



Austrian Federal Ministry for
European and International Affairs

Legal challenges for the implementation of e-democracy

**Universidad del país vasco
Euskal Herriko Unibertsitatea
XXVIth Summer Courses**

Thomas M. Buchsbaum | San Sebastián - Donostia, 5 July 2007

- **thanx / invitation**
- **I am a practitioner: a public international lawyer by training, and a diplomat by profession - who happens to have been involved in various e-democracy issues during the last years, in particular within the framework of the Council of Europe - but also as a director and shaper of practical e-democracy pilots.**
- **Self-evident, but to clarify from the outset, is the fact that this presentation - and the views contained therein - is presented in my personal capacity.**
- **Spain = well known for advanced e-democracy application: Catalan e-voting for expatriates pilot, Madrid e-participation)**
- **topic = very relevant, but little explored and addressed**
- **thanx for the incentive to think and structure this topic**

the legal challenges *at large*

- a clear terminology (definitions)
- the definition of the persons involved
- the extent of the change management
- type and scope of regulatory frameworks
- e-democracy in legislating
- e-democracy in the judiciary
- regulatory bodies

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ON a clear terminology (definitions) - WHAT DO WE MEAN by e-democracy, e-participation and related concepts ?

ON the definition of the persons involved (natural and legal/juristic persons) - Which are the ACTORS and the ADDRESSED persons in e-democracy ?

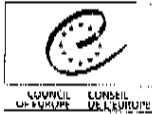
ON the extent of the change management involved - Is it mainly about the e-conceptualisation of existing democratic processes OR about reinventing democracy and participation?

ON the type and scope of regulatory frameworks - WHO is to do WHAT in WHICH FORM? WHICH RIGHTS to include and to protect?

ON e-democracy in legislating (eLegislation, eLaw – eParliament, ePetition) - Which e-elements COULD and SHOULD be used by the legislature in the pursuit of democracy ?

ON e-democracy in the judiciary (eJustice) - Which e-elements COULD and SHOULD be used by the judiciary in the pursuit of democracy ?

ON (multidisciplinary) bodies to deal with issues of e-democracy - Which bodies are LEGALLY COMPETENT and REALLY ABLE to regulate e-democracy.



the preview

- ***the scope (definition) of e-democracy***
- ***its stakeholders***
- ***some standard tools***
- ***challenges & barriers***
- ***the legal challenges proper***
- ***the Council of Europe and e-democracy***
- ***(preliminary) conclusions***

definition of e-democracy

- "the use of ICT in democratic processes"
 - e-democracy v. e-government ?
 - e-democracy v. e-participation ?
- a **BROAD, INCLUSIVE** definition, in respect to
 - sectors of democracy
 - democratic institutions
 - levels of government
 - participants
 - areas of expertise involved
 - levels of binding force of participation

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e-democracy = ONLY (?) "the use of ICT in democratic processes"

e-democracy v. e-government ? / e-democracy v. e-participation ?

a BROAD, INCLUSIVE definition, in respect to sectors of democracy: sectors of democracy: legislature – executive - judiciary

democratic institutions: decision-making /deliberative bodies of elected and appointed members – incl. schools/university and inst. of civil society

level of government: local – regional – national – inter-/supra-national

participants: nationals/aliens (migrants), elected representatives, politicians, ..., citizens

areas of expertise involved: law, technology, operations, culture, socio-economics, ...

levels of binding force of participation: information – communication – transaction [see later !]



scope & contents of e-democracy

- **E-Democracy is primarily about democracy.**
- **E-democracy is an opportunity, enabler and facilitator for increased citizen participation, for broader political debate and better political decisions.**
- **It is closely linked to the concepts of transparency and accountability, and of good governance.**
- **E-democracy is not linked or leading to a specific type of democracy.**
- **No “one-size-fits-all” tools.**

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E-Democracy is primarily about democracy – and not about technology.

E-democracy is an aspect of (the organisation of) democracy, and is intrinsically linked also to human rights.

E-democracy is an opportunity, enabler and facilitator for increased citizen participation, for broader political debate and better political decisions.

E-democracy is about offering access to more information, offering more and various types of / for communication, enabling discussion and deliberation independent from time and location, and in the end leading to better (informed) political decisions - and a higher acceptance of such decisions by citizens.

