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(VENICE COMMISSION)

COMMENTS ON
THE DRAFT LAW ON ELECTION OF PEOPLE'S DEPUTIES
OF UKRAINE (I)
Draft introduced by people's deputies M. Rud'kowsky and V. Melnychuk

by

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Introduction

On 18 July 2003, the Permanent Representation of Ukraine requested the Venice Commission for an analysis of two draft laws “On elections of the People’s Deputies of Ukraine”.

The Venice Commission appointed two rapporteurs to provide individual opinions on each draft law:

- *Mr Ángel Sánchez Navarro, Substitute Member of the Venice Commission (Spain), on the draft law introduced by the deputies S. Havrysh, Y. Ioffe and H. Dashutin; and*
- *Mr Kåre Vollan, Venice Commission expert on electoral matters (Norway), on the draft law introduced by the deputies M. Rud’kowsky and V. Melnychuk.*

These opinions will be submitted for adoption by the Venice Commission at its 57th Plenary Session, on 12-13 December 2003.

These opinions are based on:

- *the Constitution of Ukraine, adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996, CDL (2003) 86;*
- *the Law of Ukraine on Elections of People’s Deputies of Ukraine, amended according to the Law no. 2977-III (297-14) of 17 January 2002, CDL (2003) 66;*
- *the draft Law on Elections of People’s Deputies of Ukraine (I), draft introduced by people’s deputies of Ukraine M. Rud’kowsky and V. Melnychuk, CDL (2003) 83;*
- *the draft Law on Elections of People’s Deputies of Ukraine (II), draft introduced by people’s deputies of Ukraine S. Havrysh, Y. Ioffe and H. Dashutin, CDL (2003) 82;*
- *the Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, adopted by the Venice Commission on 18-19 October 2002, CDL-AD (2002) 23 rev.*

The following opinion, by Mr Kåre Vollan, is on the draft Law “On elections of People’s Deputies of Ukraine”, as introduced by the deputies M. Rud’kowsky and V. Melnychuk.

Preliminary remark

1. The current Law on elections of the Parliament of Ukraine is from 2001. There are now two drafts under review in the Parliament, one draft by the deputies S. Havrysh, Y. Ioffe and H. Dashutin and one by the deputies M. Rud'kowsky and V. Melnychuk. I have been asked to give my opinion on the latter draft.

Concurrent elections

2. Parliamentary and local elections have been held on the same day in Ukraine. Considering the complexity for both voters and administrators, this should be re-assessed. Voters need to grasp several electoral systems and up to six ballot papers. Polling station commissions have to count a large number of races. Public attention is mainly on national issues, and it may be difficult to get media attention on local issues. One may consider organising the elections on two separate days.

Electoral systems

3. Article 1 defines the electoral system as proportional representation (PR) carried out in one single countrywide constituency. Parties and blocs (coalition of parties) may propose candidates. Only parties gaining over 4% of the votes take part in the distribution (Article 77). The party or bloc names are mentioned on the ballot (Article 64) together with the first names of the five candidates of the lists. As voters can only choose a party or bloc, it is therefore a fully closed list system, even though the candidate names do give additional information to the voters.

4. The system represents a change from the current system where half of the members of the Parliament (225) are elected in single member constituencies (SMCs) in a first past the post (FPTP) or plural system (in Ukraine often referred to as system of relative majority) and the second half are elected in a PR system. As opposed to the countries using mixed member proportional systems (MMP) such as Germany, the result of the SMC election is not taken into account when distributing the PR mandates. The end result would therefore not necessarily be proportional.

5. There may be many reasons for changing the system. The mixed system used today may be a compromise between a majority and a PR system, and the results may be seen as slightly arbitrary. The following analysis is based on the fact that the drafters clearly wish to introduce a system producing more proportional representation as a result.

6. This goal may be achieved under a number of systems. A PR system in one single constituency is not common. Those countries, which have such a system, are often small in geographical area, such as the Netherlands, Moldova and Israel. Most other countries with PR systems would have some kind of geographical divisions in constituencies.

