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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON ELECTION OF PEOPLE'S DEPUTIES OF UKRAINE

adopted on 7 July 2005

and

ON THE DRAFT LAW ON THE STATE REGISTER OF VOTERS OF UKRAINE

submitted by people's Deputies of Ukraine, Mr O. Zadorozhny and Mr Yu. Klyuchkovsky

by

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COMMENTS

ON THE LAW OF UKRAINE ON ELECTION OF NATIONAL DEPUTIES OF UKRAINE, adopted by the Verkhovna Rada of Ukraine on 7 July 2005

I. General remarks

1. From a purely technical point of view, a first element that can be pointed out when considering the successive Ukrainian electoral laws is that they are excessively long, and that every reform means a longer text. The Law on Election of People's Deputies of Ukraine (as amended by the Law no. 2977-III [297-14], of 17 january 2002)[1] was formed by 87 articles, which occupied 88 pages. The 2004 Law had 100 articles, and 97 pages.[2] And the text now in force, after the last reform of 7 july 2005, has 119 articles, requiring 137 pages.[3]

2. This is not, by itself, a good starting point, especially if we take into account that this is just one of the different laws that rule elections in Ukraine and that other laws (on Presidential elections, on local elections, on the Central Electoral Commission: see art. 14). Given that most of the elements may be generally ruled (right to vote, right to be candidate, procedures of nominating candidatures, system of electoral commissions, lists of electors, principles of publicity and openness, rules of electoral campaigning, procedure for vote and vote-counting, system of appeals, etc) this system leads to a multiplicity of laws, usually complex and inevitably full of repeated provisions, giving chances for confusion and interpretation problems. In this respect, it would be technically preferable to enact a unique electoral law, containing the general aspects of any election, and –in different parts of the same body, or in different texts- the particularities of different elections.

3. With respect to this particular Law, it must also be stressed that the English versions differ, at a great extent, just because of different translations. For instance, article 1.2 in the 2002 text affirms that "The *numerical composition* of the Verkhovna Rada of Ukraine shall be determined by the Constitution of Ukraine"; in the 2004 version, it says that "The Constitution of Ukraine determines the *quantitative composition* of the Verkhovna Rada of Ukraine"; and, after the last reform, the English translation is: "*Numerical strength* of the Verkhovna Rada of Ukraine shall be determined by the Constitution of Ukraine". This is a quite obvious example of three –more or less- different translations of a (probably) single text. But differences throughout the Law may create new problems about other issues, much more complex, so that it may be difficult to ascertain if there has been or not a reform and, if that is the case, the exact extent of the changes, and their possible meaning. For example, when art. 15.1 affirms that "there may be regular and *extraordinary* elections", we have to assume that there has not been any change from the previous (march 2004) text, where article 15.1 said that "Elections of the deputies may be regular and *irregular*". It may be quite logical, but it is far away from being evident. In this respect, it would be highly desirable to

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1 CDL(2003)066.

2 CDL-EL(2005)021.

3 According to the text provided by the Venice Commssion.

use the previous text as a basis for translation of reforms, so making it easier to identify real changes.[4]

4. These two elements (a law too long, with problems resulting from translation) contribute to define a very confusing text, with too many too detailed rules which inevitably lead to frequent repetitions and difficulties. And this general point is especially remarkable when taking into consideration two other factors. The first one is that this electoral law has set up, since the previous 2004 text, a simpler electoral system, based on a proportional representation formula. This implies that many rules have just disappeared (in particular, all the rules referring to the former single-mandate constituencies, and the majoritarian election of one-half of the deputies: see arts. 14, 15 or 16 of the 2001 Law). The second factor is that electoral experience does not seem to exist in Ukraine. That is: apart from the exceptional case of "extraordinary elections" (Section XI, art. 102), almost all the procedural elements (creation of polling stations, and of the respective Election Commissions; compilation of voters' data for the voter register) are considered *ex novo*. Any electoral process seems to be ruled as the first one in Ukranian history. Antecedents are not considered. All polling stations seem to be radically new. It is surprising that, after having held at least some elections in different spheres (presidential, legislative, local), the procedures do not consider the possibility of introducing minor changes in previous polling stations distribution, but they imply coming back to the beginnings (including detailed demands from local authorities: see art. 20.2, 21.2, 22.1).

