

The Estonian E-Voting Laws Discourse: Paradigmatic Benchmarking for Central and Eastern Europe

*Wolfgang Drechsler**

1. Introduction

The Republic of Estonia has been, and still is, widely credited to be a pioneer in e-governance and especially e-democracy, with headlines such as “Estonia: 10 Years from Communism to Advanced e-Democracy!”¹ It had frequently been expected, too, that Estonia would be the leading country for e-voting, introducing it already for the national elections this year.² However, in the very last changes of the respective laws, the Estonian Parliament voted for e-voting, not for the immediate future, but only with a delay of implementation until the year 2005. Still, the Estonian is the first case world-wide of a country that has actually passed overall e-voting laws.

This primacy, by virtue of some variant of ‘the normative power of the factual’, therefore sets the scene for all e-voting laws considered anywhere – but especially so for the countries of Central and Eastern Europe (CEE), if we believe at all in any form of regional characteristics and therefore similarity and comparability. The Estonian e-voting laws, but also the discourse through which they emerged, therefore serve as a paradigmatic benchmark – broadly understood here as a benchmark both in a positive as well as possibly in a negative sense as well – for all e-voting law discourses to occur in all the other CEE countries.

This paper therefore sets out to, first, follow the process – interesting as such, it has only been documented and analyzed once before (Drechsler and Madise 2002), and the current piece presents a

* University of Tartu, Estonia.

¹ In the article at <http://www.e-smartransaction.com/asp/application.asp?cle=80&cat=Government>.

Statements, state of legislation, and web-links of this paper are generally valid as of 15 February 2003. I am grateful to Rainer Kattel and Ülle Madise for comments on this paper.

² See, e.g., http://www.time.com/time/interactive/stories/society/e_politics.html; <http://www.newsbytes.com/news/01/160092.html>; <http://www.imaginemediamedia.co.uk/newsletter/apr2001.htm>: “You can’t stop progress though and it looks as though Estonia will be the world’s first nation to provide e-voting at its next General Election in 2003.”

very short but also updated account of that story.³ The question of discourse will then be addressed, and an interpretation offered. As the benchmarking will indeed be seen to entail an inverted, i.e. negative, quality as well – the dog that did *not* bark during the night –, a final segment will also briefly discuss these aspects.

2. E-voting in Estonia: a narrative

The plan to introduce e-voting in Estonia was first publicly announced by the Minister of Justice, Märt Rask, a member of *Reformierakond* (“Reform Party”, eng.reform.ee), the neo-liberal (indeed, market-radical) ‘transition winners’ party, at the beginning of 2001. Given the general fashion of e-related matters, which is particularly strong in Estonia, and swift developments in such fields as e-banking (see e.g., www.hanza.net), paperless government (see www.cnn.com/SPECIALS/2001/ukvote/stories/epolitics/estonia.html), and broadcasting of parliamentary sessions (see www.riigikogu.ee/news.html), this was a likely step to take.⁴ Developing Estonian leadership in e-related fields was and is also seen as a key part of ‘branding Estonia’ and overall of making Estonia better known globally.

The idea of e-voting was thus strongly promoted by Prime Minister Laar, who in the Parliamentary question time of 17 January 2001 proposed the idea of testing e-voting during the same year and to decide then whether to introduce it already for the 2002 local elections. (See www.riigikogu.ee/ems/index.html)

To get an overview of the possible methods and risks of remote Internet voting, the Ministry of Justice ordered an analysis from two scholars in the field. (Lipmaa and Mürk 2001) The report by the Internet Policy Institute published in the USA at the same time⁵ was also used as a basis of study. The commissioned analysis recommended to prepare some experiments or pilot-projects first and not to introduce e-voting before 2007, because an earlier date would be technically, and therefore also socially, too risky. (1, 28-30) In the fall of 2001, another analysis was ordered from a mathematician by the Estonian Ministry of Transport and Communication, which was to focus especially on technical questions and costs. In this analysis, concrete recommendations concerning the voting process were given and a provisional budget of e-elections was drawn up. (IT Meedia 2001)

³ I would like to thank the co-author of that essay, Ülle Madise, without whom the current paper would not exist, for her very kind permission to use materials of the earlier piece, unmarked, in the current one. Drechsler and Madise 2002 also contains extensive references and technical as well as legislative details.

