



Strasbourg, 5 June 2007

Opinion no. 439 / 2007

CDL-AD(2007)021
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON LEGISLATIVE PROVISIONS
CONCERNING EARLY ELECTIONS
IN UKRAINE**

**Adopted by the Venice Commission
at its 71st Plenary Session
(Venice, 1-2 June 2007)**

on the basis of comments by

Mr Ángel SÁNCHEZ NAVARRO (Substitute member, Spain)

I. Introduction

1. *Following the political crisis in Ukraine after the President signed an Ukase on the pre-term termination of powers of the Verkhovna Rada, the Parliamentary Assembly of the Council of Europe adopted a Resolution 1549 on 19 April 2007 on the Functioning of democratic institutions in Ukraine.*
2. *The Parliamentary Assembly of the Council of Europe asked the Venice Commission to prepare an opinion on the existing legislative basis for pre-term parliamentary elections in Ukraine and on the possible ways to improve electoral legislation based on European practice.¹*
3. *The following opinion was prepared on the basis of comments by Mr A. Sanchez Navarro (Substitute member, Spain) and adopted at the 71st Plenary Session of the Venice Commission (Venice, 1-2 June 2007).*

II. General

4. The current legislature was elected on 26 March 2006. Two major forces were facing each other for the seats in the Verkhovna Rada – the Party of Regions of Mr Yanukovitch and the Yulia Timoshenko block (BYT). As a result of the vote they received 32,14% and 22,29% respectively but neither party got an absolute majority. As a consequence both forces had to form coalitions. The BYT tried to form a parliamentary coalition with its former partners from the Orange coalition – the pro-Presidential “Our Ukraine” and the Socialist party of Ukraine, however, after several months of negotiations this attempt failed. The socialist party joined a coalition led by the Party of Regions, which formed a Government on 4 August 2006.
5. From the very beginning the work of the parliament was marked by successive crises.² The latest one resulted from the change of coalition affiliation by several MPs from the opposition.
6. On 2 April 2007 the President of Ukraine used his constitutional powers and took a decision to terminating the powers of the Verkhovna Rada by a decree. A group of MPs filed a complaint against this decision at the Constitutional court of Ukraine. On 26 April 2007 the President of Ukraine issued a new decree on early elections to the Rada which cancelled his decree of 2 April 2007 and fixed the new date of elections on 24 June 2007. Following negotiations between the President, the government and different political forces on 27 May it was decided to hold the elections on 30 September 2007.
7. The question to be answered in this context would be: do the constitutional and other legal provisions in Ukraine provide for sufficient framework for a clear and timely organisation of the vote and what are the possible ways to conduct pre-term elections in accordance with the democratic standards?

III. Constitutional and legislative provisions concerning early elections

8. In its Resolution 1549 the Parliamentary Assembly noted that:

¹ Resolution 1549 (2007) on Functioning of democratic institutions in Ukraine, para 18.

² See also the Report of the Parliamentary Assembly of the Council of Europe on Functioning of democratic institutions in Ukraine of 17 April 2007 (Doc. 11255).

"both regular and pre-term elections constitute a legitimate democratic instrument for the people to choose and control the authorities that act in their name. Early elections are a normal practice in all democratic countries of the Council of Europe and as such could be accepted as a key building block of the political compromise. However, the Assembly underlines that for any elections to be considered democratic, they should be conducted according to a legitimate procedure that allows fair campaigning and free choice for voters."

9. As far as the general legal framework for organizing elections is concerned, the regulatory levels should be clear and there should be a certain stability of electoral law. The Code of good practice in electoral matters of the Venice Commission gives clear reasons for it:

"[...] Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. Rules which change frequently (...) may confuse voters."³

10. In this respect pre-term elections are no exception to the rule. In this context it can be suggested that changes to the legislation are to be made only in case if such measure is necessary to protect the constitutional right of the voters. Therefore, the existing legislation should be thoroughly assessed and if there is a possibility to remedy to the problem through decisions of the electoral management bodies, such option might be chosen.

11. Pre-term elections are a serious event in a political life of any country. Very often it is a period of tension and heated debate between different political forces. However, state bodies responsible for organising the vote should manage the electoral process in strict accordance with the Constitution and the existing legislation. Political parties have to respect the rules of the game as well, since fair elections provide them with the legitimacy as political actors. In this context the role of the electoral management bodies is essential – they implement the legislation and are in principle independent in their decision-making both from other state institutions and from political parties.

