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REPORT

VENICE COMMISSION'S OPINIONS ON UKRAINIAN LEGISLATION ON ELECTIONS AND THE JUDICIARY

by

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I. THE INFLUENCE OF INTERNATIONAL ORGANS ON ELECTORAL SYSTEMS

Defining and deciding on a country's electoral system is an inherent part of the sovereign autonomy of a State. The political consequences of the chosen electoral system are more or less described by political science. Traditionally, international documents and international organs play only a minor role in the decisions regarding the electoral systems. International documents on human rights and political liberties provide for free elections, but under this general obligation States can work out their on preferred electoral mechanism.

However, the obligation of holding free elections opens up the possibility of the interference of international organs (and some extent even of other States) to be involved in the electoral process of a given country by the way of election observation. Election observation contributes not only to the international legitimacy of a country, but also to the internal legitimacy of the political system, and – not least – to the legitimacy of the winner of the election. The latter is a very important point as in representative democracies where – roughly speaking – "elections decide about who will decide".[1]

Electoral studies are mostly concerned with the comparative and historical analysis of the different electoral systems, and of their effects on the political structure. Constitutional scholars and political scientists elaborated quite a wide range of theories on the advantages and shortcomings of the electoral systems which are drawn on comparative studies. However, the choice to change or reform a country's electoral system, is necessarily the choice of the internal political forces of the given country. Thus one would not expect a great role of the international organs in this process. Nevertheless, a certain standardization of the electoral rules can observed in the last years.

The Venice Commission plays important role in the standardization of electoral rules. Therefore it is worth to get acquainted with the practical and theoretical work of the Commission in electoral field. The opinions and reports of the Commission attempt to give answers to a series of questions concerning the effects of electoral systems.

European standards of electoral law

As it is generally acknowledged, the "hard core" of the European electoral heritage is primarily composed of international standards. At universal level, this refers to Article 21 of the Universal Declaration of Human Rights[2] and, in particular, Article 25, section b. of the International Covenant on Civil and Political Rights[3], which expressly provides for the principles of universal, equal, free suffrage and secret ballot. As further UN treaty law provisions Article 5 (c) and (d) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, and Article 7 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women can be mentioned.

At European level, the common rule is **Article 3 of Protocol 1 to the European Convention on Human Rights**, which expressly sets out the right to regular elections with free and secret

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[1] Sartori, Giovanni, The Theory of Democracy Revisited. Chatham House Publishers, Chatham, New Jersey, 1987. 110.

[2] *„The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

[3] *„To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."*

suffrage. As usually the Venice Commission uses the European standards of constitutionalism, it is appropriate to quote on the matter of free election Article 3 of Protocol 1: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” This obligation, together with the guarantee of freedom of expression under Article 10 and of freedom of association under Article 11 of the ECHR, are held to be the main guarantees of a democratic system.

The interpretation of this provision by the European Court of Human Rights was summed up by the Venice Commission in an opinion[4] as follows.

According to the established case-law of the Court, Article 3 of Protocol 1 refers not only to the positive obligation of Contracting States to organize free elections using secret ballot, but also guarantees the individual right to vote and to stand for election, although this is not explicitly stated in Article 3. In the Court’s opinion, universal and equal suffrage is included in this right (ECtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, § 54). As holders of subjective rights, individuals may draw on this provision directly.

There are several aspects to the content of Article 3 of Protocol 1: its personal and substantive scope, the “legislature” and universal suffrage. In general, every person has the right to rely on the rights guaranteed by Article 3: nonetheless, the majority of Contracting States grant the right to vote only to nationals of the State in question. Article 3 refers to the “people” without clarifying the content of this term. However, in line with European constitutional tradition, “the people” is made up only of citizens of the State. The Court has specified that the scope of Article 3 of Protocol 1 extends to equal treatment for all citizens (ECtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, §54).

In addition, Article 3 guarantees the individual right to vote and to stand for election, in addition to free and secret suffrage. Elections should be organised in such as way as to ensure free electoral choice. They should also take place in circumstances that ensure the secrecy of the ballot.

The Court has so far failed to clarify whether the guarantees of Article 3 also apply to the rights of political parties, since these are not expressly mentioned in the ECHR. They may, however, cite the rights and freedoms guaranteed to associations in the meaning of Article 11 of the ECHR (ECtHR, judgment of 30 January 1998, *Unified Communist Party of Turkey et al.*, RJD 1998-I, § 25). Given their roles in a democratic and pluralist society, it would be logical for political parties to be able to rely also on the right to be elected under Article 3 of Protocol 1.

