

20

Presentation date: October, 2021
Date of acceptance: December, 2021
Publication date: January, 2022

GOVTECH

AND SMART REGULATION IN ELECTION LAW

GOVTECH Y REGULACIÓN INTELIGENTE EN LA LEY ELECTORAL

Marina L. Davydova¹

E-mail: davidovavlg@gmail.com, davidovaml@volsu.ru

ORCID: <https://orcid.org/0000-0001-8392-9592>

¹ Volgograd State University. Russian Federation.

Suggested citation (APA, 7th edition)

Davydova, M. L. (2022). Govtech and smart regulation in election law. *Revista Universidad y Sociedad*, 14(1), 205-211.

ABSTRACT

The article investigates specifics of applying smart regulation means in election law. It provides examples of means unacceptable for use in electoral relations and means ensuring accomplishment of two main legal regulation goals in this area: increasing fairness of candidates' election campaign and upholding public trust in election management. This study focuses primarily on the notion of GovTech as the most closely related to regulating relations between the citizens and the state. Terminological analysis, formal legal and comparative legal approaches were applied as research methods. Technologies used in the election process are exemplified by the US and Russian practices. The author points out the term "technologies" has multiple meanings, in the recent years being understood predominantly in the context of digital technologies. When it comes to state regulation (GovTech), their usage demonstrates certain advantages relevant for the election process. As a result, activities of all participants are becoming more transparent to the state, while the level of public trust in elections is almost ignored and not considered to be a factor determining state policies. In conclusion, the author puts forward several questions that would affect how smart legal regulation of election process is going to be in each particular case.

Keywords: Smart Regulation, legal regulation, legal means, election process, election law.

RESUMEN

El artículo investiga los aspectos específicos de la aplicación de medios de regulación inteligente en la ley electoral. Proporciona ejemplos de medios inaceptables para su uso en las relaciones electorales y medios para garantizar el logro de dos objetivos principales de regulación legal en esta área: aumentar la equidad de las campañas electorales de los candidatos y mantener la confianza pública en la gestión electoral. Este estudio se centra principalmente en la noción de GovTech como la más relacionada con la regulación de las relaciones entre los ciudadanos y el estado. Se aplicaron como métodos de investigación el análisis terminológico, los enfoques legales formales y legales comparados. Las tecnologías utilizadas en el proceso electoral están ejemplificadas por las prácticas estadounidenses y rusas. El autor señala que el término "tecnologías" tiene múltiples significados, entendiéndose en los últimos años predominantemente en el contexto de las tecnologías digitales. Cuando se trata de regulación estatal (GovTech), su uso demuestra ciertas ventajas relevantes para el proceso electoral. Como resultado, las actividades de todos los participantes se están volviendo más transparentes para el estado, mientras que el nivel de confianza pública en las elecciones es casi ignorado y no se considera un factor determinante de las políticas estatales. En conclusión, el autor plantea varias interrogantes que afectarían lo inteligente que será la regulación legal del proceso electoral en cada caso particular.

Palabras clave: Regulación inteligente, regulación legal, medios legales, proceso electoral, ley electoral.

INTRODUCTION

The smart regulation concept is being actively developed both in theoretical research (Gunningham & Sinclair, 2017). and legislative practice It is aimed at focusing on the results and achieving the greatest effect with minimal expenses (Davydova & Makarov, 2021). One of the main constituents of this concept is the necessity to select and constantly test optimal combinations of influence means. Meanwhile, not all means are universally applicable. As a rule, their implementation depends on specifics of regulated relations, for instance, on differences between private and public law. Besides, various branches of law have their own particular attributes.

This can be clearly exemplified by election law, where several smart regulation means are simply not applicable. For example, behavioral methods that shape a certain architecture of choice and “incentivize” people to make a beneficial decision are extremely popular in regulatory practices of many nations. They are implemented to address multiple legal issues concerning consumer rights protection, environmental safety, social policies, etc. However, we agree with the authors of “nudge concept” that these methods are absolutely unacceptable for election law. “Sometimes people have a right, even a constitutional right, to government neutrality of a certain kind”.

