungsband IRIS.
- The Economist, special report, *Technology and politics*, Print edition, 26 March 2016.
- *How to hack an election*, featured in Bloomberg Businessweek, 4 April 2016: http://www.bloomberg.com/features/2016-how-to-hack-an-election/
- Motion 00.3298, *E-Switzerland. Modifications législatives, calendrier et moyens.*
- Parliamentary initiative 06.3538, Häberli-Koller, *Stimmbeteiligung Jugendlicher.*
- Motion 07.3197, Leutenegger Oberholzer, *Vote électronique, notamment des Suisses de l'étranger.*
- Interpellation 07.3630, Pascale Bruderer, *Accessibilité des sites Internet. Mettre en oeuvre la loi sur l'égalité pour les handicapés.*
- Motion 08.3908, Jacqueline Fehr, *Renforcer la démocratie. Autoriser la récolte électronique de signatures.*
- Question 07.5076, Guisan Yves, *Vote électronique. Introduction aux calendes grecques?*
- Question 07.5237, Graf-Litscher, *Vote électronique.*
- Parliamentary initiative 08.486, Joseph Zisyadis, *Inscription de la transparence de vote dans la Constitution fédérale.*
- Postulat 09.3174, Rennwald, *Votations et élections. Attention à la fraude.*
- Interpellation 09.3573, Baettig, *Légitimité et fiabilité du vote par correspondance et du e-voting.*
- Interpellation 10.3251, Luc Recordon, *Risques démocratiques inhérents au vote électronique.*

- Interpellation 12.3262, Luc Recordon, *Fiabilité et crédibilité du vote électronique.*
- Interpellation 12.3288, Jean-Christophe Schwaab, *Vote électronique. Stimuler l'innovation pour garantir la sécurité.*
- Interpellation 09.3495, Christian Wasserfallen, *Projets de cyber-administration. Utilisation de logiciels libres.*
- Question 15.5151, Maximilian Reimann, *Votation populaire fédérale du 8 mars 2015. Panne lors du dépouillement des suffrages électroniques exprimés par des Suisses de l'étranger.*
- Motion 15.4237, Lukas Reimann, *Vote électronique. Transparence indispensable.*
- Motion 13.3808, Jean-Christophe Schwaab, *Pas de précipitation en matière d'extension du vote électronique.*
- Motion 13.3812, Balthazar Glättli, *Kein unsicheres E-Voting. Nur Systeme mit Verifizierbarkeit und offenem Source Code zulassen.*
- Question 15.5372, Jean-Christophe Schwaab, *Pour un test grandeur nature à blanc du vote électronique.*
- Interpellation 15.4167, Masshardt Nadine, *Missions d'observation électorale de l'OSCE. Mise en oeuvre des recommandations*.
- Interpellation 15.3331, Kiener Nellen, *Où en est la mise en oeuvre des recommandations de la mission d'évaluation électorale du BIDDH de l'OSCE dans la perspective des élections fédérales de 2015?*
- Motion 15.3492, Christian Darbellay, *Pour un système de vote électronique public et transparent.*
- Question 15.5466, Cédric Wermuth, *Engagement de la Poste dans le développement d'une plate-forme de vote électronique.*
- Question 15.5463, Peter Keller, *Le Conseil fédéral doit-il vraiment subventionner un système de vote électronique supplémentaire réalisé avec des collaborateurs étrangers?*
- Parliamentary initiative 15.412, Reimann Lukas, *Les modalités du vote électronique doivent pouvoir faire l'objet d'un examen juridique.*
- Interpellation 15.3634, Christian Levrat, *Vote électronique.*
- Motion 15.4260, Filippo Lombardi, *Introduction du vote électronique pour tous les Suisses de l'étranger d'ici à 2019 au plus tard.*
- www.electoralpractice.ch
- http://www.heise.de/newsticker/meldung/NSA-Affaere-Nutzer-verlieren-Vertrauen-ins-E-Government-2056450.html
- http://www.dagstuhlaccord.org/index.php
- https://www.bk.admin.ch/themen/pore/evoting/07977/index.html?lang=en
- http://www.electoralpractice.ch/2013/09/client-side-viruses-and-internet-voting
- http://www.coe.int/t/DEMOCRACY/ELECTORAL-ASSISTANCE/news/2015/CAHVE2910_en.asp

CONSTITUTIONAL CONSTRAINTS FOR THE USE OF INFORMATION AND COMMUNICATIONS TECHNOLOGY IN ELECTIONS

Robert KRIMMER
Tallinn University of Technology
Ragnar Nurkse School of Innovation and Governance
Akadeemia tee 3, SOC-439
12618 Tallinn, Estonia

Abstract:

Electronic elections are increasingly popular worldwide. Almost every discussion addressing the introduction of electronic processes into an election begins with the question of whether such a system would be in line with existing legislation. Here we outline the basic regulations that can be derived from constitutional rules, electoral principles and special case law on the matter. Based on our findings, we propose principal considerations for developing a legal basis for the introduction of electronic elections.

Keywords: *constraints, electoral principles, electronic elections, e-voting, new voting technologies, Internet voting*

Résumé :

Les élections électroniques sont de plus en plus populaires dans le monde entier. Presque toute discussion sur le thème de l'introduction des processus électroniques dans les élections commence par la question concernant la possibilité d'adapter un tel système à la législation en vigueur. Dans cette présentation, on met en évidence les règles de base qui peuvent découler des normes constitutionnelles, des principes électoraux et de la jurisprudence spéciale dans le domaine. En partant de nos conclusions, nous proposons les principales considérations permettant d'établir une base juridique pour la mise en place des élections électroniques.

Mots-clés : *contraintes, principes électoraux, élections électroniques, vote électronique, nouvelles technologies de vote, vote par Internet*

Abstract:

Alegerile realizate prin mijloace electronice au devenit din ce în ce mai populare în întreaga lume. Aproape orice discuţie care abordează tema introducerii proceselor electronice în alegeri începe cu întrebarea referitoare la posibilitatea de conformare a unui astfel de sistem la legislaţia existentă. Articolul de faţă subliniază reglementările de bază ce pot fi derivate din normele constituţionale, din principiile electorale şi din jurisprudenţa specială în domeniu. În baza concluziilor noastre, propunem principalele consideraţii în vederea stabilirii unui temei juridic pentru introducerea alegerilor realizate prin mijloace electronice.

Cuvinte-cheie: *constrângeri, principii electorale, alegeri realizate prin mijloace electronice, vot electronic, noi tehnologii de votare, vot prin internet*

1. Introduction

The use of electr(on)ics for the purpose of casting and counting votes has been of interest since the beginning of understanding the usefulness of electricity. Many early inventors investigated the use of electronics for parliamentary elections and proposed solutions to their respective policy makers. The first such proposal was made in 1849 in France, followed by others in Austria, Germany (Prussia), Sweden, Finland, Russia and the United States (for an in-depth discussion, see Krimmer, 2012).

An analysis addressing whether such technologies would be legally possible is typically being found when analyzing the beginning of any electronics voting proposal. Often, law and regulations have been cited as an excuse for not pursuing the implementation of a technology, despite the possibility to change such laws/regulations if a majority of the policy makers decided so. To our knowledge, the Finnish Parliament introduced the first automated mechanism to cast and count MPs votes in 1932.

For the purpose of this report, we use the definition put forward in the OSCE/ODIHR Handbook (2013) on How to observe New Voting Technologies, which defines it as *"the use of information and communications technology (ICT) applied to the casting and counting of votes"*, including ballot scanners, electronic voting machines and Internet voting, whereby we understand its application to parliamentary elections, thus involving regular citizens.

Such an introduction of new technologies requires careful discussion of electoral reform, usually initiated by the drafting of a feasibility study. Such feasibility studies will encompass technical, political, social and legal elements, and will need to examine all the possibilities of such a system, as well as proposing which technical features should be brought forward.

These general considerations are important, as they determine to what extent existing legal basis of an election would need to be modified. However, technical choices are influenced by the legal framework, thus creating a difficulty in deciding which decisions to make first, those regarding the technical means or changes to the legal basis, resulting in a 'hen' or the 'egg' problem.

The technical possibilities of electronic elections are beyond the scope of this study, which instead focuses on the constraints and guidance the legal basis can give. This is typically the starting point of any national debate on electronic voting where two main questions arise: Is the proposal in line with our legal basis? If so, is it also in line with international standards?

While there are some general reports and studies addressing these issues, such as a study commissioned by the Venice Commission of the Council of Europe in 2004, which found general compatibility of remote voting with international commitments, including postal voting and Internet voting (Grabenwarter, 2004). In the same year, the Committee of Ministers of the Council of Europe passed a recommendation on how

electronic voting systems should be designed (Council of Europe, 2004). At the third meeting of reviewing the recommendation, it was amended by two documents to reflect recent developments in transparency and certification (Council of Europe, 2011b, Council of Europe, 2011a). Consecutively, the fourth and fifth review meetings recommended updating the recommendation, which is currently under way.[1]

At national level, most publications on legislation regarding remote electronic voting concentrate the discussion on whether it is in line with the constitutional requirements of the respective country.

Elections are essentially the expression of the sociopolitical culture of a country and, therefore, naturally depending on the context in which they are held. However, a certain common set of standards has evolved over time. These are best described in international documents such as the United Nations' International Covenant of Civil and Political Rights (ICCPR), the European Convention of Human Rights (ECHR), the OSCE Copenhagen and Maastricht Documents and other regional electoral standards.

The ICCPR describes in its article 25 that elections should give *"Every citizen [...] the right and the opportunity [...] (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country"*.

Based on art. 25 of the ICCPR, Markku Suksi developed an 8-stage cycle depicting the electoral process (2005).

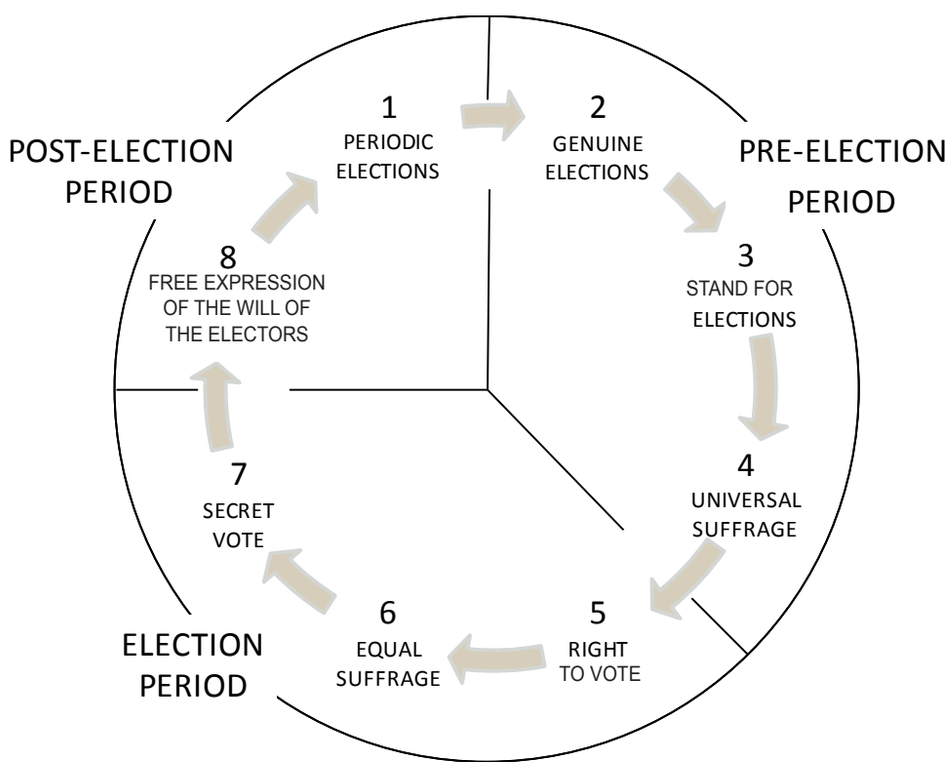


Figure 1: Electoral cycle. Adapted from Suksi (2005).

[1] See also the presentation by Gregor Wenda in this conference.

Today, ICT can be used in any step of an electoral cycle, which is increasingly being done. Examples include the use of sophisticated election management systems for election administration, electronic voter registers, electronic mark-off systems/poll books, biometric voter identification, electronic voting machines, ballot scanners and, most often, electronic result transmission and vote tabulation systems.

2. Advantages and Challenges of New Voting Technologies

The hopes connected with the introduction of new voting technologies are: to maintain or increase voter turnout; make it easier to involve citizens living abroad; lower election administration cost and standardization of electoral management; facilitation of holding several elections at the same time; support the counting of votes and improve its accuracy; and increase of the speed of tabulation and publication of results. Supporting voters with disabilities and those that speak minority languages are also often cited as advantages of electronic voting systems. Such obvious advantages have led some leaders to ask when can we finally use electronics in our electoral process? (Obama, 2016)

At the same time, the use of such voting technologies presents certain challenges. Foremost amongst these is the preservation of voting secrecy, while ensuring the integrity of the election, which is particularly problematic for Internet voting processes. The introduction of such technology to the voting process presents other challenges, such as ensuring that election administrators, judges (courts or election observers) and laymen (voters without special knowledge) can understand the process.

3. Legal Constraints

The use of ICT challenges not only the election process *per se,* but also the election legislation. Thus, the national discourse around this issue begins by examining relevant parts of the Constitution. The legal basis should describe the principles and electoral process in a way that is technologically neutral. However, as constitutions will have been written and modified with paper-based processes in mind, the first question to be addressed is whether new standards are required for electronic election processes.

While this question has never been answered definitively, the absence of new international standards or principles suggests that new voting technologies will be held to the same standards as paper-based elections.

In this regard, data protection law [e.g., the CoE convention on data protection comes to mind (Council of Europe, 1981)], which originally dealt with the transition from paper-based to electronic processes, is the best available guide for how to approach the modernization of an electoral process. Unfortunately, this is often neglected. A vote can be considered sensitive personal data, as it contains one's personal political opinion. Therefore, two important principles should be considered:

– **Proportionality:** The documentation should also include the principle of proportionality when handling personal data, and it should serve as a guiding indicator. In other words, the use of ICT in elections should add value to the groups affected, and should only then be pursued;

– **Accountability:** To provide necessary accountability to the voter, as an electoral code is often one of the first sources of information that a voter consults. It should provide any affected individual/group with the ability to see how his/her/their personal data (i.e., vote) is being processed.

But let us come back to constraints put forward by the electoral principles, often summarized with universal, equal, free, secret and personal elections:

– **Universality:** All eligible voters – without undue restrictions – should be able to cast their vote. This requires the establishment of a voter register, either through active or passive registration; in most countries this already takes place using electronic means. The principal problem here is ensuring all voters are able to participate in the

election via the electronic channel, avoiding establishing unsurmountable barriers to voter participation (e.g., in cases of ICT illiteracy or literacy in general). For this reason, the CoE recommends that electronic means should only ever be used as an alternative option, rather than replacing paper voting completely. This led to some debate in the case of Kazakhstan's experimentation with electronic voting machines during the early 2000s, should voters be given the choice between electronic voting machines in polling stations and voting on paper. When given the choice, most voters opted to vote using the paper method, which ultimately led to the abandonment of the system in 2011 (OSCE/ODIHR, 2011);

– **Equality:** Each vote should carry equal weight. In the context of electronic voting, equality requires that all voters have equal chance of their vote counting. This is of particular importance in cases of multi-channel elections (e.g., paper-based voting in polling stations, postal voting and Internet voting[2]). For example, electronic voters might have a higher chance to secure a valid vote, because the system will not allow them to cast an unintentional spoilt ballot (which cannot be prevented in paper-based systems). Also, the display of ballots should be similar, giving each candidate equal possibilities to be elected. This can be bothersome, as the equidistance between candidates on a ballot (often referred to as an "Australian ballot") cannot be guaranteed on a technical device. Also, it cannot be guaranteed that all candidates will be displayed at the same time;

– **Secret election:** The requirement for secrecy ensures that a voter does not have to fear coercion or intimidation, and can therefore vote freely. The voting booth under supervision of the polling station committee is normally a reliable protection from such undue influences, however, in remote voting, the voter has to guarantee this him/herself. To address this, Estonia introduced the possibility for a voter to cancel his/her Internet vote by subsequently voting at a polling station on paper, as well as allowing Internet voters to recast their vote an infinite number of times (one voter in the 2011 Riigikogu elections cast his/her vote 500 times), with only the last cast vote being counted. Secret elections also require that no link can be established between the voters and their vote.[3] In particular, the system should ensure that no voter can be associated to his/her vote using the sequence in which the votes were cast, the time when the vote was cast, any disclosing information such as IP-addresses, or other identifying information such as digital signatures, etc. This is not technically trivial in remote electronic voting systems; the electronic voting system used for the 2005 Venezuelan parliamentary election included a programming error that allowed detection of the sequence of how a vote was cast (EU Election Observation Mission to Venezuela, 2006). In elections where Voter Verified Paper Audit Trails (VVPAT) are kept, these must represent the individual vote of a single voter, rather than storing all votes together on one roll of paper and thereby revealing the sequence of how the votes were cast. This could consequently endanger the secrecy of the vote;

– **Integrity of the election/Personal elections:** To ensure the integrity of an election, only eligible voters should be able to participate. For this, polling stations require voters to show identification documents, and electronic mark off systems help to ensure that no voter can vote more than once (particularly important for elections involving multiple channels).

In addition to the traditional election principles, there are three additional principles that are important for the credibility of an election: transparency, accountability and

[2] For a more in-depth discussion of postal voting vs. Internet voting, see Federal Constitutional Court, 2009, *Use of Voting Computers in 2005 Bundestag election unconstitutional*, available at: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-019en.html

[3] For an overview of technical means on how to ensure the secrecy of the vote, see Krimmer, R., Triessnig, S., Volkamer, M. (2007), The Development of Remote E-voting Around the World: A Review of Roads and Directions, in Alkassar, A., Volkamer, M. (eds.), *E-Voting and Identity.* Springer.

public confidence, all of which are political commitments of the Copenhagen and Maastricht documents of the OSCE;

– **Transparency:** Janez Lenarčič, former OSCE/ODIHR director, once said that one can touch, see and feel paper – but not bits & bytes (OSCE/ODIHR, 2011). This essentially outlines the challenge that e-voting poses for elections. By introducing advanced technology one removes the essential possibility for the average person to understand the electoral process from casting the vote to entering the overall election results. Such increased requirement of knowledge is disadvantageous in general, but particularly bothersome for elections, where nobody should be excluded. The German Constitutional Court argued in its judgement from 2009 that any election technology needs to be verifiable without any prior specific knowledge and thereby introduced a new principle of publicity. This basically requires voting technology to provide a means of voter-verifiability, whether on paper (e.g., ballot scanners) or e-voting machines (with VVPAT). For Internet voting, this probably mandates the introduction of individual verifiability, which is the use of cryptographic means to verify that the vote was essentially recorded as cast, and cast as intended;

– **Accountability:** This principle complements the requirement for election integrity, as it fosters the overall trust in an election. If every step of the election's preparation and completion is properly documented, one is always in a position to precisely determine what has happened. While electronic systems can help with accountability, such systems cannot document everything, so that some aspects must be left to the human observer and the election commission (e.g., the setup of such systems and interactions beyond the command level). For this purpose, some election authorities are engaging with professional IT auditors that are in the position to document every interaction with the system and conformity with a pre-defined set of commands/operating manual. Nevertheless, for courts this expert rule is not always sufficient, as in the case of the Austrian elections, where the Constitutional Court demanded full accountability of the process, which can also be assessed without the help of experts. Again, a system that allows both individual verifiability and universal verifiability (that all votes that have been recorded are also counted and tabulated) is required;

– **Public confidence:** Public confidence in an election is particularly difficult to achieve because it is not based on facts or measurable items, but on understanding and perception of individuals that form the collective trust in a given election system. Here the German Constitutional Court (2009) also differentiates between blind trust and established trust. Blind trust refers to the unverified trust in a technology because one cannot understand it, whereas verified or established trust refers to cases in which the election stakeholder has challenged the system, verified its proper functionality and built their confidence in the system over time.

4. Conclusions

To date, most e-voting studies discuss approaches for developing more sophisticated algorithms to solve the problems of unequivocally identifying voters, secretly casting votes, and counting them honestly and accurately. Few authors have addressed how the technology influences the legal basis or provided actual guidance on how to use such a system (Krimmer, 2012). However, following recent high-profile courts decisions on this issue, collaborations between technical and legal sciences are emerging, leading to more sustainable electronic election projects.

While there is no definite solution to the problem of whether technology depends on law or law depends on technology, it is clear that single-disciplinary approaches are insufficient, and that integrated, collaborative efforts are required to deliver legislation for electronic elections, as well as the procurement of such systems.

Security is the ultimate concern when discussing the use of electronic election. Due to their complexity, important principles are

sometimes questioned. However, it should be made clear that any electronic system will always have to live up to the exact same standards applied to traditional paper-based systems. While some of the principles need interpretation and/or translation into digital realities, this does not necessarily mean that they should be altered.

About the author:

Prof. Robert Krimmer is Full Professor of e-Governance within Ragnar Nurkse School of Innovation and Governance at the Faculty of Social Science, Tallinn University of Technology, Estonia. Robert's research is focused on electronic participation and democracy, as well as e-voting, the transformation of the public sector, and all issues further developing a digital society. Robert is also Associate Editor of the international scientific journal *Government Information Quarterly* (*GIQ*), where he is in charge of participation issues. He has been one of the lead experts for the Council of Europe Ad-Hoc Committee on Electronic Democracy and drafted Annex 1 of the CoE Recommendation (2009) on e-Democracy. Teaching duties include lecturing on e-Governance, e-Democracy, e-Participation, e-Voting and End-User Management Information Systems at Tallinn University of Technology, University of Applied Sciences Hagenberg, Danube University Krems, and WU Vienna, University of Economics and Business. Robert has supervised more than twenty graduate theses and has been an author and/or editor of ten books/special issues of scientific journals. Prof. Krimmer has authored 80 international scientific articles and has been cited at least 640 times, with a Hirsch index of 13 according to Google Scholar.

E-mail: robert.krimmer@ttu.ee

Acknowledgements: *The work of the author has been supported in parts by Tallinn University of Technology Project B42 and ETAG IUT19-13.*

References:

- Braun, N. (2006). *Stimmgeheimnis. Eine rechtsvergleichende und rechtshistorische Untersuchung unter Einbezug des geltenden Rechts*, Bern, Stämpfli Verlag.
- Council of Europe (1981). *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108). Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm
- Council of Europe (2004). *Legal, operational and technical standards for e-voting*. Recommendation Rec(2004)11 and explanatory memorandum, Strassbourg, Council of Europe.
- Council of Europe (2011a). *Guidelines of the Committee of Ministers of the CoE on Certification of E-voting Systems* (2011). Available at: http://www.coe.int/t/dgap/democracy/activities/ggis/E-voting/E-voting 2010/Biennial_Nov_meeting/Guidelines_certification_EN.pdf
- Council of Europe (2011b). *Guidelines of the Committee of Ministers of the CoE on Transparency of E-enabled Elections* (2011). Available at: http://www.coe.int/t/dgap/democracy/activities/ggis/E-voting/E-voting 2010/Biennial_Nov_meeting/Guidelines_transparency_EN.pdf
- EU Election Observation Mission to Venezuela (2006). *Final Report of the December 4th 2005 Election in Venezuela*. Caracas. Available at: http://eeas.europa.eu/eueom/pdf/missions/finalreportenversion.pdf

- Federal Constitutional Court (2009). *Use of voting computers in 2005 Bundestag election unconstitutional*. Available at: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-019en.html
- Grabenwarter, C. (2004). *Report on the compatibility of remote voting and electronic voting with the standards of the Council of Europe*. Available at: http://www.venice.coe.int/docs/2004/CDL-AD(2004)012-e.pdf
- Krimmer, R. (2012). *The Evolution of E-voting: Why Voting Technology is Used and How it Affects Democracy*. Tallinn.
- Krimmer, R., Triessnig, S., Volkamer, M. (2007). The Development of Remote E-Voting Around the World: A Review of Roads and Directions, in Alkassar, A., Volkamer, M. (eds.). *E-voting and Identity.* Springer.
- Krimer, R., Volkamer, M. (2008). *Challenges Posed by Distance Voting in General: Postal Voting and, in Particular, E-voting*. EMB Meeting 2007, Council of Europe.
- Lenarčič, J. (2010). Address by Ambassador Janez Lenarčič, Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR), at the OSCE Chairmanship Expert Seminar on the "Present State and Prospects of Application of Electronic Voting in the OSCE Participating States", in Vienna, Austria, on 16 September 2010, Vienna. Available at: http://www.osce.org/odihr/71361.
- Obama, B. (2016). Speech at SXSW on 12 March 2016.
- OSCE/ODIHR (2011). *Election Observation Mission Report for the 3 April 2011 Early Presidential Election in Kazakhstan*. Available at: http://www.osce.org/odihr/elections/78714
- OSCE/ODIHR (2013). *Handbook for the Observation of New Voting Technologies*, Warsaw. OSCE/ODIHR.
- Suksi, M. (2005). Participation through Elections and Referendums, in Lindblad, J., Suksi, M. (eds.). *On the Evolution of International Election Norms: Global and European Perspectives*. Turku: Institute for Human Rights, Abo Akademi University.

STABILITATEA ŞI PREDICTIBILITATEA LEGISLAŢIEI ELECTORALE, CONDIŢII NECESARE PENTRU ALEGERI CORECTE

Prof. univ. dr. Ştefan DEACONU
Facultatea de Drept, Universitatea din Bucureşti

Abstract:

The article is an analysis of the legislative fluctuation in electoral matters during the past 25 years in Romania. This situation resulted in inconsistency and unpredictability for citizens regarding the rules by which to vote in every election cycle. Or, a coherent electoral legislation creates a coherent law that disciplines parties and state institutions. This coherence means a less frequent change of different types of electoral systems, avoiding changes of different electoral systems and ways of voting from one election cycle to another. Also, avoiding the amendments of the electoral law by emergency ordinances and considering their adoption by laws before the election is a necessity, since laws debated in the Parliament enhance transparency and strengthen the Parliament and the political parties.

Keywords: *legislative stability, clarity and predictability of the electoral law, Rule of Law, fair and democratic elections*

Résumé :

L'article fait une analyse de la fluctuation législative en matière électorale sur les 25 dernières années en Roumanie, ce qui a déterminé une incohérence et une imprédictibilité pour le citoyen concernant les règles d'après lesquelles il doit voter à chaque cycle électoral. Or, une législation électorale cohérente crée à son tour une jurisprudence qui discipline les partis et les institutions de l'Etat. Cette cohérence a besoin cependant de changements plus rares des différents types de systèmes électoraux, en évitant les situations où les différents systèmes électoraux et les modes de scrutins changent d'un cycle électoral à un autre. Par ailleurs, éviter la modification de la loi électorale par des ordonnances d'urgence et adopter ces modifications par des lois, suffisamment longtemps avant les élections, est une nécessité, parce que les lois débattues au Parlement assurent un degré élevé de transparence et aident à la consolidation du Parlement et des partis politiques.

Mots-clés : *stabilité législative, clarté et prédictibilité du droit électoral, État de droit, élections correctes et démocratiques*

Abstract:

Articolul face o analiză a fluctuaţiei legislative în materie electorală în ultimii 25 de ani în România, care a determinat o incoerenţă şi o impredictibilitate pentru cetăţean cu privire la regulile după care să voteze la fiecare ciclu electoral. Or, o legislaţie electorală coerentă creează, la rândul ei, o jurisprudenţă coerentă care disciplinează partidele şi instituţiile statului. Această coerenţă are nevoie însă de o schimbare mai rară a diferitelor tipuri de sisteme electorale, evitându-se situaţiile modificării de la un ciclu electoral la altul a diferitelor sisteme electorale şi a modurilor de scrutin. De asemenea, evitarea modificărilor aduse legislaţiei electorale prin ordonanţe de urgenţă şi adoptarea acestora prin legi, cu suficient de mult timp înainte de alegeri, reprezintă o necesitate, deoarece legile dezbătute în Parlament asigură un grad sporit de transparenţă şi ajută la consolidarea Parlamentului şi a partidelor politice.

Cuvinte-cheie: *stabilitate legislativă, claritatea şi predictibilitatea legii electorale, stat de drept, alegeri corecte şi democratice*

1. Stabilitatea şi predictibilitatea legislaţiei reprezintă componente ale securităţii juridice a normelor de drept

Stabilitatea și predictibilitatea legislației, în general, reprezintă componente ale securității juridice a normelor de drept. În ultimii 25 de ani, la nivel global, securitatea juridică reprezintă o preocupare majoră a tuturor juriștilor, deoarece multiplicarea normelor de drept, pluralitatea ordinilor juridice aplicabile într-un sistem normativ și globalizarea tot mai accentuată determină ca activitatea juriștilor să fie din ce în ce mai dificilă. Această dificultate derivă din numărul mare de norme juridice pe care le are de analizat un jurist, din schimbarea și modificarea frecventă a normelor de drept și din cantitatea mare de acte juridice pe care juriștii trebuie să le analizeze în aplicarea practică a dreptului.

Atât stabilitatea normelor, cât și predictibilitatea lor contribuie la o mai bună înțelegere și aplicare a dreptului, la crearea în timp a unei jurisprudențe unitare, dar și la creșterea gradului de încredere a cetățenilor în justiție. O fluctuație a normelor juridice, printr-o schimbare frecventă a lor, și adoptarea unor reguli juridice neclare, lipsite de predictibilitate, nu fac altceva decât să producă confuzii și neclarități în aplicarea normelor de drept și, cu timpul, să crească gradul de neîncredere a cetățenilor în sistemul de justiție.

Legile neclare, interpretabile, fără predictibilitate sau lipsite de un studiu aprofundat asupra consecințelor practice pe care le pot avea sunt doar câteva dintre cauzele care, în final, determină judecătorul să pronunțe hotărâri ce nemulțumesc nu doar una dintre părțile implicate în proces, ci, de cele mai multe ori, ambele părți din proces[1].

2. Securitatea juridică a normelor de drept reprezintă un principiu constituţional dedus pe cale jurisprudenţială

La nivel național, în România, securitatea juridică nu are o recunoaștere legală expresă. Această recunoaștere poate fi dedusă indirect prin intermediul jurisprudenței Curții Constituționale, ca urmare a aplicării practice a normelor de drept fundamentale. Așa se face că, în jurisprudența sa, Curtea Constituțională, în aplicarea practică a art. 1 alin. (5) din Constituție, care prevede că *„în România, respectarea Constituţiei, a supremaţiei sale şi a legilor este obligatorie”,* a considerat că *„într-un plan mai larg, stabilitatea normelor*

[1] Ștefan Deaconu, *Calitatea legislaţiei şi consecinţele asupra activităţii justiţiei. Despre neretroactivitate*, disponibil la: http://www.juridice.ro/272991/calitatea-legislatiei-si-consecintele-asupra-activitatii-justitiei-despre-neretroactivitate.html

de drept constituie o expresie a principiului securităţii juridice, instituit, implicit, de art. 1 alin. (5) din Constituţie, principiu care exprimă în esenţă faptul că cetăţenii trebuie protejaţi contra unui pericol care vine chiar din partea dreptului, contra unei insecurităţi pe care a creat-o dreptul sau pe care acesta riscă s-o creeze, impunând ca legea să fie accesibilă şi previzibilă"[2].

Așadar, pe cale jurisprudențială, Curtea Constituțională este cea care a impus securitatea juridică drept principiu fundamental al dreptului dedus din interpretarea prevederilor constituționale ale art. 1 alin. (5), stabilind că *„este necesar ca textul să fie regândit în ansamblul său"*[3] ori de câte ori o normă *„instituie un regim mixt şi confuz, derutant atât pentru persoana care se poate afla în ipoteza normei, cât şi pentru instanţa chemată să aprecieze cu privire la vinovăţia acesteia (...)"*[4].

3. Securitatea juridică a normelor electorale asigură credibilitatea procesului electoral

Curtea Constituțională, în aplicarea principiului securității juridice, a stabilit în numeroase decizii ale sale că *„stabilitatea dreptului este un element important al credibilităţii procesului electoral, iar modificarea frecventă a normelor şi caracterul lor complex pot dezorienta alegătorul, astfel că trebuie evitată modificarea frecventă sau cu puţin timp (mai puţin de un an) înainte de referendum a legilor în materie. În jurisprudenţa sa constantă, Curtea Constituţională a subliniat necesitatea stabilităţii legilor în materia electorală şi în materia referendumului, ca expresie a principiului securităţii juridice."*[5]

Practic, *„dreptul la alegeri libere impune respectarea unor exigenţe, între care şi aceea a stabilităţii normelor juridice în domeniul electoral"*,[6] iar *„instabilitatea legislativă în materie electorală, determinată de modificarea acestei legislaţii, cu precădere în anii electorali, s-a relevat a fi nu doar un factor de incertitudine juridică, ci şi o cauză a deficienţelor acestei legislaţii, constatate cu prilejul aplicării sale."*[7]

4. Stabilitatea legislaţiei, cerinţă esenţială pentru alegeri democratice în viziunea Comisiei de la Veneţia

La nivel european, Consiliul Europei, prin intermediul Comisiei de la Veneția, a adoptat o serie de reguli de bună practică menite să creeze un cadru legal stabil și predictibil care să asigure alegeri democratice și corecte pentru cetățeni, deoarece drepturile omului, preeminența dreptului și democrația constituie cei trei piloni ai patrimoniului constituțional european și ai Consiliului Europei.

Așa se face că într-unul dintre documentele Comisiei de la Veneția se specifică faptul că *„democraţia este de neconceput în lipsa unor alegeri desfăşurate în conformitate cu anumite principii care le conferă statutul de alegeri democratice. Aceste principii reprezintă un aspect specific al patrimoniului european constituţional care, în mod legitim, poate fi numit «patrimoniul european electoral». Acest patrimoniu acoperă două aspecte. Primul aspect este alcătuit din principiile constituţionale care guvernează dreptul electoral: sufragiul universal, egal, liber, secret şi direct, iar cel de-al doilea aspect reprezintă principiul conform căruia alegerile cu adevărat democratice pot fi desfăşurate numai dacă sunt satisfăcute anumite condiţii fundamentale ale unui stat*

[2] Decizia Curții Constituționale nr. 51 din 25 ianuarie 2012 referitoare la obiecția de neconstituționalitate a dispozițiilor Legii privind organizarea și desfășurarea alegerilor pentru autoritățile administrației publice locale și a alegerilor pentru Camera Deputaților și Senat din anul 2012, precum și pentru modificarea și completarea titlului I al Legii nr. 35/2008 pentru alegerea Camerei Deputaților și a Senatului și pentru modificarea și completarea Legii nr. 67/2004 pentru alegerea autorităților administrației publice locale, a Legii administrației publice locale nr. 215/2001 și a Legii nr. 393/2004 privind Statutul aleșilor locali, publicată în Monitorul Oficial al României, Partea I, nr. 90 din 3 februarie 2012.

[3] *Ibidem*.

[4] *Ibidem*.

[5] Decizia Curții Constituționale nr. 334 din 26 iunie 2013 cu privire la obiecția de neconstituționalitate a dispozițiilor Legii pentru modificarea și completarea Legii nr. 3/2000 privind organizarea și desfășurarea referendumului, publicată în Monitorul Oficial al României, Partea I, nr. 407 din 5 iulie 2013.

[6] Decizia Curții Constituționale nr. 51 din 25 ianuarie 2012.

[7] Comunicat de presă al Curții Constituționale din 12 decembrie 2012.

democratic bazat pe preeminenţa dreptului: drepturile fundamentale, stabilitatea legislaţiei electorale şi garanţii procedurale efective."[8]

5. Orice modificare a legislaţiei electorale trebuie făcută cu suficient timp înainte de alegeri pentru a putea fi aplicată

Tot în viziunea Comisiei de la Veneția, stabilitatea dreptului este un element important al credibilității procesului electoral și este esențială pentru consolidarea democrației. Prin urmare, *„modificarea frecventă a normelor sau caracterul lor complex pot dezorienta alegătorul. Alegătorul poate conchide, în mod corect sau incorect, că dreptul electoral este doar un instrument cu care operează cei care sunt la putere şi că votul alegătorului nu mai este elementul esenţial care decide rezultatul scrutinului."*[9]

Elementele fundamentale ale dreptului electoral, în special, sistemul electoral propriu-zis, componența comisiilor electorale și constituirea circumscripțiilor electorale *„nu trebuie amendate decât cel puţin cu un an înainte de alegeri pentru că legea electorală trebuie să se bucure de o anumită stabilitate, care ar proteja-o de manipulare de către partidele politice"*[10].

Tocmai de aceea, *„în practică, trebuie garantată nu atât stabilitatea principiilor fundamentale, cât stabilitatea unor reguli mai speciale ale dreptului electoral, în special cele care reglementează sistemul electoral propriu-zis: componenţa comisiilor electorale şi constituirea teritorială a circumscripţiilor. Aceste elemente sunt frecvent considerate a fi factori decisivi la determinarea rezultatelor scrutinului."*[11]

Acest lucru nu semnifică însă o rigidizare a sistemului electoral, ci mai degrabă o măsură menită să asigure stabilitate și predictibilitate regulilor electorale pe care orice persoană trebuie să le cunoască cu suficient timp înainte de alegeri pentru a putea considera alegerile corecte, pentru că *„a schimba regulile imediat înaintea sau în timpul jocului nu este de natură să favorizeze alegerile democratice"*[12].

6. Experienţa românească a ultimilor 25 de ani

De-a lungul ultimilor 25 de ani de democrație constituțională în România, putem constata o fluctuație destul de mare a legislației electorale. Spre exemplu, pentru alegerea Președintelui României au fost adoptate 2 legi: una în anul 1992, modificată de cinci ori, în special prin ordonanțe de urgență în anii electorali, și alta în anul 2004, modificată și ea de șapte ori, tot prin ordonanțe de urgență cu precădere în ani electorali (a se vedea Anexa nr. 1).

Anexa nr. 1: Legile privind alegerea Preşedintelui României

Legea nr. 69/1992 pentru alegerea Preşedintelui României, modificată prin:	**Legea nr. 370/2004 pentru alegerea Preşedintelui României,** modificată prin:
1. OUG nr. 63/26.05.2000	1. OUG nr. 77/7.10.2004
2. OUG nr. 129/30.06.2000	2. OUG nr. 95/2.09.2009
3. OUG nr. 140/14.09.2000	3. Legea nr. 98/15.06.2011
4. OUG nr. 154/10.10.2000	4. Legea nr. 76/24.05.2012
5. Legea nr. 43/21.01.2003	5. Legea nr. 187/24.10.2012
	6. OUG nr. 4/5.02.2014
	7. OUG nr. 45/26.06.2014

[8] Comisia Europeană pentru Democrație prin Drept (Comisia de la Veneția), *Codul bunelor practici în materie electorală*, adoptat în cadrul celei de-a 52-a Reuniuni Plenare la Veneția în 18 – 19 octombrie 2002.
[9] *Ibidem*.
[10] Comisia Europeană pentru Democrație prin Drept (Comisia de la Veneția), *Declaraţia interpretativă privind stabilitatea dreptului electoral*, adoptată în cadrul celei de-a 65-a Reuniuni Plenare la Veneția în 16 – 17 decembrie 2005.
[11] Comisia Europeană pentru Democrație prin Drept (Comisia de la Veneția), *Codul bunelor practici în materie electorală* (v. nota 6).
[12] Comisia Europeană pentru Democrație prin Drept (Comisia de la Veneția), *Raport privind stadiile şi criteriile politice de evaluare a alegerilor*, adoptat în cadrul celei de-a 84-a Reuniuni Plenare la Veneția în 15 – 16 octombrie 2010.

În ceea ce priveşte alegerile pentru Camera Deputaţilor şi pentru Senat, s-au adoptat 4 legi în anii electorali, iar acestea au fost modificate de fiecare dată, tot în anii electorali, şi cu precădere prin ordonanţe de urgenţă. Uneori, aceste modificări prin ordonanţe de urgenţă au avut loc la doar câteva luni după adoptarea legii electorale de către Parlament, ceea ce demonstrează faptul că Parlamentul adoptă astfel de legi fără o atentă analiză, din moment ce ele au nevoie de corecturi făcute prin ordonanţe de urgenţă (a se vedea Anexa nr. 2).

Anexa nr. 2: Legile privind alegerea Camerei Deputaţilor şi a Senatului

Legea nr. 68/1992 privind alegerea Camerei Deputaţilor şi a Senatului, modificată prin:	**Legea nr. 373/2004 privind alegerea Camerei Deputaţilor şi a Senatului,** modificată prin:	**Legea nr. 35/2008 privind alegerea Camerei Deputaţilor şi a Senatului,** modificată prin:	**Legea nr. 208/2015 privind alegerea Camerei Deputaţilor şi a Senatului,** modificată prin:
1. Legea nr. 115/16.10.1996	1. OUG nr. 80/14.10.2004	1. OUG nr. 66/28.05.2008	1. Legea nr. 288/19.11.2015
2. OUG nr. 63/26.05.2000	2. Legea nr. 334/17.07.2006	2. OUG nr. 97/27.08.2008	
3. OUG nr. 129/30.06.2000	3. OUG nr. 31/4.05.2007	3. Legea nr. 323/20.10.2009	
4. OUG nr. 140/14.09.2000	4. OUG nr. 35/9.05.2007	4. Legea nr. 187/24.10.2012	
5. OUG nr. 154/10.10.2000		5. OUG nr. 70/20.11.2012	
6. OUG nr. 165/13.10.2000		6. OUG nr. 4/5.02.2014	
7. OUG nr. 212/21.11.2000		7. OUG nr. 12/19.03.2014	
8. Legea nr. 43/21.01.2003			
9. Legea nr. 286/27.06.2003			
10. OUG nr. 50/15.06.2004			

Nici în privinţa legislaţiei privind alegerile locale lucrurile nu stau diferit, ţinând cont de faptul că legislaţia electorală în această materie a fost modificată destul de des şi, în mod special, prin ordonanţe de urgenţă, în ani electorali (a se vedea Anexa nr. 3).

Anexa nr. 3: Legile privind alegerea autorităţilor publice locale*

Legea nr. 70/1991 privind alegerile locale, modificată prin:	**Legea nr. 67/2004 privind alegerea autorităţilor publice locale,** modificată prin:
1. Legea nr. 25/12.04.1996	1. OUG nr. 8/24.02.2005
2. Legea nr. 164/30.07.1998	2. OUG nr. 20/27.02.2008
3. OUG nr. 28/12.04.2000	3. Legea nr. 35/13.03.2008
4. OUG nr. 63/26.05.2000	4. OUG nr. 32/19.03.2008
5. OUG nr. 72/17.05.2001	5. Legea nr. 76/24.05.2012
6. Legea nr. 158/10.04.2002	6. Legea nr. 187/24.10.2012
7. Legea nr. 161/10.04.2002	7. OUG nr. 4/5.02.2014
8. Legea nr. 170/10.04.2002	8. Legea nr. 338/10.12.2014
9. Legea nr. 43/21.01.2003	

Toate aceste situaţii au constituit un factor de incertitudine juridică şi o cauză a deficienţelor acestei legislaţii, constatate cu prilejul aplicării sale.

Curtea Constituţională, chemată să se pronunţe asupra constituţionalităţii normelor juridice electorale, a instituit o jurisprudenţă care mai degrabă a încurajat această practică a modificării legilor prin ordonanţe de urgenţă, ea nesancţionând modificarea legislaţiei prin astfel de proceduri, deşi tot ea consideră că un stat democratic înseamnă legi stabile adoptate în Parlament. *„Caracterul democratic al unui stat nu poate fi conceput fără o legislaţie electorală care să permită, în mod efectiv, exprimarea voinţei reale a cetăţenilor de a-şi alege organele reprezentative, prin alegeri libere, periodice şi corecte. Un sistem electoral democratic şi stabil, inspirat din această voinţă reală a celor care, potrivit art. 2 din Constituţie, sunt deţinătorii suveranităţii naţionale, este de natură să determine o percepţie şi o atitudine civică corespunzătoare a cetăţenilor şi, totodată, poate impune o conduită adecvată competitorilor electorali. Aceste considerente recomandă ca reglementările în materie electorală să fie dezbătute în Parlament, iar nu adoptate pe calea unei proceduri cu caracter de excepţie, prin care Parlamentul este ocolit, dar obligat la un vot tacit asupra unui conţinut normativ aflat la aprecierea aproape exclusivă a Guvernului.”*[11]

De-a lungul timpului, instabilitatea legislativă în materie electorală, determinată de modificarea acestei legislaţii, cu precădere în anii electorali, *„s-a relevat a fi nu doar un factor de incertitudine juridică, ci şi o cauză a deficienţelor acestei legislaţii, constatate cu prilejul aplicării sale”*[12].

Tot prin jurisprudenţa sa, Curtea Constituţională a încurajat modificarea legislaţiei electorale deficitare, imperfecte, însă nu în anii electorali. Un caz concret îl reprezintă legislaţia electorală adoptată în anul 2008, asupra căreia Curtea Constituţională s-a pronunţat stabilind că *„actuala reglementare a sistemului electoral românesc prezintă o serie de imperfecţiuni şi, ca atare, se impune o reconsiderare a acesteia din perspectiva alegerilor parlamentare din anul 2012, care să asigure, sub toate aspectele, organizarea şi desfăşurarea unor alegeri democratice în România. În această privinţă, trebuie să se pornească de la realităţile economice, politice şi sociale ale ţării, de la rolul partidelor politice în procesul electoral, de la necesitatea raţionalizării Parlamentului şi, în final, să fie reglementat un tip de*

* Legea nr. 115/2015 privind alegerea autorităţilor publice locale nu a fost modificată până în prezent.

[13] Decizia Curţii Constituţionale nr. 51 din 25 ianuarie 2012, *precitată.*

[14] Decizia Curţii Constituţionale nr. 682 din 27 iunie 2012 asupra obiecţiei de neconstituţionalitate a Legii privind modificarea şi completarea Legii nr. 35/2008 pentru alegerea Camerei Deputaţilor şi a Senatului şi pentru modificarea şi completarea Legii nr. 67/2004 pentru alegerea autorităţilor administraţiei publice locale, a Legii administraţiei publice locale nr. 215/2001 şi a Legii nr. 393/2004 privind Statutul aleşilor locali, publicată în Monitorul Oficial al României, Partea I, nr. 473 din 11 iulie 2012.

scrutin corespunzător concluziilor desprinse şi care să aibă corespondent în tipurile de scrutin care se regăsesc în majoritatea statelor europene (...). Rezultatele alegerilor parlamentare din noiembrie 2008 au arătat că mecanismul utilizat pentru atribuirea mandatelor a avut drept consecinţă rezultate neconforme celor specifice unui tip de scrutin majoritar uninominal, rezultate determinate de calculele matematice reglementate de regulile procedurii electorale ale scrutinului uninominal prevăzut de Legea nr. 35/2008. Aşa se face că desemnarea unor parlamentari s-a realizat pe baza unor calcule, fără ca o asemenea desemnare să rezulte din alegeri, în urma exprimării prin vot a opţiunilor politice. În cadrul preocupărilor de revizuire a legislaţiei electorale, o atenţie sporită trebuie acordată posibilităţii cetăţenilor români cu drept de vot care domiciliază în străinătate, şi nu numai acestora, de a-şi exercita dreptul de vot, în cadrul unei proceduri speciale, inclusiv prin votul electronic, care să se desfăşoare în corelare cu orele oficiale ale României între care se desfăşoară procesul de votare.''[13]

Din păcate, considerentele Curții Constituționale nu au fost luate în seamă de către legiuitor, acesta păstrându-și obiceiul de a modifica legile tot în anii electorali și pe calea ordonanțelor de urgență (a se vedea Anexa nr. 4).

Anexa nr. 4: Modificările aduse legii privind organizarea şi desfăşurarea referendumului

Legea nr. 3/2000 privind organizarea şi desfăşurarea referendumului, modificată prin:
1. Legea nr. 551/18.12.2003
2. OUG nr. 92/9.10.2003
3. Legea nr. 129/5.05.2007
4. OUG nr. 27/25.04.2007
5. OUG nr. 34/9.05.2007
6. OUG nr. 103/30.09.2009
7. OUG nr. 41/5.07.2012
8. Legea nr. 62/10.04.2012
9. Legea nr. 76/24.05.2012
10. Legea nr. 131/17.07.2012
11. Legea nr. 153/24.07.2012
12. Legea nr. 187/24.10.2012
13. Legea nr. 341/16.12.2013
14. OUG nr. 15/11.05.2016

7. Ce-i de făcut?

O legislație electorală stabilă și predictibilă este în măsură să asigure condițiile propice pentru alegeri corecte. Tocmai de aceea, consider că este nevoie de:

Stabilitate legislativă

Stabilitatea legislativă consolidează alegerile democratice, pentru că numai o legislație stabilă poate asigura alegătorului cunoașterea din timp a regulilor juridice după care își exprimă opțiunea în cadrul diferitelor tipuri de scrutin.

Adoptarea unor norme de drept clare

Orice act normativ trebuie să îndeplinească anumite condiții calitative, printre

[15] Decizia Curții Constituționale nr. 61 din 14 ianuarie 2010 referitoare la excepția de neconstituționalitate a prevederilor art. 48 alin. (17) din Legea nr. 35/2008 pentru alegerea Camerei Deputaților și a Senatului și pentru modificarea și completarea Legii nr. 67/2004 pentru alegerea autorităților administrației publice locale, a Legii administrației publice locale nr. 215/2001 și a Legii nr. 393/2004 privind Statutul aleșilor locali, publicată în Monitorul Oficial al României, Partea I, nr. 76 din 3 februarie 2010.

acestea numărându-se previzibilitatea, ceea ce presupune că acesta trebuie să fie suficient de precis şi clar pentru a putea fi aplicat[16]. Prevederile legale trebuie să stabilească distinct, precis, explicit şi cu claritate obligaţiile şi drepturile părţilor. Numai aşa, legile clare şi predictibile vor putea evita manipularea alegătorului.

Coerenţă a legislaţiei

O legislaţie electorală coerentă creează, la rândul ei, o jurisprudenţă coerentă care disciplinează partidele şi instituţiile statului. Această coerenţă este dată şi de o schimbare mai rară a diferitelor tipuri de sisteme electorale. Trebuie evitate situaţiile modificării de la un ciclu electoral la altul a diferitelor sisteme electorale şi a modurilor de scrutin.

Transparenţă în adoptarea normelor de drept

Evitarea modificării legislaţiei electorale prin ordonanţe de urgenţă şi adoptarea acestor modificări prin legi cu suficient de mult timp înainte de alegeri reprezintă o necesitate. Legile dezbătute în Parlament asigură un grad sporit de transparenţă şi ajută la consolidarea Parlamentului şi a partidelor politice.

Despre autor:

Ştefan Deaconu este profesor de drept constituţional şi sistem normativ al Uniunii Europene la Facultatea de Drept a Universităţii din Bucureşti şi Preşedinte al Curţii de Arbitraj Comercial Internaţional de pe lângă Camera de Comerţ şi Industrie a României. În perioada 2005 – 2012 a deţinut funcţia de consilier prezidenţial pe probleme juridice şi şef al Departamentului Legislativ al Administraţiei Prezidenţiale, iar anterior (2004 – 2005) a fost director în cadrul Senatului României. Are o experienţă profesională de peste 15 ani, este un reputat specialist în domeniul dreptului public, deţinând o foarte bună înţelegere şi cunoaştere a modului de funcţionare a instituţiilor publice naţionale şi a instituţiilor Uniunii Europene. Este membru al Asociaţiei Internaţionale de Drept Constituţional (IACL), secretar ştiinţific al Centrului de Drept Constituţional şi Instituţii Politice (CDCIP) şi membru în colegiul de redacţie al unor reviste ştiinţifice de prestigiu precum „Dreptul”, „Revista Română de Parteneriat Public – Privat” sau „Curierul Judiciar”.

[16] A se vedea în acest sens considerentele din Decizia Curţii Constituţionale nr. 1 din 11 ianuarie 2012 referitoare la obiecţia de neconstituţionalitate a dispoziţiilor Legii pentru modificarea şi completarea Ordonanţei de urgenţă a Guvernului nr. 155/2001 privind aprobarea programului de gestionare a câinilor fără stăpân, astfel cum a fost aprobată prin Legea nr. 227/2002, precum şi, în special, ale art. I pct. 5 [referitor la art. 4 alin. (1)], pct. 6 [referitor la art. 5 alin. (1) şi (2)], pct. 8, pct. 9 [referitor la art. 8 alin. (3) lit. a) – d)], pct. 14 [referitor la art. 13^1 şi 13^4], pct. 15 [referitor la art. 14 alin. (1) lit. b)] din Legea nr. 1/2012, publicată în Monitorul Oficial al României, Partea I, nr. 53 din 23 ianuarie 2012.

Referinţe bibliografice:

- Deaconu, Şt. *Calitatea legislaţiei şi consecinţele asupra activităţii justiţiei. Despre neretroactivitate*. Disponibil la: http://www.juridice.ro/272991/calitatea-legislatiei-si-consecintele-asupra-activitatii-justitiei-despre-neretroactivitate.html
- Comisia Europeană pentru Democrație prin Drept (Comisia de la Veneția). *Codul bunelor practici în materie electorală*, adoptat în cadrul celei de-a 52-a Reuniuni Plenare la Veneția în 18 – 19 octombrie 2002.
- Comisia Europeană pentru Democrație prin Drept (Comisia de la Veneția). *Declaraţia interpretativă privind stabilitatea dreptului electoral*, adoptată în cadrul celei de-a 65-a Reuniuni Plenare la Veneția în 16 – 17 decembrie 2005.
- Comisia Europeană pentru Democrație prin Drept (Comisia de la Veneția). *Raport privind stadiile şi criteriile politice de evaluare a alegerilor*, adoptat în cadrul celei de-a 84-a Reuniuni Plenare la Veneția în 15 – 16 octombrie 2010.
- Decizia Curții Constituționale nr. 51 din 25 ianuarie 2012 referitoare la obiecția de neconstituționalitate a dispozițiilor Legii privind organizarea şi desfăşurarea alegerilor pentru autoritățile administrației publice locale şi a alegerilor pentru Camera Deputaților şi Senat din anul 2012, precum şi pentru modificarea şi completarea titlului I al Legii nr. 35/2008 pentru alegerea Camerei Deputaților şi a Senatului şi pentru modificarea şi completarea Legii nr. 67/2004 pentru alegerea autorităților administrației publice locale, a Legii administrației publice locale nr. 215/2001 şi a Legii nr. 393/2004 privind Statutul aleşilor locali, publicată în *Monitorul Oficial al României, Partea I*, nr. 90 din 3 februarie 2012.
- Decizia Curții Constituționale nr. 334 din 26 iunie 2013 cu privire la obiecția de neconstituționalitate a dispozițiilor Legii pentru modificarea şi completarea Legii nr. 3/2000 privind organizarea şi desfăşurarea referendumului, publicată în *Monitorul Oficial al României, Partea I*, nr. 407 din 5 iulie 2013.
- Decizia Curții Constituționale nr. 682 din 27 iunie 2012 asupra obiecției de neconstituționalitate a Legii privind modificarea şi completarea Legii nr. 35/2008 pentru alegerea Camerei Deputaților şi a Senatului şi pentru modificarea şi completarea Legii nr. 67/2004 pentru alegerea autorităților administrației publice locale, a Legii administrației publice locale nr. 215/2001 şi a Legii nr. 393/2004 privind Statutul aleşilor locali, publicată în *Monitorul Oficial al României, Partea I*, nr. 473 din 11 iulie 2012.
- Decizia Curții Constituționale nr. 61 din 14 ianuarie 2010 referitoare la excepția de neconstituționalitate a prevederilor art. 48 alin. (17) din Legea nr. 35/2008 pentru alegerea Camerei Deputaților şi a Senatului şi pentru modificarea şi completarea Legii nr. 67/2004 pentru alegerea autorităților administrației publice locale, a Legii administrației publice locale nr. 215/2001 şi a Legii nr. 393/2004 privind Statutul aleşilor locali, publicată în *Monitorul Oficial al României, Partea I*, nr. 76 din 3 februarie 2010.
- Decizia Curții Constituționale nr. 1 din 11 ianuarie 2012 referitoare la obiecția de neconstituționalitate a dispozițiilor Legii pentru modificarea şi completarea Ordonanței de urgență a Guvernului nr. 155/2001 privind aprobarea programului de gestionare a câinilor fără stăpân, astfel cum a fost aprobată prin Legea nr. 227/2002, precum şi, în special, ale art. I pct. 5 [referitor la art. 4 alin. (1)], pct. 6 [referitor la art. 5 alin. (1) şi (2)], pct. 8, pct. 9 [referitor la art. 8 alin. (3) lit. a) – d)], pct. 14 [referitor la art. 13^1 şi 13^4], pct. 15 [referitor la art. 14 alin. (1) lit. b)] din Legea nr. 1/2012, publicată în *Monitorul Oficial al României, Partea I*, nr. 53 din 23 ianuarie 2012.

OPORTUNITĂŢI ŞI AMENINŢĂRI ÎN CONTEXTUL SCHIMBĂRILOR LEGISLAŢIEI ELECTORALE DIN ROMÂNIA

Conf. univ. dr. Cristian PÎRVULESCU
Decan al Facultăţii de Ştiinţe Politice
Şcoala Naţională de Studii Politice şi Administrative

Lect. univ. dr. Arpad TODOR
Facultatea de Ştiinţe Politice
Şcoala Naţională de Studii Politice şi Administrative

Abstract:

This article analyses the historical context of the Romanian electoral legislation amendment and draws several conclusions on the limits of changes occurring in 2015 and the factors generating pressure with regard to future amendment of this legislation. The first part discusses the constant features of the Romanian electoral process and of the electoral law change; the second part covers the context of amendments to the electoral law and the legislation with indirect effect on the electoral process of 2015. The third part overviews a series of issues raised by the adopted legislative solutions.

Keywords: *elections, electoral legislation, electoral system, postal voting, electronic voting, Romania*

Résumé :

Dans cet article nous analysons le contexte historique de la modification de la législation électorale de Roumanie et nous tirons une série de conclusions concernant les limites des modifications de 2015 et les facteurs qui vont générer des pressions concernant la modification de cette législation à l'avenir. Dans la première partie on discute sur les caractéristiques constantes du processus électoral de Roumanie et de la modification de la loi électorale ; dans la deuxième partie nous discutons du contexte des modifications de la législation électorale et de la législation à effet indirect sur le processus électoral de 2015. Dans la troisième partie nous passons en revue une série de questions soulevées par les solutions législatives adoptées.

Mots-clés : *élections, législation électorale, système électoral, vote par correspondance, vote électronique, Roumanie*

Abstract:

În articolul de faţă analizăm contextul istoric al modificării legislaţiei electorale din România şi tragem o serie de concluzii cu privire la limitele modificărilor din 2015 şi factorii care vor genera presiuni privind schimbarea pe viitor a acestei legislaţii. În prima parte discutăm despre caracteristicile constante ale procesului electoral din România şi ale schimbării legii electorale; în partea a doua discutăm despre contextul modificărilor legislaţiei electorale şi ale legislaţiei cu efect indirect asupra procesului electoral din 2015. În partea a treia trecem în revistă o serie de probleme ridicate de soluţiile legislative adoptate.

Cuvinte-cheie: *alegeri, legislaţie electorală, sistem electoral, vot prin corespondenţă, vot electronic, România*

1. Considerente istorice

Fragilitatea sistemului electoral, datorată tentaţiei permanente de a modifica legislaţia electorală din România, reprezintă o tendinţă dominantă a ultimilor 160 de ani. Din 1864 încoace, de la primele alegeri din România unită şi de la prima lege electorală, dacă este să luăm în calcul doar alegerile real competitive, au avut loc în România 45 de consultări electorale generale pentru alegerea Parlamentului (în 1864 şi 1946 doar pentru Camera Deputaţilor), la care se mai adaugă alegerile cu aparenţă de competitivitate din 1946, precum şi alegerile necompetitive din 1939 şi cele 9 rânduri de alegeri care au avut loc în perioada comunistă. Un total de 56 de consultări electorale doar pentru alegerea Parlamentului, ceea ce înseamnă că în medie a avut loc o alegere la fiecare 2,8 ani. Totuşi, dacă excludem perioadele necompetitive din această analiză, rezultă că în cei 99 de ani (1864 – 1937 şi 1990 – 2016) în care s-au desfăşurat alegeri competitive, acestea au avut loc la 2,2 ani. În această perioadă legislaţia electorală s-a modificat de o manieră semnificativă de 9 ori (1864, 1866, 1884, 1918, 1926, 1990, 1992, 2008 şi 2015), ceea ce înseamnă o medie de 11 ani pentru o lege. În funcţie de sistemul electoral utilizat pot fi definite două etape: (1) 1864 – 1918 – sistem majoritar cu vot cenzitar; (2) după 1918 – sistem proporţional cu vot universal (votul universal feminin a fost introdus prin legea din 1939, în timpul dictaturii regale, deci primele alegeri competitive în care a funcţionat au fost alegerile din 1990). În cazul alegerilor necompetitive din perioada dictaturii regale şi comuniste, sistemul electoral a fost unul majoritar uninominal într-un tur (*single member constituency*). Pentru autorii acestui articol, propensiunea pentru adoptarea unui sistem electoral majoritar a fost semnul unei tendinţe autoritariste recurente, inspirate, conştient sau inconştient, din practica regimurilor politice româneşti autoritare sau totalitare, în sensul reducerii la minimum a numărului de competitori electorali reali.

Relaţia dintre partidele politice şi sistemele electorale a fost privită cel mai adesea sub semnul intercondiţionării. În cadrul ştiinţei politice, lunga istorie a interesului pentru partide şi alegeri a dat naştere unor perspective teoretice diverse, chiar dacă plecau, ca bază, de la studii empirice ce încercau să analizeze de o manieră sistematică şi să clasifice efectul sistemelor electorale asupra sistemelor de partide. Interesul pentru domeniu a fost accentuat începând cu Maurice Duverger şi celebrele sale „legi" privind originea „internă" (parlamentară) şi necompetitivă a partidelor politice din secolul al XIX-lea[1] şi continuând cu teoria alegerilor sociale, care priveşte originea partidelor politice tot ca rezultat al unui proces endogen în interiorul parlamentelor care stimulează formarea unor coaliţii durabile[2]. În acest sens, au fost elaborate numeroase analize care

[1] A se vedea atât celebra lucrare a lui Maurice Duverger, *Les parties politiques*, Seuil, Paris, 1951, cât şi Joseph LaPalombara şi Myron Weiner (ed.), *Political Parties and Political Development,* Princeton University Press, Princeton, 1966.

[2] Josep M. Colomer, „On the origins of electoral systems and political parties: The role of elections in multi-member districts", în *Electoral Studies*, nr. 26, 2007, p. 262.

străbat a doua jumătate a secolului trecut, de la Maurice Duverger până la Arendt Lijphart, care analizează numărul de partide politice şi relaţiile dintre sistemul de partide şi legislaţie şi care consideră ca variabilă independentă a cercetărilor faptul că originea şi reziliența partidelor politice sunt influențate de tipul alegerilor şi de sistemele electorale.

