



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 1 March 2004
Opinion no. 253/2003

Restricted
CDL-EL(2004)006
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION ON
THE DRAFT CONVENTION ON ELECTION STANDARDS,
ELECTORAL RIGHTS AND FREEDOMS

on the basis of comments by

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Introduction

1. *The Venice Commission has been invited by the Association of Central and Eastern European Election Officials (ACEEEO) to give an opinion about the Draft Convention On Election Standards, Electoral Rights and Freedoms (hereinafter, “the Draft”), approved by the participants in the international conference of the Association, held in Moscow (Russian Federation) on September 26-28, 2002 (CDL(2003)057).*
2. *Two members of the Venice Commission, MM Christoph Grabenwarter and Ángel Sánchez Navarro, were appointed to prepare comments on the said draft Convention. The present opinion is a consolidation of those comments (CDL-EL(2003)014 and CDL-EL(2004)004).*
3. *The opinion on the Draft ACEEEO Convention was adopted by the Council for Democratic Elections at its ...meeting and by the Venice Commission at its ... session.*

Preliminary remarks

4. The Draft explicitly intends to summarise “in a legally binding international law, the experience that the Council of Europe and various states have accumulated on legal regulation and administration of democratic elections; specifying and amplifying the basic provisions set forth in Article 3 of Protocol No. 1 (entered into force in 1954) to the European Convention for the Protection of Human Rights and Fundamental Freedoms...; and defining the international law features of the modern democratic electoral process in a newly integrated Europe” (Explanatory Note).
5. 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.
6. 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.
7. At first glance, when one looks at the proliferation of international documents and Conventions, one may even wonder how many Conventions and of Rights may Fundamental Rights bear. In fact, in European countries, electoral rights and freedoms are almost always ruled by national Constitutions, and by most human rights Conventions and Declarations, since the 1789 *Déclaration des Droits de l’Homme et du Citoyen* (Articles. 3 and 6: “The principle of any sovereignty lies primarily in the Nation”; and “The law is the expression of the general will. All the citizens have right to contribute personally or by their representatives to his formation”). Among these Conventions and Declarations, we may point out:

- the 1948 United Nations Universal Declaration of Human Rights (Article 21: “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”);
- the 1966 International Covenant on Civil and Political Rights (Article 25: “Every citizen shall have the right and the opportunity...(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”);
- the ECHR and the already quoted Article 3 of Protocol N. 1 (The Parties undertake « to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature»); or
- the Code of good practice in electoral matters of the European Commission for Democracy through Law (CDL-AD(2002)023rev).

8. Different texts and different wordings have often the same purpose: to grant a given fundamental right, such as the right to political participation, in general, and the right to suffrage which makes political participation possible.

9. Nonetheless, it is possible to find differences of perspectives. In particular, the Draft states in its Preamble the wish of the States parties to this Convention “to contribute to the development of democratic traditions, such as the expression of the people’s will in elections on the basis of real political pluralism and a multi-party system, under the supremacy of the constitution (and other fundamental laws of the state) and national laws relying on the universally accepted norms and principles of international law”; and their conviction “that democratic elections are one of the political and legal instruments of a stable civil society and sustainable development of the rule of law”.

10. Those purposes seem to reveal a particular position. In general, the right to political participation appears linked to general concepts such as national/popular sovereignty, rule of law, and so on. Modern states (be it the parliamentary Britain, be it the revolutionary France) give birth to new political structures, based in national/people’s will, and the rule of law as expression of that will. At a first moment, elections, and electoral traditions, are not democratic, in the sense of not being based on universal suffrage. Nevertheless, they evolve, more or less peacefully, by enlarging the right to vote and the right to be elected. In this sense, in most countries of Western Europe, there is an “electoral heritage” which is linked to democratic values. Elections express the will of the nation, first; and of the people, after. However, the perspective is individualist, as in most of the liberal Declarations of rights. The vote is (must be) free. The vote is (must be) secret. The vote is (must be) direct. The votes are (must be) equal.