7. The current system has the advantage of local representation. This may reduce the distance between voters and the elected and thus promote accountability. With the PR system in one constituency, it is up to the parties to cover the geographical dimension. In a country of Ukraine's size one may suppose that dimension be an important feature of an electoral system. We will in the following present two systems, which would combine a geographical representation with a proportional result. The first system is a PR system in several multi-

member constituencies (MMCs) with national compensation, and the second is the mixed member proportional system (MMP).

8. Under the PR system in MMCs the country is divided into a number of constituencies. From each of these 10-25 members of the parliament are elected. Approximately 70-80% of the total number of members of the Parliament should be elected from the MMCs, leaving the rest as compensatory seats. In the case of Ukraine, the 24 oblasts would form a natural set of MMCs. With an average of 15 members from each oblast, 360 members would be elected from constituencies and 90 members would be filled as compensatory seats. The number of seats from each oblast should be proportional to the number of voters in each one of them.

9. The parties and blocs would nominate a list of candidates for each constituency. The voters will vote for one of the lists put forward in their own constituency. During the count the seats are divided between the lists of the constituency in proportion to the number of votes cast in that constituency. The sum of the seats won in the constituencies will not necessarily be proportional even though it is in each constituency.

10. The compensatory seats are being used to compensate for any disproportional representation adding up from the constituencies. The total number of votes for each party and bloc is added up across all constituencies. Then *all* the 450 seats of the parliament are distributed according to the nationwide result. This will give a proportional representation of the seats of parliament. From the number of seats each party won, one would subtract the number of seats already won in the constituencies. This will give the number of compensatory seats won for that party. The parties competing for compensatory seats would be those which gained more than the threshold (e.g. 4%) of the votes nationwide.

11. The compensatory seats won by a party should be filled from constituency lists from the same party. Several rules can be applied to determine from which list constituency they should be taken. One should also be aware that a rule should be defined if the subtraction of the previous paragraph should be negative, which could happen in rare cases. The system may also allow for independent candidates to run and for an open list system where voters select individual candidates within the party/bloc list.

12. The other alternative of combining PR with local representation would be the mixed member proportional system (MMP). From the voter's point of view this will be similar to the current system. The country is divided into 225 constituencies SMCs each electing one representative by FPTP (or by other majority based rules). The voter would select a candidate of their choice. In addition the voters vote for a party or bloc. However, as opposed to the current system, the results of the SMCs are taken into account when distributing the party seats. Thus the party list mandates work as a type of compensatory seats similar to those in the MMP system.

13. The actual calculation is done by first adding up all the party/bloc votes across constituencies. *All* 450 mandates are then distributed in proportion to the countrywide support of the party/bloc. The number of seats won for that party in the SMCs is subtracted from this number resulting in the number of seats for that particular party from the PR lists. The threshold may again apply to the PR lists.

14. Again a rule for handling negative number of PR seats needs to be in place. There is also a possibility that parties will take advantage of not proposing SMC candidates under their own

name but as independents in order to tactically gain more compensatory seats. This can be avoided only by counting individual votes for a party list if the voter has voted for an individual candidate in the SMC race who is promoted by a party who has won SMC seats in the assembly. Thus running as independent, when in reality being a party candidate, will not give benefits. This requires both races to be running on the same ballot. The MMP system is from the voter point of view slightly more complicated than the PR system in MMCs since he or she needs to vote in two races (as today) and two races have to be counted.

15. The two systems have other features as well, but the most important is that both of them retain a strong geographical element and combines it with a PR system. If this is regarded to be important one of the two systems may be considered.

The election administration

16. The draft specifies in Article 18 that the country be divided in 225 constituencies, as it is under the current law. According to the draft these are reduced to mere administrative units with a Territorial Constituency Election Commission (TEC) (Article 20) for each one of them. Unless the system is changed to MMP, there does not seem to be a good reason to establish these 225 units for pure administrative purposes. One could rather use the existing administrative units such as rayons and cities in order of managing the more than 30,000 polling stations in the country.

The size of the polling stations

17. Article 19, paragraph 10 states that it can be up to 2,000 voters. This limitation is introduced upon recommendation by observers of previous elections. The article still has an opening to exceed this number, however, even 2,000 is a very high number of voters, in particular if six races are to be carried out and counted in the polling station. Further reduction may be advisable if the election days are not separated. According to Article 23, paragraph 2 the minimum number of polling station commission (PSC) members is 10, and there is no maximum. Even if staff is increased, the counting of 1 – 2,000 of votes in 6 races takes a lot of time.

