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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 30 September 1999

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**Avis N° 104/1999**

Restricted

**CDL (99) 51**

**Engl. only**

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

(VENICE COMMISSION)

# THE 1998 PARLIAMENTARY ELECTORAL LAW OF UKRAINE: EVALUATIVE CONSIDERATIONS FROM A COMPARATIVE PERSPECTIVE

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*1. Introduction*

Ukraine, one of the new states that emerged after the break-up of the Soviet Union in 1991, belongs to those East European countries with less favourable prerequisites for democratic consolidation. Having been under Russian rule for over 300 years, Ukraine has no tradition of (democratic) stateness comparable to Poland, Hungary or the Czech Republic. Nor became the national-democratic movement *Ruch,* founded in the Ukrainian Soviet Socialist Republic in 1989, as influential as its counterparts in East-Central Europe or the Baltic states. Due to this structural weakness of civil society, Ukrainian politics have mainly been determined by the old elites of the communist regime up to now.

Given these historical-structural problems, democratic elections are obviously of great significance for Ukraine's political development. In contrast to Western Industrialized countries, free and fair elections under a „fragile" new political system mean not only a well-known, legitimized procedure to transfer political power - they can also shape the behaviour of both elites and citizens and thus contribute to the development of democratic attitudes in the post-authoritarian society.

Since the democratic quality of elections may play an crucial role within the political development of post-communist Ukraine, it becomes especially important whether the legal foundations of these elections can be considered well-established or not. Therefore, this paper focuses on the following questions: Do the regulations of the 1998 Ukrainian Parliamentary Election Law ensure competitive elections under the above mentioned contextual conditions? To what extent do they contribute to the procedural functioning of the new democracy?

However, a precise answer to these questions is no easy task. The assessment of electoral laws in new democracies is usually not a categorial decision (*either* democratic *or* undemocratic), but a matter of degree. For such a differentiated evaluation, a twofold point of reference has to be established:

a. On the one hand, there are no general criteria allowing to consider specific electoral regulations *sufficiently* democratic. For example, the same formulation concerning general suffrage that works well in a West European democracy would certainly be regarded as too vague when applied to a multi-ethnic society. Therefore, the *historical-political context* in which electoral regulations come into effect must always be taken into account.
b. On the other hand, the exclusive focus on domestic electoral debates does not provide adequate evaluative criteria. Such political discussions usually concentrate on certain

issues and therefore cannot present a systematic picture of the electoral law and its possible shortcomings. Sometimes political actors also misjudge the effects of electoral provisions that are internationally accepted and frequently used. Thus, a balanced evaluation of an electoral law also presupposes *comparative standards of electoral regulations.*

The considerations on the 1998 Ukrainian Electoral Law presented below try to include both the contextual and the comparative aspect of evaluation. Firstly, the specific historical situation of post-communist Ukraine is taken into account. The argumentation stresses both the improvements of the new Election Law compared to its predecessor and its still remaining shortcomings visible on the 1998 elections. Secondly, electoral provisions from other (mainly post-communist) countries are referred to in order to give the evaluative statements an empirical-comparative dimension.

The following remarks are structured according to the main systematic parts of electoral laws: suffrage and electoral registration, candidacy, electoral campaign, electoral system and organisational context (electoral commissions and electoral observation).

## 2. Suffrage and Electoral Registration

The electoral provisions concerning suffrage and electoral registration neither deviate from international standards nor entail serious shortcomings with regard to the Ukrainian context.

The age of voting at 18 years (Art. 3/3) corresponds to the current European standard (Grotz 2000). According to the detailed enumeration in Art. 3/1, no group of Ukrainian society can be excluded from suffrage. Moreover, the equality of ethnic groups is explicitly mentioned. This is of special importance, as Ukraine has a relatively big Russian minority (22% of population). The principle of ethnic electoral equality even exceeds the voting right of individuals, since it refers to minority groups as well. The Law explicitly states that „areas of dense residence of national minorities“ must not discriminated by the formation of electoral constituencies (Art. 7/2).

