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OPINION

ON THE UKRAINIAN LAW ON ELECTIONS OF PEOPLES 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)

On the basis of comments by

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and the Secretariat of the Commission

Introductory remarks

These comments are based on the text of the law only, not taking account of its implementation. For example, the practical questions that arose after the last parliamentary elections are dealt with in the document 8058 Addendum III of the Parliamentary Assembly of the Council of Europe.

The request asks only for comments on the draft law on election of peoples deputies. Therefore, this opinion will not deal with the legislation on the central election commission or the political parties.

The present comments were asked for at very short notice. The Venice Commission is ready to continue co-operating with the Ukrainian authorities in the field of electoral legislation.

The draft law does not introduce major changes when compared with the present law in force. In particular, the electoral system in the narrow sense has not been changed. It must be underlined that a certain stability of the main features of electoral legislation is suitable, especially concerning such a sensitive question as the electoral system. However, the practical implementation of the law should help in identifying the provisions that it would be preferable to modify.

The draft law is much more detailed than the present law in force. This will help to settle a number of questions which are dealt with in a much more general way in the present law (e.g. concerning financial questions, voting procedures, observation). The present situation is often unsatisfactory since doubts arise on how to apply the law and/or fraud is easier.

Even if the draft may be considered as an improvement on a number of points, the modification of some provisions should be considered (e.g. on appeals). Furthermore, some innovations (such as the need for the parties seeking to stand for election in the nation-wide constituency to be registered one year before the elections) should have been avoided.

The present comments are based on two translations, one provided by the ODIHR and one by the Ukrainian authorities. There was just one major divergence: Art. 50.3 does not exist in the translation provided by the ODIHR.

Ch. I General provisions

The general provisions contain the essential requirements of democratic elections (universal, equal, direct, free and secret ballot). In particular, only citizens deemed by a court to be incompetent do not have the right to vote (Art. 70.2 of the Constitution) and to be elected (Art. 8.1 of the Draft Law). The limitation of the right to be elected to those who have resided in Ukraine for at least the last five years (the same as in the present law (Art. 3.4)), seems however excessive (Art. 8). In general, electoral laws do not submit the eligibility to be elected to any minimum residence time in the country, or this time period is shorter. Two years should be the maximum.

Art. 1.3: 225 deputies are elected according to the first-past-the-post system in single-member constituencies and 225 in a nation-wide constituency with a proportional representation system. The electoral system has not been changed.

Art. 8.3: it should be made clear that only those citizens against whom there is a final conviction are not eligible for election.

Art. 11.6: observation: see ad ch. IX.

Art. 12.4: the third sentence of this provision deals with responsibilities of bodies of the State and local administration, which have to be impartial. This is of course not the case of the political parties.

Ch. II Types of elections, procedure for and terms of calling elections

Art. 15.2: The term between the announcement of the commencement of the regular electoral process and the election day (170 days) allows parties and candidates enough time to prepare the election, first by registering candidates and then by taking part in the proper election campaign. It should therefore be noted that the 170 days period is different from the period of the proper election campaign, which is 90 days (Art. 53.1). Such periods are longer than in most democracies and could be shortened. However, if the period for registering candidates is shortened, it would be more than suitable to reduce the number of required signatures, which is already very high (see ad ch. VII). Moreover, the shortening of the proper election campaign should not prevent equal treatment of the various political opinions by the media. Provision for such equal treatment, at all times and not only during the election campaign -, has to be made by the legislation on the media.

Ch. III Election constituencies

Election constituencies have to be formed before each regular election. This is both very demanding and a possible source of

unnecessary conflict. It would be preferable to redraw election constituencies after each census (normally every ten years), and not just before the elections when the temptation to manipulate the election constituency borders (gerrymandering) may be stronger. However, the extension of the deadline for forming constituencies from 120 days to 160 days before the election (Art. 16.3) is rather positive. The rule limiting the deviation of the number of voters between election constituencies to 10 percent is reasonable (Art. 16.3) and was already applied without any problems under the present law. Exceptions should be as rare as possible. The present law takes into account the areas of dense residence of national minorities when forming the constituencies (Art. 7.2). Such a rule has been deleted from the present draft, which could make the election of members of national minorities to Parliament more difficult.

