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**COMMENTS ON
THE DRAFT CONVENTION
ON ELECTION STANDARDS,
ELECTORAL RIGHTS AND FREEDOMS**

by

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Introduction

1. The Draft Convention on Election Standards, Electoral Rights and Freedoms (hereinafter “Draft Convention”) was approved by the participants in the international conference of the “Association of Central and Eastern European Election Officials” (ACEEEO) held in Moscow (Russian Federation) on September 26-28, 2002.
2. The present Draft Convention wants to give a new political and legal impetus to the synchronisation and harmonisation of the international and national legal realm, the realisation of the electoral rights and freedoms of a human being and a citizen, and the preparation and administration of democratic elections. According to the Explanatory Note its aim is to reduce certain inconsistencies, including the separation and duplication of the relevant rules and recommendations contained in the documents of various international organisations, imparting a binding international law significance to the standards of democratic elections and to the measures guaranteeing the electoral rights and freedoms of participants in the electoral process.
3. Its formulation in the framework of a European convention should – according to the Explanatory Note - make it possible to lay a more solid international legal foundation for the activity of the European Court of Human Rights which requires legal protection for the rights and fundamental freedoms of individuals.

General Remark on the system of the Draft Convention

4. The Draft Convention consists of a preamble and 27 articles. There are, however, no further divisions in the Draft Convention’s text (e.g. “parts”, “sections” or “chapters”). The **inner structure** of the Draft Convention consisting of four so-called “blocks” of articles is only mentioned in the “Explanatory Note” to the Draft Convention. In fact, the structure of the Draft Convention neither corresponds explicitly to these blocks, which would certainly promote the general understanding of the Draft Convention as a whole, nor does it determine the articles of each particular block.
5. The **first “block”** deals with the standards of democratic elections including the election principles such as periodic and mandatory, free, genuine, fair, open and public elections based on universal and equal suffrage, held by secret vote or by equivalent free voting procedures, assuring voters of their freedom to vote with effective judicial protection and civic (public) and international monitoring. In addition to these general principles, the Draft Convention includes official language guarantees, especially in favour of national minorities and ethnic groups, and the principle of openness and publicity of elections. The first block seems to contain the Art. 1 to 11. However, Art. 12 could also be regarded as being part of the first block. The extent of the first block is therefore not clear enough.
6. The **second “block”** defines the status of “election participants” and the technological infrastructure of the modern electoral process, ensuring equal legal possibilities for all election participants, including public monitoring of elections and stronger judicial guarantees. It includes the Art. 13 to 18. It lays down the basic rules of the status and powers of observers and candidates’ agents, the procedure for filing complaints against violations of the electoral rights and freedoms of election participants with courts and other bodies, the basic principles of information coverage of elections and election campaigns of candidates and political parties

(coalitions) in the mass media and telecommunications media, as well as general principles for the formation of a transparent funding mechanism for elections and the election campaigns of candidates and political parties.

7. The **third “block”** consists of one article only (Art. 19). It defines the parameters of the status and powers of international observers whose presence contributes to the publicity and openness of elections.

8. The concluding **fourth “block”** of the Draft Convention sets forth the measures that must not be regarded as discriminatory in the legislative regulation of the national electoral process and defines the obligations of the parties to the Convention. Finally, the fourth block regulates the signing, ratification and entry into force of the Draft Convention. This final block includes the Art. 20 to 27.

9. The **systematic order** within the text of the Draft Convention suffers certain inaccuracies. The following examples shall demonstrate this.

a. While Art. 1 uses the term “fair, genuine, ...” elections, this order is not maintained in the further rules of the Draft Convention, since the principle of “genuine elections” is mentioned before the principle of “fair elections” (Art. 4 and 5).

b. The enumeration in Art. 1 can generally be considered as “table of contents” of the following rules of the Draft Convention. Nevertheless, the content of Art. 7 (official language of elections), which belongs to the first block, is not explicitly mentioned in Art. 1 and interrupts thus the general order provided for in Art. 1.

c. While the right to elect and to be elected is separately mentioned in Art. 1 § 2.1, it is at the same time considered as the first aspect of the universal suffrage in Art. 8 § 1.1. The separate mentioning of these rights in Art. 1 § 2.1 could have been left out and consequently considered as one of the main aspects of the universal suffrage such as provided by § 2.3. On the other hand, the principle of “direct suffrage” is only regulated in Art. 10, but it is not enumerated in the introductory Art. 1, although it is undoubtedly one of the generally accepted election principles, which would have justified its incorporation in Art. 1 of the Draft Convention.

d. Certain rules of the Draft Convention contain at the same time material principles and procedural guarantees for these principles. There is no stringent system in the Draft Convention.