⁴ See generally, e.g., the Estonian Agenda 21, www.agenda21.ee/english/EA21/3_4.html.

⁵ See www.riik.ee/evalimised/yldanalyysid/e_voting_report.pdf.

Taking into account the purpose to introduce public remote Internet voting and some of the recommendations given by the experts – but not the one by its own experts as regarded postponement until 2007 –, e-voting provisions were drafted by the Ministry of Justice and sent to the parliament. There, they were not discussed generally, but as part of four different new election laws: The Local Communities Election Act, the Referendum Act, the European Parliament Election Act, and the *Riigikogu* Election Act. The discussions in the *Riigikogu* as far as the e-voting feature was concerned were more or less seamless as well and not really closely connected with what Act it actually was. However, since local elections were scheduled for 2002, it was this Act that drew more attention than the other, followed by the Referendum Act because of its implications for European Union accession. When discussing specific features (which in the end were the same for all four Acts), I will therefore refer below to the development of the provisions of the Local Communities Election Act.⁶

As was to be expected, already in the very first stage of developing the e-voting idea, the old and new government coalition parties – until January 2002, Right-Libertarian-Moderate, from then Libertarian-Populist – were principally in favour of e-voting, the opposition parties *Rahvaliid* and *Ühendatud Rahvapartei* factions against. In order to understand this, it is important to briefly sketch out the Estonian party structure. The first government coalition mentioned here ('Laar II' – the government headed, for the second time, by Mart Laar) included, in addition to the already-mentioned 'libertarian' *Reformierakond*,

- the 'right' *Isamaaliit* ("Pro Patria Union", www.isamaaliit.ee/isamaa2/index_eng.html; cf. also Laar 2002), a generally nationalist but for the most part also market-radical party that in a slightly different composition formed the government right after the regaining of independence; and
- the 'moderate' *Mõõdukad* ("Moderates", www.moodukad.ee/), who by their self-definition are Social Democrats but by 'Western' standards quite to the right of that field.

The second government coalition ('Kallas' – headed by Siim Kallas) includes *Reformierakond* and

- the 'populist' *Keskerakond* ("Centre Party", www.keskerakond.ee/), the main 'transition losers' party, with a semi-charismatic leader, Edgar Savisaar, currently the Mayor of Tallinn, but without a genuine post-Socialist ideology.

The two opposition parties mentioned are

- *Eestimaa Rahvaliid* ("Estonian Peoples Union", www.erl.ee), a party similar to *Keskerakond* but with a strong and explicit rural orientation; and
- *Eestimaa Ühendatud Rahvapartei* ("Estonian United Peoples Party", www.eurp.ee/eng/), the most clearly post-Socialist party with a special appeal for that part of the Russian-speaking population of Estonia that is actually allowed to vote.

⁶ The initial draft of Local Communities Election Act can be found at www.riigikogu.ee/ems/index.html: *Täiskogul menetletud eelnõu nr 747. Menetlusetaapid. Algtekst.*

The governing coalition Kallas does not command a majority in the *Riigikogu* – rather, only 47 of the 101 votes. The missing votes are usually delivered by the *Rahvaliid* (which is also the party of the President), so that party cannot be ignored.⁷

E-voting provisions were always supported in plenary session.⁸ It should be noticed that pilot projects were perhaps occasionally considered, as in the beginning by Laar himself, but they were never seriously put on the agenda. In some sense, the entire draft and then law would be its own pilot project – not a rare *modus operandi* in Estonia. In the end, as a form of compromise, in all laws or drafts,⁹ it was explicitly stated that e-voting should not be applied before the year 2005 (§ 74 (5) in the Local Communities Election Act). This was apparently in deference to the *Rahvaliid* faction – as was mentioned, the government commands at best a minority of 47 out of 101 votes, and their *Rahvaliid* votes are therefore usually important (although not in this special case), which is why their opinion is taken into consideration.

