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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**DRAFT REPORT ON**

**THE PARTICIPATION OF POLITICAL PARTIES  
IN ELECTIONS**

**by**

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## **I. Introduction**

1. *In recent years, the Venice Commission has been actively involved both in the field of electoral law and of legislation on political parties in different countries. This work is focused not only on the legislation of specific States but also on some general issues essential for the democratic development of democratic institutions in Europe and elsewhere.*

2. *Free elections and freedom to associate in political parties are closely linked in any democracy, since political parties exist for the purpose of winning political power through free and fair elections. In a number of its separate opinions and research projects, the Venice Commission has examined the role of political parties in a democratic society and their participation in the electoral process of specific countries. However, until now the Venice Commission has conducted no comparative study of the legislation and practices in its Member countries in this important field.*

3. *At its 11<sup>th</sup> meeting (Venice, 2 December 2004) the Council for Democratic Elections decided to study the question of the participation of political parties in the electoral process and appointed Mrs Á. Sanchez-Navarro (Substitute member, Spain) and H.-H. Vogel (Substitute member, Sweden) as rapporteurs on this subject.*

## **II. Specific issues related to participation of political parties in elections**

4. The Venice Commission has adopted, during the last few years, different guidelines and opinions on legislation on political parties. These documents underlined the essential role of political parties in the electoral process and highlighted the existence of some issues of great importance in the practical implementation of the right to free and fair elections. However, many of these questions cannot be answered solely on the basis of the legislation on political parties. They are the main players in the electoral process, the ground and rules of which are defined mainly by electoral laws. Consequently, the understanding of elections as one of the main reasons for the existence of political parties requires the analysis of all the elements of the ‘electoral game’.

5. Moreover, electoral legislation and laws on political parties differ from one country to another. It is usually accepted that electoral systems, and party systems, greatly depend on specific – historical, cultural, political, social - national factors. In these fields, it is practically impossible to find two similar political systems. In addition laws are intended to manage the workings of the national systems, thus responding to national problems, experiences and expectations.

6. Therefore, a general report on “political parties and elections” has to consider the existence of those differences. Questions may be somewhat similar, but answers will vary in most of the cases. In any case, some of these issues may be grouped considering the different periods which can be observed in any electoral process. This report will thus deal with them in that same order.

7. However, it seems possible to argue that the existence of parties is particularly important, and has to be especially taken into account, up to the moment of the elections. In fact, political parties precisely aim to participate in the political process, mainly presenting candidates to elections. Of course, parties are important throughout the whole electoral process. But once the voters come directly into the scene, the fact of political representation loses part of its relevance. Once the elections have been held, and even during the election day, all the constitutional or legal rules (and, most particularly, those relating to the system of appeals and complaints) are based on specific circumstances, in which all candidates and citizens have to receive equal treatment.

8. In this sense, it would not be reasonable to have different rules (deadlines, definition of irregularities, procedures, sanctions...) for partisan or non partisan actors, as they may exist for presenting partisan or non-partisan lists, for taking part in election management bodies, for having access to public media and for being able to benefit from public funding... For that reason, the final questions, especially those related to the procedures for complaining and lodging appeals (competent bodies and/or courts, legal framework, sanctions, etc.) possibly do not admit many differences depending on partisan organisation.

A) Questions raised during the pre-electoral period

9. The *Code of Good Practice in Electoral Matters*<sup>1</sup> considers universal suffrage as the first of the principles underlying Europe's electoral heritage which "means in principle that all human beings have the right to vote and to stand for election" (I, 1.a). However –and indeed- this right may be subject to certain conditions, usually concerning age and nationality.

10. In any case, there are other conditions, derived from the importance of political parties in modern democracies. This implies that the individual right to stand for election may be affected by two different sets of rules: first, by the general rules and requirements adopted by a State to allow parties to run in an election. And, second, by the rules adopted by the parties for nominating their candidates in a given election. The former rules have to be analysed especially with the perspective of pluralism: if, as the European Court of Human Rights has said, "there can be no democracy without pluralism", the main point is to ascertain that additional requirements imposed on parties are not so heavy that may hurt the expression of social pluralism. The latter rules, which may be fixed by the parties themselves, or imposed by legislation, may affect the idea of intra-party democracy, or to the right of the members of a given (in this case, political) association, to participate in the basic decisions of the association (party).

a) Rules for depositing lists and/or candidatures: additional requirements for parties for running in an election