12. In Ukraine provisions on early elections are included in the Constitution and in the law "On the election of People's deputies of Ukraine" (CDL-EL(2005)021). It is important to note that the law on the elections of deputies was adopted before the last constitutional changes. As a consequence, there could be some problems in implementing some of the constitutional provisions through the existing law.

13. Provisions on how an early vote is organised are not described in the Constitution. Article 77 paragraphs 2 and 3 establishes that early elections must be held no later than 60 days after the dissolution of the Rada in accordance with the provisions of the law on the election of the People's deputies of Ukraine.⁴

14. The law on the election of People's deputies of Ukraine deals with early elections in its article 16 paragraph 3 and article 102. The first provision just makes a distinction between "*regular*" and "*irregular*" elections and states that irregular ones are called by the President according to the procedure established by the Constitution.

15. However, article 102 establishes a rather detailed framework for organising an early election. According to its provisions:

³ The Code of good practice in electoral matters. Document CDL-AD(2002)023rev, page 26 para 63-64.

⁴ The relevant articles of this law appear in Appendix II to this opinion.

- a) the same territorial constituencies that have been used for the previous elections are used for the pre-term elections;
- b) special and exceptional polling stations (or special or exceptional polling districts as they appear in the translation of the law) are created no later than 19 days before the vote;
- c) territorial commissions are created not later than 50 days before the elections (parties must apply for nomination of their members of the commissions no later than 53 days before the vote);
- d) polling stations are established no later than 12 days before the vote;
- e) candidates can be nominated immediately after the publication of the presidential decree but no later than 40 days before the vote;
- f) registration of candidates for the deputies terminates 25 days before the day of elections;
- g) informational posters of the parties (blocs), mentioned in Article 54 of this law, are produced not later than 20 days before the day of elections;
- h) voters' lists are established by the territorial commissions and transmitted to the polling stations no later than ten days before elections (the same term applies to the special polling stations) ;
- i) the Central Electoral Commission approves the form and text of ballot papers not later than 24 days before the day of elections.

16. As it appears from the above list the process of early elections and different aspects of organizing the vote are covered by article 102 of the law. In the case of the current pre-term elections in Ukraine it was decided to hold them on 30 September 2007. This negotiated solution provides the authorities and different political forces with the additional time to prepare for the vote. However, some of the elements of this procedure need a more detailed regulation.

17. According to paragraph 2 of the article 17 of the Law on the Central Electoral Commission of Ukraine it is responsible for the implementation of the Constitutional and legislative provisions concerning the electoral process. It has even the power to propose necessary changes to the legislation on elections and referendums according to paragraph 6 of the same article. Another important attribution of the Central Electoral Commission is the possibility to adopt decisions on the practical issues concerning the organisation of the parliamentary elections (paragraph 3 of the article 19). Some of the unclear provisions of the electoral law can be completed through a set of specific decisions adopted by the Electoral Commission of Ukraine and it should use this power more actively. For example, such aspects as the work of the electoral administration, the complaints and appeals procedure and voters' lists might need additional regulation.

18. The law provides that territorial commissions are created "*not later than 50 days before the elections and parties apply for nomination of their members of the commissions no later than 53 days before the vote*". Under present circumstances and using the extended timeframe for organising elections the Central Electoral Commission might envisage the possibility of creating electoral commissions of lower levels as early as possible in order to facilitate professional training of their members.

19. The issue on complaints and appeals procedure in case of early elections is not addressed by the provisions of the law. This might be problematic under circumstances where the timeframe for different aspects of organising the vote is reduced. However, in the case of the present pre-term elections, the electoral management bodies have enough time to envisage measures providing the participants to the electoral process with a possibility to appeal against any decisions, actions or lack of action that might violate their electoral rights.

20. The process of checking the accuracy of the voters' lists could be one of the major problems in the pre-term elections. The Law on the election of People's deputies of Ukraine provides that voters' lists are established on the basis of lists from the previous election (in present case the parliamentary election of 26 March 2006). The law on the voter register adopted by the Rada in March 2007 will enter into force on 1 October 2007. According to the information received by the Commission the voters' register does not exist yet. The current provisions might not be enough for the electoral commissions and other competent bodies to carry out the work of checking and up-dating the voters' lists. However, if the competent authorities, including the Central Electoral Commission address the issue in a timely manner this problem can be solved before 30 September 2007.

