Strasbourg, 16 June 2015 CDL(2015)033*

Opinion No. 807 / 2015 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON

EXCLUSION OF OFFENDERS

FROM PARLIAMENT

by

Mr Oliver KASK (Member, Estonia)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. Introduction

1. The question on whether persons convicted should be allowed to be Members of Parliament is an issue in many countries, although usually not very highly discussed in international level as the number of cases is usually low. Still, as the practices vary, it is of general interest to state the situation in Venice Commission Member States in order to provide help for countries where the issue gets more attention.

2. Previous Venice Commission documents

2. Venice Commission has dealt with the issue in the Report on Electoral Law and Electoral Administration in Europe (CDL-AD(2006)018), paragraphs 78-79.[1] While a reference to opinion on the Law on Elections of People's Deputies of the Ukraine is made, there a many opinions without such criticism on similar provisions (see e.g. CDL-AD(2014)001 on Bulgaria).

3. Code of Good Practice in Electoral Matters, I.1.1.d, provides that deprivation of the right to be elected must be provided for by law (ii), the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them (iii), the deprivation must be based on a criminal conviction for a serious offence (iv) and withdrawal of political rights may only be imposed by express decision of a court of law (v).

3. Other documents for reference

4. A more thorough study on restrictions to stand in local elections has been carried out by the Congress of Local and Regional Authorities – Criteria for standing in local and regional elections (CG/2015(28)7PROV, paragraphs72-97), but differences compared to parliamentary elections might be possible, as 1. Protocol to the ECHR, art 3 is not applicable for these elections.

5. The Congress recommended that the Committee of Ministers invite the governments of member States to review their domestic legislation with regard to local and regional elections, in order to ensure that those countries that currently apply an automatic ban on standing for election following certain criminal convictions, review their legislation in order that any decision of ineligibility require a specific judicial decision of limited duration, and proportionate to the seriousness of the offence committed, in conformity with the case-law of the European Court of Human Rights (Recommendation 375 (2015) of the Congress, paragraph 19(vi)).

[1] 78. It is not uncommon that due to a criminal conviction for a serious offence, individuals are deprived of the right to stand for election. However, it can be regarded as problematic if the passive right of suffrage is denied on the basis of any conviction, regardless of the nature of the underlying offence. Such a blanket prohibition might not be in line with the European Convention for the Protection of Human Rights and Fundamentals Freedoms. With regard to the Law on Elections of People's Deputies of the Ukraine, for instance, the Venice Commission recommended that the law should provide greater protection for candidate rights, including removing the blanket and indiscriminate prohibition on candidacy for persons who have a criminal conviction (see CDL-AD(2006)002, paras 16 and 100). The OSCE/ODIHR recommendation that the right to be a candidate should be restored to those persons who were convicted and subsequently pardoned after the 2003 post-election disturbances in Azerbaijan goes in the same direction.
79. On the other hand, it might be not appropriate not to include (or not to implement) any restriction to eligibility to be elected for criminals at all. For instance the delegation of the Congress of Local and Regional Affairs of the Council of Europe was most concerned at the issue of the validity of the candidatures that were put forward in the 2005 local elections in "the Former Yugoslav Republic of Macedonia". An elected mayor was able to run for Mayor there despite having being sentenced to four years imprisonment for large scale theft by the court (see CG/BUR (11) 122 rev).

4. General principles

6. Parliamentary elections must be general (1. protocol to the ECHR, art 3). Limitation of the right to stand in elections has to be as as slight as possible. It should be up to the voter to decide on which candidate is suitable to be elected and serves the interest of the voter the best. Majority of citizens, adopting legislation on criminal sanctions, should not decide on moral values or appropriate activities for the representatives of minorities. Democratic decision-making should guarantee that those persons who are considered by most voters not appropriate to decide on the legislation have to stay in opposition and are left out from the government. As the ECtHR has stated in case Anchugov and Gladkov vs Russia (paragraph 96), any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1.