11. Some countries require the fulfilment of some additional conditions for applications to be presented. In particular, they may consist of a number of signatures (200 persons eligible to vote in the constituency, in Germany; one percent of the voters registered in the constituency, in Spain), or of the deposit of certain amounts of money

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<sup>1</sup> CDL-AD (2002)023rev

12. Applications and lists of candidates are usually registered by parties. In fact, in some countries (Albania, Bulgaria, Latvia, “The Former Yugoslav Republic of Macedonia” or Slovakia, amongst others),<sup>2</sup> only parties are allowed to participate in elections. In most of the others, parties do enjoy a more advantageous position than independent or non-party candidates with respect to matters such as requisites for presenting candidates, access to public mass media, etc.

13. Political parties are, as some Constitutions and the European Court of Human Rights have expressly admitted, essential instruments for democratic participation. In fact, the very concept of the political party is based on the aim of participating “in the management of public affairs by the presentation of candidates to free and democratic elections”<sup>3</sup>. They are thus a specific kind of association, which in many countries is submitted to registration for participation in elections or for public financing. This requirement of registration has been accepted, considering it as not *per se* contrary to the freedom of association, provided that conditions for registration are not too burdensome. And requirements for registration are very different from one country to another: they may include, for instance, organisational conditions, requirement for minimum political activity, of standing for elections, of reaching a certain threshold of votes...<sup>4</sup>

14. In any case, the existence of such a register, “as a measure to inform the authorities about the establishment of the party as well as about its intention to participate in elections and benefit from advantages given to political parties”,<sup>5</sup> should possibly be reflected in the additional requirements imposed at the moment of depositing lists and/or applications. In particular, countries which require registration of parties (Germany, Spain) may exempt them on any other additional requirements, allowing them to stand in elections without, for instance, collecting a number of signatures or paying a guarantee deposit, as other political agents have to do.

b) Procedures adopted by parties for nominating candidates

15. Parties are a specific kind of association. Their status is thus guaranteed under the right of freedom of association, and they can only be subject to restrictions prescribed by law. Therefore, internal party procedures for decision-making should be presided by the principle of self-governing, and in many countries these rules are only set in the Party Statutes. Nevertheless, their relevance for the working of the whole system implies that, as has been

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<sup>2</sup> *Replies to the Questionnaire on the Establishment, Organisation and Activities of Political Parties* (CDL-DEM(2003)002rev, 1.5)

<sup>3</sup> *Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues* (CDL-AD(2004) 007).

<sup>4</sup> See *Guidelines and Report on the Financing of Political Parties* (CDL-INF [2001] 8), and *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures* (CDL-INF(2000)1, Appendix I). In this sense, the Venice Commission has expressed serious concerns, for instance, about legal provisions which establish a high threshold of membership for founding new parties; which oblige parties to be active nationwide, excluding local or regional parties; or which foresee the denial of registration if the Charter of a party contains rules contrary to the Constitution or the law (*Cf.* CDL-AD(2002)017, on Ukraine; CDL-AD(2003)008, on Moldova; or CDL-AD(2003)005, on Armenia).

<sup>5</sup> *Guidelines... on Legislation on Political Parties: Some Specific Issues* (CDL-AD(2004)007).

previously pointed out, the Constitution or the law may set up some rules, usually requiring parties to respect democratic principles in their internal organisation and working.<sup>6</sup>

16. However rules may go further: the French Constitution had to be recently reformed to allow the law to impose the principle of equal access of men and women to elective offices, so limiting the free choice of candidates by party organs. In some countries, the Electoral Law contains a procedure of nomination of party candidates, which has logically be respected by the party statutes. This is, for instance, the case in Germany (art. 21) or Ukraine (art. 40). In this respect, it could be asked what is the scope of autonomy and self-governing that should be respected by the law or, in other words, what degree of external –and general- constraints are compatible with the very idea of free association? In any case, it seems that the very respect of the democratic principle should suffice to exclude any possibility of changing the order of candidates within a list after voters have cast their ballots, as for instance seems to be possible in some specific countries.<sup>7</sup>

c) Parties and election management bodies

17. In general, different Election management bodies have to guarantee the fairness of the electoral process. This aim may be reached by different means, and so the composition of election management bodies greatly differs from country to country. In some countries, such as Germany, the electoral law does not specify whether the assessors appointed to form the Electoral Committees have any partisan component. In Spain, Higher Electoral Committees are mainly composed of judges, with a number of experts who have to be jointly nominated by parties with seats in the Lower Chamber, whilst Polling Station Committees are formed by drawing lots among voters registered in each Polling Station, and by the observers that all parties can nominate (although, in practice, only major parties are able to have representatives in most of the Polling Stations). Other countries, such as Ukraine, foresee Election Commissions formed by representatives of concurrent parties, with the offices of president, deputy president and secretary proportionally distributed among parties (art. 21.8 of the Ukrainian Electoral law speaks about the “right [of parties] to a proportional share of leadership positions in polling district elections commissions”).