E-Democracy is closely linked to the concepts of transparency and accountability, and of good governance.

E-democracy is not linked or leading to a specific type of democracy. - *[E-democracy carries potentials and can lead to a more participatory democracy, and make representative democracy more representative. To this end, political will is a prerequisite.]*

AND: There are no “one-size-fits-all” tools available.



scope & contents / ctnd.

- **eParticipation leads to a more participatory form of democracy (“beyond elections”) / to a more participatory form of decision-making**
- **eParticipation is one of several strategies to enhance individual participation**
- **eParticipation is not the overall solution to all democracy deficits**
- **only an open mind to participation, and adequate and differentiated e-tools / e-methods can attract all relevant stakeholders**



scope & contents / ctnd.

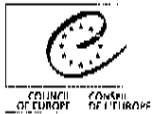
- **Technology is a tool that, if rightly used, can support and enhance democratic processes.**
- **Technology must not be the reason or driver of e-democracy.**
- **Technology is not neutral but carries in-built ideology, methodology etc.**
- **The right and appropriate technologies and e-methods have still to be found.**
- **And:
access & accessibility must be provided.**



stakeholders of e-democracy

**= any person and institution involved in democracy
includes government at all levels, politicians / elected
representatives, political parties, civil servants,
citizens, electors, members of (public law)
corporations and associations, civil society, NGOs,
media, providers of infrastructure, etc. etc.**

**different ambitions, wishes and reservations / fears
each and every stakeholder's wish and reservation
has to be identified, understood and individually
addressed !**



challenges & barriers various categorizations

- **political – organisational – cultural - technological**
- **OECD:**
 - The problem of scale - Building capacity and active citizenship -
 - Ensuring coherence - Ensuring commitment -
 - Evaluating eParticipation
- **UK's National Project for local eDemocracy:**
 - Integration and responsiveness - Reaching the public -
 - Involvement of elected representatives -
 - The right tool for the context - Evaluating eParticipation

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- **Social complexity**
Large and diverse range of stakeholders which have different needs and preferences in relation to engagement - there is a need for eParticipation approaches which reflect these differences.
- **Political culture**
Lack of political will to take account of stakeholder views; lack of responsiveness from politicians and public administrations to interact with stakeholders.
- **Organisational structures**
The need to integrate eParticipation into routine structures and policy processes - not just consider the technology but the underpinning participatory processes.
- **Technological dependencies**
Unequal access to technology: A 'one-size fits all' tool is not an appropriate way forward, since differences in language, culture and technical skills are likely to exclude some groups.
- **Understanding eParticipation**
Urgent need to better understand current eParticipation applications and learn from these experiences. There is need to consider how to undertake evaluation in a context where there is a recognised lack of any comprehensive framework to evaluate citizen engagement, either online or offline.

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some standard tools

- **information:**
websites on democracy information (laws, elections, institutions etc.), political actors' portals, blogs, Internet fora, electronic matching tools with candidates' positions, election and other political e-campaigning (e-electioneering, e-advocacy), e-democracy games
- **communication (consultation/deliberation):**
e-petitioning, electronic inputs to politicians and to procedures of political parties, legislatures, judiciary / participation in public or private political discussion fora
- **transaction ("real participation"):**
e-voting, e-referendum and e-[co-]decision

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MENTION some standard tools

according to a three-tier categorisation:

information – communication - transaction

OECD: information – communication - active participation

an ALTERNATIVE five-step categorisation:

information - consultation - involvement - collaboration - empowerment

...

What we do NOT include in e-democracy are purely administrative tools – extra- or intra-administrative -, e.g. electronic filing and information systems (eFiling, portals), eService, eAdministration, eGovernment in a narrow sense, e.g. providing forms on a website, offering on-line-forms, electronic issuing of certified copies (extracts) of civil, residence and criminal records, electronic tracing of applications

the legal challenges *proper*

= the developments of regulatory frameworks

- **needed ?**
- **goals ?**
- **how to balance rights, expectations and safeguards ?**
- **how to balance different stakeholders' diverging interests ?**