7. From the other side, there is a general public interest to avoid active role of offenders in political decision-making. Those not sharing the most important values of society have limited political rights. By restrictions, it is possible to fight better against corruption (especially if the offences have been bribery or corruption) and organised crimes or avoid illegitimate consequences of criminal offences in relation to elections.

8. Especially in countries using closed list electoral systems it is difficult for the voters to leave candidates not appropriate because of criminal offences aside as those candidates may be alternately with those having much support. In case the rules on inner democracy of political parties are not advanced or such legislation is not used in practice, stricter rules on limitation of right to stand for elections might be more appropriate.

9. It can be argued that imprisoned persons cannot take part in parliamentary sessions, communicate freely with other MPs or with voters. That might be one additional reason to restrict the right to be elected for convicted persons.[2]

10. Limitation of the right to be a candidate has to be provided in law and be proportionate. Those persons having served the sentence may hardly be restricted in political rights; it may be up to the specific type of offence or severity of concrete offence to decide on the limitation.

11. ECtHR has clarified the general principles applicable for the matter e.g. in cases Anchugov and Gladkov vs Russia (11157/04 and 15162/05) and Paksas vs Lithuania (34932/04), see especially paragraph 96 with further references.

[2] Estonian Supreme Court noted in 02.10.2013 judgement in case 3-4-1-44-13, paragraph 13 dealing with a complaint by convicted person sentenced to imprisonment denied the right to stand for local elections: „Although not all the fundamental rights of convicted person sentenced to imprisonment are restricted, a restriction of these fundamental rights entails which prerequisite is liberty. The duties of member of municipal council requires participation in the meetings of the council, at least. Usual and as an assumption for efficient work as a member of municipal council is e.g. also participation in other meetings, meetings with voters, communication with local entrepreneurs and other duties and meetings which requisite is liberty. In doing so, the council member can freely decide which activities and meetings with members of the council are needed to carry out his/her tasks. An essential part of the custodial sentence is that a person cannot move around freely. Hence, it is not unreasonable to exclude the right to stand in municipal elections for imprisoned persons."

5. Candidacy requirements

5.1. *In general*

12. Persons convicted long time ago should not be left aside in parliamentary elections. Restrictions of candidacy rights based of convictions should not last for lifetime. Only in very extreme cases such restrictions are provided (e.g. in Germany, Basic Law, Art 18). Convicted persons may change their attitude or behaviour and it should be up to the voters to decide in the elections on the appropriateness of a candidate.

13. It may be more difficult to decide on the limitations for those having served the sentence only recently (e.g. fine has been paid or imprisonment served). Again, the basic idea of democracy requires that the voter – as he/she can base the decision in elections also on the former conviction – should be the one who decides whether the person is appropriate the serve as MP and whether the offence warrants the candidate to be left out of the parliament.

14. Still, not always the restriction of the right to stand in elections should in these cases be considered as disproportionate. Electoral legislation has to take into account the limits of democratic decision-making. For crimes against humanity, genocide, terrorism, severe crimes of corruption etc it might be appropriate to restrict the right to stand in elections for long time. In some countries the time-limit of the restriction to stand in elections is stipulated in law in a general way starting from the release from prison.

15. Persons serving imprisonment sentence do not have the right to stand as a candidate for parliamentary elections in many countries. Still, sometimes it depends on the duration of the imprisonment as for non-severe offences the restriction may be considered disproportionate.

16. In some cases, restrictions might be applicable also in case person is convicted and sentenced to imprisonment on probe or pardoned.

17. In case person is not yet convicted, restrictions of the right to be elected cannot be applicable based on the presumption of innocence. As in some countries termination of mandate is possible for immoral behaviour, not only for criminal offences, such question might rise. Principle of general elections and decision-making by voters should overbalance the interest to restrict the right to be elected. Again, for crimes stipulated in Rome statute of the International Criminal Court, restrictions could be legitimate and proportionate.