The local authorities submit proposals about the formation of polling stations (Art. 17.2). It is important that such proposals are not made by administrative bodies. The variety of the possible number of voters in a polling station is very high (from 20 to 3000, art. 17.6), and a smaller or bigger number is still possible. One may wonder why such differences are allowed; the reasonable number of voters per polling station should not exceed 1000 and the number should not be too low, because this would prejudice the secrecy of the vote.

The cases in which polling stations are formed on the territory of a military unit should really be exceptional (Art. 17.4).

The late formation of polling stations (art. 17.7) should be avoided.

It would be suitable to have some criteria for the assignment of special polling stations to the single-mandate constituencies. At least, it would be appropriate to define the criteria for the exceptional late creation of polling stations Such criteria could be defined by the central electoral commission.

Ch. IV Election commissions

The present comments do not deal with the law on the central election commission, and, in particular, they do not deal with the composition of such a commission (cf. Art. 19.1, 22, 26.1). It must be recalled that a balanced composition of the central election commission, including representatives of the various parties, is vital for ensuring its impartiality. It is also most important that the election commission be independent from the executive power. Therefore, a commission mainly composed of members of political parties, in a balanced way, is often the best means to ensure its independence, since so-called independent members may also be linked to the political power or political parties.

It should be positively underlined that the formation of constituency and polling station election commissions no longer depends on (local) political authorities; rather, they are appointed by the superior election commissions. This should avoid their being dependent on the political power (see Art. 20-21 of the draft and Art. 10 of the present law).

Art. 20.1 of the law states that first of all parties that obtained at least 4 % of the votes at the last elections of the Verkhovna Rada may be represented in the constituency election commissions (Art. 20.3). This does not violate the principle of equality, since other parties, which were created after the last elections, may also be represented in the commissions, albeit only after the registration of their candidates in the multi-member constituency. What about the parties that took part in the last elections but do not take part in the next ones? A legally less questionable solution would be to maintain the present rule allowing for the presence of representatives of all parties whose candidate lists are registered for participation in elections in the all-state multi-mandate electoral constituency (Art. 10.7 of the present law). It would also be possible to provide for a higher maximum number of members of the election commission, which would be fixed by the law (e.g. 20). The commission could include all parties present in Parliament as well as the other parties if the total number of parties does not exceed the maximum number. If it exceeds it, parties not present in Parliament that would take part in the commission could be chosen by lot.

We understand Art. 20 as allowing two members of the same party to be members of a constituency election commission (as head, deputy head or secretary on the one hand, as other member on the other cf. Art. 20.6). When appointing the head, deputy head and secretary of each constituency election commission, the central election commission should appoint members of the majority as well as of the opposition. The rules applying to the members of the parties should be extended to their sympathisers, in order to avoid including so-called neutral people who in fact represent the interest of the same party.

The text of Art. 21 is not always very clear, probably due to translation. Apparently, it means that every party that has a candidate in the single-member constituency, as well as the independent candidates, are represented in the commission (Art. 21.7). This should in

principle not lead to too large a number of members of the commission. However, there could be a maximum number, and, if necessary, non-parliamentary parties and independent candidates which would be represented in the commission could be chosen by lot. Par. 8 ensures a balanced representation in the leadership positions of the polling station commissions (does it mean the posts of head, or also vice-head and secretary?). Par. 7 could be understood as forbidding having more than one representative of each party in the Commission, or does it allow for two members/representatives of the same party, including the head, vice-head and secretary? The first solution would be the better one.

Art. 21.8: The formula adopted will not lead to clear results in all cases. In order to avoid confusion a more precise rule should be adopted which would lead to the intended representative and proportionate composition of the commission.

Art. 22.2.5 should be applied in conformity with the principle of proportionality.

