



Strasbourg, 5 March 2012

Opinion No. 657 / 2011

CDL(2012)026
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**OF THE INSTITUTE OF LEGISLATION AND COMPARATIVE LAW
UNDER THE RUSSIAN FEDERATION GOVERNMENT**

ON

**THE FEDERAL LAW ON ELECTIONS OF DEPUTIES
OF THE STATE DUMA OF THE FEDERAL ASSEMBLY
OF THE RUSSIAN FEDERATION**

Question 1. Is it contemplated to draft a comprehensive electoral code?

The prospect of elaborating the Code was considered "appropriate" by the Resolution of the State Duma of the Russian Federation on November 23, 1994 №351-I GD About the Federal Law On Elections of Deputies of the State Duma of the Russian Federation. The draft Code was introduced to the State Duma for consideration by a group of deputies. Later a similar idea was expressed by the former chairman of the Russian Central Election Commission A.A. Veshnyakov at the scientific conference in Pyatigorsk in September 2000. Currently, there are several points of view on the content and internal structure of the Electoral Code. Some authors propose to develop and adopt the Electoral Code of the Russian Federation only on the basis of the Federal Law On Basic Guarantees. Others - to develop the Electoral Code based on the codification of only special federal laws on the election of deputies of the State Duma and on the presidential elections which would apply only to federal elections. Another group of authors propose to make a systematization of all election laws and on their basis to adopt the Electoral Code of Russia, regulating in detail all elections.

At present time the idea of the codification of the electoral legislation is implemented at the regional level. Electoral Codes which regulate the conduct of both regional and municipal elections are adopted in some regions of the Federation. As for today there are 16 subjects of the Russian Federation which have such codes, and the trend for adopting election codes is growing. It is true that the content of some election codes causes problems. For example, the electoral codes of Belgorod, Vladimir, Voronezh oblasts (regions) and Altai kray (territory) have accumulated not only the rules pertaining to elections, but the rules on the referendum and recall, and in the Altai Territory – on the procedure for the survey of the population; such a combination is difficult to substantiate theoretically due to the varying legal nature of elections, referendum, recall of officials and survey of population.

When discussing the question of adopting the Russian Federation Election Code it is necessary to take into account the federal structure of the Russian Federation and the separation of powers between the Russian Federation and subjects of the Russian Federation in the sphere of organizing the system of organs of state power and local self-government, as established by the Russian Federation Constitution. If the need for adopting federal laws for conducting federal elections is directly indicated by the Russian Constitution (Part 4 of Art. 81, Part 2 of Art. 96), we can say that in respect of regional elections the Constitution of the Russian Federation (clause "n" of Part 1 of Art. 72, Part 1 of Art. 77) suggests a certain independence of the subjects of the Russian Federation in their legal regulation. For this reason, the current procedure for conducting elections to the State Duma of the Federal Assembly is regulated by two federal laws: the Federal Law On Basic Guarantees of Electoral Rights and the Right to Participate in the Referendum of the Citizens of the Russian Federation and the Federal Law On Elections of Deputies of the State Duma of the Federal Assembly of the Russian Federation.

The basic guarantees on the realization of the constitutional right of the Russian Federation citizens to participate in elections and referendums held in Russia are defined in the Para 1 of Art. 1 of the Law On guarantees of electoral rights in accordance with the Constitution, federal laws and constitutions (charters) and laws of the subjects of the Russian Federation and the charters of municipalities.

Para 3 of the same article defines the place of the Law On guarantees of electoral rights in the system of the Russian legislation on elections and referendums: the federal constitutional laws, other federal laws, the laws of the Russian Federation subjects may establish only additional guarantees of electoral rights and rights to participate in referendums (to the basic guarantees already established by the Law On guarantees of electoral rights). By virtue of this provision the Federal Law On elections of deputies of the State Duma of the Russian Federation can establish only additional guarantees of electoral rights in elections to the State Duma to the

basic guarantees established by the Law On guarantees of electoral rights. In other words, the observed Act can only enlarge and develop the provisions of the Law On guarantees of electoral rights. Accordingly, Para 6 of Art. 1 of the Law On the guarantees of electoral rights stipulate that federal laws should not contradict the aforementioned Act, and that if the federal law is not in compliance with this Act, the provisions of the Law On guarantees of electoral rights should be applied.