Electoral registration is regulated in detail as well (Art. 18). In contrast to the states of former Yugoslavia, where many citizens do not live at their original place of residence any more, there are no serious technical problems with voter registration in Ukraine. As in many other democratic countries, the Electoral Law has established special provisions for military servicemembers and representative official persons abroad (Art. 19). Further regulations concerning *ethnic* Ukrainians living abroad (e.g. in Russia or Slovakia) are not necessary, as these (as citizens of the respective states) have the right to vote there. The only point that can be

critically remarked in this respect is „the failure of initiatives for granting [Crimean Tatar] returnees with permanent residence, regardless of citizenship, the right to vote“ (Council of Europe 1998: 9).

**3. Candidacy**

In contrast to the just mentioned provisions, regulations concerning candidacy have been controversially debated in the Ukrainian public. Immediately after the new electoral law had been adopted, two constitutional appeals were launched against it by 109 deputies and legal advisors. Thereupon, the Constitutional Court of Ukraine decided that the law violated the constitution „on more than 40 counts, most notably the fact that candidates were allowed to stand simultaneously in both constitutencies and on [party] lists“ (Birch/Wilson 1999: 277).

From a comparative perspective, the Court´s decision on *„parallel“ candidacies* is not comprehensible. In most of the world´s electoral systems with two or more candidacy levels, candidates are allowed to stand both in single-member constituencies and for (national) party lists. This is not only true for post-socialist states like Estonia, Hungary or Russia, but also for the international model of electoral system reforms – the German mixed-member proportional system. In fact, one can even argue that the possibility of „double“ candidatures tends to strengthen the structure of a new party system, as it helps the party elites that are not strongly rooted in local constituencies to stay in parliament and to continue their work within the governing system.

However, it is of great importance - especially under the conditions of the 'fluid' Ukrainian party system - to keep parties participating in electoral coalitions from setting up their own additional lists of candidates: This scenario is indeed expressly forbidden by Art. 10/2.

Concerning the *requirements for nomination,* the provisions are not exceptional when compared to other post-communist countries (Art. 20-25). The number of signatures for candidates in single-member constituencies (900) has been fixed at a similar level as in Hungary (750) or in the Czech Republic (Senate elections: 1000). The drawing up of a national list requires 200,000 signatures which is exactly the same number as in Russia. Given extreme disparities between Ukrainian regions as well as strong regional bases of the main political parties, it seems to be especially meaningful that at least 10,000 of these 200,000 signatures have to be collected „in every of any 14 administrative teritorial units of Ukraine“ (Art. 24/1).[1]

[1] Overall, Ukraine consists of 28 administrative units. The 1995 Russian Election Law entails a similar provision of a territorially representative set of signatures for national lists (cf. IFES 1995: 280).

Due to this „regional element“ of signature lists, it seems less problematic that parties with national lists need no signatures for the nomination of their candidates in single-member constituencies (Art. 24/1).

All in all, the provisions for candidacy in the 1998 Election Law have not as serious deficits as the Constitutional Court's decision may suggest. They principally correspond to the international standards of democratic electoral rules. Rather, the remarkable functional improvements of the 1998 regulations in comparison with the former electoral law should be stressed. In 1994, there were nearly no formal requirements for voter meetings or labor collectives to nominate candidates, whereas parties had to have at least 100 members in the respective single-member constituency (Grotz/Haiduk/Yahnyshchak 1999). Therefore, the 1994 candidacy provisions were clearly biased against parties, while the present Electoral Law contributes to a more party-based candidacy.

**4. Electoral Campaign**

In the run-up to the 1998 parliamentary elections, regulations concerning electoral campaign were not as seriously discussed as the candidacy provisions. In the aftermath, however, many experts have considered the respective paragraphs of the Election Law insufficient for the Ukrainian context.

To specify these legal shortcomings, two main aspects should be differentiated:

a. *role of the mass media*. The Election Law extensively deals with many aspects of electoral campaigns in the media. Campaigning for or against certain candidates in the media is not only generally allowed (Art. 31/1). Electoral parties have also the right to use „national mass media with a state share“ (Art. 34/4) for the conduct of their campaign at the expenses of the state.[2]

Nevertheless, the experience of the 1998 elections showed that these provisions were not sufficient to guarantee a fair campaign. Most Ukrainian national media are far from being politically independent, instead they are strongly biased for or against certain parties. For example, according to an independent election observer, the state TV-channel UT-1 put all in all 102 minutes of broadcasting time at the disposal of the People’s Democratic Party, while most smaller parties got almost no broadcasting time for their campaign (Lohmann 1998: 63).[3]

[2] Besides this, the state is obliged to provide a (not specified) amount for the printing of pre-election posters of candidates (Art. 33).