Art. 25.1 and 25.8: It should be made explicit that the chairman of the election commission is obliged to convene the commission at the request of one-third of the members of the commission.

Art. 27.3.6. and Art. 27.3.9: The systematic failure to fulfil his/her duties and his/her violation of the election legislation of Ukraine could be interpreted to cover the same acts. In order to prevent circumvention of the purpose of Art. 27.3.6 (which is to guard the independence of members of election commissions by guaranteeing that they cannot be dismissed for minor violations of the law) it is suggested to amend Art. 27.3.9 to read his/her systematic or grave violation of the election legislation of Ukraine. Another problem of delimitation arises in Art. 25.16: what difference exists between the violation of the legislation and the excess of powers? See also *infra* about the appeals (art. 29).

Art. 27.1 The possibility of terminating ahead of time the authority of an election commission for violation of the Constitution or the law should be restricted to violation of the Constitution and serious violations of the law. This would fulfil the requirements of the principle of proportionality. The same is valid for the termination of the authority of individual members of the commissions (Art. 27.3.9). It would be preferable to extend the rule imposing a majority of two thirds of the members of the commission (Art. 27.5 and 27.3.6) to such cases. The possibility for the parties or the candidates to recall their members in the electoral commissions (Art. 27.3.2) does not favour the independence of such commissions.

Art. 29: The draft provides for a provision, which is intended to settle the question of appeals in general, whereas, in the present law, the provisions are dispersed, so that a general overview of the question is very difficult. However, the draft does not provide for a clear and straightforward appeals system. Concerning appeals to courts (except the appeal to the supreme court according to par. 5), the law does not say what court is competent, and what appeals are possible against its decisions. It would be appropriate to deal with such questions in a precise way in the electoral law itself, and at any rate to avoid any negative or positive conflict of competence.

Art. 29.2 is very unusual. Appeals should be possible only against decisions of bodies vested with public powers. This would of course not exclude, if necessary, penal or civil action against private persons or legal entities.

Art. 29.3 allows for a choice between appealing to a superior election commission or to a court. This could be confusing, overload these bodies and lead to contradictory decisions. The higher election commission should have the first opportunity to redress the alleged wrong. The complainant should, however, have the right to address the (higher) court if the higher election commission does not deal with the matter within a specified time. There should be a possibility to appeal to a (higher) court against the decision of the election commission. Without a clear relationship between the review by election commissions and court review the system would be very confusing at one decisive point.

Art. 29.6: the deadlines for the appeals should be reconsidered. Appeals are possible up to 12 p.m. before the day of elections, but that should mean that the case may be settled before the elections take place. The deadline for the violations that took place in the course of voting is very short and could be extended to 3 days. Art. 29.6 third sentence introduces a further element of confusion when allowing the lodging of a complaint to the respective election commission.

Ch. V Voters lists

In general, the provisions are very complete. The polling station election commissions go on checking the lists established by the authorities (Art. 30.4), as under the present law (Art. 18.7). It would be appropriate for the central election commission to be able to control the process. This is clear neither from the present nor from the new election law.

Art. 31.10: Here too, the question of the deadlines and the competent appeal bodies should be made more straightforward and practicable (cf. *ad* Art. 29).

Ch. VI Financial and logistic support for the preparation and holding of the election of deputies

The provisions of the draft are very detailed and more precise than the present law. Donations may be made only by individuals (Art. 36.2). Limits are placed on the disbursement from the election fund, as well as on donations of individuals, which is quite sensible (Art. 36.3-4). This is a very positive point, since the absence of such limits raised concern under the present law. The question is of course how to verify that such rules are respected.

Art. 36.10 is not really proportionate, when imposing the transfer to the State of a donation by an individual not qualified to make such a donation. Such a donation should be returned (cf. Art. 36.9). Art. 36.13 is also questionable.