Pe de altă parte, o abordare fundamental diferită postulează, din contră, că partidele aleg sistemele electorale şi manipulează regulile alegerilor. Conform acestei abordări, adoptarea diferitelor reguli şi proceduri electorale este impulsionată de concurența din ce în ce mai puternică dintre partidele politice. În acest sens, partidele politice devin o variabilă independentă pentru a explica apariția şi evoluția diferitelor reguli electorale.[3]

Deşi unii autori, precum Shale Horowitz şi Eric C. Browne, constată *„că instituţiile politice – sistemele majoritare* ***(SMD electoral systems)*** *– influenţează consolidarea sistemului de partide, dar efectele lor par a fi mai slabe decât cele datorate gradului de consolidare ideologică”*,[4] autorii acestui articol constată, aducând şi o serie de elemente mai puțin cunoscute din istoria dezbaterii privind alegerile, reformele electorale şi formarea guvernelor din România din secolul al XIX-lea şi începutul secolului al XX-lea, că modul de apariție a unor noi seturi de norme electorale, deşi este legitimat prin prezentarea sa ca reacție spontană a comunității, este de fapt o formă prin care partidele îşi (re)creează cadrul de existență.

În ce priveşte schimbarea legislației, teza autorilor acestui articol este că frecvența modificărilor electorale din epoca alegerilor competitive se datorează interesului partidelor politice aflate la guvernare de a-şi conserva sau chiar consolida potențialul electoral. Încă de la începutul exercițiului parlamentar în Principatele Unite, imediat după recunoaşterea internaţională a unirii celor două principate în decembrie 1862, dezbaterea privind reforma electorală începuse. Constantin Aricescu (jurnalist şi istoric ce a trăit între 1823 şi 1886) scria în 1862:[5]*„Toată lumea se întreabă îngrijorată: Unde mergem cu legea electorală făcută de străini în favoarea unui număr mic de privilegiaţi şi în paguba tuturor românilor? Cel puţin partidele nu se pot înfrăţi ca să înceteze odată această stare critică şi să păşim cu toţii pe cale naţională? Iată întrebările pe care le pun toţi şi la care vom răspunde în această* (*carte* s.n.).

În toate ţările sunt partide fiindcă în toate locurile sunt oameni, iar oamenii diferă în opiniuni, iar opiniunile trebuie respectate când sunt sincere şi logice. Adunările (legislative s.n.*) reprezintă opiniunile partidelor, în fiecare parlament aflăm o dreaptă, o stângă şi un centru: liberalii, retrograzii şi moderaţii. (...) În realitate, la noi există numai două partide, două tabere distincte: retrograzii şi liberalii; de o parte trecutul cu privilegiile şi cu monopolul, reprezentat în Cameră prin Dreapta, de alta viitorul, cu ideile de libertate şi naţionalitate, reprezentat în presă prin Românul şi în Cameră prin Stânga.”*[6] Găsim la Aricescu deja majoritatea ideilor care vor străbate cei 165 de ani ce ne despart, de la nevoia de reformă electorală pentru a termina cu Trecutul (*„privilegiaţii”* atunci, *„comuniştii”* acum), nevoia unei aproprieri naționale a instituțiilor împotriva unor imixtiuni străine în favoarea *„privilegiaţilor”*, la împărțirea societății în două categorii clare (dreapta retrogradă – stânga novatoare, respectiv vechii comunişti – noii democrați).

[3] Josep M. Colomer, „It's Parties that Choose Electoral Systems (or Duverger's Laws Upside Down)”, în *Political Studies,* vol. 53, Wiley-Blackwell, 2005, p. 1 – 21.

[4] Shale Horowitz, Eric C. Browne, „Sources of Post-Communist Party System Consolidation: Ideology Versus Institutions”, în *Party Politics*, nr. 11, 2005, p. 691.

[5] Cartea lui Constantin Aricescu, *Reforma legii electorale*, a fost tipărită în alfabetul de tranziție chirilico-latin, care era uzual la mijlocul secolului al XIX-lea, iar pasajele de față au fost adaptate limbii şi ortografiei române actuale.

[6] Constantin Aricescu, *Reforma legii electorale*, Tipografia Stephan Rassidecu, Bucureşti, 1862, p. 3 – 4.

În acelaşi timp, tot în această perioadă, o temă recurentă a discursului public românesc, care va legitima schimbarea legislației electorale, va fi frauda în alegeri. O ilustrare a acestei teme obsesive, fraudarea alegerilor, este prezentată în următoarele rânduri. În 1890, Barbu Ştefănescu Delavrancea publica un volum, *Guvern, prefecţi şi deputaţi*, care spune multe despre prejudecățile şi stereotipurile prezente în dezbaterea politică privind alegerile şi reprezentarea politică din România de-a lungul secolelor. Cunoscut mai mult ca scriitor, Barbu Ştefănescu Delavrancea a fost un jurnalist incisiv şi un politician de tendință liberală. În volumul evocat mai sus, în care reunea mai multe articole publicate în *Voinţa naţională* la sfârşitul deceniului al optulea al secolului la XIX-lea, îşi începea expunerea cu o diatribă care, dincolo de contextul propriu-zis, este cât se poate de elocventă: *„În urma triumfului ruşinos din Capitală, al guvernului actual, triumf cu patru voturi, şi dobândit prin cel puţin 100 de voturi ale bătrânilor orbi, surzi, paralitici şi muribunzi, aduşi de mână, şi de subţiori, la urnă, de către agenţii electorali, plătiţi din fondurile primăriei*[7]*; în urma acestui triumf-cădere la care a contribuit, pe lângă altele multe, şi jurisprudenţa surprinzătoare de la Biroul central de a se admite ca valabile buletinele (de vot* s.n.*) neîndoite de loc, deşi legea electorală prin art. 95 cere categoric şi imperativ ca buletinele să fie îndoite «drept în patru»; în urma acestui triumf, cu cheie evidentă, este bine să ne amintim de alte două alegeri extraordinare, pentru a dovedi opiniei publice cum triumfa guvernul în alegeri, prin ce mijloace, prin ce prefecţi, şi asupra căror soi de aleşi cad voturile furate de administraţia unui regim cu desăvârşire cinic.”*[8]

Reforma electorală din 1866[9] vine la pachet cu instaurarea monarhiei constituționale şi votarea unei noi constituții după abdicarea forțată a lui Alexandru Ioan Cuza. Or, pentru că mecanismul electoral fusese deja modificat într-un sens liberal prin legea din 1866, creşterea corpului electoral a adus şi o importantă instabilitate guvernamentală

[7] Referința este la primarul conservator Emilian Pache Protopopescu (primar al Bucureştiului între 1888 şi 1891) şi la alegerile din 1888.

[8] Barbu Ştefănescu Delavrancea, *Guvern, prefecţi şi deputaţi. Analiză electorală*, Bucureşti, Tipografia „Voința Națională”, 1890, p. 3 – 4.

[9] Alegerile se realizau în *patru colegii* la Camera Deputaților, iar la Senat în două colegii. Colegiile erau diferențiate după cens şi permiteau o participare electorală mult mai importantă decât era posibil conform Convenției de la Paris. Astfel, la Cameră legea diferența după cens, astfel că din Colegiul I făceau parte cei care aveau un venit de la 300 de galbeni în sus, din Colegiul al II-lea cei care aveau un venit de la 100 la 300 de galbeni inclusiv, iar din Colegiul al III-lea făceau parte cei care plăteau către stat o dare anuală de 80 de lei, precum şi comercianții sau industriaşii care plăteau un impozit de 80 de lei. Erau scutite de condiția de cens toate profesiunile liberale, precum şi ofițerii în rezervă, profesorii şi pensionarii statului. Primele trei colegii se alegeau prin vot direct, iar al patrulea colegiu îi cuprindea pe toți cei ce nu se încadrau în nicio categorie de mai sus şi care plăteau o dare mai mică de 80 de lei. Din acest colegiu făceau parte şi preoții. Primele două colegii alegeau câte un deputat pentru fiecare din cele 33 de districte (adică 66 de deputați), iar cel de-al treilea un număr de 58 de deputați ai oraşelor, reprezentate proporțional în funcție de ponderea lor demografică. Membrii Colegiului al IV-lea votau indirect, 50 de alegători înscrişi desemnau un delegat, iar delegații desemnați se întruneau în reşedința județului, unde alegeau un deputat de district. În Bucureşti se alegeau 6 deputați. Toate oraşele unui district formau un singur colegiu cu oraşul de reşedință. Numărul deputaților era de 157. La Senat, corpul electoral era format din *două colegii* pentru fiecare județ. Din Colegiul I făceau parte toți proprietarii rurali cu venituri funciare de cel puțin 300 de galbeni. Colegiul al II-lea, al oraşelor reşedință, se compunea din toți proprietarii de imobile urbane cu un venit sub 300 de galbeni. Colegiile votau separat, fiecare alegând câte un reprezentant. Universitățile din Bucureşti şi Iaşi trimiteau fiecare câte un senator ales dintre profesori. Senatul era compus din 68 de senatori aleşi, cărora li se puteau adăuga membri de drept ai Senatului: moştenitorul tronului de la vârsta de 18 ani, cu vot deliberativ de la 25 de ani, mitropoliții şi episcopii eparhioți (Mitropolitul Ungro-Vlahiei, Mitropolitul Primat al României, Mitropolitul Moldovei şi Sucevei, Episcopul Romanului, Episcopul Râmnicului, Episcopul Buzăului, Episcopul Huşiului, Episcopul Argeşului, Episcopul Dunării de Jos). Operațiunile electorale durau câte două zile, iar birourile electorale nu erau prezidate de magistrați, ci de alegători selectați din rândul votanților.

şi parlamentară. Două dispozitive corective au fost masiv utilizate pentru a conserva sistemul de partide: rotativa guvernamentală şi frauda electorală. De „succesul" lor va depinde funcționarea bipartidismului românesc până la reforma electorală din 1918 şi introducerea sistemului reprezentării proporționale.

Constantin Bacalbaşa, în *Bucureştiul de altădată*, martor şi victimă a practicilor electorale de la sfârşitul secolului al XIX-lea şi începutul secolului al XX-lea, descrie utilizarea *à la roumaine* a agenților electorali, în fapt bătăuşi plătiți să împiedice electorii recunoscuți ai partidului advers să-şi exercite dreptul electoral[10]. Partidul ce obținea astfel controlul cât mai multor secții de vot câştiga alegerile, iar complicitatea autorităților era mai mult decât transparentă. Mimarea procesului electiv a contribuit la compromiterea democrației şi a oferit un alibi mişcărilor extremiste, naționaliste şi antisemite, ce vor apărea încă de la sfârşitul secolului al XIX-lea, dar vor înflori după Primul Război Mondial, odată cu introducerea votului universal, în 1918.

Noua lege electorală, adoptată în noiembrie 1918, inspirată de cea belgiană, stipula reprezentarea proporțională, mai precis sistemul d'Hondt. Era o lege care permitea reprezentarea proporțională absolută, iar, aşa cum rezultă din articolele 73 şi 24 ale legii, de atunci şi până astăzi, mandatele se vor împărți după acelaşi sistem. Deşi Mattei Dogan, bun cunoscător al României interbelice, susține că sistemul a funcționat doar pentru alegerile din 1919, 1920 şi 1922[11], sistemul a supraviețuit tuturor modificărilor electorale, dar efectul său a fost semnificativ afectat. Toate reformele electorale succesive (1926, în perioada interbelică, şi 1990, 1992, 2000, 2008 şi 2015, după căderea comunismului) vor conserva acelaşi sistem de repartizare a mandatelor. Diferențele vor consta în apariția primei electorale în 1926, respectiv a pragului electoral de 3% în 1992 şi de 5% în 2000. În 2008 s-a introdus un sistem de repartizare a mandatelor de tip german, care ar putea fi eventual asimilat celui mixt, dar era, în fapt, un sistem al reprezentării proporționale personalizate, iar în 2015 s-a revenit la vechiul sistem din 2000, cu mici adaptări. Proporționalitatea reprezentării a fost în cel mai mare grad afectată de reforma din 1926, care introducea prima electorală care premia orice partid care obținea minimum 40% din voturi, care primea 50% din mandate şi o parte proporțională cu numărul de voturi obținute din a doua jumătate a mandatelor, ceea ce asigura o majoritate artificială.

Unul dintre efectele perverse ale legii din 1926 a fost interesul şi mai mare pentru falsificarea rezultatelor, mai ales că rolul „agitatorilor stradali" nu mai putea fi, în contextul votului universal, de folos. Formula folosită a fost utilizarea regimului juridic al Legii marțiale în regiuni precum Basarabia şi Cadrilater, unde victoria guvernului era asigurată. Candidat țărănist exilat într-o circumscripție din Cadrilater la alegerile din 1926, Grigore Gafencu relatează în *Însemnări politice* experiența reținerii sale de către jandarmeria condusă de Ministerul de Interne condus la rândul său de Octavian Goga, în plină campanie electorală, şi eliberarea sa, odată ce rezultatele au fost publicate.

2. Contextul schimbărilor legislative din 2015

După cum s-a putut observa, tentația schimbării electorale este recurentă în România, fiind o tendință grea a sistemului

[10] Vezi Constantin Bacalbaşa, *Bucureştiul de altădată*, Humanitas, Bucureşti, 2000, p. 250 – 251. *„Ajunşi în strada Carol (astăzi dispărută, aflată la data faptelor relatate, în 1875, în partea dinspre Piaţa Unirii a bulevardului Ion C. Brătianu), ne încrucişăm cu o trăsură în care se afla Popa Tache şi alţi trei bătăuşi. Popa venea de la Primărie, unde urma să se facă alegerea din ziua aceea; acolo inspectase posturile de ciomăgaşi. De cum ne-a văzut, Popa Tache ne-a înţeles cine suntem. De aceea, ridicând bastonul, ne-a ameninţat spunându-ne: «Să poftiţi astăzi!» Această vorbă însemna: «Ieri la Colegiul I v-aţi jucat calul, dar astăzi n-o să meargă aşa!» ... Cu alegerea de la Colegiul al 2-lea a început teroarea în Bucureşti, teroare ce a culminat în alegerea de la Colegiul al 3-lea."*

[11] Mattei Dogan, „Dansul electoral în România interbelică", *Revista de cercetări sociale*, nr. 4, 1995, p. 4.

politic românesc. Aceleaşi tendinţe se vor resimţi imediat după căderea regimului ceauşist. După 1990, sistemul electoral din 1919 va fi reluat, dar la apropierea fiecărui nou ciclu de alegeri partidele politice parlamentare, în special cele aflate la putere, sunt ispitite să modifice legislaţia electorală (1992, 2000, 2008 şi 2015). Oricare ar fi fost însă modificările, în toată această perioadă sistemul a rămas unul al reprezentării proporţionale, chiar dacă, în mod eronat, unii au considerat sistemul adoptat în 2008 ca unul majoritar, deşi acesta era un sistem proporţional cu selecţie personalizată a candidaţilor, fiind inspirat de sistemul german, adaptat însă intereselor partidelor politice. Doar pentru alegerile din 1996 şi cele din 2012 nu s-au putut construi coaliţii parlamentare care să susţină schimbarea sistemului electoral, deşi încercări în acest sens au existat. Trebuie remarcat şi rolul Curţii Constituţionale care a temperat apetitul partidelor de a schimba regulile în timpul jocului.

Discuţia recentă privind introducerea votului prin corespondenţă a fost purtată în contextul mai larg al scăderii legitimităţii clasei politice, în special a Parlamentului României. Soluţia legislativă adoptată în urma respingerii de către Curtea Constituţională a soluţiei propuse de Asociaţia Pro Democraţia lăsa portiţa deschisă creşterii numărului de parlamentari pentru menţinerea unui grad rezonabil de proporţionalitate în cazul în care numărul de colegii uninominale câştigate cu 50%+1 din voturi era mare la nivelul ţării. Coalizarea Partidului Social Democrat (PSD) şi a Partidului Naţional Liberal (PNL) în Uniunea Social Liberală (USL) pentru alegerile parlamentare din 2012 a condus la obţinerea de către o alianţă a unui scor de 58,61% la Camera Deputaţilor şi de 60,02% la Senat, scor care s-a transpus în 73% din mandatele din Parlament. Creşterea numărului de parlamentari cu peste 100 a condus la nenumărate critici cu privire la imperfecţiunile legii electorale, critici care au condus la introducerea unei limite de parlamentari în draftul de modificare a Constituţiei României trimis către Curtea Constituţională în 2013. De asemenea, alegerile pentru funcţia de Preşedinte al României din 2014 au condus la o mare nemulţumire cauzată de imposibilitatea exercitării votului pentru un număr mare de cetăţeni români aflaţi în afara graniţelor ţării în ziua scrutinului. În acest context, organizaţiile societăţii civile au susţinut modificările legislative în direcţia creşterii posibilităţii pentru reînnoirea ofertei politice şi ameliorarea accesului la vot pentru cetăţenii din afara graniţelor ţării – în special prin intermediul introducerii votului electronic prin internet.

Discuţiile politice din 2015 au condus la o serie de modificări semnificative ale legislaţiei electorale, dar, în mai toate cazurile, schimbările aprobate au răspuns doar parţial nevoii de ameliorare a acestei legislaţii. De exemplu, Legea nr. 115/2015 pentru alegerea autorităţilor administraţiei publice locale[12] a eliminat alegerea directă a preşedinţilor consiliilor judeţene, dar a menţinut alegerea primarilor într-un singur tur de scrutin, în dauna revenirii la sistemul alegerii primarilor şi a preşedinţilor de consilii judeţene în două tururi de scrutin, soluţie susţinută de majoritatea organizaţiilor societăţii civile. În contextul sociodemografic din România, această soluţie face ca peste 80% din primarii în funcţie să-şi poată menţine cu uşurinţă mandatul. De asemenea, o altă problemă care a afectat buna funcţionare a administraţiei publice în ultimii ani a ţinut de dificultatea procedurii de demitere a primarilor şi preşedinţilor consiliilor judeţene, problemă care nu a fost abordată în recentele modificări.

Chiar dacă apropierea alegerilor parlamentare din 2016 impunea o serie de modificări legislative, trebuie subliniat faptul că în contextul în care discuţiile despre regionalizarea României au fost blocate până după alegerile din 2016, modificarea legii electorale înaintea finalizării discuţiilor privind procesul de regionalizare şi cel de modificare a Constituţiei României este posibil să fie ineficientă, întrucât va fi reluată în 2017.

De asemenea, modificările efectuate în 2015 şi 2016 menţin o serie de surse de

[12] http://www.cdep.ro/pls/proiecte/docs/2015/pr365_15.pdf

tensiune. De exemplu, Legea nr. 114/2015 privind modificarea şi completarea Legii partidelor politice nr. 14/2003[13] a condus la eliminarea mai multor bariere pentru înființarea de partide, în special cele legate de numărul de membri, dar nu a condus la o ameliorare a accesului la finanțare. De asemenea, nu au fost crescute atribuțiile şi resursele aflate la dispoziția Autorității Electorale Permanente privind monitorizarea cheltuielilor pentru finanțarea campaniilor electorale. Legea nr. 208/2015 privind alegerea Senatului şi a Camerei Deputaților[14] a condus la revenirea la votul pe listă şi la menținerea pragului de 5% pentru accesul unui partid în Parlament – soluție dorită doar de partidele politice mari. Mai toate organizațiile societății civile au susținut reducerea pragului electoral (la 3% sau chiar 1%) pentru a permite intrarea în Parlament a unor formațiuni noi. De asemenea, în lege au fost menținute restricțiile privind organizațiile minorităților naționale care nu sunt deja reprezentate în Parlament. O soluție alternativă ar fi fost revenirea la soluția propusă inițial de Asociația Pro Democrația începând cu 2001: menținerea circumscripțiilor uninominale cu introducerea unei formule prin care o parte din aleşi să fie selectați pe liste proporționale, care să fie votați în mod direct la nivel regional (sistem de tip german), şi nu la nivel de județ.

3. Alegerea pentru cetăţenii români aflaţi în afara graniţelor ţării

Nu în ultimul rând, Legea nr. 288/2015 privind votul prin corespondență[15] reprezintă un important pas înainte pe calea ameliorării accesului la vot pentru cetățenii români cu domiciliul sau reşedința în afara granițelor țării, chiar dacă soluția aleasă, votul prin corespondență, are o serie de dezavantaje față de votul electronic. *Analiza GRSP Society – Votul electronic pentru alegătorii români din străinătate*[16] din 2010 arată că, în contextul actual, opțiunea pentru votul electronic ar fi fost mult mai bună: chiar dacă 15% din cetățenii români se află în afara țării, voturile lor au reprezentat doar 1,66% din numărul total de voturi la ultimele alegeri prezidențiale (tur I 2014). Opțiunea pentru votul electronic a fost aleasă în cadrul analizei datorită unor avantaje precum: costurile reduse de operare în comparație cu extinderea numărului de secții de votare sau cu votul prin poştă, gradul înalt de securitate şi depistarea oricărui vot dublu, creşterea gradului de participare, lipsa costurilor suplimentare pentru cei cu acces la internet, accesibilitatea şi atractivitatea, economia de timp la numărarea voturilor şi raportarea rezultatelor, iar rezidenții temporari în străinătate pot vota pentru circumscripția unde îşi au reşedința permanentă în cadrul alegerilor parlamentare.

În timp ce considerăm că noua lege reprezintă un pas important, în actuala formă pot apărea o serie de probleme care vor submina legitimitatea soluției în cazul în care:

– succesul campaniei de popularizare a înscrierii în Registrul electoral nu va fi mare;

– costul de aplicare se va dovedi foarte mare în raport cu numărul de voturi exercitate prin acest sistem;

– lipsa unui sistem de confirmare a primirii votului de către birourile electorale pentru votul prin corespondență va conduce la suspiciuni privind neluarea în considerare a tuturor voturilor;

– imposibilitatea asigurării confidențialității votului va conduce la criticarea sistemului;

– introducerea votului prin corespondență va conduce la creşterea numărului de voturi, dar interesul pentru alegerile parlamentare poate rămâne diminuat în contextul în care numărul de deputați şi senatori pentru diaspora va rămâne foarte scăzut în raport cu numărul de voturi pentru această listă.

[13] http://www.cdep.ro/pls/legis/legis_pck.htp_act?ida=130324

[14] http://www.roaep.ro/legislatie/wp-content/uploads/2015/07/Legea-nr.-208-2015.pdf

[15] http://www.roaep.ro/legislatie/wp-content/uploads/2015/11/Legea-288-pentru-completarea-Legii-208-2015.pdf

[16] http://www.mygrasp.org/wp-content/uploads/2014/ 11/Diaspora-Voteaza-Document-de-politici-publice.pdf

4. Concluzii: oportunităţi şi ameninţări cauzate de modificările legislative din 2015

Revenirea la sistemul de liste închise poate conduce la o scădere suplimentară a legitimității Parlamentului – problema cauzată de alegerea unui număr suplimentar de parlamentari în 2012 putea fi rezolvată prin mai multe soluții. Revenirea la votul pe listă pare să fi fost dictată de încercarea partidelor de a-şi conserva influența atât asupra propriilor aleşi, cât şi asupra electoratului captiv, dar a ignorat cu desăvârşire motivele pentru care se realizase modificarea legislativă din 2008, care a presupus adoptarea unui sistem proporțional în care votul se desfăşura în colegii uninominale. De asemenea, menținerea pragului electoral de 5%, cumulată cu magnitudinea mică a circumscripțiilor județene, va împiedica orice tendință de reînnoire a reprezentării parlamentare a noilor partide. Opțiunea pentru votul prin corespondență în dauna votului electronic reprezintă un pas important, dar poate genera o serie de probleme în cazul în care se vor petrece o serie de evenimente cu un grad mare de probabilitate: succesul campaniei de popularizare a înscrierii în Registrul electoral nu va fi considerabil; costul de aplicare a sistemului se va dovedi foarte mare; va lipsi un sistem de confirmare a primirii votului de către birourile electorale pentru votul prin corespondență. De asemenea, introducerea votului prin corespondență ar putea conduce la creşterea numărului de voturi, dar interesul pentru alegerile parlamentare poate rămâne diminuat în contextul în care numărul de deputați şi senatori va rămâne foarte scăzut în raport cu numărul de voturi pentru această listă. În acest context, cel mai probabil este faptul că perioada postelectorală va da startul unor noi discuții privind modificarea legislației electorale, situație care va conduce la menținerea unui înalt nivel de instabilitate al acestei legislații.

Despre autori:

Cristian PÎRVULESCU este politolog, profesor de ştiințe politice, decan al Facultății de Ştiințe Politice din cadrul Şcolii Naționale de Studii Politice şi Administrative (SNSPA), preşedinte de onoare al Asociației Pro Democrația, preşedinte al grupului permanent Integrare şi Imigrare de la Comitetul Economic şi Social European. Autorul este doctor în ştiințe politice şi a efectuat numeroase stagii de specializare în străinătate: Institutul de Studii Politice şi Fundația Națională de Ştiințe Politice din Paris (1995), CESI, Paris (1998), Universitatea Paris X–Nanterre (1998, 2001), CEFIPA, Paris (1999), Institutul German pentru Politică şi Securitate Internațională, Berlin, şi IGMedien, Stuttgart (2001), Departamentul de Ştiințe Politice al Universității din Amsterdam, Olanda (2002), SUA (2003). A publicat cărți, articole şi studii de specialitate, printre care amintim: *Politici şi instituţii politice, Partide şi sisteme de partide, Ştiinţa politică* etc.

Arpad TODOR este lector universitar în cadrul Facultății de Ştiințe Politice din cadrul Şcolii Naționale de Studii Politice şi Administrative (SNSPA). A obținut titlul de doctor în ştiințe politice şi sociale în cadrul European University Institute şi doctor în ştiințe politice în cadrul SNSPA. De asemenea, a colaborat în calitate de expert cu organizații neguvernamentale, precum Asociația Pro Democrația şi Ecopolis, fiind implicat în proiecte ce țin de reforma sistemului electoral, reforma constituțională, introducerea unor mecanisme de transparentizare a procesului decizional sau analiza de politici publice în domeniul mediului şi al dezvoltării durabile. În perioada 2013 – 2015 a fost coordonatorul Forumului constituțional. Publicațiile lui pot fi accesate la: https://snspa.academia.edu/ArpadTodor

Referinţe bibliografice:

- Duverger, M. (1951). *Les parties politiques*. Paris, Seuil.
- LaPalombara, J., Weiner, M. (ed.) (1966). *Political Parties and Political Development*. Princeton, Princeton University Press.
- Colomer, J.M. (2007). On the origins of electoral systems and political parties: The role of elections in multi-member districts. *Electoral Studies*, (26).
- Colomer, J.M. (2005). It's Parties that Choose Electoral Systems (or Duverger's Laws Upside Down). *Political Studies,* 53.
- Horowitz, S., Browne, E.C. (2005). Sources of Post-Communist Party System Consolidation: Ideology Versus Institutions. *Party Politics,* (11).
- Aricescu, C. (1862). *Reforma legii electoral*e. Bucureşti, Tipografia Stephan Rassidecu.
- Ştefănescu Delavrancea, B. (1890). *Guvern, prefecţi şi deputaţi. Analiză electorală.* Bucureşti, Tipografia „Voința Națională".
- Bacalbaşa, C. (2000). *Bucureştiul de altădată*, Bucureşti, Humanitas.
- Dogan, M. (1995). Dansul electoral în România interbelică, *Revista de cercetări sociale*, (4).
- http://www.cdep.ro/pls/proiecte/docs/2015/pr365_15.pdf
- http://www.cdep.ro/pls/legis/legis_pck.htp_act?ida=130324
- http://www.roaep.ro/legislatie/wp-content/uploads/2015/07/Legea-nr.-208-2015.pdf
- http://www.roaep.ro/legislatie/wp-content/uploads/2015/11/Legea-288-pentru-completarea-Legii-208-2015.pdf
- http://www.mygrasp.org/wp-content/uploads/2014/11/Diaspora-Voteaza-Document-de-politici-publice.pdf

EXIGENŢE CONSTITUŢIONALE ÎN LEGISLAŢIA ELECTORALĂ

Prof. univ. dr. ***Tudorel TOADER***
Facultatea de Drept – Universitatea „Alexandru Ioan Cuza”, Iaşi
Judecător
Curtea Constituţională a României

Lect. univ. dr. ***Marieta SAFTA***
Facultatea de Drept – Universitatea „Titu Maiorescu”, Bucureşti
Prim-magistrat-asistent
Curtea Constituţională a României

Abstract:

The constitutional substantiation of electoral legislation involves the identification of the incidental constitutional framework and compliance with its provisions. Starting from the idea that this framework comprises more than mere express rules of the Fundamental Law, in terms of legal development of the case law, this study highlights milestones of such development that we consider particularly relevant both for the legislator and for recipients of electoral legislation.

Keywords: *electoral rights, right to vote, right to be elected, constitutionality control, accessibility of the law, predictability of the law, good practice in electoral matters*

Résumé :

Le fondement constitutionnel de la législation électorale consiste dans l'identification du cadre constitutionnel incident et dans le respect de ses dispositions. En partant de l'idée que ce cadre représente plus que les normes spécifiques de la Loi fondamentale, dans le sens d'un développement considérable par la voie judiciaire, la présente étude met en évidence les repères de ce développement que nous considérons comme particulièrement pertinent tant pour le législateur que pour les bénéficiaires de la législation électorale.

Mots-clés : *droits électoraux, droit de vote, droit d'être élu, contrôle de constitutionnalité, accessibilité de la loi, prévisibilité de la loi, bonnes pratiques en matière électorale*

Abstract:

Fundamentarea constituţională a legislaţiei electorale presupune identificarea cadrului constituţional incident şi conformarea cu dispoziţiile sale. Pornind de la ideea că acest cadru reprezintă mai mult decât normele exprese ale Legii fundamentale, în sensul unei considerabile dezvoltări a acestora pe cale jurisprudenţială, prezentul studiu subliniază repere ale acestei dezvoltări pe care le considerăm în mod special relevante, deopotrivă pentru legiuitor, dar şi pentru destinatarii legislaţiei electorale.

Cuvinte-cheie: *drepturi electorale, dreptul de vot, dreptul de a fi ales, control de constituţionalitate, accesibilitatea legii, previzibilitatea legii, bune practici în materie electorală*

1. Introducere

Pentru adoptarea oricărei reglementări în materie electorală, legiuitorul trebuie să procedeze la fundamentarea constituțională a acesteia, respectiv la identificarea cadrului constituțional incident şi conformarea cu dispozițiile sale. Prin cadru constituțional înțelegem însă mai mult decât normele exprese ale Constituției. Avem în vedere, deopotrivă, interpretarea acestor norme de către Curtea Constituțională a României, prin jurisprudența construită în aproape 24 de ani de existență, precum şi interpretarea în concordanță cu tratatele internaționale în materia drepturilor omului la care România este parte, aşadar şi cu jurisprudența instanțelor chemate să vegheze asupra respectării normelor cuprinse în respectivele tratate. De altfel, Legea nr. 24/2000 privind normele de tehnică legislativă pentru elaborarea actelor normative[1] stabileşte în mod expres, în art. 21, obligația ca, în activitatea de documentare pentru fundamentarea proiectului de act normativ, să fie examinată practica Curții Constituționale în acel domeniu, jurisprudența în materie a Curții Europene a Drepturilor Omului, practica instanțelor judecătoreşti în aplicarea reglementărilor în vigoare, precum şi doctrina juridică în materie. De asemenea, aceeaşi lege prevede, în art. 22, obligația ca soluțiile legislative preconizate să aibă în vedere reglementările în materie ale Uniunii Europene, asigurând compatibilitatea cu acestea, precum şi dispozițiile cuprinse în tratatele internaționale la care România este parte, respectiv jurisprudența Curții Europene a Drepturilor Omului.

În cele ce urmează, vom sublinia reperele pe care le considerăm în mod special relevante în privința acestui cadru constituțional complex cu care legislația electorală, indiferent de măsurile pe care aceasta le prevede, trebuie să se conformeze.

2. Norme constituţionale de referinţă

Constituția României consacră, în titlul I, destinat principiilor generale, caracterul democratic al statului român [art. 1 alin. (3)] şi stabileşte că suveranitatea națională aparține poporului român, care o exercită prin organele sale reprezentative, constituite prin alegeri libere, periodice şi corecte, precum şi prin referendum (art. 2).

În titlul II, destinat drepturilor, libertăților şi îndatoririlor fundamentale, Constituția reglementează dreptul la vot (art. 36), dreptul de a fi ales (art. 37) şi dreptul de a fi ales în Parlamentul European (art. 38).

Titlul III, consacrat autorităților publice, stabileşte în art. 73 alin. (3) lit. a) faptul că atât sistemul electoral, cât şi organizarea şi funcționarea Autorității Electorale Permanente se reglementează prin lege organică. De asemenea, relevând importanța deosebită pe care legiuitorul a acordat-o protecției drepturilor şi libertăților fundamentale, în general, precum şi drepturilor electorale în mod special, art. 115 alin. (6)

[1] Republicată în Monitorul Oficial al României, Partea I, nr. 260 din 21 aprilie 2010.

din Constituție prevede că ordonanțele de urgență nu pot afecta regimul drepturilor, libertăților fundamentale şi nici drepturile electorale. În această din urmă categorie intră o sferă de drepturi distincte de acele drepturi pe care Constituția le prevede în mod expres (şi anume dreptul de vot, dreptul de a fi ales şi dreptul de a fi ales în Parlamentul European).

În sfârşit, titlul VII, referitor la revizuirea Constituției, stabileşte, în art. 152, limitele revizuirii Constituției, una dintre acestea vizând interdicția reglementării unor prevederi al căror rezultat ar fi suprimarea drepturilor şi a libertăților fundamentale ale cetățenilor sau a garanțiilor acestora.

Cadrul constituțional de referință este îmbogățit prin receptarea tratatelor internaționale în materia drepturilor omului la care România este parte (ca urmare a aplicării art. 20 din Constituție care le conferă valoare interpretativă constituțională şi le dă prioritate atunci când cuprind dispoziții mai favorabile), respectiv a dreptului Uniunii Europene (urmând regulile instituite în acest sens de prevederile art. 148 din Constituție referitoare la integrarea în Uniunea Europeană).

O valoare specială o au recomandările Comisiei de la Veneția, cu privire la care Curtea Constituțională a României a statuat că nu au caracter obligatoriu, dar *„constituie coordonate ale unui scrutin democratic, în raport de care statele – care se caracterizează ca aparţinând acestui tip de regim – îşi pot manifesta opţiunea liberă în materie electorală, cu respectarea drepturilor fundamentale ale omului, în general, şi a dreptului de a fi ales şi de a alege, în special”*. Principalul document de referință, invocat adesea de Curtea Constituțională în jurisprudența sa, îl constituie Codul bunelor practici în materie electorală – Linii directoare şi raport explicativ, adoptat de Comisia Europeană pentru Democrație prin Drept în cadrul celei de-a 52-a Sesiuni Plenare (Veneția, 18 – 19 octombrie 2002)[2], act care evidențiază principiile care constituie baza patrimoniului electoral european, şi anume *„sufragiul universal, egal, liber exprimat, secret şi direct”*, şi accentuează stabilitatea unor reguli ale dreptului electoral, *„în special cele care reglementează sistemul electoral propriu-zis, componenţa comisiilor electorale şi constituirea teritorială a circumscripţiilor”*. Curtea a mai arătat că, *„de altfel, Codul bunelor practici în materie electorală este reţinut ca document internaţional relevant şi în jurisprudenţa Curţii Europene a Drepturilor Omului (de exemplu, Hotărârea pronunţată în Cauza Petkov şi alţii împotriva Bulgariei din 11 iunie 2009 sau Hotărârea pronunţată în Cauza Grosaru împotriva României din 2 martie 2010)”*.[3]

3. Dezvoltări jurisprudenţiale

3.1. Nivelul şi procedura de adoptare a actelor normative în materie electorală

3.1.1. Reglementările în materie electorală trebuie să fie stabilite prin lege organică, dezbătută în procedura obişnuită de legiferare, iar nu prin procedura angajării răspunderii Guvernului asupra unui proiect de lege.

Constituția prevede, astfel cum am arătat, în art. 73 alin. (3) lit. a), faptul că reglementările electorale sunt de domeniul legii organice. Este o exigență exprimată şi în Codul bunelor practici în materie electorală, potrivit căreia *„exceptând regulile care vizează chestiunile de ordin tehnic şi de detaliu – care pot fi incluse în regulamentul organului executiv – regulile dreptului electoral trebuie să aibă cel puţin un rang legislativ. Elementele fundamentale ale dreptului electoral, şi în special sistemul electoral propriu zis, componenţa comisiilor electorale şi delimitarea circumscripţiilor electorale (...) ar trebui să fie tratate la nivel constituţional sau la un nivel superior legii ordinare”*.

Legile organice, ca şi cele ordinare, de altfel, pot fi adoptate, însă în procedura obişnuită de legiferare sau într-o procedură cu caracter de excepție, şi anume angajarea

[2] www.venice.coe.int

[3] Decizia nr. 682/2012, publicată în Monitorul Oficial al României, Partea I, nr. 473 din 11 iulie 2012.

răspunderii Guvernului asupra unui proiect de lege, reglementată de prevederile art. 114 din Constituție. Această din urmă procedură reprezintă o modalitate legislativă indirectă de adoptare a unei legi, adică nu prin dezbaterea acesteia, ci, mai degrabă, a unei problematici prin excelență politice, legate de rămânerea sau demiterea Guvernului.

Sesizată cu privire la o lege adoptată prin procedura angajării răspunderii Guvernului, Curtea a subliniat că aceasta reglementează într-un domeniu – cel electoral – care este de esența regimului politic democratic. Caracterul democratic al unui stat nu poate fi conceput fără o legislație electorală care să permită, în mod efectiv, exprimarea voinței reale a cetățenilor de a-și alege organele reprezentative, prin alegeri libere, periodice și corecte. Un sistem electoral democratic și stabil, inspirat din această voință reală a celor care, potrivit art. 2 din Constituție, sunt deținătorii suveranității naționale, este de natură să determine o percepție și o atitudine civică corespunzătoare a cetățenilor și, totodată, poate impune o conduită adecvată competitorilor electorali. Or, potrivit art. 2 din Constituție, suveranitatea națională se exercită prin organele reprezentative ale poporului român și prin referendum, iar, potrivit art. 61 alin. (1) din Constituție, *„Parlamentul este organul reprezentativ suprem al poporului român şi unica autoritate legiuitoare a ţării”*. Pe de altă parte, conform art. 73 alin. (3) lit. a) din Legea fundamentală, sistemul electoral se reglementează prin lege organică. Aceste considerente recomandă ca reglementările în materie electorală să fie dezbătute în Parlament, iar nu adoptate pe calea unei proceduri cu caracter de excepție, prin care Parlamentul este ocolit, dar obligat la un vot tacit asupra unui conținut normativ aflat la aprecierea aproape exclusivă a Guvernului. Curtea a mai reținut că mecanismul moțiunii de cenzură, reglementat de art. 114 din Constituție, poate avea caracter iluzoriu atunci când Guvernul dispune de o majoritate sigură în Parlament, adoptarea legii asupra căreia Guvernul își angajează răspunderea devenind, în aceste condiții, o pură formalitate[4].

3.1.2. Necesitatea codificării în materie electorală

În legătură cu aceeași problematică, a formei pe care trebuie să o îmbrace reglementările în materie electorală, o idee desprinsă din jurisprudența Curții Constituționale și care a preocupat/preocupă deopotrivă legiuitorul și autoritățile cu competențe în materie electorală este necesitatea codificării acestui domeniu.

Astfel, dând expresie unei linii jurisprudențiale constante, prin Decizia nr. 51 din 25 ianuarie 2012[5], Curtea Constituțională a subliniat (cu referire, în special, la cele statuate în Hotărârea nr. 39 din 14 decembrie 2009[6] și Decizia nr. 61 din 14 ianuarie 2010[7]), *„necesitatea ca întreaga legislaţie electorală referitoare la alegerea Camerei Deputaţilor şi a Senatului, a Preşedintelui României, alegerile pentru Parlamentul European, precum şi la alegerea autorităţilor administraţiei publice locale să fie reexaminată, urmând a fi concentrată într-un cod electoral, ale cărui dispoziţii comune şi speciale să asigure, în concordanţă cu principiile constituţionale, organizarea unui scrutin democratic, corect şi transparent.”*

Între principalele argumente de fond[8] pe care le putem reține în favoarea codificării, sunt posibilitatea „asanării” legislației electorale, în sensul reducerii numărului actelor normative aplicabile la acest moment în domeniu, precum și faptul că prin codificare s-ar realiza o formă superioară de sistematizare a materiei electorale, într-un act normativ nou, care se bazează pe separația,

[4] Decizia nr. 51 din 25 ianuarie 2012, publicată în Monitorul Oficial al României, Partea I, nr. 90 din 3 februarie 2012.
[5] Publicată în Monitorul Oficial al României, Partea I, nr. 90 din 3 februarie 2012.
[6] Publicată în Monitorul Oficial al României, Partea I, nr. 924 din 30 decembrie 2009.
[7] Publicată în Monitorul Oficial al României, Partea I, nr. 76 din 3 februarie 2010.
[8] Pe larg, M. Safta, *Necesitatea adoptării unui Cod electoral în România*, disponibil la www.ccr.ro/ccrold/relations/relations_int/safta.doc

la diferite niveluri de abstractizare, a regulilor generale şi speciale. Aceasta întrucât *„deşi are forţa juridică a unei legi, Codul nu este o lege obişnuită, el este un act legislativ unic, cu o organizare internă aparte, în care normele juridice sunt aşezate într-o consecutivitate logică, stringentă, după un sistem bine gândit, care reflectă structura internă a ramurii de drept respective”*.[9] Printr-un Cod electoral s-ar realiza o reglementare unitară, pornind de la principiile fundamentale consacrate de Constituția României şi de la documentele internaționale în materie,[10] principii care constituie baza patrimoniului electoral european. Reglementarea unitară ar determina o mai mare coerență a dispozițiilor legale, eliminarea lacunelor, dar şi a paralelismelor legislative, cu consecința simplificării legislației electorale, a asigurării clarității, eficienței şi eficacității sale.

Fie şi o simplă trecere în revistă a reglementărilor adoptate recent în materie electorală, în cursul anului 2015, ca efort de adaptare legislativă în considerarea alegerilor locale şi parlamentare din anul 2016 (Legea nr. 115/2015 pentru alegerea autorităților administrației publice locale, pentru modificarea Legii administrației publice locale nr. 215/2001, precum şi pentru modificarea şi completarea Legii nr. 393/2004 privind Statutul aleşilor locali[11], Legea nr. 208/2015 privind alegerea Senatului şi a Camerei Deputaților, precum şi pentru organizarea şi funcționarea Autorității Electorale Permanente[12], Legea nr. 288/2015 privind votul prin corespondență, precum şi modificarea şi completarea Legii nr. 208/2015 privind alegerea Senatului şi a Camerei Deputaților, precum şi pentru organizarea şi funcționarea Autorității Electorale Permanente[13], dar şi modificarea şi republicarea Legii partidelor politice nr. 14/2003[14]), evidențiază necesitatea corelării şi reglementării unitare, fără a uita instituțiile referendumului, respectiv a alegerii Preşedintelui României, subsumate aceloraşi reguli de principiu. Amintim că lipsa unor corelări determinate de modificări legislative survenite în preajma perioadelor electorale, precum şi în considerarea unui anume tip de alegeri a determinat interpretări divergente din partea autorităților statului, controverse şi tensiuni sociale, cum a fost cazul, de exemplu, la stabilirea rezultatului referendumului pentru demiterea Preşedintelui României, din anul 2012[15].

Din unitatea şi coerența reglementării ce s-ar realiza astfel decurg şi alte argumente în favoarea codificării, ce constituie tot atâtea cerințe de fond pe care Constituția le stabileşte pentru legislația electorală: stabilitatea reglementării, încrederea cetățenilor în continuitatea şi durabilitatea actului legislativ, accesibilitatea acestuia.

3.2. Aspecte de fond şi calitatea reglementărilor în materie electorală

3.2.1. Respectarea caracterelor votului

Din examinarea sistematică a normelor constituționale de referință se deduc următoarele trăsături ale votului în România[16]:

– *universalitatea* – se referă la faptul că beneficiază de acest drept toți cetățenii români, cu circumstanțierile prevăzute de legiuitorul constituant, respectiv cu excluderea minorilor (în considerarea faptului că participarea la viața politică a statului impune un anume grad de maturitate şi responsabilitate), a alienaților şi debililor mintal (în considerarea faptului că, neavând posibilitatea unui discernământ al acțiunilor

[9] N. Popa, *Teoria generală a dreptului*, Ed. Actami, Bucureşti, 1996, p. 150.
[10] www.venice.coe.int
[11] Publicată în Monitorul Oficial al României, Partea I, nr. 349 din 20 mai 2015.
[12] Publicată în Monitorul Oficial al României, Partea I, nr. 553 din 24 iulie 2015.
[13] Publicată în Monitorul Oficial al României, Partea I, nr. 866 din 19 noiembrie 2015.
[14] Publicată în Monitorul Oficial al României, Partea I, nr. 408 din 10 iunie 2015.
[15] Pe larg, M. Safta, *National referendum. Existing Regulatory Framework and Future Perspectives,* „Tribuna Juridică”, vol. 4, nr. 1, 2014, p. 56 – 69, disponibilla http://www.tribunajuridica.eu/arhiva/An4v1/3Safta.pdf
[16] Pe larg, T. Toader, M. Safta, *Repere legislative şi jurisprudenţiale privind votul prin corespondenţă,* „Revista de Drept Constituțional”, nr. 1/2015, Editura Universul Juridic, p. 291 – 303.

lor, nu pot vota), a celor care au suferit condamnări, inclusiv la pedeapsa complementară a pierderii drepturilor electorale;

– *egalitatea* – este reflectată atât în numărul de voturi de care dispune fiecare cetățean, cât şi în ponderea fiecărui vot în desemnarea reprezentanților națiunii: astfel, fiecare cetățean are dreptul la un singur vot, iar acest vot are aceeaşi pondere cu a tuturor celorlalte voturi în desemnarea unei aceleiaşi autorități a statului, indiferent de persoana celui care a exercitat dreptul la vot;

– *caracterul direct* – se referă la faptul că cetățenii aleg direct şi personal, fără niciun intermediar sau delegat, reprezentanții lor în Parlament;

– *caracterul secret* – se referă la faptul că votul cetățenilor nu este public, ceea ce constituie una dintre cele mai puternice garanții ale corectitudinii votului;

– *caracterul liber exprimat* – se referă la faptul că exprimarea voinței cetățenilor în alegeri nu trebuie viciată în niciun fel, precum şi la faptul că votul nu este obligatoriu.

Legislația electorală trebuie să respecte aceste trăsături, care, de altfel, sunt de esența noțiunii de democrație. O serie de decizii ale Curții Constituționale statuează şi explică înțelesul conceptelor mai sus prezentate, sancționând încălcarea cerințelor constituționale în această privință ori subliniind necesitatea respectării acestor cerințe.

Astfel, potrivit jurisprudenței Curții Constituționale, pentru ca votul alegătorului să fie unul direct, acesta trebuie să se pronunțe asupra candidatului/listei de candidați; de aceea, atribuirea mandatelor de parlamentar către persoane de pe o listă care nu este votată de alegători contravine caracterului direct al votului reglementat de art. 62 alin. (1) din Constituție[17]. În schimb, procedura votului prin corespondență nu contravine acestui caracter, întrucât el se referă la opțiunea nemijlocită a alegătorului de a alege el însuşi un anumit candidat/o anumită listă electorală, şi nu de a introduce buletinul de vot în urnă. Or, în procedura votului prin corespondență alegătorul este cel care, prin lipirea autocolantului pe opțiunea sa electorală din buletinul de vot prin corespondență, îşi exprimă direct votul, deoarece între votul său astfel exprimat şi finalul operațiunii, respectiv alegerea membrilor Camerei Deputaților sau Senatului, după caz, nu există nicio interpunere din partea vreunei persoane/vreunui organism electoral[18].

Cât priveşte sublinierea la care ne-am referit, menționăm considerente ale Curții Constituționale în contextul examinării constituționalității reglementărilor referitoare la votul prin corespondență, întrucât acestea reflectă şi un dialog judiciar în slujba realizării unor principii, am spune, general valabile, ale democrației. Cu acel prilej, Curtea a invocat statuări ale altor instanțe de jurisdicție constituțională, de exemplu, ale Curții Constituționale Federale Germane, în sensul că *„principiul universalităţii votului asociat cu votul prin corespondenţă reprezintă una dintre opţiunile constituţionale fundamentale, contrapusă însă principiilor libertăţii, secretului şi publicităţii votului de natură să justifice restricţii în privinţa altor opţiuni fundamentale ale Constituţiei”*[19]. De aceea, legiuitorul are obligația constituțională de a configura legea electorală într-o manieră care să asigure un just echilibru între opțiunile fundamentale aflate în coliziune. În context, Curtea a subliniat competența sa de a verifica realizarea de către legiuitor a justului echilibru, pe de o parte, între principiul universalității raportat la dreptul la vot [art. 15 alin. (1) coroborat cu art. 62 alin. (1) din Constituție] şi principiul suveranității naționale, caracterul liber şi corect al alegerilor, caracterul direct, secret şi liber exprimat al votului, pe de altă parte. Aceste considerente sunt aplicabile, *mutatis mutandis*, şi în privința altor modalități de exercitare a votului, de exemplu, prin mijloace electronice.

[17] Decizia nr. 1.177 din 12 decembrie 2007, publicată în Monitorul Oficial al României, Partea I, nr. 871 din 20 decembrie 2007.

[18] Decizia nr. 799 din 18 noiembrie 2015, publicată în Monitorul Oficial al României, Partea I, nr. 862 din 19 noiembrie 2015.

[19] Decizia Curții Constituționale Federale din 9 iulie 2013 — BverfG, 2BvC 7/10.

3.2.2. Facilitarea exercitării dreptului la vot

Exercitarea nestingherită a dreptului la vot implică şi măsuri concrete pentru facilitarea accesului cetățenilor la vot. De-a lungul timpului, această problemă s-a ridicat, cu precădere, în privința cetățenilor români cu domiciliul în străinătate, în contextul alegerilor pentru funcția de preşedinte al României. De aceea, Curtea a subliniat că în cadrul preocupărilor de revizuire a legislației electorale, o atenție sporită trebuie acordată posibilității cetățenilor români cu drept de vot care domiciliază în străinătate de a-şi exercita dreptul de vot, în cadrul unei proceduri speciale, care să se desfăşoare în corelație cu orele oficiale ale României între care se desfăşoară procesul de votare[20].

Cu prilejul examinării legii referitoare la votul prin corespondență, Curtea a subliniat că aceasta a avut în vedere asigurarea unei participări cât mai ridicate a cetățenilor români la procesul electoral, ținând cont de necesitatea aplicării în plenitudinea sa a principiului universalității votului. Acest principiu trebuie să fie unul efectiv, nu iluzoriu, mai ales pentru categoria de cetățeni români cărora legea analizată li se adresează. Este indubitabil că, după aderarea la Uniunea Europeană, în privința libertății de mişcare s-au produs mutații fundamentale, astfel încât o mare parte a electoratului îşi are domiciliul/reşedința în străinătate, ceea ce, în planul respectării exigențelor constituționale referitoare la alegerea Camerei Deputaților şi Senatului, impune legiuitorului obligația de a reglementa modalități de vot care să se adapteze situației prezente. A refuza legiuitorului o atare competență ar echivala cu negarea evoluțiilor anterior menționate şi cu limitarea modalităților de vot, acestea din urmă rămânând tributare unor realități apuse/depăşite. De aceea, legiuitorul beneficiază de o marjă de apreciere în identificarea şi integrarea în sistemul normativ al statului a modalităților de vot care să asigure o participare cât mai ridicată la procesul electoral. De asemenea, legiuitorul trebuie să se manifeste activ şi să fie preocupat în mod constant de adaptarea legislației la realitățile de fapt existente la un moment dat[21].

Aceste considerente pot fi reținute, de asemenea, *mutatis mutandis*, şi în privința altor modalități de votare, cum ar fi cele prin mijloace electronice, subsumate aceluiaşi obiectiv, respectiv creşterea participării la procesul electoral. Menționăm, în context, soluția pe care a pronunțat-o Curtea Supremă din Estonia care, sesizată fiind cu privire la neconstituționalitatea unei legi referitoare la votul prin mijloace electronice, a respins această sesizare. Legea prevedea dreptul alegătorilor de a schimba votul dat prin mijloace electronice fie printr-un nou vot dat electronic în cadrul alegerilor în avans, fie pe buletine de vot în aceeaşi perioadă sau în ziua alegerilor. Curtea a reținut că posibilitatea dată de lege celor care au votat electronic de a schimba votul lor, printr-un nou vot exprimat în modurile arătate, ar putea fi interpretată ca o încălcare a dreptului la egalitate şi uniformitate, însă acest lucru nu este suficient pentru a contrabalansa obiectivul creşterii participării la alegeri şi a introduce noi tehnologii în procesul electoral. În cele din urmă, sistemul votului electronic asigură că un singur vot al alegătorului va fi luat în considerare şi că voturile exprimate de alegători au aceeaşi valoare indiferent de modalitatea în care au fost exprimate. Curtea a constatat că posibilitatea modificării votului electronic este necesară pentru a asigura libertatea alegerilor şi a votului secret[22].

3.2.3. Reglementări adaptate realităţilor socioculturale şi economice

Statuând de principiu asupra aceloraşi obligații ale legiuitorului, Curtea a reținut că, în adoptarea de reglementări în materie electorală, trebuie, în primul rând, să se pornească de la realitățile economice, politice şi sociale ale țării, de la rolul partidelor

[20] Ibidem, cu referire în special la Hotărârea nr. 33 din 26 noiembrie 2009, publicată în Monitorul Oficial al României, Partea I, nr. 918 din 29 decembrie 2009.

[21] Decizia nr. 799/2015, precitată.

[22] Curtea Supremă a Estoniei, Cauza 3-4-1-13-05 din 1.09.2005, publicată în *Riigi Teataja* III (Journal officiel), 2005, 26, 262, disponibilă la: http://www.codices.coe.int

politice în procesul electoral, de la necesitatea raționalizării Parlamentului şi, în final, să fie reglementat un tip de scrutin corespunzător concluziilor desprinse şi care să aibă corespondent în tipurile de scrutin care se regăsesc în majoritatea statelor europene.[23]

Această regulă capătă o importanță deosebită în cazul votului prin mijloace electronice, unde realitățile socioeconomice pot constitui o veritabilă piedică în exercitarea dreptului la vot. Este o idee ce se desprinde şi din jurisprudența instanțelor constituționale, de exemplu Curtea Constituțională a Indoneziei, care a reținut că utilizarea votului electronic este constituțională dacă nu se încalcă principiile generale care guvernează alegerile (votul universal, direct, secret, liber exprimat) şi dacă zonele unde se implementează această modalitate de vot sunt pregătite să utilizeze noile tehnologii[24].

3.2.4. Simplitatea regulilor în materie electorală. Claritatea reglementării

Pentru realizarea dezideratelor mai sus prezentate, este esențial ca legislația electorală să fie simplă şi accesibilă. Este vorba de o accesibilitate a reglementărilor în sensul de uşurință a înțelegerii şi reținerii acestora de către toți cetățenii, pentru a fi facilitat şi stimulat în acest mod exercițiul dreptului la vot.

Şi Codul bunelor practici în materie electorală al Comisiei de la Veneția recomandă ca procedura de votare să rămână cât mai simplă, pentru a lăsa deplină libertate alegătorilor de a-şi exprima voința şi a asigura astfel efectivitatea dreptului la vot şi la alegeri libere. În acelaşi sens este şi jurisprudența Curții Europene a Drepturilor Omului, pronunțată în aplicarea art. 3 din Protocolul nr. 1 adițional la Convenția pentru apărarea drepturilor omului şi a libertăților fundamentale. Curtea a reținut că *„în ordinea lor juridică internă, statele contractante pot supune exercițiul dreptului la vot şi pe cel al dreptului la eligibilitate unor condiții cărora, în principiu, dispozițiile art. 3 nu le sunt potrivnice. Astfel, statele dispun în această materie de o largă marjă de apreciere [...]. Curtea trebuie să se asigure ca asemenea condiții să nu fie de natură a aduce atingere înseşi substanței acestor drepturi, privându-le astfel de efectivitatea lor, că ele urmăresc un scop legitim şi că mijloacele folosite pentru realizarea lor nu sunt disproporționate; în special,* ***asemenea condiții şi restricții nu trebuie, practic, să anihileze libera exprimare a opiniei poporului în alegerea corpului legislativ”*** (Cauza *Mathieu-Mohin şi Clerfayt împotriva Belgiei,* din 2 martie 1987, paragraful 52)[25].

De aceea, Curtea Constituțională a sancționat, de exemplu, reglementarea care stabilea organizarea alegerilor parlamentare şi locale în aceeaşi zi, constatând că este de natură să determine dificultăți în exercitarea dreptului de vot, dificultăți care pot avea ca efect, în cele din urmă, restrângerea exercițiului acestui drept. A reținut Curtea că prin organizarea concomitentă a alegerilor pentru Camera Deputaților şi Senat şi a celor pentru autoritățile administrației publice locale, cetățenii vor avea de realizat o sarcină mult mai complexă – exprimarea opțiunii pe şase buletine de vot –, ceea ce va presupune creşterea exponențială a timpului necesar votării pentru fiecare cetățean, luând în calcul în acest sens distribuirea buletinelor, timpul de vot în cabine, introducerea buletinelor de vot în cele trei urne. Complexitatea operațiunilor de vot poate avea ca efect excluderea de la vot a alegătorilor care, independent de voința lor, nu vor reuşi să voteze în perioada de timp alocată exercitării votului, până la închiderea urnelor. O procedură greoaie de vot, determinată de numărul mare de buletine de vot, ca şi autoritățile publice diferite cu privire la care alegătorii trebuie

[23] Decizia nr. 51/2012, precitată.

[24] Curtea Constituțională din Indonezia, Decizia din 30.03.2010 – 147/PUU-VII/2009, disponibilă la: http://www.codices.coe.int

[25] A se vedea şi Cauza *Hirst împotriva Regatului Unit,* din 6 octombrie 2005, paragraful 57. Curtea a reținut că statului îi revine obligația de a adopta măsuri pozitive pentru a organiza alegeri democratice (în acelaşi sens: Cauza *Zdanoka împotriva Letoniei,* din 16 martie 2006, şi Cauza *Yumak şi Sadak împotriva Turciei,* din 8 iulie 2008).

să îşi manifeste în acelaşi timp opțiunea pot avea ca efect împiedicarea liberei exprimări a opiniei acestora[26].

3.2.5. Asigurarea implementării regulilor prevăzute în materie electorală şi a posibilităţii verificării acestora

Indiferent de regulile stabilite în privința sistemului electoral, revine autorităților competența şi, totodată, obligația de a veghea în permanență la asigurarea atât a unui cadru normativ apt să garanteze exigențele stabilite, cât şi a unui mecanism administrativ eficient, care să răspundă la problemele inerente de punere în aplicare a prezentului act normativ. Este o idee subliniată de Curtea Constituțională a României cu prilejul introducerii votului prin corespondență în România, dar şi în jurisprudența altor instanțe de jurisdicție constituțională, de exemplu, Curtea Constituțională Federală Germană, care a statuat, în acest sens, că *„legiuitorul şi autoritățile de reglementare trebuie să verifice permanent atât normele existente, cât şi formele de manipulare a votului prin corespondenţă, în funcţie de noile evoluţii ce pot releva pericole neprevăzute până atunci pentru integritatea alegerilor. Iar dacă de aici ies la iveală abuzuri de natură să pună în pericol libertatea sau secretul votului, atunci se naşte obligaţia constituţională de a completa sau modifica reglementarea iniţială în scopul remedierii sale (...). În mod similar, organele electorale şi autoritățile locale cu atribuţii de punere în aplicare a reglementărilor sunt obligate să vegheze şi să asigure, în cadrul mijloacelor de care dispun, că secretul votului şi libertatea de vot rămân garantate şi în cazul exercitării votului prin corespondenţă”*.[27]

Cu referire expresă la votul prin mijloace electronice, menționăm cu titlu exemplificativ jurisprudența Curții Constituționale Federale Germane care sublinia că şi în privința acestei modalități de exercitare a votului trebuie să se asigure posibilitatea cetățenilor de a verifica etapele esențiale în cadrul alegerilor/exercitării votului, precum şi încrederea în rezultatul votului, fără a fi nevoie de cunoştințele unui expert[28].

3.3. Stabilitatea legislaţiei în materie electorală

Dreptul la alegeri libere impune respectarea unor exigențe, între care şi aceea a stabilității normelor juridice în domeniul electoral. Într-un plan mai larg, stabilitatea acestor norme constituie o expresie a principiului securității juridice, instituit, implicit, de art. 1 alin. (5) din Constituție, principiu care exprimă în esență faptul că cetățenii trebuie protejați contra unui pericol care vine chiar din partea dreptului, contra unei insecurități pe care a creat-o dreptul sau pe care acesta riscă s-o creeze, impunând ca legea să fie accesibilă şi previzibilă.

Aceste principii cunosc o dezvoltare specială în ceea ce priveşte dreptul electoral, în considerarea importanței acestuia, fiind subliniate în documente adoptate în această materie. Astfel, Codul bunelor practici în materie electorală statuează în acest sens că *„ar fi necesar a se evita nu atât modificarea sistemelor de scrutin – ele pot fi întotdeauna îmbunătăţite –, ci modificarea lor frecventă sau cu puţin timp (cel puţin un an) înainte de alegeri. Chiar în absenţa unei intenţii de manipulare, modificările vor fi dictate de interesele iminente ale partidului politic”*. Subliniind aceleaşi principii, *Raportul asupra calendarului şi inventarului criteriilor politice de evaluare a alegerilor,* adoptat de Consiliul pentru Alegeri Democratice cu ocazia celei de-a 34-a Reuniuni (Veneția, 14 octombrie 2010), reține, totodată, că *„orice reformă care vizează legislaţia electorală care urmează să se aplice unor alegeri trebuie să aibă loc suficient de devreme pentru a putea fi cu adevărat aplicabilă”*. Cu toate acestea, în anumite situații, *„pot fi acceptate excepţii de la regula de un an, de exemplu, dacă este necesar să fie remediate pe cale legislativă probleme neprevăzute sau*

[26] Decizia nr. 51/2012, precitată.

[27] Decizia Curții Constituționale Federale Germane din 24 noiembrie 1981 – 2BvC 1/81, BVerfGE 59.

[28] Decizia Curții Constituționale Federale Germane din 3 martie 2009 – 2 BvC 3/07, 2 BvC 4/07.

pentru a rectifica legislaţia electorală, acolo unde aceasta ar aduce atingere drepturilor recunoscute la nivel internaţional".

