Strasbourg, 18 January 2000 Avis N° 104/1999	Restricted **CDL (2000) 2** **Engl. only**

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

THE LAW ON THE ELECTIONS OF PEOPLE' DEPUTIES OF UKRAINE: AN ASSESSMENT FROM A COMPARATIVE PERSPECTIVE

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The framework of the evaluation

At the request of the Ministry of Justice of Ukraine and in the framework of the Joint Programme between the European Commission and the Council of Europe, it has been decided that the Council of Europe will provide a legal expertise on the law on the elections of People's Deputies of Ukraine which shall be prepared by the experts of the Venice Commission. In this framework, the author was asked by the Secretariat General of the Council of Europe to submit a written opinion on the Law on the Elections of People's Deputies of Ukraine from March 1998.[1]

Aim, Viewpoint and Criteria of the Report

The predominant aim of the report is to investigate whether the election law provides an adequate legal framework for democratic – "free and fair" (Elklit/ Svensson 1996) or truly "competitive" (Krennerich 1996, 2000) elections to be held. In addition to the overall assessment, individual regulations will be examined to see whether they meet international standards and whether they will do justice to the problems with elections in the Ukraine. A number of fundamental observations must be made first:

Firstly an election law contains a complex set of individual regulations which concern very different aspects of the elections. The overall assessment of the election law can be ascertained from these individual regulations viewed as a whole. Even when individual regulations are considered to be problematic this does not automatically mean that the law is undemocratic as such. This only becomes the case if the election law contains regulations, which infringe fundamental principles of free and fair elections.

Secondly the report investigates only the legal framework of the elections. Even an election law, which contains sufficient democratic conditions, does not guarantee that democratic elections will, in fact be held. In this respect it is crucial how the provisions of the election law are or are not implemented in the respective election context, something which cannot be discussed here.

The evaluation of the election law is based on a general understanding of "free and fair" elections as it is also expressed within the context of the election observations of international organisations (e.g. UN, UE, OSCE, Council of Europe). It concentrates, as I have said, only on

[1] The report is based on the English translation of the electoral law, which was sent to the author by the Secretariat General.

the legal framework of the elections: on the election law. The evaluation takes place from a comparative perspective. The author draws on his experiences which he has collected not only as an observer of elections but also notably as an advisor in various election reform processes (Albania, Lesotho, Panama, Portugal, South Africa, Thailand) and as academic co-ordinator of a number of international research projects on elections and election law. Latin-American countries will also be drawn into the comparison as they also went through political democratisation processes in the 1980s and have since solved several election law problems, which are also relevant in the case of the transformation countries in Eastern Europe.

The following observations follow the formal structure of the election law.

General Provisions

The General Provisions contain the essential requirements of democratic elections (universal, equal, direct, secret). The provisions relating to active and passive election law correspond to international standards.

It is important that in accordance with the election law the election commissions – which the 1996 Ukrainian constitution unfortunately does not deal with separately – shall organise the conduct of elections. Especially in new democracies independent electoral commissions play a central role in the conducting of elections. In contrast to many established democracies where the election authorities are a part of the executive, in many new democracies the central electoral commission therefore acquires a status independent from the executive, legislature or judiciary. In this way it should be guaranteed that the work of the election authorities is independent.

In the case of the Ukraine it should be considered whether the independent and non-party nature of the work of the electoral commissions should be emphasised expressis verbis in Article 4 (1) of the election law.

Organisation of Elections

It should be positively emphasised that considerable attention has been paid to the organisation of elections – including the formation, the authority and the organisation of work of the electoral commissions. The corresponding provisions can all in all be considered to be unproblematic.

Of particular relevance is the fact that the Central Election Commission (CEC) in the Ukraine is constituted as a permanent acting state body. Non-permanent acting CECs, which do not come together until a few months before the elections, are nowadays considered inappropriate to manage the complex process of the organisation of an election. International standards are, however, met if constituency election commissions and polling station commissions are, as in the Ukraine, constituted within at least an appropriate period of time before the elections take place.

Concerning the problems of a potential politicisation of the CEC, a number of regulations are of relevance: the method of appointment and removal from office, the term of office and the personal status of the members of the CEC. In the case of the Ukraine it is surely advantageous that the members of the CEC are not to be determined (and dismissed) by the executive, and instead by the Verkhovna Rado of Ukraine upon the submission of the President of the Ukraine. In the face of a background of latent or manifest danger of a political instrumentalisation of the election authorities by the executive, the parliaments have been given a crucial role to play in the constitution of the CECs in many new democracies. In several countries the members of the CEC are even determined by judicial organs, which can be advantageous – certainly in the case of a truly independent judiciary.