Question 2. How to ensure better the equality of political parties during election campaigns, in particular with regard to neutrality of the state, funding and impartial access to the mass media?

The concrete implementation of the principle of equality in the regulation of the order of the elections is embodied in legislative provisions on direct and indirect government support to candidates and political parties, performance of the election campaign carried on the channels of broadcast and print media, as well as measures of liability for violations committed in the course of financing the electoral campaigns:

- free broadcasting time on public channels and (or) municipal broadcasters and free space in the state and (or) municipal periodicals are provided on equal terms to the candidates and electoral associations (Para. 1 of Art. 50 of the Federal Law On basic guarantees of electoral rights and the right of the citizens of the Russian Federation to participate in the referendum), except as provided by law;
- all mass media (with the exception of established by candidates and parties) may provide for candidates and parties broadcast time and print space on monetary base only on equal terms;
- the establishment of limits on spending assets from the electoral fund of a candidate or electoral association;
- political parties are entitled to public funding from the federal budget, calculated on the basis of number of votes received at the previous elections for the State Duma of the Russian Federation or the President of the Russian Federation. The total amount of federal budget funds allocated for public funding of political parties shall not be less than twenty rubles multiplied by the number of voters included in voters lists for the next previous election of deputies of the State Duma of the Russian Federation or the election of the President of the Russian Federation, provided a political party has received at least 3 percent of votes

Besides, legislation provides for ensuring equal coverage of political parties in mass media. General principles and requirements for coverage of the parliamentary parties activities are fixed in the Federal Law On Guarantees of Equality of Parliamentary Parties in Coverage of their Activities by Available State Public Television and Radio Channels. The general principles are providing for the dissemination of information about the activities of every parliamentary party in equal amounts, for the publicity of state control, for the creativity independence and for the autonomy of professional independence of TV and radio channels in a comprehensive and objective informing of the audience about the activities of such parties. Control over the provision of guarantees of equality of parliamentary parties in coverage of their activities by public state television and radio channels is carried by the Central Election Commission of the Russian Federation.

Similar provisions apply in respect of coverage of the political parties' activity at the regional level. The Federal law On political parties stipulates that in order to guarantee equality of political parties represented in the legislative (representative) bodies of state power of subjects of the Russian Federation, it is necessary to determine one regional state TV channel and one state radio channel, established and registered in appropriate procedure for covering their activities, and in their absence – another TV channel or radio channel, registered by the territorial agency of the federal executive body authorized to provide such registration.

However, there are still problems associated with the provision of equal distance of all political parties from the state. The reason for this is the close relationship of the executive organs and the ruling party. The executive organs may use considerable administrative resources to support the political party and the current legislation does not create an effective barrier to this practice. The key members of the Russian Government and the majority of the heads of the subjects of the Russian Federation are members of the ruling party, and they take an active part in electoral campaigns, inter alia by entering federal and regional lists of candidates at the elections.

Question 3. The structure of election commissions: their impartiality and independence, and ways to ensure full confidence to their work

The current electoral law lays down the principle of independence of electoral commissions, which is embodied in the order of formation of election commissions and in the exercise of powers by members of electoral commissions.

Thus, Para 12 of Article 20 of the Federal Law On basic guarantees of electoral rights and the right to participate in the referendum of the citizens of the Russian Federation stipulate that the electoral commission within their competence are independent from organs of state power and local self-government. All members of election commissions with decisive voting rights have equal rights, and their term of office expires with the termination of powers of the commission, to which they have been appointed (Para 5 of Article 29 of the Federal Law). Restrictions that prevent empowerment of a member of the Commission with a decisive vote are defined by Para 1 of Article 29 of the Federal Law and a comprehensive list of cases of exemption from the duties of a member of the Commission with a decisive vote prior to the expiration of his term is provided by Para 6 of the same article.

The nominees submitted by the parties, who were admitted to the distribution of seats in the legislative or representative body of appropriate level should be included to the election commissions. The relevant organ of public power in the presence of a sufficient number of required proposals should form a commission so that at least half of the commission members were representatives of these parties. In addition, the law contains a requirement that not more than one representative from each political party, from each electoral union or public association may be appointed to the electoral commission. A political party, electoral association, other public association may not offer the multiple nominations for appointment to a commission.

These rules are intended to exclude the possibility of influencing state and local governments, political parties and other subjects of electoral relations, distorting objectivity of the decisions made by the members of electoral commissions within their competence.