It is also hard to imagine involvement of third parties as surrogate regulators of the election mechanism. In legal regulation of economic relations, partial delegation of responsibilities to business communities, professional unities and other parties interested in clear and convenient rules for business seems quite reasonable. In this case, government acts mainly as a catalyst or a mediator (Gunningham & Sinclair, 2017; Sasongko, et al., 2019). As for election management and conduction, such distribution of regulatory efforts would seem improper. Setting rules during elections is the exclusive prerogative of the state (unlike supervision over compliance with said rules and public control that should enhance social participation as much as possible).

Usage of various regulation means in the election process is expected to further two primary goals: ensuring (1) fairness of candidates’ election campaign and (2) voters’ trust in election management.

The former can be achieved by improving the system of control and restrictions, i.e., by traditional means of legal regulation. For instance, the state imposes limits on election campaign funding sources, amount and content of political advertising, etc. However, these measures can be not sufficient for accomplishing the latter goal. It requires meticulous, well-planned state work to increase

election transparency. Actually, transparency underpins both of these goals: the former makes activities of parties and candidates transparent to the state and supervisory authorities, while the latter enables transparency of state activities to public control. Among tools used for these goals, digital technologies are becoming more and more important.

METHODOLOGY

This research focuses mainly on the notion of GovTech, as it is most closely related to electoral and voting aspects compared to other recent digital terms (FinTech, RegTech, SubTech, MedTech, etc.). As the term “technologies” has multiple meanings and is actively used in scientific studies, this work provides a terminological analysis to demonstrate how this notion is defined in different contexts and how the term “technologies” is being adopted in law studies. Voting process technologies are exemplified by the US and Russian practices. In particular, the analysis of articles published in American media in the past two years (i.e., right before and after the 2020 presidential election) has been performed to distinguish the issues of adopting digital technologies to the election management that attracted the most attention. The analysis of Russian legislation was made to assess technologies introduced to Russian electoral process, including comparing current national experimental regulations and global practices of GovTech development from the election law standpoint.

DEVELOPMENT

Because of the ongoing digitalization, the word “technologies” in the context of election law has been changing its meaning in recent years. This becomes especially evident during the analysis of Russian information sources, where once popular “election technologies” notion is almost completely superseded by “election process technologies”.

Election technologies are generally understood as a set of methods, means and scientific research aimed at achieving a certain election outcome. They include campaigning technologies, advertising technologies, image making, signatures collection, rating manipulation and other technologies that can be “black” or “white”, “soft” or “hard”, unique or widespread, etc. (Spasennikov & Golubeva, 2016).

This notion, very popular in Russian studies of the 1990s (Ustimenko, 2001), is nowadays used primarily in political science articles. In law research, it has been replaced by a similar-looking notion with a completely different meaning – latest/digital/innovative election process technologies

(Avilov, 2017; Rudneva & Makarevich, 2018; Rahmadi, et al., 2020; Suvorov, 2021).

While in the former context the term “technology” is understood as “the specialized aspects of a particular field of endeavor”, the phrase “election process technologies” prioritizes the technical aspect that “refers to methods, systems, and devices which are the result of scientific knowledge being used for practical purposes”. Attention is given mostly to information technologies, defined as the technology involving the development, maintenance, and use of computer systems, software, and networks for the processing and distribution of data.

As a result, the notion of “technologies” in election law context is more often associated not with activities of political parties and candidates but, for instance, with the Vybory (Elections) State Automated System, digital services available at Central Election Commission website, distant voting options at Public Services Portal and other modern technical solutions.

In Russia, this change of the agenda can be partially explained by political factors (changes in the political environment, departure from large-scale election campaigns of the 1990s, as well as the shift from technological to administrative election management stage that began in 2000s (Matvejchev, 2018), when the demand for scientific discussions on *winning the election* waned in favor of studies on *managing the election*). However, it is technical factors that probably played the decisive role—booming digital technologies simply overshadowed traditional problems of several scientific disciplines. It seems this “infatuation” with digitalization does not make fundamental theoretical issues less important but still has to be acknowledged as an objective fact.