Într-o jurisprudență constantă, Curtea Constituțională a subliniat necesitatea reexaminării întregii legislații electorale, evidențiind aspectele care trebuie supuse reexaminării şi principiile pe care legiuitorul trebuie să le aibă în vedere în acest sens şi, totodată, a subliniat necesitatea stabilității legii în materie electorală, expresie a principiului securității juridice[29]. Astfel, prin Decizia nr. 61 din 14 ianuarie 2010[30] şi Decizia nr. 51 din 25 ianuarie 2012[31], observând că modificarea legislativă intempestivă *„poate fi de natură să creeze dificultăţi suplimentare autorităţilor însărcinate cu aplicarea sa, sub aspectul adaptării la procedura nou-instituită şi operaţiunile de ordin tehnic pe care aceasta le presupune"*, respectiv că *„această reglementare este de natură să determine dificultăţi în exercitarea dreptului de vot, dificultăţi care pot avea ca efect, în cele din urmă, restrângerea exerciţiului acestui drept"*, Curtea a constatat neconstituționalitatea legii criticate. De asemenea, preluând exigențele Codului bunelor practici în materie electorală, Curtea a statuat recent, cu privire la legea privind votul prin corespondență, precum şi modificarea şi completarea Legii nr. 208/2015 privind alegerea Senatului şi a Camerei Deputaților, că facilitează dreptul de vot al cetățenilor români cu domiciliul/reşedința în străinătate; de aceea, în principiu, nu prezintă o relevanță semnificativă intervalul de timp în care urmează a se materializa reglementarea analizată. Chiar şi în aceste condiții, aceasta a fost adoptată la 28 octombrie 2015, respectându-se, astfel, exigența constituțională de a nu se aduce modificări cadrului electoral cu mai puțin de un an înainte de data alegerilor. Într-adevăr, legea analizată aduce o modificare de substanță în ceea ce priveşte exercitarea dreptului de vot, respectiv introduce sistemul votului prin corespondență, sistem care nu a mai fost aplicat în cadrul sistemului constituțional stabilit în anul 1991. De aceea, ea a trebuit adoptată cu cel puțin un an înainte de data alegerilor, astfel cum s-a întâmplat în cauză. Motivațiile care au stat la baza adoptării acestei legi nu se constituie în impedimente de natură să ducă la neaplicarea la termen a votului prin corespondență la alegerile parlamentare din anul 2016. Desigur, termenul de un an trebuie calculat de la data intrării în vigoare a legii, conform art. 78 din Constituție, astfel încât între această dată şi ziua alegerilor să existe un interval temporal de un an[32].

Impunerea respectării aceleiaşi reguli a determinat, de altfel, pronunțarea unei decizii, am spune, atipice sub aspectul modului de individualizare a efectelor, în privința legii referendumului însă. Astfel, examinând constituționalitatea reglementării care a schimbat, în esență, cvorumul de valabilitate a referendumului, Curtea a reținut că *„pentru a asigura respectarea principiului general al stabilităţii juridice în materia referendumului, în acord cu recomandările Codului de bune practici în materie de referendum, adoptat de Comisia de la Veneţia, cu Protocolul nr. 1 adiţional la Convenţia europeană privind apărarea drepturilor omului şi a libertăţilor fundamentale şi cu Pactul internaţional cu privire la drepturile civile şi politice, dispoziţiile Legii pentru modificarea şi completarea Legii nr. 3/2000 privind organizarea şi desfăşurarea referendumului sunt constituţionale, însă nu pot fi aplicabile referendumurilor organizate în decurs de un an de la data intrării în vigoarea a legii modificatoare"*.[33]

[29] T. Toader, M. Safta, *Dialogul judecătorilor constituţionali*, Editura Universul Juridic, Bucureşti, 2015, p. 148 – 151.

[30] Publicată în Monitorul Oficial al României, Partea I, nr. 76 din 3 februarie 2010.

[31] Publicată în Monitorul Oficial al României, Partea I, nr. 90 din 3 februarie 2012.

[32] Decizia nr. 799/2015, precitată.

[33] Decizia nr. 334 din 26 iunie 2013, publicată în Monitorul Oficial al României, Partea I, nr. 407 din 5 iulie 2013.

4. Concluzii

Desigur că alegerile libere *„nu sunt suficiente pentru a asigura democraţia, dar acestea reprezintă condiţia sa necesară”*[34]. Aceasta întrucât alegerile periodice şi corecte *„rămân principalul mecanism instituţional prin care conducătorii sunt făcuţi răspunzători către aceia în numele cărora exercită puterea politică”*.[35]

Iar pentru ca această condiție și, prin urmare, aceste efecte să se realizeze, efortul legiuitorului trebuie să se orienteze într-un dublu sens: cel al unei legislații complete, clare, simple, stabile, eficiente și cel al informării/educării electoratului. Cetățeanul trebuie să cunoască drepturile politice, caracterele acestora, modul și importanța exercitării lor. Este vorba, în esență, despre conduita civică a alegătorului, a cărei importanță este cu atât mai vizibilă atunci când sunt în discuție alte modalități de exercitare a votului (prin corespondență, electronic). Sunt aspecte subliniate de Curtea Constituțională a României, dar și de alte instanțe de jurisdicție constituțională, care au reținut, de exemplu, în cazul votului prin corespondență, responsabilitatea alegătorului în asigurarea caracterului secret al votului. Astfel, faptul că alegătorul nu are o conduită civică corespunzătoare sau referirile cu privire la aspectele de fapt ce pot fi întâmpinate în procesul electoral („vot în familie” sau „sub supravegherea angajatorului”) sunt chestiuni care nu privesc textul normativ al legii, ci elemente exterioare acestuia. În acelaşi sens, Curtea Constituțională Federală Germană a statuat că *„la exercitarea votului prin corespondenţă, alegătorul este lăsat în mare măsură să poarte singur grija de a asigura secretul şi libertatea votului. (...) De asemenea, alegătorul trebuie să ia iniţiativa de a-şi procura documentele necesare votului prin corespondenţă. Totodată, el are obligaţia de a completa personal buletinul de vot fără să poată fi văzut de un altul, de a pune singur buletinul în plicul interior, sigilat (...).”*[36] *„De obicei acest lucru nu comportă vreo dificultate, însă dacă există totuşi temeri că libertatea şi secretul votului i-ar putea fi influenţate de prezenţa unui terţ, atunci alegătorul poate şi trebuie să îi atragă atenţia asupra dreptului său de a-şi exprima votul în mod liber şi secret, precum şi asupra îndatoririi sale de a completa buletinul de vot fără a putea fi văzut de altcineva, de a-l introduce în plic şi de a atesta sub jurământ că a marcat personal buletinul de vot. Iar dacă în acest sens roagă să fie lăsat singur ca să îşi completeze buletinul de vot şi să sigileze plicul interior, atunci de regulă terţul va da curs solicitării. În cazul când alegătorul consideră că nu este posibil să îşi asigure, fie în acest mod, fie în oricare altul, secretul votului şi libera sa opţiune, el poate renunţa să îşi mai procure ori să utilizeze documentele necesare votului prin corespondenţă, care se eliberează doar la cerere, iar dacă circumstanţele excepţionale nu îi îngăduie nicio altă variantă, se poate vedea silit să renunţe chiar la vot – aşa cum era cazul şi mai înainte de introducerea votului prin corespondenţă”*[37]. Totodată, Tribunalul Constituțional Polonez, prin Hotărârea K 9/11 din 20 iulie 2011, a avut o abordare similară cu privire la problema caracterului secret al votului. Sarcina legiuitorului este însă aceea de a reglementa garanții legale de natură a proteja secretul votului. Însă legea nu poate decât să constituie premisele normative necesare exercitării corespunzătoare a votului, iar acțiunea legii trebuie completată cu o conduită de aceeaşi natură a cetățeanului.

Aşadar, astfel cum Curtea Constituțională a României a statuat, *„acţiunea statului este dozată în funcţie de specificul votului prin corespondenţă, iar cetăţeanul, respectând prevederile legii, în acord cu*

[34] R.H. Pildes, *Elections*, în *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, p. 529.
[35] *Ibidem*.
[36] Decizia Curții Constituționale Federale din 15 februarie 1967, 2 BvC 2/66, BVerfGE 21, 200.
[37] Decizia Curții Constituționale Federale din 24 noiembrie 1981 – 2BvC 1/81, BVerfGE 59, 119.

art. 1 alin. (5) din Constituţie, concură la respectarea principiilor şi exigenţelor care trebuie să guverneze procesul electoral"[38]. De asemenea, *„revine autorităţilor competenţa şi, totodată, obligaţia de a veghea în permanenţă la asigurarea atât a unui cadru normativ apt să garanteze exigenţele anterior arătate, cât şi a unui mecanism administrativ eficient care să răspundă la problemele inerente de punere în aplicare a prezentului act normativ"*[39]. Din această perspectivă, considerăm lăudabilă constituirea unui corp al experților electorali și în România, această inițiativă slujind dezideratelor prezentate.

Nu în ultimul rând, buna funcționare a sistemului electoral într-un stat este condiționată de colaborarea dintre puterile statului, care trebuie să se manifeste în spiritul normelor de loialitate constituțională, cu atât mai mult atunci când sunt în discuție principii fundamentale ale democrației. Din perspectiva aceluiaşi principiu – al loialității constituționale –, Curtea Constituțională a României a reținut de exemplu că restricțiile bugetare în contextul crizei financiare, înfățișate în cauză ca motivație a opțiunii pentru procedura angajării răspunderii Guvernului pentru o lege electorală, sunt de notorietate, fiind adesea invocate de Guvern pentru susținerea unor măsuri adoptate în ultimii ani, și persistă de o perioadă de timp suficient de lungă pentru a permite promovarea pe calea procedurii obișnuite a actului normativ în cauză. Aceasta cu atât mai mult cu cât legea vizează momente definite din punct de vedere temporal, perioada alegerilor, atât pentru Camera Deputaților și Senat, cât și pentru autoritățile administrației publice locale, fiind determinabilă, într-o anumită marjă de timp, în raport cu dispozițiile Constituției.

Despre autori:

Tudorel TOADER este judecător la Curtea Constituțională a României și membru în Comisia de la Veneția. Tudorel Toader este licențiat al Facultății de Drept „Alexandru Ioan Cuza" din Iași și doctor în științe juridice. Actualmente este profesor universitar doctor în cadrul Universității „Alexandru Ioan Cuza" din Iași și rector al acestei universități. De asemenea, a publicat numeroase studii și articole în reviste de specialitate din țară și străinătate, precum și mai multe cărți, printre care: *Codul penal şi Codul de procedură penală; Hotărâri CEDO, decizii ale Curţii Constituţionale, recursuri în interesul legii*, *Reglementare, doctrina, decizii ale Curţii Constituţionale, jurisprudenţă; Constituţia României reflectată în jurisprudenţa Curţii Constituţionale*; *Dialogul judecătorilor constituţionali; Drept penal român. Partea specială* etc.

Marieta SAFTA este prim-magistrat-asistent la Curtea Constituțională a României și agent de legătură al Curții Constituționale la Comisia de la Veneția. A absolvit Facultatea de Drept din cadrul Universității București și este doctor în științe juridice. În prezent, este lector universitar doctor la Facultatea de Drept din cadrul Universității „Titu Maiorescu" din București, titular la disciplinele Drept constituțional și Instituții politice. Marieta Safta este autor și coautor a numeroase cărți și articole de specialitate, aria sa de expertiză fiind: drept constituțional, drepturile omului, dreptul Uniunii Europene. Printre acestea se numără: *Dialogul judecătorilor constituţionali, Drept constituţional şi instituţii politice. Vol. II. Instituţii politice, Drept constituţional şi instituţii politice. Teoria generală a dreptului constituţional. Drepturi şi libertăţi, Justiţia Constituţională. Funcţii şi raporturi cu celelalte autorităţi publice* etc.

[38] Decizia nr. 799/2015, *precitată*.
[39] *Ibidem*.

Referinţe bibliografice:

- Pildes, R.H. (2012). *Elections,* în *The Oxford Handbook of Comparative Constitutional Law.* Oxford University Press.
- Popa, N. (1996). *Teoria generală a dreptului*, Bucureşti, Actami.
- Rosenfeld, M., Sajó, A. (eds.) (2012). *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press.
- Safta, M., *Necesitatea adoptării unui Cod electoral în România*. Disponibil la www.ccr.ro/ccrold/relations/relations_int/safta.doc
- Safta, M. (2014). National referendum. Existing Regulatory Framework and Future Perspectives, *Tribuna Juridică*, 4, (1). Disponibil la: http://www.tribunajuridica.eu/arhiva/An4v1/3Safta.pdf
- Toader, T., Safta, M. (2015). Repere legislative şi jurisprudenţiale privind votul prin corespondenţă. *Revista de Drept Constituţional,* (1), Bucureşti, Universul Juridic.
- Toader, T., Safta, M. (2015). *Dialogul judecătorilor constituţionali*, (1), Universul Juridic, Bucureşti.
- Constituția României, republicată. *Monitorul Oficial al României, Partea I,* nr. 260 din 21 aprilie 2010.
- Legea nr. 115/2015 pentru alegerea autorităților administrației publice locale, pentru modificarea Legii administrației publice locale nr. 215/2001, precum şi pentru modificarea şi completarea Legii nr. 393/2004 privind Statutul aleşilor locali. *Monitorul Oficial al României, Partea I,* nr. 349 din 20 mai 2015.
- Legea nr. 208/2015 privind alegerea Senatului şi a Camerei Deputaților, precum şi pentru organizarea şi funcționarea Autorității Electorale Permanente. *Monitorul Oficial al României, Partea I,* nr. 553 din 24 iulie 2015.
- Legea nr. 288/2015 privind votul prin corespondență, precum şi modificarea şi completarea Legii nr. 208/2015 privind alegerea Senatului şi a Camerei Deputaților, precum şi pentru organizarea şi funcționarea Autorității Electorale Permanente. *Monitorul Oficial al României, Partea I,* nr. 866 din 19 noiembrie 2015.
- Legea partidelor politice nr. 14/2003, republicată, cu modificările şi completările ulterioare. *Monitorul Oficial al României, Partea I,* nr. 408 din 10 iunie 2015.
- Hotărârea Curții Constituționale nr. 39 din 14 decembrie 2009. *Monitorul Oficial al României, Partea I*, nr. 924 din 30 decembrie 2009.
- Hotărârea Curții Constituționale nr. 33 din 26 noiembrie 2009. *Monitorul Oficial al României, Partea I,* nr. 918 din 29 decembrie 2009.
- Decizia Curții Constituționale nr. 61 din 14 ianuarie 2010. *Monitorul Oficial al României, Partea I,* nr. 76 din 3 februarie 2010.
- Decizia Curții Constituționale nr. 1.177 din 12 decembrie 2007. *Monitorul Oficial al României, Partea I,* nr. 871 din 20 decembrie 2007.
- Decizia Curții Constituționale nr. 799 din 18 noiembrie 2015. *Monitorul Oficial al României, Partea I,* nr. 862 din 19 noiembrie 2015.
- Decizia Curții Constituționale nr. 334 din 26 iunie 2013. *Monitorul Oficial al României, Partea I,* nr. 407 din 5 iulie 2013.
- Decizia Curții Constituționale nr. 682/2012. *Monitorul Oficial al României, Partea I,* nr. 473 din 11 iulie 2012.
- Decizia Curții Constituționale nr. 51 din 25 ianuarie 2012. *Monitorul Oficial al României, Partea I,* nr. 90 din 3 februarie 2012.
- Decizia Curții Constituționale Federale din 9 iulie 2013 – BverfG, 2BvC 7/10.

- Decizia Curții Constituționale Federale Germane din 24 noiembrie 1981 – 2BvC 1/81, BVerfGE 59.
- Decizia Curții Constituționale Federale Germane din 3 martie 2009 – 2 BvC 3/07, 2 BvC 4/07.
- Decizia Curții Constituționale Federale din 15 februarie 1967, 2 BvC 2/66, BVerfGE 21, 200.
- Decizia Curții Constituționale Federale din 24 noiembrie 1981 – 2BvC 1/81, BVerfGE 59, 119.
- Curtea Supremă a Estoniei (2005). Cauza 3-4-1-13-05 din 1.09.2005. *Riigi Teataja III* (*Journal officiel*), 26, 262. Disponibilă la: http://www.codices.coe.int
- Curtea Constituțională din Indonezia (2010). Decizia din 30.03.2010 – 147/PUU-VII/2009. Disponibilă la: http://www.codices.coe.int
- Cauza *Hirst împotriva Regatului Unit,* din 6 octombrie 2005.
- Cauza *Zdanoka împotriva Letoniei,* din 16 martie 2006.
- Cauza *Yumak şi Sadak împotriva Turciei,* din 8 iulie 2008.
- www.venice.coe.int

LEGALITY, SEPARATION OF POWERS, STABILITY OF ELECTORAL LAW: THE IMPACT OF NEW VOTING TECHNOLOGIES

Ardita DRIZA MAURER
Jurist Ll.M., Independent Consultant

***Abstract*:**

Legality, separation of powers and stability of electoral law are some of the principles of the European constitutional heritage. They should be respected and implemented throughout the electoral process, including when new voting technologies are used. This paper discusses e-voting specific implementations of the principles or challenges to it. Ongoing and proposed improvements in legislation or practice are pinpointed.

Keywords: *new technologies, e-voting, legality, separation of powers, stability of electoral law, Council of Europe, Venice Commission*

Résumé :

La légalité, la séparation des pouvoirs et la stabilité du droit électoral représentent quelques-uns des principes du patrimoine constitutionnel européen. Ceux-ci seront respectés et mis en place dans le cadre du processus électoral, y compris lorsqu'on utilise de nouvelles technologies de vote. Cet article présente les mises en œuvre spécifiques au vote électronique ou aux défis y associés. Le rapport indique avec précision les développements en cours et celles proposées dans la législation et la pratique dans le domaine.

Mots-clés : *nouvelles technologies, vote électronique, légalité, séparation des pouvoirs, stabilité du droit électoral, Conseil de l'Europe, Commission de Venise*

Abstract:

Legalitatea, separarea puterilor şi stabilitatea legii electorale reprezintă câteva dintre principiile patrimoniului constituţional european. Acestea vor fi respectate şi implementate în cadrul procesului electoral, inclusiv atunci când se utilizează noi tehnologii de votare. Lucrarea de faţă prezintă implementările specifice principiilor votului electronic sau provocărilor asociate acestuia. Sunt indicate cu precizie îmbunătăţirile aflate în curs de desfăşurare şi cele propuse de legislaţie şi practica în domeniu.

Cuvinte-cheie: *noi tehnologii, votul electronic, legalitate, separarea puterilor, stabilitatea legii electorale, Consiliul Europei, Comisia de la Veneţia*

I. Introduction

The question suggested by the title is how legality, separation of powers and stability of electoral law – three among many constitutional principles to be respected during elections – can be affected when new voting technologies are used in the electoral process. Formulated this way, the question is too large. *"Legality, separation of powers and stability of electoral law"* are broad concepts with numerous facets, the *"electoral process"* encompasses a great number of procedures and *"new voting technologies"* may refer to different uses of electronically-backed solutions, from voter registration to administration of voter lists, e-voting, vote tallying, publication of results, etc. The question should be narrowed.

New voting technologies are understood here as a synonym of e-voting – the use of electronics to cast a vote in political elections and referendums. Reference is made to e-voting both from controlled and uncontrolled environments.[1] The electoral process considered is vote casting. Legality, separation of powers and stability of electoral law are elements of the *"rule of law"* and *"democracy"* which, together with *"human rights"*, constitute the three pillars of a democratic state or the basis of all genuine democracy as mentioned in the Preambles to the Statute of the Council of Europe and to the European Convention on Human Rights. They are part of the European constitutional heritage. The three pillars contain other elements as well[2], which are related to the three ones discussed here; however they will not be examined here. Finally, we refer to the definition of the three principles according to the European constitutional heritage, which means to a consensual definition common to Council of Europe member states.[3] Such definition has been identified by Venice Commission in the following documents to which we refer: the *2011 "Report on the Rule of Law"*, the 2016 *"Rule of Law Checklist"*, the 2002 *"Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report"* and the 2005 *"Interpretative Declaration of the Stability of the Electoral Law"*.

We discuss legal provisions and practical measures that ensure that legality, separation of powers and stability of electoral law are respected in an e-voting context. An alternative approach would have been to consider the legal suits of potential problems that may be detected (before the voting, through certification and other controls, or during/after the voting period via complaints, audits, alleged/proved hacking,

[1] We think of e-voting as of the tip of an iceberg: it is the most visible and representative part of a larger picture, which is that of the extensive use of computers and telecommunication networks in electoral procedures.

[2] For example, in addition to *legality* (legality and separation of powers) and *legal certainty* (stability of electoral law), the pillar *"rule of law"* also encompasses *prohibition of arbitrariness*, *access to justice*, *respect for human rights*, *non-discrimination and equality* before the law.

[3] To be noted, the consensual definition may not entirely coincide with the national definition of the same concept. National concepts are often more developed and detailed.

etc.). An example of such a question would be: is legality respected if Internet voting, an optional voting channel, suffers a distributed-denial-of-service attack and is switched off for some time? However, legal discussion of such problems falls outside the scope of this paper.

With respect to e-voting legal provisions, reference is made to provisions found in international soft law, namely the following documents adopted by the Committee of Ministers of the Council of Europe: The *"Recommendation of the Committee of Ministers to Member States on legal, operational and technical standards for e-voting",* also known as Rec(2004)11; the *"Certification of e-voting systems, Guidelines for developing processes that confirm compliance with prescribed requirements and standards*" approved in 2011 (we refer to it as Guidelines on Certification); the *"Guidelines on transparency of e-enabled elections"* approved in 2011 (we refer to it as Guidelines on Transparency). Furthermore, Venice Commission's 2004 report on e-voting will be mentioned.[4]

The paper highlights some challenges for ensuring compliance with the principles in an e-voting context. There are close links between the three principles and several of their elements overlap. We will discuss in some detail the legality principle (II) and present an overview of separation of powers (III) and stability of electoral law (IV) as implemented in an e-voting context, followed by conclusions (V).

II. Legality and E-Voting

The law must be respected, not only by individuals, but also by authorities, public or private. Lower level e-voting regulations must respect higher level instruments and decisions must be based on law. Legality also refers to a transparent, accountable and democratic process for enacting the law. Another aspect, the fact that public officials require authorisation to act, and act within the powers that have been conferred upon them, will be examined under separation of powers (chapter III). The main elements of legality as defined in the above-mentioned "Rule of Law Report" and the "Rule of Law Checklist" of Venice Commission and their meaning to e-voting will be sketched in section A, followed by some examples of e-voting's specific aspects and their conformity with the principles (section B).

A. Elements

1. Supremacy of the Law

Supremacy of the law requires constitutional and legal conformity of an e-voting regulatory framework and practice. The e-voting regulatory framework, for example, should respect constitutional principles, in particular the principles of universal, equal, free, secret and direct suffrage, election-related fundamental rights and procedural guarantees. Its quality (or clarity) and level of detail are important. Clarity of provisions influences their implementation.

What does clarity mean? Does it mean technical regulations should be as clear as to be understood by the laymen without technical knowledge? Or clear to the competent specialist? The question was asked in Germany, Austria and, indirectly, in Switzerland[5] and opinions differ (we will come back to this later).

In the European heritage, clarity is linked to implementation. Regulations, for instance, should be clear to make implementation possible. But, implementation by whom? The civil servant without specific technical knowledge or the mandated e-voting expert?

The normative level of e-voting provisions is important. If the Constitution forbids or limits uncontrolled remote voting, as is the case in Austria, e-voting from an uncontrolled environment (Internet) can only be introduced after amending the Constitution.

[4] European Commission for Democracy through Law (Venice Commission)/Grabenwarter, Ch. (2004), *Report on the compatibility of remote voting and electronic voting with the standards of the Council of Europe*.

[5] For a detailed discussion, see the respective chapters in Driza Maurer, A., Barrat J. (eds.), *E-Voting Case Law. A Comparative Analysis*, Routledge (Ashgate) Publishing Ltd., Surrey, England, 2015.

To ascertain the constitutional conformity of an e-voting regulatory framework and practice, judicial review or other appropriate forms of review (e.g. by a specialised committee) are foreseen. In an e-voting context, the constitutional conformity of the technical solution is also ascertained through certification and other controls. Such controls (should) also apply to acts and decisions of private actors that perform e-voting related tasks.

2. Relationship between International Law and Domestic Law

The principle *pacta sunt servanda* is the way in which international law expresses the principle of legality. To comply with this principle, the domestic regulatory framework and practice of e-voting must respect treaty provisions such as art. 25 ICCPR and art. 3 of Protocol 1 to ECHR on the right to free elections. The same principles are, however, found also in national constitutions and laws. In such case, supremacy of the law and *pacta sunt servanda* coincide.

Pacta sunt servanda further means that countries comply with binding decisions of international courts, such as the European Court of Human Rights (ECtHR). The interpretation of principles, including of the right to free elections, by international courts has evolved over time. ECtHR has not yet had the occasion to interpret the right to free elections in an e-voting context. Possible future case law may impact the way e-voting is regulated at national level.

Soft law instruments such as Venice Commission's Code of Good Practice in Electoral Matters or Rec(2004)11 are not binding *per se* and *pacta sunt servanda* does not apply. However, to the extent that they set out an European standard they influence the interpretation of treaty based rights (e.g. by ECtHR). So they need to be taken into account.

3. Duty to Implement the Law

State bodies must effectively implement laws. An e-voting regulatory framework of poor quality (clarity) hinders the effective implementation of the law. Assessing the quality of regulations and their implementability before adopting them, as well as checking *a posteriori* whether they are applied (*ex ante* and *ex post* legislative evaluations) are particularly important when introducing new technologies in traditional, established procedures.

Implementation of legislation may be obstructed by the absence of sufficient sanctions or by the insufficient or selective enforcement of the relevant sanctions.

4. Private Actors in Charge of Public Tasks

Private entities are involved to different degrees in providing high-technology solutions to e-voting. The regulatory framework and practice should guarantee that non-state entities are subject to the requirements of the rule of law and accountable in a manner comparable to those of public authorities.

5. Law-Making Procedures

Rule of law and democracy require that the process for enacting the law is transparent, accountable, inclusive and democratic. The e-voting regulatory framework would benefit from being debated publicly by Parliament and adequately justified (e.g. by explanatory reports). The public should have access to draft legislation on e-voting and the possibility to provide input.

Furthermore, it is necessary to assess the impact of e-voting before introducing it. Questions like e-voting's impact on electoral risks (risk assessments) or on human and financial resources need to be clarified before.

B. Discussion

E-voting regulations should clarify how the higher-level principles are implemented. So, before introducing an e-voting system, the necessary regulatory changes should be planned and conducted.

Detailed and clear regulations are important for certification.[6] But deriving e-voting requirements from broad constitutional principles is not an easy task. Combined legal

[6] OSCE/ODIHR recommends that the e-voting legal framework should be delineated to include formalized procedures for the conduct of electronic voting from set-up and operation to counting. Further this could include standards for cryptographic methods, testing requirements, operational duties and responsibilities, certification requirements.

and technical knowledge is needed. Research has developed interdisciplinary interfaces that enable a gradual technical implementation of legal provisions. The use of such interfaces in the e-voting area is of particular interest.[7]

The interpretation of the same constitutional principles may yield different results in different countries. When considering the constitutionality of e-voting in its much commented 2009 judgement,[8] the German Constitutional Court derived a principle of the public nature of elections from other constitutional rights. Such principle introduces a presumption for public inspection in all electoral matters as a way to guarantee public trust in the result of elections. This (deduced) principle does not exist in Austria, Estonia or Switzerland, for example, despite the fact that they share similar constitutional values with Germany.[9]

By applying the principle of the public nature of elections to e-voting,[10] the German Court concluded that the layman must be able to comprehend the central steps of the election and verify reliably that his/her vote has been recorded truthfully, without any special prior technical knowledge. The Austrian Court[11] arrived at a similar conclusion based on the principle of legal determination. However, Estonia and Switzerland do accept the fact that such elements cannot be understood by the laymen but only by (democratically appointed) specialists.

When assessing the constitutional conformity of e-voting, principles related to the automatic processing of personal data and use of databases (e.g. data protection, right to informational self-determination, telecommunication secrecy) need to be considered.

In its 2004 report on e-voting, Venice Commission concluded that electronic voting is neither generally permitted by human rights, nor ruled out *a priori*. Instead, its acceptability depends on the legal, operational and technical standards implemented in the procedure.[12] The quality of the regulatory framework has a pivotal role in ensuring its conformity with the Constitution.

Ensuring quality is a challenge for the legislator. Reasoning by analogy with similar channels (e.g. consider that Internet and postal voting – both distant voting methods – can be regulated in a similar way) has shown its limits.[13] The regulatory framework conceived for low-tech (mechanical) voting machines is

[7] The method KORA (**Ko**nkretisierung **R**echtlicher **A**nforderungen = Concretisation of Legal Requirements) invented in 1993 proposes a four-tier method for acquiring technical proposals from legal provisions. Researcher has proposed and tested its use in an e-voting context; see in particular research from Melanie Volkamer and her team https://www.secuso.informatik.tu-darmstadt.de/en/secuso-home/research/publications/?no_cache=1 The applicability of KORA to Internet voting was researched by Philipp Richter in his 2012 doctoral thesis (see Further Reading). One of the latest contributions on this is from Stephan Neumann and Melanie Volkamer, "A Holistic Framework for the Evaluation of Internet Voting Systems" in Zissis, D. and Lekkas, D. (eds.) (2014), *Design, Development, and Use of Secure Electronic Voting Systems*, IGI Global, Hershey, PA.

[8] Bundesverfassungsgericht (2009), Decision *2 BvC 3/07, 2 BvC 4/07, of 3 March 2009*. Available at: http://www.bundesverfassungsgericht.de. For a detailed discussion, see the chapter on Germany by Sebastian Seedorf in *E-Voting Case Law* (fn. 5).

[9] For a detailed discussion, see the respective chapters in *E-Voting Case Law* (fn. 5).

[10] The requirement is formulated in broad terms covering voting machines as well as Internet voting.

[11] Verfassungsgerichtshof (2011), Decision *V 85-96/11-15, 13 December 2011*. Available at: http://www.vfgh.gv.at For a detailed discussion, see the chapter on Austria by Melina Oswald in *E-Voting Case Law* (fn. 5).

[12] Based on the analysis of unsupervised postal voting, the report proposes similar standards for e-voting.

[13] The principle of analogy is developed by Venice Commission in its 2004 opinion (fn. 4) (see in particular §66). The mechanical application of the principle has been criticized. See for example Driza Maurer, A. (2014), "Ten Years Council of Europe Rec(2004)11 – Lessons learned and Outlook" in Krimmer, R., Volkamer, M. (eds.), *Proceedings of Electronic Voting 2014 (EVOTE2014)*, TUT Press, Tallinn, p. 111 – 117. See also Driza Maurer, A. (2013), *Report on the possible update of the Council of Europe Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting, 29 November 2013*. Available at: http://www.coe.int/t/DEMOCRACY/ELECTORAL-ASSISTANCE/themes/evoting/default_en.asp

not suited to regulate e-voting[14] and neither is the regulatory framework of traditional voting channels: they are all insufficient or unsuitable to regulate e-voting.

Courts have sanctioned lack of quality of the regulatory framework. The German and Austrian decisions mentioned above declared unlawful the e-voting regulations as insufficiently detailed. Sufficiently detailed regulations are necessary. But what is a sufficiently detailed regulation? For the Austrian court, provisions must be understood by the members of the electoral commission without the assistance of technical specialists. For the German court, provisions must be understandable by the layman (see above).

Rules on technical matters and detail *may* go into regulations of the executive according to the Code of Good Practice in Electoral Matters (II.2.a). They actually *should*, in the e-voting context. The Austrian judge in the above mentioned decision said that including detailed technical measures in the (higher-level) law could be problematic in the light of the rapid development of technical standards. Modifications in the e-voting regulatory framework in Estonia and Switzerland also saw the introduction of multiple layers (three in Switzerland) with technical details regulated by lower layers – which are in the competence of the executive.[15]

Some fear that giving the administration the competence to regulate the technical details may weaken the content of the principles. Such fear is to be taken seriously. It supports another conclusion which is that of increasing in-house expertise of administrations on e-voting.[16] However, this risk must not become an obstacle to needed updates. Detailed regulations are actually necessary to ensure correct implementation of the principles, as the German and Austrian courts said.

Judicial review of e-voting is important to control its constitutional conformity. However, with respect to e-voting regulations, it has not been straightforward. In principle, judicial review of administrative acts (e-voting regulations or decisions) is possible. In practice, not all courts have been prone to proceed to such a review, especially when no irregularities in the voting itself were alleged (or could be proved). The difficulty or even impossibility to obtain evidence is yet another challenge in an e-voting context.)[17]

Constitutional courts in Germany and Austria did examine the constitutional conformity of administrative level regulations (and found them unlawful) even in the absence of alleged irregularities. The Swiss Federal Court did not proceed to such examination of a cantonal regulation on e-voting. The court relied on the authorization procedure (and related controls of conformity) that had been conducted by the federal government. Debate, however, continues in Switzerland on this issue.[18]

States must ascertain that e-voting technical requirements fully reflect the relevant legal and democratic principles, mainly through certification of the system by an independent and competent body as foreseen in Rec(2004)11 and Guidelines on Certification. Certification is, however, a

[14] See for example the discussion on France by Jordi Barrat in *E-Voting Case Law* (fn. 5).

[15] For a detailed discussion, see Driza Maurer, A., "Update of the Council of Europe Recommendation on Legal, Operational and Technical Standards for E-Voting – A Legal Perspective", in *Tagungsband IRIS 2016*.

[16] See Conclusions in *E-Voting Case Law* (fn.5).

[17] See the detailed discussion by Ülle Madise and Priit Vinkel in *E-Voting Case Law* (fn. 5).

[18] See the recent Parliamentary initiative 15.412, Reimann Lukas, *Les modalités du vote électronique doivent pouvoir faire l'objet d'un examen juridique*. Prompted by the court's decision, the intervention proposes to change the federal law on political rights to require cantons to set-up specific bodies for considering the constitutional conformity of e-voting modalities, independently from its use in a specific vote or election. Such abstract control of legality was so far rejected by the competent commission of the lower chamber of Parliament which refused a solution unique to e-voting. Instead, the commission proposes to reinforce existing checks: the conditions for issuing the authorization to use e-voting in a federal vote and for controlling its observance.

difficult task. It requires detailed legislation[19] and, furthermore, a competent and independent body. Identifying such competent bodies is not easy, especially in smaller countries. The Guidelines on Certification talk about perusing a certification obtained in another country. This may prove difficult to implement. Given national electoral specificities, it seems virtually impossible to use exactly the same system (and associated certification) in more than one country.

To ensure that implementability and implementation of e-voting regulations are assessed, one can refer to the good practice of a step-by-step gradual introduction of e-voting.[20] Parliaments could play a greater role as well. In addition to their traditional means of intervention, it is recommended to apply to e-voting parliamentary procedures of oversight such as hearings, ad-hoc committees, etc.[21]

Foreseeing sufficient sanctions for non-respect of higher-level principles and effectively implementing them is important. The e-voting authorisation process (where it exists) and the sanction of "non-authorisation" as well as the legal import of proofs of irregularities produced by verifiability techniques can be assessed in the light of this requirement.

The authorization process exists in several countries where e-voting is introduced gradually. Authorizations are issued upon control of fulfilment of requirements.[22] Conditions for obtaining the authorization (e.g. successful audits and certification) and the sanction of non-authorization in case of non-fulfilment of the conditions need to be clearly stated in the regulation and effectively implemented.

The link between proofs of irregularity produced by verifiability and sanctions is a more recent question which should be clarified in legislation. This is still a work in progress in the countries concerned.[23]

Implication of non-state actors (providers of software and hardware, providers of e-voting services, controlling bodies, etc.) is inevitable in an e-voting context and is even required, for instance in the case of certification.[24] Member states should devise a clear framework for the institutional responsibilities, criteria and procedures for ascertaining the competence and independence of certification bodies. States are invited to take appropriate steps to avoid circumstances where the election is dependent on a few major vendors.

Certification and transparency are relevant when discussing private actors' accountability. Certification controls the conformity of an e-voting system with legal requirements. Transparency applies to many aspects, among which the procurement processes, the publication of information on the software used, the observation of the e-vote. Earlier recommendations on transparency admitted restrictions based on security or intellectual property grounds. For instance, recommendation 105 in Rec(2004)11 prevents disclosure of the audit information to unauthorised persons. Today,

[19] For a detailed discussion, see Driza Maurer, A. (2014), "Ten Years Council of Europe Rec(2004)11 – Lessons Learned and Outlook", in Krimmer, R., Volkamer, M. (eds.), *Proceedings of Electronic Voting 2014* (*EVOTE2014*), TUT Press, Tallinn, p. 111 – 117.

[20] OSCE/ODIHR recommends that e-voting technologies are introduced in a gradual, step-by-step, manner and tested under realistic conditions. For example Switzerland, which started e-voting binding trials in 2002, continues to do so today. The number of cantons doing some e-voting has gradually increased from 3 up to 14 (out of 26) and the electorate authorized to do e-voting has gradually increased as the regulatory framework for a secure and reliable e-voting has been clarified and completed.

[21] See Recommendation 1 in the concluding chapter in *E-Voting Case Law* (fn. 5).

[22] Switzerland has experienced extensively, since 2002, the system of authorizations.

[23] The Council of Europe Guidelines on Transparency (guideline 15) requires member states to *develop rules dealing with discrepancies between the mandatory count of the second medium and the official electronic*. See also the discussion of this requirement in the chapter on Estonia in *E-Voting Case Law* (fn. 5).

[24] Good practice requires that the electoral authority delegates formal certification of the voting technology to an independent third party in order to increase accountability and transparency.

by contrast, publication of all audit results and of the source code is considered to be the good practice.

It is accepted that even the best-designed and certified system cannot resist to a number of e-voting specific threats. So, a new layer of control was added more recently: VVPAT (Voter Verified Paper Audit Trail) for e-voting machines and individual and universal verifiability for Internet voting.[25] An Internet voter in particular has the possibility to check that his/her own vote was correctly registered and counted, a possibility that does not exist in other voting methods.

With respect to law-making procedures, a specific aspect of e-voting is its multi-disciplinarity. E-voting requires the involvement of different professionals: legal, computer science and security, social science, among others.

Rec(2004)11 foresees that users shall be involved in the design of e-voting systems, particularly to identify constraints and test ease of use at each main stage of the development process (provision 62).

III. Separation of Powers and E-Voting

Separation of powers is based on the assumption that distribution of powers between the legislative, the executive and the judiciary creates a healthy system of checks and balances. The accent below will be put on *delegation* of powers in an e-voting context. However, this principle can be problematic also in case of *concentration* of legislative, organisational and judiciary powers in the hands of one authority.[26]

Separation of powers is closely linked to legality and several elements were already discussed above. A regulation or a decision that is not based on a law violates the separation of powers.

When discussing law-making powers of the executive the underlying principle is the supremacy of the legislature. General and abstract rules, in our case main conditions for e-voting, should be included in an Act of Parliament or a regulation based on that Act. Venice Commission's 2004 report on distant voting and e-voting, for example, notes that it's for the Parliament to take measures to ensure that the principle of secret suffrage is protected.

Delegation of legislative power on e-voting to the executive requires that the objectives, contents and scope of the delegation of power are explicitly defined in a legislative act (of the Parliament). In a federal state the issue should be furthermore clarified between federal and sub-federal levels.[27]

The exercise of legislative and executive powers by the executive should be reviewable by an independent and impartial judiciary. Equivalent guarantees should be established by law whenever public powers are delegated to private actors. Authorities, however, should be in command of the electoral process and not outsource essential parts of it to vendors. They should build in-house expertise and capabilities to implement e-voting.

A clear division of responsibilities between vendors, certification agencies and electoral administration is required to ensure full accountability. Furthermore, within the electoral management body itself, a strict separation of duties should be maintained and documented to ensure that no one is involved in the entire process (considered to be a security threat).

Vital public and private interests may lead to a temporary derogation from certain

[25] For a description of these methods, see Gharadaghy, R. and Volkamer, M. (2010), "Verifiability in Electronic Voting – Explanations for Non Security Experts" in Krimmer, R. and Grimm, R. (eds.) (2010), *Electronic Voting 2010* (*EVOTE10*), Lecture Notes in Informatics (LNI) – Proceedings Series of the Gesellschaft für Informatik (GI), Volume P-167.

[26] This may be the case with some Electoral Courts in Latin America. For an illustration of such problems in relation to e-voting, see Brunazo Filho, A. and Rosa Marcacini, A.T., "Legal Aspects of E-Voting in Brazil", in *E-Voting Case Law* (fn.5).

[27] See Driza Maurer, A., "Internet voting and federalism: The Swiss case", in Barrat, J. (ed.) (2016), *El Voto Electrónico y Sus Dimensiones Jurídicas: Entre la Ingenua Complacencia y el Rechazo Precipitado*, Ed. Iustel.

rights and to an extraordinary division of powers. Are such exceptions in emergency situations possible/foreseen in an e-voting context? In which circumstances? Under which conditions? Are there parliamentary control and judicial review? The issue of emergency situations is a reminder of the importance of preparing contingency plans for when e-voting process faces turbulences [see also provision 70 of Rec(2004)11].

IV. Stability of Electoral Law and E-Voting

Stability of the law is an element of the principle of legal certainty (together with accessibility of legislation, accessibility of court decisions, foreseeability of the law, legitimate expectations, non retroactivity, no crime without law, no penalty without law and *res judicata*). Stability implies that instability and inconsistency of legislation or of executive action may affect a person's ability to plan his/her actions.

Stability of the electoral law is part of the European electoral heritage. According to Venice Commission, the fundamental elements of electoral law should not be open to amendment less than one year before an election, or should be written in the Constitution or at a level higher than ordinary law. The principle has been interpreted by Venice Commission as meaning, among others, that any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election. In the e-voting area, practical experiences and research suggest that, when envisaging introduction of e-voting, one should think of the over-next election.

Distinguishing stable requirements from more frequently changing ones is crucial. Main requirements include provisions on what an e-voting system is supposed to do. They are broad and applicable to all voting methods. This makes them rather stable. They are approved by Parliament. When exercising their executive or even legislative powers, the executive authorities should respect those requirements.

Frequently changing elements are closer to technology. They include provisions that indicate how a system should do what it is required to do and how to check that a system does correctly what it is supposed to do. They are often adopted by the executive.

Stability is not an end in itself. Laws must be capable to adapt to changing circumstances. This is particularly true for e-voting given its technological dimension and the importance of security. It is necessary for this to have established procedures and deadlines. Public debate and notice should be respected, and all this without adversely affecting legitimate expectations. Expectations may come from the public/end users, the authorities in charge of organising elections, etc.

V. Conclusions

Venice Commission considers that implementing the three principles is an ongoing task, even in established democracies. Constitutional conformity is not given once and for all. It depends on the context. In the field of electronically-backed voting solutions, the constitutional conformity of regulations and systems depends, among others, on related technological and social developments. Technology development, for instance, constantly presents new challenges to e-voting. And it may also present new and better solutions.

In general, technology may be not only a threat, but also an opportunity. According to Bill Gates, the first rule of any technology used in a business is that automation applied to an efficient operation will magnify the efficiency. The second is that automation applied to an inefficient operation will magnify the inefficiency. Those involved in e-voting implementation have certainly experienced the following situation: when introducing high-tech to mimic a traditional voting procedure one finds that the procedure, as foreseen in the law, does not efficiently implement the constitutional goal. At the same time it also

becomes clear that it is possible to achieve a better constitutional compliance by using the power of ICT. Technology may enable electoral processes that better achieve constitutional objectives. But, to introduce such "optimal" processes, it is necessary to amend the law.

Constitutional conformity has so far been examined more strictly when dealing with bits (e-vote) than with paper. This is right. Let's not forget, however, that high-tech, wisely implemented to an efficient electoral procedure, may achieve better constitutional conformity than the "traditional" way of doing.

About the author:

Ardita DRIZA MAURER is a jurist based in Switzerland. She specializes in political rights and new voting technologies and works as an independent consultant. Ardita was previously a member and director of the Swiss Federal Internet voting project at the Swiss Federal Chancellery. She currently provides legal expertise to ongoing work on the update of the Council of Europe Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting.

E-mail: info@electoralpractice.ch

References:

- Barrat, J. (ed.) (2016). *El Voto Electrónico y Sus Dimensiones Jurídicas: Entre la Ingenua Complacencia y el Rechazo Precipitado*. Ed. Iustel.
- Driza Maurer, A., Barrat, J. (eds.) (2015). *E-Voting Case Law. A Comparative Analysis*. Routledge (Ashgate) Publishing Ltd., Surrey, England.
- Driza Maurer, A. (2016), Update of the Council of Europe Recommendation on Legal, Operational and Technical Standards for E-Voting – A Legal Perspective, in *Tagungsband IRIS 2016*.
- Krimmer, R., Volkamer, M. (eds.) (2014). *Proceedings of Electronic Voting 2014* (*EVOTE2014*), TUT Press, Tallinn.
- Krimmer, R. and Grimm, R. (eds.) (2010). *Electronic Voting 2010* (*EVOTE10*), Lecture Notes in Informatics (LNI) – Proceedings Series of the Gesellschaft für Informatik (GI), Volume P-167.
- Zissis, D. and Lekkas, D. (eds.) (2014). *Design, Development and Use of Secure Electronic Voting Systems*. IGI Global.
- European Commission for Democracy through Law (Venice Commission)/Grabenwarter, Ch. (2004). *Report on the compatibility of remote voting and electronic voting with the standards of the Council of Europe*.
- Bundesverfassungsgericht (2009). Decision *2 BvC 3/07, 2 BvC 4/07 of 3 March 2009*. Available at: http://www.bundesverfassungsgericht.de
- Verfassungsgerichtshof (2011), Decision *V 85-96/11-15, 13 December 2011*. Available at: http://www.vfgh.gv.at
- https://www.secuso.informatik.tu-darmstadt.de/en/secuso-home/research/publications/?no_cache=1

Further Reading:

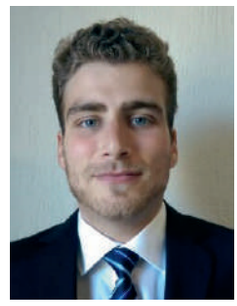
- Barrat, J. (ed.) (2016). *El Voto Electrónico y Sus Dimensiones Jurídicas: Entre la Ingenua Complacencia y el Rechazo Precipitado*. Iustel.

- Driza Maurer, A., Barrat J. (eds.) (2015). *E-Voting Case Law. A Comparative Analysis*. Routledge (Ashgate) Publishing Ltd., Surrey, England.
- Krimmer, R. (2012). *The Evolution of E-voting: Why Voting Technology is Used and How it Affects Democracy*. Tallinn University of Technology Doctoral Theses Series I: Social Sciences, No. 19.
- Richter, P. (2012). *Wahlen im Internet rechtsgemäss gestalten*. Baden-Baden, Nomos.
- Vinkel, P. (2015). *Remote Electronic Voting in Estonia: Legality, Impact and Confidence*. Tallinn University of Technology Doctoral Theses, Series I: Social Sciences, No. 24.
- Volkamer, M. (2009). *Evaluation of electronic voting: Requirements and evaluation procedures to support responsible election authorities*, Series Lecture notes in business information processing, Vol. 30, Springer, New York.
- Zissis, D. and Lekkas, D. (eds.) (2014). *Design, Development, and Use of Secure Electronic Voting Systems*. IGI Global, Hershey, PA.

NEW VOTING TECHNOLOGIES AND ELECTIONS IN FEDERAL AND REGIONAL STATES IN PRACTICE

Uwe SERDÜLT
Principle investigator, Vice-director at the
Centre for Democracy Studies Aarau (ZDA)
University of Zürich

Michele McARDLE
Assistant researcher
Centre for Democracy Studies Aarau (ZDA)
University of Zürich



Thomas MILIC
Researcher
Centre for Democracy Studies Aarau (ZDA)
University of Zürich

Jonathan WHEATLEY
Senior research fellow
Centre for Democracy Studies Aarau (ZDA)
University of Zürich

Abstract:

Experimentation with new voting technologies (NVT) typically starts with a pilot scheme on a lower level of government where not much harm can be done in case of failure. In this overview article across some of the most well-known federations, we are looking at practice and the legal bases for such pilots. The way NVTs are regulated is far from being harmonised and can be founded on an explicit legal basis or just as well on the lack thereof. The phase of the electoral cycle for which NVT are most common relates to electronic means of counting votes, whereas remote voting with the use of the Internet is still very much an exotic undertaking. A more recent dynamic can be observed for e-collecting schemes attached to e-petition systems. More centralised legislation does not seem necessary at this stage and will appear once a threshold of practice has been reached.

Keywords: *electronic voting, Internet voting, e-counting, e-collection, e-petition*

Résumé :

Expérimenter les nouvelles technologies de vote (NTV) commence habituellement par un chemin pilote à un niveau inférieur d'organisation de l'Etat, pour qu'en cas d'échec soient minimes les conséquences négatives. Dans cet article nous allons passer en revue la pratique et les bases légales pour de tels programmes pilotes dans certains Etats fédéraux les plus connus. La manière de régir les NTV est loin d'être harmonisée et peut s'appuyer sur une base juridique explicite, ou, tout aussi bien, sur l'absence de celle-ci. La phase du cycle électoral pour laquelle les NTV sont les plus communes concerne les moyens électroniques de dépouillement du vote, tandis que le vote à distance, par le biais de l'Internet, est toujours une pratique exotique. Une dynamique plus récente peut être observée pour les systèmes de collecte électronique attachés aux systèmes des pétitions électroniques. Une législation centralisée ne paraît pas être nécessaire dans cette étape, mais apparaîtra une fois atteint un seuil de l'expérience derivée de la pratique.

Mots-clés : *vote électronique, vote par Internet, dépouillement électronique, collecte électronique, pétition électronique*

Abstract:

Experimentarea noilor tehnologii de votare (NTV) începe în mod tipic cu o schemă-pilot la un nivel de organizare inferior, la care să nu se înregistreze consecințe negative în caz de eşec. În acest articol, vom trece în revistă practica şi bazele legale pentru astfel de programe-pilot din unele dintre statele federale cele mai bine cunoscute. Modul în care sunt reglementate NTV este departe de a fi armonizat şi se poate baza pe un temei juridic explicit sau, la fel de bine, pe lipsa acestuia. Faza ciclului electoral pentru care NTV sunt cele mai comune se referă la mijloacele electronice de numărare a voturilor, în timp ce votul de la distanță, prin utilizarea internetului, este încă o practică exotică. O dinamică mai recentă poate fi observată pentru sistemele de colectare electronică ataşate sistemelor de petiții electronice. O legislație centralizată nu pare a fi necesară în această etapă, dar va apărea odată ce a fost atins un prag al experienței venite din practică.

Cuvinte-cheie: *vot electronic, vot prin internet, numărare electronică, colectare electronică, petiție electronică*

1. Introduction

The following text assembles information on how new voting technologies are regulated and applied in a sample of *federated states* and states that stop short of federalism, but still include one or more *devolved territories*. Many such states allow their sub-national units some degree of autonomy when it comes to the organisation and management of elections or referendum votes. Regarding the definition of new voting technologies (NVT) we apply a pragmatic nominal approach as they are listed in a more concise way elsewhere.[1] In particular, we focus on the regulation and use of electronic voting machines, Internet voting systems, and electronic counting machines such as optical scanners, but also precision scales. The aim was not to come up with an exhaustive census of all sub-national institutional regulations and designs, but to introduce the reader to some of the most prominent examples we are aware of.

Given that the use of NVTs is still in its infancy, in most of the cases identified below legislation regulating their use is undeveloped at national level and often non-existent at sub-state level, even where sub-state entities have some power to make their own laws on how elections within their remit are to be carried out. Typically, NVTs have been introduced on an *ad hoc* basis in selected cities and municipalities, taking advantage

[1] http://www.osce.org/odihr/elections/104939, accessed 7 March 2016.

of a permissive legal environment. Given the security fears associated with NVTs, court rulings have far more often had the effect of ending experimentation with NVTs, rather than enabling their implementation.

Bearing this in mind, a narrow focus on legislative acts would be insufficient in providing an informative overview of the state-of-the-art with respect to NVTs in decentralised states. Much of the focus of this paper is therefore on experimentation at the lowest level of governance (i.e., at the level of cities and municipalities) and on the role of national and sub-state legislation in either enabling or impeding such experimentation. We also provide information on the types of NVTs that have been used in each case and the roles they play in electoral procedures at different levels.

The paragraphs below show that the development of NVTs is not unidirectional. If a degree of optimism on the potential of these technologies prevailed around the turn of the century, in recent years this has given way to a wary vigilance, and many of the experiments carried out in the early years have either been put on hold or abandoned completely. The erratic pace with which NVTs have been deployed reflects the fact that their use has been mainly the result of experimentation and has yet to be anchored by a firm legal grounding.

2. Case Studies

Australia

The Australian Electoral Act establishes no explicit provisions allowing or prohibiting electronic voting and counting technology. Due to Australia's strong federalism, all states and territories possess legislatorial power in these regards. In the case of Internet voting, New South Wales can be considered the most advanced, having introduced the i-Vote system for the 2011 state elections, allowing voters with disabilities or living far away from the next polling station to use Internet voting during an early vote period (Smith, 2016). The Parliamentary Electorates and Elections Act, in Section 120AC, states that *"The Electoral Commissioner may approve procedures to facilitate voting by eligible electors at an election by means of technology assisted voting"*[2]. Other than in New South Wales, the experience with electronic voting in Australia is rather ephemeral (Smith, 2016).

In addition to e-voting, the legislations in Victoria[3], the Northern Territory[4] and the Australian Capital Territory (ACT)[5] make reference to electronic technologies, being utilized in counting of ballot papers. These provide a legal basis for the implantation of e-counting technologies. Yet, from these solely the ACT has implemented e-counting. E-voting and e-counting technology was first commissioned in 2000. In 2001, following the elections, the Australian Electoral Commission (AEC) issued a favourable evaluation of e-counting technology, stating that it would be especially useful due to Australia's complicated alternative vote electoral system (AEC, 2010). However, they did retain some sobriety due to the costs of acquisition and maintenance of the required scanners (AEC, 2010). Later that year, the ACT first implemented e-counting for both electronic votes and traditional paper ballots. Yet, the preferences indicated by the voters had to be entered manually. After having reused the same system in 2004, the ACT's electoral commission (ACTEC) switched to a new intelligent character recognition scanning system, which obviated the need for manual coding for the 2008 elections. This system has proven a success (ACTEC, 2015). Furthermore, Southern Australia uses e-counting for local government, industrial and parliamentary elections.

Austria

The Austrian Internet voting experience was short lived. In 2009, the only legally binding election with Internet voting took place in the Federation of Students which

[2] http://www.legislation.nsw.gov.au/#/view/act/1912/41/part5/div12a/sec120ac, accessed 13 May 2016.

[3] In the case of Victoria, it is Part 6A of the Electoral Act from 2002.

[4] In the case of the Northern Territory, it is Division 6A of the Electoral Act from 2004.

[5] In the case of the ACT, it is Division 9.3 of the Electoral Act from 1992.

was surrounded by a lot of political conflict and disagreement about the usefulness of the technology (Krimmer *et al.*, 2010). Following the debate, including the Constitutional Court declaring a decree regulating the Internet voting not to be in line with underlying legislation, the Minister of Science and Research decided not to proceed with Internet voting for university elections (Goby and Weichsel, 2012).

Sub-national elections are governed by state law. As these must abide by the Constitution, there are currently no trials or projects advancing Internet voting at this level. Furthermore, there are no electronic counting machines used in Austria. Counting is undertaken in small voting districts with no more than about 700 voters per election authority. This setup allows for votes to be cast and counted exclusively in analogue form (BM.I – Wahlrecht, 2016).

Belgium

Belgium was one of the first countries to introduce electronic voting machines. It began in 1991 on an experimental basis in two electoral districts, namely in Verlaine and Waarschoot. In 1994, a federal law, the Law Organising Automated Voting, was introduced to regulate the procedure.[6] The law allows electoral districts and municipalities to use automated voting systems during elections. It is very specific about the procedures to be used.[7] By 1999, over 3.2 million voters (44% of the total electorate) cast their votes electronically.

Laws passed in 1999 and 2003 also allowed trials of an optical scanning system in which votes cast using the traditional pen and paper method were read electronically in the electoral districts of Chimay and Zonnebeke.[8] However, these trials were discontinued.

The Special Law of 13 July 2001 transferred to the regions competences in legislation on and regulation and organisation of municipal and provincial elections. The 2006 and 2007 local elections were the first to be organised by the regions on the basis of this law.

Following concerns about the capacity of the automated voting system to verify votes and about the overall security of e-voting, the law on automated voting was amended in 2003.[9] According to the revised law, votes cast electronically were also to be printed on paper.

In 2006 the Belgian government commissioned a comparative study from a consortium of universities on e-voting systems in nine European countries (including Belgium), in order to decide whether it is appropriate to continue the e-voting experiment.[10] The report recommended what is described as an *"improved paper based voting system"*, in which the voter casts his or her vote on

[6] The original law may be accessed, both in French and in Dutch, at this webpage: www.elections.fgov.be/fileadmin/user_upload/Elections2009/fr/lois/11avril1994_loi_vote_automatise__version_010207_.pdf, accessed on 7 March 2016.

[7] The law stipulates that electronic voting takes place at a polling station, in which there is a voting machine. Voters are provided with an electronic card that they insert into a slot in the voting machine. The display screen on the voting machine shows the serial number and the symbol of all the lists of candidates and the voter uses an optical pen to mark the list of his/her choice. The voter is then given the opportunity to confirm his/her vote before returning the card for inspection to the president of the polling station, and afterwards the card is inserted into an electronic ballot box, where it will remain after the data stored on it is read. Each polling station sends the data to the main office of the town or region, where it is recorded and aggregated.

[8] See also *Lecture optique pour les cantons de Chimay et Zonnebeke,* available at: http://www.elections.fgov.be/index.php?id=434&no_cache=1&print=1, accessed on 9 March 2016.

[9] Act of organizing an automated voting control system by printing the votes cast on paper and amending the Act of 11 April 1994 organizing automated voting, the Law of 18 December 1998 organizing automated vote counting through an optical reading system and amending the Act of 11 April 1994 organizing automated voting and the electoral code (11 March 2003), available at: www.ejustice.just.fgov.be/ cgi_loi/change_lg.pl?language=fr&la=F&cn= 2003031136&table_name=loi, accessed on 7 March 2016.

[10] Federal Public Service Interior (Intérieur Binnenlandse Zaken, IBZ), Direction des Elections. *BeVoting: Study of Electronic Voting Systems* (Version 1.1, 15 April 2007), available at: http://www.elections.fgov.be/fileadmin/user_upload/Elections2011/fr/presentation/bevoting-1_gb.pdf, accessed on 10 May 2016.

a voting machine and the computer then prints the vote on a ballot that contains both a human-readable part, and a bar code that can be read by a machine. In 2008, the Federal Parliament passed a resolution allowing continued experimentation with automated voting. As a result, the Federal Public Service Interior sought a partner to design a new voting system to recommend to the regions. In 2012 the firm *Smartmatic* was selected as the voting technology provider for a fifteen-year period in the Brussels-Capital region and in Flanders, but Wallonia opted out of the new system.

The *Smartmatic* system[11] was used in the 2012 municipal and provincial elections, the 2014 elections to the regional parliaments in Brussels-Capital region and in Flanders, in the 2014 federal elections and in the 2014 elections to the European Parliament. As previously, all electronic voting took place in polling booths and no Internet voting from private computers is permitted. Electronic voting only took place in Brussels-Capital region and in Flanders and, in these two regions, 153 out of 580 municipalities used the voting machines.

The government of Wallonia decided to end the experiment with electronic voting and return to traditional pen-and-paper based voting until a more reliable and secure system could be established in 2009. However, in 2011, the same government decided to allow those municipalities that already used electronic voting to continue the experiment in the 2012 elections, providing they met the extra costs incurred over and above the cost of the traditional system.[12] A number of communes did decide to continue with the experiment and used the old system of the optical pen.

Canada

In Canada, the approach to the use of NVT such as Internet voting is much decentralised and mainly implemented on the local level in the provinces of Ontario and Nova Scotia (Goodman and Pammett, 2014). In 2006, for example, this new voting channel was available in 20 municipalities in the province of Ontario. Approximately 400,000 citizens were allowed to use it. For the 2010 elections, the figure of Ontario Internet voting towns and cities rose to 44 and to 97 out of 444 municipalities in 2014. The hitherto largest Internet voting trials in Canada took place in Halifax, Nova Scotia, with an electorate of approximately 310,000.[13] Interestingly, in 2012 Halifax had to face a request for a judicial recount of the election results because of a district seat that was won with only six votes difference. Thanks to the recount procedures laid out already in a 2008 by-law, there was no uncertainty about how to administer this task with Internet voting in place. Whereas the recount brought a mistake in one of the polling stations (result was submitted twice), no irregularities were detected for the votes cast via the Internet (Pammett and Goodman, 2013: 28).

Although there is no electronic counting present in Canada at the national level, a number of municipalities use e-counting machines in local elections. These are seen also as trials for provincial and national elections. A plentiful amount of reasons, such as the higher complexity and rise in number, has led to the increased use of such machines in local elections. Furthermore, the elimination or, at least, diminution of human error has also been a leading motive (Elections Canada, 2014). Canada's *Elections Act* does not mention electronic counting aids. Nevertheless, the wording is such as to not explicitly prohibit such aids, opening a possible adaption for future elections. In what's more, the national

[11] The *Smartmatic* technology works as follows: voters cast their votes on a voting machine that prints out a paper ballot with a bar code. The voter then scans the ballot using an electronic ballot box and deposits the paper copy in the box. This allows the vote to be counted both manually, and electronically.

[12] PourEVA. *Quand on choisit un mode de scrutin 13,7 fois plus onéreux, on en assume le coût* (26 January 2014), available at: www.poureva.be/spip.php?article787, accessed on 9 March 2016.

[13] Further Internet voting experiences in Nova Scotia included (see Pammett and Goodman, 2013, for more details): Cape Breton Regional Municipality (83,000 electors, started 2012), Truro (10,000 electors, 2012) with the peculiarity that only electronic voting via the telephone or the Internet was available.

electoral commission is not responsible for the implementation of municipal elections. Hence, municipalities possess a certain degree of autonomy (Elections Canada, 2015).

Germany

In Germany, e-voting effectively came to a halt when the Federal Constitutional Court (*Bundesverfassungsgericht*) ruled it unconstitutional in 2009. Since then (almost)[14] no further moves have been made to enable an electronic voting process meeting those constitutional requirements. Before 2009, however, electronic voting was in use. The first trials on sub-national level were carried out in 1998 at local elections in Cologne. A year later, the city of Cologne used the electronic voting machines for its European Parliament elections. In 2002 the same voting machines came to use in the federal elections, however only on a small scale. The national elections of 2005 saw the first large-scale deployment of those voting machines. On that occasion, around two million voters in five different German states cast their vote electronically. Soon after, the deployed voting machines came under increasing criticism. In the Netherlands, a similar voting machine was cracked successfully by a group of hackers, which led the Dutch government to decertify the further use of that system in 2006. That incident prompted two German citizens to bring a lawsuit before the Constitutional Court in Karlsruhe, where they eventually succeeded.[15] So far, the last deployment of voting machines was on the occasion of the *Landtagswahlen* 2008 in Hesse.

It is, however, important to note that the federal electoral law of Germany (*Bundeswahlgesetz*) explicitly permits the use of voting machines (§ 35 *Stimmabgabe mit Wahlgeräten*). But *"the Federal Voting Machines Ordinance* ***(Bundeswahlgeräteverordnung)*** *is declared as unconstitutional because it does not ensure that only such voting machines are permitted and used which meet the constitutional requirements of the principle of the public nature of elections"* [16] – in the words of the citation from the Constitutional Court[17]. The use of electronic voting machines in future German elections thus depends on whether transparent control mechanisms for ensuring an accurate vote count can be provided or not.