3. The discourse

3.1. Ministry

The discourse to be analyzed already starts on the Ministerial level. According to § 60 of the Estonian Constitution, “Members of the *Riigikogu* shall be elected in free elections on the principle of proportionality. Elections shall be general, uniform and direct. Voting shall be secret.” Since the original drafting of the Constitution of 1992, these principles have not been the subject of juridical discussion, so they are ill-defined. (See Annus 2001, 64-70) As to whether e-voting would influence these principles, the Minister and Ministry based themselves on two basic decisions:

⁷ According to the descriptions given above, this means that the current governing coalition consists of ‘transition winners’ and ‘transition losers’. However, in Estonia this is not necessarily a contradiction, because *Reformierakond* indeed does promulgate an ideology appropriate for its clientele, but *Keskerakond* does not; rather, it has hardly any ideology at all – it is, therefore, a classic populist party. They are therefore not unlikely coalition partners at all. – Votes are scheduled for March 2003, i.e. they fall between the deadline for this paper and the Bucharest conference, so there might easily be a new coalition in place once this paper is discussed.

⁸ See the debate and voting results according to the minutes as cited below (FN 10). About the voting process, see the *Riigikogu* Internal Rules Act, www.riigikogu.ee/legislation.html.

⁹ The Local Communities Election Act was adopted by Parliament on 27 March 2002 and entered into force on 6 May 2002. RT I 2002, 36, 220. The Referendum Act was adopted on 13 March 2002 and entered into force on 6 April 2002. RT I 2002, 30, 176. The *Riigikogu* Election Act was adopted on 12 June 2002 and entered into force on 18 July 2002. RT I 2002, 57, 355. The European Parliament Election Act was adopted by Parliament on 18 December 2002 and entered into force on 23 January 2003. RT I 2003, 4, 22.

1. To use a *teleological* approach to Constitutional interpretation, i.e. to say that Constitutional problems should be understood through the problems the given principles were meant to solve. As an example in the current case of e-voting, the principle of secrecy (raised most strongly in Parliament later on) was said to protect an individual from any pressure or influence against her or his free expression of the political preference – i.e., that it is a means, not an end. This includes the threat that the state or a public official can check who voted for whom. But it was said that, if privacy is guaranteed in the polling station and if all those who have voted via the Internet have the right (which was proposed) to go to the polling station on election day and replace their electronically recorded, transferred and counted vote by a new paper-ballot (see § 55 of the initial draft of the Local Communities Election law), then the aim of the principle of secrecy, the end, is actually achieved.
2. To start from the assumption that the State must ‘trust the people’ and not interfere if at all possible in any of their decisions. The *Reformierakond* ideology informs this approach. As an example in our context, the problem that e-voting would facilitate some families, friends or colleagues voting together, i.e. practice collective voting, as well as the buying and selling of votes, was said to hinge on the question of whether the State would have to protect an individual only from other individuals or also from her- or himself. It was not seen that collective voting could be a problem for the state as well, and not only for the individual.

3.2 *Parliament*

Parliamentary debate on e-voting was long and lively. In the plenary session, e-voting was discussed within all readings of all four drafts.¹⁰ We can draw up the following tables of discussion points of problems of e-voting:

1.	Equality of citizens in political life – “unfair” towards non-connected citizens / digital gap
2.	Detriment to democracy (going to the polling station would be a valuable action by itself)
3.	Unconstitutionality of e-voting (secrecy, generality, and uniformity)
4.	Privacy and secrecy of voting not guaranteed
5.	Security of electronic voting systems not sure
6.	Proneness to fraud
7.	Negative or absent experiences in other countries
8.	The weakness of technical preparations
9.	The problem of hackers

¹⁰ See the minutes at www.riigikogu.ee/ems/index.html. The draft of the Local Communities Election was discussed on 14 June 2001, 23 January, 27 February, and 27 March 2002; the draft of the *Riigikogu* Election Act on 14 June 2001, 30 January 2002, 27 March, 15 and 22 May 2002; the draft of the Referendum Act on 19 September 2001, 30 January and 13. March 2002; the draft of the European Parliament Election Act on 23 January 2002.

It may generally be noticed that a large majority of Members shared the Ministry's attitude towards teleological interpretation of the Constitution, as well as the assumption that

1. e-voting increases voter turnout; and that this
2. *automatically* has a positive effect on 'Democracy'.