5. However, all reforms cannot hide a clear consideration: some of the precise shortcomings pointed out in the Venice Commission opinion on the 2001 law are still in force.[5] For instance, the need for parties to be registered one year before the elections if they want to present candidates (arts. 10.2 and 55.1 in 2005 text; 38.1 in 2001),[6] or the limitation of the right to be elected to those who have resided in Ukraine for at least five years (9.1 in 2005; 8.1 in 2001).

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[4] Moreover, it has to be stressed that the text (or the translation, as T. Annus has pointed out), presents serious problems. Many references to other articles of the Law are wrong (see, e.g., arts. 56.1 and 56.6, 58.1.10, 64.2, 73.3, 82.1, 85.5, 89.8, 90.3 and 91.1, and in many times –given the heavy wording of the text- it cannot be guessed which is the right one). Figures are also difficult to understand, especially when one considers previous texts (article 59. 1 sets up that "monetary deposit shall total 2.000 minimum wages"; the 2004 text [CDL-EL (2005)021] refers to "two and a half minimum salaries" in art. 46.1; and the 2001 law to "fifteen thousand untaxed minimum citizens' incomes" [CDL(2003)066, art. 43.1]; in a different context, art. 53.1 of the last 2005 text establishes that "optional contributions… to a party's election fund shall not exceed *four* minimum wages"; but the previous one talks about "four hundred minimum salaries" [CDL-EL(2005)021, art. 40.2]; and the first one of "one thousand untaxed minimum citizens' incomes", art. 36.4). Even some expressions seems simply out of any logic (f.i, articles 69.4 and 82.3 seem to use the word "protocol" instead of "minutes"). If the text is not precise, and the context is not clear… meaningful comments are really difficult to make.

[5] *Vide* CDL-INF (2001)22.

[6] In this respect, and by the way, arts. 10.2 and 55.1 of the 2005 text and 42.1 of the 2004 Law refer to parties registered "no later than *365 days* before" the Election Day; whilst the 2001 Law spoke of "*one year* prior to the day of election" (art. 38.1). One may wonder if it should have been better to maintain this latter expression… given that one out of four years has 366 days.

II. Particular considerations

General structure of the law

6. It has to be stressed that the successive reforms have followed the same general structure. In fact, the most important reforms are due to the 2004 Law, which put an end to the mixed electoral system to establish a proportional one; and introduced a system of appeals and control of rules which lacked in the previous Law. But, apart from that, changes seem to result mainly from a mere addition of new and more detailed rules, and do not modify the whole functioning of the system.

General provisions (Section I, arts. 1-14)

7. From 2004, the electoral law sets up a proportional system, with a minimun threshold of 3 % of the votes cast at a national level. This "simple" rule offers a good example of the general remarks previously exposed about the 2005 Law. Because it is clearly stated in article 1 (1.3: "Deputies shall be elected on principles of a proportional system" in a "national constituency"; 1.4: "Parties… that obtained at least 3 % of votes given by voters… shall take part in distribution of mandates"). But practically the same is repeated, in a much more complex way, in different paragraphs of art. 96: "The seats in the Parliament shall be distributed between the candidates for national deputies on Election lists of political parties… who received over three per cent of votes cast at the election in the national constituency" (96.3); "candidates … of political parties who received fewer than three per cent of votes… shall not be entitled to the seats in the parliament" (96.4). "Seats in the Parliament shall be distributed among… list proportionate to the number of votes cast for… political parties…" (96.5). "The Central Election Commission shall… establish the total amount of votes cast for the candidates… of political parties… who received over three per cent of votes" (96.6).

8. Too long and detailed rules appear everywhere: arts. 2.3 to 2.6 (list of documents allowed to identify a voter); 3.3 to 3.5 (extent of the principle of equal rights and opportunities; in particular, 3.5.3 and 3.5.5).

9. The definition of the "election process" in article 11.4 is not only too detailed (a list of acts), but also risks to pose problems. For instance, are electoral appeals included in such a process?

10. The wording (or the translation) of article 12 seems not to be adequate. Subjects of the election process should possibly be "voters", "election commissions", "parties", "candidates", and so on; and not "a voter", "an election commission", "a party", "a candidate"… On different grounds, also public authorities may be subjects, in different aspects, of the election process, as the 2001 Law admitted (art. 11.5: "bodies of state power and bodies of local self-government in cases provided for by this Law"). This is one of the problems posed by the technique of using not general categories, but exhaustive lists: in many times, lists cannot be as exhaustive as reality.