In giving tangible form to the ECHR’s preamble concerning “an effective political democracy” in the High Contracting Parties, Article 3 of Protocol 1 guarantees “free elections” in particular, without obliging the contracting States to establish a certain political democracy. However, the ECHR obliges States to set up a “legislature” which is directly elected by the people. The ECHR does not define the concept of “legislature” explicitly, but in any case it does include national parliaments. The concept must be interpreted on the basis of the constitutional structure of the State in question (ECtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, §53). In federal States such as Germany, Austria, Belgium or Switzerland, the parliaments of the federated States (the Länder, regions and communities or cantons) are also considered as “legislatures” in the sense of Article 3 (European Commission for Human Rights, decision of 11 September 1995, *Timke*, DR 82-A, pp. 158ff). In contrast, local authorities’ deliberative assemblies are not considered legislators, since they are endowed only with statutory powers (European Commission of Human Rights, decision of 5 July 1985, *Booth-Clibborn et al.*, DR 43,

[4] CDL-AD(2004)012.

pp. 236, 247 and onward). Equally, the scope of Article 3 does not extent to elections for the Head of State or participation in referendums (ECtHR, decision of 7 September 1999, *Hilbe*, RJD 1999-VI).

The rights arising from Article 3 of Protocol 1 are not absolute, since they are subject to implicit limitations. The contracting States enjoy a wide margin of discretion in deciding the conditions for universal suffrage and the electoral system. However, these conditions and limitations should serve a legitimate purpose and should not be disproportionate (ECtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, § 52).[5]

Non-binding international and European rules consist in the 2003 Existing Commitments for Democratic Elections in OSCE Participating States, and the 1994 Declaration on Criteria for Free and Fair Elections adopted by the Inter-Parliamentary Council at its 154th session (Paris, 26 March 1994).

Within the **European Union** a body of community law has evolved since the treaty of Maastricht has established citizenship and voting rights of EU citizens in local and EU parliamentary elections.[6] These provisions are valid only for the twenty-five EU member states which are all members of the Council of Europe. The list of EU laws relating to elections consists of Article 8 b (1) of the Treaty on European Union (TEU), Council Directive 93/109/EC, Council Directive 94/80/EC, and Order of the Court of 10 June 1993, the *Liberal Democrats v European Parliament*, Case C-41/92. These provisions and the relevant amendments in the national constitutions and electoral legislation introduced the rights to vote and stand in municipal elections and in the elections for the European Parliament of EU citizens having a member state of residence different from their home member state.

The Venice Commission

The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters.

The Commission's main mission is to help the adoption of constitutions that conform to the standards of Europe's constitutional heritage. Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the commission in February 2002 became an enlarged agreement, thus allowing non-European states to become full members. All Council of Europe member states are members of the Venice Commission; in addition, Kyrgyzstan joined the commission in 2004. Belarus is associate member, while Argentina, Canada, the Holy See, Israel, Japan, Kazakhstan, the Republic of Korea, Mexico, the United States and Uruguay are observers. South Africa has a special co-operation status similar to that of the observers.

According to Article 1 of the Revised Statute of the European Commission for Democracy through Law the Commission is an independent consultative body which co-operates with the member states of the Council of Europe, as well as with interested non-member states and international organisations and bodies. Its own specific field of action shall be the guarantees offered by law in the service of democracy. It shall fulfil the following objectives:

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[5] CDL-AD(2004)012**.** para. 4-11.

[6] Evgeni Tanchev, International and European Legal Standards Concerning Principles of Democratic Elections. In: European standards of electoral law in contemporary constitutionalism. Science and Technique of Democracy 39. Council of Europe, Strasbourg, 2005. 9.

- strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer;
- promoting the rule of law and democracy;
- examining the problems raised by the working of democratic institutions and their reinforcement and development.[7]

The Venice Commission is composed of "independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science" (article 2 of the revised Statute).

The members of the Commission act on the commission in their individual capacity, the members are appointed for four years by the participating countries.