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- **needed? – CAEVAT: don't regulate upon lawyers' demand only**
- **goals:**
 - **to improve democratic procedures ?**
 - **to (re-)engage civil society in governance ?**
 - **to ensure transparency and accountability ?**
 - **to have power decentralized – to more actors, and to levels closer to the issue and able to handle it ?**
 - **to empower the citizens / to see the citizen beyond a passive audience and passive recipients of services ?**
 - **to move from G2C to C4C ?**
 - **to preserve, strengthen, (in relation to the changing world) reinvent, & (when damaged) rebuild democracy ?**
- **how to balance rights, expectations and safeguards? - e.g. access to information v. personal data protection**
- **how to balance different stakeholders' diverging interests? - e.g. politicians – citizens, speed legislation – in-depth-deliberation, providers – users, public – enterprises**



development of reg. frameworks / ctnd.

- **contents ?**
- **create novel channels
OR: novel methods ?**
- **institutions ?**
- **type ?**
- **regulator ?**

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- **contents? – WHAT and WHAT not to regulate ?**
- **create novel channels OR novel methods ? – just adding e-channels to traditional democratic processes, OR: introduce new democratic methods through ICT possibilities ?**
- **institutions? - WHICH institution to deal with issues of e-democracy?**
- **type of regulation? - strict or soft law: acts, regulations; guidelines; gentlemen's agreements, ect.**
- **regulator?**
 - **state at any level**
 - **self-regulation by stakeholders / users / provider?**
 - **an independent board / QUANGO?**
 - **an international body like, eg, the CoE?**



the legal challenges / regulations: suggestions for regulating citizens rights

1. Rights to Access
2. Rights to Education and Training
3. Rights to Online Information
4. Rights to Online Participation

EUROCITITES'

**'European Charter of Rights of Citizens in the Knowledge
Society' / "Charter of e-Rights" of 7 July 2005**

Charter of eRights

- Every citizen of the European Union will have access to the Internet through Public Internet Access Points, preferably via a broadband network
- Every citizen of the European Union must be guaranteed the security and privacy of any personal data managed through online public services

(5)

Charter of eRights

- Every citizen of the European Union will have the right to acquire the basic skills for an effective use of services and information through ICT
- Every citizen of the European Union will have access to personalized assistance when accessing public and ICT-based equipment and facilities
- Every citizen of the European Union will have access to lifelong e-learning platforms to benefit from all the available resources generated by communication technology facilities and thus take part in the Knowledge Society

Charter of eRights

- Every citizen of the European Union will have access to the best quality information produced by public administrations
- Every citizen of the European Union will have access to online information regardless of disabilities

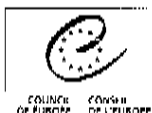
Charter of eRights

- Every citizen of the European Union be ensured the right to participate through ICT platforms in the decision-making processes of his or her local government
- Every citizen of the European Union will receive public administration feedback on any online consultation results

the legal challenges / regulations: suggestions f. regulating transparency

- *Document transparency* - the right to examine documents relevant to the political decision making process, including documents received, documents produced, and the decisions made by the political body.
- *Benchmarking transparency* - the right to access statistical information collected by government and government agencies; such information can be used for benchmarking.
- *Meeting transparency* - the right to be present at meetings of political bodies.
- *Disclosure transparency* - the right to ask questions to find out what is not in documents and meeting agendas
- *Decision maker transparency* - the right to know where and what elected and administrative leaders are up to.

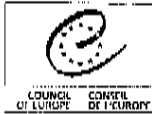
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the legal challenges / the judiciary: eJustice – the topics

- **electronic documentation**
- **electronic communication with courts and public prosecutors**, in particular:
 - electronic communication with persons involved in proceedings
 - transmission of written documents
 - the use of video-conferencing techniques
- **electronic registers**, including:
 - rights to electronic consultation (retrieval rights), and
 - the right to submit applications on-line (input rights)
- **Internet presence of the judicial system**
 - *i.e.* on-line presence of courts and judicial authorities

© Study, use of ICT in MSs' judicial systems, Europäische EDV Akademie des Rechts gGmbH (EEAR), May 2007



on eJustice: the EU way ahead

Decisions by the EU Council (JAI) of 13 June 2007:

- “An *E-Justice system* should give access to citizens, economic operators, practitioners of law, judicial authorities and courts, which will benefit from available modern technologies.”
- “An E-Justice system should ensure a user-friendly access.”
- the creation of a technical platform giving access, in the sphere of justice, to electronic systems at national, Community and, where appropriate, international level

on eJustice: the EU way ahead / ctnd.