10. Democratic elections can only be held if certain basic conditions of a democratic society based on the rule of law are met. The so-called “European electoral heritage” consists of the fundamental rule that the suffrage must be universal, equal, free, secret and direct. Furthermore, elections must be held periodically.

11. In the Draft Convention, democratic elections are considered as “one of the supreme direct expressions of the power and the will of the people” (Art. 1 § 1). The common European “election standards” in the sense of the Draft Convention (Art. 1 § 2) include

- the right to elect and to be elected,
- free, periodic and mandatory, fair, genuine, open and public elections,
- universal and equal suffrage held by secret vote ensuring free expression of the voters’ will,
- judicial and other protection of the electoral rights and freedoms of individuals, and

- the effective public control over and impartial international monitoring of elections.

12. The enumeration of election standards in Art. 1 of the Draft Convention has certainly an introductory and programmatic character, while the single election standards are defined and explained in the following articles of the Draft Convention. However, there is no clear structure in that respect. The principle of free elections (Art. 1 § 2.2.) is established by following Art. 2, periodic and mandatory elections in Art. 3, fair elections in Art. 5, genuine elections in Art. 4, open and public elections in Art. 6. The election principles of the universal suffrage and equal suffrage are defined in Art. 8 and 10. The conditions of secret voting are defined in Art. 11. The direct suffrage is not included in Art. 1 § 2, though it is mentioned in Art. 10 of the Draft Convention. In addition to these election principles, Art. 7 refers to the official language of elections.

Standards of democratic elections, Voting Principles

13. Subject to a rather unsystematic approach of the Draft Convention the following remarks seem of particular importance when an assessment of this draft instrument has to be made.

14. First of all, the question of **free elections** is dealt with in Art. 2. According to Art. 2 § 4 “no one” should be able to influence a citizen to compel him to participate in elections or electoral procedures. However, having regard to the fact that the draft should turn out as a Convention and thus as an international treaty, it would be more in conformity with general practice that it does not impose direct prohibitions on individual persons. The situation is similar with regard to Art. 3 § 3.

15. According to Art. 2 § 3 of the Draft Convention voters and other electoral participants must have the choice to participate or not to participate in the electoral process. However, in a number of European countries, the legislature may impose a duty to participate in elections. This is accepted by Art. 2 § 5. For systematic reasons Art. 2 § 3 and Art. 2 § 5 should therefore be taken together.

16. Art. 2 § 7 raises a problem in a different context: according to the Draft Convention foreign nationals, foreign legal entities, and “international political movements” shall not be allowed to participate “unlawfully” in “any activity related to the calling for and the holding of elections.” This wording must be understood as a general prohibition of participation of foreigners in electoral campaigns. This conflicts not only with the constitutional law of some member states but also with the law of the European Union. It is true that member states of the ECHR are allowed to restrict the rights of foreigners in the context of political activities (Art. 16 ECHR). However, there is no obligation under the Convention. On the contrary, under certain circumstances member states of the Convention, which are members of the EU at the same time, must not take advantage of this permission. First of all, it is generally suggested that this article does not apply to EU foreigners in a EU member state. This has been confirmed by the European Court of Human Rights in the case of a person who stood for election for the European Parliament (case of Piermont ./ France, judgment of 27.4.1995; Series A 314). For elections on the level of local communities this problem is even more evident. As there is a right for EU foreigners to stand for elections on local community level such a prohibition would prevent those people from using a right provided in community law and to be confirmed by the draft Constitution of the European Union. Finally a number of European states accord the right to vote to certain groups of foreigners even at the national level.

17. In addition, the strict ban on donations by foreign nationals seems too strict having regard to various systems in Europe. At any rate, it should apply only when there is an explicit prohibition in the national legislation (see the terms “shall not be allowed to participate unlawfully”).

