

# **E-Voting in Austria**

## **Legal Requirements and First Steps**

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**Abstract:** Whereas e-government mainly focuses on strengthening the efficiency of public government processes, it is the goal of e-democracy to improve democratic processes. Law can be defined as a communication-system between the legislative authority and the people. Using electronic media for democratic instruments can make this communication process easier. But there are also dangers and risks.

The topic e-democracy and e-voting is situated at the interface between law, politics and technology. This paper deals with the legal point of view: Which requirements does the law define for internet-based political communication, especially for computer-aided voting procedures in Austria? The law, respectively the constitutional law, defines clear and strict rules for voting and the instruments of direct democracy. If one wants to use computer-aided communication in these fields, the techniques eventually used must fulfil the relevant legal requirements.

### **1 Introduction**

This paper deals with e-democracy and e-voting from the legal point of view. Which requirements does the law, respectively the constitutional law, define for internet-based political communication, especially for computer-aided voting procedures? The paper focusses on the legal analysis of the constitutional and statutory limits and framework. Furthermore, it concentrates on working out the preconditions, *de lege lata et ferenda*, for e-voting. It will also mention the first statutory amendments of implementing e-voting in Austria.

The topic e-democracy and e-voting is situated at the interface between law, politics and technology: while it is the task of legal research to define the legal preconditions and framework for electronic elections and polls, it is incumbent on technological research to develop electronic voting systems that are able to fulfil the legal guidelines. Technical knowledge is necessary to define the concrete legal issues and demands. The goal of the legal analysis is to work out the legal preconditions for the implementation of such a model.

According to this work it should be feasible to evaluate the risks and opportunities of e-voting. This might aid the Austrian legislator in deciding on the question of whether and in which fields electronic elections and voting could actually be implemented and how the constitutional and statutory principles for this task have to be drafted.

## **2 Democratic Instruments**

Democracy means a form of political decision-making. Article 1 of the Austrian Constitution defines: "Austria is a democratic republic. Its law emanates from the people." Austria has an indirect parliamentary democracy, with some additional instruments of direct democracy. That means that law is not made by the people, but by elected representatives, the parliamentary bodies. Voting is the most important act in political decision-making by the people. Beside that the people can take part in the political decision-making process by three legal instruments of direct democracy: Referendum (Volksabstimmung), popular initiative (Volksbegehren) and public consultation (Volksbefragung).

A referendum is a national plebiscite concerning the enactment of a specific statute. With the – facultative or obligatory – referendum the people can accept or reject parliamentary resolutions at a constitutional level. The positive result of a referendum is binding. At the federal level two referenda have been undertaken so far: one concerning the question of opening a nuclear power station, the other concerning the question of joining the European Union.

The second instrument of direct democracy, the popular initiative, is a formal request by the public to introduce a matter for legislative action in the parliament. With the popular initiative a qualified number of people can raise a law-making initiative. If, at the federal level, more than 100.000 signatures are collected, the "Nationalrat" has to discuss the matter formally. But it will not be obligated to respond to the request in substance. So far, there have been over 30 popular initiatives at the federal level. Nearly all of them reached the limit of 100.000 signatures; but almost none of them was followed by the parliament.

The public consultation is the weakest of the three instruments of direct democracy. With the public consultation the parliament merely collects public opinion on a special issue. Contrary to a referendum, a consultation does not have a binding effect but only an advisory character. A public consultation has not yet been undertaken at the federal level, but this instrument predominately is used at the local and regional level.

Election and the named elements of direct democracy are the constitutionally planned instruments in the process of people's decision-making. They constitute the basic democratic instruments. In a wider sense, these also include the pre-forming of political decision-making, particularly performed by political parties, organisations and pressure groups.

### 3 Democratic Instruments and electronic techniques

Nowadays the internet is not only used for both commercial transactions (e-commerce) and the communication between public authorities and private persons (e-government); it is also gaining ground in the central area of democracy, i.e. election and voting procedures (e-democracy)<sup>1</sup>.

Whereas e-government mainly focuses on strengthening the efficiency of government processes, it is the goal of e-democracy to improve democratic processes. Law can be defined as a communication-system between the legislative authority and the people. Using electronic media for democratic instruments can make this communication process easier. But there are also dangers and risks.

Internet-based political communication is conceivable in all the above mentioned fields of democracy. Webpages of political and parliamentary parties or political discussion-forums in the internet are a case in point. But such type of communication is also possible with the institutionalized and constitutionally planned instruments of decision-making. The buzzwords here are “e-voting” and “e-referendum”. Clearly the latter case calls for a more stringent legal framework than the former.

### 4 E-Voting and legal requirements

The law, respectively the constitutional law, defines clear and strict rules for voting and the instruments of direct democracy<sup>2</sup>. If one wants to use computer-aided communication in these fields, the techniques eventually used must fulfil the relevant legal requirements<sup>3</sup>.

Elections to parliamentary assemblies (e.g. the federal parliament, regional state parliaments and the European Parliament), the head of state as well as to referenda are governed by constitutional law. In contrary to this elections to institutions representing public or private interests (e.g. unions of any kind) are governed by statutory law.

Considering the instrument of voting, e-voting would have to fulfil the requirements the law defines for traditional voting<sup>4</sup>. Austrian citizens above the age of 18 who are not excluded on account of a criminal conviction enjoy a general, immediate, equal, personal, secret and free right to vote. Austria’s electoral system is based on the principle of proportional representation of contending political parties in parliament. That means that the number of votes cast for a party in principle determines the number of its seats in parliament. In general, there are no single-member districts, and no majority system, no principle of “winner takes all”.

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<sup>1</sup> Some authors define e-democracy as a part of e-government; see, e.g., [Sche00].