Composition of election commissions

18. Observers have previously recommended introducing more guarantees for multi-party representation in the election commissions.

19. The TECs are set up after nomination by parties and blocs (Article 22, paragraph 1). Only one member may be nominated from each party or bloc. In addition individuals may be put forward for membership. Paragraph 5 states that the chairperson, deputy chairperson and secretary all have to represent different political parties (blocs). It also says that the number of appointed members of a party should be in proportion to the number of nominations to commissions of the same party. This is not necessarily a good guarantee for balanced commissions since it does not say anything about the number of individuals appointed, and the number of proposed commission members should not necessarily be the basis. Number of candidates for the election, or number of seats won during last election may be a better basis. Otherwise there may be competition by even insignificant parties to propose a high number of commission members.

20. Article 23, paragraph 8 has similar arrangements for polling station commission (referred to as district election commission in the English translation) members. The previous comment applies even here.

Voters' register

21. Articles 31 and 32 describe the procedure for establishing the voters' register. It is left to local authorities to draw the registers from various sources. A more unified system for extracting voters' registers from continuously maintained civic registers should be considered.

22. In Article 32, paragraph 3 it stipulates that if the date of birth is missing, it is set to 1st January the year of birth. This seems to give persons below 18 years the right to vote in certain instances.

23. Scrutiny of voter registers is improved in the draft, Article 34. Changes are forbidden on Election Day. It is important that these provisions are properly implemented so that voters are given a real chance to correct their listing before Election Day.

24. Observers have earlier commented on the practice of absentee voting. Now a so-called relocation certificate is being introduced for those who have moved since the voters' register was compiled. This is meant to insure that a voter is deleted from his or her original list before being allowed to vote in the new place. Again implementation needs to be monitored in such a way that exceptions are not accepted.

Campaign finance

25. Article 38 gives detailed regulations on how parties and blocs may finance their campaigns. Articles 55 and 56 give rules for paid and free advertisements in media. During previous elections observers commented that campaign advertisements had been paid for using other sources than official party funds, and thus escaped control. More explicit regulation against such in-kind contribution to party campaigns should be added.

Nomination of candidates

26. Article 42 states that a party needs to be registered a year before Election Day. This seems an unnecessarily long period before the elections, when nomination of candidates only starts 115 days before Election Day.

27. Article 47 requires candidates to disclose his or her property and income. The CEC may deny registration if data seems to be misleading. The provisions of Article 49, paragraph 3 allowing a party to send in additional information do not seem to apply in such situations. Some of the provisions of Article 49 for denial of candidacy are rather open. The Civil Procedure Code allows the party to lodge a complaint regarding such decisions with the Supreme Court. For this to be a real possibility, the CEC should have a clear deadline for denying candidates to run.

28. Currently, a candidate can withdraw at any time from a list before the election (Article 48, paragraph 5 and Article 51, paragraph 1.1). However, once a candidate has agreed, there should be a deadline to withdraw, at least in order to change the ballot paper before it is printed. Such an open way of deciding and changing ones mind really gives the parties and others a possibility

for intimidation and pressure. Once voters have been informed of a formal nomination, the decision should remain.

29. That the CEC is able to cancel registration of parties and candidates according to Article 51 is potentially open for abuse, for example paragraphs 1, 6) and 7), 3 and 5. Particularly dangerous is the possibility of punishing the party for an individual's violation.

The campaign and the media

30. The campaign starts 70 days before the elections and ends at 12 pm on the Friday immediately prior to Election Day. Article 52, paragraph 3 states that campaigning outside of this period is prohibited. Many countries will not define the start of the campaign at all. Normal political discussions and campaigning will always have an element of election campaigning regardless of when it happens. The need to regulate the starting point is limited to the special provisions for media, support from the public for contestants and financial disclosure. Beyond this, it is difficult to define what campaigning or regular political debate actually is.

