

Theses for the Conference of 4th February 2021

Any democratic regime governed by law has three aspects inherent: 1) the principle of the rule of law; 2) institutes of civil society, and 3) free and fair elections.

Elections and a referendum are democratic institutes that have lost nothing of their current, effective and legitimate nature; therefore, a logical question arises: if a state is gradually veering towards e-administration, will the technological advancement affect the process of elections and referendums too?

Developments in recent years show that interest about new approaches to the election processes grows. That is supported by various pilot projects in the states where governments are pondering over an idea of introducing internet voting.

I would like to emphasize the key aspects: the technological advancement highlights the future of our society; this trend poses a challenge to adapt, accept and apply reasonably; this evolution is inevitable, and discussions over benchmarks and solutions in our way are crucial.

Another aspect I would like to stress in this discussion is the meaning of secrecy and privacy in democratic elections, and internet elections (i-elections) specifically.

It is possible to assess the constitutional validity of elections in e-democracy subject to legitimate and constitutional compliance with the fundamental principles of elections and the main legal requirements arising out of the specifics of an internet election model in equal measure.

There are several countries that have evaluated the constitutional validity of e-elections, and the latest conclusion is that such elections in themselves are not unconstitutional subject to the context we approach it¹.

¹ On 13 December 2011 in case [85/11 et al] the Constitutional Court of Austria evaluated compliance of the e-election procedure established by the Student Association Act with the constitution. In 2009 electronic ballot was authorised for elections of the Austrian Student Association [ASA]. Individual groups of the association challenged the outcome of e-elections arguing that the e-elections were anti-constitutional, because the right to free, fair and secret elections and data protection were infringed. The applicants stated in the complaint that it was impossible to ensure correct counting of electronic ballots during the e-elections and verify the results by a repeated counting of ballots, and guarantee secrecy of voting for voters during the elections. The Constitutional Court recognized that Article 3 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is not applicable to the elections of the student association, because it applies only to legislative bodies. The Constitutional Court pointed out that the voters need a certain digital literacy which cannot be perceived as implicit with regard to the majority of voters in order to ascertain of compliance of the electronic voting procedure with general principles of voting. E-election system needs to be built in

Constitutional courts and high courts have emphasized that Article 3 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that guarantees a right of citizens to free elections is applicable only to government institutions having a legislative function.

Upon introduction of internet elections, one should bear in mind that voters need technical literacy which cannot be perceived as implicit for the majority of voters in order to ascertain of compliance of the internet voting procedure with general principles of voting (comprehensibility, equality, directness, secrecy, and proportionality). The internet election system needs to be developed in such a way as to make it possible to verify the outcome of ballot.

My proposal is to put PRO and CON arguments on the imagined scales of goddess Themis in order to weigh introduction of the internet elections. What would be the benefit of an equilibration of these arguments? That would be an answer to the question whether we are ready to promptly switch to online elections, whether and what preliminary work should be done for a state to introduce the internet elections.

Motives for introduction of internet elections are varied, and the most commonly voiced reasons are that internet elections would:

- increase mobility of voters,
- provide a possibility for voters living outside their home country to take part in the elections,
- increase activity of voters by providing an additional platform for voting,
- enhance access of in-patients and persons with special needs to the election process,
- reduce costs of elections, and would allow to publish election results faster, that is, it would alleviate the procedure and make it more expedient.

such a way as to make it possible to verify the outcome of the elections. Use of e-ballot during the elections of the Austrian Student Association of the year 2009 was intended as a trial for introduction of electronic voting during federal or municipal elections in the nearest future. This process was surrounded by active protests from student groups, legal experts and technical experts were sceptical about the process of these elections. A brief summary of the court ruling is as follows: the loopholes of e-ballot pointed out by the court (such as the possibility of manipulations or programming errors) are inherent to every electronic election system; furthermore, the standards set for the legal framework of such elections have reached a level that cannot be reached yet either legally or practically.

The arguments above may be counterweighted by other arguments on the other side of the weights:

- an obstacle to any internet voting system globally is the issue of security – a ballot cast can be changed, if the system allows for it, or a person has been involved in development of the system who abuses loopholes of the system,
- an unauthorised voter may cast a ballot in an eligible voter's stead,
- the internet election model does not guarantee secrecy and privacy.

Alongside technical risks I, as an Ombudsman, am worried about guaranteeing secrecy and privacy in such internet elections.

Upon making the final decision, the state needs to consider all arguments and counterarguments on the weights; it has to understand that a system built with loopholes may prove detrimental to a trust in a fundamental institute of democracy – elections and referendums.

In addition, I would like to note that one should understand whether society is ready (technically equipped) for introduction of such a challenge. The society of Latvia is aging rapidly, and a sure sign of the readiness to switch to online elections would be the part of the society surveyed which has digital literacy and which is technically equipped for this process. The state also needs to be ready for such a challenge – how to prepare for the internet election process that part of the society where the support function is crucial, i.e., people with special needs.

Re guaranteeing privacy and secrecy

Protection of privacy (personal data) and guarantees of secrecy might be the biggest challenges for the internet elections. One should not presume that concern of people about protection of their privacy is only their own concern. The secret ballot implies that taking care of the concerns and feelings of others is a sufficient reason for the requirement to follow confidentiality, anonymity and secrecy in many circumstances.

The matter of us focusing more on instrumental or internal aspects of the privacy depends on the values we possess and the threat for democracy that we see in it.

A democratic political system needs to protect privacy of an individual because if citizens have a right vested to make decisions for others in light of their involvement in the political processes, they, consequently, need a right to make decisions on their own in the most crucial personal matters.

If the privacy is a value in a democracy, this value should be made subject to and, possibly, characterized by being able to protect an individual's self, confidentiality and intimacy. The secrecy of ballot is the standard justification of this concept.

Privacy in a voting (polling) booth creates a sense of security that we are free in our choice and we are not and will not be subject to external pressure or influence. The justification of the secrecy of voting is its necessity in order to prevent corruption, duress, intimidation from jeopardizing the fairness of election process.

The secrecy of ballot does not preclude the persons from expressing their own choice, and legally nobody can request such persons to disclose their choice in voting. Therefore, a question that remains open is how the internet elections can guarantee such secrecy.

If the secrecy of ballot is not respected, and the system allows for unauthorised processing of personal data (by hackers breaking into the system, changing data or collecting them for different processing), it may lead to a crucial infringement of privacy which is inadmissible in a democratic country.

In my opinion, the alleviated procedure, expedience and comfort put on scales cannot outweigh and compensate crucial risks of privacy, as well as the necessity for respecting confidentiality.

Summary

Discussions about switching to internet elections become ever more frequent in the public domain, and the reason for that is changing generations. Modern technologies enter our everyday lives more intensively; therefore, it is only logical to infer that this process will affect the elections as well. Online elections are a reality in some countries already; therefore, it cannot be precluded that Latvia might switch to internet elections in future upon absolute guarantees of digital security and respect for the fundamental principles by such election model.