<sup>2</sup> Art 26, 41 Abs 2, 43, 44 Abs 3, 45, 46, 49b B-VG.

<sup>3</sup> For the following see also [He03], [Ma00], [Po01], [Schr01a], [Schr01b].

<sup>4</sup> Art 26 B-VG and NRW *BGBI* 1992/471 idF *BGBI* I 2003/90.

Regarding the principle of general voting computer-aided communication does not seem to cause particular problems, given that e-voting is used together with traditional voting. A point yet to be proven is whether it indeed increases voter-turnout and thereby strengthens the principle of general voting. The principle of immediate voting demands that the casted votes have to reach the central voting-teller directly and non-altered. The principle of equal voting demands that each individual can cast her/his vote only once.

Parallel e-voting and traditional voting requires equality between the two voting instruments. For instance, there must be no different information on either of the two voting-“ballots” (eg: programmes of the political parties or information about the candidates). Also different error-filtering procedures might be problematic from the aspect of equality between electronic and traditional voting. Furthermore, e-voting also requires the possibility to cast unvalid votes.

But the greatest problems of e-voting lie in the principles of secret, personal and free voting. E-voting as defined in this paper is casting the votes without the supervision of an official, like voting from one’s own computer at home or in the office. From this point of view e-voting poses similar problems as postal voting. In both cases the votes are not given within a secure polling booth, but the voters themselves must look for the secret and free voting act. Therefore postal voting in political elections is allowed only in some states – predominately in exceptional cases. In those states that allow postal voting – like e. g. Switzerland<sup>5</sup> in general or Germany<sup>6</sup> in exceptional cases – the constitutional barriers for e-voting seem lower than in states which have no right of distant voting.

The Austrian Constitutional Court decided, that postal voting is unconstitutional because it infringes the principles of personal and secret voting<sup>7</sup>. A few years later another decision by the Austrian Constitutional Court held, that Austrian nationals living abroad, must not be excluded from the right to vote only due to the lack of a permanent residence in Austria<sup>8</sup>. Following that a constitutional amendment was undertaken: Austrians abroad, e.g. Austrian citizens resident abroad or just staying abroad, may also vote in embassies and consulates. Even a vote in the presence of a witness will suffice. The latter case can be turned “quasi-postal” voting for Austrians abroad.

The special challenges of e-voting are twofold. On the one hand the techniques must satisfy that only legally entitled people can cast their votes and this only once. Also technical protection against electronic election fraud by hackers or technical breakdowns is necessary. On the other hand the techniques must guarantee that identification of the voter is impossible. In other words: both must be guaranteed: identity of the elector and authenticity of the casted vote and at the same time strict anonymity of the ballot paper.

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<sup>5</sup> See, e.g., *Braun* in this book.

<sup>6</sup> See, e.g., *Volkamer* in this book.

<sup>7</sup> VfSlg 10.412/1985.

<sup>8</sup> VfSlg 12.023/1989.

Furthermore, e-voting, like traditional voting, must also allow for the possibility of ex-post examination of the election result: therefore the election-data have to stay accessible after the election day in an adequate way.

Another point is the future role of the constitutionally planned government officials in an e-voting and e-counting process.

Arguments outlined for e-voting also apply to e-referenda and e-public-consultation. E-referenda and e-voting are thus the most challenging and delicate fields of e-democracy.

The legal requirements for an “e-popular initiative” seem comparatively easier to fulfil. Here only authenticity, but no anonymity is required. From the political point of view computer-aided political communication in this element of direct democracy might have the most practical relevance. Because of electronically collecting the large numbers of signatures involved is much less time consuming and less costly than the traditional type of signature collection. This might not only lead to more frequent use of this instrument. It might also inhence opportunities to raise political initiatives for smaller and less institutionally organized groups.

## 5 Implementation

The implementation of e-voting for political elections of the first level (i.e. elections to the head of state, the federal parliament, regional state parliaments and the European Parliament as well as to referenda) is unconstitutional and would require a constitutional amendment. By contrast for implementing e-voting for elections to institutions representing public or private interests (e.g. unions of any kind) statutory amendments are sufficient. This is because here the voting principles are statuted not on a constitutional but on a statutory level and there is no principle of personal voting<sup>9</sup>.

In the latter case the Austrian legislator has already taken the first steps: legal provisions for e-voting already exist for the Austrian Union of Students as well as for the Austrian Chamber of Economics<sup>10</sup>. Still the concreting statutory orders are missing.

Until now there have been no legally binding electronic elections in Austria. However, a first test of e-voting was undertaken parallel to the elections of the Austrian Federation of Students at the Vienna University of Economics and Business Administration<sup>11</sup>; another test was undertaken recently parallel to the elections of the Austrian Head of State. The implementation of e-voting in elections for unions and chambers like the named or other institutions, might help to stop the steadily declining number of people casting their votes.

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<sup>9</sup> *VfSlg* 8.590/1979, 14.440/1996.

<sup>10</sup> § 34 Abs 4 ff *HSG*, *BGBI* I 2001/18; § 74 Abs 2 ff *WKG*, *BGBI* I 2001/153.

<sup>11</sup> See [Kr03], [Me01], [SK00].

Provided that all technical problems with e-voting can be solved and the legal provisions mentioned above can be fulfilled, there would still remain issues to be settled. Above all the fact of distance-voting and – in a more sociological sense – the necessity of trusting the electronic techniques by the electors. As mentioned above: absolute protection of the secrecy voting act can not be guaranteed. If the Austrian legislator would in the future decide to implement e-voting in political elections, this possibility should always be restricted to those groups who are not able to cast their votes within the official polling booth.

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