There are many cases of similar scientific “focus shift”. For instance, technological progress intervened in the discussion of Russian law theorists on the notions of legal technique and legal technology. These two rival terms have been actively competing since late 20th century, when the traditional understanding of technique as a set of means, *methods and other tools* was challenged by the following structure: legal technique (means of legal activities) – legal tactics (methods of legal activities) – legal strategy (principles and long-term plans of activities) – legal technology (an umbrella term encompassing all the components mentioned above) (Kartashov, 2000). This discussion became widely known, turning into a fundamental topic that most works on technical legal problems touched upon.

Both points of view are formally still relevant. However, in the past two decades the “legal technology” term was eventually claimed by a branch previously unknown to

academicians - Legal Tech, understood as the use of technology and software to provide legal services and support the legal industry. This term has been used by law theorists and practitioners so often that using it in another meaning requires further explanation. Besides, while such clarifications may seem reasonable in Russian works, there is almost no point translating them into English, as the notion of legal technology has been firmly established in scientific and professional legal discourse.

Thus, once purely theoretical dispute on legal technique and legal technology suddenly became affected by external factors, as digital technologies permeated the real life and demanded a place for themselves in scientific terminology.

Alongside Legal Tech, other terms appeared to reflect the triumphant venture of digital technologies into various human activities (Davydova, 2020): FinTech, RegTech, SupTech, MadTech, InsurTech PropTech, MedTech (Kobyakov, 2018), EdTech) and so on.

Because of this, it is no wonder the word “technology”, regardless of its context, is automatically associated with digital technologies applied in different areas of human life.

From the whole range of these new notions, GovTech seems to be the closest to election and voting aspects analyzed in this article. This term (“government + technology” abbreviation) covers digitalization of government management, i.e., relations between the citizens and the authorities. It describes technological solutions creating available and comfortable services to optimize and simplify internal and external management, as well as to provide new state services and public participation methods previously impossible due to technological limitations. Compared to other application of digital technologies, GovTech does not involve creating resources and using them for selling products – it deals with managing resources for better provision of available products (also known as public services). All this helps to make government sector more innovative, flexible, development-focused and technologically sophisticated.

Significant advantages of this digitalization tendency have been widely recognized on the global level. It is no coincidence the World Bank established the GovTech Global Partnership (GTGP) initiative (GovTech, n.d.). These advantages include:

- maximal transparency and digital recording of all operations that ensure extensive control,
- acceleration and reduction of costs for all processes including those involving public participation,

- provision of fast, flexible, convenient and fully available services greatly improving public communication with local, regional and national authorities.

The main scope of GovTech worldwide application involves cybersecurity, digital support, decision-making platforms, smart transport, waste management, e-government solutions, etc. Some of these activities are directly related to election management, furthering voting accessibility, transparency, security and integrity.

To understand practical approaches to this topic, we studied US cases, as all these aspects are very relevant for this country because of recent 2020 presidential election. We have analyzed posts on Government Technology website. published in its Election Technology section in the past two years, i.e., right before and after the presidential election. On the one hand, themes discussed on this portal demonstrate there is significant distrust in e-voting means. In some states, electronic voting machines had the option of printing backup hard copies of ballots in case additional vote counting was required (*Harris County, Texas, Officials OK \$54M Voting Machine Spend, 2021; Indiana Putting \$10 Million Toward Election Security, 2021*), while other states did not use online voting at all for security reasons (Lohrmann, 2021b). On the other hand, in general there is no doubt online voting (or voting using biometrics and other latest technologies) offers many advantages that cannot be cast aside, especially opportunities for disabled people, military personnel and citizens staying in foreign countries (Maruri, 2021). This is where technologies reducing risks of confidential data disclosure, external effect on election outcome etc. come to the foreground. Much attention is given in particular to election infrastructure assessment and testing (Ropek, 2021b), with state and municipal authorities getting grants for assigning third-party contractors to enhance security and eliminate vulnerabilities of any kind (Ropek, 2021a).