21. The organisation of elections both regular and irregular in Ukraine is regulated through several laws. As it has been already mentioned, in the case of pre-term elections there is a very limited possibility for interpreting the way how these laws can be applied and combined. In their joint 2006 opinion on the Law on elections of peoples deputies of Ukraine⁵ the Venice Commission and OSCE/ODIHR recommended the authorities to assess "*whether the combination of various electoral rules into a single electoral code would be feasible*". This recommendation should be seriously considered by the authorities.

IV. Conclusions

22. The Constitution, as well as the electoral law, provide for the basic elements which must rule special or pre-term elections. Nevertheless, some legislative provisions and procedural aspects of their implementation seem to be unclear and/or not sufficient for fully ensuring the electoral rights of voters. This can seriously compromise the electoral process and create political and social unrest.

23. In order to minimise the above-mentioned shortcomings the Central Electoral Commission should fully use its powers in implementing the existing legislative provisions on pre-term elections. Its role is essential in organising the work of the lower commissions, registering the candidates and checking the voters' lists. In the context of early elections the political climate is tense and there is a risk of confrontation between political forces. The Central electoral commission's role is essential during the pre-electoral period and it should not be subjected to undue pressure from other state authorities and from different political forces. If the Central Electoral Commission uses its powers there should be no obstacles to holding of early elections in a manner compatible with the European standards.

24. The legislative provisions should indicate clearly the terms for a timely allocation of financial resources to organise the pre-term elections.

25. Decisions taken within their competencies by different state authorities and courts should be implemented in a timely way otherwise the voters' trust in the electoral process could be seriously undermined.

⁵ CDL-AD(2006)002rev, page 24, para 107.

Appendix I**DECREE
of the President of Ukraine****No. 264/2007 (cancelled by the decree of 26 April 2007)****On the Pre-Term Termination of Powers of the Verkhovna Rada of Ukraine**

Recently a situation has emerged when the majority in the Verkhovna Rada of Ukraine was ignoring the constitutional requirements with regard to the formation of the coalition of deputy factions. To replace isolated instances of inclusion of some people's deputies into composition of the deputy factions' coalition, which had taken place during the formation of the Anti-crisis Coalition in July 2006, a new practice of massive enlargement of the coalition on the basis of individual or group membership has appeared. Such practice is a flagrant violation of Article 83 of the Constitution of Ukraine which provides for formation of the deputy factions' coalition in the Verkhovna Rada of Ukraine, upon results of elections and on the basis of agreed political positions, exclusively by deputy factions.

The violation of the constitutional provisions concerning the formation of the deputy factions' coalition in the Verkhovna Rada of Ukraine distorts results of people's expression of will, carried out in accordance with Article 69 of the Constitution of Ukraine through parliamentary elections in March 2006, is a negation of constitutional election rights of citizens of Ukraine, results in the neglect of the constitutional principle of people's sovereignty, provided for in Article 5 § 2 and 3 of the Basic Law of Ukraine. Such developments are a real pre-condition for usurpation of power in Ukraine which is prohibited by Article 5 § 4 of the Constitution of Ukraine. This also threatens national security, causes destabilisation of the political situation in the state, and creates potential risk to the state sovereignty.

According to Article 102 § 2 of the Constitution of Ukraine the President of Ukraine is the guarantor of state sovereignty and territorial indivisibility of Ukraine, the observance of the Constitution of Ukraine and human and citizens' rights and freedoms. Such constitutional status of the President of Ukraine obliges him to take actions to halt violations of the Constitution of Ukraine, of citizens' rights, to prevent threats to the state sovereignty and territorial integrity of the state. This, in particular, entails an obligation to effect early termination of powers of the parliament in the case of violation by the latter of the Basic Law of Ukraine, if there are no other means to prevent flagrant violations of the Constitution of Ukraine by the Verkhovna Rada of Ukraine.