18. In this respect, different elements should be considered. For instance, the different kinds of election management bodies, their size, the way their members are nominated, or which parties have the right to participate in this process. It could be argued that the lower Committees have to deal with the working of the voting process, solving problems as fast as possible, and so they have to be functional and –really and apparently- trustworthy, in political terms. That implies that they possibly should not include too many members, and that their working should not be submitted to politically-oriented criteria. In this sense, bodies, mainly or totally composed of politically-nominated members, do not seem to be a

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<sup>6</sup> Cf. *Replies to the Questionnaire on the Establishment, Organisation and Activities of Political Parties* (CDL-DEM(2003)002rev, 3.5).

<sup>7</sup> *Joint Recommendations* (by the Venice Commission and the OSCE/ODIHR) *on the Electoral Law and the Electoral Administration in Albania* (CDL-AD(2004)017, paragraph 68).

practical option.<sup>8</sup> On the other side, higher bodies mainly have to deal with complaints or particular problems which have to be solved with more general criteria, in an almost-judiciary function. In this case, the number of people is possibly less important, and of course the confidence of the concurrent parties must be assured, be it because of the independence and technical expertise of their members, or because the parties (all or just the main ones? In fact, the guarantee of pluralism does not require that all parties participate in every sphere of the electoral organisation. The mutual control among the main ones may be enough) have a role in their nomination process.

#### d) Rights and obligations of parties observers

19. During the electoral process, party observers and representatives must indeed have the same opportunities for defending their interests in any sphere of political activity. It does not necessarily follow, as has been previously suggested, that all parties do have to take part in every organ of the electoral administration, but it implies that all concurring parties must have the right to be heard in the decision-making process and to complain against any decision which they consider not to be legally grounded.

20. It is also important that representatives of the political parties keep their observer status not just until the voting is over but up to the date when the last disputes concerning election results are settled. This could have a positive impact on the credibility of the results.

#### B) Questions raised at the electoral campaign

##### a) Financial questions. Equality and use of public (State) resources

21. The Venice Commission has already established some guidelines on the financing of electoral campaign expenses, which differs from regular financing<sup>9</sup>. In fact, regular financing may be justified for the essential role of political parties in democratic regimes, but electoral financing has an even stronger basis: the electoral process is the regular procedure for people to decide the main orientation of democratic institutions. It is therefore the main stream through which democratic legitimacy runs. In that sense, campaign expenses are similar to institutional expenses: expenses which are necessary for institutions to work according to the constitutional framework.

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<sup>8</sup> Very recently, for instance, the Venice Commission and OSCE/ODIRH adopted the *Preliminary Joint Opinion on the Revised Draft Amendments to the Electoral Code of Armenia* (CDL-AD(2005)008) which underlines the “strong partisan interest” of the members of the Central Electoral Commission, and states that “the rule of having the commissions constituted only by parliamentary appointments... without any non-partisan based appointments... that the commissions cannot be regarded as being sufficiently pluralistic and providing an adequate balance of overall impartiality and independence”, highlighting the importance of “inclusiveness of political *and civil* interests in order for there to be a sufficient level of public confidence in the election processes and results” (emphasis added). Similarly, the already mentioned *Joint Recommendations on the Electoral Law and the Electoral Administration in Albania* (CDL-AD(2004)017) express a “major concern” about “provisions regulating formation of electoral commissions... [which] have given an extremely dominant role to each of the two main political parties at every level of the election administration”, establishing a “highly politicized environment”.

<sup>9</sup> *Guidelines and Report on the Financing of Political Parties* (CDL-INF(2001)8).

22. This perspective allows some limits to be drawn: party activities have to be financed, and equally financed, in as much as they contribute to the working of democratic institutions. This means that public resources may be limited only to “institutional” parties, i.e., parties which are represented in Parliament, and therefore participate in the parliamentary activity. It is also obviously possible to extend this public funding to other parties which represent a “significant section of the electoral body”, or which “reach a certain threshold of votes”. But equality this does not mean that all parties are entitled to public resources regardless of their real strength in a given society.