Electoral counting in turn is currently allowed and deployed (since 2002) in some municipalities of the three *Bundesländer Hesse, Baden-Wurttemberg* and *Bavaria*. In contrast to the voting machines, these counting systems are not subject to any admission procedure. In *Hessen*, §48a(8) of the municipal election ruling permits the automated (electronic) counting of votes, although the respective municipality law (*Kommunalwahlgesetz*) does not provide a corresponding authorisation. In Bavaria it is §82 of the *Wahlordnung für die Gemeinde- und die Landkreiswahlen* that provides a legal basis for electronic counting, while in *Baden-Wurttemberg* it is §37 of the *Kommunalwahlordnung* that assures electronic counting. In practice, the electronic counting of votes works as follows: the ballots are combined with a bar code next to the candidates' names. The bar code is subsequently scanned with a respective bar code gun (or pen[18]). The votes are then transferred to a connected computer, on which the counting process is administered. On the occasion of the local elections in 2008 in Bavaria, roughly a thousand municipalities used the above-mentioned system to electronically count the votes.

[14] The Technical University of Darmstadt is developing a system ("Easy Vote") compatible with the requirements of the Basic Law.

[15] The 2005 elections result, however, was deemed valid by the court since there has not been any evidence of fraud or systemic errors.

[16] The latter principle is prescribed by the articles 38 and 20 of the Basic Law (*Grundgesetz*).

[17] Press release of the Federal Constitutional Court regarding the Judgment of 3 March 2009: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2009/bvg09-019.html

[18] Following the 2005 national pilot study, the Senate of Hamburg decided to use a digital pen voting system for the upcoming local elections in 2008 (*Bürgerschaftswahl*). However, these plans have ultimately been cancelled due to concerns over the accuracy of voting tallies.

Increasingly, voting technologies should not only be understood in a narrow sense related to the act of voting or of counting the vote in an election or referendum. They could also be discussed in relation to e-petitions as well as crowd-sourcing legislation platforms, such as the ones in Finland and Latvia that integrate online endorsing mechanisms (Serdült *et al.*, 2016). In this sense, the example of the national, but also sub-national, e-petition websites in Germany are interesting. A petition right is defined in Article 17 of the German Basic Law (*Grundgesetz*) from 1949 and an e-collecting system was introduced in 2005, first as a pilot, allowing for the digital submission and endorsement of a petition. The German e-petition was modelled according to the Scottish system and can be considered to be one of the earliest and most advanced of its kind worldwide.

In Germany, a further distinction should be made between individual and public petitions, the latter can be submitted with the appropriate form on the Parliament's official website. With 50,000 signatures within four weeks, the petition can go public and eventually there will be a debate in the petition committee. Citizenship or residency is not required in order to submit or sign a petition. In case the petition is accepted as public, the petitioner is invited to participate in a session and speak in front of the committee.

The current system (see: http://epetitionen.bundestag.de) has been online since September 2012. Since May 2014 there is a secure e-ID option available for holders of the new German identity card. Instead of a petitioner entering personal data, one is temporarily transferred to the provider of the e-ID and would return to the e-petition site once authentication has taken place. The use of this option is, however, not mandatory. Interestingly, there seems to be a top-down diffusion effect of e-petition systems going on to the sub-national level: the City State of Bremen started with public e-petitions in January 2010 and Rheinland-Pfalz, Schleswig-Holstein and Thüringen followed soon thereafter. All other Länder, such as Baden-Wurttemberg or Bavaria, have a simple submission site with an Internet form only.

Switzerland

Switzerland is characterised by two distinctive political institutions that have affected experimentation with new voting technologies such as Internet voting. First, its extremely decentralised system of *federalism* and, second, a tradition of *direct democracy* in which citizens are called to vote very frequently, 3–4 times a year on federal, cantonal and communal issues (Serdült, 2014). The interaction of these two formal institutions played an important role in shaping the approach to experimentation with Internet voting. First, although there is an overarching umbrella legislation on the national level to guarantee political rights, the cantons are within certain boundaries in charge of legislating, implementing and administering elections as well as referendum votes (Driza Maurer, 2013: 16 – 21). They are free to choose whether or not to implement Internet voting.

The introduction of Internet voting in Switzerland is therefore characterised by a piecemeal implementation and diffusion process very typical for its federal political system (Mendez and Serdült, 2014). Although Internet voting is typically only available in a selection of municipalities, it has nevertheless been available for more than a decade on a more or less permanent basis. In addition, an increasing number of cantons is offering the new voting channel to their citizens living abroad (Germann and Serdült, 2014).

Judicial review by the highest Swiss court has so far rejected complaints against Internet voting[19] because it considered the legal basis provided by federal laws and in the cantons to be sufficient and because the plaintiffs were not able to point to technical flaws in the system able to change the final

[19] See for example the Federal Court Decision from 22 July 2014 (1C_136/2014) for a challenge of the vote result or the Federal Court Decision from 23 March 2006 (1P.29/2006) regarding access to the source code of the Internet voting software, available at: www.bger.ch

result of a vote (Driza Maurer, 2013; Hill, 2015).

Whereas the introduction of Internet voting is regulated in a national ordinance[20] and in great detail, several cantons and cities have experimented with e-counting without much control from the national level. The cantons Geneva (since 2001) and Basle-City (since 2015) as well as the cities Bern (2014), Lausanne and several others in the canton of Vaud (2005), Fribourg (2004) and St. Gallen (2008) are using electronic means for vote counting, such as optical scanners, based on cantonal and municipal legislation only. They must, however, get approval from the Swiss Government.[21]

For the counting with precision scales[22] and ballot counting machines[23], as they are used in banks to count paper money, the votes are first separated and sorted by hand and only thereafter they are counted by the machines. For optical scanners, the degree of technical complexity is higher because it is actually a software recognising the will of the voter. So far, the Federal Chancellery – as the national electoral management body – has only used very soft instruments in order to achieve a certain harmonisation of e-counting among the cantons in the form of a handout, in 2003, regarding the use of precision scales and eventually an additional one coming out in 2016. The imbalance regarding the (lack of) regulation for e-counting technology at national level in comparison to the detailed prescriptions for Internet voting is currently under review.

With three to four referendum dates a year, the Swiss electorate is called to vote on all three state levels more often than in any other polity. For many of these votes a prior collection of signatures is necessary. This is a tedious task which is sometimes outsourced to semi-professional signature collectors. Paying citizens for signing up for a certain cause is however forbidden by law.[24] It would therefore seem obvious to develop a system of e-collecting for the direct democratic instruments requiring a certain number of signatures. Such a system does not exist yet (Serdült *et al.*, 2016) and is not foreseen as a priority in the national e-government strategy paper of the Swiss government "Digital Switzerland"[25]. In the absence of an official e-collecting portal it is not surprising to see "wild", semi-automatic signature collecting portals appearing such as the one set up by middle-left political circles called www.wecollect.ch. This not-for-profit online platform supports initiative committees with an online solution allowing to fill in a pdf form which, however, still has to be signed and sent in by snail mail in the end of the process for verification.

United Kingdom

Electoral law in the United Kingdom is not enshrined in a single legal act; instead there is a large volume of both primary and secondary legislation regulating elections (separately) in England, Scotland, Wales and Northern Ireland. Overall, the law tends to lack detailed provisions on how elections

[20] All requirements and the whole legal basis are available on the website of the Federal Chancellery in German, French, Italian and also in English: https://www.bk.admin.ch/themen/pore/evoting/07979/index.html?lang=en, accessed on 3 March 2016.

[21] See Federal Act on Political Rights, Art. 84: Use of technical aids:
"1. The Federal Council may authorise cantonal governments to enact provisions that derogate from this Act for the purposes of ascertaining the results of elections and popular votes by using technical aids.
2. Election and popular vote procedures that use technical aids shall require the approval of the Federal Council." (See link above for the source.)

[22] See for example the municipality of Maur in the Canton of Zürich: http://ch.mt.com/ch/en/home/supportive_content/know_how/po/service/weighing_votes.html

[23] See for example in the ordinance related to the Law on Political Rights in the Canton of Argovia, in paragraph 30 (1): *"For vote counting in elections and referendums the use of technical or electronic aids is permitted, provided these procedures are reliable and approved by the State Chancellery"* [131.111 Verordnung zum Gesetz über die politischen Rechte (VGPR), 25 November 1992, in force since 1 January 1993 (https://gesetzessammlungen.ag.ch/frontend/versions/1622, accessed 6 June 2016)].

[24] On campaign regulation regarding financing and media, see Serdült, 2010.

[25] http://www.bakom.admin.ch/themen/infosociety/index.html?lang=en, accessed on 6 June 2016.

are to be conducted, and the way to conduct certain procedures is left to the discretion of the returning officer for the constituency. The use of specific technologies in the conduct of elections is not specified in the law. However, the 2000 Representation of the People Act allowed local authorities in England or Wales to submit proposals to the Secretary of State to carry out an electoral pilot scheme. Such pilot schemes can involve changes to how voting at local elections (district, county and borough council level) can take place and how votes cast are counted. The 2002 Scottish Local Government (Elections) Act granted permission for similar pilot schemes for local government elections in Scotland. Both acts allowed voting to take place in other places than the polling stations. The 2002 Scottish Local Government (Elections) Act allowed pilot schemes to alter the method used to cast votes. This was further reflected in the 2004 Local Governance (Scotland) Act, which made provision for the election of councillors by Single Transferable Vote (STV) in Scottish local elections.

The first trials to be held in the UK were carried out in the local elections of 2000. Electronic vote counting was used in the Broxbourne Borough Council and Three Rivers District Council (both in Hertfordshire). In the case of Broxbourne, a specific bar code was associated with each candidate on the ballot paper and a bar code reader was used to swipe the bar code next to the name of the candidate that the voter had selected. In Three Rivers, optical scanning machines were used to read the ballot papers.

Electronic counting was introduced for London mayoral elections and the simultaneous elections to the Assembly for London in 2000. It was considered expedient to do so as the voting and counting procedures were quite complex; each voter was asked to cast three ballots: one for mayor (ranked in order of preference), one to elect a constituency Assembly member and one to elect an additional member on a London-wide basis – the result of the Supplementary Vote system of proportional representation that was used to elect the London Assembly. Optical scanners to scan the ballot papers were provided by the company Data & Research Services (DRS), which won the contract to provide the technology for the electronic vote. Electronic counting was used again in the 2004, 2008, 2012 and 2016 Assembly and mayoral elections and the technology was once again provided by DRS.

2000 was also the year in which electronic voting was first used in the United Kingdom. Five pilots were carried out in Bury Metropolitan Borough Council, Salford City Council and Stratford-upon-Avon District Council, in which voters were able to cast votes using a touch screen voting machine installed at polling stations. The votes were also subsequently counted electronically.

Significantly, more pilot schemes were rolled out in local elections in 2002 and 2003. In 2002, fifteen local authorities used electronic counting mechanisms and eight of these used various electronic and remote voting procedures as well. Electronic counting either occurred automatically, as a result of electronic voting, when ballot papers were keyed into electronic scanners, or a semi-automated counting method was used whereby an electronic wand was passed over ballot papers[26]. In total, nine local authorities used some form of electronic or remote voting: five[27] used remote online voting (for example, from a personal computer), seven[28] used electronic voting via touch screen kiosks in the polling station or elsewhere, while two[29] allowed voting by SMS text messaging.[30] In 2003, seventeen pilots also introduced a number of forms of electronic voting, including Internet voting, voting via touch screen kiosks and voting by SMS text messaging, while three

[26] In Broxbourne and Liverpool.

[27] Two wards in Liverpool City Council, three wards in Sheffield City Council, two wards in St. Albans City and District Council, two wards in Crewe and Nantwich Borough Council and nineteen wards in Swindon Borough Council.

[28] Sheffield, St. Albans, Crewe and Nantwich, as well as the London Borough of Newham, Stratford-upon-Avon, Bolton Metropolitan Council and Chester City Council.

[29] Liverpool and Sheffield.

[30] See The Electoral Commission (2002). *Modernising Elections: A Strategic Evaluation of the 2002 Electoral Pilot Schemes*, available at: http://tinyurl.com/hhjxhtx, accessed on 2 March 2016.

councils introduced special schemes for electronic counting.

From 2004, the pace of innovation began to slow down and in 2006 just two local authorities trialled the electronic counting of ballot papers. The final round of pilots occurred in the 2007 local elections, five local authorities pioneered Internet voting schemes[31], while six used electronic counting of ballot papers[32]. In 2008 the Electoral Commission (EC) recommended that further pilots would be unnecessary and the introduction of Internet voting and counting more widely should only be introduced in combination with a more far-reaching plan for modernising elections, including a system of individual voter registration (introduced only in 2014), and procedures implemented to ensure that e-voting solutions were secure and transparent. The EC described the e-voting trials as *"broadly successful"* insofar as it made voting easier, but identified a number of problems involving accessibility, public understanding of the pre-registration process and (occasionally) technical issues. The EC rated electronic counting more negatively, pointing to significant technical problems that, on occasions, even made it necessary to abandon the electronic count and revert to traditional counting methods. Even though the government disagreed with the EC report and pledged to continue the schemes, no further such pilot schemes have been held by local authorities.

A rather original method of voting was used in September 2006 in the small Scottish town of Menstrie, Clackmannanshire, for local community council elections. Digital pens were used to record the votes on special digital paper. There is no evidence, however, that the trial was repeated.[33]

In *Scotland*, STV for local elections was introduced in 2007 according to the provisions of the 2004 Local Governance (Scotland) Act. Because the counting process for STV is complex and arduous, the Scottish government decided that the traditional manual counting of ballot papers should be replaced by an electronic vote count for both the local and Holyrood (Scottish parliamentary) elections, which were held simultaneously, on the 3rd of May 2007. The count took place in 32 counting stations across Scotland and electronic scanning machines were used. A number of problems were identified with the procedure, including a database malfunction within the electronic counting system in some of the count stations, and a disproportionate number of ballots were rejected. In subsequent elections Holyrood and local government elections were held separately and electronic counting was abandoned for the Holyrood elections. Electronic counting was used again for the Scottish local elections of 2012, although another company was contacted to implement the system (CGI replaced DRS as the main provider). The 2012 experience was widely hailed as successful and the same company will be used to implement electronic voting for the 2017 local elections.

United States of America

The USA is one of the countries with the oldest traditions and a frequent use of citizen initiated referendums. More than half of the US American states have some degree of direct democracy mechanisms in their constitutions, which in principle could make use of Internet voting[34] and e-collecting for their respective signature gathering procedures triggering a vote. Indeed, some US states, such as California and Oregon, have vibrant systems of direct democracy

[31] Rushmore Borough Council, Sheffield City Council, Shrewsbury and Atcham Borough Council, South Bucks District Council and Swindon Borough Council.

[32] Bedford Borough Council, Breckland District Council, Dover District Council, South Bucks District Council, Stratford-on-Avon District Council & Warwick District Council.

[33] BBC News, *Electronic Voting "World First"* (27 September 2006), available at: http://news.bbc.co.uk/2/hi/uk_news/scotland/tayside_and_central/5385086.stm, accessed on 2 March 2016.

[34] Since the history and legal quarrels in US states on electronic voting machines are well-known and documented, we are highlighting here the less commonly known regulations in the field of e-collecting. Regarding Internet voting, the general tone in the USA is very critical. Besides experiments for primary elections and military personnel overseas, there was not much practice in recent years (Simons and Jones, 2012).

involving citizen initiated referendums. Unlike Switzerland, there is, however, no tradition of direct democracy at the federal level. But, whereas Switzerland has not yet looked into making use of e-collecting, there is noticeable demand for upgrading the signature collecting via more efficient online means in several US states.[35]

All states wanting to use e-collecting systems connected to referendum votes have thus far been blocked by the courts. As is typical of the US, there has been a flurry of legal activity surrounding e-collecting as proponents and opponents have mobilised via the courts. Prominent cases include states such as Utah, California, Tennessee and Nebraska.

Following a Utah Supreme Court ruling on the validity of e-signatures, the Lieutenant Governor issued an interim rule allowing the collection of e-signatures. The interim rule remained in effect for 120 days from 8 July 2010; initiators were required to use an *"electronic packet"* created by the Governor's office and a signee could only sign in a petition circulator's presence. Following that period, state officials were scheduled to work with the Utah Legislature to establish a permanent rule in the state code. Opponents argued that the rule did not allow for the chief purpose of electronic signatures – to facilitate signature gathering by allowing it to be done online – and restricted petitioners. In early 2011 Senate Bill 165 – a measure banning e-collecting – was introduced. The Bill was approved in March by the Utah House of Representatives and enacted into law following approval by the Governor.[36]

In June 2011, the California First District Court of Appeals issued a ruling in *Ni v. Slocum* prohibiting electronic signature collection in California. Verafirma founder Michael Ni filed the suit, challenging San Mateo County's rejection of an electronic signature in favour of Proposition 19 (Regulate, Control and Tax Cannabis Act of 2010). In its decision, the court ruled that the term "affix", as used in California law, implies a physical signature.[37]

Legislative Bill 566 introduced by Nebraska State Senator Paul Schumacher would have allowed proponents to collect signatures online as long as they pay a fee to authorities for operating costs. The Bill died after being referred to government, but another version (Bill 214) was proposed by Mr Schumacher in 2015 to establish e-collecting for initiative and referendum petitions. In April, the Bill was still on hold in the Government, Military and Veteran Affairs Committee, but it has since been abandoned.[38]

In Nashville-Davidson County, Tennessee, a proposal was made for a petition campaign for marijuana decriminalisation with an intention to use e-collecting. County Election Commission said they would not allow electronic signatures. A lawsuit was filed against the Election Commission in January 2014 seeking to require the commission to accept electronic signatures.Ultimately the initiative did not progress to the ballot because the group behind the initiative did not submit any petitions by the deadline on 18 May 2015.

As we can see, legislation has been enacted in some states such as Utah explicitly prohibiting e-collecting, while the court in California clarified that a signature implies a physical signature, i.e., not electronic. In Tennessee, the Election Commission has prohibited e-collecting. These have all been states with instruments of direct democracy. Furthermore, at the state level we found no evidence of e-collecting being made available for petitions in the US, a weaker signature gathering instrument that does not trigger the potential for un-mediated policy change. There is one notable exception, however, at the Federal level. Launched by the Obama Administration in 2011, *"We the people"* is an e-petition system that provides a platform for citizens to petition the US administration's

[35] For an overview of the debate in the USA, see: https://ballotpedia.org/Electronic_petition_signature

[36] http://le.utah.gov/xcode/Title20A/Chapter1/20A-1-S306.html?v=C20A-1-S306_2014040320140513, accessed on 3 March 2016.

[37] http://www.leagle.com/decision/In%20CACO%2020110630026/NI%20v.%20SLOCUM, accessed on 3 March 2016.

[38] https://ballotpedia.org/Nashville-Davidson_County_Metro_Marijuana_Decriminalization_Initiative_(August_2015), accessed on 3 March 2016.

policy experts (see https://petitions.whitehouse.gov). The availability of such an instrument, with a fully-fledged e-collecting system at the federal level, contrasts vividly with dynamics at the state level, where no e-collecting is possible for petitions. The big difference is the lower degree of consequentiality on the national level (Serdült *et al*., 2016).

3. Conclusions

This short overview across some of the most prominent federated polities confirmed that there is a vibrant, ongoing but at the same time very scattered experience with NVTs in all of our cases. Comparing the different NVTs we looked at (electronic or Internet voting, e-counting, e-collecting to some degree), we are not able to detect a clear emerging pattern. The way NVTs are regulated is far from being harmonised and can be founded on an explicit legal basis or just as well the lack thereof. Explanatory factors such as the degree of federalism, the legal system as well as political culture certainly play a role, but we also observe a very much erratic dynamic over time. Experimentation can come to a sudden halt by technical failures or the decision of a court or ministry.

NVTs seem to be rather sticky in the sense of a path dependency. Early adopters of electronic voting machines have either fully or partially abandoned their use (Belgium, Germany, UK) or continued, but not made any serious attempts to make a transition to the Internet age. Constituencies with current Internet voting trials are usually not early adopters and take a very piecemeal trial and error approach to introducing this new voting channel.

Within a country only a handful of municipalities or regions typically take the lead (Australia, Canada, Switzerland), be it because of a certain familiarity with remote voting such as in Switzerland, where postal voting is generalised and very popular, be it because of rather pragmatic concerns in constituencies, where the distance to the poll can be very long, such as in Australia and Canada, or be it because of political leaders wanting to be at the forefront of technical development seeking a positive image. Except for Austria, all our selected countries show a long-standing and rather expanding experimentation with the use of e-counting technologies. Whereas e-collecting systems do not seem to make any inroads into polities with strong, binding elements of direct political participation in the forms of referendums. A certain dynamism can be observed by a number of parliaments opening up with the help of e-petitions including more or less elaborate systems of electronic signature collection.

Whether the further de-materialisation of the vote will continue and lead to an alienation of the voter or is even to be expected by a younger generation entering political maturity is still an open question.

About the authors:

Uwe SERDÜLT is vice-director at the Centre for Research on Direct Democracy (c2d) and works there as a principle investigator and lecturer. He studied History, Political Science and Computer Science at the Universities of Zürich and Geneva. He wrote his doctoral thesis in the field of comparative public policy at the Institute of Political Science, University of Zürich. He is principle investigator for a social scientific research project on Swiss Internet voting at the Centre for Democracy Studies Aarau (ZDA) at the University of Zürich, Switzerland. Mr. Serdült is publishing in the fields of direct democracy as well as e-democracy. Among his most recent publications, there are:

− Serdült, U. (2014). Referendums in Switzerland, in Qvortrup, M. (ed.). *Referendums Around the World: The Continued Growth of Direct Democracy*. Basingstoke, Palgrave Macmillan, p. 65 – 121.

− Serdült, U. (2015). A dormant institution – history, legal norms and practice of the recall in Switzerland, *Representation – Journal of Representative Democracy*, 51 (2), p. 161 – 172.

− Serdült, U. and Welp, Y. (2012). Direct Democracy Upside Down, *Taiwan Journal of Democracy* 8 (1), p. 69 – 92.

− Serdült, U., Germann, M., Mendez, F., Portenier, A. and Wellig, Ch. (2015). Fifteen Years of Internet Voting in Switzerland: History, Governance and Use, *IEEE Xplore* CFP1527Y-PRT, p. 126 – 132.

E-mail: uwe.serdult@zda.uzh.ch

Michele McARDLE joined the Centre for Democracy Studies Aarau (ZDA) at the University of Zürich, Switzerland, in June 2015 as an assistant researcher. Michele McArdle studies political science at the University of Zürich and is currently writing his Master thesis on dominant parties at sub-national level.

E-mail: mcardle.michele@hotmail.com

Thomas MILIC is a researcher at the Centre for Democracy Studies Aarau (ZDA) at the University of Zürich, Switzerland. He holds a PhD degree in Political Science from the University of Zürich. He has done empirical research on voting behaviour in Switzerland and recently published a book on that topic. Among his most recent publications there are:

− Milic, T. (2012). Correct Voting in Direct Legislation, *Swiss Political Science Review* 18 (4): p. 399 – 427.

− Milic, T., Rousselot, B. and Vatter, A. (2014). *Handbuch Abstimmungsforschung*. Zürich: NZZ Libro.

− Milic, T. (2015). For They Knew What They Did: What Swiss Voters Did (Not) Know About The Mass Immigration Initiative, *Swiss Political Science Review* 21 (1): p. 48 – 62.

E-mail: thomas.milic@zda.uzh.ch

Jonathan WHEATLEY is a senior research fellow at the Centre for Democracy Studies Aarau (ZDA) at the University of Zürich, Switzerland. He holds a PhD degree in Social and Political Sciences from the European University Institute in Florence. Subsequently, he was a Research Fellow at the Osteuropa Institut, Free University Berlin. He is now Regional Director at the Centre for Democracy in Aarau (Switzerland) with responsibilities for the Commonwealth of Independent States and the Western Balkans region. His research interests include political parties and party systems, regime transition and the role of the Internet in democracy. Among his most recent publications there are:

− Wheatley, J., Carman, C. and Mendez, F. (2014). The dimensionality of the Scottish political space: Results from an experiment on the 2011 Holyrood elections. *Party Politics*, 20(6): p. 864 – 878.

− Wheatley, J. (2015). Restructuring the policy space in England: The end of the Left–Right paradigm? *British Politics*, 10(3): p. 268 – 285.

− Wheatley, J. (2015). Identifying Latent Policy Dimensions from Public Opinion Data: An Inductive Approach. *Journal of Elections*, *Public Opinion and Parties*, 25(2): p. 215 – 233.

E-mail: jonathan.wheatley@zda.uzh.ch

References:

- Achour, R.B. (2010). *Etat de la Question: Quel avenir pour le vote électronique en Belgique?* Available at: http://tinyurl.com/zelbe2j (accessed on 14 May 2016).
- ACT Electoral Commission (2015). *Electronic voting and counting*. Available at: http://tinyurl.com/bua9u4y (accessed on 14 May 2016).
- Australian Electoral Commission (2010). *Electronic voting and electronic counting of votes*. Available at: http://www.aec.gov.au/voting/report.htm#evotecounting (accessed on 14 May 2016).
- BM.I – Wahlrecht (2016). Available at: http://www.bmi.gv.at/cms/BMI_wahlen/wahlrecht/start.aspx (accessed on 14 May 2016).
- Driza Maurer, A. (2013). Voting and Federalism: The Swiss Case, *Revista General de Derecho Público Comparado*, 13, p. 1 – 33.
- Driza Maurer, A. and Barrat, J. (eds.) (2015). *E-voting case law: A comparative analysis*. United Kingdom: Ashgate Publishing.
- Elections Canada (2014). *Technology and the voting process*. Available at: http://www.elections.ca/content.aspx?section=res&dir=rec/tech/tec&document=p5&lang=e (accessed on 14 May 2016).

- Germann, M. and Serdült, V. (2014). Internet Voting for Expatriates: the Swiss Case, *JeDEM-eJournal of Democracy&Open Government* 6(2), p. 197–215.
- Goby, B. and Weichsel, H. (2012). Das E-Voting-Erkenntnis des VfGH: Gesetzwidrige Ausgestaltung der ÖH-Wahlordnung, *Zeitschrift für Hochschulrecht, Hochschulmanagement und Hochschulpolitik: zfhr*, 11(3), p. 118 – 125. doi: 10.1007/s00741-012-0051-2.
- Goodman, N. and Pammett, J. (2014). The patchwork of Internet voting in Canada, *2014 6th International Conference on Electronic Voting: Verifying the Vote (EVOTE)*, Tallinn: TUT Press, p. 13 – 18. doi: 10.1109/evote.2014.7001134.
- Goos, K., Beckert, B. and Lindner, R. (2016). Electronic, Internet-Based Voting, in Lindner, R., Aichholzer, G., and Hennen, L. (eds.). *Electronic Democracy in Europe: Prospects and Challenges of E-Publics, E-Participation and E-Voting*. Cham: Springer, p. 135 – 184.
- Hall, T. (2015). Internet Voting: The State of the Debate, in Coleman, S. and Freelon, D. (eds.). *Handbook of Digital Politics*. Cheltenham UK: Edward Elgar, p.103 – 117.
- Hill, R. (2015). Challenging an e-voting system in court, in Haenni, R., Koenig R.E., and Widström, D. (eds.). E-Voting and Identity: 5th International Conference, VoteID 2015, Bern, Switzerland, September 2 – 4, 2015, Proceedings. *Lecture Notes in Computer Science 9269*. Cham: Springer Science + Business Media, p. 161 – 171.
- Krimmer, R., Ehringfeld, A., and Traxl, M. (2010). The Use of E-Voting in the Austrian Federation of Students Elections 2009, in Krimmer, R. and Grimm, R. (eds.). *Electronic Voting 2010*, LNI P-167. Bonn: GI-Edition, p. 33 – 44.
- Mendez, F. and Serdült, U. (2014). From initial idea to piecemeal implementation, in Zissis, D. and Lekkas, D. (eds.). *Design, Development, and Use of Secure Electronic Voting Systems*. Hershey PA: IGI Global, p. 115 – 127.
- Pammett, J. and Goodman, N. (2013). *Consultation and Evaluation Practices in the Implementation of Internet Voting in Canada and Europe*. Available at: www.elections.ca/res/rec/tech/consult/pdf/consult_e.pdf (accessed on 14 May 2016).
- Poier, K. (2001). Grundrechte und E-Voting, in Österreichische Juristenkommission (ed.). *Grundrechte in der Informationsgesellschaft, Kritik und Fortschritt im Rechtsstaat*. Wien: Neuer Wissenschaftlicher Verlag, p. 102 – 118.
- Prosser, A., Schiessl, K. and Fleischhacker, M. (2008). E-voting: Usability and acceptance of Two-Stage voting procedures, in Wimmer, M.A., Scholl, J., and Ferro, E. (eds.). *Electronic Government*, Lecture Notes in Computer Science 4656. Berlin: Springer Science + Business Media, p. 378 – 387.
- Serdült, U. (2010). Referendum Campaign Regulations in Switzerland, in Gilland Lutz, K. and Hug, S. (eds.). *Financing Referendum Campaigns*. New York: Palgrave/MacMillan, p. 165 – 179.
- Serdült, U. (2014). Referendums in Switzerland, in Qvortrup, M. (ed.). *Referendums Around the World: The Continued Growth of Direct Democracy*. Basingstoke, Palgrave Macmillan, p. 65 – 121.
- Serdült, U., Mendez, F., Harris, M. and Su Seo, H. (2016). Scaling Up Democracy with E-Collection?, in Noella, E. and Peter, P. (eds.). *CeDem 2016 Conference for E-Democracy and Open Government 2015, 18 – 20 May 2016, Danube University Krems, Austria*. Los Alamitos CA: IEEE, p. 25 – 31.
- Simons, B. and Jones, D.W. (2012). Internet voting in the U.S., *Communications of the ACM*, 55(10), p. 68. doi: 10.1145/2347736.2347754.
- Smith, R. (2016). Confidence in paper-based and electronic voting channels: Evidence from Australia, *Australian Journal of Political Science*, 51(1), p. 68 – 85. doi: 10.1080/10361146.2015.1093091.
- Vegas González, C. (2012). The New Belgian E-voting System, in Kripp, M. J. (ed.). *5th International Conference on Electronic voting (EVOTE2012)*, LNI P-205. Bonn: GI-Edition, p. 200 – 213.
- Volkamer, M. (2010). Electronic voting in Germany, in Gutwirth, S., Poullet, Y., and De Hert, P. (eds.). *Data Protection in a Profiled World*. Springer Science + Business Media, p. 177 – 189.

INTERNATIONAL ORGANISATIONS AND NEW VOTING TECHNOLOGIES IN THE ELECTORAL FIELD

Gregor WENDA
Deputy Head of Department of Electoral Affairs
Austrian Federal Ministry of the Interior
Chair of the Council of Europe Ad Hoc Committee of Experts on Electronic Voting (CAHVE)

Abstract:

The rise of information and communication technologies in daily life made policy makers, administrators, and researchers to increasingly discuss the opportunities of new voting technologies since the beginning of the millennium. Academic papers, legal drafts and pilots showed a need for general guidance and commonly accepted standards among democratic states in order to continue the e-voting path in a credible and safe way. The Council of Europe eventually passed a Recommendation on legal, operational, and technical standards for e-voting in 2004. Since then, additional international organisations and institutions have developed guidelines and handbooks on the implementation, use, and observation of NVT. In 2015, the Council of Europe decided to formerly update its e-voting recommendation and therefore continues its leading standard-setting role in this field.

Keywords: *e-voting, i-voting, Internet voting, ICT, Council of Europe, OSCE, ODIHR, EU, standards, Recommendation, Rec(2004)11, CAHVE*

Résumé :

Depuis le début du millénaire, l'essor des technologies de l'information et des communications dans la vie quotidienne a engendré de plus en plus de discussions concernant les opportunités offertes par les nouvelles technologies de vote parmi les facteurs de décision politique, les administrateurs et les chercheurs. Les travaux académiques, les projets d'actes normatifs et les projets pilotes ont montré le besoin d'orientations générales et de normes communément acceptées au sein des Etats démocratiques afin de poursuivre la démarche sur le vote électronique, de façon crédible et sûre. Enfin, en 2004, le Conseil de l'Europe a adopté une recommandation concernant les normes juridiques, opérationnelles et techniques relatives au vote électronique. Depuis lors, d'autres organisations et institutions internationales ont élaboré leurs propres lignes directrices et des manuels sur la mise en œuvre, l'utilisation et le respect des NTV. En 2015, le Conseil de l'Europe a décidé de mettre à jour officiellement sa recommandation concernant le vote électronique et, par la suite, il maintient son rôle de leader dans l'établissement des normes dans ce domaine.

Mots-clés : *vote électronique, vote par internet, TIC, Conseil de l'Europe, OSCE, BIDDH, UE, standards, recommandation, Rec.(2004)11, CAHVE*

Abstract:

Încă de la începutul mileniului, progresul tehnologiei informaţiei şi a comunicaţiilor în viaţa de zi cu zi a determinat din ce în ce mai multe discuţii referitoare la oportunităţile oferite de noile tehnologii de votare între factorii de decizie politică, administratori şi cercetători. Lucrările academice, proiectele de acte normative şi proiectele-pilot au semnalat nevoia unor recomandări şi standarde general acceptate în rândul statelor democratice pentru a continua demersul privind votul electronic, în mod credibil şi sigur. În cele din urmă, în 2004, Consiliul Europei a adoptat o recomandare privind standardele legale, operaţionale şi tehnice pentru votul electronic. Începând din acel moment, alte organizaţii şi instituţii internaţionale şi-au redactat propriile ghiduri şi manuale privind punerea în aplicare, utilizarea şi respectarea NTV. În 2015, Consiliul Europei a decis actualizarea oficială a recomandării sale privind votul electronic şi, prin urmare, îşi menţine rolul de lider în stabilirea standardelor în acest domeniu.

Cuvinte-cheie: *vot electronic, vot prin Internet, TIC, Consiliul Europei, OSCE, ODIHR, UE, standarde, recomandare, Rec. (2004)11, CAHVE*

1. Introduction[1]

The rise of information and communication technologies (ICT) in daily life made policy makers, administrators, and researchers increasingly discuss the opportunities of new voting technologies (NVT) since the beginning of the millennium. A British opinion paper outlined the motivation for e-voting activities in 2002: *"Citizens rightly expect to be able to vote in a straightforward, accessible, and efficient way, being able to have confidence in the security and integrity of the poll. (...) Governments, therefore, are being faced with requests from their citizens to introduce new technologies in the electoral processes, in particular to make available various forms of e-voting."*[2] While rather simple voting machines had been used in some countries for decades, now was the time for a new generation of modern terminals in polling stations and kiosks, or for voting through remote channels such as telephones and the Internet. In retrospect, these first years appeared rather *"easy going"*.

[1] All Internet links quoted in this article were last accessed on 1 May 2016.

[2] IP 1: Exploratory Workshop on e-voting (1 – 2 July 2002), Proposal for a Council of Europe activity on e-voting standards – document prepared by the United Kingdom authorities (http://www.coe.int/t/dgap/goodgovernance/Activities/E-voting/Work_of_e-voting_committee/03_Background_documents/98IP1(2002)11_en.asp).

"We did it rather than talk about it", was the conclusion of a British representative[3] on the UK's e-voting pilots at an e-Democracy conference in Brussels in 2004. The trust in NVT was surprisingly high and strong hopes and expectations coined the general discussion: e-voting was supposed to increase the overall turnout, attract young voters and those otherwise barred from the polls, and become a more integral part of daily life. The public's interest in politics should be regained. The supposedly high expenses would pay off in the long run. However, Michael Remmert noted that *"modernizing how people vote will not,* per se*, improve democratic participation. Failure to do so, however, is likely to weaken the credibility and legitimacy of democratic institutions"*[4]. Academic papers, legal drafts, and pilots showed that there was a strong need for general guidance and commonly accepted standards among democratic states in order to continue the e-voting path in a credible and safe way.

2. The Council of Europe

Different international institutions and fora – such as the OSCE, the United Nations or the European Union – could have dealt with the new phenomenon of electronic voting, but it was eventually the Council of Europe that started off first: this international organisation headquartered in Strasbourg, France, was founded in 1949 and comprises 47 member states. The Council of Europe's focus is particularly on legal standards, human rights, democratic development, the rule of law, and cultural co-operation.

2.1. Ad Hoc Group of Specialists

A *"multidisciplinary Ad Hoc Group of Specialists on legal, operational and technical standards for e-enabled voting"* was created[5] within the framework of its 2002 – 2004 Integrated Project *"Making democratic institutions work"* (IP 1). Its goal was to craft a Recommendation on e-voting to be submitted to the Council of Ministers. Two subgroups dealing with legal and operational aspects as well as technical ones supported the ad hoc group. 13 formal meetings took place between July 2002 and July 2004; in addition, the two subgroups and individual experts met numerous times to elaborate texts and combine the *"different worlds"* of lawyers and technicians. As there was little to no practical experience in e-voting, various assumptions had to be made. Some technological changes during the forthcoming decade, such as the enormous rise of hand-held devices and the almost universal access to the Internet throughout the day, were barely imaginable in the early 2000s. Both remote e-voting and e-enabled voting at polling places should be covered in the same Recommendation – against the background of a broad variety of different legal and administrative cultures and systems. In March 2004 the European Commission for Democracy through Law (Venice Commission) presented a report on the compatibility of remote voting and electronic voting with the standards of the Council of Europe.[6] The Ad Hoc Group eventually came up with a set of 112 legal, operational and technical standards as well as an explanatory memorandum. The Council of Ministers adopted them in the form of Recommendation Rec(2004)11 on 30 September 2004. The Recommendation outlined some of the reasons for the introduction of e-voting, such as to enable *"voters to cast their votes from a place other than the polling station in their voting district"*; to facilitate *"the casting of the vote by the voter"* and *"the participation in elections and referendums of all those who are entitled to vote, and*

[3] John W. Stephens, BT Government Unit, talking about the case study *Digital Divide cases from Liverpool and Sheffield* at the European Commission's e-Democracy Seminar on 12 and 13 February 2004 in Brussels.

[4] Remmert, M. (2004), Towards European Standards on Electronic Voting, in Prosser, A. Krimmer, R. (eds.). *Electronic Voting in Europe – Technology, Law, Politics and Society*, P-47, Gesellschaft für Informatik, p. 15.

[5] Original ideas for an experts' meeting with at least one lawyer and one technician eventually led to the creation of an ad hoc experts' group.

[6] http://www.venice.coe.int/webforms/documents/CDL-AD%282004%29012.aspx

particularly of citizens residing or staying abroad", to widen *"access to the voting process for voters with disabilities or those having other difficulties in being physically present at a polling station and using the devices available there"*, to increase *"voter turnout by providing additional voting channels"*, to bring *"voting in line with new developments in society and the increasing use of new technologies as a medium for communication and civic engagement in pursuit of democracy"*, to reduce *"over time, the overall cost to the electoral authorities of conducting an election or referendum"*, to deliver *"voting results reliably and more quickly"*, and to provide *"the electorate with a better service, by offering a variety of voting channels"*.[7]

2.2. Recommendation Rec(2004)11

Rec(2004)11, developed by an inter-governmental ad hoc experts' group and adopted by the Council of Ministers, enjoys general support among the member states of the Council of Europe. By nature, a recommendation is not binding, though countries declared their commitment and respect for the set of standards. Rec(2004)11 is not supposed to answer all election-related questions. Instead, it is linked to a number of additional international documents and instruments such as The Universal Declaration on Human Rights, The International Covenant on Civil and Political Rights, The United Nations Convention on the Elimination of All Forms of Racial Discrimination, The United Nations Convention on the Elimination of All Forms of Discrimination against Women, The Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), in particular its Protocol No. 1 (ETS No. 9), The European Charter of Local Self-Government (ETS No. 122), The Convention on Cybercrime (ETS No. 185), The Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (ETS No. 108), The Committee of Ministers Recommendation No. R (99) 5 for the protection of privacy on the Internet, the document of the Copenhagen Meeting of the Conference on The Human Dimension of the OSCE, The Charter of Fundamental Rights of the European Union, as well as The Code of Good Practice in Electoral Matters, adopted by the Council for Democratic Elections of the Council of Europe and the European Commission for Democracy through Law.[8]

Over the years, the Recommendation has become a singular reference in NVT matters and is still the only internationally recognized document regulating e-voting from a legal perspective. The Preamble postulates that *"e-voting shall respect all the principles of democratic elections and referendums"* and *"shall be as reliable and secure as democratic elections and referendums which do not involve the use of electronic means."*[9] Member states were asked to *"consider reviewing their relevant domestic legislation in the light of this Recommendation"*[10] but were not required *"to change their own domestic voting procedures which may exist at the time of the adoption of this Recommendation, and which can be maintained by those member states when e-voting is used, as long as these domestic voting procedures comply with all the principles of democratic elections and referendums"*.[11] Paragraph v. of the Recommendation called for a review after two years *"in order to provide the Council of Europe with a basis for possible further action on e-voting"*. On 23 and 24 November 2006, the first review meeting was held in Strasbourg. It concluded that the Recommendation had become accepted by member states *"as a valid and currently the only internationally agreed benchmark by which to assess and evaluate e-voting systems."*[12] The following review meetings

[7] Rec(2004)11, Preamble.

[8] Rec(2004)11, Preamble. The list of documents will be reviewed, with additional documents to be added, in the course of the ongoing update by CAHVE.

[9] Rec(2004)11, Preamble, Paragraph i.

[10] Rec(2004)11, Preamble, Paragraph iii.

[11] Rec(2004)11, Preamble, Paragraph iv.

[12] For the reports of all Review Meetings and additional material on the Council of Europe's e-voting activities, see: http://www.coe.int/ru/web/electoral-assistance/e-voting

took place on 15 to 17 October 2008 in Madrid, on 16 and 17 November 2010 in Strasbourg, on 11 July 2012 in Lochau near Bregenz (Austria) and on 28 October 2014, again in Lochau near Bregenz.

In 2004, the Council of Europe started the project *"Good governance in the information society"*, which lasted until 2010 and constituted a new forum for dealing with e-enabled voting. Even though the project had no intergovernmental mandate to work on any standards, the biannual review meetings were carried out in this format. The project also followed a broader scope of *"electronic democracy"* (e-democracy)[13] as its overall goal was to provide *"governments and other stakeholders with new instruments and practical tools in this field and to promote the application of existing instruments and of good and innovatory policy practice"*.[14] Two follow-up documents supplementing Rec(2004)11 – the *"Guidelines on certification of e-voting systems"* and the *"Guidelines on transparency of e-enabled elections"* – were elaborated by experts commissioned by the Council of Europe. The presentation of these guidelines, along with an *"E-voting handbook"* about the *"key steps in the implementation of e-enabled elections"* were presented during the third review meeting in Strasbourg on 16 and 17 November 2010. They also constituted the end of the Council of Europe's activities during the project *"Good governance in the information society"*.

2.3. Updating the Recommendation?

The review meetings of 2006, 2008 and 2010 showed that in light of an ever changing world of ICT, new social approaches and practical experiences with e-voting as well as related court decisions in different countries, an update of Rec(2004)11 would become necessary. In parallel, academic discussions about the Recommendation, along with research on new technological solutions, proved to have a strong impact on all further evaluations.[15] The fourth review meeting in Lochau near Bregenz[16], Austria, on 11 July 2012 came to the conclusion that the Recommendation was still precious, but that in light of recent practical experiences, and despite the additional guidelines of 2010, a number of issues could not be dealt with anymore. As a consequence, the representatives of the member states *"agreed to recommend that the 2004 Committee of Ministers' Recommendation (...) should be formally updated"*.[17] They further stated *"that the biennial review meetings were highly useful and should be continued (...)"*.[18] Austria used the opportunity of the Chairmanship of the Committee of Ministers[19] to invite e-voting experts to an informal workshop in Vienna in order to discuss possibilities of a future update. The *"Division of Electoral Assistance and Census"* handled e-voting matters since 2010 and organized the workshop in cooperation with the Austrian Federal Ministry of the Interior on 19 December 2013.[20] The Council of Europe commissioned a report *"on the possible update of the Council of Europe Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting"* to give experts the essential food

[13] The Council of Europe's Ad Hoc Committee on e-democracy (CAHDE) prepared a Recommendation on e-democracy, which was adopted by the Committee of Ministers as Rec(2009)1 in February 2009.

[14] See CoE website: http://www.coe.int/t/dgap/democracy/Activities/GGIS/Default_en.asp

[15] For a concise overview of the academic discussions see Ardita Driza Maurer's report "On the possible update of the Council of Europe Recommendation Rec(2004)11 on legal, operational and technical standards", dated 29 November 2013, p. 15 et seq (accessible at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent? documentId= 090000168059be23).

[16] The precise location was Castle Hofen in Lochau near Bregenz, but all international documents bear the more widely known city name of Bregenz.

[17] Report Fourth Review Meeting, 4 June 2013, DGII/Inf(2013)06, p. 5.

[18] Report Fourth Review Meeting, 4 June 2013, DGII/Inf(2013)06, p. 6.

[19] Austria assumed the chairmanship of the Committee of Ministers of the Council of Europe on 14 November 2013. The formal end was the annual meeting of the Committee of Ministers on 6 May 2014.

[20] Approximately 50 persons from about a dozen countries participated, among them almost all states actively involved in e-voting (among them being Belgium, Estonia, Norway, Russia, and Switzerland).

for consideration.[21] Based on the report[22], the experts' workshop demanded an update *"taking into account the issues listed in this report and the high probability that, in the medium and long term, the number of electoral systems will comprise some electronic features, there are a number of strong and valid reasons for updating Recommendation Rec(2004)11"* and concluded that *"it must be ensured that the necessary legal and technical expertise is available during the drafting process and that it must be open, with detailed mechanisms to be determined, to the full range of stakeholders, e.g., civil society actors, e-voting systems providers and possibly non-member states"*.[23]

The exact terms of the update were left to the Council of Ministers. The Ministers' Deputies/Rapporteur Group on Democracy (GR-DEM) debated the report on 20 May 2014, but came to no final decision about the future of e-voting or whether another review meeting could be held. Due to a *"non-paper"*[24] for information *"in view of the meeting of the GR-DEM on 17 June 2014"*, in which several countries[25] called for another review meeting, the Council of Europe Secretariat eventually supported the proposal. On 23 June 2014, official invitations for the 5th meeting *"to review developments in the field of e-voting since the adoption of Recommendation Rec(2004)11"* were sent out. The Review Meeting was organized on 28 October 2014 in Lochau/Bregenz with the Austrian Federal Ministry of the Interior as the co-host. 15 countries were present, additional countries submitted written reports. The meeting emphasized that an *"(...) update of CM Rec(2004)11 should be undertaken in a concentrated way by a special ad hoc group of experts, as soon as possible, but at the latest in the intergovernmental structure within the next Programme and Budget 2016 – 17"*. The said *"group of experts should be composed of government representatives from election management bodies supported, as necessary, by other relevant stakeholders such as academia, industry, and civil society"*.

2.4. CAHVE

The Ministers' Deputies/Rapporteur Group on Democracy (GR-DEM) endorsed the conclusions of the 5th Review Meeting in its meeting on 13 January 2015 and agreed that experts of the competent Election Management Bodies in the different member states should lead the update process. Similar to the Ad Hoc Group of 2002 – 2004, work on Rec(2004)11 was not deferred to another existing committee or group, but put in the hands of the very experts in electoral matters.[26] The Secretariat was asked to prepare a draft for the creation of an *"Ad hoc Committee of Experts"* to be placed directly under the Committee of Ministers. In the GR-DEM Meeting on 17 March 2015, a draft of the *"Terms of Reference"* was presented by the Secretariat and unanimously adopted. The Ministers' Deputies approved the Terms of Reference on the 1st of April 2015 without further debate.[27]

Thereby, a new *"Ad hoc Committee of Experts on legal, operational and technical standards for e-voting"* (CAHVE)[28] was

[21] The author was Ardita Driza Maurer, an independent lawyer/consultant and former member of the e-voting team in the Swiss Federal Chancellery (see Driza Maurer, A., *Report on the possible update of the Council of Europe Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting*, 29 November 2013).

[22] For a summary of the whole debate see Report of 25 April 2013, DGII/Inf(2014)06, p. 4 – 6.

[23] Report of 25 April 2013, DGII/Inf(2014)06, p. 5.

[24] For further details regarding the process on the way to the 5th Review Meeting, see Stein, R., Wenda, G., The Council of Europe and E-Voting: History and Impact of Rec(2004)11 in: Krimmer, R., Volkamer, M., *Proceedings of Electronic Voting 2014 (EVOTE2014)*, TUT Press, Tallinn, p. 106 – 109.

[25] Austria, along with Belgium, Estonia, Hungary, Latvia, Poland and Switzerland.

[26] Similar to 2002 – 2004, e-voting was not regarded as part of e-governance, but as an entirely separate area. IP1 differentiated between two focus points: IP1-S-EE (E-enabled Voting) and IP1-S-EG (E-Governance).

[27] On 25 November 2015 the terms of reference, originally only applicable to 2015, were extended to the end of 2016 [CM(2015)131 add.].

[28] The acronym CAHVE is deriving from the French *"*Comité ad hoc d'experts sur les normes juridiques, opérationnelles et techniques relatives au vote électronique*"*.

created. The Secretariat invited countries on the 13th of April 2015 to nominate experts to the committee. CAHVE's goal is to finalize a *"draft Recommendation updating Recommendation Rec(2004)11 of the Committee of Ministers to member States on legal, operational and technical standards for e-voting"* as well as the *"explanatory memorandum to the updated Recommendation"*. Members are *"representatives of highest possible rank from election management bodies with direct experience or specialized knowledge on e-voting"* (nominated by the member states). Each state has one voting right. Other participants without the right to vote include the Parliamentary Assembly, Congress of Local and Regional Authorities of the Council of Europe, ECHR, Commissioner for Human Rights of the Council of Europe, Conference of INGOs enjoying participatory status with the Council of Europe, European Committee on Democracy and Governance (CDDG), European Committee on Legal Co-operation (CDCJ), Steering Committee on the Media and Information Society (CDMSI), Ad hoc Committee of Experts on the Rights of Persons with Disabilities (CAHDPH), European Commission for Democracy through Law (Venice Commission); European Union, Observer States to the Council of Europe, OSCE Office for Democratic Institutions and Human Rights (ODIHR), Organization of American States (OAS), European Commission/UNDP Joint Task Force on Elections, Association of European Election Officials (ACEEEO), International Institute for Democracy and Electoral Assistance (IDEA). Additional ICT experts, civil society, other states and organisations could also be invited upon request.

In contrast to 2002 – 2004, where two subgroups were formed, 13 physical plenary meetings were held and considerable resources were available, the time frame and infrastructure for CAHVE are on a smaller scale. The draft is prepared with the help of a *"*Legal expert*"*. Ardita Driza Maurer, who had prepared the first assessments for the Vienna meeting in 2013 and the 5th Review Meeting in 2014, was asked by the Secretariat to continue her work.[29] With the input of this core group, the Secretariat prepared a questionnaire, which was disseminated on the 22nd of June 2015. Member states had to answer eight questions regarding the future of the Recommendation (i.e., the definition and scope of e-voting, the role of EMBs, risk management and assessment, structure of standards, wishes and hopes regarding an update).

The first meeting of CAHVE took place on 28 and 29 October 2015 in Strasbourg. Approximately 50 participants from 25 countries, organizations, institutions, and academia were present. Upon a proposal from Estonia, Austria (represented by the author) was elected as Chair and Sweden's delegate, Kristina Lemon, upon Austria's proposal, was elected Vice-Chair.[30] The meeting discussed the actual approach regarding the forthcoming update of Rec(2004)11. The Lead Expert presented the results of the questionnaire[31] and the Committee took its first decisions:[32] The definition of e-voting should be extended to include all kinds of optical scanners. Provision with a much broader scope should be introduced to remind EMBs of their special responsibilities in e-enabled elections, taking into account the specific features of the electoral administrations in each member state. Awareness on the challenges accompanying the introduction of e-voting should be stressed more strongly; accordingly, the updated Recommendation should set out the difficulties that could be encountered in introducing e-voting. With regard to the actual update, a new multi-

[29] A small core group of additional experts, selected by the Lead Expert in accordance with the Secretariat, also contributed to the preparatory work and is currently involved in the first drafting process.

[30] Both the author and Kristina Lemon already participated in the Ad Hoc Group of experts drafting Rec(2004)11 and thereby belong to the longest-serving election officials in CAHVE.

[31] 19 national delegations and representatives of three institutions answered the questionnaire.

[32] The details are taken from Report GR-DEM(2016)5, presented at the GR-DEM meeting on 25 February 2016.

layered structure was decided[33]: the main aspects of e-voting, mostly of a legal and more *"timeless"* nature, should be put into a *"core layer"* and constitute the actual Recommendation. Complementary layers could be updated more frequently and include guidelines, regional issues, and best practices. The Committee also considered that the updated Recommendation should formalize a review mechanism comparable to the previous biannual review meetings. Within the framework of this mechanism, complementary layers could be updated more easily. The review mechanism should be based on the experience acquired by member states in the field of e-voting and on the examples of best practice identified in previous review meetings. Pursuant to the CAHVE meeting, the Secretariat commenced the second phase of the update work led by Ardita Driza Maurer. Following the decisions of the Committee, she is currently in the process of finalizing the first draft along with a small core group of experts, the Secretariat, and the Chairs. An informal meeting of the core experts' group took place in Bucharest on the 13th of April 2016, another one is scheduled for June. The draft will be put on a newly created online platform before the summer and CAHVE participants will receive access to review the proposals and contribute to the text of the final version. Another plenary meeting is expected to be held in the autumn of 2016. According to the Terms of Reference, CAHVE will finish its update work until the end of 2016.[34]

2.5. Impact

The Council of Europe's impact in the field of NVT is evident. Its expertise and reputation in electronic voting are internationally renowned. Rec(2004)11 was drawn upon by different countries, courts, and academia when assessing plans or the practical use of e-enabled voting. Norway incorporated most of the Recommendation's standards into the regulatory framework for the country's Internet voting trials in 2011 and 2013.[35] A Belgian study on e-voting, sponsored by Belgian Federal and Regional administrations, referred to Rec(2004)11 and used it as a benchmark for their evaluation efforts.[36] Estonia's[37] Supreme Court considered the Recommendation when dealing with the question of the constitutionality of Internet voting.[38] For the 2008 e-voting pilot in Finland, where some municipalities used voting machines with Internet access in polling stations, Rec(2004)11 was taken into account.[39] Standards of Rec(2004)11 were also considered in Switzerland[40] and Austria[41]. The OSCE handbook on the *"Observation of New Voting Technologies"* (see below) calls Rec(2004)11 *"the only specialized international legal document in this regard"* and mentions it under *"Good*

[33] For further considerations, see Driza Maurer, A., *Update of the Council of Europe Recommendation on Legal, Operational and Technical Standards for E-Voting – A Legal Perspective*, IRIS 2016 Proceedings (2016), p. 295 – 304.

[34] The GR-DEM meeting on 25 February 2016 explicitly invited the Committee to exhaust all resources available (both in terms of time and budget) if needed.

[35] http://www.regjeringen.no/upload/KRD/Kampanjer/valgportal/Regelverk/Regulations_relating_to_trial_internet_voting_2013.pdf

[36] http://www.ibz.rrn.fgov.be/fileadmin/user_upload/Elections/fr/presentation/bevoting-1_gb.pdf

[37] An in-depth presentation of e-voting in Estonia is covered in Solvak, M. and Vassil, K. (2016). *E-Voting in Estonia, Technological Diffusion and Other Developments Over Ten Years (2005 – 2015)*, University of Tartu.

[38] Madise, Ü. and Vinkel, P. (2011). Constitutionality of Remote Internet Voting: The Estonian Perspective, *Juridica International. Iuridicum Foundation*, Vol. 18, p. 4 – 16.

[39] Whitmore K., *Congress of Local and Regional Authorities Information Report on the Electronic Voting in the Finnish Municipal Elections* (https://wcd.coe.int/ViewDoc.jsp?id=1380337&Site=Congress)

[40] Concerning e-voting in Switzerland on the federal level, see: http://www.bk.admin.ch/themen/pore/evoting/

[41] Ehringfeld, A., Naber, L., Grechenig, T., Krimmer, R., Traxl, M., Fischer, G. (2010), *Analysis of Recommendation Rec(2004)11 based on the experiences of specific attacks against the first legally binding implementation of e-voting in Austria*. For additional information on the 2009 use of Internet voting in Austria, see the article on "E-Voting in Austria" in this publication.

Practice Documents" on e-voting.[42] Even in overseas countries such as Canada[43] or the United States[44], elements of the Recommendation were included in different studies and reports.

Recent discussions about new voting channels and e-voting also took place in the Council of Europe's Congress of Local and Regional Authorities[45], within the framework of the 1st Scientific Electoral Experts Debates in Bucharest on the 12th and 13th of April 2016[46], and at the EMB Conference of the Venice Commission in Bucharest on the 14th and 15th of April 2016.[47] The Council of Europe's Internet Governance Strategy for 2016 – 2019, which was adopted by the Council of Ministers on the 30th of March 2016, specifically mentions e-voting as a future topic next to *"future of the Internet and its governance"*, *"citizen participation"*, and *"transparency in democracy"*.[48]

3. Other International Organisations and Stakeholders

3.1. OSCE/ODIHR

The Organisation for Security and Co-operation in Europe (OSCE), an intergovernmental organisation with 57 participating states, maintains the Warsaw-based *"Office for Democratic Institutions and Human Rights"* (ODIHR) as one of its executive structures. ODIHR's areas of work include election observation, the rule of law, promoting tolerance and non-discrimination.[49] The office regularly carries out international election observation missions to assess whether elections respect fundamental freedoms and are characterized by equality, universality, political pluralism, confidence, transparency and accountability; it supports authorities in their efforts to improve electoral processes and to follow up on ODIHR recommendations by reviewing election-related legislation and by providing technical expertise and support.[50] After monitoring "traditional" voting for over a decade, the use of ICT in elections gradually gained importance in the 2000s.

The OSCE Supplementary Human Dimension Meeting, which took place in Vienna from the 21st to the 22nd of April 2005, dealt with *"Challenges of Election Technologies and Procedures"*.[51] The meeting noted that there was a particular *"need for public confidence as a prerequisite for the introduction of new election technologies"*[52] and that *"OSCE participating states should consider both the possible advantages and disadvantages to e-voting"*. As a general recommendation to OSCE, the meeting held that *"(in) order to address emerging challenges of new election technologies, the OSCE should consider the need for developing standards for security and verification of e-voting system."* Besides, the OSCE/ODIHR *"should consider establishing an expert group, within the context of an existing yet unfunded extra-budgetary project established*

[42] OSCE, Handbook for the Observation of New Voting Technologies (2013) 8.

[43] Schwartz, B. and Grice, D. (2013). *Establishing a legal framework for e-voting in Canada* (http://www.elections.ca/res/rec/tech/elfec/pdf/elfec_e.pdf).

[44] U.S. Election Assistance Commission (2011), *A Survey of Internet Voting* (http://www.eac.gov/assets/1/Documents/SIV-FINAL.pdf). For further information on NVT in the U.S., see, for instance, the *U.S. Election Assistance Commission 2005 Voluntary Voting System Guidelines,* which were revised in 2015: http://www.eac.gov/testing_and_certification/voluntary_voting_system_guidelines.aspx

[45] See the report "E-media: game changer for local and regional politicians" (CG/GOV/2015(29)14 final), Co-Rapporteurs: Leo Aadel (Estonia) and Annemieke Traag (Netherlands).

[46] Organized by the Venice Commission in co-operation with the Permanent Electoral Authority of Romania.

[47] 13th EMB Conference on *"New Technologies in Elections – Public Trust and Challenges for Electoral Management Bodies"*: http://www.venice.coe.int/WebForms/pages/default.aspx?p=04_13th_EMB_conference&lang=EN

[48] CM(2016)10–final (https://search.coe.int/cm/ Pages/result_details.aspx?ObjectId=09000016805c1b60).

[49] 2016 Fact Sheet about the OSCE (http://www.osce.org/whatistheosce/factsheet?download=true).

[50] For further information see: http://www.osce.org/odihr/elections

[51] See the online version of the final report: http://www.osce.org/odihr/elections/15996?download=true

[52] Report (footnote 51), p. 1.

for this purpose, to look into e-voting and its correlation to OSCE commitments".[53] Missions[54] to the Netherlands (Parliamentary Elections, 22 November 2006), Kazakhstan (Presidential Elections, 4 December 2005, and Parliamentary Elections, 18 August 2007), Finland (Parliamentary Elections, 18 March 2007), Estonia (Parliamentary Elections, 4 March 2007), or Belgium (Federal Elections, 10 June 2007) repeatedly brought up the question: how to best observe electronic voting[55] which *"poses challenges to the traditional and broadly accepted concepts of transparency and accountability of election processes"*. A 2008 OSCE/ODIHR *"Discussion Paper in Preparation of Guidelines for the Observation of Electronic Voting"*[56] points out that e-voting has become *"the subject of public debate in a number of countries, thereby influencing public perceptions and confidence concerning the security and secrecy of the ballot and the reliability of electronic voting. The obvious challenge of electronic voting, in terms of transparency and accountability, is that it is more difficult to observe."* This is particularly due to the fact that electronically-enabled processes in elections are sometimes not visible or difficult to comprehend without a certain degree of technical knowledge.[57]

In order to ensure that the OSCE principles of the 1990 Copenhagen Document[58] and subsequent OSCE commitments are equally followed when using NVT, ODIHR developed a specific methodology for the observation of e-enabled elections. In 2010, the first Senior Adviser for NVT was appointed[59], and in 2013 the first OSCE/ODIHR Handbook for the Observation of New Voting Technologies was published.[60] Based on the handbook's finding, main elements for e-voting observation missions should include:

– the decision-making process to introduce New Voting Technologies (NVT);
– the legal context;
– the electoral system and NVT;
– political parties and civil society;
– media and NVT;
– procurement and acquisition of NVT;
– the role of the election administration;
– security and secrecy of the vote;
– integrity of results;
– usability, ballot design, voter accessibility and reliability;
– public testing;
– evaluation and certification;
– verification methods (verifiability, auditing of results, paper audit trails, etc.);
– observer's access, documentation and other transparency measures.

While no specific documents, let alone commitments, concerning NVT have been developed by OSCE participating states as yet, ODIHR and the Council of Europe have worked closely in reviewing and assessing guidelines and advice for e-enabled voting. ODIHR's experiences are currently fed into the update of Rec(2004)11 at CAHVE.