18. The principle of “**free suffrage**” dealt with in Art. 2 of the Draft Convention under the head of “Free Elections” is based on two different aspects: firstly, the free formation of the elector’s opinion and secondly, the free expression of this opinion including the freedom of voting procedure and accurate assessment of the result. In order to guarantee the freedom of voters to form an opinion, it requires the state and all public authorities to honour their duty of even-handedness. The freedom of voters to express their opinion requires strict observance of the voting procedure. Law must punish any violation of these rights and obligations by the state or by individuals.

19. Art. 2 of the Draft Convention refers to “free elections” in the sense that the holding of free elections should have in any case a legal basis which consists of the national constitution and other fundamental laws of the state in accordance with the universally accepted principles and norms of international law and international treaties (Art. 2 § 1). In addition, it defines the principle of free elections by the possibility for voters and other election participants to choose, without coercion, threat of coercion or any other unlawful influence, whether to participate or not to participate in elections in the forms allowed by law and by lawful methods, without fear of punishment, influence or compulsion, specifically depending on voting and election results (Art. 2 § 3). The participation of a citizen in elections should be free and voluntary (Art. 2 § 4), whereas the obligation of a citizen to participate in the voting laid down by the constitution or law does not constitute a restriction of the principle of free elections (Art. 2 § 5). In order to exercise his right to participation in free voting, each voter shall be entitled to equal and free access to an election precinct and a polling station (Art. 2 § 6). Foreign nationals and other foreign or international entities shall not be allowed to participate unlawfully in any activity related to elections and electoral campaigns (Art. 2 § 7). It provides that the applicable rules have to enter into force before the beginning of the election campaign (Art. 2 § 2); even if it is perhaps difficult to introduce a more stringent provision in an international convention, it would be suitable to deal with revisions of electoral legislation well in advance of (one year before) elections.

20. Nevertheless, the determination of a freely expressed will of voters and its implementation shall be ensured by the observance of the principle of “genuine elections” established by Art. 4 of the Draft Convention. Although, the principle of genuine elections can generally be considered as an integral part of the principle of free suffrage in the mentioned meaning.

The Draft Convention does not refer explicitly to the freedom of voters to form an opinion. Rules on this question have actually to be found in Articles 12, 14 and 17.

21. In accordance with Art. 3 of the Additional Protocol to the European Human Rights Convention and Art. 25 b of the International Covenant on Civil and Political Rights, Art. 3.1 of the Draft Convention provides for **periodic elections** held in reasonable intervals. The period of powers of a legislative assembly or other representative body should not exceed five years. This is fully in line with European standards and international human rights as far as parliamentary elections are concerned. For presidential elections, however, longer periods should be possible. The Draft Convention does not explicitly refer to other types of elections, such as presidential elections.

22. Art. 3 of the Draft Convention also deals with the beginning and the end of voting elections, as well as the duration of the voting period, ensuring the most favourable and equal legal conditions for the expression of the will of all voters. § 3 again concerns a problem of third-party-application (see above 7.). It should also be applied in conformity with the principle of proportionality.

23. The principle of “**genuine elections**” established in Art. 4 shall ensure the determination of a freely expressed will of voters and its direct implementation. As already mentioned before, the rules and measures provided in §§ 2 to 7 of Art. 4 could, however, be regarded as being contained in the principles of free and equal suffrage, so that the separate mentioning of an additional principle of “genuine elections” is not necessary. The meaning of “genuine” in this context is not clear, especially in relation to the principle of “free elections”.

24. The principle of “**fair elections**” (Art. 5) shall ensure equal legal conditions to all election participants. “Fair elections” should guarantee

- universal and equal suffrage (Art. 8 and 9),
- equal legal conditions in an election campaign (e.g. Art. 17),
- public, timely and full funding of elections, election campaigns and political parties as well as disclosure of information about all expenditures incidental to the preparation and administration of elections of election campaigns (Art. 16),
- honest execution of electoral procedures provided for by laws (Art. 13),
- organisation of the electoral process by impartial election bodies (Art. 8 § 1.5 and Art. 13),
- quick and effective adjudication by courts and other bodies of complaints and statements about violations of election laws (Art. 18).

