

## The work of the Venice Commission on digital technologies and elections

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Ladies and Gentlemen,

The issue of new technologies is now central to nearly each discussion on future activities. I really mean all future activities, not qualifying them. New technologies are, should or will be omnipresent – and are central to the theme of communication we are dealing with today.

Omnipresent in substance – but also omnipresent in practice: with the COVID crisis, what was possible but that many people were reluctant to do became an imperative: conferences such as today's are held online, and probably many will be in the future.

My contribution will start with the Council of Europe's involvement in the field, before coming more precisely to the activities of the Venice Commission.

The Council of Europe is not the last organisation to be active in the field of new technologies. As you know, just to talk about the electoral field, it was a pioneer in adopting a recommendation on e-voting back in 2004, which was replaced by an updated one in 2017.

A number of recommendations and even conventions of the Council of Europe relate to new technologies, and in particular to their use in media and communication. The most topical conventions are the Convention on cybercrime, or Budapest Convention (ETS 185) – a second Protocol is being drafted -, and the Convention on Data Protection (officially: the "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data", ETS 108), to which an additional Protocol has been added at the end of 2018 (ETS 223). Amongst the recommendations, I already referred to e-voting, but we should not forget CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries, CM/Rec(2016)1 on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services, or Recommendation CM/Rec(2007)15 on measures concerning media coverage of electoral campaigns.

So there is already a *corpus* in the Council of Europe, and it is called to be further developed: for example *ad hoc* Committee on artificial intelligence (CAHAI) has been established. The terms of reference of this Committee provide that it has to "examine the feasibility and potential elements (...) of a legal framework for the development, design and application of artificial intelligence, based on the Council of Europe's standards on human rights, democracy and the rule of law".

The Venice Commission is co-operating narrowly with this Committee, by preparing draft principles for a fundamental rights-compliant use of digital technologies in electoral processes, which could (preferably should) be used as elements of this legal framework on artificial intelligence. This is however work in progress so I will not focus on it.

These principles are not coming out of the blue, but they are the culmination of a long-term undertaking. In 2019 already, the Venice Commission adopted a joint report with the Directorate of Information Society of the Council of Europe on digital technologies and elections. I will now focus on this document (CDL-AD(2019)016). And a number of you were already present at the European Conference of Election Management Bodies in Oslo in 2018, where we discussed security – and in particular cyber-security – in elections, so they are already familiar with this issue.

Digital technologies are essential to electoral communication and, more broadly, communication. So the report states that “In online society [that is in the society where we live, like most people in the world], information is the prime commodity not only of economic production but also of social interaction and governance. The impact of the internet on reality is universal, and affects even those who have never used the technology. It directly affects public opinion wherever people are located, and has already changed the way that people think and behave in the world around them. It gives voice to each and everyone interested and enables them to contribute to the public discourse, whether negatively or positively.” (22) Information is mainly image-based and therefore less open to reasoning as mere speech would be.

Now that I have said that image can lead to emotional rather than to intelligent reactions, you will hopefully excuse me for not illustrating my intervention by images.

For example, the report underlines that “the mass distribution of images has decisively contributed to the success of ‘fake news’, by giving information the appearance of infallibility” (26). “Fake news” is a general, if not colloquial concept, so the Council of Europe prefers to distinguish:

- Mis-information, that is sharing false information, but without the intent of causing harm;
- Dis-information, which stands for knowingly sharing false information with the intent to harm; and
- Mal-information, which describes genuine information shared with the intent to cause harm, often by disclosing information from the private sphere into the public sphere

The impact of manipulation of information is particularly acute in the electoral field – thus challenging democracy in one of its core aspects.

The report describes challenges to the electoral process in three ways (108):

- Challenges to electoral democracy – that is to the institutional activities and infrastructure that make elections possible;
- Challenges to deliberative democracy, which refers to participation by individuals in open debate in the belief that it will lead to better decisions on matters of common concern;
- Challenges to the so-called “*monitory democracy*”, defined as “the public accountability and public control of decision makers, whether they operate in the field

of state or interstate institutions or within so-called non-governmental or civil society organisations, such as businesses, trade unions, sports associations and charities".  
Monitory democracy can be considered as part of deliberative democracy.