11. In this Draft, however, there is not a wish to describe the principles of “the European electoral heritage” (as in the “Code” of the Commission for Democracy through Law), but to prescribe the principles which should contribute “to the *development* of democratic traditions”, according to the explicit purpose of this Draft. In a sense, it could be said that the Draft tries to develop a democratic tradition that already exists in other countries and spheres. In western traditions, the development of elections is more or less parallel to the development of democracy. However, in the Draft, there seems to be the idea that elections can be not democratic at all.

12. The consequence is what could be called a “structural/global approach”, more than an “individual” one. In other words, the Draft seems to point out how elections have to be held to be democratic (free elections, genuine elections, fair elections), more than the features of the democratic vote (free, universal, secret, direct suffrage), which seem to be more or less known. That is why the Draft primarily defines standards, more than the rights of the voters. These are, of course, also considered. But the Draft Convention emphasises other aspects, such as real political pluralism, multi-party system and real and law-based possibility of election, as previous requirements (Article 4.1); the right not to participate in elections (Article 2); the duty of elected candidates to assume and to remain in office (Article 4.7); or the definition of the rights of national and international observers (Articles 15 and 19).

13. In a way, it could be even said that this Draft responds to a previous heritage of non-democratic elections. The suffrage is well known, but the functioning of the whole system may not be democratic. The emphasis is not as much in the suffrage as in the elections as a whole. Of course, democratic elections require universal, free, secret, direct, equal votes. That is not enough. Without real pluralism, multi-partism, freedom not to participate, without observers... the votes can be useless in democratic terms. Elections can be fraudulent. In addition, the point is to define “the international law features of the modern electoral process in a newly integrated Europe”, to set “the standards of democratic elections” (explanatory note of the Draft, first and second paragraphs).

General Remark on the system of the Draft Convention

14. 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.

15. 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 Articles 1 to 11. However, Article 12 could also be regarded as being part of the first block. The extent of the first block is therefore not clear enough.

16. 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 Articles 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.

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

18. 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 Articles 20 to 27.

19. Although the explanatory note considers these articles to be part of the fourth block, I think they are clearly a separate part, not related to the object of the Convention, but to the life of the Convention itself (signing, ratification, entry into force, accession, denunciation, notification...).

20. 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” (Articles 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 Article 7 (official language of elections), which belongs to the first block, is not explicitly mentioned in Article 1 and interrupts thus the general order provided for in Article 1.

c. While the right to elect and to be elected is separately mentioned in Article 1 paragraph 2.1, it is at the same time considered as the first aspect of the universal suffrage in Article 8 paragraph 1.1. The separate mentioning of these rights in Article 1 paragraph 2.1 could have been left out and consequently considered as one of the main aspects of the universal suffrage such as provided by paragraph 2.3. On the other hand, the principle of “direct suffrage” is only regulated in Article 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 Article 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.

21. 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.

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

23. The enumeration of election standards in Article 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 (Article 1 paragraph 2.2.) is established by following Articles: free elections, Article 2; periodic and mandatory elections: Article 3; fair elections: Article 5; genuine elections: Article 4; open and public elections: Article 6. The election principles of the universal suffrage and equal suffrage are defined in Articles 8 and 10. The conditions of secret voting are defined in Article 11. The direct suffrage is not included in Article 1 paragraph 2, though it is mentioned in Article 10 of the Draft Convention. In addition to these election principles, Article 7 refers to the official language of elections.

24. These comments will follow that structure, pointing out different aspects of the Draft.

Block one: standards of democratic elections, voting principles

25. As it has already been noted, the first group of articles tries to define the standards of democratic elections, which include rights, principles and organisational elements.

26. First, the principles. **Democratic elections must be free, periodic and mandatory, fair, genuine, open, and public.** Different features which, as it has been exposed, refer to the whole election, and not only to each one of the votes.

27. Article 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 (Article 2 paragraph 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 (Article 2 paragraph 3). The participation of a citizen in elections should be free and voluntary (Article 2 paragraph 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 (Article 2 paragraph 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 (Article 2 paragraph 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 (Article 2 paragraph 7). It provides that the applicable rules have to enter into force before the beginning of the election campaign (Article 2 paragraph 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.