18. In case criminal conviction takes place during elections, the law should foresee the consequences for the candidacy. In case convicted persons are not allowed to stand as candidate, the consequence should be similar to any other kind of loss of the right to stand in elections (a.o. death): whether the candidates name is deleted from the list, votes given to the person considered as invalid or counted only for the candidates list.

19. In many countries, loss of the right to stand in elections is provided only for severe crime or for electoral offences. There are also many countries where the loss of the right may result after any criminal offence, but level of punishment has to be not any imprisonment, but a lastly (one year or above) imprisonment.

20. There is yet another possibility to regulate the right to stand for election for convicted persons. It is possible to allow then to take part in elections with an obligation to declare publicly the information on conviction, e.g. by adding to posters a sentence on the conviction (see Election Code of Lithuania, Article 98(3) on previous convictions already served).

5.2. *Offences committed abroad*

21. Constitutions nor electoral legislation does not provide directly the loss of candidacy rights due to punishments in foreign countries. It is up to international treaties binding for a concrete country to mutually recognise judgements of another country or up to exequatur procedure in criminal law to recognise such judgements unilaterally. Convictions by International Criminal Court have to be recognised with same consequences as convictions by domestic courts if the state has ratified the Rome statute.

22. The law should provide for competent authority and administration of such information, especially if the information on conviction is addressed by mass media, not by foreign country.

5.3. *Form of regulation*

23. As the restriction of the right to stand in elections has to be stipulated in law, electoral law is the most common for such provisions. Indeed, a constitutional provision is widespread as it touches upon constitutional matters *par exellence*, but not obligatory, as restriction of that fundamental right may be stated in ordinary legislation as well.

24. In case the right to stand in elections is restricted, there are two main types of systems used: 1) restriction is provided in a general manner by law, stipulating the conviction, type of sentence or offence which cases the loss of right to be elected automatically; 2) the restriction is decided by court as a punishment case-by-case. In latter case, election law provides disenfranchisement based on such kind of court decision (e.g. in Germany, Federal Election Law Art 18(1)). The intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights

5.4. *Examples*[3]

25. There are countries where conviction is not a reason to restrict eligibility to stand as a candidate in national elections. Such examples are Finland, Slovenia and Sweden.

26. In many countries, persons convicted for a crime and imprisoned are banned to stand in parliamentary elections.

27. In Estonia, Art 58 of the Constitution[4] leaves it open to the legislation to decide on the ban to take part in elections (incl. right to stand in elections) for persons convicted for a crime and sentenced to imprisonment. *Riigikogu Election Act* Art 4(6)[5] provides for respective ban in general, irrespective of crime committed or length of imprisonment.[6]

28. In Armenia, Art 2(3) of the Electoral Code and in Albania, Art 45(3) of the Constitution provide same restriction.

[3] The list of examples takes is far from being exhaustive or giving all the variety of possible provisions in diferent countries, taking into note that the Secretariat of Venice Commission has prepared an overview already and list of examples shall be added based on later input.

[4] https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530102013003/consolide

[5] https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/520012015018/consolide

[6] No court practice on the matter in Estonia is available.

29. In Lithuania, persons who have not fulfilled punishment imposed by a court judgment may not stand as candidates in elections (Art 56(2) of the Constitution; Article 2(3) of the Election Code). Same applies to persons been impeached (Election Code, Art 2(4)).

30. In Turkey, persons sentenced to imprisonment for more than one year (with the exception of conviction for negligence) are ineligible to stand for election, as well as persons convicted of specific serious criminal offences listed in the law.

31. In Kyrgyzstan, persons who are being held in places of confinement, as well as persons whose previous convictions have not been expunged or served, shall not have the right to be elected (Election Code, Art 3(3) and 3(4)).

32. In Moldova, individuals who are sentenced to prison (deprivation of liberty) by a final court decision and who serve their sentence in a penitentiary institutions, as well as individuals who are under court jurisdiction or have active criminal records for deliberately committing crimes, are denied the right to stand as a candidate in elections (Electoral Code Article 13(2)c).