It is interesting that development of advanced technologies is accompanied by debates on traditional, “pre-digital” ways of electoral participation. At least seven states adopted laws expanding access to mail-in ballots, while other three states, on the contrary, imposed legislative measures to limit mail-in voting. We believe there is nothing strange about this fusion of traditions and innovations. “Smart” regulation researchers point out the necessity to change “regulation philosophy” and “widen the focus” of technology assessment (Omarova, 2020). The underlying principle is that blind support of technological development trends must be avoided. Instead, it is necessary to adapt these technologies to socially important goals. For the US election process, this goal is to raise trust in election integrity. The 2016 election demonstrated

that even minor interference can cause widespread doubt about outcome fairness (Ropek, 2021a). This is why all solutions concerning both old and new technologies should promote transparent and convincing election results (Lohrmann, 2021a; Ropek, 2021c).

Thus, in this case smart regulation implies active introduction and application of digital technologies to the extent they can assist in solving governmental tasks. Digitalization of election processes should be viewed not as the end goal but as a means to reasonable state policy.

The Russian Federation stipulated its digitalization priorities in Specifications of Digital Governance Federal Project (adopted by the Presidium of the Government Commission on Digital Development, Use of Information Technologies to Improve the Quality of Life and Business Condition on May 28, 2019), included in Digital Economy National Program (put into effect by Minutes of Meeting 7 of the Presidential Council for Strategic Development and National Projects on June 4, 2019). According to Clause 1.28 of this document, by the end of 2024 Russia must ensure accessibility of distant voting; establish the database of voters and other election participants available to election commissions; provide digital services for election process participants. This program has been already partially implemented. As of now, the Central Election Commission website offers the following digital services: informing on election commissions (users submitting their home address can get the number of their polling station, its address, phone number and the list of local election commission members); informing on registering at the polling station (upon request, this information will be sent by e-mail); informing of absentee voting request status (Mobile Voter system); besides, a request by polling station number and address provides information on election dates, candidates and parties, as well as results of previous elections and referendums. These services are available not only at the election commission website but also at the personal account on Public Services Portal, where users can submit absentee or digital voting requests as well.

Some provisions of Digital Governance Federal Project still need to be developed and tested. For instance, while in 2019-2020 distant voting option was available only in Moscow as an experimental format, in the nearest future this practice is going to be applied nationwide. For this purpose, the Distant E-voting Portal (<https://vybory.gov.ru>) was launched to test the national e-voting system in spring 2021. As a result of this test, 5 regions will be chosen to perform online voting in fall 2021, alongside Moscow. The next stage of digitalization involves creating personal accounts of candidates and political parties on

public services portal, services for candidates' financial reporting, opportunities for electronic collection of signatures in support of nominees, etc.

As we can see, Russian authorities demonstrate positive attitude towards election process digitalization. When it comes to purposes mentioned above (ensuring election campaign fairness and raising voters' trust in election management), digitalization will definitely facilitate the former. Activities of candidates and political parties will become more transparent and accountable to state authorities when these technologies are applied.

Meanwhile, influence of digital technologies on public trust is rather hard to assess. No independent data on voters' trust level in election proceedings are currently available. State authorities confirm success of implementing said technologies by providing statistical evidence that the number of voters who use e-voting opportunities and other digital services is increasing. However, this growth may be caused not by high levels of trust in e-voting procedures but by other factors (for instance, voters may find distant voting more comfortable and less time-consuming).

Another important issue involves risks related to introducing new technological solutions. This is especially relevant for election processes as they affect both citizen rights and state system legitimacy. This is why experimental legal regulation seems to be the most logical opportunity for testing emerging election technologies.

In Russia, the main way to conduct a legal experiment is to adopt a special federal law imposing specific rules on a designated territory for a certain time period. This is how these experiments are performed in various branches of law including labor (experimental usage of electronic work documents – Federal Law 122-FZ of April 24, 2020), tax (experimental professional income taxation – Federal Law 422-FZ of November 27, 2018) and environmental legislation (experimental quoting of pollutant emissions – Federal Law 195-FZ of July 26, 2019).