28. 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 Article 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.

29. 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.

30. 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 Article 3 paragraph 3.

31. In a number of European countries, the legislature may impose a duty to participate in elections. This is accepted by Article 2 paragraph 5. For systematic reasons Article 2 paragraph 3 and Article 2 paragraph 5 should therefore be taken together.

32. Some original and useful cautions are included. Close to the traditional bans to prevent voters from freely expressing their will, and to compel citizens to declare their intentions of vote, a new – and quite practical - prohibition is set up: “it shall not be allowed to gather, publish, or disseminate personal information about voters who have or have not taken part in the voting” (Article 2.4). Such information may be particularly valuable for parties’ campaigning among the non-voters.

33. Article 2 paragraph 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 (Article 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.

34. 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”).

35. The principle of “**free suffrage**” dealt with in Article 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.

36. In accordance with Article 3 of the Additional Protocol to the European Human Rights Convention and Article 25.b of the International Covenant on Civil and Political Rights, Article 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.

37. The Draft foresees the possibility of restriction on electoral rights and freedoms, including the election postponement, in extreme situations such as state of emergency or martial law.

38. Article 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. Paragraph 3 again concerns a problem of third-party-application (see above 7). It should also be applied in conformity with the principle of proportionality.

39. Article 4 refers to “**genuine elections**”. A basic principle, even the most basic principle. When we talk about democratic elections, we mean “genuine elections”, and this idea implies “the determination of a freely expressed will of voters and its direct implementation”, defining “a *real* and *law-based* possibility to elect candidates”, in a framework of “*real* political pluralism, ideological diversity, and a multi-party system”, through parties “whose lawful activity is under the legal protection of the state”.

40. That “real” possibility also requires that voters have “timely and free access to information”, and that candidates “have access to the mass media and telecommunications media under equal legal conditions” (4.3), following previously known (and “clear, definite” and “applied in a uniform manner”) procedures, which “allow candidates... to organise a full-fledged election campaign”. And this guarantee includes, of course, the right to appeal possible violations of the election laws (4.6). Apart from the already mentioned duty of elected persons to “assume office” and to “remain” in it until their powers are terminated according to constitutional or legal rules. A duty which clearly points out the possibility of fraudulent elections, neither genuine nor real, simply because the elected people do not assume their duties or resign, leaving non-elected people in charge.

41. As already mentioned before, the rules and measures provided in paragraphs 2 to 7 of Article 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”.

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

- universal and equal suffrage (Articles 8 and 9),
- equal legal conditions in an election campaign (e.g. Article 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 or election campaigns (Article 16),
- honest execution of electoral procedures provided for by laws (Article 13)
- organisation of the electoral process by impartial election bodies (Article 8 paragraph 1.5 and Article 13), working openly, publicly and independently,
- quick and effective adjudication by courts and other bodies of complaints and statements about violations of election laws (Article 18).

43. These points are classical. There are also some original aspects, whose meaning should be possibly better understood in the global perspective already pointed out. For instance, Article 5.2.4 includes within the guarantee of fair elections the “*honest* execution of electoral procedures provided for by laws, specifically during voting and vote counting”, and the “rapid provision of full information about all voting results”.

44. The significance of this Article 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.

45. The content of the principle of “open and public elections” (Article 6) is also quite traditional: “elections shall be prepared and held openly and publicly”. This refers to all decisions related with the electoral process, including statutory acts (which “shall not be applicable until they are officially published”; and “shall have no retroactive legal force” when they “restrict electoral rights and freedoms”), and includes the exigency of creating “legal conditions for the exercise of effective public control... and for impartial international monitoring of elections”. This principle does not extend, of course, “to the secrecy of voting and the expression of the voter’s will”.

46. Article 7 introduces the obligation of considering the existence of different languages in a country, so that electoral proceedings will have to use official languages of all regions..., languages of minority peoples and nationalities, and national minorities and ethnic groups within the territory in which regional or minority languages are used, in accordance with the situation of each language and *as far as this is reasonably possible*”. This principle is obviously related with the very idea of real, genuine, and in general democratic elections: elections are not genuine, free, and democratic if some groups of citizens can have no free, real, equal... access to information and means.