Types of election of Deputies, procedure and terms (Section II, arts. 15-17)

11. The election process shall start 120 days before the Election Day (art. 16.2). This implies a longer process than in 2001 (90 days). But the Law foresees some activities which have to take place before that starting point: e.g., arts. 57.6, 60.2 and 68.6 refer to a different time limit of "130 days before the Election Day" for the Central Election Commission to approve the "form of the election list of candidates for deputies"; for the Ukrainian Ministry of Finance to approve a form of an "act of income and property to be filled in by candidates"; and for the "respective media outlet" to establish the "cost of a printed section and airtime unit" for election campaigning through mass media. In other words, despite of this long (may be too long) process, it does not seem long enough to include all activities related to the elections.

12. Article 17 includes some rules about "calculation of time periods" whose necessity seems very doubtful. They seem to be general rules, not exclusive of electoral law and, consequently, should not possibly be included here.

Territorial organization of election of Deputies (Section III, arts. 18-23)

13. The new nation-wide, proportional system explains the disappearance of the 10 % deviation-limit among constituencies of the 2001 Law. After all, electoral districts are not constituencies, but just serve to organize elections at a national level, and so population differences are not important in terms of value of the vote. In this respect, the differences between Presidential and Parliamentary elections are reduced, underlining the possibility of using general rules when organizing the whole election process (districts, polling stations, register of voters, system of election commissions…).

14. Instead of that, creation and organization of polling stations is, as it has been previously pointed out, one of the issues whose regulation is more detailed and complex. In fact, the new text dedicates to "polling stations" five articles, while the 2001 and 2004 Laws contained just one.

15. Previous Venice Commission opinions considered that the number of voters included in one polling station could be too high (from 20 to 3000 voters, as a general rule: articles 17.6 and19.10 of the 2001 and 2004 Laws). The 2005 reform has reduce the highest limit to 2.500, which seems too high yet, but has to be considered as an improvement.

16. Nevertheless, on the whole the new rules do not seem to improve the general system. The distinction among small, medium and large polling stations (art. 19.2) only serves to introduce a new distinction relative to the formation of less or more crowded polling station commissions (art. 28.2), but has no more incidence in the working of the electoral system. The detailed provisions about the procedure of establishing this polling stations (in particular, the procedure and content of the submission of different authorities) seem not to be justified, including many specific rules that should be just fixed by the electoral authorities (especially, by the Central Election Commission). Curiously enough, even when it has been already said that the election process is quite longer than before (it lasts 120 days, instead of 90), the deadlines for establishing polling stations do not change.

17. In sum, at is has also been underlined, these rules seem not to be justified, especially when a number of elections have already taken place before. In fact, it has to be emphasized that the Law contains an alternative, much simpler and more logical regulation in Section XI (article 102), relative to "Extraordinary elections". In this case, that is, when elections are scheduled by the President of Ukraine in accordance with the Constitution, through a Decree of pre-term dissolution of the *Verkhovna Rada* (articles 15.3 and 16.3 of the 2005 text), the organization of elections has to follow the antecedent of previous elections ("the election districts and polling stations situated abroad established for the previous parliamentary election shall be used", 102.1; and "lists of voters… shall be compiled and produced pursuant the [general] procedure established by the Law on Ukraine "On the State Register of Voters…", 102.8 and .11). Given that pre-term dissolution of Parliaments is the rule in almost all parliamentary systems, and the apparent evolution of Ukrainian model to this pattern, it should not be discarded that this "exceptional", "alternative" or "extraordinary" procedure becomes the ordinary one… something which, on the other side, would possibly mean a much clearer and easier election system.

Election Commissions (Section IV, arts. 24-38)

18. In this respect, the 2005 law follows quite closely, but with more details, the antecedents of the previous 2001 and 2004 texts. Consequently, it is too long and detailed (with 15 articles, that seem too much to rule a system of commissions which have been already used in quite a number of occasions).[7]

19. On the whole, the Election Commission system (whose top, the Central Election Commission, is ruled by an specific law: art. 25.1) maintains its previous features. In particular, as it may have been deduced from the last footnote, these Commissions are formed following partisan lines. Their members are conceived as representatives of the parties or blocs that nominate them, up to the point that the successive laws have foreseen their recall as a cause of early termination of their membership (arts. 27.3.2 in 2001; 29.3.2 in 2004, and 37.3.2 in 2005). And their main members (chair, deputy chair or secretary) may be censured by two-thirds of the total membership (arts. 27.5, 29.9 and 37.11, respectively). This option makes sure the internal political plurality of these bodies, but does not fit at all to their almost-judiciary functions, as detailed in Section XII (especially, arts. 105 and ff.: complaints may be filed to a court or to a election commission, at the complainer's discretion).