[53] Report (footnote 51), p. 8.
[54] All mission reports can be accessed at: http://www.osce.org/odihr/elections
[55] For a general overview, see: Vollan, K., *Observing Electronic Voting*, NORDEM Report 2005 (https://www.jus.uio.no/smr/english/about/programmes/nordem/publications/docs/Observing%20electronic%20voting_Vollan_2005.pdf).
[56] http://www.osce.org/odihr/elections/34725
[57] The challenges of the observation of e-enabled elections were also among the subjects of the 2006 Conference of the Council of Europe and the Estonian Foreign Ministry; see also Breuer, F., *E-Voting: Lessons Learnt and Future Challenges,* Council of Europe Conference Report, Tallinn (Estonia), 27 – 28 October 2006 (http://www.coe.int/t/dgap/goodgovernance/Activities/E-voting/CoE_Studies/Report%20Tallinn%20Conf%20E-voting%2027-28%2010%2006%20E%20fin.asp).
[58] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 June 1990 (http://www.osce.org/de/odihr/elections/14304).
[59] Dr. Robert Krimmer, who is now Professor of E-Governance at the Ragnar Nurkse School of Innovation and Governance (Tallinn University of Technology).
[60] http://www.osce.org/odihr/elections/104939

The 2004 Recommendation already featured some standards dealing with the role of election observers.[61] Guidelines on transparency supplementing the Recommendation were introduced in 2011.[62]

3.2. European Union

Despite rising e-voting activities in a number of member states, NVT did not appear in the focus of the European Union in the early 2000s. E-voting was occasionally dealt with in the wider scope of e-democracy. One of the few international EU events in that period was an *"e-Democracy Seminar"* held by the European Commission on the 12th of February 2004 in Brussels. It provided an overview of e-voting activities and experts' opinions in Europe and gave a certain feeling of the EU's official opinion on NVT. Commissioner Erkki Liikanen, responsible for Enterprise and the Information Society in the European Commission, stated in his opening speech that *"(...) to date electronic, mobile and Internet voting solutions remain expensive compared to traditional methods. This is mostly due to immature technology and on-off infrastructure set-up costs. Nevertheless, as we develop better technological solutions, e-voting may become financially more attractive than traditional methods. This would allow referenda to be more widely used than at present. But we will be faced with many constitutional challenges."*[63]

Similar to the OSCE, it was mainly in the area of election observation that NVT phenomena eventually received broader attention on the EU level. Whereas the first Handbook for European Union Election Observation Missions (EOM) in 2002 did not cover any e-voting issues, the 2nd edition of 2008 contained some pages on the challenge of observing e-enabled elections. The handbook's 3rd edition, which was published in April 2016, further extends the chapter on e-voting and also gives reference to other international documents such as Rec(2004) 11 or the OSCE/ODIHR Handbook.[64] *Inter alia*, the publication mentions *"issues to be considered by the EU EOM"* with regard to e-voting, such as *"Is there broad confidence of the public and electoral stakeholders in e-voting?", "Does the e-voting system used facilitate an election that is in accordance with international obligations, including emerging standards for electronic voting and counting technologies?" or "Has the e-voting system been certified and tested? What are the legal requirements?"*

A joint group of the European Commission and the United Nations has also shown a stronger interest in NVT for some years: The European Commission/UNDP Joint Task Force on Elections[65], which is based in Brussels, regularly participates in experts' meetings and workshops on NVT issues[66] and organized a thematic workshop on *"Information Technology and Elections Management"* from 5 to 9 March 2012 in Mombasa. A comprehensive summary report published after the meeting deals with e-voting in greater detail provides advice for countries when considering the use of NVT and summarizes lessons learned and best practice models.[67] Members of the EC-UNDP Joint Task Force are also invited to participate in CAHVE and contribute to the update of Rec(2004)11. The European Commission already covered electronic voting phenomena in a *"Methodological Guide*

[61] For instance, standard 23 states: *"Any observers, to the extent permitted by law, shall be able to be present to observe and comment on the e-elections, including the establishing of the results."*

[62] GGIS (2010) 5 fin. E (https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168059bdf6).

[63] The speech is accessible at http://europa.eu/rapid/press-release_SPEECH-04-71_fr.htm?locale=en

[64] See: http://eeas.europa.eu/eueom/pdf/handbook_eom_2016_en.pdf

[65] http://ec-undp-electoralassistance.org

[66] Representatives of the Task Force were, for instance, present at the 5th Review Meeting of the Council of Europe regarding Rec(2004)11 on the 28th of October 2014 in Austria.

[67] http://www.ec-undp-electoralassistance.org/index.php?option=com_docman&task=doc_download&gid=437&Itemid=&lang=en

to Electoral Assistance" released in 2006.[68] In addition to introducing the common systems of e-enabled elections, the guide highlighted the main findings from the Council of Europe and international research.

On the 11th of November 2015, the European Parliament adopted a proposal to amend the Act concerning the election of the members of the European Parliament by direct universal suffrage (*"Electoral Act"*) and presented a resolution on the reform of the EU electoral law in order to foster interest and voter turnout in future European Parliament elections.[69] The proposal contains two possible new articles which invite member states to allow *"electronic and Internet voting"* (Article 4a)[70] or *"postal voting"* (Article 4b) for European elections. Despite the non-binding character of the suggested provisions, some member states indicated doubts about such an explicit wording. The proposal is currently further debated by the Council of the European Union and the European Commission. An additional momentum for discussions about online participation was already created by the introduction of European Citizens' Initiatives (ECI) in all EU member states in 2012[71]. ECIs can be supported both on paper and through an online platform.[72] Details are specified in an Implementing Regulation laying down technical specifications for online collection systems.[73]

3.3. International IDEA

The Institute for Democracy and Electoral Assistance (International IDEA) in Sweden has been a long-time stakeholder in researching NVT matters. IDEA calls itself *"the only global intergovernmental organisation with the mission to support sustainable democracy worldwide as its sole mandate."*[74] International IDEA is governed by a Council of 29 member states[75]. The institute particularly aims for *"increased capacity, legitimacy and credibility of democracy, more inclusive participation and accountable representation, and more effective and legitimate democracy cooperation"*.

Representatives of IDEA participated in the ad hoc group drafting Rec(2004)11 and regularly attended subsequent Review Meetings of the Council of Europe and experts' circles of various international institutions to discuss e-voting matters. International IDEA is currently also present in CAHVE in order to update Rec(2004)11. Numerous research projects and publications have covered NVT developments and challenges for more than a decade. The handbook *"Voting from Abroad"*, which was published in 2007, provides a full chapter on *"E-voting and external voting"*[76] dealing with experiences, risks, and opportunities in the area of NVT; the observation of *"external voting"* was also covered for the first time.[77]

[68] EuropeAid/European Commission (2006) Methodological Guide to Electoral Assistance: http://eeas.europa.eu/eueom/pdf/ec-methodological-guide-on-electoral-assistance_en.pdf

[69] European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union [2015/2035(INL)].

[70] Article 4a: *"Member States may introduce electronic and Internet voting for elections to the European Parliament and, where they do so, shall adopt measures sufficient to ensure the reliability of the result, the secrecy of the vote and data protection."*

[71] Regulation (EU) No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, in force since 1 April 2012.

[72] Stein, R., Wenda, G., *Implementing the ECI: Challenges for the Member States*, EDEM 2011, 45 (2011); Stein, R., Wenda, G., Reviewing the Regulation: The Future of European Citizens' Initiatives, in: Balthasar, A., Golob, B., Hansen, H., König, B., Müller-Török, R., Prosser, A. (eds). *Independence Day: Time for a European Internet*, ceeeGovDays 2015 Proceedings (2015).

[73] European Union, (2011a) Commission Implementing Regulation No. 1.179/2011 of 17 November 2011 laying down technical specifications for online collection systems pursuant to Regulation (EU) No. 211/2011 of the European Parliament and of the Council on the citizens' initiative, Official Journal of the European Union, L 301, 2011, available at un-lex.europe.eu.

[74] http://www.idea.int

[75] Australia, Barbados, Belgium, Botswana, Brazil, Canada, Cape Verde, Chile, Costa Rica, Dominican Republic, Finland, Germany, Ghana, India, Indonesia, Mauritius, Mexico, Mongolia, Namibia, The Netherlands, Norway, Peru, Philippines, Portugal, South Africa, Spain, Sweden, Switzerland, Uruguay.

[76] Author: Nadja Braun (http://www.idea.int/publications/voting_from_abroad/upload/chap10.pdf)

[77] http://www.idea.int/publications/voting_from_abroad/upload/chap9.pdf

In December 2011, International IDEA presented the policy paper *"Introducing Electronic Voting: Essential Considerations"*, which summarizes guiding principles, overall goals and recommendations concerning e-voting.[78] Rec(2004)11 is among the essential international documents. In 2012, an additional publication specifically dealt with *"Observing E-enabled Elections: How to Implement Regional Electoral Standards"*.[79] A separate *"Guide on the Use of Open Source Technology in Elections"*[80] came out in the autumn of 2014. It aims at enhancing the understanding of Open Source Technology (OST) among key electoral stakeholders, who might already be familiar with IT solutions in elections, but have not yet dealt with open source software. The guide takes up possible misconceptions about OST and presents positive effects which could *"be instrumental in enhancing the transparency and efficiency of their electoral process"*.

3.4. Organisation of American States

The Organisation of American States (OAS) is considered the *"world's oldest regional organisation"* as its roots date back to the late 19th century. The OAS was officially founded in 1948 in order to achieve among its member states *"an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence"*.[81] All 35 independent states of the Americas belong to OAS; in addition, 69 countries and the EU are observers. Within the Organisation's Secretariat for Strengthening Democracy, a Department of Electoral Cooperation and Observation (DECO) provides support to EMBs in the design, support and analysis of systems and processes that involve ICT. Since a number of countries in North and Latin America use NVT, OAS has accumulated a wealth of practical insight and technology knowledge both by accompanying specific projects, and by observing electoral events. The international OAS seminar *"Comparative Experiences in the Implementation of Electronic Voting"*, which was held in Lima, Peru, on the 22nd and 23rd of October 2013, summarized the *status quo* of NVT in the Organisation's countries.[82] Recent NVT-related projects included the *"Audit and Certification of Electronic Voting Solutions in Peru"* (2011), *"Technical Cooperation in the use of Electronic Voting in the State of Jalisco, Mexico"* (2012), *"Auditing of the Electoral Register and Computer Center in the Dominican Republic"* (2012), *"Electronic Voting in Honduras"* (2013), *"Technical Cooperation in the Transmission of Preliminary Electoral Results* in Uruguay*"* (2014), and the piloting of e-voting abroad in the Costa Rican Presidential Elections (2014).[83]

The OAS has not developed any multilateral standards or guidelines on e-voting, but introduced a specific methodology for the observation of e-enabled elections. The handbook *"Observing the Use of Electoral Technologies: A Manual for OAS Election Observation Missions"*[84] was published by the General Secretariat of the Organisation of American States in 2010 and has become widely used in the Americas. Rec(2004)11 of the Council of Europe and the (then current) OSCE/ODIHR Discussion Paper in Preparation of Guidelines for the Observation of Electronic Voting, dated 2008, are also mentioned among the relevant international documents.

4. Additional Stakeholders and Sources

4.1. International Foundation for Electoral Systems

The International Foundation for Electoral Systems (IFES)[85], headquartered

[78] http://www.idea.int/publications/introducing-electronic-voting/

[79] Author: Jordi Barrat: http://www.idea.int/democracy-dialog/ upload/Observing-e-enabled-elections-how-to-implement-regional-electoral-standards.pdf

[80] http://www.idea.int/publications/open-source-technology- in-elections/

[81] http://www.oas.org/en/about/who_we_are.asp

[82] http://www.oas.org/es/sap/deco/seminarios/peru/

[83] For further details on the projects see: http://www.oas.org/en/spa/deco/TecELECTORAL.asp

[84] http://www.oas.org/es/sap/docs/Technology%20English-FINAL-4-27-10.pdf

[85] http://www.ifes.org

in Washington, D.C., aims at supporting citizens' rights to participate in free and fair elections by strengthening electoral systems and building local capacity to deliver sustainable solutions. Since 1987, IFES has worked in over 145 countries. The foundation provides, *inter alia*, technical assistance to election officials and field-based research to improve the electoral cycle. Several IFES publications have earned international recognition and have been drawn upon by election officials and other stakeholders. The 2007 publication *"Challenging the Norms and Standards of Election Administration"* contains a chapter on e-voting, which is mainly meant to help when deciding about a possible implementation of electronic voting systems.[86] As the author Jarrett Blanc points out, it *"specifically addresses direct recording electronic (DRE) voting systems and their implementation in new, fragile, and transitional democracies"*. In 2011, IFES published *"Electronic Voting & Counting Technologies: A Guide to Conducting Feasibility Studies"*.[87] The book proposed clear guidelines for conducting thorough feasibility studies in order to determine whether electronic voting and counting technologies should be adopted in a certain jurisdiction. The author, Ben Goldsmith, noted that *"every country is different and the factors that may push one nation toward an electronic voting or counting technology may not be present for another"* but that *"there are steps all countries should take in assessing whether voting technology is right for them"*. The E-Vote Project in Norway in 2011 led to a total of 7 research papers sponsored by IFES. For the purpose of my report, the paper *"Compliance with International Standards: Norwegian E-Vote Project"*[88] and the paper *"International Experience with E-Voting: Norwegian E-Vote Project"*[89], both published by Jordi Barrat and Ben Goldsmith in June 2012, appear most relevant as they refer to European and global experiences, guidelines, and standards. In December 2013, the comprehensive manual *"Implementing and Overseeing Electronic Voting and Counting Technologies"*[90] was released, which provides insight on key issues related to NVT and sums up the expertise of IFES and the National Democratic Institute (NDI). The publication was supported by the United States Agency for International Development (USAID).

4.2. National Democratic Institute for International Affairs

The National Democratic Institute for International Affairs (NDI), based in Washington, D.C., is a non-profit organisation providing practical assistance to civic and political leaders to advance *"democratic values, practices and institutions"*. Elections play a central role in NDI's portfolio. The institute conducts international election observation missions and was an initiator and co-drafter of the Declaration of Principles for International Election Observation, commemorated on the 27th of October 2005 at the United Nations in New York.[91] Said declaration also refers to NVT as it states in Article 12b that an international election observation mission *"should not be organized"* unless the country holding the election *"(guarantees) unimpeded access of the international election observer mission to all stages of the election process and all election technologies, including electronic technologies and the certification processes for electronic voting and other technologies, without requiring election observation missions to enter into confidentiality or other nondisclosure agreements concerning*

[86] http://www.ifes.org/sites/default/files/1_ifes_challenging_election_norms_and_standards_wp_elvot.pdf

[87] http://www.ifes.org/sites/default/files/electronic_voting_and_counting_tech_goldsmith_0.pdf

[88] https://www.regjeringen.no/globalassets/upload/KRD/Prosjekter/e-valg/evaluering/Topic7_Assessment.pdf

[89] https://www.parliament.uk/documents/speaker/digital-democracy/IFESIVreport.pdf

[90] Lead authors: Ben Goldsmith Holly Ruthauff (http://www.ifes.org/publications/implementing-and-overseeing-electronic-voting-and-counting-technologies)

[91] http://eeas.europa.eu/eueom/pdf/declaration-of-principles_ en.pdf

technologies or election processes, and recognizes that international election observation missions may not certify technologies as acceptable".

Chapter 2 of *"Monitoring Electronic Technologies in Electoral Processes – An NDI Guide for Political Parties and Civic Organisations"*[92] deals with the *"Introduction to Electronic Technologies in Elections"*. It unveils systems in use and presents *"important elements for discussing standards for equipment, technology and procedures on a national level"*. The guide also notes that *"(to) date, the most significant multinational attempt to develop international standards for electronic voting is the «Recommendation of the Council of Europe Rec (2004) 11». This document and the corresponding associated Explanatory Memorandum provide nonbinding recommendations to the member states on how to implement electronic voting."*

4.3. The Carter Center

The Carter Center is a non-governmental organisation founded in 1982 by former U.S. President Jimmy Carter and his wife in partnership with Emory University in Atlanta, Georgia.[93] The Center's mission is *"to advance peace and health worldwide"*. One of its goals is to work *"globally to advance democratic elections and governance consistent with universal human rights"*. In this respect, The Carter Center has monitored over one hundred elections in about 40 countries since 1989. It assists in developing guidelines for election observation and in building consensus on standards for democratic elections. In October 2007, The Carter Center complemented its methodology of election observation by publishing *"Developing a Methodology for Observing Electronic Voting"*.[94] In January 2012, the 2nd edition of *"The Carter Center Handbook on Observing Electronic Voting"*[95] was presented. It provides, *inter alia*, draft guidelines and checklists for observers when dealing with NVT and summarizes *"overarching principles (...) based on the collective experience of international election observation"*. The publication suggests that the *"Council of Europe's 2004 Recommendation on Legal, Operational, and Technical Standards for E-voting may be extrapolated to provide examples of international good practice in settings outside the Council of Europe member states"*.[96]

4.4. Other References

Valuable information and guidance regarding NVT is also provided by the **ACE Project**, which is a collaborative effort between nine organizations: IDEA, EISA, Elections Canada, the National Electoral Institute of Mexico (INE), IFES, The Carter Center, UNDP, and the UNEAD. The ACE Electoral Knowledge Network presents online information and advice to EMBs, political parties, academia, and civil society. Among a wide array of services related to elections, a comprehensive part of the ACE website deals with e-voting.[97] The Internet page mentions countries using NVT, summarizes opportunities, risks and challenges of e-voting, describes types of e-voting, provides a historical overview and discusses necessary steps when introducing e-enabled voting, ranging from auditing to voter verification. A section is devoted to *"International Standards & Handbooks on E-Voting"*.

The **Association of European Election Officials** (ACEEEO), based in Budapest, was founded in 1991 and is open to all Electoral Management Bodies and organisations supporting the electoral process.[98] 24 states and two international non-profit organisations are currently represented.

[92] http://www.ndi.org/node/14616
[93] http://www.cartercenter.org
[94] http://www.needsproject.eu/files/developing_methodology_ observing_e_voting.pdf
[95] http://www.cartercenter.org/resources/pdfs/peace/democracy/des/Carter-Center-E_voting-Handbook.pdf
[96] *The Carter Center Handbook on Observing Electronic Voting (2012)*, p. 11.
[97] https://aceproject.org/ace-en/focus/e-voting/default
[98] http://www.aceeeo.org/en/about-us

ACEEEO contributed actively to the crafting of Rec(2004)11 and attended Council of Europe and OSCE meetings on NVT matters in subsequent years. While ACEEEO's current focus seems to be on other electoral issues, e-voting is still mentioned as a project among the association's activities.[99]

5. Conclusions

Intergovernmental standard setting in e-voting matters is still not well advanced. The Council of Europe remains the only international organization with a (soft-law) Recommendation [Rec(2004)11] on legal, operational, and technical standards for e-voting as well as additional guidelines supplementing the said recommendation. Rec(2004)11, its explanatory memorandum and the subsequent guidelines have become unique documents to draw upon by other international organizations, individual countries, and courts as they are supported by a common understanding of the Council of Europe's member states. Due to their singular status, the standards are currently brought into the next decade: with the establishment of a new ad hoc e-voting committee subordinated to the Council of Ministers, the Council of Europe decided to continue its lead position in the field of NVT. The creation of this experts' committee, called CAHVE, is a strong signal and the actual update of Rec(2004)11 will be closely watched by the international community. The Recommendation's practical relevance has become particularly obvious with regard to the observation of e-enabled elections. The OSCE/ODIHR worked close with the Council of Europe to develop a new methodology for election observation missions involving NVT and to reflect the intergovernmental standards adopted by the Committee of Ministers. Other institutions, such as the EU or OAS, have also put a strong focus on transparency in e-voting and the role of election observers, though no intergovernmental standards were developed. Besides, a number of institutions, associations, and global projects issued handbooks, checklists, summaries of minimum requirements, and papers of advice in order to contribute to a wide array of global information in the ever changing world of ICT and to assist stakeholders dealing with NVT.

About the author:

Gregor WENDA, born and raised in Vienna, is a graduate of the University of Vienna Law School (Magister iuris) and the University of Salzburg Management Business School (MBA). He started to work in the Austrian Federal Ministry of the Interior in 2003. After two years as a legal specialist in the Department of Legislative Affairs, he transferred to the Department of Electoral Affairs and became Deputy Head of this Department. In 2006, Gregor Wenda was also appointed 3rd Vice-Chair of the Austrian Federal Electoral Board. He was a member of the Austrian delegation in the ad hoc group of experts finalizing the Recommendation of the Council of Europe's Committee of Ministers on legal, operational and technical standards for e-voting Rec(2004)11 in 2004. Since then, he has frequently published articles and given presentations and lectures on the issue of e-enabled voting and has participated in all review meetings regarding Rec(2004)11. In October 2015, he was elected Chair of the newly established Council of Europe Ad Hoc Committee of Experts on Electronic Voting (CAHVE), which is tasked with updating Rec(2004)11 through 2016. Aside from his job in electoral affairs, Gregor Wenda also serves as Advisor to the Director-General for Legal Affairs, particularly in personnel matters. He is a deputy editor-in-chief of the Interior Ministry's official magazine *"Öffentliche Sicherheit"* and one of the editors of the academic journal *"SIAK Journal"*. Gregor Wenda is the author of numerous publications, including articles and commentaries, and holds functions in different associations, *inter alia* as the Secretary General of the Austrian Society of Administrative Sciences.

[99] http://www.aceeeo.org/en/projects/e-voting

References:

- Barrat, J. (2012). *Observing e-enabled elections: how to implement regional electoral standards*. IDEA.
- Barrat, J., Goldsmith, B. (2012). *Compliance with International Standards, Norwegian e-vote project*. IFES.
- Barrat, J., Goldsmith, B., Turner, J. (2012). *International Experience with Internet Voting, Norwegian e-vote project*. IFES.
- Breuer, F., *E-Voting: Lessons Learnt and Future Challenges,* Council of Europe Conference Report, Tallinn (Estonia), 27 – 28 October 2006 (http://www.coe.int/t/dgap/goodgovernance/Activities/ E-voting/CoE_Studies/Report%20Tallinn%20Conf%20E-voting%2027-28%2010%2006%20E%20fin.asp).
- Buchsbaum, T. (2003). E-Voting aus dem Ausland, in: Prosser, A., Krimmer, R. (eds.). *E-Democracy: Technologie, Recht und Politik; Österreichische Computer Gesellschaft (OCG)*. Vienna, p. 133 – 144.
- Driza Maurer, A. (2014). Ten Years Council of Europe Rec(2004)11 – Lessons learned and outlook, in: Krimmer, R., Volkamer, M. *Proceedings of Electronic Voting 2014 (EVOTE2014)*. TUT Press, Tallinn, p. 111 – 117.
- Driza Maurer, A. (2016). *Update of the Council of Europe Recommendation on Legal, Operational and Technical Standards for E-Voting – A Legal Perspective*. IRIS 2016 Proceedings, p. 295 – 304.
- Ehringfeld, A., Naber, L., Grechenig, T., Krimmer, R., Traxl, M., Fischer, G. (2010). Analysis of Recommendation Rec(2004)11 based on the experiences of specific attacks against the first legally binding implementation of e-voting in Austria, in: Krimmer, R., Goldsmith, B. *Electronic Voting & Counting Technologies, A Guide to Conducting Feasibility Studies*. IFES Election Technology Series, 2011.
- Grimm, R. (ed.). *Electronic Voting 2010 (EVOTE10), Lecture Notes in Informatics (LNI)*. Proceedings Series of the Gesellschaft für Informatik (GI), Volume P-167, p. 225 – 237.
- Grabenwarter, G. (2004). Briefwahl und E-Voting: Rechtsvergleichende Aspekte und europarechtliche Rahmenbedingungen. *Journal für Rechtspolitik*, no.70.
- Krimmer, R. (2012). *The Evolution of E-voting: Why Voting Technology is Used and How it Affects Democracy*. Tallinn University of Technology Press.
- Krimmer, R., Volkamer, M. (2006). *Observing Threats to Voter's Anonymity: Election Observation of Electronic Voting*. Working Paper Series on Electronic Voting and Participation, 01.
- Krimmer, R., Triessnig, S., Volkamer, M. (2007). The Development of Remote E-Voting around the World: A Review of Roads and Directions, in: Alkassar, A., Volkamer, M. (eds.). *E-Voting and Identity* (1−15).
- Kucsko-Stadlmayer, G. (2009). E-Voting und Europäischer Grundrechtsstandard, in: Jabloner, C., Lucius, O., Schramm, A. (eds). *Theorie und Praxis des Wirtschatsrechts, Festschrift für René Laurer*.
- Madise, Ü. and Vinkel, P. (2011). Constitutionality of Remote Internet Voting: The Estonian. Perspective, *Juridica International. Iuridicum Foundation*, Vol. 18, p. 4 – 16.
- McGaley, M., Gibson, J.P. (2006). *A Critical Analysis of the Council of Europe Recommendations on e-voting*. EVT'06 Proceedings of the USENIX, Accurate Electronic Voting Technology Workshop.
- Pran, V., Merloe, P. (2008). *Monitoring electronic technologies in electoral processes: an NDI guide for political parties and civic organisations*.

- Remmert, M. (2004). Towards European Standards on Electronic Voting, in: Prosser, A., Krimmer, R. (eds.). *Electronic Voting in Europe – Technology, Law, Politics and Society*. P-47, Gesellschaft für Informatik, p. 13 – 16.
- Remmert, M. (2006). *The Council of Europe and the Information Society*, presentation at the Meeting to Review developments in the field of e-voting since the adoption of Recommendation Rec(2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting, 23 – 24 November 2006.
- Schwartz, B. and Grice, D. (2013). *Establishing a legal framework for e-voting in Canada* (http://www.elections.ca/res/rec/tech/elfec/pdf/elfec_e.pdf).
- Stein, R., Wenda, G. The Council of Europe and e-voting: History and impact of Rec(2004)11 in: Krimmer, R., Volkamer, M. *Proceedings of Electronic Voting 2014 (EVOTE2014)*. TUT Press, Tallinn, p. 105 – 110.
- Solvak, M. and Vassil, K. (2016). *E-Voting in Estonia, Technological Diffusion and Other Developments Over Ten Years (2005 – 2015)*, University of Tartu.
- Stein, R., Wenda, G. *Implementing the ECI: Challenges for the Member States*, EDEM 2011, 45 (2011); Stein, R., Wenda, G., Reviewing the Regulation: The Future of European Citizens' Initiatives, in: Balthasar, A., Golob, B., Hansen, H., König, B., Müller-Török, R., Prosser, A. (eds). *Independence Day: Time for a European Internet*, ceeeGovDays 2015 Proceedings (2015).
- Volkamer, M. (2009). *Evaluation of Electronic Voting, Requirements and Evaluation Procedures to Support Responsible Election Authorities*. Springer-Verlag, Berlin, Heidelberg.
- Volkamer, M., Spycher, O., Dubuis, E. (2011). *Measures to establish trust in Internet voting,* in: ICEGOV. ACM International Conference Proceeding Series, ACM.
- Vollan, K. (2005). *Observing Electronic Voting*. NORDEM Report 2005.
- Wenda, G. (2015). *Alles online, oder was? – Europa und das elektronische Wählen*. Kooperation. IRIS 2015 Proceedings, p. 319.
- Wenda, G. (2014). *Quo Vadis, E-Voting? Rückblick und Ausblick für Europa*. IRIS 2014 Proceedings, p. 309.
- Wenda, G. (2011). *Good Governance in the Information Society − Der Europarat und E-Voting*. IRIS 2011 Proceedings.
- Wenda, G. *CAHVE: Das neue Ad Hoc-Komitee des Europarates für E-Voting*. IRIS 2016 Proceedings, p. 287 – 293.
- Whitmore K. (2008). *Congress of Local and Regional Authorities, Information Report on the Electronic Voting in the Finnish Municipal Elections,* observed on 26 October 2008.

THE ROLE OF THE JUDICIARY IN THE OVERSIGHT OF ELECTRONIC ASPECTS OF THE VOTING PROCESS

Jordi BARRAT ESTEVE
Professor of Constitutional Law
University of Catalonia

Abstract:

Both new electoral technologies and electoral justice, or electoral dispute resolution (EDR) procedures in broader terms, have received in depth analysis in recent years, but generally speaking their intersections remain unexplored. Both topics have been analyzed only separately, with no special attention to their mutual relationships. Once recalled the main features of both notions, the paper highlights up to three aspects where judicial procedures should be adapted due to the implementation of new electoral technologies: timeframes will not be the same anymore, evidence and probatory means would have to be reformulated and, finally, the implementation of new control mechanisms and traditional judiciary tasks might overlap.

Keywords: *ICT, NVT, e-voting, electoral justice, electoral dispute resolution (EDR), evidence, certification*

Résumé :

Au cours des dernières années, les nouvelles technologies électorales et la justice dans le domaine électoral, ainsi que les procédures de règlement des différends électoraux (EDR), dans un sens plus large, ont été analysées de près, mais, en général, les croisements entres elles sont restés inexplorés. Les deux sujets ont été analysés exclusivement de manière séparée, sans mettre l'accent sur la relation entre eux. Après avoir rappelé les principales caractéristiques des deux notions, le document met en évidence trois aspects où les procédures judiciaires exigent une adaptation suite à la mise en œuvre des nouvelles technologies électorales : les délais seront différents, il sera nécessaire de reformuler les preuves et les éléments probatoires et, enfin, les tâches de mise en œuvre de certains nouveaux mécanismes de contrôle peuvent se superposer aux tâches judiciaires traditionnelles.

Mots-clés : *TIC, NTV, vote électronique, justice dans le domaine électoral, règlement des différends électoraux (EDR), preuves, certification*

Abstract:

În ultimii ani, atât noile tehnologii electorale şi justiţia în domeniul electoral, cât şi procedurile de soluţionare a disputelor electorale (EDR), în sens mai larg, au fost analizate îndeaproape, însă, în general, intersectările dintre acestea au rămas neexplorate. Ambele subiecte au fost analizate exclusiv separat, fără a pune accent pe relaţiile dintre acestea. După ce reaminteşte principalele caracteristici ale ambelor noţiuni, lucrarea evidenţiază trei aspecte în care procedurile judiciare necesită adaptare, ca urmare a implementării noilor tehnologii electorale: termenele vor fi diferite, va fi necesară reformularea dovezilor şi a probatoriului şi, în final, sarcinile de punere în aplicare a unor noi mecanisme de control se pot suprapune sarcinilor judiciare tradiţionale.

Cuvinte-cheie: *TIC, NTV, vot electronic, justiţie în domeniul electoral, soluţionarea disputelor electorale (EDR), dovezi, certificare*

1. Introduction

In recent years electoral procedures have been reshaped due to the introduction of e-enabled tools and the judiciary will likely have to adapt its criteria and patterns to such a new scenario. The paper begins with a brief review of those e-enabled tools that are being currently used for electoral purposes (§ 2) and it summarizes afterwards the key features of electoral courts (§ 3). Once known both components, consideration is given to some grey areas that appear when the judiciary has to deal with the introduction of new e-enabled tools: a renewed notion of the judicial timeframe for electoral-based procedures (§ 4.1), the opposition between substantial and procedural evidence (§ 4.2) and the importance as well as the risks of parallel supervision means (§ 4.3). Given that in most countries case law on this topic is still in an early stage, the paper only intends to provide a prospective approach that will have to be confirmed by ulterior judgements.

2. What Is an E-Enabled Voting Process?

As any other social reality, elections are now evolving quickly taking into account the innovations linked to Information and Communication Technologies (ICTs). E-enabled tools already cover different steps of the whole electoral cycle and therefore understanding electoral procedures needs nowadays a correct approach to the changes, impacts and also menaces produced in this specific domain by ICT tools.

If we analyze the electoral cycle, ICTs can be found in different phases. There are some obvious examples, like e-voting, but other important cases can also be highlighted. Electoral campaigning, for instance, has evolved and social media is nowadays a factor with an increasing impact. Likewise, voter registration and voter identification have also been updated with new e-enabled tools (e.g., biometrics). Moreover, voter registration may use Internet for on-line publication of the database, that entails some doubts regarding data protection and voter identification, in conjunction with a networked system, and may allow any citizen to choose where to vote.

And the list may continue including other electoral fields where ICTs are being used to a certain extent: preliminary results are tabulated and published with e-enabled means; districting has to use advanced geo-referencing means; electoral finances are exploring new opportunities through crowdfunding and other alternative (and normally less regulated) schemes; voter information also needs an intensive use of ICTs (e.g., social media), polling station management is being computerized (e.g., Spain) and finally the general electoral procedure, like any other domain, uses normal (but also increasingly sophisticated) e-enabled tools as ordinary means for administrative tasks.

The number and variety of such tools provide significant information about their importance, but a correct approach cannot consider all of them in the same package. Each innovation is linked to specific electoral principles and thus their impacts differ a lot. Social media are important for pluralism and equality, while electronic voting concerns freedom, secrecy or transparency. Privacy should be properly addressed by new biometric means, while a level playing field and transparency could be the main caveats for alternative finance sources. And, finally, sound institutional capacity is needed for the ICT update of the general election management.

Anyway, most of e-enabled tools share some features that have a great impact on other electoral players, like the judiciary. They normally need a long preparatory phase, different decision-making procedures and new information management. Such issues will be analyzed in § 4, but let's first provide a brief overview of what an electoral court is.

3. Key Features of an Electoral Court

An electoral court is a tribunal, that is, a public body entitled to resolve complaints using legal grounds and specific procedures that guarantee a fair trial. But electoral courts may have specific features (see IDEA's Handbook at: Orozco Henríquez, 2010).

Having in mind the normal profile of a court, an electoral-based one should be at least independent and stable, but the reality provides interesting and contradictory cases. Independence, for instance, might be doubtful when the same body assumes both the electoral management and the subsequent judicial review (e.g., Costa Rica). Moreover, stability rather relies upon specific criteria that may differ a lot from one country to another. Recruitment procedures as well as limitation of mandates, for instance, are important patterns that would have to be scrutinized. Finally, as an electoral court may cover electoral issues and also other topics, what happens when the ordinary administrative branch of the judiciary or the constitutional court assume the resolution of these complaints. Both bodies are normally involved in electoral issues only during short periods of time. They have a partial dedication and, as explained below, such discontinuity could become a problem for e-enabled tools that have a different life cycle.

Last but not least, do not forget those countries where judiciary is not in charge of final results (e.g., Norway[1]) because such an issue belongs to political bodies, normally the parliamentary assembly. However, other topics, like candidate or voter registration, may be judicialized. The implementation of e-enabled tools will have to duly consider such distinctions.

4. Judiciary and Electoral ICTs

4.1. An Extended Timeframe

The electoral cycle is closely related to the judiciary because a successful process, in terms of electoral integrity, rule of law and citizen confidence, needs *"an efficient and effective (electoral justice system) with sufficient powers, resources and tools to be capable of responding adequately to these demands throughout the electoral cycle"* (Orozco Henríquez, 2010: 19). Although many issues are resolved in the very last stages (e.g., candidate registration, voters' lists, voting, counting), others cover previous segments of the cycle, such as boundary delimitation or registration of political parties.

E-enabled tools cover almost all the electoral cycle and, what is more important, their implementation needs several preparatory phases that have a clear external impact in terms of voting rights and thus judicial oversight. On the other hand, other electoral procedures may also need preparatory phases, but only with internal effects and without important judicial effects.

Certification mechanisms, transparency regulations or specific procurement principles are good examples. They are needed at least for e-voting, biometrics (i.e., voter registration and voter identification) and it

[1] Venice Commission Opinion 587/2010. CDL-AD(2010)046.

would be helpful for other e-enabled tools, such as official media monitoring, boundary delimitation, publication of preliminary results or voter information campaigns. In general terms, these three components are increasingly important in order to deliver a professional e-electoral service, but they cannot be implemented on a short notice because they entail a complex procedural reengineering, new legal frameworks and strengthened human resources. As recalled by OSCE/ODIHR, for electoral observation purposes, *"many of the preparations for the use of NVT take place before the arrival of a normal full-scale EOM. [...] This gives Needs Assessment Missions (NAM) ... an important role when NVT are used"* (2013: 14). Timeframe matters.

Moreover, the final acceptance of some e-enabled solutions depends precisely on these first implementation stages. Certainly, other important aspects are also decided at the beginning (e.g., districts, validity of political parties), but such issues are deemed irrevocable once they are not being challenged in a timely fashion: *"This procedural feature makes it possible to wrap up each successive stage of the election as a clear and firm basis for the next, and to decide the outcome of the election in a consolidated manner"* (Orozco Henríquez, 2010: 20). And social acceptance or distrust will likely appear when the decisions are taken (e.g., interdiction of a political party).

On the other hand, it would be difficult to apply the same patterns at least to some e-enabled tools. If the certification procedures have been badly designed and worse implemented, social confidence will not be damaged at that moment, due to the technical nature of the topic. If transparency rules pose disproportionate burdens, distrust will increase within a limited group of activists, but not in general terms. Finally, procurement issues are always technical areas where citizen awareness is very low.

Shortly, e-enabled tools need significant preparatory phases that, despite their apparent neutral and technical profile, are crucial elements for a final positive outcome; in terms of citizen confidence, not only of internal management. Election monitoring should extend the period submitted to oversight and include preliminary stages because, when E-Day is approaching, there could be no room for a meaningful control.

Consequently, the judiciary will be asked to react to this new scenario even in the early stages of the electoral cycle. Electoral courts will need to extend their temporal awareness, temporary ad hoc bodies will not be appropriate and experienced judges on electoral matters will have to be in place for a long period or even permanently.

And it is important not to forget that the judiciary encompasses both judges and other judicial actors, such as prosecutors, interested parties and lawyers. Their responsibilities are regulated by the relevant procedural codes, whose content needs to be adapted to this new scenario as well. For instance, new appeals and new groups of entitled actors will likely be included in the legal framework since some decisions will be initiated even before the call for elections, where no formal candidates still exist, only political parties, parliamentary groups and of course citizens (see Orozco Henríquez, 2010: 20).

4.2. A Procedural Notion of Evidence

Transparency is a key word for electoral matters. Given that any election consists in formalizing a civic battle among different contestants, with opposite ideologies and mutual distrust, a level playing field means at least a clear procedure commonly agreed and namely the chance to supervise each stage by external and independent means.

Normal electoral procedures create such a scenario, but e-enabled tools introduce some doubts. It is the case, for instance, of e-enabled tools that need a robust identification (e.g., e-voting, biometrics). Identification, ballot secrecy and verifiability might not become compatible anymore. While a sure ID control is needed, a layman will have no means to verify how his/her ballot is being handled by the e-system. Revealing the content of a given ballot and its linkage to a given ID would be an easy way to guarantee that there has been no fraud, but such a solution wouldn't be acceptable because it breaks the principle of anonymity.

End-to-End (E2E) verifiability (Benaloh, 2013; Jones, 2009) intends to overcome such a barrier, but it cannot provide a system where the overall supervision remains under the control of each citizen[2]. For instance, universal verifiability of Internet voting systems may entail complex cryptographic controls (e.g., Zero-Knowledge Proof/ZKP – Gjøsteen: 2015) that provide enough information for computer experts, but such new controls are meaningless for a normal voter. Therefore, once assumed that a voter cannot check the accuracy of the result, as may happen with traditional electoral solutions, and that the alternative means also failing to deliver a meaningful service for layman, the only way to establish enough confidence consists in strengthening procedural guarantees, that is, voters will not understand technicalities, such as ZKP, but they could be informed that such controls will be carried out in an open, fair and independent manner.

If only one computer expert conducts ZKP, one might reasonably wonder whether such an expert is really independent, namely when she/he has been contracted by the electoral management body itself (e.g., Norway in 2011), but, if the system's structure allows for repetitive controls performed by anybody (i.e., any computer expert), voters might conclude that the procedure is fair enough and, even though they cannot understand all the details, the fact that any expert will have access to the system will be sufficient to deter potential frauds and, in any case, to discover them.

The so called second generation of e-voting systems (i.e., Norway, Estonia, Switzerland) follows this path, but the role of judiciary is often forgotten, which is a clear weakness because, beyond procedural and computer expertise, from a legal point of view, the transition from a traditional voting system to an e-enabled voting one mainly relies upon evidence, that is, how facts are being objectively presented, both to the citizenry and in court.

E-enabled tools provide new forms of evidence that differ a lot from previous ones. Moreover, new e-enabled systems intend to generate evidence that may plan to reduce the importance of courts. If we have a real E2E system, the procedures themselves will generate objective (i.e., mathematical) evidence and the discussion would be over. There would be no need for a further judicial involvement. Unfortunately the reality, and the law as well, is much more complex. For instance, what happens if discrepancies arise? What should the judicial reaction be for such a situation?

Discrepancies can affect both the results and the methodology itself, that is, one could wonder first whether the system is really based on an E2E verification, and second, whether it meets the requirements that are legally established for any election. Thus, there could be judicially resolved at least the following two types of discrepancies:

a) Regardless of what was stated by the EMB and even by the experts, one can understand that the system does not provide an E2E verification because some features or elements are excluded from supervision (see the discussion between Jordi Puiggalí and Josh Benaloh on the Norwegian system during a NIST seminar: Benaloh, 2013);

b) Once conducted an E2E verification and once compared the results with those achieved by other similar analysis, the findings are not the same.

Obviously, in an academic agora, such discrepancies would lead to a rich discussion, but electoral matters have compelling timeframes. Elections must offer accurate results in a short period. There is no time to find out who is wrong and unfortunately a third opinion, even issued by forensic staff, will not solve the problem either.

Supervision of traditional paper-based systems could also lead to similar discrepancies, but they can be resolved directly by the court itself because no expertise beyond legal science is required. For example, invalid ballots often pose serious problems, but judges themselves can analyze the ballots and take the appropriate decisions. However, if a court must resolve a dispute over E2E verification, it is likely that the judges will not have enough experience and their opinion will be based on a third

[2] Traditional electoral procedures may also include some voting channels with no general supervision. Postal voting is, for instance, a clear example.

technical report (forensic), whose content will not be able to be evaluated by the judges themselves either, that is, with the judges' own legal expertise.

It would be a forensic report whose validity, from a judicial point of view, will likely be more acceptable than other expert texts, but from a scientific perspective, forensic documentation may also contain errors. A judicial solution would have been achieved, which is not a minor fact, but pure legalistic approaches would also have failed to guarantee the overall credibility of at least some electoral technologies. That is a legal challenge, but also a civic problem that needs a broader solution. The law can always be useful, but relying solely on legal solutions is a mistake, particularly when the final decision has no substantial arguments. Judges usually prefer the forensic report only because it is issued or promoted by judiciary units themselves, but its actual content may not be taken into consideration due to the high level of expertise required.

In fact, judges face similar problems in other technological areas (for example, disputes between insurance companies) where they must decide, with no specific expertise, which technical report is the best. Initially, the same scheme could be applied to election technologies, but there is an important difference. In the election field, the technical debate is not the starting point.

One that had reached this stage accepted that we could trust the objectivity of E2E verification (mathematics), that is, that citizens could accept without problems the loss or mitigation of their democratic right to electoral supervision on the basis that mathematics would provide a single, clear and especially unanimously accepted conclusion. If this is not the case, if the court has also to analyze the distinctions among experts' reports themselves, it is not a simple legal dispute between insurance companies, where each party brings its own expert team. The problem is rather different: how to rebuild public confidence on election technologies that do not provide external evidence able to be understood by everybody.

And relying on a forensic opinion might not be a good strategy, simply because no qualitative leap would have taken place. A new (judicial) opinion is added to previous discrepancies generated by E2E verification means, but no objective and unanimous solution is found. Ultimately, mathematics, and their inherent objectivity, would have lost their mystery and it could not be useful for our purposes anymore. Mathematics would have not avoided discrepancies, they would not become the expected support for citizen confidence and the judiciary would have to face electoral disputes within complex IT based scenarios.

4.3. Pseudo Judicial Oversights? From Technical to Judicial Truth.

Finally, the legal framework might be customized in a way where alternative means of oversight could become unexpected alibis for further judicial reactions, that is, there would be particular practices that, although initially created to improve the overall oversight over critical systems, might also have negative collateral effects, particularly in terms of judicial tasks. Audits, certifications, quality controls and similar procedures might be included, with the appropriate nuances, within such a group.

Given the challenges that e-enabled electoral tools have to address, public authorities use to promote a series of supervisory means that provide relief and enough confidence to the relevant stakeholders. Moreover, civic protests could be mitigated beforehand because such tools will be implemented as precautionary measures. On the other hand, judicial review normally takes place as a reaction and not as a preventive mechanism.

Such tools are normally used for technical and managerial reasons, which makes sense when one intends to improve the overall procedural quality, but, deliberately or not, they can also be used for other purposes. One might think that judicial oversight is somehow less necessary when the electoral procedure itself already includes other supervisory methods. Different formats of self regulation would be presented as a

way to circumvent judicial burdens while achieving similar outcomes.

Certification could be a good example (Barrat, 2008). Initially implemented as a guarantee that ensures the compliance of the e-enabled system with a set of previously established principles, it could easily become a legal self evidence, that is, the final certificate would be the proof that the e-enabled system is legal, and thus judicially acceptable. At the end, a technical means would become a legal truth.

A recent publication on Electoral ICT certification provides a definition that could be used for such purposes: *"a systematic process (carried out by an accredited third party) to evaluate whether a given election technology satisfies systematically established standards and/or* ***legal requirements****"* (Barrat *et al.*, 2015, p. 8; emphasis added)[3]. If the certification already evaluates the compliance with legal principles, one may wonder which are the remaining tasks to be carried out by the judiciary. Are they redundant of what has already been done? Or, if judiciary adds supplementary factors to its decisions, then the previous definition would be partially false because certification would not be entitled to establish such a definitive legal compliance.

The text also identifies up to eleven doubts[4] that certification procedures might create, but its relationship with judicial bodies is not explicitly covered. However, some paragraphs provide interesting approaches: *"introducing a full-fledged certification process not only increases the transparency of the election technologies under evaluation, it also contributes to the* ***division of power*** *and by that to the democratic nature of the election. Ideally, a certification process will give (almost) all electoral stakeholders a higher level of confidence"* (Barrat *et al.*, 2015, p. 5; emphasis added).

Division of power is a constitutional notion that is closely related to parliamentary, governmental and obviously judicial activities. A good democratic system should foresee independent courts and any other public administration remains fully liable to their decisions. Rule of law and division of power are two faces of the same coin.

The text mentions division of power without thinking in terms of judiciary activities, but also intends to highlight that certification would provide a more balanced institutional structure. An external and independent player (certifier) would be involved in a way that previous potential discrepancies could be solved through decisions (certificate) based on objective data. And it is true, but the judiciary has more or less exactly the same task.

Interestingly, the text admits that *"the legal requirements have to be transformed into technical requirements the certifier can use for the evaluation"* (Barrat *et al.*, 2015, p. 33) and, although some mutual interrelations are also analyzed, a symmetric translation from technical to legal principles is not foreseen, that is, how certification outputs could influence subsequent legal (judicial) decisions.

Such situations also appear in other contexts. In general terms, when the law faces important barriers to correctly solve specific disputes, technical remedies are prompted to assume a broader role and intend to substitute the inherent task of any judicial body. But such technical outcomes (i.e., the certificate) can never provide enough data for a final judicial decision. They only provide significant facts, but such information has to be embedded in a broader legal

[3] The Council of Europe uses a broader definition with no specific mentions to legal issues: *"a process of confirmation that an e-voting system is in compliance with prescribed requirements and standards and that at least it includes provisions to ascertain the correct functioning of the system"* (Appendix I. *Certification of e-voting systems. Guidelines for developing processes that confirm compliance with prescribed requirements and standards*).

[4] (I) Certification is only a lot of bureaucracy without added value; (II) Certification lacks the flexibility needed for an agile IT project; (III) Certification is too expensive; (IV) There is no such thing as an independent third party; (V) Certification takes up too much time in our tight schedule; (VI) Certification is no more than rubber-stamping an election; (VII) Certification is an insider business anyway; (VIII) Certification is not applicable to "our" kind of election technology; (IX) Our country is too small for certification; (X) One cannot be sure the running system is the one that was certified; (XI) Certification might fail.

context and only legal players, like judges, are entitled to make such assessments, that is, to determine whether technical outputs comply with legal principles. The fact that such assessments are hard to conduct cannot justify the exclusion of one component (i.e., the legal aspect), nor judicial decisions that rely upon technical guarantees only (e.g., the certificate).

However, that could be the case in certain circumstances, namely when judges face new challenges (e.g., e-enabled electoral tools) and they are not yet familiar with them. Moreover, self-restraint attitudes might be explained by this uncomfortable situation where judges are forced to deal with not ordinary facts and evidence. In USA, for instance, the courts are not very proactive when dealing with e-voting issues and they have normally admitted a certain margin of political/technical appreciation. As Tokaji highlights, *"although U.S. courts have generally taken an active role in policing election administration since 2000, they have – for better or for worse – mostly left the resolution of questions involving electronic voting to the political branches of local, state, and federal government"* (2015: 229; and Driza Maurer, 2015: 17)[5].

Similar scenarios might be found with other closely related topics, where specific expertise is needed and forensic tasks are used to help judicial decisions, but elections are slightly different. Elections deal with social trust, with collective decision-making procedures and therefore judicial involvement is much more sensitive, namely when the requirements of secrecy forbid the use of explicit evidence, as occurs in many others technical domains, and alternative procedural means are in use to enhance the system trustworthiness and legality.

5. Conclusions

The paper focuses on three aspects that are considered important for the reformulation of the role of judiciary vis-à-vis the implementation of new electoral technologies. These three pillars show that a challenge with multiple facets has to be addressed. Internal procedures as well as substantial criteria for final judicial decisions would have to be adapted. For instance, timeframes and criteria normally used for assessing evidence need to be updated. Consideration should also be given to administrative control mechanisms that could overlap judiciary tasks.

Given that the judiciary is not normally involved beforehand, one can reasonable foresee that the number of judgements on e-enabled issues will increase a lot in the near future, as a normal consequence of the implementation of new electoral technologies. New doubts and nuances will likely appear. An advanced awareness, with the appropriate critical approach, of such inputs will be very helpful for a proper understanding of the relationship between the judiciary and electoral technology.

[5] Different arguments can also justify limited judicial proactivity: *"D'autres questions délicates mais n'apparaissant pas à première vue essentielles à la constatation du caractère démocratique du scrutin ne sont abordées qu'assez rarement et avec beaucoup de prudence. On pensera à la libre formation de la volonté de l'électeur, notamment à travers les médias, ou encore à la répartition des sièges entre les circonscriptions."* (Garrone, 2009: 10)

About the author:

Jordi BARRAT ESTEVE (Reus, 1968) is a professor of constitutional law at the University Rovira i Virgili (Catalonia/Spain) and his research areas focus on electoral matters, namely the intersection between new voting technologies and the legal framework. He has also served as a consultant for different international organizations. Latest publications: Ardita Driza Maurer, Jordi Barrat Esteve (eds.). *E-Voting Case Law: A Comparative Analysis*. Farnham: Ashgate, 2015; Jordi Barrat Esteve *et al. Certification of ICTs in Elections*. Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 2015; Carlos Vegas, Jordi Barrat Esteve. "Overview of Current State of E-voting World-Wide" in Feng Hao and Peter Y.A. Ryan (eds.). *Real-World Electronic Voting: Design, Analysis and Deployment* [forthcoming/2016].

http://about.me/jordibarrat|jordi.barrat@gmail.com

References:

- Barrat Esteve, J. (2008). The Certification of E-Voting Mechanisms. Fighting against Opacity, in Krimmer, R., Grimm, R. (eds.). *Electronic Voting 2008* (Col. "Lecture Notes in Informatics – LNI"/P-131). Bonn: Gesellschaft für Informatik, p. 197 – 206.
- Barrat Esteve, J., Bolo, E., Bravo, A., Krimmer, R., Neumann, S., Parreño, Al. A., Schürmann, C., Volkamer, M., Wolf, P. (2015). *Certification of ICTs in Elections*, Stockholm: International Institute for Democracy and Electoral Assistance (IDEA).
- Benaloh, J. (2013). *End-To-End Verifiable Election Technologies*. Symposium on the Future of Voting Systems, Washington DC, NIST. Available at: csrc.nist.gov/groups/ST/voting2013/presentations/benaloh_fov2013.pdf (March 23rd 2016).
- Driza Maurer, A. (2015). E-Voting: What Do the Judges Say, in Driza Maurer, A., Barrat Esteve, J. (eds.). *E-Voting Case Law: A Comparative Analysis*, Farnham: Ashgate, p. 1 – 20.
- Garrone, P. (2009). *Le contentieux électoral. Questions de fond*, *Le contrôle du processus électoral*, UNIDEM Seminar, Madrid: Commission de Venise, CEPC.
- Gjøsteen, K., Smedstuen Lund, A. (2015). *The Norwegian Internet Voting Protocol: A New Instantiation.* Available at: https://eprint.iacr.org/2015/503.pdf [March 24th 2016].
- Jones, D. (2009). *Some Problems with End-to-End Voting*, End-to-End Voting Systems Workshop, Washington DC, NIST. Available at: csrc.nist.gov/groups/ST/e2evoting/documents/papers/Jones_E2E_Paper.pdf (March 24th 2016).
- Orozco Henríquez, J. (coord.) (2010). *Electoral Justice: The International IDEA Handbook*. Stockholm: IDEA.
- Owen, B. (2006). *Constitutional Review of Elections*, The protection of electoral rights and the right to political associations by the Constitutional Court Conference, CDL-JU(2006)003, Tbilisi, Venice Commission. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282006%29003-e [March 24th 2016].
- Solijonov, A. (2015). *Global Database on Elections and Democracy*, Ensuring Neutrality, Impartiality and Transparency in Elections: The Role of Electoral Management Bodies, 12th European Conference of Electoral Management Bodies. Available at: www.venice.coe.int/files/12EMB/12EMB_Abdurashid_Solijonov.ppt [March 23rd 2016].
- www.idea.int/elections/ej [Electoral Justice Database / IDEA].
- Tokaji, D. P. (2015). Electronic Voting Law in the United States, in Driza Maurer, A., Barrat Esteve, J. (eds.). *E-Voting Case Law: A Comparative Analysis*. Farnham: Ashgate, p. 215 – 232.
- OSCE/ODIHR Report (2013). *Handbook for the Observation of New Voting Technologies*, Varsaw, OSCE/ODIHR. Available at: www.osce.org/odihr/elections/104939?download=true [March 24th 2016]

BEING ON THE RIGHT SIDE OF THE TRACKS: WHY THE TRANSPARENCY OF POLITICAL FUNDING SHOULD BE THE RULE

Septimius PÂRVU
Project Manager
Expert Forum

Abstract:

Party financing is one of the most sensitive topics related to elections. Many countries still lack transparency if we talk about the publicity of the financing and necessary tools such as open data and centralized databases represent more of an exception. If some electoral commissions publish the data in an accessible and usable manner, the non-reusable document seems to be the rule. Civil society organisations compensated this need and further more have shown the relation between party financing and lobbyists, private interests or companies, by combining data. Political clientelism during the electoral periods is another type of abuse that completes the landscape. The use of open data remains a challenge as politicians oppose the unveiling of their financing sources, although in many cases no significant modifications of the legislation are needed.

Keywords: *party financing, elections, open data, transparency, accountability, clientelism*

Résumé :

Le financement des partis est l'une des questions les plus sensibles liées aux élections. De nombreux pays manquent encore de transparence si nous parlons de la publicité du financement, et les instruments nécessaires tels que les données ouvertes et les bases de données centralisées sont plutôt l'exception. Même si certaines commissions électorales publient des données d'une manière accessible et utilisable, le document papier jetable semble être la règle. Les organisations de la société civile ont équilibré ce besoin et ont montré la relation entre le financement des partis et les lobbyistes, les intérêts privés ou les entreprises, en combinant les données. Le clientélisme politique en période électorale est un autre type d'abus qui complète le paysage. L'utilisation des données ouvertes reste un défi, parce que les politiciens s'opposent à la divulgation de leurs sources de financement, bien que, dans de nombreux cas, il ne soit pas nécessaire d'avoir des changements significatifs dans la législation.

Mots-clés : *financement des partis politiques, élections, données ouvertes, transparence, responsabilité publique, clientélisme*

Abstract:

Finanțarea partidelor politice este unul dintre cele mai sensibile subiecte legate de alegeri. Multe țări încă nu dau dovadă de transparență, dacă vorbim despre publicarea finanțării și instrumentele necesare, cum ar fi datele deschise şi bazele de date centralizate. Acestea reprezintă mai mult o excepție. Chiar dacă unele autorităţi electorale publică datele într-o manieră accesibilă și utilizabilă, documentul de unică folosință pare a fi regula. Organizațiile societății civile au compensat această nevoie și au arătat relația dintre finanțarea partidelor politice și lobby-iști, interese private sau companii, prin combinarea datelor. Clientelismul politic în timpul perioadelor electorale este un alt tip de abuz care completează peisajul. Utilizarea datelor deschise rămâne o provocare, deoarece politicienii se opun dezvăluirii surselor lor de finanțare, cu toate că, în multe cazuri, nu sunt necesare modificări semnificative ale legislației.

Cuvinte-cheie: *finanțarea partidelor politice, alegeri, date deschise, transparență, răspundere publică, clientelism*

1. Introduction

Robert Putnam[1] starts his adventure to study the governance and public participation in Italy by telling about the experience of visiting two regional institutions. One in the developed North, in Emilia Romagna, made of glass, using computers and with friendly staff, and another one, in the South, in Puglia, beyond the train tracks, dusty, unfriendly and situated in a building that is practically stuffed with old paper files. A mayor tells even about bringing his own typist and typewriter in order to finish some paperwork. The first one creates the sensation of transparency, openness, communication with the citizens, while the other one generates the feeling of an inaccessible administration that does not communicate with the community it should serve.

Similarly, many of the administrations in Central and Eastern Europe tend[2] to have an obsolete attitude, based on paper, strongly bureaucratized, and have a reticence in adopting modern communication instruments. Although Romania is a part of the Open Government Partnership (OGP) since 2011, a low number of institutions have adopted good practices in opening and making their activity more transparent. Their greatest part is established at the central level – the ministries. A significant part of the administration tends to look in a sceptical manner to any attempt to adopt new instruments of transparency or to introduce more efficient ways to communicate with the community.

The usage of open data is one of the most proficient indicators through which an administration is able to understand the benefits of the new ways of doing things. Open data can be defined as the *"data that can be freely used, re-used and redistributed by anyone – subject only, at most, to the requirement to attribute and share alike"*.

There are a few characteristics that define open data[3]:

- ***availability and access:*** *the data must be available as a whole and at no more than a reasonable reproduction cost, preferably by downloading over the Internet. The data must also be available in a convenient and modifiable form;*
- ***reuse and redistribution:*** *the data must be provided under terms that permit reuse and redistribution, including the intermixing with other dataset;*
- ***universal participation:*** *everyone must be able to use, re-use and redistribute – there should be no discrimination against fields of endeavour or against persons or*

[1] Robert D. Putnam, Robert Leonardi and Raffaella Y. Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton University Press, 1993, p. 3 – 6.

[2] Open Data Barometer, 2nd edition, www.opendatabarometer. org/report/analysis/rankings.html

[3] Open Data Handbook, http://opendatahandbook.org/

groups. For example, "non-commercial" restrictions that would prevent "commercial" use, or restrictions of use for certain purposes (e.g. only in education) are not allowed.

The use of open data can serve multiple purposes[4]. Firstly, it can generate transparency and accountability. Although many public institutions (and political parties are in such a category) may not want to become more transparent, open data can be an instrument for those who want to increase their level of integrity and public trust. The publication of open data can lead to unveiling corruption cases or abuse in power, as we will see later in the paper.

Secondly, the public institutions hold in most cases monopolies over the public information and either do not want to publish it, or are overwhelmed and do not have the capacity to reply to FOIA requests. By publishing the information, the institutions can save resources and time.

A third reason to publish open data is to enhance civic participation. Open data can be a useful tool to debate policy proposals, to allow NGOs and citizens to get involved in the decision-making process and to better communicate with the business sector.

What is to be understood is that open data does not necessarily involve major efforts to be produced. In many cases, the data is already in the backyard of the institutions and just has to be published. Furthermore, it can be reused with very low costs and great results. Such an example comes from Indonesia, where a parallel elections monitoring website was set up with just $54 and voluntary work[5].

A special domain in which open data is critical, but is rather rare, is represented by elections and financing of political parties. Money in politics is a real issue in many countries and not only during the electoral campaigns, but also beyond the elections period. Recent cases in Romania, prosecuted by National Anticorruption Directorate (DNA), have shown how parties use state owned enterprises[6], public institutions or any other means to gather funds.

A study published by the Sunlight Foundation[7], comprising 54 countries all over the world, shows some serious issues related to the publicity of the financial information:

"The public is unable to easily access much of the financial information that is reported to oversight authorities. Despite legal requirements enshrining the public availability of political finance information, only two countries – Australia and the United States – make all reported information available online in machine-readable formats. Many other countries provide some limited information, or publish details in less accessible formats. Magnifying these issues is the lack of standardization in publicly available financial reports. Only 13 countries provide relevant information in fully comparable formats."

Recently, the National Democratic Institute (NDI) started the Open Election Data Initiative that has the purpose of increasing the participation of the citizens, identifying what is good and wrong in the electoral processes or what sort of data should be available. The initiative is based on nine principles for open elections data: the data should be published timely, detailed, free, complete, analysable, non-proprietary – meaning in a format over which no entity has exclusive control – non-discriminatory, licence-free and permanently available.

The initiative promotes some good practices in terms of open data use. Still, overall, for many electoral institutions, the use of .pdf format remains the usual way of doing

[4] See also OGP principles www.opengovpartnership.org/about/open-government-declaration

[5] Auralice Graft, Stefaan Verhulst and Andrew Young, *Indonesia's Kawal Pemilu*, January 2016, http://odimpact.org/static/files/case-study-indonesia.pdf

[6] Elin Falguera, Samuel Jones, Magnus Ohman (eds.), *Funding of Political Parties and Election Campaigns. A Handbook on Political Finance*, http://www.idea.int/publications/funding-of-political-parties-and-election-campaigns/loader.cfm?csModule=security/getfile&pageID=64347

[7] *The Money, Politics, and Transparency. Campaign Finance Indicators: Assessing Regulation and Practice in 54 Countries across the World in 2014*, http://assets.sunlightfoundation.com.s3.amazonaws.com/mpt/MPT-Campaign-Finance-Indicators-Key-Findings.pdf

things. If we look at countries publishing data related to elections in an extensive and intelligible manner, there are some indicators showing which of them performs well. For example, the Global Open Data Index[8] analyses the elections results published in open data. Only 14 out of 97 countries publish complete results by constituency per district for all major national electoral contests. Amongst them are Denmark, Brazil, France, Colombia, Australia, Finland and Sweden. Moldova and Romania are both mentioned in this statistics. For Romania, the data is published on the official portal www.data.gov.ro[9] and www.alegeri.roaep.ro (without the possibility of downloading).

Comparatively, Romania also publishes legislation and tender procurement (recently), company register (minimal information) and government spending (recently and not downloadable in bulk). This type of information is also important when combining different types of databases in order to show clientelism, illegal donations or lobby and party capture by third parties. For example, by combining multiple data, EFOR has shown how the party in power uses public budgets in order to indirectly finance the local candidates.

2. Who Is Who – Good Practices and Transparency

According to the OGP commitment list, only three out of 77 countries assumed to open data related to elections and party financing: Croatia, Georgia and El Salvador[10]. Croatia, for example, aims in the second Action Plan to *"improve the process of election of members of voter committees at elections and referendums"*. The plan also includes a proposal to publish data on media ownership, including party affiliation[11]. El Salvador proposed to make the information related to financing more accessible and according to the evaluation for the 2013 – 2014 plan, it partially obtained it[12]. Georgia proposed raising public awareness of the electoral process[13]. Therefore, a first conclusion to be drawn is that the countries are not that eager to make money in politics transparent and do not assume this kind of commitments.

