

Remarks during the Fourth Eastern Partnership Facility Seminar on
The use of administrative resources during electoral campaigns

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I. Introduction

It is a great pleasure to have the opportunity to present this preliminary report on the use of administrative resources during electoral campaigns. I will also take this opportunity to share a brief overview of the legal framework on the topic in Latin America and conclude my intervention with a few suggestions that may be useful for the seminar's deliberations, in order to improve and strengthen the report.

II. The draft report: definitions and comparative analysis

In order to provide a baseline for our discussions, I will summarize the draft report, explaining its structure, fundamental concepts and some of its main preliminary findings and recommendations.

This draft report, based on the comments of Monsieurs Manuel González Oropeza, Oliver Kask, and Johan Hirschfeldt, is a response from the Venice Commission to address a long standing political problem: the “constant, or frequent, practice of misuse of administrative resources [also known as public resources] during electoral campaigns,” with the purpose of giving incumbents “an undue advantage compared to their challengers”. By administrative resources the report understands “resources enjoyed by incumbent political forces in elections, deriving from their control over public sector staff, finances and allocations”, explicitly leaving state-owned media out of the analysis.

The use of administrative resources violates the principle of equality of opportunity. When they are used to disrupt the basic level playing field of political competitions, a democratic building block is compromised. A clear legal framework against misuse of administrative resources helps to protect this democratic principle, but the State also needs to guarantee balance of powers and freedom of opinion. As the report argues, it is fundamental “how the legislative instrument is used, the executive power exercised and the Judiciary or independent relevant agencies apply the law”. Moreover, there must be a clear distinction between the State and political parties, as stated in the Copenhagen Declaration.

To assess the situation among Venice Commission member states, the report aims to answer two questions: 1) what are the inherent weaknesses in legislation and in practice in the member states that lead to misuse of administrative resources during electoral campaigns? 2) How to address this problem in law and in practice?

The report draws answers from various documents from the Council of Europe, the Organization for Security Co-operation in Europe (OSCE) and Case-law of the European Court of Human Rights. The comparative analysis that stems from this review points out that at least eighteen Venice Commission member states “do not have specific provisions” on the issue. It continues to describe the legal framework and, where available, a practical assessment of the situation in seventeen countries and concludes the comparative section by analyzing six more countries where there is no specific regulation on the use of administrative resources during campaigns, but “other rules which may be intended at dealing with this issue”.

The report shows that the legal environment is heterogeneous: in some cases there is a broad reference – as in the case of Finland, where the Election Act sanctions the *breach of official duty* by members of electoral commissions – and in some others there are precise provisions, including lists of public servants for whom certain behaviors and activities during electoral campaigns are restricted, definitions for when this restrictions apply or specific references to the use of administrative financial, human and other material resources during campaigns. In general, it is noted in the report that “the level of details and of effective sanctions stipulated by law is variable and does not ensure the same level of safeguards”.

For most countries, this legal landscape is contrasted with practice described by election observation reports from the Parliamentary Assembly of the Council of Europe (PACE) and from the Office for Democratic Institutions and Human Rights of the OSCE. In the cases of Finland, Ireland, Spain and Portugal, these reports do not mention the misuse of administrative resources during electoral campaigns. In the rest of the analyzed countries there are different levels of concerns with regard the conditions of equality of the playing field in electoral competitions and the separation of state resources from party and candidate resources. This includes various forms of coercion of public servants to favor of incumbents, unequal access to administrative resources by contestants and practices of vote buying, which shows “that the implementation of legal provisions in the field remains difficult in many countries”.

It is important to note that the draft report makes a distinction between use and misuse of administrative resources during electoral campaigns. In order to do so, it suggests that there is a legitimate use of them “by elected persons and senior civil servants when a political platform (and more precisely the events implementing this platform, such as inaugurations of public buildings, launching new public building programmes, increased salaries or pensions in the public sector, etc.) arises from a long-term established plan, i.e. established at the beginning of the legislature (or mandate) or at the latest at the beginning of the budgetary year. Moreover, the outcome of such a policy is not intended to be seen during electoral campaigns.” In this context, the need that “civil servants strive to develop and maintain high ethical standards in their work” is highlighted, in order to make a clear distinction between legitimate activities of a government from those of the ruling party during electoral periods.