[3] A statistical analysis of the European Institute for the Media came to a similar result (Council of Europe 1998: 10).

In order to ensure a fair pre-election campaign under these contextual conditions, a more precise legal regulation would be recommendable that gives each electoral party an equal share of broadcasting time in national (TV-)media for campaigning.

b. *financing of the electoral campaign.* The analysis of provisions concerning electoral financing leads to a similar evaluation. To a great extent, the respective paragraphs of the Election Law entail relatively detailed regulations. For example, Art. 37/3 defines clearly which persons and institutions are prohibited from contributing to the parties' electoral funds. Electoral parties and candidates are also obliged to submit a „finance report on sources of contributed funds“ to the Central Election Commission (CEC) at the end of the campaign (Art. 37/10).
However, a serious deficit of these regulations is the lack of explicit limits for the electoral financing of both individual candidates and parties. This is even more problematic, as in post-soviet Ukraine the level of clientelism is very high (Birch 1997) and vote-buying before the 1998 elections has been a wide-spread practice (Lindner 1998: 26). Therefore it would be highly desirable to introduce precise upper limits for the financing of an electoral campaign corresponding to those in other post-communist states.[4]

**5. Electoral System**

In comparison with the above mentioned parts of the Election Law, the electoral system[5] underwent the most significant changes. All in all, these changes contribute to a much better procedural functioning of the democratic system than did the former regulations of 1994.
In this respect, two positive aspects should be especially stressed:

a. In 1994, it took several rounds of repeat elections to fill the parliamentary seats, because the electoral law required an absolute majority (50%) of valid votes for the winning candidate, combined with a minimum participation rate of 50% of all registered voters within the respective single-member constituencies. Due to these provisions, not all parliamentary mandates could be distributed in the end (Nohlen/Kasapovic 1996: 69ff.). Therefore, the minimum participation rate established in communist times rather damaged than promoted the legitimacy of democratic elections.

[4] In contrast, Art. 52 of the Russian Parliamentary Election Law states, for example, that „the maximum amount of candidate’s expenditures from an election fund may not exceed 10 thousand minimum salaries set forth by the federal law on the day of election“.

[5] „Electoral system“ means the modus by which votes are transferred into parliamentary seats (Nohlen 1999).

Both problematic regulations were changed by the new Election Law. The minimum participation rate has been deleted, and the decision rule for seats elected in single-member constituencies has been altered from absolute majority into plurality („first-past-the-post"). Thus, all seats can be easily allocated in one election round.[6]

b. The *type* of electoral system has been changed from an absolute majority system in single-member constituencies to a „segmented system" that combines majority decision rule (225 seats allocated in single-member constituencies by plurality) and proportional representation (225 seats allocated in one national constituency) without any connection of these two parts.[7] This new electoral system seems to encourage the development of a democratic, nationally structured party system. Firstly, the contingent of seats distributed proportionally in one national constituency (with a 4%-threshold) can be seen as an incentive for political elites to establish party organisations with more than just regional bases. Secondly, the allocation of mandates in single-member constituencies tends to favour the „centrist", moderate political groups: Although their party organisation is often loose, they bring in local personalities as candidates which are able to win a plurality of votes in single-member constituencies. The better organized post-communist forces, on the other hand, benefit most from the exclusion effect of the national 4%-threshold that comes into effect with the allocation of party-list seats. Consequently, the segmented system contributes to a politically balanced result under the given context (Grotz/Haiduk/Yahnyshchak 1999).

Finally, one provision should be mentioned that has remained unchanged and does not promote the functioning of the democratic system: Electors still have the option to cast their vote „against all candidates/parties" (Art. 39/5). This so-called *negative vote* was a typical feature of non-competitive elections in the communist era and has been in use in some post-communist countries up to now (e.g. in the Russian Federation). At first glance this – internationally unusual – voting procedure seems to extend the elector's choices. It can, however, have negative consequences for the development of democratic attitudes: If voters are not restricted to choose between (more or less good) political alternatives, but can also reject (democratic) politics as a whole, the political fatigue which is especially wide-spread in post-communist societies will only be uttered in a sweepingly negative way. Therefore it is recommendable to abolish the possibility of negative voting.