The work of the European Commission for Democracy through Law aims at upholding the three underlying principles of Europe's constitutional heritage: democracy, human rights and the rule of law. The Commission meets four times a year in Venice for plenary sessions and works in the following four main fields:

- constitutional assistance
- elections and referendums
- co-operation with constitutional courts
- transnational studies, reports and seminars.

The Council for Democratic Elections

In 2002 the Commission set up, together with the Parliamentary Assembly of the Council of Europe and the Congress of Local and Regional Authorities, a new, tripartite body: the Council on Democratic Elections.

On 8 November 2001 the Permanent Commission of the Parliamentary Assembly, acting on behalf of the Assembly, invited the Venice Commission to

1) set up a working group to discuss electoral issues,
2) formulate a code of practice in electoral matters, and
3) elaborate a list of the principles of European electoral systems.[8]

Following this resolution, the Council for Democratic Elections was founded on 7 March 2002. It consists of members of the Venice Commission, the Parliamentary Assembly of the Council of Europe, and the Congress of Local and Regional Authorities. The ODIHR, the Parliamentary Assembly of OSCE, the European Commission, the European Parliament and the ACEEEO

7 Resolution Res(2002)3 adopting the revised Statute of the European Commission for Democracy through Law (Adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies)

8 *"i. set up a working group, comprising representatives of the Parliamentary Assembly, the CLRAE and possibly other organisations with experience in the matter, with the aim of discussing electoral issues on a regular basis;*

ii. devise a code of practice in electoral matters which might draw, inter alia, on the guidelines set out in the appendix to the explanatory memorandum of the report on which this resolution is based (Doc. 9267), on the understanding that this code should include rules both on the run-up to the election, the elections themselves and on the period immediately following the vote;

iii. as far as its resources allow, to compile a list of the underlying principles of European electoral systems by co-ordinating, standardising and developing current and planned surveys and activities. In the medium term, the data collected on European elections should be entered into a database, and analysed and disseminated by a specialised unit." Resolution 1264 (2001)

(Association of Central and Eastern European Election Officials) were all invited to participate in its work as observers.

Assuming the appropriate and quick responses of the Venice Commission to the demands of the Parliamentary Assembly, the same body on 30 January 2003 adopted a resolution inviting the Venice Commission to further tasks:

> *"i. to set the activities of the Council for Democratic Elections on a permanent footing and consider the Council one of its own bodies while maintaining its current form of mixed membership, as specified in Resolution 1264;*
> *ii. to implement the aims of the Council for Democratic Elections, as set out in Resolution 1264, and, in particular, continue its activities with a view to:*
>> *a. setting up a database comprising, inter alia, the electoral legislation of Council of Europe member states;*
>> *b. formulating opinions, in co-ordination with the Assembly, on all general questions relating to electoral matters as well as opinions concerning possible improvements to legislation and practices in particular member states or applicant countries;*
>> *c. drafting, as soon as possible, a computerized questionnaire, setting out in a practical form the general principles of the Code of Good Practice in Electoral Matters, which would give the observer delegations a better overview of the electoral situation."*

The Council adopted its Internal Rules of Procedure on 11 March 2004.[9] The CDE appoints rapporteurs on questions submitted to its attention. Members, substitute members, observers and external experts can be rapporteurs of the CDE.

II. THE PRACTICAL ACTIVITIES OF THE VENICE COMMISSION IN ELECTORAL MATTERS

As regards electoral matters the Commission strives to bring the electoral legislation of member states up to European standards. For any democratic society, free and fair elections are of paramount importance; therefore, the Venice Commission has defined the principles applicable to democratic elections in the Code of Good Practice in Electoral Matters and a number of other standard-setting texts. It also drafts opinions and recommendations on the electoral legislation of member countries and organizes training seminars targeting all actors involved in the electoral process.

The Venice Commission had intensive co-operation with a number of States in the field of electoral assistance in the former years, too. The most important aspect of this co-operation is the adoption of opinions on electoral legislation. In this respect the Venice Commission increased its co-operation with ODIHR and started a practice of joint opinions of the two institutions. This reinforced the weight of these opinions and could prevent contradictions between both institutions which could be exploited politically.

In addition, the Venice Commission takes active part at workshops on electoral standards.