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

48. According to the Draft Convention these rights are subject to a certain number of conditions, such as the age (paragraph 1.1), the nationality or citizenship (paragraph 1.2) and the residence (paragraphs 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 a federal state

(paragraph 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 (paragraph 1.3). The electoral rights should also be granted to citizens who lawfully reside outside the territory of their state (paragraph 1.4). In paragraph 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”.

49. Paragraph 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 incapacity or a criminal sentence, the provision by law and the express decision of a court, Article 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, Article 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 (Article 20 paragraph 1). Article 20 paragraph 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. The principle of universal suffrage is closely related to the “effective, impartial and equitable procedure of state registration of voters”, and to the existence of a voter list, which has to be updated periodically. Each citizen has also “the right to correct this information to ensure its completeness and accuracy, as well as the right to know who is using or has used this information and why, and to whom it has been supplied” (8.1.5).

50. For systematic reasons it would be better to have a closer link between Articles 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 (Article 8 paragraph 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, Article 8 paragraph 2 contains a general non-discrimination clause.

51. The principle of **equal suffrage** is dealt with in Article 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”; Article 9 paragraph 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”; Article 9 paragraph 1.2). This is obviously a *lapsus calami*: the Draft Convention aims at fixing a “*maximum*” admissible departure from the distribution criterion adopted.

52. Article 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 Article 12 could be considered as specific exceptions of the principle of equal suffrage, thus it should form an additional paragraph of Article 9 (equal suffrage).

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

54. Article 9 paragraph 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; paragraph 3).

55. 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 (Article 11) is rather short compared to other principles and incomplete.

56. A final comment deserves to be made. Paragraph 4 of Article 9 foresees that “a candidate shall not take advantage of his position or official status to gain election or the nomination and/or election of other candidates...”. This idea is pointing out one of the main sources of inequality in contemporary political life, and of course in elections. In fact, the Draft only mentions the classical notion of restriction of the right to be elected due to the official status of some persons in Article 20 admitting some restrictions referred to the right to be elected, or better to say, to be a candidate. But the dimension of modern administration makes it difficult to control the use of public means (time, facilities, even staff members) for electoral purposes, a problem to which the Draft opposes the general obligation of the States who are Parties in the Convention “to prevent the state, administrative and other resources, including state and municipal employees, from being used to express preferences or create privileges or restrictions for candidates or political parties... participating in elections” (Article 21.2.5). A point that deserves to be underlined.

57. The principle of **direct suffrage** is dealt with in Article 10, although direct suffrage is not enumerated explicitly in Article 1 paragraph 2 of the Draft Convention. According to this provision, direct suffrage should be applied to at least one of the chambers of the national parliament but also to other regional or local assemblies (Article 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 (Article 10 paragraph 3). The need of an explicit mention of the vote “against” (paragraph 1) could be questioned, since it is unusual in most member countries of the Council of Europe.

58. The voters’ right of **secret voting** as one aspect of voter freedom should not be restricted or infringed in any way (Article 11 paragraph 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 (paragraph 3). Article 18 paragraph 5 refers to the prohibition and punishment provided by law of any violation of the secret suffrage.

59. This first block of provisions finishes with Article 12, allowing some exceptional measures which could be considered as violations of the principle of equal suffrage (and equal conditions and opportunities to participate in the electoral process). More concretely, the Draft includes “additional possibilities” to “take further measures” to ensure to women conditions equal to those enjoyed by men; and to guarantee disabled persons, or other categories of population (“representatives of indigenous and small peoples, nationalities, other national minorities, or ethnic groups”) additional conditions for their participation in the electoral process. A rule that may be necessary, subject to certain formal and substantial conditions (particularly, the need to find a constitutional basis able to justify the different legal treatment), but which can also be very dangerous, unless it is very clearly defined.

Second block: Status of election participants and the technological infrastructure of the modern electoral process (Article 13 ff)

60. Article 13, referred to the “preparation and administration of elections by independent election bodies” could be considered the end of the first block, or the beginning of the second. In fact, it is included in this second group of articles just to emphasise its relevance for the public monitoring and guarantees of the electoral process.