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[6] The tendency to lower or abolish minimum participation rates can be observed in other post-communist countries, too (e.g. in Hungary).

[7] The Ukrainian „segmented system" is nearly identical with the current electoral system in Russia (Nohlen/ Grotz/Krennerich/Thibaut 2000).

**6. Organisational Context: Electoral Commission and Electoral Observation**

In some West European countries like Germany the electoral process is administrated by a Commission of the Ministery of the Interior. For new democracies, however, this close relationship between electoral administration and executive power cannot be considered an adequate model: In the absence of a well-functioning 'Rechtsstaat' the risk of electoral fraud by state organs is very high. Consequently, the formal separation of the Electoral Commission and state administration is of great importance to ensure the fairness of competitive elections in post-communist Eastern Europe.

The respective provisions of the 1998 Ukrainian Election Law fulfill this condition of institutional independence in an exemplary manner. The Central Election Commission (CEC) is strictly separated from the state's executive as its members are appointed by parliament (Art. 10/1). Its autonomy is further strengthened by the fact that it is a „permanently acting state body" and that „its staff cannot be changed by more than one-third during a year" (Art. 10/4). On the other hand, the CEC itself can be controlled by both electoral parties and candidates: Their representatives are allowed to participate in CEC-sessions with the „right of deliberative voice" (Art. 10/5).

Among the competences of the CEC, the formation of the single-member constituencies (SMCs) is especially worth mentioning. From a general perspective of democratic theory, significant differences between the number of registered voters per SMC are regarded as problematic because they violate the principle of equal representation. Implementing this evenness, however, is a very difficult task. Therefore, even in 'advanced' West European democracies deviations between 15% (Germany) and 25% (Great Britain) from the average number of registered voters per SMC are allowed by law. In contrast to these countries, the Ukrainian Election Law prescribes a maximum deviation of only 10% (Art. 7/4). It is even more remarkable that the CEC has managed a territorial division of the SMCs without exceeding the provided deviation limit (Ott 1998: 996).[8]

Finally, a short remark on those legal provisions concerning *electoral observation:* Since elections in new democracies are often not fully free und fair, the presence of international observers is considered important for improving the democratic quality of elections. Therefore, foreign observers should be explicitly admitted by the electoral law, but simultaneously not be

[8] The 1993 Russian parliamentary elections, for example, showed extreme deviations with regard to the electoral body of SMCs: While the biggest SMC (Buryatia) had 676,000 registered voters, there were less than 20,000 per SMC in some autonomous oblasts.

restricted by concrete regulations of the monitoring process. In these respects, the provisions of the 1998 Ukrainian Election Law seem to be adequate, giving domestic and foreign observers the right to „participate in events, connected with elections, forseen by this Law“ (Art. 30).

## 7. Conclusions

In summary, this paper suggests a differentiated evaluation of the 1998 Ukrainian Election Law. On the one hand, the new provisions reflect a significant progress towards a democratic functioning of the elections process and to the development of a nationally structured party system. This positive aspect becomes especially clear when the regulations of the electoral system are compared with the respective provisions of the 1994 Election Law that were strongly biased against parties.

On the other hand, there are still certain legal ambiguities and shortcomings that should be amended in order to ensure the fairness of future parliamentary elections. These shortcomings, however, do not refer to the candidacy provisions that were controversially debated in the run-up of the 1998 elections. Rather, certain regulations of the electoral campaign (equal access to the (TV-)media and upper limits of electoral financing) should be modified and/or formulated more precisely.

If considering an amendment of the present Election Law, one procedural aspect should be absolutely respected. As the experience of the 1998 parliamentary elections has shown, a reform of the electoral law should take place timely before the next elections. Otherwise, the reform process itself could create „a climate of uncertainty which [.. does] little to legitimise the procedures through which democratic choice is embodied“ (Birch/Wilson 1999: 277).

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