At the international level, there are not many public institutions that publish data on party financing in a centralized detailed database. Less countries allow users to access and use the information in an open data format. For example, Argentina[14] publishes the information (in cloud), but the quality is quite poor, as it does not offer details.

The UK Electoral Commission[15] may seem to be one of the best examples when it comes to transparency and detailed information. The institution publishes information on donations, loans and other information about the registration and the accounts of the political parties for several categories: Political party, Minor party, Non-party campaigner (Third party), Referendum participant or Regulated donee. The data is very detailed. For example, the database refers to the rates of the loans. Each loan entry includes data as the lender, starting and ending date and the paid instalments. If we look at the spending, they are detailed per categories, such as market research/canvassing, advertising, media or rallies and other events. Still, the most important aspect is the fact that all the data is exportable in an editable file.

In Latvia, the party financing is monitored by the Corruption Prevention and Combating Bureau. The institution also boasts a database[16] where it publishes the

[8] Global Open Data Index, http://index.okfn.org/dataset

[9] The Romanian official portal of open data, http://data.gov.ro/organization/autoritatea-electorala-permanenta

[10] http://www.opengovpartnership.org/explorer/landing

[11] http://www.opengovpartnership.org/sites/default/files/Croatia%20-%20Second%20Action%20Plan%2C%202014%20-%202016.pdf

[12] http://www.opengovpartnership.org/country/el-salvador

[13] http://www.opengovpartnership.org/sites/default/files/OGP%20Georgia%20AP%202014-2015_eng.pdf

[14] Cámara Nacional Electoral, www.electoral.gov.ar/financiamientoconsolidado2015.php

[15] UK Electoral Commission, http://www.electoralcommission.org.uk/

[16] Corruption Prevention and Combating Bureau, http://www.knab.gov.lv/en/financing/

information related to donations, declarations and subscriptions. The page contains the lists of parties, with declarations and original documents. The website does not offer users the possibility to download and reuse data.

The central register of Statistics of Norway provides general data about elections financing[17]. Information about the money of the parties per fiscal year is published by the Ministry of Local Government and Modernisation here: www.partifinansiering.no/a/english. The parties have to use a platform developed by the County Governor of Sogn og Fjordane in order to report their finances[18].

The US Federal Electoral Commission[19] hosts a detailed database related to public financing. The website offers information about candidate expenses and reimbursements, contributions, fines or lobbyists. All data can be downloaded in open data format.

On the other side, some good portals, based on open data, are designed by non-governmental organizations or private initiatives and they link the spending done by the political parties with other registries such as lobbyists, corporations or public procurement, which may generate red flags when it comes to the integrity of the party financing.

In Brasil, the portal www.asclaras.org.br is based on the data obtained from the electoral authority, Tribunal Superior Eleitoral. The website connects donations and votes, shows the evolution of financing in time and publishes information about the financing of political parties and candidates.

The Czech webpage www.politickefinance.cz shows information about donations for the political parties. Initially, it has been developed within a project by the Ministry of Finance, as a measure to fight organized crime. The website is not developed totally from open data, due to the fact that part of the information is collected manually. Still, the administrators of the website offer the entire database for download. The database shows the parties' budgets (revenues and expenditures), debts and detailed donations.

The portal www.maplight.org is a tool that unveils another side of the party financing, the relation with interest groups and the financing mechanisms. With a less strict legislation and practice, in the US the interest groups are a significant source of financing. The statistics shows that on average, in order to win the elections, a member of the US House gathers $2,315 per day, for 2 years, while a member of the Senate raises 14,351 per day. They are at the same time one of the main sources of lobbying and influence of public policy, by gaining special decisions in their favour. The datasets are utilised in order to raise the accountability of the elected officials and related donations to the decision-making process. The website is frequently used by journalists.

Another United States portal, www.followthemoney.org, publishes data about parties and candidates' financing and makes connections by showing the influence of industries on elections and policy making. The same purpose is declared by www.influenceexplorer.com, a website that also maps lobbying and foreign impact on elections and decision-making process.

3. Putting Open Data to Use – Clientelism in Romania

A good exercise to put open data to public use is to show the abuse of public resources for electoral purposes, one of the most recurrent issues in party financing and elections. Generally, it is defined as:

*"The **misuse of public resources** is widely recognised as the unlawful behaviour of civil servants, incumbent political candidates and parties to use their official positions or connections to government*

[17] Norway Statistics Office, https://www.ssb.no/en/valg/statistikker/valgkamp

[18] Party portal, http://prosjekt.fylkesmannen.no/partistotte/

[19] US Federal Election Commission, http://www.fec.gov/data/CommunicationCosts.do?format=html

institutions aimed at influencing the outcome of elections[20]*".*

OSCE Guidelines on Political Party Regulation[21] state that:

"The abuse of state resources is universally condemned by international norms.

While there is a natural and unavoidable incumbency advantage, legislation must be careful to not perpetuate or enhance such advantages. Incumbent candidates and parties must not use state funds or resources (i.e., materials, work contracts, transportation, employees, etc.) to their own advantage."

The phenomenon appears in different shapes and it may involve engagement of human resources, use of official spaces and buildings, obligatory attendance of state employees at events or rallies, use of goods that are owned by different public institutions, such as schools' buses[22]. Another form of abuse is the engagement of state owned companies or of other institutions, including the usage of their budgets for electoral campaigns. In Romania, several criminal investigations have been opened for this kind of abuse. The former Prime Minister Adrian Năstase and heads of institutions have been condemned for using public money, gathered from state institutions, in order to finance the campaign. Other politicians have been or are currently under investigation for such abuses.

A specific type of abuse of resources is the use of public funds to support the local administration, in electoral years. It is a more subtle type of abuse, but affects highly the distribution of resources and the fairness of the campaign. Moreover, it is not illegal, but it is a proof of bad governance. EFOR has developed the Index of Clientelism that shows how many times a mayor who is a member of a party in power can get more money than one belonging to an opposition party. In some years, a mayor in power had three times a bigger chance to get money. This happened in 2007 – 2008, during the liberal government in Romania. In 2014 – 2015 the ratio was 2 : 1.

The research stems from 2004 to 2016 and it is based on a combination of information extracted from open data, as well as on requests for public information. The research is visually illustrated – www.expertforum.ro/en/clientelism-map and www.expertforum.ro/clientelism-2016 – within interactive maps that have the purpose of better representing the impact of the preferential distributions, but also of allowing citizens to understand the process and get involved.

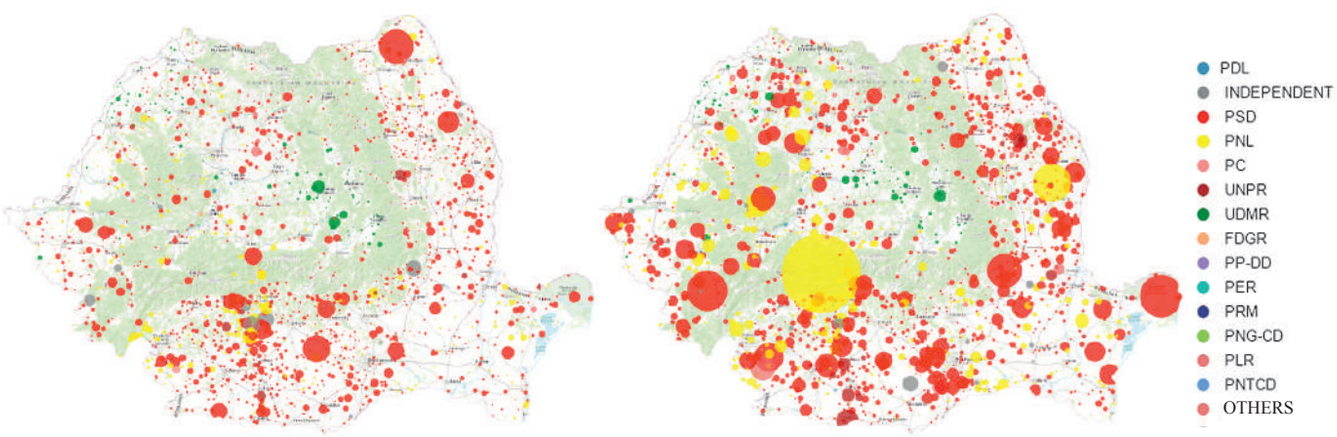


Figure 1. The map of clientelism, October – December 2014 (left) and 2015 (right). The dimension of the dots is directly proportional with the sums of money *per capita* that each locality got, excluding county councils.

[20] European Commission for Democracy through Law, *Report on the misuse of administrative resources during electoral processes*, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)033-e

[21] OSCE, *Guidelines on Political Party Regulation*, adopted by the Venice Commission at its 84th Plenary Session,Venice, 15 – 16 October 2010. http://www.osce.org/odihr/77812?download=true

[22] Marcin Wałecki, *Illegal funding of politics – combating abuse of state resources and illegal campaign finance*, July 2009, http://www.moneyinpolitics.info/wp-content/uploads/2015/05/Walecki-_July-2009_-IFES-Combating- Abuse-of-State-Resources.pdf

The research also shows a few interesting conclusions related to the indirect budgetary influence over the electoral campaign. Several legal instruments managed by the central government are also being used as a factor of helping or disadvantaging the competitors. One of the sources that influences the elections is the Reserve Fund. This is a fluid mechanism – present in many countries under different forms, but with the same substance – through which the prime minister can give money to the local municipalities or counties. Although the funds should be distributed for unpredicted or emergency situations, the parties in power have found ways to create exceptions and to transfer the funds to the municipalities for constructions, debts, infrastructure or other unrelated expenses. The Court of Accounts underlined in the reports published in the past years that this kind of transfer of money is not in accordance to the purpose of the budget. The parties in power have increased the quantum of the Reserve Fund even 10 times in 2012 and 15 times in 2014, both electoral years.

Putting data together also proved the parties practically bought mayors in order to move from one party to another[23] and gave them more money after the migration. Some of the mayors that migrated from the liberals to the social democrats received even 4 times more money than before October 2014, when the migration took place.

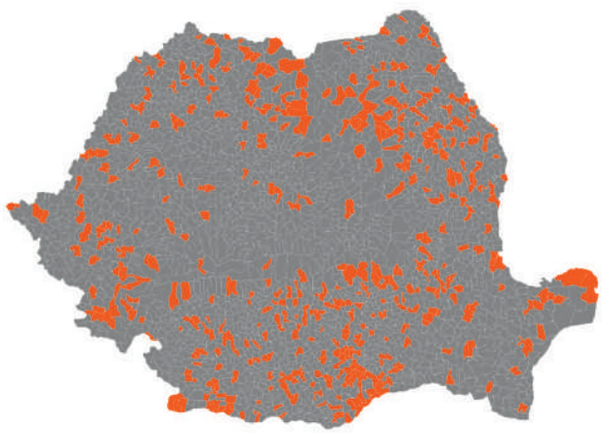


Figure 2. Map of migration – localities where migration of mayors took place.
For the full report access http://expertforum.ro/en/migration-of-local-elected-officials/

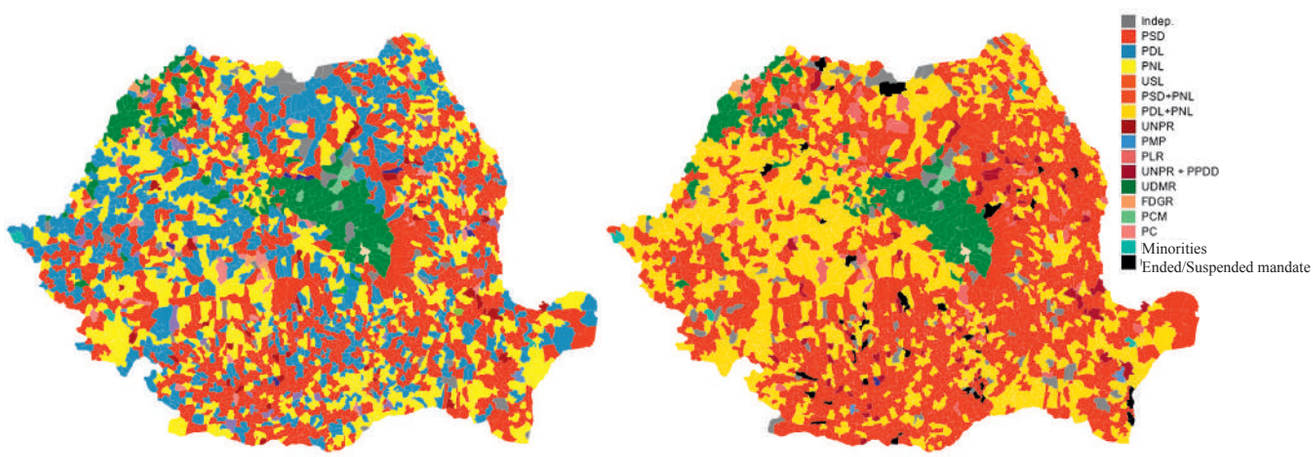


Figure 3. Comparison of mayors' political colours September 2014 – December 2015.

[23] In September 2014, the Social Democrat Government produced the Government Emergency Ordinance no. 55/2014 that allowed local officials (mayors, councillors, presidents of county councils) to switch parties for 45 days, once, without losing their position, as the general law provides. A number of 552 mayors switched party, and 436 persons went to the Social Democrat Party (PSD). See more about the migration, including an interactive map here: http://expertforum.ro/en

The research has shown that the party in power always took advantage of its position and other mechanisms[24] and supported its own mayors. If we look at 2014, for example, when the presidential elections took place in Romania (2 and 16 November), we can see that between 70 and 80% of the funds dedicated to 2014 were distributed in the months before the elections, starting with August – September, a rule that does apply in the same manner to the other years under analysis.

Although this instrument is not directly linked to party financing during the elections, it shows alternative means to support political parties and it may be a red flag when it comes to the fairness of the elections. It also shows the importance of using open data published by the government, even though the products are not completely based on editable data.

4. What Do We Need to Publish?

The first step would be to see as many electoral authorities publishing centralized, transparent and detailed databases and not just information in succinct files that cannot be edited. If the data would be provided in an open format such as .xls or .csv, it would offer opportunities to a lot more people and NGOs to view and republish it in a more accessible and understandable way.

This would also allow cross-referencing with other available information, such as the company lists, asset declarations and declarations of interests, public institutions, budgetary execution or public procurement; the combination of data may produce information about illegal financing of campaign, lobbying or interest groups supporting candidates and waiting for favours in return. Still, the number of countries that publish all this data in a concomitant manner is quite low.

Georgia is such an example, even if the access to the company list has been reduced[25]. Transparency International Georgia managed to combine the information regarding financing and companies, in order to see which companies support the political parties during elections.

The list of data that can be published differs from one country to another, but there are sets of data that should be available to the public in a general manner. First of all, the electoral commission or other institutions that manage and monitor the financing of the political parties should publish the public financial support that the parties receive outside the electoral periods. During elections, the most important information is related to donations, contributions, loans, reimbursement or debts. This list can include detailed budgets, income and outcome, activity reports, lists of members and affiliations, donors and contributors[26].

Also, the oversight data is important, showing if the parties declared everything, as requested by the legislation, in time and correctly, and if fines or other sanctions have been applied. Information about the appeals and the reasons for sanctions should also be published.

While some countries publish interests and assets information[27], this comes from the public institutions and not from the proactivity of the parties. Actually, the lack of proactivity of the political parties is one of the main reasons people do not trust them and see them as very corrupt institutions[28]. According to the Global Corruption Barometer, 51 out of 107 countries see political parties as the most corrupt public bodies in those countries. But as considerable sums of public money are reimbursed worldwide for political

[24] This is not the only mechanism. Our research also includes the National Program for Local Development – PDNL, funds for infrastructure, heat, modernization of infrastructure, etc.

[25] Giorgi Chanturia and Derek Dohler, *Which corporations are connected to which political parties?,* September 2012, http://transparency.ge/en/blog/which-corporations-are-connected-which-political-parties

[26] Granickas Karolis, www.europeandataportal.eu/sites/default/files/library/201404_open_data_as_a_tool_to_fight_corruption.pdf

[27] Romania publishes information (asset declarations and declarations of interests) for public officials on the National Integrity Agency website, www.integritate.eu

[28] http://www.transparency.org/gcb2013/results

campaigns, the lack of transparency should not be an option for the parties[29].

Although Romania's experience can be considered an example of good practice from many points of view, when it comes to the process of opening data, the transparency of the party financing must be enhanced when the new legislation is implemented. Most of the information is published in the Official Gazette, but its website has a limited free archive and it is not editable. The information published on the website of the Electoral Authority is not editable – but under the form of .pdf – and it is not very detailed. For example, according to the law, parties have to publish membership fees, donations, revenues detailed per type. Moreover, the list of donations includes names, sums, personal data, type of donations and sums, if it involves money. The Electoral Authority publishes data such as the reports containing the revenues and expenses of the campaign or the results of the controls envisaging the political parties.

In 2015, the legislation regarding the financing of the parties was modified by Law no. 113/2015, introducing the public financing for electoral campaigns. Until now, the campaign was supported by the parties themselves. In order to introduce more transparency and reduce potential frauds – as the legislator himself declared – the funds spent during the campaigns, defined by strict limits, will be refunded if a party or independent candidate receive more than 3% of the votes.

This could be a significant opportunity for the Romanian authorities and political parties to make the process more transparent by publishing all the information regarding incomes and expenses, as well as reimbursement in an open data and detailed format. Also, taking into consideration that political parties and the Parliament are seen as some of the most corrupt institutions in Romania, this could be a chance to prove that things are done in a correct and legal manner during the elections. Of course, this does not covers issues related to abuse of public resources or to electoral fraud produced in other manners, but at least raises the credibility of the electoral process and the level of trust of the citizens.

5. Why We All Must Be Emilia Romagna Administration?

Ending with the same reference to Putnam's comparison, we can conclude that being like the Northern administration means applying transparency rules and procedures, including publishing the complete information in an open, editable file or database, while go off the rails means using paper, not editable .pdfs or not publishing at all. Therefore, the purpose of the electoral authorities and political parties should be to go North.

Transparency must not be a choice, but a rule. According to OSCE's Guidelines on Political Party Regulation[30]:

"Political parties may obtain certain legal privileges from registration as political parties that are not available to other associations. This is particularly true in the area of political finance and access to media resources during election campaigns. As a result of having privileges not granted to other associations, it is appropriate to place certain obligations on political parties due to their acquired legal status. These may take the form of imposing reporting requirements or transparency in financial arrangements. Legislation should provide specific details on the relevant rights and responsibilities that accompany the obtainment of legal status as a political party."

Therefore, publishing information in reusable data should be a consequence of the advantages the parties get from the state. This is even more visible in states where the funding is public. And they are not

[29] According to the OECD, in France, in the 2012 presidential campaign, EUR 21,769,895 were reimbursed for François Hollande and EUR 21,339,664 for Nicolas Sarkozy. http://www.oecd.org/about/membersandpartners/publicaffairs/Transparency%20and%20Integrity%20in%20Political%20Finance.pdf

[30] OSCE, *Guidelines on Political Party Regulation*. Adopted by the Venice Commission at its 84th Plenary Session, Venice, 15 – 16 October 2010. http://www.osce.org/odihr/77812?download=true

a few. According to IDEA party financing database[31], 17 countries out of 44 in Europe had both regularly provided funding and in relation to campaigns, while 20 had regularly provided funding. This principle should make the parties even more responsible towards the citizens and they should publish according to the legislation, but also from their own will information related to the way they spent the money.

Open data may represent one of the most useful instruments in order to map corruption, conflicts of interest, illegal lobbying and influence within the electoral processes and, therefore, states should impose such provisions, either by law – although politicians are not eager to show their backyard to everyone – or by signing international commitments through the OGP Action Plans. Still, the best situation is that the legislation doesn't need to be modified in many cases, but just to show good will and courage in facing the political pressure. Practically, this is not about the legislation, but about the way the electoral commissions understand to ensure transparency and accountability towards the citizens. And in this entire situation the civil society must play an essential role as an active advocate and partner for this cause.

About the author:

Septimius PÂRVU is a Romanian expert in administrative reform, good governance and electoral processes working with the Bucharest based think tank Expert Forum. Mr. Pârvu has more than 7 year of experience in the civil society, collaborating with some of the most important NGOs in Romania and in the region. He coordinated multiple electoral monitoring campaigns in Romania starting with 2009 and organized trainings for electoral observers in countries such as Republic of Moldova and Montenegro. Mr. Pârvu published reports, articles and public positions on topics such as abroad voting, transparency of the electoral process, election observation, party financing or political clientelism. He also contributed to several electoral draft laws in Romania. List of relevant publications of the author: *Contributions to technical documents regarding the reform of the Romanian party financing legislation.* Available at: https://politicafarabariere.wordpress.com. *Technical positions regarding the reform of the electoral legislation.* Available at: http://expertforum.ro/propuneri-reforma-electorala/. Policy briefs and monitoring reports*:*

– *Procesele electorale în România, între improvizaţie şi bune practici*. Available at: http://expertforum.ro/improvizatie-electorala/

– *Codul Electoral nu mai poate aştepta*. Available at: http://expertforum.ro/alegeri/

– *Restanțele legii privind votul prin corespondență.* Available at: http://expertforum.ro/restantele-legii-votuluiprin-corespondenta/

– *Transparența alegerilor nu este opțională.* Available at: http://expertforum.ro/transparenta-alegerilor-nu-esteoptionala/

– *Hârtie vs on-line: este votul electronic o soluție pentru România?* Available at: http://expertforum.ro/votelectronic/

– *Raportul anual EFOR: Erorile politice din 2014; ce e de făcut.* Available at: http://expertforum.ro/raport-anual-2015/

– *Clientelismul politic 2012 – 2016.* Available at: http://expertforum.ro/clientelism-2016/

– *Radiografia anului electoral 2012.* Available at: http://www.alegericorecte.ro/docs/Radiografia%20anului%20electoral%202012.pdf

E-mail: septimius.parvu@expertforum.ro

[31] International IDEA, Political Finance Database, http://www.idea.int/political-finance/question.cfm?field=270

References:

- Chanturia, G., Dohler, D. (2012). *Which corporations are connected to which political parties?*. September. Available at: http://transparency.ge/en/blog/which-corporations-are-connected-which-political-parties
- European Commission for Democracy through Law. *Report on the misuse of administrative resources during electoral processes*. Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)033-e
- Granickas, K. https://www.europeandataportal.eu/sites/default/files/library/201404_open_data_as_a_tool_to_fight_corruption.pdf
- Falguera, E., Jones, S., Ohman, M. (eds.). *Funding of Political Parties and Election Campaigns. A Handbook on Political Finance*. Available at: http://www.idea.int/publications/funding-of-political-parties-and-election-campaigns/loader.cfm?csModule=security/getfile&pageID=64347
- Graft, A., Verhulst, S. and Young, A. (2016). *Indonesia's Kawal Pemilu*. January. Available at: http://odimpact.org/static/files/case-study-indonesia.pdf
- Putnam, R.D., Leonardi, R., Nanetti, R.Y. (1993). *Making Democracy Work: Civic Traditions in Modern Italy*. Princeton University Press, 3 – 6.
- OECD. *Transparency and integrity in political finance*. Available at: http://www.oecd.org/about/membersandpartners/publicaffairs/Transparency%20and%20Integrity%20in%20Political%20Finance.pdf
- OSCE (2010). *Guidelines on Political Party Regulation*. Available at: http://www.osce.org/odihr/77812?download=true
- Sunlight Foundation. *The Money, Politics, and Transparency. Campaign Finance Indicators: Assessing Regulation and Practice in 54 Countries across the World in 2014*. Available at: http://assets.sunlightfoundation.com.s3.amazonaws.com/mpt/MPT-Campaign-Finance-Indicators-Key-Findings.pdf
- Wałecki, M. (2009). *Illegal funding of politics – combating abuse of state resources and illegal campaign finance*. Available at: http://www.moneyinpolitics.info/wp-content/uploads/2015/05/Walecki-_July-2009_-IFES-Combating-Abuse-of-State-Resources.pdf
- Global Open Data Index. http://index.okfn.org/dataset
- International IDEA, Political Finance Database. Available at: http://www.idea.int/political-finance/question.cfm?field=270
- Open Data Barometer, 2nd edition. Available at: www.opendatabarometer.org/report/analysis/rankings.html
- Open Data Handbook. Available at: http://opendatahandbook.org/
- Open Government Partnership. Available at: http://www.opengovpartnership.org/explorer/landing
- The Romanian official portal of open data. Available at: http://data.gov.ro/organization/autoritatea-electorala-permanenta
- Transparency International, Global Corruption Barometer (2013). Available at: www.transparency.org/gcb2013/results
- Corruption Prevention and Combating Bureau. Available at: http://www.knab.gov.lv/en/financing/
- Cámara Nacional Electoral. Available at: www.electoral.gov.ar/financiamientoconsolidado2015.php
- Norway Statistics Office. Available at: www.ssb.no/en/valg/statistikker/valgkamp
- Norway Party Portal. Available at: http://prosjekt.fylkesmannen.no/partistotte/
- UK Electoral Commission. Available at: www.electoralcommission.org.uk/
- US Federal Election Commission. Available at: www.fec.gov/data/CommunicationCosts.do?format=html

ELECTORAL LAW AND NEW TECHNOLOGIES: LEGAL CHALLENGES THE CASE OF GERMANY: THE ROAD NOT TAKEN

Sebastian SEEDORF
Deputy Head of Interior Policy Division
German Federal Chancellery

Abstract:

In 2009 the German Federal Constitutional Court ruled that voting machines used in previous elections were unconstitutional. To reach that conclusion the Court developed a constitutional standard of public elections. This standard requires that elections are to be held in public to ensure trust in democracy. Each citizen must be able to comprehend and verify the central steps in the elections reliably and without any special technical knowledge. The consequence of this standard was that electronic voting machines could no longer be used in German elections. It also effectively prevents the development of a new e-voting system (such as online voting), because no system will be able to guarantee the security and the secrecy of voting by means comprehensible to everyone.

Keywords: *election, e-voting, Germany, Constitutional Court, public elections, verification of elections, secrecy of elections*

Résumé :

En 2009, la Cour constitutionnelle fédérale de l'Allemagne a décidé de l'inconstitutionnalité des machines de vote utilisées lors des élections précédentes. Afin d'arriver à cette conclusion, la Cour a conçu un standard constitutionnel pour l'organisation publique des élections. Ce standard prévoit l'organisation des élections en public afin d'assurer la confiance en la démocratie. Tout citoyen doit être en mesure de comprendre et de vérifier les étapes centrales des élections de manière fiable et sans connaissances techniques particulières. Sur la base de ce standard, l'utilisation des machines de vote électronique dans le cadre des élections en Allemagne est devenue impossible. En outre, ce standard empêche efficacement le développement d'un nouveau système de vote électronique (tel que le vote par Internet), étant donné qu'aucun système ne peut garantir la sécurité et le secret du vote par des moyens faciles à comprendre.

Mots-clés : *élections, vote électronique, Allemagne, Cour constitutionnelle, élections publiques, contrôle des élections, secret des élections*

Abstract:

În 2009, Curtea Constituţională Federală a Germaniei a decis cu privire la neconstituţionalitatea maşinilor de vot utilizate la alegerile anterioare. Pentru a ajunge la concluzia respectivă, Curtea a conceput un standard constituţional pentru alegeri publice. Acest standard prevede organizarea alegerilor în public, pentru a asigura încrederea în democraţie. Fiecare cetăţean trebuie să fie în măsură să înţeleagă şi să verifice etapele centrale în alegeri în mod fiabil şi fără cunoştinţe tehnice speciale. Ca urmare a acestui standard, utilizarea maşinilor de vot electronic în cadrul alegerilor din Germania a devenit imposibilă. De asemenea, acest standard previne în mod eficient dezvoltarea unui nou sistem de vot electronic (cum ar fi votul prin internet), dat fiind faptul că niciun sistem nu va putea garanta securitatea şi secretul votului prin mijloace uşor de înţeles.

Cuvinte-cheie: *alegeri, vot electronic, Germania, Curtea Constituţională, alegeri publice, verificarea alegerilor, secretul alegerilor*

1. Introduction

Germany is an economic diverse country with both a competitive high tech industry, and a lively digital research community. Germans are not shy to use cutting-edge electronic applications in all walks of life. The Federal Government, regional authorities and municipalities offer all kind of public services through the Internet and smartphone applications. You can register a car, change your legal residence and even declare your taxes online. But you cannot vote electronically, neither on the national, nor on state or municipal level. Neither Internet voting, nor stand-alone voting machines are used and will be for the foreseeable future. This is not because there would be no interest in such a voting channel. The sole reason is a judgment of the Federal Constitutional Court (*Bundesverfassungsgericht*), Germany's highest court, of 3 March 2009.[1]

Before, there was some using of technical means in the procedure of elections. Since the 1950's mechanical voting machines were used in federal and state elections in which the voter either had to push a button for the different candidates and parties, or to place an election token in an opening allotted to one of the candidates. Later, the Federal Electoral Act (FEA)[2] allowed the introduction of new, more sophisticated voting machines, as long as they guaranteed the secrecy of the ballot. The Federal Ministry of the Interior was authorized to issue detailed provisions by means of an ordinance on the prerequisites for the design of voting machines, the Federal Voting Machine Ordinance (*Bundeswahlgeräteverordnung*). But voting machines never really developed into a standard voting channel in Germany.

In the European Parliament Elections of 1999, electronic voting machines were used for the first time in Germany. In the Bundestag elections of 2002 and 2005 up to 1.850 voting machines of two different types by the Dutch manufacturer N.V. Nederlandsche Apparatenfabriek (NEDAP) were used.[3]

2. The Constitutional Court Case of 2009

In the elections to the 16th German Bundestag on the 18th of September 2005,

[1] Judgment of the Second Senate of 3 March 2009 on the basis of the oral hearing of 28 October 2008 in the combined cases 2 BvC 3/07 and 2 BvC 4/07. The judgment has been published in German in the Court's official records as BVerfGE 123, 39, in several German law journals and on the Court's website. An official English translation has been published on the Court's website: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/03/cs20090303_2bvc000307en.html. The paragraphs of the judgment have been numbered and I cite the numbers from the English translation. Please note that the numbering deviates slightly from the numbering of the original German version.

[2] *Bundeswahlgesetz* as promulgated on 23 July 1993 (BGBl. 1993 I 1288, 1594), as last amended by Article 2 of the Act of 3 May 2013 (BGBl. 2013 I 1084).

[3] Cf. Bundestag-Drucksache 16/5194, p. 7.

approximately 2 million voters had cast their votes on 1.850 electronic voting machines (direct-recording electronic voting machines, DREs).[4]

After the elections, two voters lodged complaints against the use of voting machines in the elections. The plaintiffs argued that the deployment of computer-controlled voting machines had violated the principle of democracy, the principle of the rule of law, the principle of the public nature of elections and the principle of the official nature of elections. The plaintiffs did not claim any manipulation or specific malfunction of any of the voting machines. In the Court proceedings, the requirement that elections had to be held in public turned out to be the key point. The plaintiffs argued that because the cast votes were stored exclusively on an electronic storage medium and the votes were only counted electronically by the voting machine, there was no way to ascertain that the votes cast by the voters were inserted into the ballot box without a change, that the votes were not subsequently altered and that only the votes from the ballot box were counted at the end of the election.[5]

The government, on the other hand, argued that the Constitution certainly did not require each distinct act, every little step and procedure of an election, to be subject to an individual check, as this would *"overstretch"* the constitutional principle of a public election.[6] Instead, as a typical consequence of the advance in technology, it could be expected that the voter would presume that the systems deployed were viable, given that they had been examined and certified in a designated procedure prior to their deployment.[7]

The Constitutional Court delivered its judgment on the 3rd of March 2009. The ruling declared the Federal Ordinance on the Deployment of Voting Machines in Elections to the German Bundestag to be invalid as it did not ensure monitoring that complies with the constitutional principle of the public nature of elections.

However, the Court did not declare the Bundestag election of 2005 to be invalid, because there was no indication that there had been any kind of malfunction of the voting machines or manipulation of the result.

A remarkable aspect of the judgment is the complete absence of any reference to international legal instruments and a complete lack of international comparisons. The Court does not evaluate the German law, or the practical operation of the voting machines, against the Council of Europe's Recommendation on legal, operational and technical standards for e-voting.[8]

2.1. The Constitutional Standard of Public Elections

The German Constitution does not make any explicit reference to elections being public or having to comply with publicity requirements. Therefore, the Court deduces the concept of public elections from the constitutional principles of democracy, the republic and the rule of law, as these are mentioned in article 20 of the Constitution.[9]

Of particular importance here is the Court's understanding of the relation between democracy, trust and elections: *"The public nature of elections is [the] fundamental precondition for democratic political will-formation. It ensures the correctness and verifiability of the election events, and hence creates a major precondition for the*

[4] For a detailed description of the construction and operation of these machines, see Constitutional Court Decision of 3 March 2009, at paragraphs 3 – 7.

[5] Constitutional Court Decision of 3 March 2009, at paragraph 35.

[6] Constitutional Court Decision of 3 March 2009, at paragraph 81.

[7] Constitutional Court Decision of 3 March 2009, at paragraphs 58 – 59; see also below "The Constitutional Standard for E-Voting" where this argument is discussed.

[8] Rec(2004)11 of the Committee of Ministers to member states, adopted by the Committee of Ministers on 30 September 2004 at the 898th meeting of the Ministers' Deputies.

[9] Constitutional Court Decision of 3 March 2009, at paragraph 108.

well-founded trust of the citizen in the correct operation of the elections."[10]

The Court here shows a somewhat functional understanding of the *"publicness"* of an election. That an election is held in public is not an end in itself, but rather a means to ensure that trust and confidence can be built and sustained. It is that trust, the Court emphasizes, that enables a democracy to exist. Elections are crucial in that regard, because elections form the *"fundamental act of legitimisation"*[11] of a government. To cast a vote in an election constitutes the major element of the transfer of public power from the people to the state bodies; it is the act in which a *"government of the people, by the people, for the people"* is created.

Only an elected government can legitimately exercise power in a democracy. People have to know that the election, with its specific outcome result, is a genuine expression of their will. For the Court, an election without the trust of the electorate is insufficient. It is not enough that an election simply is free and fair and that a government has been democratically elected – the people must also be confident that this has been the case.

What is the foundation of such confidence? It is the implementation of the election *"before the eyes of the public"*.[12] For the Constitutional Court, individual citizens have no other tool at hand but the possibility of monitoring whether elections comply with the constitutional requirements. Only by transparency can the citizens ensure that their transfer of power has been accurate and does not suffer from a shortcoming. The democratic legitimacy of elections requires that the election events be controllable so that manipulation can be ruled out or corrected and unjustified suspicion can be refuted.[13]

Two questions remain open: *Who* should be able to monitor the elections? And *to what extend* should an election be controllable? On both questions, the Court is very strict. In a republic, elections are a matter for the entire people and a joint concern of all citizens. Consequently, the monitoring of the election procedure must also be a matter for and a task of the citizen. Each citizen must be able to comprehend and verify the central steps in the elections reliably and without any special prior technical knowledge.[14]

On the second aspect (extent of the public control of elections), the Court employs an all-encompassing principle, too. All *essential* steps in elections have to be subject to public examination unless other constitutional interests justify an exception.[15] Particular significance is attached here to the monitoring of the casting of the ballot (the *"election act"*) and the counting and tabulation of results (*"the ascertainment of the election result"*).[16] The voter has to *"reliably comprehend whether his or her vote is unfalsifiably recorded and included in the ascertainment of the election result, and how the total votes cast are assigned [to the different candidates/parties] and counted"*.[17]

2.2. The Constitutional Standard for E-Voting

In its judgment, the Court only had to deal with *"voting machines"* (*Wahlgeräte*) as they were practically in use at the time and consequently only refers to those. But when it starts its reasoning on the constitutional standard of their deployment, it adds a qualifier, which effectively imposes that

[10] Constitutional Court Decision of 3 March 2009, at paragraph 107. To use "the major precondition" instead of "a major precondition" in my view better reflects the German original text.

[11] Constitutional Court Decision of 3 March 2009, at paragraph 109.

[12] Constitutional Court Decision of 3 March 2009, at paragraph 109 (my emphasis, references omitted).

[13] Constitutional Court Decision of 3 March 2009, at paragraph 109.

[14] Constitutional Court Decision of 3 March 2009, at paragraph 110.

[15] Constitutional Court Decision of 3 March 2009, at paragraph 112 (my emphasis).

[16] *Ibidem.*

[17] Constitutional Court Decision of 3 March 2009, at paragraph 113.

standard on all forms of e-voting as it now refers to *"voting machines which record the voters' votes in electronic form and determine the result of the election electronically"*.[18]

When electronic voting is to be used, it must be possible to check, reliably and without special expert knowledge, the essential steps in the casting of the vote and in the counting and tabulation of the results.[19] Interestingly, the Court offers an additional argument to reinforce its claim: e-voting is *"susceptib[le] to manipulation"* and *"amenab[le] to error"*.[20] Errors in the voting machine software are difficult to recognize from outside. *"Over and above this, such errors can affect not only one individual election computer, but all the devices used."*[21] In contrast to traditional vote-casting channels, *"a major impact may in principle be achieved with relatively little effort by encroachments on electronically controlled voting machines"*.[22] Therefore, the Court concludes that special precautions need to be taken when employing e-voting in order to comply with the principle of the public nature of elections.[23]

Consequently, every voter must be able to verify – also without more detailed knowledge of computers – whether his or her vote has been *"recorded truthfully"*, i.e., that the vote has been cast as intended, stored and eventually counted as cast. In the view of the Court, it is not sufficient if the voter must rely on the functionality of the system without the possibility of personal inspection. When the Court emphasized that *each citizen* must be able to comprehend and verify the central steps in the elections reliably and without any special prior technical knowledge, it effectively ruled out expert procedures. In recent years, some authors have claimed that mathematical calculations could be employed to show that there have been no manipulations to an e-voting system.[24] This may be so, but for the average voter (without technical knowledge) all kinds of mathematical proofs remain a mystery.

Based on all this background, the Court, in its decision of 2009, held that, while the provision which generally created the possibility to cast a vote by way of e-voting (and granted the Federal Ministry of the Interior the authority to regulate all necessary details by way of an ordinance) passed constitutional scrutiny, the specific ordinance which provided for the implementation and use of voting machines was held to be unconstitutional. The Court held that the *"Federal Voting Machine Ordinance"* did not ensure that only those voting machines could be approved (and used) which comply with the constitutional preconditions of the principle of the public nature of elections laid out in the judgment.

Since the judgment of the Constitutional Court, e-voting has no longer been in use in Germany, neither in the form of the traditional voting machines, nor by Internet voting. The Bundestag election of 2013 was held in approximately 80,000 polling stations, in which traditional ballot papers were used, and an additional 10,000 polling districts for postal ballots. Not a single voting machine was used.

2.3. The Court's Suggestions for Improved Voting Machines

In the judgment of 2009, the Constitutional Court explicitly left the door open for electronic voting machines if the constitutionally required possibility of a reliable correctness check is ensured. The court even made quite specific suggestions in that regard: *"Voting machines are*

[18] Constitutional Court Decision of 3 March 2009, at paragraph 118.
[19] Constitutional Court Decision of 3 March 2009, at paragraph 119.
[20] Constitutional Court Decision of 3 March 2009, at paragraph 120.
[21] *Ibidem.*
[22] *Ibidem.*
[23] *Ibidem*.

[24] M. Henning, D. Demirel and M. Volkamer, Öffentlichkeit vs. Verifizierbarkeit – Inwieweit erfüllt mathematische Verifizierbarkeit den Grundsatz der Öffentlichkeit der Wahl, in *Transformation juristischer Sprachen, Tagungsband des 15. Internationalen Rechtsinformatik Symposiums (IRIS) 2012* (Vienna, OCG, 2012), p. 213 – 220.

conceivable in which the votes are recorded elsewhere in addition to electronic storage. This is, for instance, possible with electronic voting machines which print out a visible paper report of the vote cast for the respective voter, in addition to electronic recording of the vote, which can be checked prior to the final ballot and is then collected to facilitate subsequent checking."[25]

This *"Voter Verified Paper Audit Trail"* (VVPAT) seems to fulfil all the requirements put forward in the judgment. The voting machine does not only store and count the votes, but is equipped with a second, independent verification system, which every voter without computer knowledge can understand. With the paper slip at hand, the voter can verify that his or her vote was cast as he or she had intended.

For the individual voter it is easy to compare the paper slip with his or her vote previously cast at the machine. But the counting and tabulation procedure is still done by the machine. The voter has to rely on the functionality of and trust in the correct working of the machine. Of course, the polling officials can compare all the paper slips with the result stored in the machine to verify that the votes were counted as cast. The Constitutional Court seems to have had this in mind when it stated that the voter must be able to verify whether his or her vote is recorded truthfully *"at least as a basis for a subsequent re-count, if the votes are initially counted with technical support"*.[26]

But a verification of the automatic counting by the machine is only possible with a subsequent manual counting. However, if the result of every machine would have to be counted manually, again there is no point in using voting machines. Every machine count without manual recount means that again the machine has to be trusted.

This means that a manual recount has to be done whenever a single voter asks for it, which would imply a heavy burden on the election management body.

2.4. Secrecy of the Vote and Protection Against Manipulations

Although the main argument in the Constitutional Court's decision was the verification of the counting and tabulation of the votes, the judgment applied this standard to other conditions of free and fair elections, in particular the secrecy of the vote.

Individual control of the secrecy of the vote, however, means that every voter could convince himself/herself that the entire technical process of the e-voting system employed does not allow any breaches of the secrecy of his/her vote and ensures the security of the election against any other kind of manipulation.

Such a legal condition requires a certain design of voting machines with paper audit trails, which ensure that no connection could be established between the paper slip and the voter. E-voting by means of the Internet would have to guarantee the secrecy of the entire transfer of the vote to a/the central computer system. And it would have to do so in a manner which the voter can understand. Such a system would finally have to include the time factor in its consideration: that is, it has to make sure that the memory module in the e-voting system, which stored the information during the vote casting, could not somehow be hacked or reprogrammed while it is stored after an election (in Germany up to four years), with more sophisticated technology, to reveal the individual vote of a voter.

In its judgment of 3 March 2009, the German Constitutional Court did not explicitly rule on the standard of public monitoring or verification of the secrecy of the vote as this was not necessary for the case it had to decide. But the approach taken by the Court and the possible consequences outlined above show that the question of secrecy of the vote, and with it security of the system against manipulation, carry an enormous constitutional weight and involve high legal risks which would have to be considered

[25] Constitutional Court Decision of 3 March 2009, at paragraph 123.
[26] Constitutional Court Decision of 3 March 2009, at paragraph 121.

thoroughly before the introduction of a new e-voting system in Germany.

Furthermore, the goal of protecting an electronically stored or transferred vote against manipulation or a breach of secrecy may lead an election authority to make great technical and organizational efforts with high costs, only to be constantly challenged by activist groups that would try to find ways to show that the system is still neither safe, nor secret. This is what happened to the Dutch authorities when their original voting machines were subjected to critical scrutiny by an activist group that refuted one argument after the other which the authorities brought forward to *"prove"* the security of their e-voting system.

The experience of the Dutch authorities can well be applied to other jurisdictions: every effort by election authorities to make an e-voting system safe against manipulations and breaches of the secrecy of the vote may only be seen as an incentive for hackers, activist groups or critical individuals to show that the system can in fact be compromised and that manipulations and breaches of the secrecy of the vote are still possible, and to prove the government or election management body is wrong. Every effort to further improve the security of the e-voting system may just create an even higher incentive or temptation to put more effort into challenging the system. The election authority needs constantly to update, develop and improve its system in order not to be vulnerable to attacks. Hence, the election authority may be caught in a kind of *"security arms race"*, where new layers of security need to be added all the time to keep the trust of the electorate. It may find itself in a situation where greater and greater monetary and human resources have to be devoted to create a constitutionally acceptable election environment.

3. Conclusion

The 2009 judgment of the Constitutional Court in has effectively ended all initiatives on e-voting in Germany for the foreseeable future. The principled reasoning is not easy to bring in line with the experimental and expert-driven reality of e-voting. It is not possible to foresee when new technology may be available that could render a previously very good security system utterly useless.

Mathematicians may develop even more sophisticated and academically sound verification which really proves that no manipulation has occurred – any advance in technology seems to create an even greater distance between the few experts who really understand a technological system and the general population that can use the system, but could never comprehend its operation.

The German Constitutional Court Decision of 2009 effectively stopped any further development. In the interest of the best constitutional principles, the Court set a standard which no available and no conceivable e-voting system can completely fulfil.

But to dismiss the judgment of the Constitutional Court for its lack of technological thoughtfulness, or even vision, means overlooking the more significant philosophical and political core of the ruling: trust in public institutions by a society is such a fragile thing that sometimes a society needs to refrain from committing itself to certain developments to preserve it. If this means conducting things in an old-fashioned way, so be it. In terms of e-voting, every society has to find its own solution. But – and this is the important message we can draw from the German Court case – every advance may come with a price and every society has to decide if it is willing to pay it.

About the author:

Dr. Sebastian SEEDORF is a senior legal advisor and the Deputy Head of the Interior Policy Division in the Federal Chancellery in Berlin, Germany. Before that, he worked for some years in the Electoral Law Division of the German Federal Ministry of the Interior, with a focus

on constitutional law matters in elections and comparative electoral law. Sebastian graduated from Düsseldorf University, earned a master's degree (LL.M.) from the University of Cape Town in South Africa and received a doctorate from Humboldt University in Berlin. From 2007 to 2008 he was a senior researcher at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law.

References and Further Reading:

- Henning, M., Budurushi, J. and Volkamer, M. (2014). Elektronische Wahlen durch Stimmzettelbelege? Untersuchung möglicher Umsetzungen des Öffentlichkeitsgrundsatzes bei elektronischen Wahlen, in *MultiMedia und Recht* (*MMR*), p. 154 – 158.
- Henning, M., Demirel, D. and Volkamer, M. (2012). Öffentlichkeit vs. Verifizierbarkeit – Inwieweit erfüllt mathematische Verifizierbarkeit den Grundsatz der Öffentlichkeit der Wahl, in *Transformation juristischer Sprachen, Tagungsband des 15. Internationalen Rechtsinformatik Symposiums (IRIS) 2012* (Vienna, OCG, 2012), p. 213 – 220.
- Neumann, S., Kahlert, A., Henning, M., Richter, P., Jonker, H. and Volkamer, M. (2013). Modeling the German Legal Latitude Principles, in Wimmer, M. A., Tambouris, E. and Macintosh, A. (eds.), *Electronic Participation: Lecture Notes in Computer Science, 5th International Conference on eParticipation (ePart 2013)*, vol. 8075, Springer, September 2013, p. 49 – 56.
- Richter, P. (2012). *Wahlen im Internet rechtsgemäß gestalten*. Baden-Baden: Nomos.
- Schreiber, W. (ed.) (2013). *Bundeswahlgesetz*, 9th edition. Köln. Carl Heymanns Verlag.

E-VOTING IN AUSTRIA: A NATIONAL CASE STUDY

Gregor WENDA
Deputy Head of Department of Electoral Affairs
Austrian Federal Ministry of the Interior
Chair of the Council of Europe Ad Hoc Committee of Experts on Electronic Voting (CAHVE)

Abstract:

At the beginning of the new millennium, an increasing interest in the use of new voting technologies was recorded in Austria. While the introduction of Internet voting for elections and referenda on the federal, provincial and local level would require a constitutional amendment, the Economic Chamber Act and the Federation of Students' Act contained suitable provisions for e-voting since the early 2000s. In 2009, Internet voting was introduced as an additional, binding voting channel within the framework of the Federation of Students' elections. In 2011, the Austrian Constitutional Court overturned parts of the respective election regulation and specified conditions for any future legal implementation of e-voting, particularly for students' elections, but with a certain impact on other electoral events as well.

Keywords: *Austria, e-voting, Internet voting, Federation of Students' elections, Constitutional Court, transparency, legal determination*

Résumé :

Au début du nouveau millénaire, on a enregistré un intérêt accru pour l'utilisation des nouvelles technologies de vote en Autriche. Tandis que l'introduction du vote par Internet lors des élections et des référendums au niveau fédéral, provincial et local exige la modification de la Constitution, la Loi de la Chambre de commerce et la Loi de la Fédération des étudiants contenaient des dispositions adéquates pour le vote électronique dès le début des années 2000. Lors des élections de la Fédération des étudiants de 2009, on a introduit le vote par Internet comme canal de vote supplémentaire, à titre obligatoire. En 2011, la Cour constitutionnelle de l'Autriche a annulé la réglementation en cause concernant les élections et elle a spécifié les conditions pour toute mise en place légale future du vote électronique, particulièrement pour les élections des étudiants, ce qui a en même temps un certain impact sur d'autres événements électoraux.

Mots-clés : *Autriche, vote électronique, vote par Internet, élections de la Fédération des étudiants, Cour constitutionnelle, transparence, détermination légale*

Abstract:

La începutul noului mileniu, s-a înregistrat un interes în creştere pentru utilizarea noilor tehnologii de votare în Austria. În timp ce introducerea votului prin internet pentru alegeri şi referendumuri la nivel federal, al provinciilor şi local necesită modificarea Constituţiei, Legea Camerei de Comerţ şi Legea Federaţiei Studenţeşti conţineau dispoziţii adecvate pentru implementarea votului electronic încă de la începutul anilor 2000. În cadrul alegerilor Federaţiei Studenţeşti din 2009 a fost introdus votul prin internet drept canal de votare suplimentar, cu titlu obligatoriu. În 2011, Curtea Constituţională a Austriei a anulat reglementarea respectivă privind alegerile şi a specificat condiţiile pentru orice implementare legală viitoare a votului electronic, în special pentru alegerile studenţilor, însă având, de asemenea, un anumit impact asupra altor evenimente electorale.

Cuvinte-cheie: *Austria, vot electronic, vot prin internet, alegerile Federaţiei Studenţeşti, Curtea Constituţională, transparenţă, determinare legală*

1. Introduction[1]

While Austria has been known as particularly active and innovative in e-government matters for almost two decades, experiences with e-voting must be considered diverse and of a much lower scale. Since the beginning of the new millennium, rising interest in the use of new voting technologies (NVT) could be recorded, though the focus of discussions was mainly on Internet voting rather than the use of voting machines at polling places.[2]

The Federal Constitution covers elections of the legislative bodies (both of the federation and the provinces), the representative bodies at the municipal level, the members of the European Parliament, and the Federal President, as well as referenda and consultations. These electoral events are open to all national citizens (and to EU citizens in European and municipal elections) and come under the authority of electoral boards set up at the different administrative levels of the republic.[3] In contrast, elections to bodies of "self-government" (e.g., Economic Chamber, Labour Chamber, Federation of Students, Medical Chamber) are generally run by these institutions themselves. Even these elections, however, have to be regulated by specific statutory acts passed by Parliament and are effectively linked to state administration as a member of government who bears the ultimate responsibility.

A clear hierarchy of norms[4] coins the legal framework in Austria. The Constitution and lateral constitutional laws, along with European Law, are on top of a *"legal pyramid"*. Ordinary laws (both on the federal and the provincial level) have to be passed by legislature in accordance with the Constitution. Federal laws are passed with an absolute majority in the National Council. Administrative regulations ("Verordnungen") are based on statutory laws and enacted by an administrative authority, e.g., a Federal Minister. As a consequence, electoral authorities are not permitted to render decisions without an elaborate statutory backing. With regard to e-voting, no introduction would ever be possible without adequate laws passed by parliament. The obligation to strictly construe electoral

[1] All Internet links quoted in this article were last accessed on 1 May 2016.

[2] An inter-ministerial working group established at the Federal Ministry of the Interior in 2004 and tasked with an analysis of prerequisites for e-voting in Austria held in its final report that only Internet voting as a form of remote voting was considered, not least due to the high number of polling stations in the country (see report at: http://www.bmi.gv.at/cms/BMI_wahlen/faq/files/Abschlussbericht_E_Voting_2004_11_29.pdf).

[3] Federal Electoral Board, Provincial Electoral Board, District Electoral Board, Municipal Electoral Board, Precinct Station Board.

[4] Hausmaninger, H. (2011). *The Austrian Legal System*, p. 23.

legislation according to the wording also gives little to no room for interpretation and experiments in electoral affairs. Authorities could not even run non-binding pilots without a proper act – a ministerial decree or an electoral board decision would not be sufficient. Hence, all attempts to establish e-voting in Austria require a solid basis in the law. With regard to parliamentary elections, municipal elections, mayoral elections, and referenda, an amendment to the Constitution would be indispensable.[5] Concerning elections to self-governing bodies, concrete provisions in the respective *"ordinary laws"* are needed. Such legal provisions, allowing for the use of e-voting, were first implemented in two *"self-government acts"*: The Economic Chambers Act in 2000[6] and the Federation of Students' Act in 2001.

Since Internet voting constitutes a remote voting channel, i.e., enables the electorate to cast their vote outside a polling station, art. 26 paragraph 6 of the Constitution would have to be amended. The first time such a constitutional amendment was passed by Parliament was with the introduction of full postal voting in 2007.[7] The creation of this legal basis required a two-third majority in the National Council and put a factual end to a decades-long case law of the Austrian Constitutional Court.[8] The Court, having the sole jurisdiction in electoral matters, held in a landmark decision in 1985[9] that the use of postal voting was in violation with the principles of personal and secret suffrage as the casting of the vote took place in an unsupervised environment. This legal *"conflict"* could only be solved by putting postal voting directly into art. 26 paragraph 6 of the Constitution and by designing it as an *"exception"* to the act of voting before an electoral authority.[10] Postal voters now have to furnish a reason when applying for a postal ballot and sign an affidavit stating that the vote was cast personally, uninfluenced, and unobserved. In 2014, the Constitutional Court had to decide about the legality of certain norms governing the European elections and thereby held that the use of postal voting was in accordance with European law and Austrian laws due to an appropriate constitutional basis.[11] In case the legislator would ever consider introducing Internet voting as an additional voting channel in Austria, explicit provisions would have to be laid down in the Constitution aside from postal voting.

2. First Experiences with E-Voting

Following the wish of the Austrian Federation of Students to allow for a remote voting channel, inspired by university elections in Germany[12], the legislature passed a legal basis[13] for Internet voting in 2001.[14]

[5] Heindl, P. *E-Voting in Austria: Legal Requirements and First Steps*, E-VOTE 2004 Proceedings, p. 165; Heindl, P., Prosser, A., Krimmer, R. (2003). *Constitutional and technical requirements for democracy over the Internet: E-democracy. Electronic Government.* R. Traunmüller. Berlin, Springer-Verlag Berlin, p. 417 – 420; 2004 report of the inter-sectoral sub working group on legal matters regarding e-voting: http://www.bmi.gv.at/cms/BMI_wahlen/faq/files/Bericht_UAG_1_Legistische_Belange.pdf

[6] Section 73 paragraph 1 of the „Wirtschaftskammergesetz 1998 – WKG", Federal Law Gazette BGBl. I Nr. 103/1998.

[7] 2007 Electoral Law Amendment Act („Wahlrechtsänderungsgesetz 2007"), Federal Law Gazette BGBl I 2007/28.

[8] Wenda, G. (2009). *Postal voting & voting from abroad: The Austrian perspective,* 5th European Conference of Electoral Management Bodies on "Distance voting", p. 23.

[9] VfSlg. 10.412/1985.

[10] Stein, R., Wenda, G. Die Wahlrechtsreform 2007. Ausgewählte Neuerungen, *SIAK-Journal* 4/2007, 61 (2007).

[11] VfSlg.19.893/2014.

[12] Otten, D. (2001). Uni Wahl Deutschland – wann, wo Uni Osnabrück Februar 2000, in: Holznagel, B., Grünwald, A., and Hanßman, A. *Wählen wie im Schlaraffenland? Erfahrungen der Forschungsgruppe Internetwahlen mit dem Internet als Wahlmedium. Elektronische Demokratie: Bürgerbeteiligung per Internet zwischen Wissenschaft und Praxis*. Munich, Verlag C.H. Beck, p. 73 – 85.

[13] Amendment to the „Hochschülerinnen- und Hochschülerschaftsgesetz 1998", passed on 1 February 2001 (Federal Law Gazette BGBl. I No. 18/2001).

[14] Krimmer, R. (2002). *e-Voting.at: Elektronische Demokratie am Beispiel der österreichischen Hochschülerschaftswahlen.* Working Papers on Information Systems, Information Business and Operations. I. f. I. u. Informationswirtschaft. Vienna, WU Vienna University of Economics and Business.

While initial attempts to apply it for the 2001 students' elections could not be realized, a first non-binding Internet voting test was run by the Vienna University of Economics in 2003.[15] In 2004, the same academic group organized another test as a shadow election parallel to the federal presidential elections in Austria. The goal was primarily to show the feasibility of e-voting and to present a possible technical solution.[16]

In the same year, the Federal Ministry of the Interior convened an inter-sectoral working group in order to research and document various aspects of e-voting. The group included members from different ministries, scientists, regional authorities, and the private sector. It was launched regardless of possible later moves by the government or Parliament in the direction of e-voting. Three sub-working groups – on legislative matters, technological matters, and international aspects – were set up. A final report, dated 15 November 2004, was submitted to the Federal Minister of the Interior.[17] It illustrated then the *status quo* of NVT in Europe and summarized possible prerequisites for e-voting. The main findings were:

– e-voting appears feasible as long as legal, operational, and technical conditions are sufficiently met (e.g., amendment to the Constitution needed, clear responsibilities of electoral authorities, recognition of election principles);

– definite identification and authentication necessary [then with a smart card solution, the so-called "Bürgerkarte" (citizen card) introduced by the E-Government Act in 2004];

– creation of a centralized electoral register and online administration system necessary;

– e-voting only as an additional voting channel;

– no e-voting on the federal, provincial or local level without previous experiences in e-enabled elections of other institutions (particularly self-governing bodies);

– respect for the Recommendation Rec(2004)11 of the Committee of Ministers of the Council of Europe on legal, operational, and technical standards for e-voting.

Awareness-creation was also achieved through the work of the so-called Austrian Convention ("Österreich-Konvent").[18] This advisory body finished its work after one and a half year at almost the same time as the Interior Ministry's working group. Under the Convention's auspices, a wide range of proposals for reforming the Austrian state and the nation's Constitution were examined.[19] Part of the remit of two of the ten committees was the future of postal voting and e-voting on the federal level. The final report was published on 31 January 2005 and submitted to Parliament for further treatment.

While the Austrian Convention again emphasized the importance of a constitutional basis for e-voting and postal voting, the Interior Ministry's working group underlined the importance that e-voting should first be tested and carried out on a relatively small scale and a rather low level of representation, especially in unions or associations. Testing e-voting processes on the nationwide level, during real elections, was not considered

[15] For more information on the 2003 test, see: http://epub.wu-wien.ac.at/dyn/virlib/wp/mediate/epub-wu-01_574.pdf?ID=epub-wu-01_574; for general considerations see also: Uhrmann, P. (2003). Das Potential von E-Voting: Welchen Beitrag können Online-Wahlen zur Qualität der Demokratie leisten, in: Prosser, A., Krimmer, R. (eds.). *E-Democracy: Technologie, Recht und Politik; Österreichische Computer Gesellschaft (OCG)*. Wien, p. 163 – 173.

[16] An additional test, at that time aimed at Austrian expatriates, was carried out in 2006.

[17] See footnote 2.

[18] The Austrian Convention was founded on 2 May 2003 as a 70 member body responsible to Parliament (www.konvent.gv.at).

[19] Wenda, G. (2012). Was wurde aus dem Österreich-Konvent?, *Verwaltung Innovativ 2/2012, 12.*

an option, particularly due to the lack of an adequate legal basis.[20]

In January 2007, a new Austrian Government came into office[21] and put the point *"examination of electronic voting"* on their agenda. This point picked up the threads from the Austrian Convention and the inter-sectoral working group at the Federal Ministry of the Interior in 2004 and 2005, respectively – in particularly since the parties SPÖ and ÖVP behind the newly formed "Grand Coalition government" possessed a two-third majority in the National Council. The Parliament asked the Federal Government to *"continue research on e-voting in Austria and to evaluate experiences with e-voting in other democratic states"*. The Council of Ministers decided that the Federal Ministry of the Interior was tasked to view different e-voting models and to examine whether and in which period the technical presuppositions of electronic voting could be created *"while guaranteeing the voting principles"*.

In the wake of these developments, the Federal Minister of Science and Research decided to introduce Internet voting for the Federation of Students' elections. During a speech at the University of Linz on the 11th of May 2007, Federal Minister Johannes Hahn announced publicly to offer e-voting for the first time during the 2009 elections.[22] The appropriate legal basis, a technologically neutral provision, had been in existence since 2001. In section 34 paragraph 4 of the Federation of Students' Law 1998 (HSG), the use of electronic signatures for identification purposes in accordance with the Austrian signature law as well as the data protection law 2000 (DSG) was regulated.

The second self-governing body with an explicit provision for e-voting (introduced in 2000) was the Austrian Economic Chamber. The introduction of NVT started out slowly with interlinking all polling stations under the jurisdiction of the Vienna Chamber in 2000 and by installing voting terminals with a kiosk system at some locations during the Vienna Chamber elections of 2005.[23] In recent years, no further e-enabled voting solutions have been pursued by the Austrian Economic Chamber[24], though the respective legal provision is still laid down in the Economic Chamber Act.

After early elections to the National Council in 2008 and the formation of a new Austrian government, e-voting was no longer mentioned in the governmental program.[25] However, the creation of a new nation-wide Central Electoral Register was put on the agenda for the 24th legislative period. While the main goal was specified as *"improving inspection times"* for the local voters' lists, the benefits of a centralized register for any future use of NVT were also evident.[26] A proposal for a new centralized database was submitted to Parliament in 2013 as part of large "Democracy Bill"[27] and the debates have continued in the 25th legislative period (since December 2013). Within the framework of the bill, the strengthening of specific participatory tools and the use of electronic solutions for public initiatives were debated for the first time. The start of

[20] If need be, non-binding tests covering non-political issues were regarded as a possible first approach.

[21] 23rd legislative period from 2007 to 2008.

[22] APA News: „Wissenschaftsminister Hahn will E-Voting bereits bei ÖH-Wahl 2009", APA0431, 11 May 2007; for a more detail description of the developments see: Krimmer, R., Ehringfeld, A., Traxl, M. (2010). The Use of E-Voting in the Austrian Federation of Students Elections 2009, in Krimmer, R. and Grimm, R. *Electronic Voting 2010 (EVOTE2010)*. Bregenz, GI LNI. 167: p. 33 – 44.

[23] De Carlo, A. Wirtschaftskammer Wahlen 2005, in: Prosser, A., Parycek, P. (eds.) (2007). *Elektronische Demokratie in Österreich; EDem 2007;* Österreichische Computer Gesellschaft (OCG). Wien, p. 79 – 87.

[24] Information provided by senior officials of the Austrian Economic Chamber.

[25] Another agenda point in the governmental program vaguely related to NVT was the goal to *"organise shareholder meetings […] with the aid of information technology"*.