It appears that the legislative measures aimed at improving the independence and objectivity of the electoral commissions could be as follows:

- 1) restriction in each election commission of the commission members who are members of one political party but nominated by different subjects of nomination;
- 2) reduction of the maximum number of state and municipal employees included in the election commissions, which currently comprises one half of their composition.

Question 4. Restrictive provisions regarding the right to nominate candidates

Restrictive provisions on the implementation of the passive electoral rights of citizens are fixed in Article 4 of the Federal Law On basic guarantees of electoral rights and the right of the citizens of the Russian Federation to participate in the referendum.

The following groups of citizens do not have the right to elect, to be elected and to vote in referendum:

1) citizens recognized incapable by court or imprisoned in the places of detention according to court sentences;

2) citizens of the Russian Federation having citizenship of other state or residence permits or other documents, confirming their right to reside in other state do not have the right to be elected. These citizens have the right to be elected to organs of self-government, as provided for in the international agreements of the Russian Federation;

3) persons convicted to imprisonment for committing grave crimes and (or) gravest crimes and who have unrevoked or outstanding conviction for such crimes;

4) persons convicted for extremist crimes according to the Criminal Code of the Russian Federation and who have unrevoked or outstanding conviction for such crimes at the polling day;

5) persons who were subject to administrative punishment for administrative offences provided by Article 20.3 (propaganda and public demonstration of Nazi symbols) and Article 20.29 (the manufacturing and the distribution of extremist materials) of the Code of the Russian Federation On Administrative Offences, if the polling day should be before the lapse of the term during which such persons are deemed to be under administrative punishment;

6) persons who were found guilty by court decisions in offenses against limitations provided by Para 1 of Article 56 of this Federal law or in commitment of acts, as provided by clause "j" of Para 7 and clause «j» of Para 8 of Article 76 of this Federal law, if these offences or acts were committed before the polling day during the tenure (term of powers) of organs of state power or self-government. These limitations are connected with the prohibition of committing acts of extremist activity or inciting such acts, as defined by the Federal law of July 25, 2002 № 114-FZ On Counteraction to Extremist Activity.

To limit the passive vote rights the following conditions must be present simultaneously:

- a fact of committing offences or acts was recognized by the court decision which entered into force;

- offences or acts have been committed before the polling day during the tenure of organs of state power or self-government or official persons subject for election.

Question 5. Supervision over elections: opportunity to ensure participation in elections of local nonparty observers. How is it possible in practice to ensure the rights of observers over elections including the post-elections period?

The procedure for appointment and the powers of observers are regulated by the Federal law "On the guarantees of Electoral Rights and the Right to Participate in Referendum of the Citizens of the Russian Federation", Federal law "On the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation", Federal law "On the Election of the President of the Russian Federation" and by other laws and normative legal acts of the subjects of the Russian Federation and by international agreements.

According to Para 4 of Article 30 of the Federal law On the guarantees of electoral rights and the right to participate in referendum of the citizens of the Russian Federation, an observer can be appointed by the registered candidate, by electoral association which nominated candidates, by electoral association which registered the list of candidates. This Para admits that law can provide for the appointment of observers by other public associations. According to Para 8 of Article 23 of the Federal law On the election of the President of the Russian Federation, part 1 of article 30 of the Federal law On the election of members of the State Duma of the Federal Assembly of the Russian Federation, such an opportunity during the federal elections is not provided. However the Federal law stipulates that subjects of the Russian Federation may by enacting laws provide for the appointment of observers by other public associations and,

initiative groups on holding referendum. But the practice demonstrates that many acts of the subjects of the Russian Federation do not provide the appointment of observers by public associations, as for example the Law of Lipetsk region of July 3, 2006 № 298-OZ On the election of members of the Council of Deputies of the Lipetsk region and in the Electoral code of Moscow City of 2005.

Observers can not be appointed by public associations having purposes or committing actions aimed on violent change of the fundamentals of the constitutional system, breach of the territorial integrity of the Russian Federation, inciting of social, race or religious animosity. The formation and activities of such public associations are prohibited according to Para 5 of Article 13 of the Constitution of the Russian Federation. Elected officers, deputies, supreme officers of the subjects of the Russian Federation, heads of local administrations, persons in their direct subordination, judges, procurators, members of election commissions with the right of decisive vote can not be appointed as observers.