3.3. *Public*

There was hardly any accompanying discussion of e-voting in media or society (with the exception of a few newspaper articles and simple and emotional anonymous comments to them in online-newspapers and info-portals);¹¹ likewise, neither were there any significant public comments by social scientists or lawyers. In January 2001, the editorial of the business daily *Äripäev* had been devoted to the idea of the Minister of Justice to introduce e-voting in Estonia. ("Miks oodata aastani 2003" 2001) The editor asked why Estonia should wait until 2003; rather, Internet voting should be introduced already for the local elections of 2002. This had then been discussed. (See *Äripäev* Online, 5 January 2001, www.aripaev.ee/1836/arv_kysitus_183601.html.)

4. Discussion

One can safely say that the e-voting initiative came from political elite, and that it was and is largely detached from 'the people' whose participation it is supposed to increase. One could certainly diagnose for Estonia an attitude towards the right to vote, and democratic decision-making in general, that one might describe variously as pragmatic, relaxed, detached, or cynical. Anecdotally, as regards e.g. possibilities of fraud, one could often hear people saying that, if they trusted the net with their banking, why should they not in a so much less important field as political elections?

Still, while Estonia could have easily been the world leader in e-voting by introducing this as a regular feature already for the local elections of 2002, probably genuine worries that technical problems would not be solved by the Fall of that year, as well as the scepticism of individual members of parties generally in favour of e-voting, all of them reasonable and appropriate, were among the reasons that prevented such an outcome. Nonetheless, the resistance of the rural opposition party, which – likewise reasonably and appropriately – feared that such a feature would increase the vote of its competitor parties, and which therefore would have very rightly and properly fought against it in Parliament, at least contributed significantly to the postponement of actual e-voting in Estonia until 2005.

However, many of the to-be-expected points of discourse (Will 2002 and Buchstein and Neymanns 2002 provide very good surveys) were hardly considered, and are missing from the Estonian discourse. Without claiming completeness, I would want to single out the following five points, two general and three Estonia-specific:

¹¹ See, e.g., www.postimees.ee; www.delfi.ee. As all comments are anonymous, their level is indeed exceedingly low, and they often do not connect with the subject at hand.

1.	Are the effects of e-voting really beneficial for Democracy?
2.	Will e-voting increase voter turnout?
3.	How high are really the costs?
4.	Are there possibly adverse effects of the e-voting provisions for joining the European Union?
5.	Are there dangers of a law suit on the basis of the European Human Rights Convention?

4. and 5. came as a great surprise to many Estonian experts when mentioned; as regards 3., out of all people, the “internet guru” of the Laar administration, Linnar Viik, cautioned that, compared to a traditional one, “It’ll cost ten times as much to have an e-election,”¹² but it did hardly enter the discourse.

More interesting for this paper, however, are the more fundamental questions of 1. and also of 2., because they are so often badly considered. Regarding these, results are not really ‘in’ yet, but naturally, in such a key matter as Democracy, if there is reason for a cautionary approach, this should be mentioned very clearly, and also discussed and taken into consideration *before* laws are passed. Estonia is noticeable for its strong proclivities of anything e-related among its politico-economic elite, as well as for an extremely low level of resistance against, and indeed discourse about, any ‘progressive’ developments that might have unwanted side-effects (biotechnology is another example; see Weber 2001), which is perhaps why these matters were comparatively unaddressed. However, probably not many CEE countries are doing much better in this respect. Thus, the following points might serve as a general reminder:

4.1. Voter turnout

We have no good reason to think that e-voting will necessarily increase voter turnout. Rather, it seems that those people who will vote on-line are highly e-literate people *who are politically interested already*. (See Kersting and Baldersheim forthcoming) Darin Barney has noticed, correctly, that “recent research indicates that network technologies tend to reinforce existing patterns of democratic behaviour rather than mobilizing new actors and practices.” (2001, 264) But even if it were otherwise, one might also consider theories such as the ‘Crispin Curve’ argument that overly high voter turnout is a sign of problems, not of a healthy Democracy (1948, 160-165).