EU action on cross-border issues in civil and commercial matters and in criminal matters:

- a) the set-up of a European interface (*E-Justice portal*);
- b) the possible use of IT for the communications between the judicial authorities and interested parties (applicant, defendant and other participants involved in the proceedings);
- c) the possible use of IT in the context of specific procedures; and
- d) access to judicial registers in electronic form.



on eJustice: the EU way ahead / ctnd.

priorities for future EU work on eJustice:

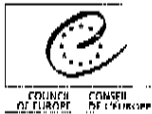
- a) set up a European interface (E-Justice portal);
- b) create the conditions for networking of criminal records, insolvency registers, commercial and business registers and land registers;
- c) start the preparations for the use of IT for the European payment order procedure;
- d) improve the use of video-conferencing technology for communication in cross-border proceedings, in particular concerning the taking of evidence, and interpretation.

the Council of Europe and e-democracy

- CoE started work on developing standards on e-democracy a few years ago already
- ... was and still is a forerunner amongst intergovernmental organisations (*why?!*)
- ... has become the *only* international institution addressing e-democracy *in its entirety*, and
- ... is attempting to develop respective standard-setting.

why:

- **democracy is at the heart of the CoE's mandate, since its inception in 1949;**
- **the same applies to harmonisation of legal norms, and**
- **to legal standard-setting; - and**
- **other IOs have no competence in democracy matters (e.g. the EU).**



the Council of Europe: major documents

- *Recommendation on legal, operational and technical standards for e-voting* – September 2004
- *Recommendation on electronic governance (“e-governance”)* – December 2004
- *Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society* – May 2005
- *Recommendation of the Committee of Ministers to member states on the remit of public service media in the information society* – January 2007



the Council of Europe: timelines on e-democracy

- creation and mandate of 24 May 2006 to the *Ad-hoc committee on e-democracy (CAHDE)*
- public symposium on '*E-democracy: new opportunities for enhancing civic participation*'
23-24 April 2007, Strasbourg
- proposal on e-democracy, by possibly mid-2008, for endorsement by the Committee of Ministers
- *Forum for the Future of Democracy on 'e-democracy and e-government'*,
15 to 17 October 2008, Madrid

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What became clear so far is that the Council of Europe may not resort to some traditional instrument like an international agreement - a convention - in order to frame some standards on e-democracy,

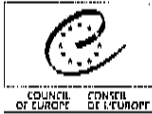
but rather to use softer instruments - like guidelines or recommendations - to make first international steps on a way to standards on e-democracy.

CAHDE's mandate

- to examine developments on e-democracy/c-participation at European and international level;
- to identify political, social, ethical, legislative and technological issues and their interdependence;
- to identify examples of emerging good practice which could be of interest to member states;
- to elaborate definitions of key terms;
- to consider in particular the issues of measuring the effectiveness and impact of e-democracy initiatives and devices, and their complementarity and interoperability with non-electronic forms of democratic engagement and participation;
- to prepare appropriate reports and documentation; and
- to make recommendations to the Committee of Ministers on possible further action in the field of e-democracy.

CAHDE's work plan

- **representatives of ALL (47) CoE member states, all relevant CoE sectors, other international institutions, academia and NGOs**
- **(1) plenary and (3) smaller-scale sessions held – more planned for 2007 and 2008**
- **one symposium held, one (more) workshop(s) planned**
- **developing recommendations on e-democracy to the CoE member states, with a political and a practical focus**



CAHDE's (20) work items

- **elements, stakeholders and tools**
- **goals and benefits, and challenges, barriers and dangers**
- **e-democracy and different types of democracy**
- **cSolutions to shortfalls in democratic processes**
- **a roadmap towards e-democracy**
- **generic good practices of e-democracy**
- **a check-list for the introduction of e-democracy tools**
- **elements of a regulatory framework**
- **social, ethical and cultural issues**
- **specific sectors of democracy: media/information, justice, environment, etc.**

some CoE's current focuses

- **stimulate interest by and involvement of, politicians / elected representatives**
- **e-inclusion in particular by the young, elderly, minorities and marginalised socio-economic groups**
- **are political parties and the media sidelined by eParticipation – if so, how to counteract ?**
- **dangers of e-democracy & eFear**
- **enablers of e-democracy**
- **comprehensive eParliament**
- **eJustice, eEnvironment**