Taking into account the above mentioned and being governed by Article 5 § 2-4, Article 77 § 2, Article 83 § 6, Article 106 § 1 (1, 7) and 3 of the Constitution of Ukraine, in order to implement Article 102 § 2 I hereby **decree**:

1. To terminate powers of the Verkhovna Rada of Ukraine of the V convocation before expiration of its term of office.
2. To propose to people's deputies of Ukraine to continue to carry out their powers which are not directly related to the powers of the Verkhovna Rada of Ukraine.
3. To designate extraordinary elections to the Verkhovna Rada of Ukraine on 27 may 2007.
4. The Cabinet of Minister of Ukraine shall ensure financing of the extraordinary elections to the Verkhovna Rada of Ukraine.

5. The Central Election Commission shall ensure the holding of the extraordinary elections to the Verkhovna Rada of Ukraine in accordance with the Constitution of Ukraine, Law of Ukraine "On the Elections of People's Deputies of Ukraine", and other laws of Ukraine.
6. This decree comes into effect from the day of its official publication.

President of Ukraine Viktor YUSHCHENKO
2 April 2007

Appendix II

Articles 16 and 102 of the Law of Ukraine On Elections of People's Deputies of Ukraine

As amended by laws:

N 3099-IV (3099-15) of 17.11.2005, N 3368-IV (3368-15) of 19.01.2006, N 10-11,N 3437-IV (3437-15) of 09.02.2006, N 10-11, cm.98 N 3519-IV (3519-15) of 14.03.2006.

Article 16. Terms of conduct of elections

1. Regular elections of the deputies are conducted on the last week of March of the last year of powers of the Verkhovna Rada of Ukraine, the term of which is determined by the Constitution of Ukraine.
2. Electoral process of regular elections of the deputies begins 120 days before the day of elections. The Central Electoral Commission announces the beginning of an electoral process not later than 125 days before the day of elections.
3. Irregular elections of the deputies are conducted on the last week of the sixty-day period after publication of the Decree of the President of Ukraine on pre-term termination of powers of the Verkhovna Rada of Ukraine, issued according to the Constitution of Ukraine.
4. Electoral process of irregular elections of the deputies starts on the day following the publication of the Decree of the President of Ukraine, mentioned in part three of this Article.
5. Electoral process is terminated by official declaration of the results of elections of the deputies by the Central Electoral Commission.

Article 102. Peculiarities of conduct and preparation of irregular elections of the deputies

1. Territorial constituencies created for conduct of the last elections of people's deputies of Ukraine are used for conduct of irregular elections of the deputies.
2. Special or exceptional polling districts for conduct of irregular elections are created not later than 19 days before the day of elections and in exceptional case of creation of a polling district in accordance with Article 19 part eleven of this Law – not later than 5 days before the day of elections in the order established by this Law.
3. Territorial electoral commissions are created not later than 50 days before the day of elections upon the applications of parties (blocs) – subjects of electoral process of last elections of people's deputies of Ukraine, which are submitted to the Central Electoral Commission not later than 53 days before the day of elections.
4. Polling district electoral commissions are created not later than 12 days before the day of elections, and in exceptional case of creation of a polling district in accordance with Article 19 part eleven of this Law – at the same time with creation of polling districts upon applications of republic in the Autonomous Crimea Republic, oblast, local in city Kyiv or Sevastopol organization of a party (bloc) – subject of electoral process. These requests are submitted to the territorial electoral commission 15 days before the day of elections in the order established by Article 23 of this Law.

5. Nomination of candidates for the deputies starts on the next day after publication of the Decree of the President of Ukraine on pre-term termination of powers of the Verkhovna Rada of Ukraine, and terminates 40 days before the day of elections.
6. Submission of documents for registration of candidates for the deputies to the Central Electoral Commission terminates 30 days before the day of elections. Registration of candidates for the deputies terminates 25 days before the day of elections.
7. Informational posters of the parties (blocs), mentioned in Article 54 of this law, are produced not later than 20 days before the day of elections.
8. Lists of electors in exceptional polling districts are prepared according to the procedure, established by law and are transmitted to the territorial commissions no later than 20 days before the elections.
9. Territorial electoral commissions transmit one copy of the electoral list to the polling district electoral commissions no later than ten days before the elections.
10. Lists of electors in special polling stations are established according to the law no later than 10 days before the elections.
11. Lists of electors in foreign polling districts are drawn up in the order envisaged by this Law. Lists of electors are transmitted to the foreign polling districts no later than ten days before elections. Lists of electors in foreign polling districts are verified according to the provisions of the present law.
12. The Central Electoral Commission approves the form and text of a ballot papers not later than 24 days before the day of elections.