61. 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 (Article 13 paragraph 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. Article 13 does not, however, refer to this particular aspect.

62. 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 (paragraph 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. Article 13 paragraph 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.

63. Of course, the basis of the status of candidates is formed by traditional political freedoms: to express their views and preferences, to search for, obtain and communicate information, to travel over the country, to associate with others in political parties...

64. In Articles 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 Articles 10 and 11 of the ECHR and of Article 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 Article 20 paragraph 1, 20 paragraph 3 and Article 22 paragraph 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 Article 20 paragraph 5 of the Draft Convention.

65. Article 14 paragraph 1 guarantees each citizen, individually or collectively, **the right 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. Article 14 paragraph 2 rules the individual right to join or to organise a political party on a lawful basis for the purpose of participation in elections, including the nomination of candidates or lists of candidates. Additionally, Article 14 paragraph 3 repeats the duty to safeguard and protect the political and electoral rights and freedoms by law. Article 14 paragraph 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.

66. The States parties in the Convention are also obliged to organise what could be called an institutional campaign about elections, “informing citizens and other election participants” about the rules of the electoral process (14.4).

67. The Draft allows some measures which may be specified by the law to restrict the right to nominate and register candidatures. Be it through the requirement of a number of voters’ signatures (which shall not exceed 2 percent, an excessively high percentage: Article 14.5, paragraph 2), or through the payment of an electoral deposit (which must not be too burdensome and must be returned if the candidature receives a certain number (percentage) of votes). According to the Draft, 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 (Article 14 paragraph 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 (paragraph 6). The existence of an electoral threshold, once more established legislatively (Article 14.7), for parties (coalitions) to participate in the distribution of deputy mandates, is also foreseen, with the clear

aim of avoiding the atomisation of the Parliament, divided into too many small party groups or fractions, and thus trying to make it easier to form governmental majorities.

68. Article 15 rules the “**status and powers of national observers, agents of candidates**”. This article shows clearly the global difficulties previously suggested, especially when referring to “national observers” appointed by non-governmental public organisations. The point is that free, fair, genuine... in a word, democratic elections reach legitimacy through different ways. One of them is, of course, by having an electoral administration, which acts with respect to the already quoted principles of independence and impartiality, always related to the rule of law. It is, in a word, a technical control of the rules made by a body which is external to the political fight, and whose “externality” is ensured through different rules (composition, decision-making, statute of their members...).

69. A second way is, of course also, by “internal control”: candidates, parties and coalitions taking part in the electoral fight, have their representatives and observers in all the electoral process, so that they may report on any suspected violation of democratic rules, and even appeal to the competent bodies (administrative or judiciary), to provoke a decision on any conflicting point. Therefore, it is a control based on the partial defence of different interests, internal to the electoral process.

70. There is even a third way, due to general social control. If the electoral process is submitted to the principles of publicity and openness, as a principle there is a quite general control, which may be especially evident in moments like voting or vote-counting, which have to be open to citizens in general.

71. The problem may be in the participation of observers appointed by national non-governmental organisations. In fact, and out of some particular moments (transitions, periods of high political conflict), the non-governmental organisation observers tend to reproduce the idea of an “external” (independent, supra-partes, impartial) control, even when it is difficult to test, and to control, the real independence of those organisations from all political parties or, at least, political interests or trends. From this perspective, the participation of these observers should be carefully defined: number of organisations, time in which they can act, rights which they are entitled to... In this sense, the Draft establishes the same status for agents of candidates than for NGOs observers, without imposing any additional limit. The only restriction, quite logical and common to all kind of agents and observers, is that the law may prohibit the simultaneous presence at a polling station of two or more observers representing the same interests.

72. Article 16 provides rules for **funding of elections and election campaigns**. It requires, of course (although this rule may be absent in most of traditional electoral laws) that the public activities related to elections must be funded in proper conditions (“the budget funds shall be allocated and made available to election bodies in due time and in amount sufficient for organising and administering elections...”).