Ch. VII Nomination and registration of candidates for deputy

Art. 38: except for the case of self-nomination (par. 2), the right to nominate candidates belongs only to political parties (blocks) registered in compliance with the law of Ukraine at least one year prior to the election date (par. 1). The present comments do not deal with the law on registration of political parties. At any rate, if individual candidates from non-registered parties may compete for the 225 single-mandate seats (cf. Art. 38.2), these parties are excluded from competing for the 225 seats of the multi-member constituency. The registered parties may present candidates only if they submit at least 500 000 signatures, including at least 17 000 signatures in each of two-thirds of the regions (that is 18 regions).

The minimum of 500 000 signatures in 18 regions appears to be too high, especially in comparison with the present rule (Art. 24.1.9: 200 000 voters, and not less than 10 000 in 14 regions).

Imposing furthermore on a party to have been registered for at least one year (which is not the case in the present law) is clearly excessive. It is for the voters to say whether they accept a new party to be represented in Parliament. At any rate, in conformity with Art. 58.1 of the Constitution and European standards, such a provision should not be applied retroactively: all parties registered at the date of the adoption of the law should be allowed to take part in the election.

It should however be remarked that the new law no longer provides for an electoral deposit.

In general, the conditions for registering candidates should not be too burdensome, since, if a party has no real platform, it will simply not be voted for.

Contrary the to present law (Art. 21.3), the new law has introduced specific rules on how a party (or bloc of parties) nominates candidates (Art. 40.7). This is a positive step, even if more detailed provisions on the democratic character of the internal procedure of the party could be suitable.

Art. 40.1 and 40.8 look contradictory. The deadline of 125 days before the elections of Art. 40.1 does not appear anywhere else.

Art. 41.1.7, 82.1: it would be preferable to include the list of incompatibilities in the law.

Art. 41.1.8, 42.1.5: It must be clear that citizenship means Ukrainian citizenship, and not nationality understood as ethnic belonging.

Art. 42.1.5: the number of 4 000 signatures for candidates in single-member constituencies again (see above) appears to be too high. (The present law does not require a party which registered candidates in the multi-member constituency to sample signatures at the level of the single-member constituencies; the other candidates need only 900 signatures (Art. 25.1.2)).

Art. 44.3.1: it is supposed that every voter receives a number when registering.

The time to collect signatures is in principle 50 days (Art. 44.1 and 48.2, 49.2): this is rather short if the high number of required signatures is taken into account.

Art. 50.1.1 appears to be too broad. Not every technical violation of a rule of procedure should lead to the refusal of registration. Perhaps only a violation of an essential rule of procedure for nomination of a candidate (candidates) should be a sufficient reason to refuse registration of a candidate (candidates).

Apparently, Article 50.1.2 requires that all signatures be checked. This should be welcomed.

Art. 50.1.7, concerning the refusal to register candidates after a court has established the violation of Art. 45 of the law, should be applied in conformity with the principle of proportionality.

Art. 50.3 (only in the version submitted by the Ukrainian authorities): excluding a party from the election process because one of its candidates has been excluded is clearly disproportionate.

Art. 51/52: some possibilities to register again are provided to the candidates of parties which withdrew from a bloc. However, due to the deadlines and the high number of signatures required, it is not certain that a new registration is possible in practice. Such rules, contrary to the rule of one-year registration of Art. 38.1, may be considered as justified by the fact that the preparation of the elections has started.

Art. 51.12: since the candidates of the parties need the same number of signatures as the independent candidates in the single-member constituencies, there is no reason for excluding a candidate where there is a change in the composition of an election bloc. The voters will decide who has to be elected. For the same reason, the parties should not be able to ask for the cancellation of the registration of the candidates they proposed, at least in the single-member constituencies (Art. 53.3.2; see also Art. 52.2.2).

Art. 52.1.8-12, 52.4: the draft provides for the possibility to exclude the registration of a candidate only in cases of serious offences or after a warning. Since the translation of the present Art. 26.2 at our disposal is not easy to understand, it is difficult to know whether the new rule extends or reduces the possibilities for such an exclusion (apparently, they are reduced). At any rate, the principle of proportionality has to be respected. The same is valid for Art. 52.2 and 52.3.