[7] Article 27 (procedure of creation of a *district election commission*) contains 11 paragraphs. Article 28 (procedure of creation of *polling station commissions*), 14 paragraphs. Article 29 (procedure of creation of a *polling station commission in a polling station abroad*), 14 paragraphs. Quite logically, given the respective contents of those articles, repetitions are frequent (e.g.: arts. 27.2, 28.4 and 29.3: parties which have the right to nominate members in such Commissions; 27.3 and 28.5; 27.4, 28.6 and 29.4: contents of the list of candidates to membership submitted by parties; 27.5, 28.7 and 29.6 (required information about candidates to Commissions); 27.7, 28.9 and 29.10 (effects of "technical errors or inaccuracies" in submissions), 27.9 and 28.11; 27.10, 28.10 and 29.11 (proportional distribution of management positions in Commissions among parties)… All this questions should be ruled by general provisions -applicable to all kind of Commissions-, leaving the particular aspects of any of them to be ruled by specific articles.

20. Another characteristic of these Commissions is their high number of members. This point has suffered some very minor changes, but their standard composition (between 10 and 24 members, article 28.2) seems equally not adequate to many of the functions they have to fulfill, which require efficient and quick procedures of decision-making.

21. These criticisms about their general features may be reinforced when considering the fact that membership of these Commissions is a paid function, which may even justify the release of members from their work or service duties (art. 36.6). In a nutshell, it implies an extremely expensive system, very difficult to afford and that possibly does not find many similar examples in countries with much more economic resources.

22. Apart from that very important questions, other particular considerations deserve to be made. For instance, after declaring -quite clearly and simply- that "voters residing in the territory of Ukraine may be members of" just one election commission, fixing some justified exceptions (art. 26), the following articles 27, 28 and 29 establish a too complex procedure to create the Commissions. In particular, articles 27.4 and .5 (and 28.6 and .7; and 29.4 and .6) require that the candidates to membership of such Commissions have to be nominated by the "Central governing body of a party" (so limiting the possibilities of internal party organization). And that the parties have to include in their lists of candidates not only the personal data (name, place of residence and address, even a contact telephone number and the command of the state language, which may be necessary to perform their functions), but also other data which do not seem pertinent at all (year of birth: it should suffice if the candidate has reached the age of 18 or not; education, place of work and position…). All this requirements, only useful to fix the salary of Commission members, may not help to find volunteers to perform those functions, and should be limited just for a better respect of some fundamental personal rights. In any case, the precise content of these documents does not seem to be a matter which should be ruled by the law.

23. Very similar points can be made with respect to provisions on powers of the Election Commissions. Firstly, it does not seem too logic that, after a general sending to a specific law on the Central Election Commission (which appears in articles 25.2, 30.1 and 36.1), article 30.2 may add a list of 14 functions/powers of that body. Once more, the multiplication of laws on the same issue creates technical problems, and the powers of this Commissions are determined, at least, in two different laws, which will have to be considered together to solve any possible conflict.

24. Secondly, and quite logically, there are many provisions repeated in articles 30.2 (powers of the *Central* Election Commission), 31 (powers of *District* Election Commissions) and 32 (powers of *Polling Station* Commissions): once more, it should have been desirable to include the common rules in one -shorter- article, instead of repeating them with reference to any of these specific bodies.[8] And it is possible to find also provisions simply absurd for a law like this (art. 38.4: "A registration fee for registration of a district election commission as a legal entity shall not be paid"!!; very similarly, 38.8: "A payment for publishing information about the termination of a district election commission in the Bulletin of State Registration shall not be paid"…).

[8] See, e.g., arts. 31.1, 32.1, 33.4; 30.2.1, 31.2.2, 32.2.1; 30.2.2, .3, 31.2.3; 30.2.4, and 31.2.6…

25. With respect to the rules of functioning of the Election Commissions, it must be underlined that, since the 2004 reform, Commissions may be convoked by just a minority of their members (one-third: art. 33.3 of the 2005 text), and that a minority of just three members may also force the inclusion of one issue in the agenda of the meeting (art. 33.9). This opening of this basic, but basically political bodies, to minority demands has to be positively considered, since it makes it more difficult for majority parties to control their working.