The election law does not specify a term of office – at least not expressis verbis - for the members of the CEC. The author considers this to be a shortcoming. International experiences show that the political dependency of the CEC members can be reduced if they are appointed for a fixed term of office and their removal from office during this term can only occur – just as it is provided for in Art. 16-3 of the Ukrainian electoral law – in the event of a violation of law by the commission (and a number of other understandable situations). This effect can be further strengthened if the term of office of the CEC members does not coincide with the term of office of the president or parliamentarians so that it can be ensured that new political balances of power do not automatically have an effect on the composition and the work of the CEC. The electoral law does not provide for the last point. It does at least state that the staff of the CEC cannot be changed by more than one-third during a year (Art. 10-4). In addition the danger of a politicisation is reduced to at least to the extent that candidates for deputy, their authorised persons or authorised persons of political parties, electoral blocs of parties or who are not close relatives of a candidate for deputy (husband, wife, their children, parents, brothers and sisters), are not allowed to be members of election commissions (Art. 16-1).

The competencies of the different electoral commissions do not present a problem. It is important that the CEC exercises control over the entire election process (Art. 11-1, 11-2, 11-3), including a number of delicate areas relating to the drawing up of the budget (Art. 11-4), the use of elections funds (Art. 11-5), the formation of election constituencies (Art. 11-6) or the registration of lists of candidates, nominated by political parties or electoral blocs of parties (Art. 11-8) etc. In any case the drawing up and control over the voters list (see below) seems not to be conferred upon the CEC, as is the norm in Latin America for example.

The formation of election constituencies is dealt with, sensibly, in a separate article (Art. 7). Any system that applies single-member constituencies – even a combined system – requires the time-consuming and expensive process of drawing electoral boundaries. This is no one-off task since boundaries have to be regularly adjusted to take population changes into account. Care must be taken that the formation of constituencies is politically meaningful. Here a far greater importance exists for the majority structures in parliament where there are single-member constituencies in the shape of parallel electoral systems, as used in the Ukraine and Russia than in Mixed Member Proportional Systems, such as used e.g. in Germany, New Zealand or Venezuela. In order to prevent a political manipulation of the drawing of election constituencies ("gerrymandering")[2] it is therefore sensible to consider the administrative-territorial division and to limit the deviation of number of voters from the average number of voters in election constituencies. Corresponding provisions are contained in the Ukrainian electoral law (Art. 7-1, 7-3 and 7-4). It is also a welcome that in the formation of election constituencies the density of national minority populations is explicitly considered (Art. 7-1, 7-2).[3]

Voters List

"Voter registration is the most complex, controversial and often least successful part of electoral administration" in new democracies (International IDEA 1997: 117). In the Ukraine the voters lists will, with few exceptions, be drawn up by the respective local state administration for each polling station (Art. 14-1), whereby the polling station commission should verify the voter lists before the elections and afterwards receive those voters who arrive on the territory of the polling

[2] Gerrymandering is the practice of drawing electoral constituency boundaries with political parties' interest in mind. This manipulative tactic is named after Mr. Gerry, who cut out a safe salamander-shaped constituency for himself in the city of Boston (Nohlen 1996: 51).

[3] At least in the English translation, the second sentence of Art. 7-2 is not clear: "In cases when the number of voters who belong to the national minority make a larger number of voters than needed to form one election constituency, the constituencies shall be formed in such a way that at least in one of them the voters who represent the minority make a larger number than the number of voters in the constituency".

station after the lists have been drawn up and checked. Special regulations for voters who reside within the territory of military units, for voters in places of temporary stay (hospitals etc.) and for voters abroad are provided for. It is not clear from the electoral law whether the CEC is to oversee the entire process of electoral registration, which would be considered very sensible by the author in the light of international experiences.

Nomination and Registration of Candidates for Deputy

The regulations in respect of the nomination and registration of candidates for Deputy have been controversially debated in the Ukraine. They are, however – bearing in mind the reservations mentioned below – acceptable.

It should be noted as positive that parties may explicitly form electoral alliances. (In a number of countries in Latin America this is, for example, not possible). Sensibly it is not, however, permitted that a political party, included with an electoral bloc of parties which submitted its list of candidates for deputy, submit another list of candidates for deputy and be a member of another electoral bloc of parties.