From this analysis, the report provides six recommendations: political self-regulation, legislation against bribery and corruption, complementary legislative

measures, correct and effective application of the legislation, strong transparency and freedom of information, and public grants to political parties. I will come back to these and other recommendations by the end of my presentation.

III. The legal framework in Latin America

In a non-exhaustive ongoing research on the legal framework that regulates the use of administrative resources in Latin America, developed for the purposes of this seminar, we have identified a broad set of constitutional and specialized legislation in the region. Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela, all of them have special provisions on the issue.

Also, in line with the draft report's findings, constitutional principles provide grounds to the Judiciary to adjudicate controversies over the illegal use of administrative resources. For instance, in Mexico, article 134 of the Constitution, establishes an explicit mandate for public servants to make impartial use of administrative resources, avoiding influencing equality in the competition between political parties. In the Constitution of Uruguay, article 58 clearly states that civil servants are at the service of the Nation and not of a political group, specifying that any kind of proselytism is illegal in the work place and during work hours.

There is evidence in the region that Supreme Courts and Specialized Electoral Courts have taken action with regard misuse of administrative resources. The Colombian Supreme Court, in its decision C1153-2005, determined that public servants were banned from forcing subordinates to support political campaigns, from offering promotions or other incentives to those that take part in their political campaign or cause, and from providing benefits to citizens or communities through public administration acts or services aimed at influencing voting behavior, among other prohibitions.

In the same category, the Peruvian National Electoral Jury ruled that, as soon as there is a call for elections, State entities are forbidden to campaign in favor of political parties, candidates or coalitions. Also, national, state and municipal governmental facilities shall not be used for activities in favor of a given candidate or political organization.

Legal provisions on the use of administrative resources during campaigns establish different timeframes when drawing a line between their use and misuse. In Argentina, inaugurations of public buildings, launch or promotion of plans, projects and programs, and any governmental act in favor of candidates is forbidden seven days before the election. In Costa Rica, advertising of new public buildings is forbidden to institutions of the executive power, starting the next day of the call for elections and until the day it takes place. In Colombia, there are similar restrictions four months before the election.

Another interesting feature is that there are sanctions for misuse of administrative resources during campaigns against civil servants that violate legal provisions on the matter, but also against political parties, their representatives and/or candidates, that benefit from those resources. The latter case includes Argentina, Brazil, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay and Venezuela. These sanctions range from fines to imprisonment.

This brief overview points towards a trend to adopt regulations that protect the principle of equality in electoral competitions; a trend that is most welcome and, to different extents, supports good practice in democratic constitutional states. However, there is evidence that misuse of administrative resources during electoral campaigns is still entrenched in political behavior.

To follow the methodology of the draft report described in the first part of my intervention, there are indeed electoral observation reports for Latin America that express concerns regarding possible misuse of administrative resources during electoral campaigns and warnings to strengthen control over them. Examples include press releases by the Organization of American States of its electoral observation missions in Ecuador in 2009 and 2013 and El Salvador in 2012, which make recommendations in that sense.

As this initial assessment shows, comprehensive legislation in Latin America has not eradicated the misuse of administrative resources in electoral campaigns. Even when political actors abide by the law, cases of incumbents attempting to use their influence to shape voters' preferences remains pervasive. Two cases from the region illustrate this point.

In May 2010, Luiz Inacio Lula da Silva, president of Brazil at the time, pronounced a speech at the celebration of workers day, where he mentioned that continuity of his work was necessary and that the audience knew who he preferred. Dilma Rousseff, was present at the event and the reference was obvious. The Superior Electoral Court sanctioned the Brazilian president with a fine of 5,000 Reals under the grounds of anticipated campaigning. His presence at the event and even his explicit support to Dilma Rousseff was legal, but remains questionable with regard to the level playing field of the electoral competition.

