Introduction

Good morning. It is an honor to participate in the 19th European Conference of Electoral Management Bodies.

First, I would like to thank the Secretary and Director of the Venice Commission, Simona Granata-Menghini for the invitation, as well as my co-panelists and the moderator of this session.

Prior to my main exposition, I would like to make a few precisions:

- In my opinion, the issue of artificial intelligence in a democratic context goes beyond campaigns and might affect the authenticity of votes and the legitimacy of democracy itself. Therefore, I will comment from this broader perspective.
- In a similar way, I consider that the issue of whether artificial intelligence might be good or bad for democracy has little practical relevance, because the use of digital technologies in elections is already a reality, as can be seen in the recent elections of Austria, Brazil, Bulgaria, Denmark, and Slovenia, among others.
- In this context, my comments will focus on the effects that artificial intelligence has on democratic rights and principles, and how we might address them from a practical legal and judicial perspective.

How is AI used in electoral campaigns? How can AI affect electoral integrity?

Artificial Intelligence systems share the same characteristics of other digital technologies and, therefore, the same issues: private nature, extra-territoriality, anonymity, and automation.

But unlike other digital technologies, AI could replace human beings in data-processing, pattern-recognition, and decision-making processes, including those inherent to the electoral cycle and democracy.

The absence of human intervention poses at least two issues in democracy:

- First: lack of user control of such processes because of their opacity and automation.
- Second, due to its preprogramed and automated nature and the range of actors and algorithms (for example, machine learning), AI promotes the dispersion of responsibilities for its outcomes.

- Furthermore, when applied at big scale, AI can foster discrimination, manipulation and illegal surveillance of whole populations, affecting the fundamental rights to fair trial and due process; non-discrimination and equality; freedom of expression, assembly and association; data protection and privacy; and free elections.

For instance, meta-data processing (for example, AI mixed with big data) is used to create complete psychometric profiles of voters, based on the content they post, share or react to on social media platforms or discuss in private messages, as well as taking into account their search histories.

In the field of electoral campaigning, AI-based profiling and propaganda, automated messaging, and recommendation systems might create misinformation and disinformation, deep fakes, hate speech, and micro-targeting of voters.

AI - driven mass surveillance like facial recognition or highly detailed political profiling might have a "chilling effect" on political behavior.

What are the main challenges of adjudicating in these cases?

Responsibility attribution.

The anonymous, automated, private, and extra-territorial nature of AI makes it extremely difficult to determine who is responsible for the negative outcomes of AI in elections.

To face this challenge, the law should clearly provide for different types of responsibility according to the level of participation of the involved actors:

Individual responsibility for the direct use of AI tools to commit illegal behavior, and for the design of AI systems with the clear intent of violating or bypassing legal provisions.

Solidary responsibility of software companies when they have directly encouraged or knowingly allowed the creation of AI tools intentionally designed for violating or bypassing legal provisions.

Subsidiary responsibility for companies when they have been negligent in the design, distribution and use of AI systems that may evidently represent a risk for human rights or democratic principles.

Efficacy and opportunity.

Timely detection, prosecution and sanction of illegal activities committed with AI is a challenge.

Cooperation between public and private actors at national and international levels, an adequate legal framework and a significant investment in technical capacities are essential for the protection of electoral integrity.

Legal inadequacy.

An adequate legal framework is essential for preventing the negative effects of AI in elections, as well as for promoting its advantages.

However, digital technologies evolve faster than legislations and judges receive enormous pressure to create jurisprudence to guarantee the efficacy of the law in novel circumstances.

Concluding remarks

AI technologies may be powerful tools for democratic regimes, but they can also undermine the authenticity of votes and the legitimacy of democracy itself.

To face the challenges of AI in elections, judges, legislators, and all involved actors "*should interpret the right to vote as encompassing… the right to a fair and legitimate democratic process*" (Yasmin Dawood).

Thank you very much.

Justice José Luis Vargas Valdez