Art. 52.3.6: it is not possible for a candidate to be registered at the same time in the nationwide constituency and in a single-mandate constituency. Such a regulation is in conformity with international standards, even if most countries with such a mixed system allow for double candidacies (in the multi-member as well as in a single-member constituency). It must be noted that this has been introduced following a decision of the constitutional court, which prohibited such a double candidacy.

Ch. VIII Pre-election campaign

The duration of the election campaign (90 days: Art. 53.1) could be shortened (see ad ch. II). Equal opportunities are offered to all parties (Art. 54.4, 56.1) during this period; such opportunities are to be guaranteed not only during the campaign, but at all times, in particular through the legislation on mass media. Detailed rules are intended to provide for the actual application of equal opportunities, especially in the mass media (Art. 56 et seq.). They are more precise than the present rules (Art. 34-35), and this has to be positively underlined. However, the question of how the provisions will be applied should still arise.

Art. 54.5. According to this provision, the state and the municipalities must accord political parties and candidates meeting halls and other premises on the basis of equality. The use of such facilities should be free and not be distributed on the basis of the available electoral funds (even if they are channelled through state organs viz. the electoral commissions).

Restrictions on pre-election publicity campaining: Art. 59.3 appears to be too broad. It should be interpreted in conformity with freedom of expression and the principle of proportionality, as enshrined in Art. 10 ECHR. This concerns, in particular, the possibility to restrict calls to undermine its security or calls threatening human rights and freedoms or human health. Very often electoral statements are perceived by political opponents as undermining the security of the state or threatening human rights and freedoms.

The provision prohibiting, *inter alia*, state-owned or communal mass media from campaigning, evaluating programmes or imparting any preferences (Art. 59.4), has to be welcomed and applied scrupulously. It is a very important guarantee of the impartiality of the mass media. Information programmes should not be used in order to promote a political programme or candidates (especially those of the majority in power) (cf. Art. 59.11).

Article 59.14 prescribes a comparatively long period of silence for the publication of opinion polls. This could create an unfair advantage for bigger political parties or groups, which will continue to conduct their own opinion polls (and will not publicize them). Such a long period of silence may also lead to the creation of rumours and speculations. A period of one week would appear to be more appropriate.

Ch. IX Guarantees of activity of the parties (blocs), candidates for deputy, and official observers

This chapter is new and has to be welcomed. The presence of representatives of the parties (candidates), as well as of national and international observers, at every level of the electoral process is an important guarantee against fraud. Indeed, it would be suitable to allow national non-partisan observers also to take part in electoral observation. However, the representatives of the legislative and executive powers (national or local) should not be allowed to intervene in the electoral process, even through election observation. Their role is very different from the role of political parties enshrined in Art. 36.2 of the Constitution.

The participation of members of political parties in the discussions of the central election commissions, with the right to express an advisory vote (Art. 60), is an important guarantee of their possibility to take part in the electoral process and to guarantee the independence of the central election commission from the political power. Of course, this does not imply that they are members of the central election commission, since only the members vote is decisive.

The former Art. 27.2, concerning the salary to be given to the candidates, has been abolished (see Art. 61). This should help to avoid abuse.

The detailed rules on observers introduced in the new law have to be positively underlined (see in particular Art. 62-64). The presence of international as well as national observers at all stages of the elections is very important in order to ensure free and fair elections, and also to ensure that such elections are regarded as free and fair.

Art. 62.3: termination of the authority of observers in the case of violation of the law: in this case too, the principle of proportionality has to be respected scrupulously.

Ch. X Voting and determining of deputy election results

225 deputies are elected according to the first-past-the-post (plurality) system in single-member constituencies and 225 in a nation-wide constituency with a proportional representation system and a threshold of 4 % (Art. 1.3, 79.2), with the Hare quota (number of votes divided by number of seats) and the largest remainders system (Art. 79.4-8). The candidates in the multi-member constituency are elected according to the order of the list (Art. 79.8). Each voter has two ballots (Art. 65.4 and 5, 69.7). The electoral system in the narrow sense is the same as in the present law (Art. 1.2, 38, 42.5-11) and is in conformity with European standards.