Laar’s continuous touting of e-voting as a possibility to increase voter turnout and (partially therefore) develop democracy (see Laar 2002, 244-246 *et passim*) is therefore without any rational basis.

4.2. Digital gap

That the Digital Divide or Gap is a real threat that will in all likelihood widen various already-existing gaps in society is, I think, clear for anyone who has studied the subject, and it has certainly been

¹² Quoted in <http://www.thefeature.com/index.jsp?url=article.jsp?pageid=12832>; on Viik, see <http://noweurope.com/CitybyCity.asp?ArticleNo=292>.

demonstrated for Estonia. (Kalkun and Kalvet 2002) And if Democracy is about representing people, then *Rahvaliid* is right: The studies we have indicate that internet voting can substantially change the result. (Cf., e.g., Tolbert and McNeal 2001 for the influence of Internet access (without e-voting) on voter turnout) One of the most recent thorough studies we have, of a German county commissioner election with model e-voting, shows that the result via e-voting would have brought another candidate to power (the more left one, incidentally). (See Meuren 2001) It is somehow difficult to reconcile this with the basic principles of participatory democracy.

4.3. *e-matters and Democracy*

But there is also a very general problem, which I will address only briefly, and by way of some quotes, here (see Drechsler 2002 for a more extensive argument). Hubert Dreyfus' excellent critique of 'virtual community' and 'electronic republic' advocates, who suffer from a deep deficiency of thought on what a *polis* is about and what are pure incidentals or mechanisms (2001, 103-106), should be mandatory reading for all dealing with e-governance. As he says, "The Athenian agora is precisely the opposite of the public sphere, where anonymous electronic kibitzers from all over the world, who risk nothing, come together to announce and defend their opinions. As an extension to the deracinated public sphere, the electronic agora is a grave danger to real political community. ... it is ... a nowhere place for anonymous nowhere people." (104)

On virtual communities, Darin Barney makes the similar general point: "Though they might *feel* like it, the fact remains that computer networks are not real places, and while their virtuality might present certain benefits for community formation, these same attributes compromise the rootedness of those communities once they are established." (2001, 214) "The network digital computer is often presented to contemporary individuals as the final technology of their ultimate self-creation ... in so far as they reduce the world – human beings included – to a standing-reserve of bits, networks culminate the distinctly modern technological conditions described by Martin Heidegger: a condition characterized by rootlessness, calculation, and the denial of mystery." (195) Barney cites a 1998 study from Calgary in which "it was found that membership in network associations had 'corrosive effects' on civility: 'Respondents who were most engaged online tended to be relatively disengaged with (and distrusting of) the "real" community. It appears that these online associations could be damaging to civil society'". (216)

5. Conclusions

It is well known that cyberspace, information and communication technologies (ICT), the internet, the web, network technology, whatever you call it, makes our lives better, easier, and safer; flattens hierarchies and thus makes people more independent; fosters democracy; improves social capital and the sense of community; allows for greater freedom for the individual person because of the possibility of re-defining oneself again and again, and so on. This is the basis of the desirability of e-voting as

well as e-governance; unfortunately, as basic assumption of an automatism, it is also exactly as wrong as it is well-known. Yet, it can hardly be doubted that, technology-driven as our time is, this is the ‘train into the future’. What the Estonian case shows, and why this is an excellent paradigmatic benchmark for Central and Eastern Europe, is that one should consider the problems of e-voting thoroughly before passing respective laws; and the discourse analysis has shown that one can simply not rely on the assumption that a nice conversation among all stakeholders will happen. The detachment of the discourse from scientific approaches and study results in just such a science- and progress-charged field is particularly curious. All this presents a challenge precisely to social scientists in the area to push for a higher and therefore more responsible level of discourse.

On the most basic level, “When societal consideration of a new technology is limited to identifying technical problems and technical solutions, the general condition in which technology holds sway is reinforced rather than challenged. This, by and large, has been the case with network technology.” (Barney 2001, 233) Worse, it has become part of the general paradigm of today, and even modest critics of the net easily appear as luddites. The most appropriate counter for this is to take a step back and look at the issue from the perspective of what the human person can and should be, and then consider what network technology generally, and e-voting specifically, does.

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(Note: Pure web-based information is not reprinted here.)

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