26. It is also remarkable the addition in the last 2005 reform of a new article (number 34) to rule the "right to be present at a Commission's Meeting". Apart from the fact that this question should not possibly be reserved to the law, the extent of this right may put in risk the conditions for the Commissions to perform their function. In effect, the will to affirm this right to many subjets (candidates, representatives of parties and mass media, foreign and international observers), united to the excessively high number of these Commissions, may make it very difficult -if not, rightly impossible- to perform their many and important functions, which require continuous debating and decision-making.

Voter registers (Section V, arts. 39-47)

27. This Section deserves an specially critical consideration, because all the technical faults already pointed out seem to be particularly present here. In purely quantitative terms, Chapter V of the 2001 law dedicated to this issue two articles (30 and 31), with 19 paragraphs in total. Four years later, this fith Section of the 2005 text contains nine articles with… more than 120 paragraphs.[9] And so, the article 31.6 of the 2001 Law said that "the procedure of producing absentee ballots, their delivery…, withdrawal and cancellation of unused… ballots shall be established by the CEC", within the temporal framework established by the same paragraph. The 2005 Law dedicates to these absentee certificates one article (number 42), with 24 paragraphs (three of them, divided in sub-paragraphs) in four pages.

28. This datum, out of any logic, is even more subject to criticism when considering the existence of a general Law of Ukraine "On the State Register of Voters of Ukraine", quoted in article 102.8, relative to "extraordinary elections", and which contains an absolutely alternative approach to this issue.[10] Once more, it should be better to have just one general ruling in this sphere, but at a glance, the system of the other -specific- Law seems easier to understand and to put in practice. And it fits better with the need of a system of permanent register of voters, as demanded by the paragraph 1.2 of the "Code of Good Practices" adopted by the Venice Commission.

29. All that said, it may be underlined that the beginning and the successive steps of the process of formation of the Register is established with reference to a future fact ("by October 1 of the "year preceding the year of regular election of national deputies", art. 39.1; see also 39.2, .3, .4, .12, .13; 40.1). But that "regular election" may just simply not to take place in the case of pre-term dissolution of the *Verkhovna Rada*. Therefore, this system implies the beginning of a complex process for every election, that is not applicable to the case of anticipated parliamentary elections, so obliging to consider an alternative system. Even if the general system were to be maintained, it should be much more logic and practical to fix the beginning

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[9] The 2004 Law had in this Chapter V 5 articles, with 44 paragraphs.

[10] Another "Draft Law on the State Register of Voters of Ukraine" is also subject of a separate opinion by the Venice Commission (CDL-EL(2005)022).

of the process with reference to the *last* elections (for instance, two-three years after the date of the last election).

Finantial, material and technical provisions for the conduct of election (Section VI, arts. 48-54).

30. In this sphere, it may be stressed that the Law in force, as the previous ones, set up a system very expensive for the public treasure, which must afford not only the expenditures due to the mere organization of elections, but also many costs caused for parties and candidates (e.g.: "printing out informational posters of parties…, publication of election programs… in mass media": art. 49.3). A remark that must be reinforced when considering also the remuneration for (partisan) Commission members, and that may transform elections in a too expensive process.

31. Once more, the rules are too detailed, and sometimes quite arguable. For instance, the prohibition for a party to "fund its election campaign in a foreign constituency" (51.4) does not seem adequate to an electoral organization which includes foreign constituencies.

Nomination and registration of candidates (Section VII, arts. 55-64)

32. It has already been noticed that only parties registered no later than 365 days before the Election Day may nominate candidates (art. 55.1). This restriction, already present in previous laws, has to be considered "clearly excesive", because "it is for the voters to say whether they accept a new party to be represented in Parliament", to repeat the wording of the Venice Commission opinion about the 2001 text.[11]

33. The text also maintains the high degree of intervention on internal party procedures that was already evident in former laws. In this sense, for instance, it seems difficult to accept that a Law must rule the procedures and contents of the agreements among parties to create blocs or coalitions, or the terms of a coalition breakdown as article 56 and 63 do exhaustively. In this sense, for instance, one may wonder why a law must say that "parties constituting a bloc may pass a decision on election bloc dissolution *no later than 35 days prior to the Election Day*" (article 63.7). It may rule if the resulting parties can or cannot present their own candidates, or the consequences of the crisis on already presented candidatures (as it does in paragraphs 3, 4, 8, 9 and 10 of the same article), but it is a non-sense to prohibit political crisis from a given moment.