In the face of a background of fluid and fragmented party systems and major regional differences it is not considered problematic that the national candidature lists of parties will have to be supported by at least 200,000 voters (the same number as in Russia), and no less than 10,000 voters in each of any 14 administrative territorial units of the Ukraine. The great demands did not prevent the list vote being contested by 30 parties and party blocs in the 1998 elections. No incentives are to be had though by independent candidates – the number of which is indeed great in the Ukraine – from the great demands on the parties, to organise themselves in a party-political way. The rule that independent candidates in single-member constituencies require 900 signatures for their candidature for Deputy, whilst party candidates for Deputy in single-member constituencies do not have to provide any signatures does at least seem to have this effect. The preference of candidates from parties / party blocs – criticised by the Constitutional Court – in the single-member districts is considered by the author to be non-serious in the light of the great demands placed on the admission of party lists and the large number of independent candidates. Also the rule that candidates are able to stand simultaneously in both single-member districts and on party lists is not unusual from an international perspective. Such a rule is adopted in numerous democracies with two or more candidacy levels, including Germany. The advantage of such a rule is that also “anonymous” list candidates are active in the constituencies and are

thereby tied to the constituencies. In other words: The possibility of the parallel candidacy can improve the relationship between voter and representative in parallel electoral systems. Also reduced is the much-cited danger that two "classes" of MPs emerge – on the one hand the constituency MPs who are directly elected "at the grass-roots level", on the other hand the "anonymous" list MPs, which nobody in the constituency knows.

The rule in Art. 27-2 that during the election campaign, a candidate for deputy receives an average salary or other income for the last three months accounted by the election commission which registered the candidate for deputy from the funds, allocated for the conduct of elections should be re-considered. Although the purpose of such a rule is obvious (equalising opportunities for candidates) care must be taken that this does not lead to the number of (especially independent) candidates increasing considerably. The rule is extremely unusual for Western Europe and Latin America.

Problematic is Art. 21-3 which states that the formation of lists of candidates from political parties and electoral blocs of parties shall be carried out by the higher representative administrative body of a political party or electoral bloc of parties *in a manner, determined on their own.* It would be advisable here to require the principal of internal party democracy, in which for example the above mentioned passage is at least modified: *in a democratic manner.*

Not provided for is a minimum quota of women on the voting lists of the parties and party blocs. Although such an admittedly very progressive rule has up until now only been introduced in a few democracies, it is worth considering when re-working or reforming new electoral laws. It is in any case noticeable in the Ukraine that "... [n]one of the parties or blocs seem to have tried to put lesser-known but serious female candidates on its list" (Diuk 1998: 197). Similarly the Information Report on the parliamentary elections in Ukraine (29 March 1998) of the Council of Europe found that "... [w]omen were badly represented in the lists of almost all political parties, both at local and parliamentary level".

Pre-Election Campaign Publicity

In respect of the pre-electoral campaign, the access for candidates, parties and party blocs to the mass media is of most significance. This area is regulated in the electoral law. In practice it has been demonstrated, however, that "... [b]oth state and private media clearly promoted particular

parties over others"[4]. In the light of these experiences it would seem advisable to draft the corresponding rules in the electoral law, or at least the provisions for their implementation by the CEC more precisely. International experiences show that it is sensible to clearly regulate the different branches, divided into public and private media: The conditions for access to the media (free, semi-free or upon payment); the allocation of time and space in the media for the respective candidates/parties/alliances and the time of broadcast or printing of election propaganda. Here there are very varied solutions. It is important, however, that these rules are precise enough – and that not adhering to them will be sanctioned. In this respect there are a number of improvements that can be made in the case of the Ukrainian electoral law. For the Ukraine, amongst other things it has thus been provided: “Most media outlets, especially television, complied with the law requiring them to give free air time or column space to candidates, but it was widely thought that this time or space was insufficient for candidates fully to explain their platforms" (Diuk 1998: 110). Certainly in many cases the electoral law was quite simply breached, for example Art. 35-11 which states: "State television and radio companies, printed mass media with a state share, share of bodies of local self-government, their officials, creative workers of mass media are prohibited from supporting or giving preferences in any form to any political parties, electoral bloc of parties, candidates for deputies and their electoral programs in their reports, materials and programs during the period of pre-election campaign". It would be a good idea to think about stricter sanctions and controls. The same goes for other restrictions for the Conduct of Pre-Election Campaign Publicity. The rule – in practice largely ignored – that the participation of state institutions, bodies of self-government and their authoritative and public officials, chairmen, deputy chairmen, secretaries and members of elections commission in election campaign publicity is prohibited (Art. 35-7) should be emphasised here.