During the 2012 electoral process in Mexico, shortly after a presidential debate, Marcelo Ebrard Casaubón, mayor of Mexico City appeared in radio and television spots explaining that, in case Andres Manuel López Obrador was elected president, he would be Minister of the Interior in his cabinet. Two political parties presented complaints to the Electoral Court of the Federal Judiciary against Ebrard Casaubón and the political coalition that supported López Obrador, on the grounds of violations of the electoral law. The Electoral Court ruled by majority that there was no disruption of the constitutional principle of equality and that the public servant did not act partially. However, other judges argue that since the spots had the clear goal of promoting López Obrador's coalition, Ebrard's appearance did violate those principles. It is true that he did not mention his position, but this fact can be deemed obvious for many of the audiences.

These behaviors by political leaders, many times at the limits of legality, are a breeding ground for persistent violations of the principle of equality. In the end, elected officials are human resources at the service of the State whose freedom of speech should be exercised with good judgment and a clear sense of responsibility. As acknowledged by the Constitutional Court of Germany in a sentence from 1977, actions by State authorities have an influential effect on the electorate's opinion and how it casts its vote. Therefore, they are forbidden, with regard to their public function, to identify themselves with political parties or candidates during elections and to use administrative resources in favor or against them, particularly through advertising aimed at influencing the voters' decision (see BverfGE 44, 125, C., I., 4, par. 49).

IV. Recommendations and guidelines

These comparative reflections point toward recommendations and suggested guidelines for the upcoming deliberations. First, there is a need to distinguish activities inherent to the State's responsibility from those of political parties and candidates. In some countries, this has been tackled with legislation on the use of administrative resources during campaigns and it is desirable to develop laws on the matter where they do not exist and improve the existing ones.

However, more laws do not necessarily imply a better protection of constitutional principles. In order to achieve this, work is much needed in the development of a truly democratic culture that counteracts entrenched vicious political habits. This involves efforts from political groups, citizens and authorities.

The draft report suggests political self-regulation to reduce abuse or misuse of political power. Charts of ethics and agreements during electoral campaigns that include the use of administrative resources could help improve the conditions of political competition. Publicity and thorough dissemination of these instruments is crucial to increase their effectiveness. Although Scandinavian countries are the primal referent, efforts can be documented elsewhere and it should be systematized and discussed, towards a catalog of best practice.

Laws against corruption and bribery must be enforced through increased integrity of the police force and prosecutors, with an independent Judiciary and by thorough auditing processes to political actors.

Fine-tuning the overall legislative environment is instrumental. The way the fundamental law defines principles, institutions, separation of powers, accountability and other decisions, affects all legislation, including electoral laws. Also the way budgetary issues are regulated determines how efficient audits can be. In many countries, financial operations that impact equality of electoral competitions occur out of the books or through complex unregulated networks.

A reflection on which institutions are responsible for the administration of justice is also important. When citizens know how to protect their political rights and who

is the responsible authority, accountability and certainty improves, and it is more likely that misuse of administrative resources is detected.

At this stage, the report provides a comprehensive comparative analysis of specialized electoral legislation and practice. A similar effort could be done around the systematization of successful preventive efforts on the misuse of administrative resources during electoral campaigns. This is in line with the idea of a catalogue of good practices and the systematization of judicial interpretations on constitutional principles about equality.

To strengthen the report, ways in which domestic law and international conventions and treaties turn into effective systems for the protection of administrative resources could be explored, identifying models for coordinated action against malpractice.

Moreover, it would be beneficial to identify specific responsibilities for the use of administrative resources during campaigns by different actors – namely, supreme, specialized and ordinary courts, prosecutors, electoral commissions, political parties, candidates, elected officials and civil servants, organizations of civil society and citizens in general. In this exercise it would be important to clarify that even though a formal campaign may have a clear timeframe, the misuse of public resources in support of a political party or cause may happen early in the electoral process or between electoral cycles. Again, prevention is key.

Finally, a deeper reflection on how the principle of neutrality is verified in the action of senior public officials in different contexts would stress the need for ethical behavior of incumbent political parties and officials. Public service, even at the highest political level, should be invested with principles, particularly during campaign periods.

With these ideas in mind, I look forward to the works of this seminar and to find in your varied and thorough experience valuable inputs to the draft report.

Thank you.