Code of Good Practice in Electoral Matters

The Parliamentary Assembly resolution set as a task to the Council to prepare a code of good practice in electoral matters. A preliminary draft guidelines in electoral matters had been

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[9] CDL-EL(2003)017rev. The documents of the Venice Commission are published on the following website: http://www.venice.coe.int

already drawn up by the Venice Commission Secretariat[10] on the basis of Appendix IV to document 9267 of the Parliamentary Assembly, and which was developed in the preliminary draft code of good practice in electoral matters[11]. The so-called Code of Good Practice in Electoral Matters was adopted by the Venice Commission at its 51st and 52nd sessions.

The Code of Good Practice is not a binding document under international law.[12] However, the resolutions and recommendations of the Parliamentary Assembly gave the Code of Good Practice official status at Parliamentary Assembly level. The recommendation called on the Committee of Ministers to transform the Code of Good Practice in Electoral Matters into a European convention. However, the Committee of Ministers assumed that *"it may prove difficult at this moment to draft a legal instrument (particularly a binding one) on this matter… in the immediate future a sustained effort should be made to increase awareness in member states of the existence and merits of the Code of good practice in electoral matters".*

Finally, the Committee of Ministers of the Council of Europe, at its 114th session at Ministerial level (12-13 May 2004), adopted a declaration on the Code of Good Practice in Electoral Matters, and undertook to give political support to this document.

A) General principles

The Code contains guidelines and an explanatory report offering details on the issue. It aims to define a European electoral heritage which should be respected when organising democratic elections. The document is divided into two parts. The first part deals with the principles of European electoral heritage, namely free, equal, universal, secret and direct elections at regular intervals. The second part relates to the conditions of implementation of these principles and in particular to the respect of fundamental rights such as freedom of expression, assembly and association, observation of elections and guarantees to be ensured with respect to funding and security.

If elections are to comply with the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, they must observe five fundamental rules:

- Universal suffrage,
- Equal suffrage,
- Free suffrage,
- Secret ballot, and
- Direct suffrage.[13]

Furthermore, elections must be held *periodically*. All these principles together constitute the European electoral heritage.

The underlying principles of European electoral systems can only be guaranteed if certain *general conditions* are fulfilled.

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[10] CDL-EL (2002)2

[11] CDL-EL (2002)1

[12] The Code of Good Practice in Electoral Matters was forwarded to the Parliamentary Assembly which on 30 January 2003 adopted Resolution 1320 (2003) and Recommendation 1595 (2003), both concerning the Code of Good Practice in Electoral Matters (CDL-AD (2002) 23.

[13] For a detailed study on these five principles see Pierre Garrone, The constitutional principles of electoral law, in: New trends in electoral law in a pan-European context. European Commission for Democracy through Law, Science and technique of democracy, No. 25. 11-34.

- The first condition is *respect for fundamental human rights*, and particularly freedom of expression, assembly and association, without which there can be no true democracy;
- Second, electoral law must enjoy a certain stability, protecting it against party political manipulation;
- Last and above all, a number of procedural guarantees must be provided, especially as regards the organisation of polling.

B) The stability of electoral law

The explanatory none to the Code underpins that the stability of the electoral law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. Rules which change frequently – and especially rules which are complicated – may confuse voters. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections.

In practice, however, it is not so much stability of the basic principles which needs protecting as stability of some of the more specific rules of electoral law. The Code states that "The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law." The Venice Commission had to issue an interpretative declaration[14] on this paragraph pointing out that the above-quoted principle concerns only the fundamental rules of electoral law. The three fundamental rules concern:

- the electoral system proper, i.e. rules relating to the transformation of votes into seats;
- rules relating to the membership of electoral commissions or another body which organizes the ballot;
- the drawing of constituency boundaries and rules relating to the distribution of seats between the constituencies.

These three elements are often regarded as decisive factors in the election results, and care must be taken to avoid not only manipulation to the advantage of the party in power, but even the mere semblance of manipulation.

It is not so much changing voting systems which is a bad thing – they can always be changed for the better – as changing them frequently or just before (within one year of) elections. Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests.

One way of avoiding manipulation is to define in the Constitution or in a text higher in status than ordinary law the elements that are most exposed (the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries). Another, more flexible, solution suggested by the Venice Commission would be to stipulate in the Constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will take effect after that.

For the rest, the electoral law should normally have the rank of statute law. Rules on implementation, in particular those on technical questions and matters of detail, can

[14] CDL-AD(2005)043

nevertheless be in the form of regulations.