The voting procedures are dealt with in a much more detailed manner in the new law than in the previous one. This should allow for a greater accountability of the voting procedure and limit the risks of fraud.

The system of control slips (Art. 65.9, 69.7, 71.9 etc.) is not ideal. Actually, the more controls there are, the more risks of errors there are, and in practice the commissions tend to be more lenient and there are more risks of fraud. Moreover, the way of cutting the slips would lead to the possibility of recognising some ballots. Therefore, it seems advisable to limit the checks to the number of ballots and the number of voters who signed the register.

Art. 69.7: it would be preferable that the members of the election commissions do not touch the ballots, in order to avoid frauds such as imposing marks.

Art. 69.10, 14: the right of the voter to resort to the help of another person has been limited to persons with physical incapacity. This should allow abuse to be avoided.

Art. 70: vote beyond the bounds of the premises for voting. Such a kind of vote could involve fraud. However, the law limits the cases in which it may be used (health problems, Art. 70.1) as well as the risks of fraud, since three members of the polling station election commission organise such voting and observers have the right to be present (Art. 70 par. 4 and 7). Art. 70.5 is to be understood as providing for such a vote on the day of the election. These rules do not differ in substance from the present law (Art. 40.12).

Art. 73: definition of the election as void: this rule provides for the principle (the election is void if the results may not be established with accuracy), as well as with the cases in which such a situation arises. Apparently, the list of such cases is exhaustive. This is more precise than the present law, which does not allow for the cancellation of the election at the level of the polling station and is not very clear about the respective powers of the constituency and central election commissions in this field (Art. 43.8 and 47).

See also Art. 80 for the result in the single-member constituency.

(Art. 75: there must be a problem of translation: district commission is understood as constituency election commission).

Art. 84.3 (on the exclusion by a party of non-elected candidates from its list) is rather unusual. It must be recalled that, even if the voters could not choose among the candidates on the list, the order of the list may have influenced their vote. At any rate, it would not be admissible for a party to force a deputy to leave Parliament, even if he or she leaves the party.

Art. 85: Apparently, and contrary to the present law (Art. 48), it is not possible to declare the election void in the nation-wide proportional constituency. The draft does not make clear that, if elections are declared void at the level of a polling station, they should be repeated. This is very important, in particular due to the fact that no repeat elections may be held in the multi-member constituency. Clear provisions should be introduced, declaring that elections have to be repeated in the polling stations where they were declared void, for the plurality as well as for the proportional part of the election. Otherwise, the voters of the polling stations where the election was declared void would be deprived of their right to vote.

Art. 86 Interim elections and Art. 87 Extraordinary elections. The deadlines are often shorter than under the present law (Art. 50 and 51) and the possibility to extend them should be considered. It would be preferable to adopt more detailed provisions on such elections.

We do not understand in what case interim elections may be held in the multi-mandate constituency (Art. 86.5).

It may be recalled that the possibility to express a negative vote (against all parties or candidates, Art. 65.4-5) is very unusual in established democracies.

(There is no Chapter XI).

Chapter XII Concluding provisions

Art. 88: this provision is much more precise than the present law about the violation of the law. Concerning the sanctions, Art. 88 should, at the very least, specifically refer to the laws that provide for the precise offences and their sanctions. It would, however, be very desirable to include the provisions on the sanctions in the electoral law itself.

Legislative technique

The law is much longer and more detailed than the previous one. It deals with most questions linked to the elections, leaving not much room to the CEC (or the government) for adopting regulations. Even if this may not appear ideal from a point a view of legislative technique, it must be welcomed since it eliminates many doubts about how the law will be applied.

A further, minor point of legislative technique: it would be appropriate, when a rule is enshrined in the Constitution, to repeat it rather than simply to refer to the Constitution (see e.g. art. 1.2, 2.4, 37.1 of the law).