31. Articles 52, 55, 56 or 57 do not cover the particular care, which should be taken by editors of news and other programmes in their campaign coverage and other political issues. Past experience has shown that incumbents have had too easy access to media outside the particularly allotted airtime for broadcast, in effect campaigning. That does not mean that the media should not cover state affairs during the campaign, only that special care needs to be taken so as to ensure an unbiased manner and by letting critical voices be heard as well.

Official observers

32. Official observers are, according to Article 61, only those belonging to parties and blocs, foreign states and international organisations. It is important that domestic civic organisations are also given the right to observe elections. They represent very important elements of providing transparency to the electoral process.

The voting and the count

33. Article 64, paragraph 3 states that the ballot paper shall contain the TEC number. This does not seem to be necessary any more as ballot papers are the same throughout the country.

34. There is a possibility for disabled persons or illiterates to - upon request - be assisted in the polling booth (Article 69, paragraphs 4 and 7). Experience shows that family voting is common even when such help is not needed. A requirement for an extra signature of the person assisting the voter in the voters' register may help reducing this practice.

35. It should be explicitly stated that unauthorised persons are not permitted into the polling station, and that police can enter only upon request by the head of the PSC.

36. The counting procedure is detailed and good. There are reasonable requirements for reconciliation of figures, and for recording any discrepancies. Before opening the ballot box, the number of ballots issued to the polling station is checked against the number of signatures on the voters' list plus unused and spoiled ballots. In addition, the number of stubs is checked against the number of signatures. After opening the box the number of ballots in the box is checked against the number of signatures on the lists. These reconciliation processes do not always tally,

and sometimes for good reasons: for example, the voter may have received the ballot but decided not to use it. There may also be minor mistakes during the count. The draft law states that discrepancies should be recorded. In addition Article 73 allows the polling station commission to declare the election of the polling station invalid if for example there are 10% more ballot papers in the ballot box than the voters' registers indicate (ballot stuffing). 10% may seem to be a high number. On the other hand it is not said what will happen in such cases, for example if a new election needs to be held. Even if inaccuracies cannot effect the results, that might not be the right remedy. One may therefore consider to change this in such a way that as a first step even a small inaccuracy leads to a recount. Then if there is still a discrepancy, it is left with the CEC to decide on the actions to take, e.g. to evaluate whether the results can be effected (after having counted the ballots) and to start an investigation into a possible election fraud.

37. Article 71, paragraph 27 lists the criteria for invalid ballots. One may consider singling out blank votes as a separate entity, so that possibly high numbers of invalid votes may be more easily analysed and explained.

Transparency of tabulation and publication of results

38. Article 78 does not require making detailed tabulation of results from polling station level available to the public. This is important so that party agents, candidates, observers and the general public can check their polling station and that the aggregation is correct.

39. Article 81, paragraph 3 allows a party after the election to remove from their lists, at any point in time and before they appoint deputies, candidates who were not elected. This means that these candidates cannot be substitutes for deputies who, for legal reasons, have to withdraw as deputy. This gives the party too much power. Voters have voted for a particular list of candidates, and the party should not be able to change this, even in the case of list of substitutes.

40. Article 90, paragraph 4 mentions single-member constituencies, even though such constituencies do not exist according to the draft.

A single electoral code

41. The Election Law for Parliament is now also under discussion. The electoral and legal process would greatly benefit by consolidating the three electoral codes (including Crimea) into one single election law. This would make the maintenance of the laws much more efficient, the regulations will have to be decided on only once and the risk of inconsistencies will be drastically reduced.

Abbreviations used

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| CEC | Central Election Commission |
| TEC | Territorial Election Commission |
| PSC | Polling Station Commission (referred to as district election commission in the English translation of the draft) |
| PR | Proportional Representation, the party list based system proposed in the draft |
| FPTP | First Past the Post, a plural system, often in Ukraine referred to as the system of relative majority. It means that the candidate with the highest number of votes is elected, regardless of the share of the votes. |
| SMC | Single member constituency |
| MMC | Multi-member constituency |
| MMP | Mixed Member Proportional system. An electoral system where the voter votes for both a candidate in his or her SMC and for a party list in a PR system, and where the result in the end is proportional because the distribution of PR seats takes the results of the SMCs into account. |