C) Procedural guarantees

a. Electoral commissions

An impartial body must be in charge of applying electoral law. The Code in its section on procedural safeguards discusses the role of impartial management bodies in the organization of elections. This is a very important aspect of elections as turning votes into seats is a basic element of legitimacy. The characteristics of the electoral system (PR, majority, plurality) happen to be only of secondary importance if elections are not properly conducted, the organs responsible of managing and supervising elections are politically influenced or biased, and electoral frauds dominate. Unfortunately, according to the reports of the Bureau of the Parliamentary Assembly on election observations, the following shortcomings concerning the electoral commissions have been noted in a number of member States: lack of transparency in the activity of the central electoral commission; variations in the interpretation of counting procedure; politically polarized election administration; controversies in appointing members of the Central Electoral Commission; commission members nominated by a state institution; the dominant position of the ruling party in the election administration.

Therefore, the Code states in a very definite language that "This is why *independent, impartial electoral commissions* must be set up from the national level to polling station level to ensure that elections are properly conducted, or at least remove serious suspicions of irregularity."

b) Observation of elections

Observation of elections is closely connected to the procedural guarantees. Both national and international observers should be given the widest possible opportunity to participate in an election observation exercise.

c) Effective system of appeal

An effective system of appeal is indispensable for the legitimacy and stability of the electoral system. Fraud or even the possibility of fraud might become also subject of balancing between legitimacy (as frauds derogate the legitimacy of electoral results) and stability (final result should be achieved as soon as possible).

Country Specific Activities

An important area of the Council's activity is focused on assisting individual member-states of the Council of Europe in the legislative and administrative tasks related to electoral matters. Election observations, elaboration of guide-lines and questionnaires, trainings and seminars contribute to the practical improvement of fair elections.

The Council for Democratic Elections has started drafting recommendations concerning possible improvements to legislation and practices in particular member states. The first ones were already adopted in 2003. Since then the Venice Commission adopted opinions on electoral law in Albania, Armenia, Azerbaijan, Georgia, Russian Federation, Moldova, Montenegro, Romania and Ukraine.

III. OPINIONS ON UKRAINIAN ELECTORAL LAW

The Venice Commission has issued opinions on Ukrainian legislation since 1993, beginning with comments on the draft constitution.

As regards our present subject, the first document issued by the Commission on electoral legislation was an evaluative consideration from comparative perspective on the 1998 parliamentary electoral law of Ukraine [CDL(1999)051].

An opinion was published on the draft law on the judicial system, too [CDL-INF(2000)005].

The Venice Commission analysed the Ukrainian Law on Elections of People's Deputies of 2001, and the draft amendments to the law.[15]

The Ukrainian parliament adopted the Law on Election of People's Deputies of Ukraine on 25 March 2004, replacing the law that was in force since 2001. Among the most significant changes was the introduction of an election system of pure proportional representation, replacing the previous mixed system whereby half of the MPs were elected from single mandate constituencies. On 7 July 2005, the parliament adopted a new law on the election of national deputies (technically, the new law only made amendments to the law adopted in 2004). This law, except for a few provisions, came into force on 1 October 2005. The Venice Commission adopted an opinion on this law in December 2005.[16]

The major changes in the law were the followings:

- At the elections in March 2006 all 450 seats were filled by proportional representation in one nationwide constituency. This change was reflected in amendments (Article 3, Chapter XV) to the Constitution adopted in December 2004.
- The threshold for securing seats in the proportional vote has been reduced from 4% to 3%.
- The Law provides a very detailed regulation of elections to the Supreme Rada. It draws on recommendations from international organisations and builds on the experience of previous national elections. There are numerous and detailed provisions which aim at enhancing transparency, accountability, and equality between election participants.