Similar experiments on election processes were performed in 2019-2020. All of them involved distant e-voting in one particular region – Moscow city of federal importance. In May 2019 experimental distant e-voting was announced for Moscow City Duma elections (Federal Law 103-FZ of May 29, 2019); similar laws were adopted to extend the duration of this experiment (Federal Law 151-FZ of May 23, 2020) and establish e-voting for other 2020 elections in Moscow (Federal Law 152-FZ of May 23, 2020). All these laws were no longer in effect by the end of the election cycle.

When it comes not to general election management but to developing specific election services and digital solutions, adopting individual federal laws for each of them seems unreasonable. Abundance of digital innovations simultaneously developed for various areas of life and requiring prompt response from the legislators makes it necessary to work out common standards and rules for legal experiments. This is why Federal Law 258-FZ "On Experimental Legal Regimes in the Field of Digital Innovations in the Russian Federation" was adopted on July 31, 2020. These regimes (Davydova & Makarov, 2020) enable lawful, risk-free assessment of innovation efficiency for medical activities, transport, agriculture, e-commerce, architecture and construction, industrial production, state and municipal services.

For the last category, which can include many election technologies, this law provisions specific regulations. In all other cases, approbation of a new technology can be initiated by any legal entity or individual entrepreneur, following legal requirements. However, innovations for state and municipal services, state supervision, state and municipal control can be initiated and implemented only by state and municipal authorities in the special order provisioned by the federal government (Russian Federation Government Resolution 1978 of December 1, 2020).

How much does this approach correspond to global practices? Two main models of GovTech development can be distinguished:

- the open model, with private startups actively engaging in state regulation improvement (USA),
- the closed model, with services developed within the state sector or involving major IT companies (Singapore).

The fact Russia opted for the latter model and does not allow participation of private startups can be explained not only by traditional closedness of government authorities. It is necessary to understand the specifics of this matter and clearly, not all solutions can be applicable in terms of election law. In particular, the state has reasonable doubts about introducing private developers to public authority, given the risks of unlimited access to personal data, potential political manipulation, etc.

It must be noted, however, that firstly, such risks can be mitigated by guarantees provisioned by the law (e.g., the law on experimental legal regimes imposes increased developers' responsibility for any damage, regardless of the fault). Secondly, by artificially limiting competition in innovative solution development, the government may face the situation when its services turn out to be less functional

and advanced than the ones provided by banks and other private sector structures.

CONCLUSIONS

Smart regulation is expected to minimize expenses while maximizing efficiency. One of the ways to achieve these results is to use digital technologies (GovTech in terms of state policies). Meanwhile, adopting these technologies for election processes is not reasonable *per se* and needs careful consideration of the following questions:

- should we strive for a complete shift from paper copies or, alternatively, take a more cautious approach to implementing digital technologies instead of simply following technological trends? An abstract answer could imply that the extent of changes must guarantee procedure reliability and voter trust. However, answering this question generally requires elaboration for each particular situation.

- is it more reasonable to introduce new technologies experimentally by single temporary laws or to work out the common rules and regulations for such experiments? It is obvious that detailed regulation by a “one-time” law seems logical for unique and large-scale experimental projects. Still, multiple experiments on implementing digital technologies and services need clearer and more reliant guidelines.

- is it acceptable to assign private developers for designing technologies (in order to uphold competition and high quality of innovations) or should we instead exclusively authorize government-affiliated structures to develop state services (in order to ensure personal data protection and political neutrality)?

There are probably no universally applicable answers to these questions, yet the chosen responses will undoubtedly determine how smart the regulation is going to be in each particular case.

REFERENCES

Avilov, Y. D. (2017). Possibilities of Applying Blockchain Technology in Elections: Implementation Means and Legal Grounds. *Legal Science*, 6, 159–165. (In Rus.)

Davydova, M. L. (2009). *Legal Technique: Theoretical and Methodological Aspects* (1st ed.). Volgograd State University Publishing. (In Rus.)