Before entering into more details, I must underline that the report recognises of course the advantages of the information society, including the broad access to data which were in the past available to the happy few, and everything it has brought to make our all-day life easier. Focusing on the problems should not lead us to forget this; and this was already underlined in Oslo in 2018.

Challenges to electoral democracy are of course your primary concern, since they are mainly directed at the activities of the Electoral Management Bodies, all along the electoral process. This starts from the registration of voters and ends with the transmission and tabulation of results, not talking about cyberespionage.

From a cybercrime perspective, the report retains two types of interference (113). One type is attacks against the confidentiality, integrity and availability of election computers and data, including:

- compromising voter databases or registration systems, for example, through hacking of computer systems or deleting, altering or adding data;
- tampering with voting machines to manipulate results;
- interfering with the functioning of systems (for example, a distributed denial of service attack on election day);
- illegally accessing computers to steal, modify or disseminate sensitive data such as, for example, the theft of data from election campaign computers for use in information operations.

The second type of attack involves (dis-)information operations – which do not constitute cybercrime but violate the rules on the protection of personal data, on political finances, on media coverage or on the broadcasting of elections, that is, rules to ensure free, fair and clean elections.

The report states that “[t]hese challenges need to be addressed from an interdependent stance, which means that (1) the transnational nature of the problem and (2) the essential role played by the gatekeepers of information highways (i.e. internet service providers) to investigate and prosecute cybercrimes must be recognized.”

Communication, our theme of today, is therefore involved in different ways in these challenges to electoral democracy. In a narrow sense, internal as well as external communication of the EMBs, for example, may be interfered with by malevolent actors. In a broader sense, all communication to voters is threatened.

This leads us to address challenges to deliberative democracy. One of the basic standards of electoral law is freedom of voters to form an opinion, as is equality of opportunity. Many countries have now got a *corpus* of legislation dealing with media and finances in the electoral process to ensure respect of these principles. Of course implementation may be problematic but classical media have – or at least should have – enough professionalism and deontology to make it not too difficult. This is not the case with social networks and the internet which are open to everybody. Nor is it possible for the time being to control the money invested in such kinds of electoral propaganda. A lot could be said on the

manipulation of electoral preferences through personalized ads and messages, including contradictory ones addressed to different groups. One only example is that “biased search rankings can shift the voting preferences of undecided voters by 20% or more” (126). Other problems are the use and abuse of personal data for electoral purposes, undermining the rights to privacy, free elections/electoral equity and freedom of expression and opinion.

This is just an overview of the possible problems. Once again, we must not forget the immense room for freedom and development provided by the new technologies, but we must be conscious of the risks. So there is clearly a need for regulation, but this regulation must be intended at ensuring the right to free elections. Restrictions to fundamental rights must be envisaged in this perspective: the remedy should not be worse than the evil, and the principle of proportionality always respected.

So we are coming back to the principles, as defined in particular in the European Convention on Human Rights: mainly the right to free elections (Article 3 Prot 1), including the principles developed *inter alia* in the Code of good practice in electoral matters drafted by the Venice Commission; freedom of expression (Article 10). These rights are interrelated; and their possible limitation should be in the public interest and in conformity with the principle of proportionality.

In short, some form of regulation is called for, but it has to respect fundamental freedoms, in particular, freedom of expression, the right to privacy and social rights. The key words are adaptability and international co-operation.

As I said before, the Venice Commission is now working on the principles applicable to this regulation. I will not introduce them since the Venice Commission’s contribution is intended be innovative, due to the relative novelty of the problem: we have to be creative, not to just reproduce old concepts, and the discussion is still open! The elaboration of the principles will take into account the peculiarities of the Internet, including one, if not the major one, at least for lawyers the Internet is borderless so its successful regulation by national legislators without any international co-operation is subject to caution – and this is an understatement – unless very serious limitations are made to fundamental rights, thus endangering democracy itself - to use a medical metaphor, the remedy would kill the patient.

Ladies and Gentlemen, your experience is also crucial to focus on the right issues. It is not an exaggeration to say that, without the discussion held two years ago during the European Conference of Electoral Management Bodies on security in elections held in Oslo in 2018, we would have missed a number of points which have been developed since. So it is time for me to come to the end of my speech, and to listen on my turn.