The most important observations and suggestions of the opinion are as follows:

> "12. The Law seems excessively detailed[17], especially since this is just one of the different laws on elections in Ukraine and that other laws (on Presidential elections, on local elections, on the Central Electoral Commission: see art. 14) are also very detailed and cover a number of similar issues. Given that most of the elements may be generally ruled (right to vote, right to be candidate, procedures of nominating candidatures, system of electoral commissions, voters' lists, principles of publicity and openness, rules of electoral campaigning, procedure for vote and vote-counting, system of appeals, etc) this system leads to a multiplicity of laws, usually complex and inevitably full of

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[15] **CDL-INF(2001)022** Opinion on the Ukrainian Law on Elections of People's Deputies, Adopted by the Verkhovna Rada on 13 September 2001, adopted by the Venice Commission at its 48th Plenary Meeting (Venice, 19-20 October 2001); **CDL-AD(2004)001** Opinion on the Draft Law on Election of People's Deputies of Ukraine, (Draft introduced by people's deputies M. Rudkowsky and V. Melnychuk) adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003); **CDL-AD(2004)002** Opinion on the Draft Law on Election of People's Deputies of Ukraine (Draft introducted by people's deputies S. Havrish, Y. Ioffe and H. Dashutin) adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003)

[16] „OPINION ON THE LAW ON ELECTIONS OF PEOPLE'S DEPUTIES OF UKRAINE by the Venice Commission and OSCE/ODIHR adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005) on the basis of comments by Messrs Jessie PILGRIM and Joseph MIDDLETON (Experts, ODIHR), Mr Angel SANCHEZ NAVARRO (Substitute Member, Spain), and Mr Taavi ANNUS (Former Member, Estonia) CDL-AD(2006)002rev

[17] All the following underlines are mine. P.P.

redundant provisions, leading to confusion and questions of interpretation. In this respect, it would be technically preferable to enact a unique electoral code, containing the general aspects of any election, and - in different parts of the same body, or in different texts - the particularities of different elections."

It is interesting – in view of the requirement formulated by the Code of Good Practice – the criticism of the so-called 'freezing provision' of the law.

"Stability of electoral law is important for ensuring confidence in the electoral process. (*Code of Good Practice in electoral matters* (CDL-AD (2002) 23 rev), II.2). However, the freezing provision in the Final Provisions of the Law (paragraph 2), which states that amendments may be made to the Law no later than 240 days before the day of election of people's deputies in 2006, may appear excessive. Given that the Law was only signed by the President on 7 July 2005, this left a window of just one month during which any amendments could be made. This provision is also of uncertain legal effect. This Law has no special status as compared to any law which could be adopted in the future; it would therefore appear that there is nothing to prevent the Supreme Rada from adopting a new law repealing this provision. This part of the Final Provisions could be interpreted as freezing the Law as it now stands for ever - or as long as the law is not totally revised -, not just in relation to the elections in 2006.
15. Good legislation is of course no substitute for effective implementation. The Ukrainian authorities will need to devote considerable resources towards voter education and specialist training for the judiciary, election administrators at all levels and public employees involved in election processes."

Areas where the Law would benefit from further reconsideration include the following:

- The Law should provide the opportunity for independent candidates to seek office in the Supreme Rada, in accordance with Paragraph 7.5 of the OSCE Copenhagen Document.
- The Law should clarify the circumstances under which a political party or bloc may re-order candidates or "eliminate" a candidate on the lists after they have been registered.
- The Law should expand the category of persons who have the right to observe meetings of the Central Election Commission and include domestic non partisan observers.
- Ballot papers should not be corrected by hand once they have been printed. The risk of accidental or deliberate error is obvious and real. If any party or bloc withdraws or is excluded from the electoral process, it would be better for this fact to be widely publicised in the mass media and in posters displayed at polling stations.
- There is a danger that the use of video and still cameras by observers from party and other observers may compromise the secrecy of the vote and create an atmosphere of intimidation.
- It is recommended to eliminate the option to vote "against all" as it opens the

  way to votes of uncertain status.

- A rule requiring or permitting invalidation of election results where it was found that instances of illegal voting amounted to 10% of the number of voters who received a ballot, is arbitrary and effectively creates a tolerance level for fraud.
- In order to avoid any conflict of jurisdiction, no choice should be possible between appealing to a superior election commission or to a court.

The opinion drew the conclusion that the text of the Law improves regulations on the composition of the election commissions, the organisation of the poling stations, the election campaign, the use of the mobile ballot box, the use of absentee voting certificates, the status of domestic non partisan observers, and some other issues. However, the law still overregulates some areas of electoral administration and a number of its provisions are still controversial. This might create problems as to the practical implementation of the Law during the forthcoming elections to the Rada in March 2006.