25. The significance of this Art. 5 may also be qualified as introductory and programmatic, as it gives an overall view of certain aspects of fair elections referring to provisions contained in other articles of the Draft Convention.

26. The principle of **universal suffrage** in the sense of Art. 8 refers to the active and passive electoral rights, in other words to the right to vote (Art. 8 § 1.1: the “right to elect”) and the right to stand for election (the “right to be elected”).

27. According to the Draft Convention these rights are subject to a certain number of conditions, such as the age (§ 1.1), the nationality or citizenship (§ 1.2) and the residence (§§ 1.3 and 1.4). The right to vote should at least be granted to a person who has attained the age of majority (in most states 18 years), while the minimum age for the right to be elected may be higher but not more than 25 years, unless otherwise provided by the constitution or laws with respect to candidates for certain elected offices, in particular the head of state or the highest-ranking official of a territorial unit within an federal state (§ 1.1). It is understood that the terms “when the person is able to independently and to a full degree exercise his rights and discharge his duties” do not mean a limitation of the right to vote; for the sake of clarity, it would be suitable to drop them. The requirement for the period of residence should only be imposed at regional or local elections, but should not exceed six months (§ 1.3). The electoral rights should also be granted to citizens who lawfully reside outside the territory of their state (§ 1.4). In § 1.3, the term of “more” before “reasonable” is certainly a *lapsus calami*, but it is not clear what is meant by assuring “electoral rights... of the given territory as a whole”.

28. § 1.6 provides that the electoral rights may be restricted by law for persons pronounced by a court to be incapable and persons serving a criminal sentence. Apart from the conditions of mental incapacity or a criminal sentence, the provision by law and the express decision of a court, Art. 8 does not refer to the principle of proportionality as an imperative condition for the legal deprivation of the electoral rights in accordance to the conditions under which fundamental rights may be restricted and it does not restrict the condition of criminal conviction to a serious offence. However, Art. 20 refers implicitly to this principle, since it provides that the electoral rights and freedoms of individuals may be restricted only so far as it is necessary for the protection of the health, rights and legitimate interests of other persons, the safeguarding of national security and public order and the prevention of crime (Art. 20 § 1). Art. 20 § 2.1 permits the constitutions to restrict the electoral rights and freedoms of individuals, especially providing reasonable requirements for persons pronounced to be incapable by a court or a person serving a criminal sentence.

29. For systematic reasons it would be better to have a closer link between Art. 8 and 12. Under the principle of the universal suffrage voters should be registered on a permanent basis. The registration of voters should be updated at least once a year. Each voter has a guaranteed right to receive information about his inclusion on a voter list and to appeal in a court or “in some other procedure established by law”, the refusal to include him on or his removal from a voter list, or any inaccuracy in the information about voters (Art. 8 § 1.5). Voter lists shall be made available for examination and additional correction. Under certain circumstances, there shall also be provided a supplemental voter list. In addition to these guarantees, Art. 8 § 2 contains a general non-discrimination clause.

30. The principle of **equal suffrage** is dealt with in Art. 9 of the Draft Convention. The observance of this principle comprises a variety of aspects. It means that each voter has the same number of votes as other voters, and his vote has the same weight as votes of other voters (“equality in voting rights”; Art. 9 § 1.1). According to the Draft Convention, electoral constituencies and precincts should be formed on a fair basis, so that voting results should reflect most accurately and fully the will of the voters that participated in the voting, but with a “minimum allowable deviation” from an average representation quota for a constituency and with due regard to territories with national minorities and ethnic groups (“equality in voting power”; Art. 9 § 1.2). This is obviously a *lapsus calami*: the Draft Convention aims at fixing a “*maximum*” admissible departure from the distribution criterion adopted.

31. Art. 12 refers again to further measures to ensure equal legal conditions and additional possibilities for participation in elections, especially for women and persons with physical and other disabilities (infirmities) as well as other categories of the population (representatives of indigenous and small peoples, nationalities, other national minorities or ethnic groups). However, the provisions of Art. 12 could be considered as specific exceptions of the principle of equal suffrage, thus it should form an additional paragraph of Art. 9 (equal suffrage).