33. In Macedonia, person does not have the right to be elected if he has been sentenced with a final court decision for unconditional imprisonment above six months and serving of the sentence has not yet commenced or who is serving an imprisonment for a criminal offence (Election Code, Article 7(3)).

34. In Greece the Constitution (Article 53) provides that persons convicted for some felonies listed in the electoral law are denied the right to be elected.

35. In Iceland, Article 5 of Election Law provides that no person is considered to possess full civil rights who has been convicted by a court of law for committing an act that is considered heinous by public opinion unless that person has been granted a restoration of his or her civil rights. A judgment of conviction for a punishable offence does not entail the loss of civil rights unless the defendant in a criminal case had reached the age of 18 when the offence was committed and the resulting sentence is at least four years prison without probation or a sentence of preventive detention for defendants who are committed to psychiatric care.

6. **Termination of mandate of MP based on offence**

6.1. *General*

36. Termination of mandate of MP is a limitation of the right to be elected and by that of the fundamental right in Protocol 1 of the ECHR, Article 3. Termination has thus as well to be based on clear norms in law and be proportionate.

37. In case the conviction enters into force after the elections while the person is already assumed Office, voters have not had the information on offences by the candidate. The democratic nature of elections is not hampered if the mandate is terminated because of criminal offences. In case a person has been convicted for an offence and the electorate still votes for that person, it could be argued that principle of democracy asks for the legislation not to interfere as far as the offence does not endanger the constitutional order, peace and fundamental rights. In case the conviction takes place after the elections, wider possibilities for the termination of persons mandate should be allowed.

38. In case a MP is accused for committing a severe crime, there is a public interest to avoid participation of that person in parliamentary proceedings. It is not always obvious that such persons have to be kept in pre-trial detention anyway. For those situations, impeachment procedure could be provided. It is obviously not a matter of election law.

39. Finnish Constitution, Art 28 provides such kind of dismissal procedure for MPs who have essentially and repeatedly neglected duties as a representative. It is notable that there is no restriction for those persons to be re-elected in next elections.

40. Persons convicted for crimes are in many countries dismissed from office of MP. While the wording of legislation may just declare the termination of mandate if the person has committed a crime, it is obvious that such termination has to be based on final court decision.

41. In Brazil, a deputy or a senator shall lose his office if he is criminally convicted by a final and unappealable sentence (Article 55(VI) of the Constitution).

42. In some countries, dismissal takes place only in case the MP is sentenced to imprisonment or convicted on a severe crime or on electoral offence. Sometimes the reason for dismissal may be else than criminal conviction as well.

43. In Portugal, deputies cease to hold office if they are convicted by a court for a crime committed in the exercise of their duties and are thus sentenced, or for membership of an organisation that is racist or has a fascist ideology (Art 160(1) of the Constitution).

44. It could hardly be reasoned to terminate the mandate of a MP who has been sentenced and whose conviction entered into force before elections. By that, for the termination of mandate, the question of how long a restriction based on conviction should be applicable does not raise. Indeed, especially for convictions abroad, it may happen that the person was convicted before elections and the legislation does not allow such person to take part in elections. Law should provide for such situations termination of mandate.

45. In Lithuania, mandate shall be dismissed in case the candidate did not follow the rules provided for disclosure of prior conviction (Election Code, Article 98(3)).

6.2. Form of regulation

46. Mainly provisions on the termination of mandate of MP are contained in constitutions, sometimes repeated in the election laws (e.g. Election Code of Bulgaria, Article 271).

6.3. Example of Estonia

47. Estonian Constitution, Article 64(2) provides the termination of MPs mandate in case of entering into force of conviction. Similar provisions are in the Status of Members of Riigikogu Act (https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516042015001/consolide), Article 8. In practice, there have been until now two cases of termination of mandate based on criminal conviction, both of them for corruption or bribery. There are still two more pending cases with judgements not entered into force yet. The sanctions have been imprisonment on probe. In none of the cases a question on the proportionality of termination of mandate of MP has been raised.

48. There are no specific provisions for offences committed abroad.