> “106. Some specific provisions, as for example, restrictions imposed on the mass media for the coverage of election campaign and sanctions for the violation of election campaign rules might not be in line with the Council of Europe’s standards in the field of freedom of expression.
> 107. The Ukrainian legislator should in the future also assess whether the combination of various electoral rules into a single electoral code would be feasible. Many provisions of different laws regulating different types of elections are repetitive. At the same time, discrepancies in procedures may occur due to the complex and extensive nature of those rules. Such inconsistencies should be avoided if at all possible.“

OPINIONS ON OTHER LAWS RELATED TO ELECTIONS

Law on the State Register of Voters

On 22 February 2007 the Verkhovna Rada of Ukraine adopted a Law on the State Register of Voters. A previous Draft Law on the State Voter Register of Ukraine had been prepared in 2005 and commented jointly by the OSCE/ODIHR and the Venice Commission upon a request from the Ministry of Justice of Ukraine. A Joint Opinion on the Draft Law on the State Register of Voters on Ukraine, (CDL-AD(2006)003), was adopted by the Venice Commission in December 2005.

This Law should be considered in view of the objective to complete the establishment of a voter register for 2010. A further joint opinion was adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007 – CDL-AD (2007)026).

The Venice Commission underlined that the introduction of a national voter register in the form of a regularly updated electronic database can lead to a significant improvement over existing arrangements for preparing voter lists. This Law provides a detailed framework for the introduction and maintenance of the new Register. It includes strong provisions to promote the accuracy of the list and the protection of voters’ data and appropriate sanctions for unlawful access and abuse of registered data.

“ 28. As it was underlined in a previous opinion on the State Register, the very idea of passing a law setting up a model of permanent State Voter Register seems to be technically correct. In particular, its objective of replacing all the different rules about “compiling and maintaining voter lists” foreseen by other electoral laws (Final Provision number 3) is a good departing point even when it could have been completed: in fact, this replacement will only take place “as far as the other Laws do no contravene this text”. In other words, this Law will need to be completed by other provisions fixed in other laws, so that citizens, lawyers, electoral authorities or judges will have to take into account different texts in order to be sure about the applicable rules. This underlines the expediency of incorporating all election related legislation into one single Electoral Code. “

Early elections

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 Resolution 1549 on 19 April 2007 on the Functioning of democratic institutions in Ukraine. 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.

The Venice Commission issued a critical opinion on the respective legislative provisions with the following main recommendations:

- 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.
- 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.
- 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.
- 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 Ukraine 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.

The opinion concluded that in order to minimise the 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. 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.

> "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. "

It is important to remark that no request has arrived for an opinion regarding the amendments

to the Law 'On the Election of People's Deputies' (dated 1 June 2007).

OPINIONS ON THE LAWS RELATED TO THE JUDICIARY

By a letter dated 10 October 2006, the Chairman of the Ukrainian Commission for Strengthening Democracy and the Rule of Law, Mr. Serhiy Holovaty requested an opinion on the draft laws on the Status of Judges and the Law on the Judiciary (CDL(2006)096 and 097, revised versions CDL(207)040 and 039). Both texts were submitted by the President of the Ukraine to the Verkhovna Rada (Parliament) of Ukraine on 27 December 2006.

The joint opinion of the Venice Commission and the Division for the Judiciary and Programmes of the Directorate General of Legal Affairs of the Council of Europe was prepared on the basis of comments by Mr Hamilton (CDL(2007)034) and Ms Suchocka (CDL(2007)035) for the Venice Commission and Mr Oberto (PCRED/DG1/EXP(2006)49) and Mr Zalar (PCTC(2006)22) for the Division for the Judiciary and Programmes. (CDL-AD(2007)003).

Following an exchange of views with Mr Serhii Kivalov, Chairman of the Committee on Justice of the Verkhovna Rada of Ukraine, the present opinion was adopted by the Commission at its 70th Plenary session (Venice, 16-17 March 2007).

The Commission welcomed the draft laws as a clear improvement as compared to the present situation and previous drafts. Nonetheless, the draft laws will require a number of further improvements in order to guarantee an independent and efficient judiciary.

As there is a good deal of interlinking between the two it would be simpler and clearer to have one law "On the judiciary and on the status of judges" instead of two separate laws, since the same issues dealt with are often spread between the two laws. A single law would make the regulations more coherent and understandable.