32. While the registration of candidates and lists of candidates of political parties is dealt with by Art. 4 §§ 5 and 6 (genuine elections), Art. 8 § 1.5 (universal suffrage) refers to the registration of voters and its procedure, especially to the voters lists.

33. Art. 9 § 2 establishes the principle of voting in polling stations but establishing at the same time legal exceptions to this principle and other legal form of voting, such as postal voting, voting on the basis of an absentee certificate, early voting, voting on the basis of a power of

attorney or other forms of voting which assure maximum convenience to voters, including persons with physical and other disabilities (infirmities; § 3).

34. In this context it has to be mentioned that, if the present (detailed) structure of the Draft Convention is maintained, problems with regard to **remote voting** should be addressed more precisely. This is even more important as there are a number of initiatives on national level in a number of states as well as on international level, in particular within the framework of the Council of Europe. Reference is made to the Integrated Project 1 “Making Democratic Institutions work” on e-voting. In particular, provisions providing for security, reliability and transparency of such voting methods should be introduced. This applies also to other forms of remote voting such as the traditional form of postal voting and proxy voting. The article on secret voting (Art. 11) is rather short compared to other principles and incomplete.

35. The principle of **direct suffrage** is dealt with in Art. 10. Although, direct suffrage is not enumerated explicitly in Art. 1 § 2 of the Draft Convention. , According to this provision, irect suffrage should be applied to at least one of the chambers of the national parliament but also to other regional or local assemblies (Art. 3 of the Additional Protocol to the European Convention on Human Rights; European Charter of Local self-government, ETS No. 122). The direct election of the national legislative assembly and other regional or local representative bodies is one of the principal aspects of the European constitutional and democratic heritage. If in a bicameral system, the other chamber is not elected by direct elections, this does not contradict the provisions of the Draft Convention (Art. 10 § 3). The need of an explicit mention of the vote “against” (§ 1) could be questioned, since it is unusual in most member countries of the Council of Europe.

36. The voters’ right of **secret voting** as one aspect of voter freedom should not be restricted or infringed in any way (Art. 11 § 1). The terms “and other equivalent forms guaranteeing freedom of voting” in the title do not look necessary. Any kind of control whatsoever over the expression of voters’ will should be excluded in any forms established by law (§ 3). Art. 18 § 5 refers to the prohibition and punishment provided by law of any violation of the secret suffrage.

Status of election participants and the technological infrastructure of the modern electoral process (Art. 13 ff)

37. The preparation and administration of elections should be carried out by **collective election bodies** headed by the “central election body”, acting independently, impartially and within the scope of competence and powers established by the constitution and/or laws and other statutory acts (Art. 13 § 1). Only independence, impartiality and transparency from politically motivated manipulation will ensure proper administration of the election process. The central electoral body or commission should have a permanent status and a special composition, facilitating maximum impartiality. Art. 13 does not, however, refer to this particular aspect.

38. The procedure for the formation of election bodies, their powers and their legal status should be **established by law**. Election bodies should include **representatives of political parties** and other groups participating in the election, national minorities and ethnic groups (§ 2). By these means, stability of the specific rules of electoral law, especially those covering the electoral system per se, the composition of electoral commissions and the drawing of constituency boundaries can be ensured. **Electoral law** should have the rank of statute law and should not be changed too often and in no case immediately before elections (within one year). The basic rules and elements of the electoral procedure should as well be defined by the

constitution or other text higher in status than ordinary law. Art. 13 § 6 provides that **resolutions of lower election bodies** may be appealed in the higher election body or in a court, which may reverse the decision of the lower election body.

39. Art. 14 § 1 guarantees each citizen, individually or collectively, to express freely political views and political preferences, which can be regarded as part of the comprehensive freedom of opinion and expression. Emerging from this fundamental freedom, each citizen should also be entitled to seek election to elected offices and nominate his candidacy for nomination as a candidate, search for and communicate information about the electoral process and make a sound personal choice, and to travel freely over the territory of the state. Art. 14 § 2 rules the individual right to join or to organize a political party on a lawful basis for the purpose of participation in elections, including the nomination of candidates or lists of candidates. Additionally, Art. 14 § 3 repeats the duty to safeguard and protect the political and electoral rights and freedoms by law. Art. 14 § 5 allows for a selective verification of a quota of signatures. This should be admitted only when it leads to the validation of a list; its invalidation should be possible only when it is certain that it has not obtained the required number of valid signatures.