73. More usual is the requirement of public funding of candidates and parties participating in elections, “on a fair basis” as the possibility of private funding. The allocation of public funds must follow objective criteria, such as number of votes received in previous elections, number of registered candidates, status of a parliamentary party, etc. In any case, the rules include the prevision of a maximum size of the election fund, and the openness and transparency of private donations and expenses, which allows an effective control by the competent bodies. It would be

suitable, in order to be absolutely clear, to add at the end of Article 16 paragraph 3, after “by other conditions stipulated by law”, “in conformity with the principle of equality”.

74. Article 17 deals with **information support of elections and election campaigns**. The States must ensure the basic freedoms (to search for, to collect and to disseminate information, without censorship), and the equality of treatment of the candidates and parties, through impartial and balanced information, “without any political, ideological or other biases”. This is another of the basic points of modern elections, in which the absence of objective criteria (as may be, for instance, the competence of the independent electoral bodies to control possible partiality in information) may impede a good working of election principles. Access to private (paid) media is also allowed, submitted to the general control of election expenditure. And, even when these rights have to be of course limited, the problem may arise when defining the limitative criteria: for instance, Article 17.3 quite logically bans “purposeful direct or indirect defamation of candidates or political parties (coalitions) participating in elections... in the mass media and telecommunications media”. The provision of 17.5, according to which “no abuse of the freedom of assembly,... of association, ... of speech and freedom of mass media shall be allowed, including calls for a violent seizure of power, a violent change of the state system, a violation of the territorial integrity of a state, calls directed at campaigning of war, or terrorist or other violent acts inciting social, racial, gender, national, ethnic or religious hatred and enmity”, seems more problematic. The problem will be, of course, the effective control and implementation of these rules, which should be restrictively interpreted. It should be made clear that they have to be applied in conformity with the principle of proportionality.

75. Again in Article 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 Article 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.

76. With regard to the “equal” access (“on an equitable basis”) to mass media required according to Article 17 paragraph 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.

77. To finish with this Article, the provisions calling for using all native languages and additional instruments for all citizens (including those belonging to national or ethnic minorities, or those with physical or other disabilities) (Article 17.6) to participate in the electoral process must also be positively considered.

78. Article 18 sums up the rules for **complaints for violation of electoral rights and freedoms**. It sets up the general principle that all national (constitutional, civil, administrative, criminal) procedures must serve to the legitimate and public nature of elections. The subjects entitled to submission of complaints because of violation of electoral rights and freedoms are widely considered, so that they include all participants in the electoral process. Of course, procedural details have to be clearly laid down by law, and they have to consider the special nature of these processes, particularly with respect to the time of adjudication, which “shall not lead to the postponement of elections or electoral procedures, shall not violate the integrity of the electoral process, and shall not in any way affect the actual expression of the will of citizens”, as general but clear criteria.

Third block: status of international observers

79. This block is in fact composed of just one Article, Article 19. It considers an aspect which is quite usual in “new democracies”, that is the participation in the electoral process of international observers, experts usually appointed by international organisations to guarantee the respect of all rights and freedoms constitutionally, legally or conventionally established. Even when these observers share partially the same status (rights and duties) already seen with reference to national – NGOs - observers, they are probably less likely to create problems of partiality, even though the conditions for their participation and their powers should also be carefully defined. In this respect, Article 19.7 makes a quite comprehensive list of powers, which obviously highlights the limits of not interfering in the work of the bodies in charge of the preparation and administration of elections, and the prohibition to “engage in any activity unrelated to monitoring of elections”. Their opinions must be publicised “after the end of voting”, thus avoiding any possibility of political/electoral usage.

80. The possibility to withdraw international observers’ accreditation (Article 19 paragraph 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 (Article 19 paragraph 7.1; see also Article 15 paragraph 4.1 on national observers).

Fourth block: measures not to be regarded as discriminatory in the legislative regulation of the electoral process

81. This part of the Draft, as clearly stated by the explanatory note and by the title of Article 20, tries to set up some rules which can legitimately limit the electoral freedoms and rights acknowledged in the rest of the document, and that in some cases have been already admitted in previous articles.