In accordance with the electoral legislation observers shall be the citizens of the Russian Federation who have active and passive electoral rights and who are empowered to supervise the voting, the counting of votes or other activities of election commissions during the polling day and the days of early voting. Political party can appoint to every election commission several observers entitled to supervise in turns in the place of voting. In order to exclude influence by any political party on electoral commission, simultaneous supervision by two or more observers from the same political party is not allowed.

Question 6. How can be improved ensuring of recording and transparency of votes counting and passing of results and consequently to ensure trust to this part of electoral process?

Recently normative decisions have been passed with the aim to create additional guarantees of control of votes counting and passing of voting results which have to improve the trust of citizens to electoral process, ensure maximum transparency and publicity of voting and votes counting. For example, it would be appropriate to note the system of video monitoring in voting premises in the forthcoming elections of the President of the Russian Federation. Legal basis for the system of video monitoring at the election is laid down by the Ordinance of the Central Electoral Commission of the Russian Federation "On the Procedure of Video Monitoring in Voting Premises in the Elections of the President of the Russian Federation of March 4, 2012" which was enacted at the end of the last year. The video monitoring in voting premises begins from the moment when electoral commission starts its work on the polling day and will continue till 20.00 of local time and from 21.00 of Moscow time till finalizing all electoral procedures in voting premises. Only a registered candidate to the President's office is entitled to nonstop broadcasting. In accordance with the Ordinance of the Central electoral commission it is planned to locate 2 cameras in every voting premise. One of them which is called as "Camera № 1" should simultaneously monitor voting premises, places of giving out ballot papers to voters and of processing the lists of voters. The second camera should monitor stationary and transportable ballot boxes and places used for liquidation of unused ballot papers and for counting voted ballot papers.

Question 7. Procedures for processing of appeals and applications: how to distinguish the powers of electoral commissions and judges? How to simplify procedure? How to ensure that appeals and applications are considered effectively and the decisions are accomplished?

Electoral legislation provides to participants of electoral process the right to appeal in court against decisions and actions (or inaction) of organs of state power and local self-government, electoral commissions or their officers which violate their electoral rights. According to the norms of Civil Procedure Code of the Russian Federation (articles 26, 27, 259 – 261), subjects

of electoral process have the right to appeal against decisions and actions (or inaction) of electoral commissions as collegial bodies in appropriate court in accordance with its jurisdiction. Court decisions are legally binding for organs of state power and local self-government, public associations and their officers and other subjects of electoral relationships.

For more complete defense of the electoral rights of citizens, the legislator provides not only the judicial procedure but also institutional procedure of resolution of electoral disputes. Decisions and actions (or inaction) of electoral commissions or their officers violating electoral rights may be appealed straightly to the higher electoral commission according to the level of the elections. The higher electoral commission shall, without sending the appeal to the subordinate electoral commission (excluding cases when the circumstances indicated by the appellant were not considered by them), process the appeal and enact one of the following decisions: 1) leave it without satisfaction; 2) revoke the appealed decision fully or in part; 3) acknowledge actions (or inaction) as illegal; 4) to bind the lower electoral commission to consider the question again and to enact the decision on it's own.

When choosing one or another way of defense of violated rights, the appellant may give preference to any of them being guided by law and his own considerations. He is not bound to appeal to the higher electoral commission or referendum commission up to the Central Electoral Commission of Russia, in order to obtain the right to appeal to courts for the defense of his rights.

The appellant may appeal to both organs simultaneously, but in the case when the appeal is pending both in a court and in a relevant commission, such commission shall, in accordance with Article 250 of the Civil Procedure Code of the Russian Federation, suspend the processing of this appeal until the entry into force of the court decision.

The only kind of electoral disputes, that is considered only in court procedure, are the decisions of the commissions on the results of voting and elections. At the same time the relevant court while considering the appeal shall study the decision of the commission, which organizes the elections, and - in the case when the results of the elections might have been influenced by violations committed by lower commissions, taking part in holding elections, - the decisions of these lower commissions as well.

In order to simplify the procedure for processing the appeals and applications it is provided that courts and procurator's offices shall organize their work in such a way (including day-offs) that will permit to process timely the filed appeals. This obligation is laid down with account of the reduced terms of processing appeals, filed before the polling day during the electoral campaign: within five days, but not later then the day preceding the polling day or immediately if it is filed at the poling day or at the day following the polling day.