40. The **right of candidacy** in elections may only be restricted by the collection of a certain number of voter's signatures, which should not exceed 2 percent of the number of voters in the given constituency, or by the payment of an electoral (monetary) deposit, which should not be burdensome for the candidate or the political party. The law should also specify the minimum number (percentage) of votes that has to be received by a candidate or political party for the electoral deposit to be returned. The law should establish the duration of the signature collection period, the deadline for submission of the signatures for verification as well as the procedure for the verification of signatures and for pronouncing them to be *bona fide* or otherwise (Art. 14 § 5). The decision to register a candidate or a list of candidates participating in the elections may be reversed by courts or election bodies accordingly (§ 6). There may also be established by law a certain number (quota) of votes required by political parties to participate in the **distribution of deputy mandates or seats** in accordance with the voting results at elections.

41. In Art. 14, 17, 20 and 21 the Draft Convention provides for a number of political rights in the context of elections. In this respect one would expect in a Council of Europe document that reference is made at least once to the relevant Art. 10 and 11 of the ECHR and of Art. 3 of Protocol No. 1. Such a reference would also ensure that restrictions on these rights are admissible within the limits of the "necessity" test effected by the European Court of Human Rights. Although the Draft Convention makes reference to international obligations, restrictions etc. in Art. 20 § 1, 20 § 3 and Art. 22 § 2. This is not enough to cover the whole election process and the corresponding electoral campaigns. The Draft Convention goes on to regulate in a detailed way also the political process leading to elections. In this respect it should be kept in mind that the European Convention on Human Rights allows restrictions beyond those formulated in the Draft Convention, such as restrictions on the political activity of civil servants, soldiers, policemen etc. in particular in post-communist times. This may go further than the incompatibilities mentioned in Art. 20 § 5 of the Draft Convention.

Art. 16 develops the rules which should ensure equality between political competitors from a financial point of view. It would be suitable, in order to be absolutely clear, to add at the end of Art. 16 § 3, after "by other conditions stipulated by law", "in conformity with the principle of equality".

42. Again in Art. 17 reference is made to the “conditions of real pluralism of opinions”. As far as a duty to guarantee the freedom of expression goes beyond the requirements of Art. 10 of the European Convention of Human Rights this seems problematic. As far it is covered by the Human Rights Convention it seems quite exaggerated to repeat requirements in detail in this document.

Art. 17 §§ 3 and 5 allows for restrictions of the freedom of expression. It should be made clear that they have to be in conformity with the principle of proportionality.

43. With regard to the “equal” access (“on an equitable basis”) to mass media required according to Art. 17 § 4 of the Draft Convention reference is made to national practice according to which the size of a party may influence the extent of access to the mass media.

The possibility to withdraw international observers’ accreditation (Art. 19 § 8) should be interpreted in conformity with the principle of proportionality. The same is true for the restrictions on their rights based on national security (Art. 19 § 7.1; see also Art. 15 § 4.1 on national observers).

There is a *lapsus calami* in Art. 23 § 3 (“rectification” instead of “ratification”).

Conclusion

44. The adoption of a convention on elections could be an important step towards the harmonisation of electoral legislation all over Europe, in conformity with the principles of the European electoral heritage. The drafting work of the ACEEEEO has to be greeted in this respect.

Irrespective of the particular questions addressed in this opinion, the general shape of the Draft Convention raises a number of questions. It is not short, on the contrary. It provides for many details, which are sometimes very important, sometimes quite surprisingly included in an international document. Not few guarantees can be found twice or even more often in the Draft Convention, not always in the same form. This may give rise to misunderstandings. The Draft Convention refers to the principles of the European electoral heritage. These principles could however be presented in a more systematic way in order to avoid misinterpretations.

Concerning the substance, the essential features of the European electoral heritage have been introduced into the text. A certain number of points could however be reviewed. They will not be enumerated again here. It should however be underlined, in a more general way, that all restrictions to the rights enshrined in the Convention should be clearly submitted to the principle of proportionality.