Davydova, M. L., & Makarov, V. O. (2020). Experimental Legal Regimes (Regulatory Sandboxes): Theoretical Problems and Implementation Prospects in Modern Russia. In, A. Inshakova & E. Inshakova (Eds.), *Competitive Russia: Foresight Model of Economic and Legal Development in the Digital Age. CRFMELD 2019. Lecture Notes in Networks and Systems*. (pp. 577–584). Springer.

Davydova, M. L., & Makarov, V. O. (2021). Smart Technologies in Lawmaking: Towards the Concept of Smart Regulation. In, E. G. Popkova & B. S. Sergi (Eds.), *“Smart Technologies” for Society, State and Economy. ISC 2020. Lecture Notes in Networks and Systems*. (pp. 1297–1305). Springer.

Kartashov, V. N. (2000). Legal Technique, Tactics, Strategy and Technology (Correlation Issues). In, V. M. Baranov (Ed.), *Legal Technique Issues*. (pp. 16–22). Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia. (In Rus.)

Kobyakov, I. (2018). *MedTech in Russia and abroad: main players, problems and prospects*. Rusbase. <https://rb.ru/opinion/medtech-obzor/>

Lohrmann, D. (2021a). *Election Security: What Can Governments Do Now?* GovTech. <https://www.govtech.com/blogs/lohrmann-on-cybersecurity/election-security-what-can-governments-do-now.html>

Lohrmann, D. (2021b, April 29). *How Election Security Has Become a Top Issue*. GovTech. <https://www.govtech.com/blogs/lohrmann-on-cybersecurity/how-election-security-has-become-a-top-issue.html>

Maruri, K. (2021). *Experts Discuss Challenges of Voting in An Electronic Age*. GovTech. <https://www.govtech.com/elections/experts-discuss-challenges-of-voting-in-an-electronic-age.html>

Matvejchev, O. A. (2018). Russian Market of Political Technologies: Stages of Formation and Prospects of Development. *Polis: Journal of Political Studies*, 2, 82–99. (In Rus.)

Omarova, S. T. (2020). Technology v Technocracy: Fintech as a Regulatory Challenge. *Journal of Financial Regulation*, 6(1), 75–124.

Rahmadi, I., Hayati, E., & Nursyifa, A. (2020). Comparing Pre-service Civic Education Teachers’ TPACK Confidence Across Course Modes. *Research in Social Sciences and Technology*, 5(2), 113-133.

- Ropek, L. (2021a). *Bipartisan House Bill Proposes \$50M for Election Security*. GovTech. <https://www.govtech.com/policy/bipartisan-house-bill-proposes-50m-for-election-security.html>
- Ropek, L. (2021b). *DHS Publishes 2020 Strategic Plan for Election Security*. GovTech. <https://www.govtech.com/security/dhs-publishes-2020-strategic-plan-for-election-security.html>
- Ropek, L. (2021c). *The 'Most Secure' U.S. Election Was Not Without Problems*. GovTech. <https://www.govtech.com/elections/the-most-secure-us-election-was-not-without-problems.html>
- Rudneva, T. S., & Makarevich, M. L. (2018). Methods of Application and Legal Problems of the Implementation of the Blockchain Technology in the Electoral Process. *Innovative Economy: Prospects of Growth and Improvement*, 6 (32), 178–182. (In Rus.)
- Sasongko, G., Huruta, A.D., & Wardani, A. (2019). Does the Wagner's Law exist in a strategic national area? An evidence from Kedungsepur – Indonesia. *Insights into Regional Development*, 1(2), 99-117. _
- Spasennikov, V. V., & Golubeva, G. F. (2016). Social and psychological specifics of using modern technologies in election campaigns. *Vestnik of Kostroma State University. Series, Pedagogics, Psychology, Social Kinetics*, 22(4), 88–92. (In Rus.)
- Suvorov, E. G. (2021). Digital Technologies in Election Process. *Topical Problems of Fighting Crime and Other Law Offences*, 12, 74–77. (In Rus.)
- Ustimenko, S. V. (Ed.). (2001). *Election Technologies and Election Art* (1st ed.). ROSSPEN. (In Rus.)