The Venice Commission also remarked that the laws are extremely detailed. This method of drafting seems to be part of the Ukrainian legal culture. It does, however, have the significant drawback that where something is not mentioned at all one has to be doubtful whether general provisions cover the matter sufficiently. For example, nowhere in the provisions dealing with disciplinary liability of judges is it set out clearly that the judge has a right to legal representation and to put forward a case against his accusers. In these circumstances one has to wonder whether it is intended that a judge should have this very fundamental right in the event of disciplinary proceedings being brought. In many places there is a level of detail to be found in the law which one would not in other legal cultures expect to be regulated at the level of statute law but which would be dealt with in subordinate legislation. Despite the attempt to provide for every eventuality the level of detail at times makes it quite difficult to locate the provisions relating to a particular matter. Moreover, some articles are written in such a way that they give the impression that they contain not only substantive provisions but also some kind of comment to other provisions.

In general, the Commission welcomed the draft laws as a clear improvement as compared to the current situation and previous drafts. The fundamental provisions are in line with European standards. The Commission further welcomes the announced intention by the Ukrainian Parliament to merge the two very detailed draft laws into a single (hopefully more simple) text.
Nevertheless, a number of critical remarks were formulated concerning the proposals of the laws on the judiciary:

> " 77. As concerns the judges' independence and immunity:
> • The discretionary powers of the President of the Republic should be curbed by limiting him or her to verify whether the necessary procedure has been followed (effect of a "notary").

• Clear and stringent criminal sanctions should protect the judges against external pressure.
• Judges should benefit only from a functional immunity.
• Judges should be free to join judges associations or unions.
• There is no need to provide that a criminal case against a judge can be initiated only by the General Prosecutor or his/her deputy.
• Parliament should not have any role in lifting a judges' immunity (constitutional amendment required).

78. As concerns the establishment of courts and unification of judicial practice:
• A simpler procedure of establishment of courts providing for cooperation between the President and/or the Ministry of Justice and involving the High Council of Justice would seem more appropriate.
• High Specialised Courts and the Supreme Court should not provide abstract explanations but contribute to the unification of judicial practice by way of appeal in individual cases.

79. As concerns judicial appointments:
• There is no need for a separate High Qualifications Commission. Its competencies should be attributed to a High Council of Justice with a majority of judges. If this cannot be achieved via a required constitutional amendment, the independence of the High Qualifications Commission needs to be further strengthened because its composition seems problematic.
• The procedures for the initial appointment of judges are not fully transparent.
• Setting a probationary period of 5 years can undermine the independence of judges (constitutional amendment required).
• Appointments of judges of non-constitutional courts are not an appropriate subject for a vote by Parliament. This would require a constitutional amendment. However, if the Constitution cannot be changed, the overriding of the insistence by the High Qualification Commission on a rejected candidate should require a qualified majority in Parliament.
• Objective criteria in the choice should be binding for Parliament, which should be obliged to give reasons for granting or denying appointments.
• Appointments of judges to other, in particular higher positions should be done on a competitive basis.

80. As concerns disciplinary procedures:
• The failure to participate in obligatory training should not be a ground for disciplinary liability.
• An incorrect interpretation of the law by the judge should be solved by way of appeal and not by way of a disciplinary procedure.
• A clear definition of the term 'immoral deed' warranting disciplinary liability is required.
• An adversarial system clearly separating accusation and decision should be established.
• The right to counsel for the judge needs to be provided.
• The right of the judge for an adversarial procedure and to question witnesses should be provided for.
• It should be possible to appeal to a court against disciplinary measures.

81. As concerns judicial self-administration:
• The High Judicial Council should have a majority of judges elected by their peers (constitutional amendment required).
• The system of judicial self-administration is overly complex and should be simplified (e.g. building upon a single body such as a High Judicial Council with a judicial majority, perhaps with sub-committees for specialised functions).
• The State Judicial Administration and judicial training should come under the control of an independent body of judicial self-administration.

82. As concerns the budget of the judiciary and judges' remuneration:
• An autonomous body with substantial judicial representation should play a significant

role in presenting and defending the judicial budget before the parliament.

• The draft Law should provide for a strict prohibition of any reduction of a judge's salary.

83. The Venice Commission recommends to pursue the reform of the Judiciary in Ukraine on the basis of the draft laws submitted to Parliament. The fact that the Parliamentary Committee on the Judiciary intends to merge the two drafts into a single law is encouraging in this respect."