[26] Stein, R., Wenda, G. (2014). Das zentrale Wählerregister – Ein skalierbares Instrument zur Bürgerbeteiligung mit 1:1-Verifikation, *Informatik 2014*, p. 1427 – 1436.

[27] "Demokratiepaket", Initiativantrag (Initiative Bill) submitted to the National Council, 2177/A (24th legislative period), with subsequent proposed changes (still in the process).

European Citizens' Initiatives (ECI) in all EU Member States[28] created an additional momentum in the Austrian discussion as ECIs can be supported both on paper and through an online platform.[29] While the introduction of a Central Electoral Register was basically undisputed, it was linked right from the start to other elements of direct democracy.[30] For the whole *"democracy package"*, a two-third majority in the National Council would be required. To date, neither the "Democracy Bill", nor the Central Electoral Register project have moved ahead and the outcome is more than uncertain.

3. E-voting at the 2009 Federation of Students' Elections

The Austrian Federation of Students ("ÖH")[31] legally represents all Austrian students. Representation is carried out at three different levels (federal level, university level, level of study area). The competent member of government for students' matters is the Federal Minister of Science and Research. Students' elections, run by the ÖH, ultimately come under the lone oversight of the Science Minister.[32] Students vote for the ÖH bodies every two years in general elections according to the principles of universal, equal, secret and personal suffrage. Similar to all bodies of self-government, the legal basis for elections is laid down in a law passed by Parliament. During the time of the introduction of e-voting, this was the Federation of Students' Act 1998 (HSG).[33] Further details regarding the elections were laid down in a regulation enacted by the Federal Minister of Science and Research (Federation of Students Election Regulation 2005 – HSWO).[34] This general administrative norm had to be in accordance with the law. It specifically mapped out deadlines, procedures, and prerequisites. The Austrian Constitution prescribes that organs of self-governing bodies are to be *"established according to democratic principles of their members"*. These electoral principles, however, are not laid down in the Constitution, but merely in "ordinary" laws. Hence, the implementation of e-voting in self-governing bodies is possible without any constitutional amendment. In general, there is a wide margin of appreciation for regulating elections in bodies of self-government.[35]

After the Federal Minister of Science's announcement to launch e-voting for the 2009 Federation of Students' elections, a feasibility study was carried out. The project was divided into four phases:[36]

– initial phase: October to December 2008;

– pre-voting phase: January to April 2009;

– voting phase: May 2009;

– post-voting phase: June 2009.

As the legal basis for e-voting in the Federation of Students' Act was considered

[28] Regulation (EU) No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, in force since 1 April 2012.

[29] Stein, R., Wenda, G. (2011). Implementing the ECI: challenges for the member states, in: *Proceedings of EDEM 2011*, p. 45.

[30] Zitat Link-Empfehlung Artikel Stein (IRIS).

[31] In English, the "Österreichische Hochschülerinnen- und Hochschülerschaft (ÖH)" is also referred to by the term "Austrian National Union of Students" or "Austrian Students' Union". During the e-voting project, the translation "Federation of Students" was preferred due to the complex structure and organization of the ÖH bodies, which come closer to a "federation" than a "union".

[32] The Federal Minister of the Interior plays no role in these elections. He or she heads both the Federal Ministry of the Interior (with a Department of Electoral Affairs) and acts as the chairperson of the Federal Electoral Board ("Bundeswahlbehörde") being in charge of elections of the legislative bodies (both of the federation and the provinces), the representative bodies at the municipal level, the members of the European Parliament, and the Federal President, as well as referenda and consultations on the federal level.

[33] Hochschülerinnen- und Hochschülerschaftsgesetz 1998 (HSG 1998), Federal Law Gazette BGBl. I No. 22/1999.

[34] Hochschülerinnen-und Hochschülerschaftswahlordnung 2005 (HSWO 2005), Federal Law Gazette BGBl. No. II 91/2005.

[35] Oswald, M. *(2015).* E-Voting in Austria: Legal Determination Matters, in: Driza Maurer, A., Barrat, J. *E-voting case law: A comparative analysis*, p. 51 et seq.

[36] Ehringfeld, A., Krimmer, R., Traxl, M. The Use of E-Voting in the Austrian Federation of Students Elections 2009, in Krimmer, R., Grimm, R. (eds.). *Electronic Voting 2010 (EVOTE10)*, p. 33 et seq.

sufficient, the Federal Ministry of Science and Research prepared the necessary changes to the Election Regulation HSWO. The system had to comply with the Data Protection Act. The electoral rules referred to security standards in Rec(2004)11 of the Committee of Ministers. Right from the start, e-voting was only designed as an additional channel aside from voting at polling stations, but expected to facilitate participation in the polls and to increase the generally low turnout.[37] The architecture of the elections was gigantic: 230,749 students were eligible to vote in 50 polling stations at 21 universities. All over Austria, 376 different elections were held with 376 different ballot sheets. 2,500 candidates ran in the 2009 elections. While paper-based voting traditionally took place during the three day period stipulated by law (i.e., Tuesday to Thursday, 26 to 28 May 2009), Internet voting was designed as advance voting and available from 18 to 22 May 2009 (Monday, 8:00, to Friday, 18:00). For identification purposes, *"citizens' cards"* (smart cards) and a suitable smart card-reader device were required from all users.[38] Anonymity was performed by using a cryptographic protocol in the post-electoral phase, similar to postal voting procedures in a paper based system. Certification of the voting software took place 60 days prior to e-day, the computing center was set up in March 2009. The servers were placed in two separate data centers of the "Bundesrechenzentrum" (Austrian Federal Computing Centre) for double safety. From 21 to 28 April the voter register could be checked online. The certification report and source code were reviewed on the 8th of May 2009, the signing of the encryption keys for members of the election committee took place on the 9th of May 2009. While preparations went along, the Federal Minister of Science and Research and the competent organizing team were confronted with an unexpected degree of protests among students. Discussions around the *"forceful introduction"* dominated the electoral campaigns and lead to strong resistance from the Federation of Students, who told students not to use the offered Internet channel during elections, allegedly fearing manipulations, voter coercion, and a breach of the secrecy of vote. Despite the students' protests and some administrative flaws in the pre-election phase, the first legally binding use of Internet voting in Austria was eventually deemed *"technically successful"*.[39] Almost 1% (2,161) of the eligible students cast their votes electronically between the 18th and 22nd of May 2009. The official evaluation report[40] published after the 2009 elections held that the *"use of the citizen card was appropriate because of its associated high safety and powerful legal standing"* but that *"(...) the penetration of the citizen card is rather low at present. (...) Main reason to this is the general limited number of applications aimed at students which make use of this card. The general acceptance and with it the penetration numbers for this smart card will only be reached when a wide range and a large number of additional services are provided with appropriate functionality, especially for students."* Besides, *"(...) a more positive atmosphere amongst the stakeholders has to be reached"*.

At the beginning of 2010, there was a change in the office of the Minister of Science and Research. Dr. Johannes Hahn became the new Austrian member of the European Commission and Dr. Beatrix Karl was sworn in as his successor in the Science Ministry.[41] In April 2010, she decided not to continue the use of e-voting for the 2011 elections of the Federation of Students. The main reason presented was the small diffusion rate of smart cards among Austrian students.[42] After the announcement of the 2009 elections'

[37] Ehringfeld, A., Krimmer, R., Traxl, M. The Use of E-Voting in the Austrian Federation of Students Elections 2009, in Krimmer, R., Grimm, R. (eds.). *Electronic Voting 2010 (EVOTE10),* p. 33 et seq.

[38] During the project, around 15,000 students received a smart card for free.

[39] See English Summary of the Evaluation Report (http://www.e-voting.cc/wp-content/uploads/downloads/2012/05/Evaluierungsbericht_EVoting_ochschuelerinnen-_und_Hochschuelerschaftswahlen_2009.pdf)

[40] Evaluation Report, see footnote 27.

[41] Dr. Beatrix Karl was in office from 26 January 2010 to 20 April 2011.

[42] „Der Standard" (2 April 2010): http://derstandard.at/1269448837562/Ministerin-Karl-Kein-E-Voting-mehr-bei-OeH-Wahlen

final results, several attempts were made by campaigning groups to challenge the legal basis for the elections (HSG and HSWO) before the Constitutional Court. Several claims were originally rejected for formal reasons; one complaint was eventually dealt with by the constitutional judges in substance.

4. Decision by the Constitutional Court

In a judgment of 13 December 2011[43], the Austrian Constitutional Court suspended some provisions in the HSWO Regulation, which had provided the basis for the 2009 Federation of Students elections.[44] While the Federation of Students' Act (HSG) was considered lawful and the use of e-voting was generally regarded as in compliance with electoral principles, the concrete legislative implementation of e-voting met the Court's disapproval. According to the Court, the regulation lacked *"sufficient determination"* concerning the application of NVT. The principle of *"legal determination"* calls for *"sufficient specification"* of procedural rules on e-voting. From the Constitutional Court's point of view, members of electoral commission have to completely understand and follow the whole process, including all technical details and steps, in order to carry out their sensitive role in overseeing elections. This is not least due to the high vulnerability of the system, making it more prone to errors and manipulations. In order to tackle these challenges and to face an e-voting system's unique technical complexity, any legal basis has to be extremely detailed (*"determined"*) and allow for full transparency and verifiability of the e-voting system. The Austrian constitutional judges did not follow the arguments of the German Constitutional Court of 2009[45], which stated that the whole electoral process in Germany had to be watched by *"everyone"* and that complete oversight was impossible to guarantee in e-enabled elections. In Austria, there is no principle of complete *"publicity"* as it is the electoral boards' task to *"represent"* the public and to control and review the electoral process on their behalf. One central conclusion, however, was not much different from the German judgment as the Austrian Constitutional Court demanded full transparency in all future deployments of e-voting, both for election commissions, and the individual voters.

5. Conclusions

The 2011 Constitutional Court judgment on e-voting specifically dealt with the Federation of Students' elections and the insufficient *"legal determination"* of the e-voting procedures in the electoral regulation. Notwithstanding, the Court's conclusions gave a certain orientation for any future attempt to implement e-voting in the Austrian law – at least in bodies of self-government where no constitutional amendment is needed. In principle, the introduction of an e-voting system should still be possible as the Constitutional Court did not prohibit e-enabled elections in general. However, the strict requirements and high standards demanded for future specifications of e-voting systems may be difficult to match in reality. According to the Court, electoral boards should be able to oversee the whole election process and assess how the results were achieved *"without specific expert knowledge"*. In areas of highest technical complexity such as in e-voting, this seems hard to imagine. The inclusion of experts in the process will therefore be a challenge for any future legislation.[46]

For the time being, there is no legal basis to carry out e-enabled elections on the

[43] VfSlg. 19.592/2011, available at: http://www.vfgh.gv.at/cms/vfgh-site/attachments/7/6/7/CH0006/CMS1327398738575/e-voting_v85-11.pdf

[44] For a very elaborate presentation of the Court's findings, see Oswald, M. (2015). E-Voting in Austria: Legal Determination Matters, in: Driza Maurer, A., Barrat, J. *E-voting case law: A comparative analysis*, p. 45 – 64.

[45] See Sebastian Seedorf's article in this publication.

[46] Melinda Oswald correctly points out that even the Constitutional Court acknowledged the inclusion of technical experts in the e-voting process of the 2009 Federation of Students' Elections as a Confirmation Body, composed of specifically assigned experts, dealt with the correct handling of electronic signatures required for the smart card solution (see Oswald, M., *op. cit*, p. 60) .

federal, provincial, or local level in Austria and any future implementation would call for a two-third majority in the National Council, similar to the introduction of postal voting in 2007. Even with an appropriate legal backing, additional corner stones as a Central Electoral Register and wide-spread, fully reliable identification means[47] would be essential before any further considerations. The Federation of Students' elections no longer provide for the use of e-enabled voting. The procedural rules on e-voting in the HSWO Regulation, which were quashed by the Constitutional Court in 2011, were never repaired and the provision permitting e-voting in the Federation of Students' Act was completely removed by Parliament in 2014.[48] As a new remote voting channel (and a possible alternative to e-voting), postal voting – along with a newly designed centralized election administration system – was introduced for the first time for the 2015 elections.[49] Should any other self-governing body plan to look into NVT solutions in the future, the adoption of an appropriate ordinary law, the reflection of the 2011 Constitutional Court ruling, and a timely and comprehensive dialogue with all stakeholders would be the key.

About the author:

Gregor WENDA, born and raised in Vienna, is a graduate of the University of Vienna Law School (Magister iuris) and the University of Salzburg Management Business School (MBA). He started to work in the Austrian Federal Ministry of the Interior in 2003. After two years as a legal specialist in the Department of Legislative Affairs, he transferred to the Department of Electoral Affairs and became Deputy Head of this Department. In 2006, Gregor Wenda was also appointed 3rd Vice-Chair of the Austrian Federal Electoral Board. He was a member of the Austrian delegation in the ad hoc group of experts finalizing the Recommendation of the Council of Europe's Committee of Ministers on legal, operational and technical standards for e-voting Rec(2004)11 in 2004. Since then, he has frequently published articles and given presentations and lectures on the issue of e-enabled voting and has participated in all review meetings regarding Rec(2004)11. In October 2015 he was elected Chair of the newly established Council of Europe Ad Hoc Committee of Experts on Electronic Voting (CAHVE), which is tasked with updating Rec(2004)11 through 2016. Aside from his job in electoral affairs, Gregor Wenda also serves as Advisor to the Director-General for Legal Affairs, particularly in personnel matters. He is the deputy editor-in-chief of the Interior Ministry's official magazine "Öffentliche Sicherheit" and one of the editors of the academic journal "SIAK Journal". Gregor Wenda is the author of numerous publications, including articles and commentaries, and holds functions in different associations, *inter alia* as the Secretary General of the Austrian Society of Administrative Sciences.

[47] The current rise of electronic signatures over the mobile phone as an alternative to the physical smart card might be a chance.

[48] An entirely new Law (Hochschülerinnen- und Hochschülerschaftsgesetz 2014 – HSG, Federal Law Gazette BGBl. I No. 45/2014) was passed by Parliament in 2014. Based on the new HSG, the Federal Minister of Research enacted an entirely new regulation (Hochschülerinnen- und Hochschülerschaftswahlordnung 2014 – HSWO, Federal Law Gazette BGBl. II No. 376/2014).

[49] Voting by *"voting card"* (including postal voting) is regulated in sections 44 et seq. of the 2014 Federations of Students' Act. The provisions were modeled after the rules in the National Council Elections Act. For further information see Gruber, M., Stangl, S. *Praxishandbuch Hochschülerinnen- und Hochschülerschaftsrecht (facultas 2015)*.

References:

- Balthasar, A., Prosser, A. (2012). *E-Voting in der „sonstigen Selbstverwaltung" — Anmerkungen zum Beschluss des VfGH vom 30. Juni 2011, B 1149, und zum Erkenntnis des VfGH vom 13. Dezember 2011*. V, p. 85 – 96.
- Dickinger, A., Prosser, A., Krimmer, R. (2003). Studierende und elektronische Wahlen: Eine Analyse, in Prosser, A., Krimmer, R. (eds.) (2003). *E-Democracy: Technologie, Recht und Politik;* Österreichische Computer Gesellschaft (OCG), p. 145 – 155.
- De Carlo, A. Wirtschaftskammer Wahlen 2005, in Prosser, A., Parycek, P. (eds.) (2007). *Elektronische Demokratie in Österreich; EDem 2007;* Österreichische Computer Gesellschaft (OCG). Wien, p. 79 – 87.
- Ehringfeld, A., Krimmer, R., Traxl, M. The Use of E-Voting in the Austrian Federation of Students Elections 2009, in Krimmer, R., Grimm, R. (eds.). *Electronic Voting 2010 (EVOTE10)*, Lecture Notes in Informatics (LNI) – Proceedings Series of the Gesellschaft für Informatik (GI), Volume P-167, p. 33 – 44.
- Ehringfeld, A., Naber, L., Grechenig, T., Krimmer, R., Traxl, M., Fischer, G. (2010). Analysis of Recommendation Rec(2004)11 based on the experiences of specific attacks against the first legally binding implementation of e-voting in Austria, in Krimmer, R. and Grimm, R. (eds.). *Electronic Voting 2010 (EVOTE10)*, Lecture Notes in Informatics (LNI) – Proceedings Series of the Gesellschaft für Informatik (GI), Volume P-167, p. 225 – 237.
- Goby, B., Weichsel, H. (2012). Das E-Voting—Erkenntnis des VfGH: gesetzwidrige Ausgestaltung der DH-Wahlordnung, *Zeitschrift für Hochschulrecht*, p. 118.
- Grabenwarter, C. (2004). Briefwahl und E-Voting: Rechtsvergleichende Aspekte und europarechtliche Rahmenbedingungen, *Journal für Rechtspolitik*, p. 70.
- Gruber, M., Stangl, S. *Praxishandbuch Hochschülerinnen- und Hochschülerschaftsrecht (facultas 2015)*.
- Handstanger, M. (2009). E-Voting und Wahlrecht, in Poier, K. (ed.). *Demokratie im Umbruch: Perspektiven einer Wahlrechtsreform.*
- Hausmaninger, H. (2011). *The Austrian Legal System*, p. 23.
- Heindl, P. *E-Voting in Austria: Legal Requirements and First Steps*, E-VOTE 2004 Proceedings, p. 165.
- Heindl, P., Prosser, A., Krimmer, R. (2003). *Constitutional and technical requirements for democracy over the Internet: E-democracy*. *Electronic Government.* R. Traunmüller. Berlin, Springer-Verlag Berlin, p. 417 – 420.
- Krimmer, R. (2002). *e-Voting.at: Elektronische Demokratie am Beispiel der österreichischen Hochschülerschaftswahlen.* Working Papers on Information Systems, Information Business and Operations. I. f. I. u. Informationswirtschaft. Vienna, WU Vienna University of Economics and Business.
- Krimmer, R. (2003). E-Voting in Österreich, in E. Schweighofer et al (Hrsg.), *Zwischen Rechtstheorie und e-Government*, p. 271 et seq.
- Krimmer, R., Ehringfeld, A., Traxl, M. (2010). The Use of E-Voting in the Austrian Federation of Students Elections 2009, in Krimmer, R. and Grimm, R. *Electronic Voting 2010 (EVOTE2010)*.
- Krimmer, R., Lehner, C., Stangl, S., Varga, B., Stein, R., Wenda, G., Kozlik, J. (2009). E-Voting im Rahmen der Wahlen zur Österreichischen Hochschülerinnen- und Hochschülerschaft 2009. *Jahrbuch Hochschulrecht.* W. Hauser and M. Kostal. Wien, Neuer Wissenschaftlicher Verlag, Wien, p. 539 – 551.
- Krimmer, R., Triessnig, S., Volkamer, M. (2007). The Development of Remote E-Voting around the World: A Review of Roads and Directions, in Alkassar, A., Volkamer, M. (eds.). *E-Voting and Identity (1−15)*. Springer.

- Krimmer, R. (2012). *The Evolution of E-Voting: Why Voting Technology is Used and How it Affects Democracy*. Tallinn University of Technology Press.
- Kucsko-Stadlmayer, G. (2009). E-Voting und Europäischer Grundrechtsstandard, in Jabloner, C., Lucius, O., Schramm, A. (eds.). *Theorie und Praxis des Wirtschatsrechts, Festschrift für René Laurer*.
- Marx, G. E-Voting bei den ÖH-Wahlen 2009, in Werner Hauser (ed.). *Jahrbuch Hochschulrecht 2010 (NWV 2010)*.
- Menzel, T. (2001). E-Voting an österreichische Hochschulen, in E. Schweighofer et al (Hrsg.), *Auf dem Weg zur ePerson*, p. 281 et seq.
- Oswald, M. (2015). E-Voting in Austria: Legal Determination Matters, in Driza Maurer, A., Barrat, J. *E-voting case law: A comparative analysis*, p. 45 – 64.
- Otten, D. (2001). Uni Wahl Deutschland – wann, wo Uni Osnabrück Februar 2000, in Holznagel, B., Grünwald, A. and Hanßman, A. *Wählen wie im Schlaraffenland? Erfahrungen der Forschungsgruppe Internetwahlen mit dem Internet als Wahlmedium. Elektronische Demokratie: Bürgerbeteiligung per Internet zwischen Wissenschaft und Praxis*. Munich, Verlag C.H. Beck, p. 73 – 85.
- Pabel, K., Sonntag, M. (2012), *E-Voting bei den ÖH-Wahlen gesetzwidrig Zeitschrift für Energie- und Technikrecht*, p. 175.
- Pentz, E. (2012). „Richtungsweisend — nur wohin? Die Judikatur des VfGH zu E-Voting" juridikum, p. 6.
- Poier, K. (2013). E-Voting — mehr als ein einmaliger Flop? Die Entscheidung des VfGH zur ÖH-Wahl 2009 und ihre Folgen für E-Voting in Österreich, in Baumgartner, G. (ed.), *Jahrbuch Öffentliches Recht 2013*.
- Prosser, A., Kofler, R., Krimmer, R., Unger, M. *The first Internet-Election in Austria: The Findings by e-Voting.at*, Working Papers on Information Processing and Information Management, No. 04/2003.
- Prosser, A., Steininger, R. (2006). *An Electronic Voting Test Among Austrians Abroad*; Nr. 02. Institut für Informationsverarbeitung und Informationswirtschaft – Wirtschaftsuniversität Wien.
- Stein, R., Wenda, G. (2014). Das zentrale Wählerregister – Ein skalierbares Instrument zur Bürgerbeteiligung mit 1:1-Verifikation, *Informatik 2014*, p. 1427 – 1436.
- Stein, R., Wenda, G. (2007). Die Wahlrechtsreform 2007. Ausgewählte Neuerungen, *SIAK-Journal* 4/2007, 61.
- Stein, R., Wenda, G. (2005). *E-Voting: Information on Recent Developments in Austria*, in Joint Workshop on Decision Support Systems, Experimental Economics & e-Participation, Graz.
- Stein, R., Wenda, G. (2005). E-Voting in Österreich. Status Quo und Ausblick, SIAK-Journal 3, p. 3.
- Stein, R., Wenda, G. (2011). Implementing the ECI: challenges for the member states, in *Proceedings of EDEM 2011*, p. 45.
- Stein, R., Wenda, G. (2014). The Council of Europe and e-voting: History and impact of Rec(2004)11, Electronic Voting: Verifying the Vote (EVOTE), 2014 6th International Conference.
- Stern, J. (2009). „Demokratie minus 2.0 — Die Distanzwahl ist verfassungsrechtlich höchst bedenklich", juridikum, p. 72.
- Uhrmann, P. (2003). Das Potential von E-Voting: Welchen Beitrag können Online-Wahlen zur Qualität der Demokratie leisten, in Prosser, A., Krimmer, R. (eds.). *E-Democracy: Technologie, Recht und Politik; Österreichische Computer Gesellschaft (OCG)*. Wien, p. 163 – 173.
- Wenda, G. (2009). *Postal voting & voting from abroad: The Austrian perspective,* 5th European Conference of Electoral Management Bodies on "Distance voting", p. 23.
- Wenda, G. (2012). Was wurde aus dem Österreich-Konvent?, *Verwaltung Innovativ 2/2012,* 12.

NATIONAL CASE STUDY: THE ESTONIAN CASE

Oliver KASK
Member of Venice Commission
Vice-Chair of the Council for Democratic Elections

Abstract:

E-voting has been used in Estonia for many years over the Internet. This paper discusses the trust in voting over the Internet, main security mechanisms and Supreme Court's decisions on the matter. As a conclusion, Supreme Court of Estonia has supported the e-voting in its 2005 judgement and has been reluctant to deal with security and secrecy issues of Internet voting afterwards. All cases brought before it later on are rejected mainly on the grounds of being unreasoned, submitted without concrete evidence or being not timely. In a response, the main criticism has been addressed outside of courts to the public. No proof of falsification is available. Internet voting has been widespread, despite the extensive criticism, with more than 30% of votes for the last two elections given over Internet.

Keywords: *Estonia, Internet voting, electoral justice, electoral principles*

Abstract :

Le vote électronique est utilisé depuis longtemps en Estonie. Ma présentation analyse la confiance dans le vote par Internet, les principaux mécanismes de sécurité et les décisions de la Cour Suprême concernant cette question. En conclusion, la Cour Suprême de l'Estonie a soutenu le vote électronique dans sa Décision de 2005 et, par la suite, elle a été réticente à traiter les problèmes de sécurité et de protection du secret du vote par Internet. Toutes les affaires qui lui ont été présentées par la suite ont été rejetées principalement parce qu'elles étaient considérées comme non motivées, sans preuves concrètes, ou parce qu'elles ne venaient pas au moment opportun. Comme réponse, les principales critiques ont été adressées en dehors de la cour, au public. Aucune preuve de falsification n'est disponible. Malgré les critiques extensives, le vote par Internet s'est répandu, avec plus de 30% de votes par Internet lors des deux dernières élections.

Mots-clés : *Estonie, vote par Internet, justice électorale, principes électoraux*

Abstract:

Votul electronic este folosit de mulţi ani în Estonia, pe internet. În această lucrare voi aborda tema încrederii acordate votului prin internet, principalele mecanisme de securitate şi deciziile Curții Supreme cu privire la această chestiune. Ca o concluzie, Curtea Supremă a Estoniei a susținut votul electronic în hotărârea din 2005 şi apoi a fost reticentă în ceea ce priveşte rezolvarea problemelor de securitate şi de păstrare a votului secret pe internet. Toate cazurile care i-au fost prezentate mai târziu au fost respinse în principal pe motiv că erau iraţionale, fără dovezi concrete sau că nu erau prezentate la momentul oportun. Ca răspuns, principalele critici au fost adresate, în afara Curții, publicului. Nicio dovadă de falsificare nu este disponibilă. În ciuda multitudinii de critici, votul electronic s-a răspândit, iar pentru ultimele două alegeri mai mult de 30% din voturi au fost date prin intermediul internetului.

Cuvinte-cheie: *Estonia, votul prin internet, justiţie electorală, principii electorale*

1. Introduction

Estonia is a small country with approximately 1.4 million inhabitants. Electronic voting over the Internet was introduced in 2005 and used for parliamentary, municipal and European Parliament elections for 8 times. The percentage of voters using Internet voting has raised over that time from 1.9 to 30.5. There have been many reasons why the introduction of Internet voting was seen as positive and did not lead to a large scale of criticism or doubts. The trust in Internet voting was twofold: first, high level trust in election management, second, high level trust in Internet security.

Since the end of the Soviet era, election management bodies have been set up not by representatives of political parties or nominated by the Parliament, but of civil servants and judges. Central Election Commission consists of 7 members nominated by: the Chief Justice of the Supreme Court, the Chancellor of Justice, the Auditor General, the Chief Public Prosecutor, the State Secretary and the Secretary General of *Riigikogu*. Such a neutral body has organised elections over the years without complaints to the courts from the main political parties. Contentment with the management of elections can be identified by the lack of any draft laws proposed by any political party in the Parliament, which provides a change in the nomination procedure of the members of Central Election Commission.

The high level of election management can be concluded as there is a small level of complaints against voter registration. Voters personally receive letters from the election management bodies informing them about their registration as voters for different types of elections before each election with information on the address of the polling station premises as well as on the date and time of polling. Based on that information (or lack of it), voters can apply any corrections in the voters' register on their personal data.

As the number of Estonian citizens living abroad at the beginning of 1990s was due to a high number of asylum seekers in 1940s and the diaspora was quite old, postal voting for voting abroad as the voting method, well-suitable for elderly people living far from any polling stations, was introduced in 1998. Such method had not brought any complaints on electoral fraud or violation of the principle of secrecy of vote.

Overall level of ICT use was high during the introduction of Internet voting. Internet banking had a high level of trust as no leaks or large scale hacking was detected. Now, over 95% of tax declarations are submitted over Internet and digital signatures are widely used and acknowledged. Public authorities had provided the possibility to access the main public registers over the Internet or to submit most common applications (*X-tee*).

ID cards with a chip were introduced in 2002. Later on, mobile ID was introduced

allowing personal identification over smartphones. Chips on ID cards and SIM cards with mobile ID contain certificates for remote authentication and digital signature. These certificates are protected with PIN codes. The program for the use of ID card is free of charge. ID cards are mandatory for Estonian citizens and residents.

2. Main Characteristics of Internet Voting

Provisions in *Riigikogu* Election Act have been amended a couple of times since 2002, with the latest amendments adopted in April 2016. The law providing Internet voting since 2005 was adopted in 2002 with 55 votes in favour and 31 against out of 101 members of *Riigikogu*. Internet voting was provided in addition to ordinary paper voting in polling stations with a chance to amend the vote. Now, it is possible to amend the vote either by another Internet vote or by a vote in polling station. Only the last vote over the Internet or the one cast on a paper ballot counts and previous votes are deleted. In order to vote, the voter has to identify himself or herself by the ID card. The Internet voting program has to be tested and audited, and a report on test results has to be published. The key to decrypt the results of Internet voting has to be divided between members of Central Election Commission. For each election, a new program for Internet voting is available just from the beginning of Internet voting. Internet voting takes place with 10 to 4 days before election day. Votes are encrypted before being sent to the server for Internet voting. The voter can check whether the vote was received – and as an innovation, for which candidate the vote was registered in the main server – for 30 minutes after the submission of the Internet vote. Detailed explanations are given on the webpage of the Central Election Commission on the voting over the Internet from a procedural approach as well as on the security mechanisms and vote counting procedure.

The code of the program in voters' computers, smartphones or tablets is not public. This restriction makes the hacking more difficult, as the program is made available only just before the Internet voting begins. For each election, a new program is provided. The code of the program put into the server for collecting and counting the Internet votes is public and can be assessed beforehand.

3. Court Cases on Internet Voting

After the Estonian Parliament adopted amendments to Local Government Council Election Act introducing detailed provisions on Internet voting, the President of the Republic brought the law to the Supreme Court, which decides on the constitutional cases as well. The President claimed the law to be unconstitutional because of inequality of votes and unequal suffrage, as votes over the Internet may be amended for multiple times, but those given in polling stations, i.e., on paper ballots, may not. On the 23th of August 2005 the Supreme Court rejected the application,[1] stating that through the legislation concerning the suffrage the legislator has guaranteed all voters the legal possibility to vote in a similar manner. In the legal sense the system of electronic voting is equally accessible to all voters at local government council elections.

The court claimed that (see TNS EMOR monitoring survey of 2005 – http ://www.riso.ee/et/?q=node/136) *"[t]he measures the state takes for guaranteeing the possibility to vote to as many voters as possible are justified and advisable. (...) The ever growing number of Internet users among Estonia's inhabitants and the spread of services offered through electronic means as well as the introduction of mandatory ID-card have created favourable conditions for the introduction of electronic voting. Also, the preamble of «Standards of e-voting», enumerating the aims of allowing e-voting, refers, inter alia, to facilitating the casting of*

[1] Judgement of the Constitutional Review Chamber of the Supreme Court No 3-4-1-13-05, available at: http://www.nc.ee/?id=381

the vote by the voter, increasing voter turnout by providing additional voting channels, bringing voting in line with new technologies and reducing, over time, the overall cost of conducting an election. Pursuant to this document the members states (of the Council of Europe) need to take account of the new information and communication technologies, which are increasingly being used in day-to-day life, in their democratic practice. The Constitution does not prohibit the modernisation of electoral practices, and thus it is a legitimate justification of the infringement of the right to equality and principle of uniformity."

The case was an abstract one without real practice of Internet voting. The arguments of the President of the Republic did not touch upon the possibility to observe the secrecy of voting. So the Court was not in a position to decide on the issues of potential hacking or fraud by election commission. Still, the Court described the advantages of e-voting and considered the mechanism to be constitutionally advisable.

Further cases were brought before the Supreme Court – the only court to judicate on the complaints and appeals against Central Election Commission – in 2011. All those cases were rejected on procedural grounds and not discussed in content. In case No 3-4-1-4-11, the Supreme Court decided on a complaint based on the fact that it is possible to infect the computer of a voter with a virus not letting the vote given with this computer to be sent to the server of the Central Election Commission, but showing the voter a confirmation that the vote was given. The Supreme Court rejected the case as there was no evidence of such manipulations in any computer, except the one the complainant had intentionally infected. A prerequisite to satisfaction of an appeal is a violation of the appellant's rights by a resolution or act of the election management body. In case No 3-4-1-7-11[2], the Supreme Court clarified that a complaint may not be hypothetical. It has to be proved that a violation has taken place. One has to make a complaint on the violation of his or her own rights. Arguments of the claimant were not based on proved violation of the principles of electoral heritage. In case No 3-4-1-10-11[3] submitted by one of the main political parties, the Supreme Court decided that the complaint was not timely. The provisions on time-limits for submitting complaints against the decisions of Central Election Commission are clear and uniform for different decisions of the Central Election Commission.

Complaints sent after 2013 and 2015 elections against Internet voting touched only upon limitation of observation. These complaints did not go into the questions on secrecy of vote or other key principles of European electoral heritage and were rejected on procedural reasons as the complaints did contain only suspicions of general nature[4], were not timely[5] or did not aim to protect the rights of the complainant, but were submitted for the general interest.[6]

4. Public Campaign against Internet Voting

A wide campaign against Internet voting was started in 2013 and 2014 by some leaders of *Keskerakond*, one of the main political parties in opposition. Some ICT experts criticized the Internet voting mechanisms used. Overall, the Central Election Commission and Estonian Internet Voting Committee were active in reflecting on the criticism, claiming that Internet voting is open to manipulation and hacking only in extreme cases where many unlikely conditions are fulfilled simultaneously. As a result, Internet voting usage has dropped for about 1% for the 2015 elections. No real cases of fraud have been observed. An independent committee, not paid by state authorities, tested the program for e-voting before 2013 elections and said it contained some errors, but was safe against falsifications.

[2] Judgement of the Constitutional Review Chamber of the Supreme Court No 3-4-1-7-11, available at: http://www.riigikohus.ee/?id=1256

[3] Similar case No 3-4-1-11-11.

[4] Case No 3-4-1-10-15.

[5] Case No 3-4-1-11-15.

[6] Case No 3-4-1-17-15.

5. Conclusions

Unlike many other countries observed or discussed, Estonian Supreme Court has been reluctant to discuss the issues of secrecy of Internet voting and security of the processes in abstract. As there has been no evidence of falsification of election results for the votes given over the Internet, e-voting results have never been declared invalid. Although there is a high level of procedural guaranty against falsification – testing, auditing, encryption and use of ID cards with chips – which is developing over time, it is possible in the future to see a shift in the case law of the Supreme Court, as the constitutional issues related to Internet voting have not been thoroughly tested before the Court. The positive attitude towards e-voting of the Supreme Court in its 2005 judgement and the difficulties to bring practical and real cases before the Court might have cooled down the will to abandon Internet voting in Estonia by legal means. Instead a high level of criticism has been shifted to public debates.

About the author:

Oliver KASK has a degree in Law from University of Tartu, Estonia. He has been an expert in constitutional law, especially electoral law and human rights as well as administrative law. He has been a judge since 2004. He has also been an ad hoc Judge at the European Court of Human Rights since 2010. Mr Kask is a member of the Venice Commission and Vice-Chair of the Council for Democratic Elections of the Council of Europe.

References:

- *Riigikogu* Election Act. Available at: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/506052016002/consolide
- Local Government Council Election Act. Available at: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/510032016002/consolide
- Solvak, M., Vassil, K. (2016). *E-voting in Estonia: Technological Diffusion and Other Developments Over Ten Years (2005 – 2015)*. Tartu University. Available at: http://skytte.ut.ee/sites/default/files/skytte/e_voting_in_estonia_vassil_solvak_a5_web.pdf
- Vinkel, P. (2016). *Remote Voting in Estonia: Legality, Impact and Confidence*. TTU Press.
- Madise, Ü., Vinkel, P. (2015). A Judicial Approach to Internet Voting in Estonia, in Barrat, J., Driza Maurer, A. (eds.). *E-Voting Case Law. A Comparative Analysis*. Ashgate Publishing, p. 105 – 128.

VOTING TECHNOLOGIES AND ELECTORAL RIGHTS: THE CASE OF ROMANIA

Elena Simina TĂNĂSESCU
Professor
Faculty of Law
University of Bucharest
Counsellor of the President of Romania

Ramona Delia POPESCU
Lecturer
Faculty of Law
University of Bucharest

Bogdan DIMA
Lecturer
Faculty of Law
University of Bucharest

Abstract:

New technologies raise legal challenges for electoral systems which have to be debated each time an electoral reform is started. The reform of the electoral system undertaken in Romania in 2015 provided for a limited use of new technologies, meant mainly to ensure the correctness of the electoral process, while giving preference to postal voting instead of e-voting for citizens living abroad.

Keywords: *electronic voting, electronic counting, new technologies, the right to vote, constitutional guarantees, electoral legislation*

Résumé :

Les nouvelles technologies lancent des défis juridiques pour les systèmes électoraux, et ceux-ci doivent être discutés lors de chaque réforme électorale. La réforme du système électoral en Roumanie, menée en 2015, prévoit une utilisation limitée des nouvelles technologies, destinée à assurer, en principe, l'équité du processus électoral, en mettant en avant le vote par la poste plutôt que le vote électronique pour les citoyens vivant à l'étranger.

Mots-clés : *vote électronique, depouillement électronique, nouvelles technologies, droit de vote, garanties constitutionnelles, législation électorale*

Abstract:

Noile tehnologii lansează provocări juridice pentru sistemele electorale, iar acestea trebuie dezbătute cu ocazia fiecărei reforme electorale. Reforma sistemului electoral din România, întreprinsă în anul 2015, prevede o utilizare limitată a noilor tehnologii, menită să asigure, în principal, corectitudinea procesului electoral, acordând întâietate votului prin poştă în locul votului electronic, pentru cetăţenii care locuiesc în străinătate.

Cuvinte-cheie: *vot electronic, numărare electronică, noi tehnologii, dreptul la vot, garanţii constituţionale, legislaţie electorală*

This paper describes the use of new technologies for electoral purposes in Romania and the main constitutional challenges it faces, taking into consideration constitutional provisions, the case law of the Constitutional Court and the new electoral legislation. We will first present the main types of new voting technologies currently in use in various countries, then we will analyse the constitutional background against which an evaluation of e-voting technologies has been undertaken in Romania in order to conclude with a presentation of the modern technologies finally introduced and a brief appraisal of the legislative provisions making this possible.

Used in a smart manner, modern technologies (including e-voting/e-counting) can bring people closer to the political life and make them aware of their capacity to induce change and put pressure on public officials, as well as on public institutions, thus making democratic societies more participative.

Last year, the Romanian Parliament embarked upon a broad reform of the electoral and political parties system aimed at consolidating democracy in Romania by enhancing its representative dimension (providing for a proportional electoral formula in parliamentary and local elections) and by liberalising the political parties "market" (some rough criteria in order to register a political party were eliminated from the old legislation).

The newly adopted legislation did not regulate the use of voting technologies, neither as a mechanism for expressing electronic voting, nor as a mechanism for electronic counting. However, this infra-constitutional legislation acknowledges the use of modern digital technologies in other ways, at various stages of the electoral process.

In Romania, any debate about the regulation of e-voting and/or e-counting by law should have the objective of finding the right balance between the aim of enhancing political participation through the use of new technologies and the aim of respecting the constitutional features of the vote as long as these are regulated at constitutional level, explained and developed by the case law of the Constitutional Court.

Moreover, even the Constitutional Court in its case law seems to favour those legislative incentives aiming at enhancing political participation in electoral processes, seen as a constitutive element of a healthy democratic society. Therefore, one might say that we already have all the prerequisites for a more inclusive, detailed and technical debate concerning the introduction of voting technologies, in a more or less distant future.

1. A Brave New World

The choice made with regard to the type of electoral system and its specifics offers valuable insights upon the political regime and the party system in a given country. Everything matters in elections: everything from the electoral formula to the voting and counting procedures. Who has the right to vote, where, when and how a voter casts his/her vote, who, at what level and how the votes are numbered, as well as the formula used to distribute the mandates to the winning candidates, well, everything matters in this complex relationship between the voter and his agent of representation.

It is beyond doubt that we are living in a more and more technologized society, where the use of computers and Internet, the easy access to a brave new digital world are all factors of change which have already started to influence and even change not only electoral systems, but the whole political game in many countries. And this is just the beginning. New, better and highly sophisticated technologies will be developed and societies will become more and more interconnected; the major movement from offline to online will generate major changes regarding the way we think, we understand each other and, of course, we evaluate politics and participate in the public life. The use of new technologies might become useful for an enhanced participation of citizens to the electoral process and beyond, to the political life.

An enhanced political participation and a high level of citizens' trust in public institutions are key issues for a consolidated democracy. However, modern technologies by themselves cannot generate a significant change in the low levels of trust of citizens in public institutions and political life. Nevertheless, used in a smart manner, they can bring people closer to the political life and make them aware of their capacity to induce change and put pressure on public officials, as well as on public institutions, thus making democratic societies more participative. In elections, new technologies can open up and speed up the electoral process, meaning that more people could easily express their political will in different types of elections and referenda.

2. Types of Voting Technologies

When designing an electoral system, the legislator must deal with a whole range of variables which are relevant in the process, such as the electoral formula, ballot types, the threshold, the size of the electoral constituency, etc.[1] Moreover, Maurice Duverger was the first scholar pointing out that the political party system (the dependent variable) in a given country is influenced by two major factors: the nature of the political conflict within the society and the type of the electoral system (both being the independent variables)[2]. The type and the specific features of the political party system are relevant criteria to understand the level of democracy in a given country. Considering the massive development of new technologies which binds people in a previously unknown online existence, thus unprecedentedly influencing the power relations between all political actors within a democratic society, one can argue that the future of the representative democracy is inherently related to the way new technologies will be used in political processes, especially in electoral matters.

According to various documents issued by the Council of Europe or the National Democratic Institute and dealing with electronic tools used in elections, one can differentiate between *e-voting* and *e-counting*.[3] Consequently, voting technologies cover a wide range of options and basically consist of electronic voting (e-voting) and counting technologies (e-counting). It is possible to use these two types of voting technologies separately or combined. For a comparison, the traditional paper-based voting system means that a voter is manually marking the paper ballot, while the respective ballot is also manually counted by election officials.

Electronic voting means that an electronic device is used by the voter in order to express and record his/her choice. The voter's choice is either recorded using the electronic device itself, or the electronic

[1] Lijphart, A., *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven and London, Yale University Press, 1999, p. 144 – 145.

[2] Duverger, M., *Les partis politiques*, Ed. A. Colin, Paris, 1951, p. 226.

[3] *E-Voting Handbook*, Council of Europe Publishing, 2010, p. 9 – 11, available at: http://www.coe.int/t/dgap/goodgovernance/ Activities/E-voting/E-voting%202010/Biennial_Nov_meeting/ID10322%20GBR%206948%20Evoting%20handbook%20A5%20HD.pdf; Goldsmith, B., Ruthrauff, H. (2013). *Implementing and Overseeing Electronic Voting and Counting Technologies*, NDI, p. 19 – 32, available at: http://www.eods.eu/library/Implementing_and_Overseeing_Electronic_Voting_and_Counting_Technologies.pdf

device generates a document which is then used by the elector to express his choice.

Electronic counting involves the use of an electronic device to count the cast votes. The most common counting devices are using scanning technologies, such as optical mark recognition (OMR) or optical character recognition (OCR) in order to count ballots that have been manually given by voters.

There can be four major types of *e-voting*:

1. Remote Voting: an electronic device is used to cast a vote. The device transmits the voter's choice using a communication channel. The choice is recorded in a central location – this procedure is also known as the Internet voting and SMS voting;

2. Non-Remote Voting Machines: an electronic device is used to cast a vote. The voter's choice is recorded on the electronic device itself or on a printed ballot;

3. Supervised Environments: a voting machine is used in a location where election staff is present to manage the voting process, such as a polling station;

4. Unsupervised Environments: a voting device is used in a location where no election staff is present to manage the voting process, such as any computer with an Internet connection which is used by the voter to express his option.

It is possible to combine remote voting with supervised environments technologies, for instance when Internet voting computers are set up in polling stations. This allows polling staff to verify the identity of voters by using voters' lists before allowing them to vote and to ensure the secrecy of the vote – two significant challenges for any form of remote voting.

Concerning the *e-counting*, there are many types, such as, for example, optical and digital scanning devices. An optical scan voting system is an electronic voting system and uses an optical scanner to read marked paper ballots and tally the results.

Voting technologies were used at different levels of elections (supra-national, national or local), as pilot projects (Switzerland, Norway) or as binding tools provided by the legislation of certain countries (Estonia). There are wide arrays of possibilities to use voting technologies for electoral purposes. These technologies were used for all kinds of elections (Estonia) or just for local elections (Switzerland). In some countries, voting technologies were used as an alternative to other ways of voting only to allow the citizens living abroad at the time of the election to cast their votes (Netherland).

The main reasons for using voting technologies are: facilitating voting for people living abroad and for disabled people, speeding up vote counting, increasing voter turnout and implementing the e-voting on a generalized level. For example, Switzerland has a special interest in trying to increase electoral participation due to its low turnout compared to other European countries and also considering its tradition of referring all sorts of issues concerning public life to referenda[4].

3. The Reform of the Electoral System in Romania

Last year, the Romanian Parliament embarked upon a broad reform of the electoral system, enacting important statutes such as Law no. 115/2015 concerning local elections[5], Law no. 208/2015 concerning parliamentary elections[6], Law no. 288/2015 concerning postal voting[7], Law no. 113/2015 on financing of the political parties,[8] Law no. 114/2015 on political parties[9]. This legislative package aimed at consolidating democracy in Romania by enhancing its

[4] For a detailed presentation of using voting technologies see *E-Public, E-Participation and E-Voting in Europe – Prospects and Challenges, European Parliament Report*, November 2011, available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/471584/IPOL-JOIN_ET(2011)471584_EN.pdf, p. 119 – 126.

[5] Published in Official Gazette of Romania no. 349/20.05.2015.

[6] Published in Official Gazette of Romania no. 553/24.07.2015.

[7] Published in Official Gazette of Romania no. 866/19.11.2015.

[8] Published in Official Gazette of Romania no. 339/18.05.2015.

[9] Published in Official Gazette of Romania no. 346/20.05.2015.

representative dimension (providing for a proportional electoral formula in parliamentary and local elections) and by liberalising the political parties "market" (some rough criteria in order to register a political party were eliminated from the old legislation). For example, under the new legislation, a political party might be officially registered with only three founding members, while under the former legislation no less than 18,000 founding members were needed to register a political party. In addition, the new law on political parties provides a distinction between local parties and national parties, hence supporting a more dynamic "local" political life as it is expected that local political parties will develop with the aim of providing a better representation of people in a given local community.

As a general observation, the new laws on electoral matters and political parties seem to give preference to the consensual rather than the majoritarian dimension[10] of Romanian democracy, allowing for a better and more precise representation of different interests within the society at national and local level, while preserving a moderate multiparty system and a proportional electoral formula which, in turn, may foster coalition governments and a more national and local consensus-based politics. However, this new legislation must be field-tested in the next elections, to be held in 2016, in order to find out if the political reality validates or not the main objectives of the legislator.

In this context and considering the general theme of this debate, it is important to underline that the newly adopted legislation does not regulate voting technologies, neither as a mechanism for expressing electronic voting, nor as a mechanism for electronic counting. However, this infra-constitutional legislation acknowledges the use of modern digital technologies in other ways, at various stages of the electoral process.

For example, in the law concerning *parliamentary* elections several provisions refer to:

A. Drawing up of an electronic Electoral Registry: a database comprising Romanian citizens with the right to vote, and their distribution to polling stations. On the basis of the Electoral Registry the permanent electoral lists are drafted. The Electoral Registry is managed by the Permanent Electoral Authority and provides for:

– *ex officio* registration of Romanian citizens with the right to vote and domicile in the country. The registration is carried out by the representatives of the Permanent Electoral Authority and by mayors or representatives of the mayors;

– voluntary registration of Romanian citizens who have domicile in Romania but wish to vote in a specific election at the polling station where they reside (only based on an official residence permit);

– voluntary registration of Romanian citizens living abroad in order to vote in a specific election at a polling station abroad;

– voluntary registration of Romanian citizens with domicile abroad or with the domicile in the country, but residing abroad, in order to vote for parliamentary elections by postal voting. Once the documents for postal voting have been received by the elector, she/he cannot vote at polling stations, save for the specific and restrictive exceptions provided for by the law. In case of postal voting, ballots should be received at the electoral bureau at least 3 days before the election day.

B. Using an electronic system for monitoring turnout and preventing illegal voting. This system will be used for the first time in the local elections of June 2016. The electronic system for monitoring turnout and preventing illegal voting is designed to block from voting persons who are legally and/or judicially deprived of the right to vote and to prevent the practice of double voting, as well as voting in other electoral constituencies than those where the voter has domicile or residence;

[10] See Lijphart, A., *op. cit.*, p. 3 – 4.

C. Using electronic applications and services by the Central Electoral Bureau to centralize the results of elections.

According to article 120 of the law regarding parliamentary elections, provisions concerning the electronic Electoral Registry are equally applied for presidential, local and European Parliament elections, as well as for national and local referenda. In the same vein, the law regarding presidential and the law regarding local elections make compulsory the use of the electronic applications and services at the level of the Central Electoral Bureau to centralise the results of elections. One slight difference can be noticed between the law on local elections and the law on presidential elections, since only the first one mentions the use of electronic technologies for monitoring turnout and preventing illegal voting.

Compared with previous ones, the electoral rules adopted in 2015 make room for new technologies mainly with regard to the accuracy of elections. The use of an electronic Electoral Registry and of an electronic system for vote monitoring and preventing illegal voting are indicators of a tendency towards an open attitude with respect to new technologies in the electoral process. Nevertheless, e-voting or e-counting technologies are still not in common use in Romania.

4. Constitutional Challenges for Voting Technologies in Romania

When analysing the opportunity of introducing e-voting or e-counting technologies in Romania, one should bear in mind the current constitutional and legal framework.

Article 36 of the Constitution regulates the right to vote: every citizen having turned 18 up to or on the election day shall have the right to vote. The mentally deficient or alienated persons, laid under interdiction, as well as the persons disenfranchised by a final decision of the court cannot vote. Article 37 of the Constitution regulates the right to be elected: citizens entitled to vote, who fulfil the conditions specified in Article 16, paragraph (3), have the right to be elected, unless they are prohibited from forming political parties in accordance with Article 40, paragraph (3). Candidates must be at least 23 years of age by or on election day to be elected to the Chamber of Deputies or to the local public administration bodies, at least 33 years of age to be elected to the Senate, and at least 35 years to be elected to the office of President of Romania.

Article 38 of the Constitution regulates the right to vote and to be elected to the European Parliament: after Romania's accession to the European Union, Romanian citizens shall have the right to vote and to stand as candidates in elections to the European Parliament.

Article 62 paragraph (1) and Article 81 paragraph (1) of the Constitution refer to the features of the vote: universal, equal, secret, direct and free. The Chamber of Deputies and the Senate are elected by universal, equal, direct, secret, and free suffrage, in accordance with the electoral law. The President of Romania is elected by universal, equal, direct, secret, and free suffrage.

The above-mentioned constitutional provisions are detailed by organic laws regulating electoral matters. The Romanian legislator has chosen to issue a special law for every type of elections: parliamentary, presidential[11], local, and for the European Parliament[12] and, separately, a law for postal voting, which only applies to parliamentary elections.

The provisions of the European Convention of Human Rights, ratified by Romania in 1994, must also be followed.

[11] Law no. 370/2004 for presidential elections, republished in Official Gazette of Romania no. 650/12.09.2011.

[12] Law no. 33/2007 for elections for European Parliament, republished in Official Gazette of Romania no. 627/31.08.2012.

Its provisions prevail over national legislation, except in case of *mitior lex*, according to Article 20 of the Romanian Constitution[13]. According to Article 3 Protocol no. 1 (right to free elections) of the ECHR, the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. In this respect, the rich and diverse case law of the European Court of Human Rights on electoral rights must also be considered[14]. The Court stated *inter alia* that the right to free elections is a complex and important political right within a participatory democratic society[15].

Moreover, the important role played by the Venice Commission recommendations concerning electoral matters should also be acknowledged[16]. Some of these recommendations have been explicitly taken into consideration by the Romanian Constitutional Court while deciding on the constitutionality of electoral laws[17]. The Venice Commission stated the five principles underlying what it has called *"Europe's electoral heritage"*, namely the universal, equal, free, secret and direct suffrage. Furthermore, elections must be held at regular intervals[18].

With regard to the elections for the European Parliament, rules adopted at the level of the European Union and included in the European treaties, regulations, directives and decisions[19] also have to be respected. The mandatory EU legislation takes precedence over contrary national legislation according to Article 148 of the Romanian Constitution[20].

The Romanian Constitution provides for five features of the vote: universal, equal, direct, secret and free[21]. Article 62 and

[13] *"(1) Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which Romania is a party. (2) In case of an inconsistency between domestic law and the international obligations resulting from the covenants and treaties on fundamental human rights to which Romania is a party, the international obligations shall take precedence, unless the Constitution or the domestic laws contain more favorable provisions."*

[14] Some of this case law also refers to the Romanian legislation concerning electoral matters: ECHR, 2 June 2010, *Grosaru v. Romania*; ECHR, 1 July 2008, *Calmanovici v. Romania*; ECHR, 21 April 2014, *Danis v. Romania.*

[15] For a comprehensive analysis of the Court case law see Selejan-Guțan, B. (2015) *Les élections dans la jurisprudence de la Cour européenne des droits de l'homme – principes et développements*, in Tănăsescu, S.E., Vrabie, G., *Constitution, démocratie et élections*. Ed. Institutul European, Iaşi, p. 43 – 55.

[16] *Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report*, adopted by the Venice Commission at its 52nd session, 18 – 19 October 2002, available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e

[17] Decisions no. 61/2010, 50/2012, 682/2012, 80/2014, 460/2014, and 799/2015.

[18] See also Selejan-Guțan, B., *op. cit.*, p. 44.

[19] http://ec.europa.eu/justice/citizen/voting-rights/index_en.htm

[20] *"(1) Romania's accession to the constituent treaties of the European Union with the objective of transferring certain powers to community institutions and of jointly exercising with the other member states the powers regulated in those treaties shall be decided by a law adopted by the Chamber of Deputies and the Senate in joint session, with a majority of two-thirds of the deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union as well as the other mandatory community rules take precedence over conflicting provisions of national law, in conformity with the terms of the Accession Act. (3) The provisions of paragraphs (1) and (2) shall apply accordingly to the accession to the acts amending the constituent treaties of the European Union. (4) The Parliament, the President of Romania, the Government and the judicial authority guarantee the implementation of the obligations resulting from the Accession Act and the provisions mentioned in paragraph (2). (5) The Government transmits the draft proposals for mandatory acts to the two Chambers of Parliament before they are submitted to institutions of the European Union for approval."* For the relation between national law and European law, see Tănăsescu, E.S., Vrabie, G. (2015), *op. cit.*, p. 1428 – 1441.

[21] Muraru, I., Tănăsescu, E.S. (2014). *Drept constituţional şi instituţii politice*, ediția a 14-a, vol. 2, Ed. C.H. Beck, Bucureşti, p. 93 – 98, Deaconu, Şt. (2015). *Instituţii politice*, ediția a 2-a. Ed. C.H. Beck, Bucureşti, p. 95 – 97.

Article 81 only refer to national elections, i. e., to the election of Parliament and of the President of Romania. However, these features have been extended also to local elections (for mayors, county and local councils) not by express provisions of the Constitution, but as a result of infra-constitutional law.

Concerning the *direct* vote, the Constitutional Court developed several key ideas in its case law:

– The parliamentary mandates are assigned according to the votes cast by the electoral body (Decision no. 1.177/2007);

– The electoral body should cast the votes directly by personally choosing either a list of candidates, either a candidate, depending on the electoral formula used in elections. A law providing for a list of candidates which is not personally voted by the voters is not constitutional. The direct vote represents the elector's option to cast the vote for a candidate/electoral list and not the introduction of the ballot into the ballot box. There should be no other persons/ entities interposed between the elector and the elected body (Decisions no. 1.177/2007, 799/2015)[22]. Consequently, the direct vote is the direct expression of the elector's right to vote; it is a personal expression of his political choice;

– Mandates of organizations of citizens belonging to national minorities shall be distributed according to the principle of representativeness (Decision no. 682/ 2012). The number of mandates depends on the proportion between the national minority and the population of a county, as also on the electors' political options within that county. Therefore, few mandates might result indirectly from the ballot.

Regarding the *secrecy* of the vote, the Court emphasized three major ideas:

– Responsibility of the elector to protect the secrecy of his vote; the vote should be the expression of his political choice without external pressure. Consequently, the Court emphasized the need for an electoral conduct from the elector who should bear the burden of protecting his political option (Decision no. 799/2015);

– Obligation of voters to respect the political choices of others as they have been expressed through voting; the elector should not exercise any pressure to know, influence or control the electoral options of others (Decision no. 799/2015);

– In the particular case of *postal voting*, the Court stated that the new law offers sufficient guarantees to protect the secrecy of the vote: envelopes used for casting votes have to be sealed, the obligation of the electoral bureau to keep the second envelope sealed until the end of the election day, the annulment of the damaged envelopes if the integrity of the vote would be endangered (Decision no. 799/2015). Overall, the Court concluded that the normative prerequisites for the adequate exercise of the right to vote must be completed by a responsible electoral conduct of the citizen.

Concerning the *free* vote, two major ideas arose from the Court's case law:

– Electors cast their votes according to their conscience and political options (Decision no. 799/2015). The Court emphasized the civic conduct of the elector to protect his political option from any external pressure. The elector cannot be obliged to cast his vote for a specific electoral competitor;

– Voting procedure shall be as simple as possible in order to ensure the full freedom of electors to express their will and for the vote to be effective (Decision no. 51/2012). The Court acknowledged that a difficult voting procedure generated by a large number of ballot papers may crimp the free character of vote; alike, the simultaneous organization of elections for different types of public authorities (Parliament and local authorities)

[22] See also Tănăsescu, E.S. (2004). *Legile electorale. Comentarii* şi *explicaţii*. Ed. All Beck, Bucureşti, p. 2 – 8, 70.

might endanger the free expression of the political choices of citizens.

Equality of the vote has been taken into consideration by the Court since the beginning of the post-communist democratic regime. Thus, two relevant issues were debated:

– Delineation of electoral constituencies: according to the Court, this is a technical matter which does not endanger the principle of the equality of vote (Decisions no. 305/2008, 1.248/2008). However, in our opinion, the delineation of electoral constituencies is a key element of the electoral system. The way a constituency is designed may influence the principle of equality with regard to one of its elements (Decision no. 2/1992), respectively equal constituencies in terms of population for the same number of mandates allocated;

– Provision of an electoral threshold: the Court stated that a threshold is not contrary to the principle of equality, if applied to all electoral competitors (Decision no. 2/1992). Moreover, the Court decided that a progressive threshold does not endanger the equality of chances for political entities, as it is granted by Article 8 of the Constitution. On the contrary, in a multiparty system, the progressive threshold might generate a necessary and useful political polarization.

As far as it concerns the *universal* vote, the Court stressed (Decision no. 799/2015) that it encompasses both legal guarantees to allow all citizens to vote, save the mentally or morally incapacitated, and viable mechanisms to effectively allow citizens to vote.

Most often, new technologies are considered to enhance participation in elections, thus promoting the effective universality of the right to vote, while challenging the direct and secret characters of the vote[23]. However, the choice of the Romanian legislator went rather for postal voting instead of e-voting, and this only in parliamentary elections, exclusively for Romanians living abroad.

Introducing postal voting for Romanian citizens living abroad aimed at enhancing participation in the electoral process in order to underline the universality of the vote. According to the Constitutional Court of Romania (Decision no. 799/2015), universality must be effective and not illusory. Since after communism many Romanian citizens have chosen to live abroad, the Romanian legislator decided to offer them new ways of voting. Adjusting legislation to social facts, including by identifying new modalities of voting in order to enhance participation in the electoral process, is firmly within the margin of appreciation of the state.

On the contrary, refusing to regulate such alternative modalities to paper-based

[23] Norris, P., *Will New Technology Boost Turnout? Evaluating Experiments in E-Voting v. All-Postal Voting Facilities in UK Local Elections*, paper presented at the British Study Group Seminar on Friday, 31st October 2003, Minda de Gunzberg Center for European Studies, Harvard University, available at: https://www.hks.harvard.edu/fs/pnorris/Acrobat/New%20technology%20and%20turnout.pdf; Bochsler, D., Can Internet Voting Increase Political Participation? Remote Electronic Voting and Turnout in the Estonian 2007 Parliamentary Elections, paper presented at the conference *"Internet and Voting"*, Fiesole, 3 – 4 June 2010, available at: http://www.eui.eu/Projects/EUDO-PublicOpinion/Documents/bochslere-voteeui2010.pdf; Norris, P., Will New Technology Boost Turnout? Experiments in E-Voting and All-Postal Voting in British Local Elections, in Voter Turnout in Western Europe since 1945: A Regional Report, IDEA Publication, 2004, available at: http://www.idea.int/publications/voter_turnout_weurope/upload/chapter%206.pdf; Trechsel, A.H., Kies, R., Mendez, F., Schmitter, Ph.C., Evaluation of the Use of New Technologies in Order to Facilitate Democracy in Europe. E-Democratizing the Parliaments and Parties of Europe, available at: http://cies.iscte.pt/en/ destaques/pdf/1.pdf; Macintosh, A., Using Information and Communication Technologies to Enhance Citizen Engagement in the Policy Process, in OECD, Promise and Problems of E-Democracy: Challenges of Online Citizen Engagement, OECD Publishing, Paris, 2004, available at: http://dx.doi.org/10.1787/9789264019492-3-en; The ACE Encyclopaedia: Civic and Voter Education, available at: http://aceproject.org/ace-en/pdf/ve/view

ballot would affect the right to vote of the citizens, and particularly its universal character.

Considering the growing use of new technologies in electoral processes, on the one hand, and the main ideas developed by the Constitutional Court pertaining to the constitutional features of the vote, on the other hand, one can assess the main (constitutional) risks the legislator would undertake if it were to adopt e-voting or e-counting in Romania: lack of acceptable and sufficient guarantees for ensuring the secrecy of the vote. To this it should be added the inherent potential security deficiencies that might endanger the whole electoral process. Referring especially to the secrecy of the vote, for example, in the case of remote voting in an uncontrolled environment, the secrecy of the ballot cannot be fully guaranteed. As a matter of fact, even in the case of postal voting the so-called "family vote" cannot be fully and totally prevented, this being – maybe – one explanation of the rather limited use provided by the Romanian legislator for this alternative method of voting. As for possible frauds or errors, complex systems such as electronic voting and electronic counting may contain errors, which should be corrected if they are identified, in order to avoid unforeseen consequences[24]. Security issues must be seriously taken into consideration (for example, the case of hacking the software or the software blocks or crashes).

5. Striking the Right Balance Between Constitutional Guarantees and Enhanced Political Participation

In Romania, any debate about the introduction of e-voting and/or e-counting should have the objective to identify the right balance between the aim of enhancing political participation through the use of new technologies and the aim of respecting the constitutional features of the vote, as regulated at constitutional level and interpreted in the case law of the Constitutional Court.