(preliminary) conclusions

- **e-democracy & law:**
just at the beginning of its encounter
- **definitions and concepts still missing**
- **starting to formulate the [right] questions**
- **few to none (comprehensive) examples:**
neither from states nor IOs
- **the Council of Europe:**
an early comprehensive start, ambitious aims

E-democracy and law is at its very beginning of encountering each other.

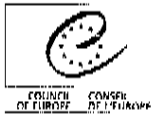
Broadly agreed definitions and concepts are still missing.

We are beginning to formulate the questions - hopefully the right ones.

Few to none (comprehensive) examples from state practice can be drawn upon.

International institutions - like *e.g.* the UN, OECD, OSCE, Council of Europe, EU - either do not have democracy and electronic issues within their competence or on their agenda, nor are yet well advanced in their work on e-democracy in order to propose or agree upon, relevant standards.

The frontrunner amongst them is, for the time being, the Council of Europe, with agreed standards on e-voting, agreed views on e-governance, and work started on standard-setting on e-democracy.



conclusions / ctnd.

the basic questions of the legal challenges:

- *if to regulate ?*
- *what to regulate ?*
- *in which form to regulate ?*
- *who to regulate ?*
- *which expertise necessary to regulate ?*
- *at which level to regulate ?*

conclusions / end

no definite answers to legal challenges (yet):

- **some (early) regulation is necessary**
- **including on rights and their protection, on identity and security (technology)**
- **strict *and* soft law options to use**
- **possibilities of separate acts/regulations *and* additional provisions**
- **at a regulatory level which can assure quality, coherence and interoperability**

On the one hand, not everything in democracy may need laws and regulations enacted by parliamentary bodies and government.

On the other, democratic processes may well need agreed rules.

While e-democracy applications which (binding) relevance to parliamentary or government processes (e.g. e-voting, e-legislation, e-[co-]decision) need legal provisions enacted by the respective legislative body.

For other applications - non-binding e-consultations, Internet fora -, soft-law frameworks or guidelines may suffice.

They, too, however, will have to include technology issues.

***E-democracy has,
in the long run,
to loose its 'e'.***

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a final quotation: (author unknown):

E-democracy has, in the long run, to loose its 'e'.

i.e. Democracy has to naturally offer also e-channels alongside traditional ways of democratic processes.

another one:

“democracy consists of steady work”

post-card campaign at the ‘7th Global Forum on Reinventing Government’ on ‘Building trust in Government’, Vienna, 26-29 June 2007;

www.7thglobalforum.org

E-democracy is, in essence, NOT about the “E”, but

- intrinsically linked to the debate of improving democratic processes (“reinventing democracy to meet today’s challenges”),***
- by providing more opportunities to citizens participation, -***
- in order, in the end, to enhance the legitimacy of political decisions, and thus***
- to enhance trust in democracy and democratic institutions.***



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**Thank you
for your attention.**

www.coe.int/democracy

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The **FUTURE** of e-democracy

uncertain

dependent on ...

- the political will (on civic participation)
- a broad agreement (on the use of e-demo)
- a general understanding of the concept and goals, opportunities and dangers of e-demo
- the broad use (areas, & society incl. the marginalised)
- right and easy-to-use tools / methods
- the reaction by politicians (to citizens' input)

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dichotomy between listening to citizens and their possible expectation toward government to act according to their individual wishes

balancing citizens wish to speak and be heard on the one hand, and ## on the other

convincing decision-makers that listening to citizens

- *improves the substance and legitimacy of their decisions,*
- *improves the citizens' trust in democracy and politics and*
- *increases the legitimacy of elected representatives and el. bodies*

E-democracy can

- *enhance the qualitative and quantitative participation (in democratic processes),*
- *improve the substantive and democratic quality of political decisions,*
- *improve governance, and*
- *increase the legitimacy and credibility of government and the citizens' trust in democracy, democratic institutions and democratic processes.*