82. The first one is a general rule, very similar to others established in many international documents on human rights. It says that “the electoral rights and freedoms of individuals may be restricted by law *only so far as it is necessary* for the protection of” some other constitutional or general principles, such as “health, rights, and legitimate interests of other persons, the safeguarding of national security and public order, and the prevention of crime” (20.1). In the same general sense, paragraph 3 requires that some particular restrictions “may be imposed only by law”, and “shall conform to the international obligations of a state”.

83. Other paragraphs admit other measures, be they negative (restriction of rights for incapable or criminally sentenced persons; establishment of a “reasonable period” after naturalisation to be fully entitled to enjoy electoral rights and freedoms, and provided a liberal policy with respect to naturalisation is pursued) or positive (legislative allocation of a quota of deputy mandates to ensure representation of minorities, additional guarantees for women or disabled persons, including measures for inclusion on lists of candidates). Some of these possibilities are, once more, foreseen in Article 21.2.2, which obliges the Parties to the Convention “to take the necessary measures... to assure that [these categories of persons] have additional means for participating in elections”.

84. Article 20 allows also some measures concerning the possibility of restricting the participation in the electoral process to some categories of persons, for various reasons (“candidates running for re-election”; “members of the clergy, employees of a body of executive power, judges or prosecutors”). A restriction with, as previously suggested, is strongly justified,

even if the different cases have to be looked at carefully, taking into account the various circumstances in each country; and, what is more, leaves out some other cases of categories of persons who, because of their position, could influence the voting (for instance, owners of media holdings).

85. Article 21 comes to summarise the “obligations” undertaken by the Parties to the Convention. Most of those obligations are already pointed out, be it because of their general character (“to guarantee protection of the democratic principles and norms of electoral law, the democratic nature of elections...; to have strict requirements for declaring elections legitimate”: 21.2.1; “to develop, introduce and/or use new information and computer technologies... which contribute to the openness and publicity of the elections... and to raise the trust of voters, candidates.... and other election participants in electoral procedures and elections in general”: 21.2.6; “to adopt national programs... of civic education and training...”: 21.2.7; and others); be because Article 21 repeats obligations previously defined (“to take the necessary measures, including legislative measures, to assume that women, persons with... disabilities,... national minorities or ethnic groups, have additional means for participating in elections”: 21.2.2; “to establish an effective and non-discriminatory procedure for the registration of voters”: 21.2.3; the already mentioned prohibition to use public resources and employees for partial electoral campaigns: 21.2.5).

86. Some other obligations are more interesting. That is the case of Article 21.2.12, which foresees the possibility of foreigners residing in the country to take part in some categories of elections: “to strive to grant the right to elect and be elected in elections for bodies of local administration... enjoyable to foreign nationals and stateless persons who reside permanently on lawful grounds in the territory of the [State] Party to this Convention, provided they meet the same criteria as citizens of the state”.

Fifth (and final) block

87. Even when they are considered as part of the previous block in the Explanatory note, the last six articles are more generally referred to the life of the Convention: Article 22 specifies that nothing in it prevents the States Parties from the fulfilment of their international obligations, nor shall interfere with other spheres of rights and freedoms. Article 23 rules the procedure for signature and ratification of the Convention, and for its entry into force. There is a *lapsus calami* in Article 23 paragraph 3 (“rectification” instead of “ratification”). Article 24 refers to the possibility of accession of states that are not members of the Council of Europe. Article 25 defines the obligation of the Parties to present periodically to the Secretary General of the Council of Europe a report on the measures taken in the sphere of this Convention, and Articles 26 and 27 provide for the possibility of denunciation of the Convention and describe the obligations undertaken by the Secretary General of the Council of Europe referred to notification of various events related to the life of the Convention.

Conclusion

88. 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 ACEEEO has to be greeted in this respect.

89. The Draft has some elements which reproduce other international – or, more specifically, European - international documents; some others which can pose some difficulties. It offers an

interesting regulation of the different aspects of the electoral process, including not only rights and freedoms of the different agents involved, but also the description of the context and the circumstances, which may influence, and give sense, to the whole process.

90. 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.

91. 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.