23. In any case, some specific points that can be examined. Provided that not every party is entitled to public (regular, or electoral) resources, which are the admissible thresholds for denying public funding? Electoral systems may leave socially important parties out of Parliament, but the denial of public means may simply make them disappear, thus reducing the social pluralism and the political alternatives of a society. Should electoral financing be more generous than regular financing, increasing the incentives for social movements to offer their political alternatives at the moment of elections, without great risks of bankruptcy?

24. In a different sphere, it is clear than major parties, whose members and leaders usually dispose of institutional power (for instance, members of national, regional or even local chambers; executive positions at any of those different levels, etc.) may dispose of much more resources (facilities, advisors, administrative staff), just because they do have access to public means, which are not considered as public financing of party activities. In the United Kingdom, for example, the Statutes of the Conservative Party set up a different, and stronger, majority, for the incumbent leader to be confirmed than for a new leader to be elected, just because it is generally accepted that the incumbent leader has many more means to influence party members or electors. Is this kind of difference relevant? And, if so, is it taken into account in other spheres?

b) Access to (public and private) media

25. From a different point of view, contemporary societies are mainly mass societies: elections are fought in a mass context, so that access to mass media is possibly the best instrument for parties to transmit their message to electors. Therefore, that is possibly the main resource that parties may seek. And the access to publicly-owned media is, at the same time, the least expensive of the aids that the State authorities may offer, so that there is a clear interest from both sides. Of course, problems will arise when deciding the details of that access (time provided to the different parties and/or lists, presence of the campaign in the news, etc.). In this respect, the existence of a model of party registration may also be taken into account, giving some advantages to registered parties, but it cannot be used as a discriminatory instrument, depriving other social sectors of any opportunity to defend their positions in a fair campaign.

26. In the field of private media, problems are clearly different. The principle of fair elections must be compatible with that of free elections: if all parties and/or candidates have the right to campaign, and to address their messages to all citizens, it is also true that many private media have clear social, ideological and, at the end, political orientations, which may be considered when defining a right to access to all mass media. This factor, of course, cannot justify the definition of different economic conditions for the different parties' publicity, but it might even support claims to deny the access of some parties to some media.

The difficulties of establishing a balanced equilibrium of media in a given society are thus particularly evident in the framework of electoral competition.

C) Questions raised the day of election

a) Role of parties observers

27. It is particularly important to guarantee the possibility of all parties and candidates to have observers during the election day. In this respect, it is evident that parties have some elements –permanent organization, membership, and so on- which help them in this task, and that are much more difficult to dispose of for other non-partisan candidates.

28. These observers must have the right to control all the spheres of the voting process (polling boxes, election committees at all levels), to intervene –at least, to be heard- in the resolution of possible conflicts which may arise, and to lodge appeals against any decision which they may consider is not grounded in legal terms.

b) Complaints procedures

29. The Explanatory Report of the *Code of Good Practice in Electoral Matters* insists in the importance of “an effective system of appeal”. And, as has just been pointed out, that requirement has to be applied to the whole system, including of course the appeals which can be posed on election day, be it by party observers, by individual citizens or by any other subject.

D) Questions raised at the post-election period.

a) Contesting electoral results: timeframe.

30. The “deadlines for taking decisions on complaints and appeals”, including of course the decision of contesting electoral results, have to be “realistic”.<sup>10</sup> This is obviously an important element of the whole system of appeal, but the precise timeframe must vary not only from one country to another (depending on multiple factors, such as the systems of ballot-counting and of transmitting results), but also from case to case (different elections, which may be held in different contexts: uninominal districts or national constituencies, for instance; different chambers...). It does not seem easy to draw general conclusions about what deadlines should be admitted or not, and it will greatly depend on the circumstances.

b) Sanctions

31. Something similar may be held with respect to the system of sanctions. Firstly, there are obviously such a large number of different possibilities that it is not possible to sum them up in very short terms. Secondly, in this field the participation of parties does not affect to the definition and working of the rules: the cancellation of the election of seats, the eventual loss of seats, the economic and financial sanctions, may affect candidates independently of their partisan affiliation.

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<sup>10</sup> *Joint Recommendations on... Albania* (CDL-AD(2004)017), already quoted, para. 103.