If and when deciding to adopt e-voting/e-counting, it would be advisable for the authorities to conduct a comprehensive review of the relevant legislation for the implementation of voting technologies. This should cover issues such as transparency mechanisms, security mechanisms, certification requirements, audit requirements and procedures for challenging results generated by electronic voting or counting procedures. It may also be relevant to review other legislation that might not be directly related to elections, such as laws dealing with information technology; administrative and criminal codes; data security and protection; procurement; and the issue of government contracts[25].

An open and inclusive process before drafting any legal amendments concerning e-voting/e-counting is vital in order to win the public confidence in such modern and still risky voting procedures.

If electronic voting and counting technologies are to be trusted by electoral stakeholders, it is important that the security risks inherently raised by the use of the new technologies to be presented and understood by the public. Also, safety mechanisms must be in place to mitigate these security challenges, and any security breaches should be easily identified and eliminated[26].

Trust is a vital component of any democratic process, and trust in the electoral process is critical for political actors and other electoral stakeholders. It is not enough only to generate trust in the electoral formula used in elections or even in the technologies used to cast or count the vote. It is also important for the people to trust that the public authorities organizing the electoral process, such as the Electoral Management Body, have executed their responsibilities in a just, impartial

[24] See for detailed examples *E-Public, E-Participation and E-Voting in Europe – Prospects and Challenges, European Parliament Report*, November 2011, available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/471584/IPOL-JOIN_ET(2011)471584_EN.pdf

[25] *E-Voting Handbook*, Council of Europe Publishing, 2010, p. 22; Goldsmith, B., Ruthrauff, H., *op. cit.*, p. 33.

[26] http://www.coe.int/t/DEMOCRACY/ELECTORAL-ASSISTANCE/themes/evoting/default_en.asp

and efficient manner, thus safeguarding the integrity of the entire electoral process[27].

When referring to the Romanian case, one should observe that the new electoral laws provide for some infusion of technologies within the electoral process, even though not in the form of e-voting or of e-counting. Moreover, even the Constitutional Court did not promote in its case law a very strict and restrictive interpretation regarding the secrecy of the vote. In fact, the Court seems to favour those legislative incentives aiming at enhancing political participation to electoral processes, which is seen as a constitutive element of a healthy democratic society. Therefore, one might say that we already have the prerequisites for a more inclusive, detailed and technical debate concerning the introduction of e-voting procedures in the future. In short, our conclusion regarding e-voting in Romania would be: probably relevant for better political participation, highly risky, yet somehow not impossible.

About the authors:

Elena Simina TĂNĂSESCU is a professor of comparative constitutional and European law at the University of Bucharest. She has got her PhD degree at the Université Aix-Marseille III and her habilitation at Université Paris I Panthéon-Sorbonne. Between 2000 and 2006 she was Pre-accession adviser of the EC Delegation in Bucharest and between 2007 and 2011 she was a member in the Management Board of the EU Agency for Fundamental Rights. Since 2004 she has been representing Romania in the Group of Independent Experts of the Congress of Local and Regional Authorities at the Council of Europe. Since January 2015 she has been the Presidential Counsellor for institutional and constitutional reform.

E-mail: simina-elena.tanasescu@drept.unibuc.ro

Ramona Delia POPESCU has been a lecturer at the Faculty of Law, University of Bucharest, since 2012, teaching constitutional law and political institutions as well as legal methodology. At the same time, she is a legal adviser within the Ministry of Justice, the Department for the Endorsement of Normative Acts. She has got her PhD degree in 2011 at the Faculty of Law, University of Bucharest, with the thesis "The Responsibility of Parliament in public law".

She is an alumnus of the 2009 Summer school on federalism organized by the Institute of Federalism in Fribourg. She also attended summer courses organized by International Academy of Constitutional Law (Tunis, 2008), International Institute of Human Rights (Strasbourg, 2009), University of Montpellier (Montpellier, 2009), as well as international conferences and congresses on constitutional topics in Oslo (2014), Dresden (2014), Kishinev (2014), Aix-en-Provence (2015), Bucharest (2015).

Her topics of study and interest are: electoral procedures, citizens and political parties, justice and the rule of law, transparency in decision-making processes, the accountability of public authorities, direct democracy.

E-mail: ramona-delia.popescu@drept.unibuc.ro

Bogdan DIMA has got a PhD degree in Law at the Faculty of Law, University of Bucharest, where he has also been teaching Administrative Law since 2007. His professional background is highly diversified, focusing mainly on strategic communication, political and electoral strategies, legislative analysis and institutional building processes. He worked closely with several political parties and Romanian politicians, and also with several corporate senior officials as a consultant for political and electoral strategies, political profiling, strategic communication, risk management, government relations. He is the author of the *Conflict between the Palaces. Power relations between the Parliament, Government and President in Post-Communist Romania*.

E-mail: bogdan.dima@drept.unibuc.ro

[27] *E-Voting Handbook*, Council of Europe Publishing, 2010, p. 23.

References:

- Bochsler, D., *Can Internet Voting Increase Political Participation? Remote Electronic Voting and Turnout in the Estonian 2007 Parliamentary Elections*, paper presented at the conference *"Internet and Voting"*, Fiesole, 3 – 4 June 2010. Available at: http://www.eui.eu/Projects/EUDO-PublicOpinion/Documents/bochslere-voteeui2010.pdf
- Deaconu, Şt. (2015). *Instituţii politice*, ediția a 2-a. Bucureşti, C.H. Beck.
- Duverger, M. (1951). *Les parties politiques*, Paris, A. Colin.
- Goldsmith, B., Ruthrauff, H. (2013). *Implementing and Overseeing Electronic Voting and Counting Technologies*, NDI. Available at: http://www.eods.eu/library/Implementing_and_Overseeing_Electronic_Voting_and_Counting_Technologies.pdf
- Lijphart, A. (1999). *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven and London, Yale University Press.
- Muraru, I., Tănăsescu, E.S. (2014). *Drept constituţional şi instituţii politice*, ediția a 14-a, vol. 2. Bucureşti, C.H. Beck.
- Norris, P., *Will New Technology Boost Turnout? Evaluating Experiments in E-Voting v. All-Postal Voting Facilities in UK Local Elections*, paper presented at the British Study Group Seminar on Friday, 31st October 2003, Minda de Gunzberg Center for European Studies, Harvard University. Available at: https://www.hks.harvard.edu/fs/pnorris/Acrobat/New%20technology%20and%20turnout.pdf
- Tănăsescu, E.S. (2004). *Legile electorale. Comentarii şi explicaţii*. Bucureşti, All Beck.
- Tănăsescu, E.S., Vrabie, G. (2015). *Constitution, démocratie et élections*. Iaşi, Institutul European.
- Trechsel, A.H., Kies, R., Mendez, F., Schmitter, Ph.C., *Evaluation of the Use of New Technologies in Order to Facilitate Democracy in Europe. E-Democratizing the Parliaments and Parties of Europe*. Available at: http://cies.iscte.pt/en/destaques/pdf/1.pdf
- *E-public, E-participation and E-Voting in Europe – Prospects and Challenges, European Parliament Report*, November 2011. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/471584/IPOL-JOIN_ET(2011)471584_EN.pdf
- *E-voting Handbook* (2010). Council of Europe Publishing. Available at: http://www.coe.int/t/dgap/goodgovernance/Activities/E-voting/E-voting%202010/Biennial_Nov_meeting/ID10322%20GBR%206948%20Evoting%20handbook%20A5%20HD.pdf
- *Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report*, adopted by the Venice Commission at its 52nd session, 18 – 19 October 2002. Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e
- *Voter Turnout in Western Europe since 1945: A Regional Report* (2004). IDEA Publication. Available at: http://www.idea.int/publications/voter_turnout_weurope/upload/chapter%206.pdf
- *Promise and Problems of E-Democracy: Challenges of Online Citizen Engagement*, (2004). OECD Publishing, Paris. Available at: http://dx.doi.org/10.1787/9789264019492-3-en
- *The ACE Encyclopaedia: Civic and Voter Education*. Available at: http://aceproject.org/ace-en/pdf/ve/view
- *Official Gazette of Romania* no. 349/20.05.2015.
- *Official Gazette of Romania* no. 553/24.07.2015.
- *Official Gazette of Romania* no. 866/19.11.2015.
- *Official Gazette of Romania* no. 339/18.05.2015.
- *Official Gazette of Romania* no. 346/20.05.2015.

- Law no. 370/2004 for presidential elections, republished in *Official Gazette of Romania* no. 650/12.09.2011.
- Law no. 33/2007 for elections for European Parliament, republished in *Official Gazette of Romania* no. 627/31.08.2012.
- ECHR, 2 June 2010, *Grosaru v. Romania.*
- ECHR, 1 July 2008, *Calmanovici v. Romania.*
- ECHR, 21 April 2014, *Danis v. Romania.*
- Decisions no. 61/2010, 50/2012, 682/2012, 80/2014, 460/2014, 799/2015.
- http://ec.europa.eu/justice/citizen/voting-rights/index_en.htm
- http://www.coe.int/t/DEMOCRACY/ELECTORAL-ASSISTANCE/themes/evoting/default_en.asp

NATIONAL CASE STUDY: THE BRAZILIAN CASE

Prof. Dr. Augusto Tavares Rosa MARCACINI
Faculdades Metropolitanas Unidas
São Paulo, Brazil

Abstract:

E-voting proved to be very fast to provide final results, but very sensible issues arise on its security and transparency. This paper discusses what is expected from a political election, arguing about democratic principles, then presents a brief report on some of the auditing methods that were defined and executed by Brazilian High Electoral Court. As a conclusion, there is no way to hold an election that simultaneously meets these three requirements: a) anonymous votes; b) publicly auditable; c) 100% digital. The key for achieving security, secrecy and transparency is to abandon the use of 100% electronic voting systems, and adopt software-independent voting machines and paper auditing trails.

Keywords: *Brazil, voting machines, e-voting auditing, anonymous votes, publicity principle, paper trail*

Résumé :

Il s'est avéré que le vote électronique fournit des résultats finaux très rapidement, mais des questions très sensibles se posent quant à sa sécurité et à sa transparence. Ce travail discute des attentes concernant les élections politiques, en discutant des principes démocratiques, puis il présente un rapport succinct de certaines méthodes d'audit définies et exécutées par la Cour Suprême Électorale du Brésil. En conclusion, on ne peut pas organiser des élections qui répondent simultanément à ces trois exigences : a) votes anonymes ; b) qui peuvent être audités publiquement ; c) 100% électroniques. L'élément essentiel pour assurer la sécurité, le secret et la transparence est d'abandonner les systèmes de vote électronique à 100% et d'adopter des machines de vote à enregistrement direct et des supports papier pour l'audit.

Mots-clés : *Brésil, machines de vote, audit du vote électronique, votes anonymes, principe de la publicité, support papier*

Abstract:

S-a dovedit că votul electronic aduce rezultate finale foarte rapid, însă generează probleme foarte delicate referitoare la securitatea şi transparenţa acestuia. Lucrarea de faţă dezbate aşteptările referitoare la alegerile politice, argumentând despre principiile democratice, apoi prezintă un raport succint al unor metode de audit definite şi executate de Curtea Supremă Electorală din Brazilia. În concluzie, nu se pot organiza alegeri care să întrunească concomitent următoarele trei cerinţe: a) voturi anonime; b) care să poată fi auditate în mod public; c) 100% digitale. Elementul esenţial pentru asigurarea securităţii, a secretului şi a transparenţei este reprezentat de renunţarea la sistemele de vot electronic în procent de 100% şi adoptarea unor maşini de vot cu înregistrare directă şi suport de hârtie pentru audit.

Cuvinte-cheie: *Brazilia, maşini de vot, auditarea votului electronic, voturi anonime, principiul publicităţii, suport de hârtie*

1. Introduction

Brazil has been using electronic voting machines since 1996 and, from 2000 onwards, all political elections have been driven solely by electronic means.

As an introduction to this paper, it seems useful to present some geographical aspects of Brazil. Brazilian population is estimated at more than 205 million inhabitants.[1] On the last political election of 2014, 141,824,607 voters[2] were inscribed and allowed to vote for President, Senators, State Governors and Federal and State Representatives. This huge number of voters is spread across an area of 8.5 million km² and four different time zones, with around 85% of people living in cities and the rest of them in the countryside.[3]

Brazil is also a country full of contrasts: though its most famous urban centres, like São Paulo or Rio de Janeiro, are among the world's biggest cities, vast territories where some voters live[4] are places where the only means of transport is by boat and it takes some hours to reach the next village. Most of the population is concentrated in cities closer to the Brazilian coast, but this coast draws a line of more than 7,000 km long.

Looking at this environment, there is no doubt that the use of information and communication technologies (ICT) can improve the efficiency of political elections. In fact, it is a difficult task nowadays to point out any service or activity that will not benefit from informatics, from huge business companies or public entities to a small bakery at the nearest corner.

ICT can be used in elections to send partial results from the very distant and almost inaccessible places, to easily tally millions of votes and to disclose the finest details of everything to the general public. And – that is the most sensible issue of ICT use in political elections – to receive the votes directly from the citizens.

The most perceptible goal of ICT use is that it is *very fast* to provide the final results of an election, regardless of the Brazilian dimensions as mentioned just above.

[1] According to projection numbers of IBGE – Instituto Brasileiro de Geografia e Estatística, an official public entity: http://www.ibge.gov.br/apps/populacao/projecao/

[2] According to Brazilian High Election Court (*TSE – Tribunal Superior Eleitoral*): http://www.tse.jus.br/imprensa/noticias-tse/2014/Maio/justica-eleitoral-registra-aumento-do-numero-de-eleitores-em-2014

[3] Numbers from IBGE's 2010 census: http://7a12.ibge.gov.br/vamos-conhecer-o-brasil/nosso-povo/caracteristicas-da-populacao.html

[4] Some news about 2012 elections are good examples of it (with pictures and video): http://g1.globo.com/ro/rondonia/eleicoes/2012/noticia/2012/10/mais-de-19-mil-indigenas-votarao-nas-eleicoes-de-domingo-em-rondonia.html, http://g1.globo.com/mato-grosso/eleicoes/2012/noticia/2012/08/justica-eleitoral-em-mt-deve-gastar-ate-r-25-mil-para-votacao-em-aldeia.html

Elections in Brazil are always performed on Sundays, and the next Monday morning all major results (President, Governors, Mayors, and Senators) are already computed and publicly announced by the national electoral authorities. In fact, almost all votes are tallied even before the end of the same day.

Since the first use of electronic voting machines these advantages were noticeable and the use of ICT achieved an enthusiastic support from the Brazilian people as a whole, although its implementation had been done without any further discussion, either in Parliament or at any academic or scientific level. Official propaganda may be considered responsible for convincing the public opinion that the Brazilian voting machines were the most sophisticated and represented a safe way to execute national elections.

No doubt e-voting is fast and that *"old-fashioned"* paper ballots present a lot of risks and vulnerabilities. The big issue, however, is: how safe e-voting really is, especially when it is 100% done by digital means? Is the Brazilian experience one to be proud of?

To answer these questions, this paper will begin discussing what is expected from a political election, arguing about democratic principles, then present a brief report on some of auditing methods that were defined and executed by the Brazilian High Electoral Court (*TSE – Tribunal Superior Eleitoral*)[5], finally stating a general opinion on this very important issue.

[5] Elections in Brazil are organized, managed and executed by a branch of Judicial Power, the Electoral Courts (*"Justiça Eleitoral"*, as named in Portuguese), and the same Courts also have jurisdiction to decide any dispute aroused from the elections, including the ones originated from its own acts. The Tribunal Superior Eleitoral – TSE is the top entity of all Electoral Courts and it also holds the power to rule on most of the minor details of an election, defining instructions for a myriad of subjects, from political parties organization to allocating radio and TV time to them and their respective candidates, on methods and procedures to vote and on framing and developing of all e-voting system and infrastructure. All kind of auditing methods used in Brazil since e-voting was implemented were organized and conducted by *TSE*. More about this concentration of powers was discussed on a previous article [Brunazo Filho, A., Marcacini, A.T.R., *Legal Aspects of E-Voting in Brazil* in: Maurer, A.D., Barrat, J. (eds.), E-Voting Case Law: A Comparative Analysis, Routledge, 2016].

2. What Is Expected from a Political Election?

In democracies, the people are the source of power. Thus, a popular election is the genesis of all political power. The obvious purpose of an election is to provide a final result that matches the voters' will. That is the simplest answer. But in a real world, it is legitimate to ask some questions: a) *How* do we achieve such a goal? b) Who watches over the elections to assure that the final result matches the voters' will? c) And *who watches the watchmen*?

In fact, when put into practice, elections may expose some practical contradictions of these political theories: if the people are the original source of power, how can the previous power ruling and organizing the election be explained? Can the rules and procedures influence the final result? Or worse: can the organizers influence or even forge the final result? How could it be avoided in the benefit of democracy in information society?

It seems there is no better way to avoid it rather than providing political elections with the maximum of transparency. *Sunlight is the best of disinfectants*, as it was said before. A lot of economic, political, social or ideological views or interests may be protected or set aside depending on the result of the elections, so, at first, voters or candidates cannot rely on anyone else and nobody is above suspicions. The perfect scenario would be the one in which everybody could control and be controlled by each other. Since perfect scenarios in real world are as feasible as passing beneath the rainbow, the best thing modern societies can do is to try to get as close as possible to this colourful mirage. In an optimistic view, ICT use may bring us closer to the rainbow as never before in human history, it just depends on *how* computerized are the systems that will be used. Technology is just a tool: humans will get it to work for good or for bad. ICT is a powerful tool for spreading information, so that every citizen might be allowed to get and check every piece of data. Thus, electronic devices may perform more functions in an election and not just be used as a way to make things faster.

Democratic elections, on the other hand, are based on the secrecy of individual votes. This is the only way to assure that each voter is free to express nothing but his/her intimate will. Secrecy of vote protects voters from every kind of pressure: from their private or professional circle (family, friends or boss) or from the authorities. Since a voter under some kind of pressure could be asked to prove who he voted for, the vote must be secret for everybody including the voter himself. This is especially true in developing countries like Brazil, where some candidates, mainly in poorer locations of the countryside, have the bad practice to promise individual benefits to the voters in exchange for their support. Anyway, even in the big cities, pressure at the workplace should not be overlooked. So, the secrecy of the vote also means that even the voter himself should not be allowed to identify his own vote among all others.

Thus, the scenario is not that simple. Everything must be transparent, public, but each vote must be completely anonymous and at the same time it must be authentic and prone to be proven as such. Paper ballots are a good way to accomplish these requirements: it is anonymous and we can still check their authenticity using special paper, checking signatures of election officials, or watching carefully the ballot boxes, but of course these procedures are not tamper-proof.

Would e-voting machines be better than paper ballots?

In the next title, the opinions of some renowned experts on e-voting or information security will be presented. They offered several arguments for the use of voting machines, at least the ones in which everything is done exclusively by electronic recordings. Auditing methods used in Brazil can confirm their statements.

3. What Experts Say about E-Voting Systems?

From the moment a voter chooses his candidate to the end of the tally, a lot of steps need to be done. This paper is focused on the previous ones: how voter options are recorded and counted at the very first step. That is the main problem of e-voting systems, because it involves a conceptual paradox. Once each local machine discloses its votes, checking the final and total result of the whole election, a lot of work might be required from political parties, candidates, press, or anyone else who wants to audit political elections. Nevertheless, it is just a matter of getting the figures of each voting machine and summing them all: it may be difficult, but possible. On the other hand, checking that each voting machine recorded precisely the input given by each voter is a very difficult conceptual issue when anonymous votes are a must. There wouldn't be such a trouble if identified votes were an acceptable option. In this case, e-voting would be, no doubt, an outstanding means to conduct an election, as there are reliable procedures to audit and track identified digital data. Even digital signatures could be used. But anonymous votes are one of the most important principles to be observed in a democratic political poll.

Computers can do a lot of things better than humans. From executing complex (or not so complex) maths operations or dealing with huge amounts of data, their superiority is beyond doubt. But checking the authenticity and integrity of digital information may be a big issue. Since computers can work with data at very fast rates, they can also *change* them instantaneously. At present, no computer system may be considered fail-proof, and newspapers frequently publish some lines about criminal attacks directed to online services of big companies or important or powerful public agencies. But, even simpler than that, can voters trust their options were correctly recorded by the voting machine in the first place? Can the software change it until the end of the Election Day? Will the voting machine count it right? Who are the bad guys to be afraid of: outsider crackers or insider developers, managers or officials?

Ordinary people usually trust in what they can see. But whatever a computer makes or shows is just the result of an activity it was programmed for. When someone writes down an "x" on a sheet of paper he can see, that "x" is real and was a direct consequence of his action with a pen and his hand. When a key is pressed on the computer keyboard, what appears on the screen is the result of a sequence of software commands. *Someone else* has previously

programmed it to show on the screen *the same key* that was pressed, otherwise nothing would happen, the computer would do nothing by itself!

As stated by Rebecca Mercuri: *"Fully electronic systems do not provide any way that the voter can truly verify that the ballot cast corresponds to that being recorded, transmitted, or tabulated.* ***Any programmer can write a code that displays one thing on a screen, records something else, and prints yet another result. There is no known way to ensure that this is not happening inside a voting system.****"*[6]

Though this is known by any computer professional (or anyone who ever tried to learn how computers work and how software is built), it seems that common people are not aware of this fact.

In 2000, Bruce Schneier published some notes about the incidents that happened in Florida elections that year, saying that the greater use of technology wouldn't solve those problems. He said that: *"Certainly Florida's antiquated voting technology is partially to blame, but newer technologies wouldn't magically make the problems go away. It could even make things worse, by adding more* ***translation layers between the voters and the vote counters and preventing recounts****.*

That's my primary concern about computer voting: There is no paper ballot to fall back on. Computerized voting machines, whether they have a keyboard and a screen or a touch screen ATM-like interface, could easily make things worse. You have to trust the computer to record the votes properly, tabulate the votes properly, and keep accurate records. You can't go back to the paper ballots and try to figure out what the voter wanted to do. And computers are fallible; some of the computer voting machines in this election failed mysteriously and irrecoverably."[7]

Since there is no way to look inside and see what voting machines are doing during the Election Day, there are very few things inspectors can check or watch at the polling place. According to Rebecca Mercuri's opinion: *"Electronic balloting and tabulation make the tasks performed by poll workers, challengers, and election officials* ***purely procedural****, and removes any opportunity to perform bipartisan checks. Any computerized election process is thus* ***entrusted to the small group of individuals who program, construct and maintain the machines****."*[8]

So, her proposal is: *"It is therefore incumbent upon all concerned with elections to refrain from procuring any system that* ***does not provide an indisputable, anonymous paper ballot which can be independently verified by the voter prior to casting****, used by the election board to demonstrate the veracity of any electronic vote totals, and also available for manual auditing and recounting."*

In 2006, a paper written by Rivest and Wack introduced the terminology *software-independent* and *software-dependent* voting systems to describe *"whether or not the correctness of election results depends in an essential way on the correctness of the voting system software"*. They finally state that *"the ability to prove the correctness of software diminishes rapidly* ***as the software becomes more complex****. It would effectively be impossible to adequately test future (and current) voting systems for flaws and introduced fraud, and thus these systems would always remain suspect in their ability to provide secure and accurate elections"*.[9]

In a few words, these knowledgeable experts believe that there is no better way to audit an election than using a paper trail to provide a way to recount the votes independently of the electronic system or

[6] Mercuri, R. *Rebecca Mercuri's Statement on Electronic Voting*. Available at: http://www.notablesoftware.com/RMstatement.html

[7] Schneier, B. *Voting and technology*. Available at: https://www.schneier.com/crypto-gram-0012.html#1 >.

[8] Mercuri, R. *op. cit.*

[9] Rivest, R.R., Wack, J.P. *On the notion of "software independence" in voting systems*. USA: National Institute of Standards and Technology (NIST) (28 July 2006). Available at: http://people.csail.mit.edu/rivest/pubs/RW06.pdf

the software. Any other proposed way to audit would be too expensive or practically impossible, even for experts, and, of course, there might not be enough experts available to do the task at a huge national election. Moreover, it does not sound democratic to prevent common citizens from checking e-voting correctness by themselves.

During the last two decades, Brazilian electoral authorities rejected the use of paper trail auditing.[10] Instead, three different auditing methods were tried, as presented in the next title.

4. The Brazilian Experiences in Auditing E-Voting Systems

4.1. Parallel Voting

The first method used to check electronic voting machines in Brazilian elections was known as *parallel voting*, a practice that started in 2002[11] and is briefly described below:

a) two or three days before the election, when all the machines are already at the polling places, four of them are chosen at random during a public meeting that takes place at each Electoral Court office located in the State Capital (this procedure is separately executed in each state);

b) moments after that, electoral officials, together with party inspectors (where available), go to the polling places where the chosen machines were installed, grab them and substitute them for others to be used there; possibly, the chosen machines may be located hundreds of kilometres far from State Capital and it takes some hours for the officials to get there; the four machines are brought to the capital and taken to a public building (normally the State Legislative House or the City Council) where parallel voting will take place;

c) party inspectors and observers are asked to fill in some simulated paper ballots;

d) on Sunday, during the same time of the poll, the four machines are turned on and used as if they were in its original place; then, the simulated votes are inserted in their system during a very formal and slow procedure, registered step-by-step by a video camera;

e) at the end of the day, the four machines disclose their votes and the result is compared with the simulated ballots.

The purpose of this method would be to prove that any random machine is working properly and correctly and sums all votes inserted in it. In fact, this kind of test may be useful to check involuntary software errors, but it is very doubtful if it is able to avoid an insider attack. Since e-voting machines are as complex as any other computer (in fact, they *are* computers), there are uncountable ways an insider attacker with enough access to the code could avoid being caught by this kind of test. All the insider attacker would need is a kind of *switch* (probably designed by a software) that turns the fraud on and off. If the software detects any sign that the machine is not at its poll place, the fraud would be turned off. The way this audit was developed makes the tested machines work in very different conditions compared to their normal environment. For example, as it could be observed during all these tests, the time lapse between any two votes was unreal, because each simulated vote should be recorded on video, then it was counted in another computer, following a slow and formal established procedure so that it takes around three minutes between any two votes. In real conditions, three or four voters would use the machine in a three-minute interval. On the other hand, tested machines received votes on regular time lapses spread during all day, while machines in real conditions may be idle for several minutes, as voters do not flow constantly. At least in one of these tests that occurred in São Paulo, the staff started the audit in the morning using voter names in an

[10] In fact, laws ordering paper trail auditing were approved and subsequently revoked along these two decades. See, about this pendulum movement: Brunazo Filho, A., Marcacini, A.T.R. *cited work.*

[11] Federal Law no 10.408, of January 10th, 2002. Portuguese version available at: http://www.planalto.gov.br/ccivil_03/leis/2002/L10408.htm

alphabetical order.[12] Of course, in a real poll, there's almost no chance that this happens! On other occasion, no tested machine all over the country received more than 200 votes during all day (due to this slow procedure), much less than the normal average number of real voters who attend each polling station, that is around 400.

In conclusion: knowing how the parallel voting will be performed, an imaginative attacker that can compromise the software would be able to create dozens of "alarms" to detect several different signs that the machine is not at the real poll place (so, it is under parallel voting audit!) and turn the fraud off. Parallel voting is not efficient against a willful and experienced attacker. It can, however, detect involuntary errors. Anyway, if errors were detected in just four voting machines, what could be done? Do all other machines have the same problem? If they failed, how can we recover the true votes?

4.2. Auditing Code

In 2003, a new law[13] established a second method of auditing and it was put into practice for the first time during the 2004 elections. External observers were allowed to examine the software used in electronic voting machines and in the tallying systems. Until that time, I sincerely believed that this method could be a possible and useful way to check the reliability of e-voting machines. These feelings vanished, though, once I took part in it.[14] The difficulties to check the systems proved to be enormous.

The auditing was performed under very restrictive procedures. According to the rules of that auditing, no inspector was allowed to take the code away, nor could he examine it using his own equipment. The only allowed task was to check lines of programming code on the screen of some computers available at *TSE* headquarters. The code to be examined comprised tenths of thousands of .txt files, so it seemed useless for the computer professionals working on it just to be able to read some of those files on the screen. But even if inspectors could take the code away and try it the most as they could – it must be said it is not a common or easy task, and maybe only experts in security would be able to detect a more sophisticated fraud – checking that the code they review is the same one that generated the final software was not that simple.

According to the procedures of this auditing method:

a) the code would be available for some weeks (to be read on screen);

b) at a certain date, in a formal ceremony with the presence of all inspectors, the code would be compiled and the resulting executable files produced by compilation would be digitally signed by them;

c) the executable files would be installed in every voting machine and after that, inspectors would be allowed to check the validity of their digital signatures, testing them directly on voting machines.

Apart from not having full and direct access to the code, all this auditing work seems useless to repeal internal frauds. The compilation and signing ceremony appears to be "purely procedural", to repeat the wise words of Professor Rebecca Mercuri. Since it is impossible to go into the computer or enter inside the silicon chips to look what is happening there, everything inspectors could see was a Court worker operating a computer and giving it some orders using the keyboard. There is absolutely no way to assure at that exact moment that the code compiled was the same that was (briefly) reviewed during the previous weeks. When the compilation was finished, inspectors used their private key to sign the executable files, but all the operations

[12] One big issue that will not be discussed here is that each voting machine is programmed with the list of its voters, according to electoral sections distribution. To allow each vote to be inserted, a poll worker needs to input the voter's register number in a keyboard that is connected to the voting machine. This means a serious risk to the secrecy of vote, if the software, by fail or by will, links voter's identification to the candidates they choose.

[13] Federal Law no. 10.704, of October 1st, 2003. Portuguese version available at: http://www.planalto.gov.br/ccivil_03/Leis/2003/L10.740.htm

[14] In 2004 and 2006, Brazilian Bar Association pointed out two lawyers and two computer professionals as its observers, and I was one of them.

were done on the same computer. Inspectors had no means to check if the files they signed were the same ones that resulted from the compilation process. Finally, checking if the digital signatures are valid in hundreds of thousands of voting machines, one by one, is an almost impossible task. The best thing that could be done was to check just a dozen of them in one state or another. Even so, checking a digital signature in an unknown computer (the voting machines themselves) is tricky. It seems clear that an attacker with full knowledge of the system could make the checks to appear valid *on the machine screen*, even though the digital signatures did not match. Furthermore, checking that the software is the same some days before the Election Day does not rationally prove that the same software will be there during the poll.

As a conclusion: inspectors are asked to digitally sign some executable files that cannot be proved to be the true result of the compilation task, that, in turn, was done by an unknown compiler software, using source codes that cannot be assured that were the same ones that were *not* fully analysed. And, afterwards, the work of testing the signatures on each voting machine (or at least on a representative number of machines) was not an easy task, especially along the continental territory of Brazil.

4.3. Public Security Test

A third auditing method was implemented in 2009 and since then it has been used two times. It is a kind of competition in which teams of computer experts may apply to and execute attacks to test vulnerabilities that could affect the secrecy of votes, the availability of machines and the risks of failure during Election Day, among other security issues.

This is not, however, a fully comprehensive penetration test, as participants must follow very restricted rules defined by *TSE*. In a few words, experts cannot make any kind of attack but only the ones that are approved by *TSE* technical department and its rules. Even so, in every edition of this Public Test, *something* was discovered by the experts. In 2009, the winner group captured electromagnetic waves emitted by the voting machines keyboard while typing, and it was enough to break the secrecy of the votes.[15] In 2012, a group was successful in reverting the random order of the digitally recorded votes, so that it exposed the chronological sequence in which the votes were given. The group published a report about the discovered vulnerabilities with suggestions to improve the security of Brazilian e-voting system.[16]

Apart from the security breaches detected, their report also points out the "inappropriate attacker model" allowed by electoral authorities, as *"significant emphasis is put on the design of security features resistant only to outsider attackers,* ***when insider threats present a much higher risk****"*.

In fact, insider threats cannot be detected by these kind of tests. Even if the groups were allowed to execute a free penetration test or to review the whole software, there is no way to assure that the software reviewed will be exactly the same one used during the poll by hundreds of thousands of voting machines.

Also, according to the experts who detected this flaw: *"We presented a collection of software vulnerabilities in the Brazilian voting machines which allowed the efficient, exact and untraceable recovery of the ordered votes cast electronically. Associating this information with the ordered list of electors, obtained externally, allows a complete violation of ballot anonymity. The public chronological record of events kept by the voting machines also allows recovering a specific vote cast in a given instant of time. The consequences of these vulnerabilities were discussed under a realistic attacker model and mitigations were suggested. Several additional flaws in the software and its development process were detected and discussed with concrete*

[15] TSE encerra testes do sistema eletrônico premiando melhores contribuições. Available at: http://agencia.tse.jus.br/sadAdmAgencia/noticiaSearch.do?acao=get&id=1255520

[16] Aranha, D.F. *et al. Software Vulnerabilities in the Brazilian Voting Machine in Design, Development, and Use of Secure Electronic Voting Systems, IGI Global, 2014*.

recommendations for mitigation. In particular, it was demonstrated how to defeat the only mechanism employed by the voting machine to protect ballot secrecy."

"In particular, we can conclude that there was no significant improvement in security in the last 10 years. Inadequate protection of ballot secrecy, the impossibility in practice of performing a full or minimally effective software review and the insufficient verification of software integrity are still worrisome. Since these three properties are critical to guarantee the anonymity and integrity of votes, the authors repeat the conclusions of the aforementioned report and ***defend the reintroduction of voter-verified paper audit trails to allow simple software-independent verification of results****. Paper audit trails distribute the auditing procedure among all electors, who become responsible for verifying that their votes were correctly registered by the voting machine, as long as an audit is done afterwards to check that the electronic and manual vote counts are equivalent."*

"We believe that, for this reason, and in light of the severe security problems discussed in this report, the software used in the Brazilian voting system does not satisfy minimal and plausible security and transparency requirements."

5. Conclusions

Auditing an election is even more complex than auditing any other kind of electronic system. Two main characteristics make electronic poll a singular challenge so that auditing it becomes a more difficult task than auditing electronic systems used in other scenarios: the requirement of anonymous votes and the fact of being held solely on the polling day. Brazil's experience can be a perfect example of it. All three methods described in this paper, that have been used to check the reliability of voting machines for more than a decade, proved to be insufficient, especially to avoid an insider attack.

It seems that there is no way to hold an election that simultaneously meets these three requirements: a) anonymous votes; b) publicly auditable; c) 100% digital. Only two of them may be obtained at the same time. Democracies, however, can not give up the first two requirements. The key for achieving security, secrecy and transparency is to abandon the use of 100% electronic voting systems, and adopt *software-independent* voting machines and paper auditing trails.

About the author:

Augusto Tavares Rosa MARCACINI is a lawyer and professor of Civil Procedure Law and Law and Technology in São Paulo, SP, Brazil. He is a Bachelor in Law from São Paulo University – USP (1987) and has also the degrees of Master (1992), PhD (1999) and Habilitation (2011) in Law from the same University. He was the Chairman of the Digital Society Commission of Brazilian Bar Association, São Paulo Chapter, during three mandates (2004 – 2006, 2007 – 2009 and 2010 – 2012) and member of Information Technology Commission of the Federal Council of Brazilian Bar Association (2004 – 2006). Since 2009, together with other lawyers, professors, engineers and computer professionals, he joined the Brazilian Independent Multidisciplinary Committee, an informal group whose aim is studying and observing e-voting practices in Brazil. He is a professor of UniFMU (Laureate International Universities), where he teaches Civil Procedure Law at the Law College and conducts classes and researches on efficiency of Civil Justice, access to Justice, e-Justice, digital signatures and cryptography, electronic documents as legal evidence and other subjects related to law and technology at the Master of Law of Information Society course. His main books and papers are: *Assistência jurídica, assistência judiciária e justiça gratuita* (Masters dissertation), *Estudo sobre a efetividade do processo civil* (Phd thesis), *Processo e tecnologia: garantias processuais, efetividade e a informatização processual* (Habilitation thesis), *Direito e informática: uma abordagem jurídica sobre a criptografia*, *O documento eletrônico como meio de prova*, *Legal aspects of e-voting in Brazil*.

E-mail: amarcacini@gmail.com

References:

- Aranha, D.F. *et al*. (2014). Software Vulnerabilities in the Brazilian Voting Machine in *Design, Development, and Use of Secure Electronic Voting Systems.* USA, IGI Global. Available at: https://sites.google.com/site/dfaranha/pubs/aranha-karam-miranda-scarel-12-book
- Brazil. *TSE encerra testes do sistema eletrônico premiando melhores contribuições*. Available at: http://agencia.tse.jus.br/sadAdmAgencia/noticiaSearch.do?acao=get&id=1255520
- Brunazo Filho, A., Cortiz, M.A. (2006). *Fraudes e defesas no voto eletrônico.* São Paulo, All Print.
- Brunazo Filho, A., Marcacini, A.T.R. (2015). *Legal Aspects of E-Voting in Brazil,* in Driza Maurer, A., Barrat, J. (eds.). *E-Voting Case Law*. Surrey, Ashgate Publishing.
- Brunazo Filho, A. (2014). *Modelos e Gerações dos equipamentos de votação eletrônica.* Available at: http://www.brunazo.eng.br/voto-e/textos/modelosUE.htm.
- G1. *Justiça eleitoral em MT deve gastar até R$ 25 mil para votação em aldeia.* Available at: http://g1.globo.com/mato-grosso/eleicoes/2012/noticia/2012/08/justica-eleitoral-em-mt-deve-gastar-ate-r-25-mil-para-votacao-em-aldeia.html
- G1. *Mais de 1,9 mil indígenas votarão nas eleições de domingo em Rondônia.* Available at: http://g1.globo.com/ro/rondonia/eleicoes/2012/noticia/2012/10/mais-de-19-mil-indigenas-votarao-nas-eleicoes-de-domingo-em-rondonia.html
- Mercuri, R. *Rebecca Mercuri's Statement on Electronic Voting.* Available at: http://www.notablesoftware.com/RMstatement.html
- Mercuri, R. *Electronic Vote Tabulation Checks & Balances*. PhD dissertation, presented on 27 October 2000 at the School of Engineering and Applied Science of the University of Pennsylvania, Philadelphia, PA, USA.
- Rezende, P.A.D. *Devagar com o andor da urna: Comentários sobre testes de penetração no TSE e de sua cobertura midiática*. Available at: http://cic.unb.br/~rezende/trabs/penetracao.html
- Rivest, R.R., Wack, J.P. *On the notion of "software independence" in voting systems*, National Institute of Standards and Technology (NIST), USA (28 July 2006). Available at: http://people.csail.mit.edu/rivest/pubs/RW06.pdf
- Schneier, B. (1996). *Applied cryptography* (2nd edition). New York, John Wiley & Sons.
- Schneier, B. *Designing Voting Machines to Minimize Coercion*. Available at: https://www.schneier.com/crypto-gram-0707.html#8
- Schneier, B. *Voting and technology*. Available at: https://www.schneier.com/crypto-gram-0012.html#1
- Schneier, B. *Internet Voting vs. Large-Value e-Commerce*. Available at: https://www.schneier.com/crypto-gram-0102.html#10
- Seedorf, S. (2015). *Germany: The Public Nature of Elections and its Consequences for E-Voting,* in Driza Maurer, A., Barrat, J. (eds.). *E-Voting Case Law*. Surrey, Ashgate Publishing.

CONCLUSIONS OF THE 1ST SCIENTIFIC ELECTORAL EXPERTS DEBATES

BUCHAREST, 12 – 13 APRIL 2016

Oliver KASK
Member of Venice Commission
Vice-Chair of the Council for Democratic Elections

The meeting of electoral experts which is coming to the end was the first of this kind. There are many international organizations or institutions which aim to join the electoral law debates, e.g., Office for Democratic Institutions and Human Rights (OSCE/ODIHR), Association of European Election Officials (ACEEEO) and International Foundation for Electoral Studies (IFES), International Institute for Democracy and Electoral Assistance (International IDEA), International Centre for Parliamentary Studies (ICPS), as well as different mechanisms for mutual cooperation as conferences for Electoral Management Bodies, the workgroup to draft amendments to the Council of Europe Recommendation discussed by Mr. Gregor Wenda, summer schools and other forms of cooperation in academic world among election law experts. We could ask if there is a need for a new means of cooperation. After the discussions, we can conclude that it fulfilled its task. Venice Commission and Council for Democratic Elections share expertise mostly of academic origin, but not only. There are members of these bodies with judicial background, politicians taking part in elections and closely following the practice of elections in Council of Europe or OSCE Member States by participating in election observation missions. There is a need that academic world and election management bodies practice to become more tightly linked. Election management has to be aware of the problems faced in other countries to avoid similar mistakes and to take advantage of solutions for problems used elsewhere. Administration needs to have close contacts with academics in order to fulfill its tasks in the best way. For academic world, the election experts debate is an additional forum to exchange knowledge and ideas.

We discussed different aspects of e-voting from a practical perspective and we went through a scientific analysis of them. Overall, all these interventions can be summarised as following: we need to think about the issues raising with regard to e-voting more in-depth. There are many unstudied areas, more question marks than good and clear answers. We can look at the work done for the updating of the Recommendation Rec(2004)11 of the Council of Europe on legal, operational and technical standards for e-voting, which has lasted for many years and has been done in cooperation with many

institutions and representatives of those countries, having solid practice with the use of e-voting. The updating is still not an easy task, while the number of issues to be further discussed does not seem to decrease, as the technical possibilities as well as the loopholes continue to broaden and get more advanced with the development we can continuously see in ICT sector.

The tendency to broaden the use of e-voting that we faced ten years ago has mainly stopped and, in the case of many countries, this tendency is going backwards, as we could find out from many country reports and the presentation made by Mr. Uwe Serdült. It has its roots in the discredit of technologies, as only a few can assure the reliability of any program or application in our computers or phones. The revelations by hackers with regard to manipulation of election results as well as the information revealed on the systemic efforts to have access to any phone calls and information sent over the Internet by state authorities have led to the mistrust in governments and secrecy of e-voting mechanisms on a large scale. There are only few countries which are currently eager to widen the use of e-voting (including Internet voting).

Secrecy of vote is one of the main cornerstones of present definition of democratic elections. It is expressed in Article 25(b) of the ICCPR, Article 3 of the First Protocol to the ECHR and it is more elaborated in respective case law of the UN Human Rights Committee and European Court of Human Rights, Copenhagen Document and Code of Good Practice in Electoral Matters. Without trust in the electoral processes in general concerning the use of ICT, clear standards on assessment of the technologies used and clear possibilities to observe the election process in balloting and counting with the help of technologies, there is not sufficient trust in democratic governance in general. Trust in the democratic process and elections is assessed in order to assess the level of democracy in a specific country as well.

Maybe we should start more from general e-governance, e-petitions, e-registers where the ICT reliability is not so important and in case of failure – on whatever reasons – the democratic system would not be hampered or paralysed. Efforts to use ICT in less decisive areas of governance as well as banking systems may raise the trust of public. If we see a large scale trust in these areas, there might be more bases to go further and discuss the use of new technologies in electoral matters, up to Internet voting.

For elections, the governments should be advised to start first by updating and keeping electronic voter registers. New technologies are the best means to control spending of public finances for campaign reasons, to fight against misuse of administrative resources and to evaluate the neutrality of public or private media, where such requirements are present. Professor Jordi Barrat Esteve offered us a refreshing view upon the role of judiciary in the oversight of electronic aspects of the voting process and its challenges. Having solid databases for courts and possibilities to collect evidence for judicial disputes with the help of Internet, the court proceedings can be faster and judgements better justified and reasoned. The introduction of new technologies to elections should be a step-by-step arrangement, not a leap into the unknown, as the risk of failed election procedures could lead for certain to less participation and less trust into political actors. Experts in electoral matters can explain the issues a country might face if it introduces e-voting. The better the understanding, the more reasoned the decision of the authorities will be.

With a growing usage of smartphones, computers, Internet and digital signatures, as Professor Robert Krimmer put it, it is not a question of *whether*, but *when* and *how* the e-voting shall be introduced or further developed. The obstacles and threats – with a reference to big data, revelations by Edward Snowden and hackers – need to be taken into account, but we cannot overlook the growing social need. While acknowledging the threats in e-voting, one has to notice the long tradition of fraud with paper ballots and the need to tackle against it, as well. The election process is always open to fraud and the ways to manipulate paper balloting might improve over time, too.

It is the task of experts to suggest solutions for trustable e-voting procedures. As the scientific electoral experts debate that is coming to the end was the first of this kind, we are looking forward to a second, third and even a fiftieth debate session.

CONCLUSIONS DES PREMIERS ENTRETIENS SCIENTIFIQUES DES EXPERTS ÉLECTORAUX

BUCAREST, LES 12 – 13 AVRIL 2016

Oliver KASK
Membre de la Commission de Venise
Vice-président du Conseil des Élections Démocratiques

La rencontre des experts électoraux, qui arrive à sa fin, a été la première de ce genre. Il y a beaucoup d'organisations ou d'institutions internationales qui souhaitent rejoindre le débat sur le droit électoral, comme le Bureau des Institutions Démocratiques et des Droits de l'Homme (OSCE/BIDDH), l'Association des Instances Électorales Européennes (ACEEO) et la Fondation Internationale pour les Études Électorales (FIEE), l'Institut International pour la Démocratie et l'Assistance Électorale (IIDEA), le Centre International pour les Études Parlementaires (CIEP), ainsi que différents mécanismes de coopération mutuelle comme les conférences des administrations électorales, le groupe de travail pour l'élaboration d'amendements sur recommandation du Conseil de l'Europe, dont M. Gregor Wenda a parlé, des écoles d'été et d'autres formes de coopération dans le monde académique entre les experts du domaine électoral. Nous pourrions nous poser la question de savoir si un autre moyen de coopération est nécessaire. Suite aux discussions, nous pourrions conclure que la tâche a été accomplie. La Commission de Venise et le Conseil des Élections Démocratiques partagent une expérience plutôt académique, mais pas seulement. Parmi les membres de ces organes il y a des personnes avec une expérience judiciaire, des politiciens qui participent aux élections et qui suivent de près la pratique des élections du Conseil de l'Europe ou des États membres de l'OSCE par la participation à des missions d'observation des élections. Il est nécessaire que le monde académique et les administrations électorales s'approchent davantage. Les administrations électorales doivent être également conscientes des problèmes auxquels d'autres pays se confrontent afin d'éviter de faire des erreurs similaires et de profiter des solutions utilisées ailleurs.

L'administration doit avoir des contacts étroits avec les universitaires, afin d'accomplir ses tâches le mieux possible. Pour le monde académique, le débat des experts du domaine électoral est un forum additionnel pour échanger des connaissances et des idées.

Nous avons discuté différents aspects du vote électronique dans une perspective pratique et nous avons également fait leur analyse scientifique. L'élément commun de toutes ces interventions est le fait qu'il faut penser plus profondément aux problèmes découlant du vote électronique. Il y a beaucoup de domaines non étudiés, plus de signes d'interrogation que de bonnes réponses claires. Nous pouvons regarder le travail effectué pour mettre à jour la Recommandation Rec(2004)11 du Conseil de l'Europe sur les normes juridiques opérationnelles et techniques relatives au vote électronique, qui a duré plusieurs années et qui s'est déroulé en coopération avec plusieurs institutions et représentants des pays ayant une pratique solide dans l'utilisation du vote électronique. Néanmoins, la mise à jour n'est pas une tâche facile, puisque le nombre de problèmes qui doivent être approchés ne semble pas diminuer, vu que les possibilités techniques ainsi que les lacunes continuent à s'étendre et à avancer avec le développement que nous ne cessons pas d'observer dans le secteur des TIC.

La tendance d'étendre l'utilisation du vote électronique à laquelle nous avons assisté il y a dix ans a en grande partie cessé, et dans le cas de nombreux pays, celui-ci régresse, comme on nous a indiqué dans les rapports d'autres pays et dans la présentation de M. Uwe Serdült. Cette tendance résulte de la discréditation des technologies, puisque quelques-unes seulement peuvent assurer la fiabilité de tout programme ou de toute application de nos ordinateurs ou de nos portables. Les révélations des pirates

informatiques concernant la manipulation des résultats électoraux et les informations dévoilées sur les efforts systématiques pour avoir accès à tout appel téléphonique et à toute information transmise par Internet par les autorités de l'État ont engendré une méfiance à large échelle dans les gouvernements et dans le secret des mécanismes de vote. Il n'y a plus que quelques pays qui sont à présent désireux d'étendre l'utilisation du vote électronique (y compris le vote par Internet).

Le secret du vote est l'un des piliers de la définition actuelle des élections démocratiques. Celle-ci est exprimée dans l'article 25, point (b) de PIDCP, article 3 du Premier Protocole à la CEDH, étant plus élaborée dans la jurisprudence en la matière du Comité de l'ONU pour les Droits de l'Homme et de la Cour européenne des Droits de l'Homme, le Document de Copenhague et le Code de bonne conduite en matière électorale. Sans une confiance dans les processus électoraux en général en ce qui concerne l'utilisation des TIC, sans des standards clairs en matière d'évaluation des technologies utilisées et sans des possibilités claires de surveiller le processus électoral, lors du scrutin et lors du dépouillement à l'aide de ces technologies, il n'y pas assez de confiance dans la gouvernance démocratique en général. La confiance dans le processus démocratique et les élections est évaluée afin d'évaluer le niveau de la démocratie d'un certain pays aussi.

Peut-être que nous devrions commencer plutôt par une gouvernance électronique générale, par des pétitions électroniques, des registres électroniques, où la fiabilité des TIC n'est pas si importante et en cas d'échec – quelle qu'en soit la raison – le système démocratique ne serait pas entravé. Les efforts d'utiliser les TIC dans les zones moins décisives de la gouvernance ainsi que dans les systèmes bancaires peuvent augmenter la confiance du public. Si nous voyons une croissance à grande échelle de la confiance dans ces domaines, cela peut être une base pour aller plus loin et discuter sur l'utilisation des nouvelles technologies dans les questions électorales, jusqu'au vote par Internet.

Pour ce qui est des élections, il est conseillé aux gouvernements de commencer d'abord par la mise à jour et la tenue des registres électroniques d'électeurs. Les nouvelles technologies sont les meilleurs moyens de contrôler les dépenses des finances publiques pour l'appui des campagnes électorales, de lutter contre l'utilisation abusive des ressources administratives et d'évaluer la neutralité des médias publics ou privés, où ces exigences sont présentes. Le professeur Jordi Barrat a fait preuve d'un regard rafraîchissant sur le rôle du pouvoir judiciaire dans la surveillance des aspects électroniques du processus de vote et ses défis. S'il existe des bases de données solides pour les instances et des possibilités de recueillir des preuves pour les litiges judiciaires à l'aide de l'Internet, les procédures judiciaires peuvent être plus rapides et les jugements mieux motivés et justifiés. L'introduction des nouvelles technologies pour les élections devrait se faire par étapes, pas comme un saut dans l'inconnu, car le risque d'un échec des procédures électorales pourrait certainement engendrer une baisse du nombre de participants et moins de confiance dans les acteurs politiques. Les experts dans le domaine électoral peuvent expliquer les problèmes potentiels auxquels un pays pourrait se confronter s'il introduit le vote électronique. Mieux on la comprend, plus justifiée la décision des autorités.

Une augmentation de l'utilisation des smartphones, des ordinateurs, de l'Internet et des signatures numériques, comme le professeur Robert Krimmer l'a montré, a mené à la question non pas si, mais quand et comment on introduira et développera le vote électronique. Les obstacles et les menaces – avec des références au Big Data, les révélations d'Edward Snowden et des pirates informatiques – doivent être pris en considération, mais nous ne pouvons pas négliger non plus le besoin social croissant. Tout en reconnaissant les menaces possibles du vote électronique, il faut également tenir compte des longues traditions de fraude concernant le dépouillement du vote en format papier et de la nécessité de lutter contre ce problème aussi. Le processus électoral est toujours ouvert à la fraude et les façons de manipuler le dépouillement du vote en format papier pourraient elles aussi s'améliorer au fil du temps.

C'est à la charge des experts de proposer des solutions de confiance pour les procédures de vote électronique. Vu que les entretiens scientifiques des experts électoraux qui arrivent à leur fin ont été les premiers, nous attendons avec impatience un deuxième, un troisième et un cinquantième entretien.

CONCLUZIILE PRIMEI EDIŢII A DEZBATERILOR ŞTIINŢIFICE ALE EXPERŢILOR DIN DOMENIUL ELECTORAL

BUCUREŞTI, 12 – 13 APRILIE 2016

Oliver KASK
Membru al Comisiei de la Veneţia
Vicepreşedinte al Consiliului pentru Alegeri Democratice

Întrunirea experților electorali, care se apropie de final, a fost prima de acest gen. Există multe organizații sau instituții internaționale care doresc să se alăture dezbaterilor privind legea electorală, de exemplu, Oficiul pentru Instituțiile Democratice şi Drepturile Omului (ODIHR), Asociația Oficialilor Electorali Europeni (ACEEEO) şi Fundația Internațională pentru Studii Electorale (FISE), Institutul Internațional pentru Democrație şi Asistență Electorală (IDEA), Centrul Internațional pentru Studii Parlamentare (CISP), precum şi diferite mecanisme de cooperare reciprocă, cum ar fi conferințele pentru Organele de Management Electoral, grupul de lucru pentru elaborarea de amendamente la recomandarea Consiliului European, discutate de către domnul Gregor Wenda, şcolile de vară şi alte forme de cooperare din lumea academică între experții din domeniul electoral. Am putea să ne întrebăm dacă este nevoie de un nou mijloc de cooperare. În urma discuțiilor, putem concluziona că sarcina a fost îndeplinită. Comisia de la Veneția şi Consiliul pentru Alegeri Democratice împărtăşesc o experiență mai mult din zona academică, dar nu numai. Există membri ai acestor organe cu un background judiciar, politicieni care participă la alegeri şi persoane care urmăresc îndeaproape practica alegerilor din Consiliul European din statele membre OSCE, prin participarea la misiuni de observare a alegerilor. Este nevoie ca practica lumii academice şi cea a organelor de management electoral să devină mai apropiate. Membrii managementului electoral trebuie să fie conştienți de problemele cu care se confruntă alte țări pentru a evita erorile similare şi pentru a profita de soluțiile folosite în altă parte.

Administrația trebuie să aibă contacte strânse cu specialiştii din zona academică, pentru a-şi îndeplini sarcinile în cel mai bun mod. Pentru lumea academică, dezbaterea experților din domeniul electoral reprezintă un forum de discuții suplimentar, în care se face schimb de cunoştințe şi idei.

Am discutat diferite aspecte ale votului electronic dintr-o perspectivă practică şi am realizat o analiză ştiințifică a acestora. În ansamblu, toate aceste intervenții au în comun faptul că trebuie să ne gândim mai profund la problemele ce decurg din exercitarea votului prin mijloace electronice. Există multe zone nestudiate, mai multe semne de întrebare decât răspunsuri bune şi clare. Ne putem uita la munca depusă pentru actualizarea Recomandării Rec(2004)11 a Consiliului Europei cu privire la normele operaționale şi tehnice ale votului electronic, care a durat mulți ani şi s-a desfăşurat prin colaborarea cu mai multe instituții şi reprezentanți ai țărilor cu practică solidă în privința utilizării votului electronic. Totuşi, actualizarea nu este o sarcină uşoară, deoarece numărul problemelor care trebuie abordate nu pare să se diminueze, iar posibilitățile tehnice, dar şi lacunele continuă să se extindă odată cu dezvoltarea pe care o putem observa încontinuu în sectorul TIC.

Tendința de a extinde utilizarea votului electronic, care a luat amploare acum zece ani, a încetat în mare parte, iar în cazul multor țări această tendință regresează, după cum am fost informați de rapoartele din alte state şi de prezentarea domnului Uwe Serdült. Acest fapt îşi are originea în discreditarea tehnologiilor,

întrucât numai câteva pot asigura fiabilitatea oricărui program sau oricărei aplicații de pe calculatoarele sau telefoanele noastre. Dezvăluirile hackerilor privind manipularea rezultatelor electorale şi informațiile oferite în legătură cu eforturile sistematice de a avea acces la orice apel telefonic şi la orice informație transmisă prin internet de către autoritățile statului au dus la manifestarea unei neîncrederi pe scară largă în guverne şi în secretul mecanismelor de votare electronică. Mai sunt doar câteva țări care sunt în prezent dornice să extindă utilizarea votului electronic (inclusiv votul prin internet).

Secretul votului este una dintre principalele pietre de temelie ale definiției actuale a alegerilor democratice. Acesta este exprimat în articolul 25(b) din PIDCP, în articolul 3 din Primul Protocol la CEDO, fiind în mai mare măsură elaborat în jurisprudența în materie a Comitetului ONU pentru Drepturile Omului şi a Curții Europene a Drepturilor Omului, a Documentului de la Copenhaga şi a Codului bunelor practici în materie electorală. Fără încredere în procesele electorale, în general, în privința utilizării TIC, fără standarde bine stabilite privind evaluarea tehnologiilor utilizate şi fără posibilități clare de a supraveghea demersul electoral în procesul de desfăşurare a numărării voturilor cu ajutorul acestor tehnologii nu există suficientă încredere în guvernarea democratică în general. Încrederea în procesul democratic şi în alegeri este evaluată pentru a aprecia totodată gradul democrației într-o anumită țară.

Poate ar trebui să începem mai degrabă de la o guvernare electronică generală, de la petiții electronice şi registre electronice, unde fiabilitatea TIC nu este atât de importantă şi unde, în caz de eşec – oricare ar fi motivul –, sistemul democratic nu ar fi blocat. Eforturile de a folosi TIC în domeniile de guvernare cu putere decizională scăzută şi în sistemele bancare ar putea spori încrederea publicului. Dacă observăm o creştere pe scară largă a încrederii în aceste domenii, s-ar putea pune bazele pentru a se discuta despre utilizarea noilor tehnologii în domeniul electoral, până la votul prin internet.

În ceea ce priveşte alegerile, guvernele sunt sfătuite să înceapă mai întâi prin actualizarea şi ținerea unor registre electronice de votanți. Noile tehnologii sunt cele mai bune mijloace pentru a controla cheltuielile finanțelor publice pentru susținerea campaniilor, pentru a lupta împotriva utilizării abuzive a resurselor administrative şi pentru a evalua neutralitatea mass-mediei publice sau private, unde astfel de cerințe sunt prezente. Profesorul Jordi Barrat Esteve a venit cu o constatare plină de prospețime privind rolul puterii judiciare în supravegherea aspectelor electronice ale procesului de votare şi provocările acestuia. Cu baze de date solide pentru instanțe şi posibilități de a strânge probe pentru litigiile judiciare cu ajutorul internetului, procedurile judiciare pot deveni mai rapide, iar judecățile mai bine justificate şi raționalizate. Introducerea noilor tehnologii în domeniul electoral ar trebui să se întâmple pas cu pas, nu brusc, deoarece riscul eşecului procedurilor electorale ar putea duce la un număr de participanți mai mic şi la scăderea încrederii în actanții politici. Experții din domeniul electoral pot explica problemele potențiale cu care o țară s-ar putea confrunta dacă aceasta decide să introducă votul electronic. Cu cât problemele sunt înțelese mai bine, cu atât decizia autorităților va fi mai justificată.

Odată cu dezvoltarea utilizării smartphone-urilor, a calculatoarelor, a internetului şi a semnăturii digitale, după cum a pus problema profesorul Robert Krimmer, întrebarea nu ar fi *dacă*, ci *când* şi *cum* va fi introdus şi dezvoltat votul electronic. Obstacolele şi amenințările – cu referire la datele importante, precum dezvăluirile făcute de Edward Snowden şi de hackeri – trebuie să fie luate în considerare, dar nu putem trece cu vederea nici nevoia socială, care este în creştere. Conştientizând amenințările posibile ale sistemului electronic de votare, trebuie în acelaşi timp să se țină cont de lunga tradiție a cazurilor de fraudă privind numărarea voturilor pe hârtie şi de necesitatea abordării acestei probleme. Demersul electoral este mereu pasibil de fraudă, iar modalitățile de manipulare a numărării voturilor pe hârtie ar putea, de asemenea, să se îmbunătățească în timp.

Este sarcina experților să propună soluții de încredere pentru procedura de votare electronică. Având în vedere că dezbaterile ştiințifice ale experților electorali care tocmai se apropie de final au fost o premieră, aşteptăm cu nerăbdare o a doua, a treia şi chiar a cincizecea dezbatere.

CALL FOR PAPERS
ELECTORAL EXPERT REVIEW

The Electoral Expert Review, published by the Permanent Electoral Authority, invites stakeholders and those interested to contribute in publishing scientific articles related to the electoral field and to areas such as: human rights, political science, legal and administrative domain. Regarding the next edition of the Electoral Expert Review, the editorial board welcomes articles with interdisciplinary character that have not been or are not published in other journals, reviews or scientific symposium volumes.

The Electoral Expert Review is a quarterly publication of studies, researches and analyses related to the elections field. The editorial project Electoral Expert Review appears in a European context in which articles and scientific research aimed at various aspects of national and European electoral processes are increasing in the last two decades, but it appears a small number of academic magazines and journals assemble them in a publication focused on the electoral field.

With an interdisciplinary and applied character, firstly the publication aims at a wide audience, this being ensured by distributing our journal to the Romanian Parliament, the Government and other institutions from the central and local government, to the most important public libraries, universities, the media, other academic institutions and NGOs. Secondly, the Electoral Expert Review can be found in electronic format in Romanian; this will be completed by an English version, giving it an international character.

The Electoral Expert Review publishes articles with the following general topics: **electoral reform, political financing, electoral system, voting methods, gender and elections, etc.**

Indications and text formatting requirements:

- ✓ Submitted articles may cover theoretical studies, case studies or researches that have not been published or submitted to other publications or part of the proceedings of scientific conferences. Submitted articles should be original.
- ✓ We recommend that submitted articles should be between 4,000 and 6,000 words in length (bibliography and footnotes included).
- ✓ Manuscripts must be accompanied by an abstract. The abstract must have between 100 and 150 words (Times New Roman, 12, italic). After each abstract the author must mention the keywords. We recommend that the articles submitted should be accompanied by a brief presentation of the author/ authors (name, institutional or/and academic affiliation, brief research activity and published papers, e-mail address).
- ✓ The preferred working language of Electoral Expert Review is English.
- ✓ Main text of the manuscript: Times New Roman, 12, justified, 1.5 line spacing options. Page setup: A4 with 2.5 cm margins. Titles: Times New Roman, 14, bold. Subtitles: Times New Roman, 12, bold. Footnotes: Times New Roman, 10, justified.
- ✓ All figures, tables and photos must be clear and sharp. The tables should be numbered consecutively in Arabic numbers. The number and the title of each table should be written above it, using Times New Roman, 12, bold. The number and the title of each figure or photo should be written under it, using Times New Roman, 10, bold.
- ✓ Abbreviations and acronyms will be explained the first time they appear in the text.
- ✓ Quotations and references should be made using the Harvard or European system (only one of them will be used in the manuscript).
- ✓ Internet references should be quoted with the whole link and the date on which it was accessed.

The authors may submit proposals for articles directly to the following address: **expert.electoral@roaep.ro** . Deadline for submitting the articles: **the 25th of September 2016.**


EXPERT
ELECTORAL


EXPERT
ELECTORAL


EXPERT
ELECTORAL

Autoritatea Electorală Permanentă
Str. Stavropoleos nr. 6, sector 3, Bucureşti
www.roaep.ro