Another crucial point concerns the financing of pre-election campaign publicity, carried out at the expense of the state budget of Ukraine, as well as funds of political parties, electoral blocs of parties, candidates for deputy, donations of physical and legal entities (Art. 37-1). Around the world very different models are employed in this context. All things considered, the regulations in the Ukraine do not go against any democratic principles. It could though be considered whether the non-limitation of both the amounts of private donations for the election campaign

[4] Preliminary Joint Statement ussued on 230 March 1998 by the OSCE and the Council of Europe Parliamentary Assembly, in: Council of Europe (1999).

and the level of campaign expenditure is appropriate. Of particular significance is the transparency of the financing which Art. 37-4, 37-5, 37-6, 37-10, 37-11 and 37-12 seek to achieve. Here it also depends essentially on the practice of control. It remains unclear what sanctions infringements will be punished. The transfer of improperly allocated election funds election fund to the state budget of Ukraine (Art. 35-7) is the only explicit rule, and this is by no means a hard sanction.

The prohibition of publishing surveys and public opinion polls regarding rating of political parties, electoral alliances or candidates directly – in the case of the Ukraine 15 days – before elections (Art. 35-12) is meanwhile a permanent feature of modern electoral laws.

Voting

The electoral law (Art. 4-3; Art. 40-1) provides for the secrecy of the election and regulated (Art. 40-9): Ballots shall be completed by the voter in a booth or room of secret voting. The presence of other persons while the completing of ballots is prohibited. Exceptions to this rule are also contained in the same article, which are obviously somewhat vague in one respect: the condition for a voter to be able to request assistance in completing the ballot paper is "that he cannot complete the ballots himself". It would possibly be sensible to more precisely formulate the exceptions and similarly the corresponding sanctions for breaching the secrecy of the vote. What is not acceptable is surely the – indeed not permitted by the electoral law – "family vote", whereby two or three people go into the cabin at the same time (Council of Europe 1998: 3). In practice open voting and family voting is still a common problem in the Ukraine. Besides legal counter-measures there must certainly also be measures taken in the area of voter education and the election administrator education.

A not inconsiderable new feature of the electoral law of 1998 was the introduction of the positive vote backing the candidate or the list by the party/party bloc (whereas earlier the candidate who was not voted for was crossed off) (Lohmann 1998). This form of voting is meanwhile an international norm. What is unusual for western democracies is, however, the possibility of casting a negative vote: ("Do not support any of the candidates for deputy" in the ballots for elections in single-member constituencies. "Do not support candidate list of any political party, electoral bloc of parties" in the ballots for elections in the multi-member all state constituency). The negative vote comes from the communist tradition of non-competitive elections and is still used in a number of post-communist states. It gives the voter the possibility of expressing his

annoyance with the parties on the ballot paper. Certainly in this way the politics and party apathy in the population can also be strengthened if the voter can simply reject politics and parties instead of making the – often not easy – decision as to who is the better – or best of the worst – candidate or party/alliance. There are, then a number of good reasons for abandoning completely the negative vote.

Tabulation of Votes and Determining of Elections Results

Art.1-2 already lays down the fundamentals of the Ukrainian voting system (in the narrow sense)[5]: "The total number of People's Deputies of Ukraine to be elected is 450. Two hundred and twenty-five (225) deputies shall be elected in single-mandate electoral constituencies on the basis of relative majority, 225 shall be elected according to lists of candidates from political parties, electoral blocs of parties in the multi-mandate all-state electoral constituency on the basis of proportional representation". In the terminology of voting system research this is a parallel or segmented system (see Nohlen 1996; Krennerich 1996a; Nohlen/ Grotz/ Krennerich/ Thibaut 2000). The explanations are complete by way of the rule that each voter has two votes (Art. 40-6, 40-10 and 40-11) and by way of the provisions in articles 42 and 43. According to these the seats in the national constituency are to be allocated proportionally. (4% threshold, Hare quota and largest remainder) (Art. 42-5, 42-6, 42-7, 42-9, 42-10). In contrast to this, the winners in the single-member districts are to be determined by way of the plurality rule (first-past-the post) (Art.43-4).

The voting system, which tends strongly towards the Russian model conforms without any doubt with democratic standards. Comparing the Ukrainian parliamentary voting systems of 1994 and 1998 even reveals considerable improvements: In 1994 an absolute majority system in single-member constituencies was applied. To be elected a candidate needed an absolute majority (50% plus one) of valid votes with a minimum turnout of 50% of the registered voters. In practice, these two clauses had resulted in numerous repeat elections until a winner emerged. Several seats couldn't even be allocated. In the electoral law of 1998 the old Soviet era requirement of a 50 percent turnout was dropped, as was the absolute majority requirement in the single-member districts. By using a simple majority rule (plurality rule) these countless repeat elections in den single-member constituencies are no longer necessary. Taking into account the party system, it

[5] "Electoral systems determine the rules according to which the voters may express their political preferences and according to which it is possible to convert votes into parliamentary seats (in the case of legislative elections) or into government posts (in the case of elections for the president, governors, mayors etc.)" (Nohlen 1996: 20 f.)

also appears that the parallel system is more functional for the Ukrainian democracy than the absolute majority system (see Grotz/ Haiduk/ Yahnyshchak 1999).

The regulations which are contained in the other sections of the electoral law (Repeat Voting, Repeat Elections, Procedure to Fill Vacancies of People's Deputies, Extraordinary Elections; Concluding Provisions; Final Provisions) are essentially unproblematic. It is important that in particular Art. 52 which stipulates that persons who breach the electoral law shall be accountable in accordance with the laws of Ukraine. Unfortunately, no further specific details have been arranged.

It is also noticeable that Art. 47 (Definition of Elections as Void) has been kept very short. The question as to how challenges to the validity of elections are to be dealt with is only briefly considered. The provisions in many other countries are more detailed. It has been determined that in numerous new democracies which have been confronted with accusations of election fraud or election complaints the question of challenges to elections has unfortunately only been vaguely regulated and allows for a considerable amount of freedom of interpretation. The central question is who decides on the validity of the elections or on challenges to the validity of elections. In some countries the final decision lies with the National Electoral Commission alone, in others it is an organ of the judiciary, for example the Supreme Court (see e.g. the Polish electoral law of 1993). In other countries again the National Electoral Commission in principal makes the decision but the Constitutional Court or the Supreme Court can where necessary challenge this. The Ukraine regulation corresponds mostly to the third model: Art. 47 states that the CEC may declare elections void if, during the course of their conduct or tabulation of votes, there were violations of the electoral law, which influenced the outcome of elections (Art. 47-1). A request to declare the elections void can be submitted to the CEC by a specific group of people as stated in Art. 47-2 and within a specific period of time. The decision of the CEC to declare the elections void, to refuse to declare the elections void or non-adoption of a decision on this issue can be appealed to the court (Art. 47-3). It is not clear on what basis, in what form and through whom this judicial review of the decision of the CEC should occur. It can as such quickly lead to disputes over competencies. Here there is the need for further regulation, especially as the issue is of great political significance in the Ukraine. Numerous complaints on the subject of procedural misconduct and fraudulent activities flooded the Central Election Commission after the 1998 parliamentary elections (Birch/ Wilson 1999: 280).

Conclusions

In summary it has been established that the Law of Ukraine on Election of People's Deputies of Ukraine of March 1998 does not infringe fundamental principles of democratic elections. In contrast to the 1994 electoral law (which was not a part of the evaluation in this report) it contains a number of improvements, notably in the area of the electoral system, which are beneficial for the democratic development of the Ukraine.

Certainly the law contains a number of important gaps which should be filled. The most serious of these concerns the question of challenges to elections. The need for regulation also exists, however, in respect of the role of the media and state functionaries in the pre-electoral-campaign as well as the appropriate control and sanction possibilities in the case of a breach of the electoral law. What is more it would be advisable to fix a regular term of office for the members of the Central Electoral Commission in Art. 10 and to work in the principle of party political democracy to Art. 21-3. A more precise drafting of Art. 40 could do more to hinder open voting and family voting. An explicit emphasis of the independent and non-party nature of the work of the CEC in Art. 4-1 would not be out of place. The retention or abolishing of the negative vote could be discussed.

The much-debated area of the nomination of candidates is not perceived to be a problem by the report's author.

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