34. The same can be said when regarding the intra-party processes to nominate candidates: minimum number of delegates of the party participating in the party congress, requirements of previous information about such a congress to Central Election Commission and mass media, data of the candidates which have to be indicated by the party (including, once more, data about education, month and year of birth, occupation, etc.). In a free competitive party system, parties are interested in informing public opinion about their activities, but state interventionism is not so high.

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[11] CDL-INF (2001) 22, ch. VII.

35. If previous laws established that the number of candidates could not exceed the number of deputies of the *Verkhovna Rada*, the 2005 reform has imposed a minimum number of 14 candidates (57.1). Such a rule is quite logical, because parties are not obliged to present hundreds of candidates. But it is possibly unnecessary, because the Ukrainian electoral system includes other different measures (in particular, the minimum threshold of three per cent of the votes to participate in the distribution of seats, and the monetary deposit to register candidatures, which is only recovered if that threshold is reached) which guarantee that only very strong parties may survive.

36. For the rest, this Section is also full of unnecessary and too detailed rules. For instance, the provision that parties may nominate as a candidates any individual, "being a party member… or a non-affiliated person" (57.2). Or the list of documents required for the registration of candidates, including signatures and seals of heads of parties, copies of registration certificate and charters of the parties, certified by the Ministry of Justice, decisions of congresses of the parties, autobiographies and photographs of the candidates, programs of the parties, etc. (article 58). Or the lists of causes that may justify the denial or the cancellation of registration of candidates, which at the end refer to the lack or the loss of the conditions required to register by the relevant laws (articles 62 and 64, which include some common causes)

37. It has already been said that the monetary deposit (apart from the problems pointed out at the beginning of this report) seems to have been reduced to 2.000 minimum wages. The Venice Commission Code of Good Practices in Electoral Matters[12] admits this kind of deposit, if the deposit is not excessive. A condition that seems to be fulfill in this case, given the antecedents and the fact that it is a single deposit, required to nationwide candidatures.

Election campaign (Section VIII, articles 65-71)

38. In this section, the same problems may be underlined. For instance, article 66.1 says that "campaigning may be performed in any form… not conflicting with the Constitution and Laws of Ukraine", a general principle that deprives of sense the following paragraph, according to which "campaign may be held" in the nine forms listed there (66.2). Whilst 68.2 requires that "campaigning with utilization of all forms of mass media shall be performed in forms, and in compliance with requirements established by… this Law". And article 66.3 tries to explain what "political ads" are considered as "agitation materials". Paragraphs 4 and 5 of article 68 are almost identical (may it be an error?)

39. Apart from that, some rules may pose problems. In particular, the prohibition for "citizens of other states and stateless individuals" to participate in campaigning (art. 71.1) seems too strict (when we are seeing the progressive organization of international parties or organizations, including participation of foreign political leaders in support of their "political friends" in other countries).

40. Less clear is the principle according to which mass media in general cannot refuse to include political advertising from some parties (68.8). In principle, the principle of equal treatment of all parties must be respected, but there are factual conditions (affecting, particularly, to some private media) which could justify well-grounded denial of participation in political campaigning of political groups whose ideology could be opposed to that of the media. In the

[12] CDL-AD (2002) 23, 1.3.

same sense, the 2001 provision that "state-owned or communal mass media as well as their officials, employees and creative staff shall… not be allowed to campaign for or against" any candidates or parties (art.56.4) has been replaced by a different one, the article 71.4 in force, affecting "mass media, their officers and officials and creative workers" in general and not, as the previous one, the "state-owned and communal". A provision that, if it is not the result of a mistaken wording or translation, may create problems with respect to some fundamental rights, in particular all those that protect freedoms of thought, speech and press, personal freedom and private property rights.

41. The prohibition of distribution of all kind of materials containing claims for liquidation of Ukraine's independence; for disruption of security, for any kind of violence; or stirring up national, inter-ethnic, or religious hatred (art. 71.3), seems perfectly legitimate, but should be carefully applied not to cover any abuse of power.

Guarantees (Section IX, arts. 72-77)

42. Once more, it is surprising the degree of detail of the article 72 of the Law to rule the possibility for parties to nominate representatives in charge of taking care of their interests during the election campaign. At the Central Election Commission, these representatives do have a right of "recommendation vote" (72.1; the 2001 text referred to "deliberative vote" in article 57.1; the 2004 version, to "advisory vote" in 59.1; possibly, it may be just a problem of translation). All party representatives have to be "approved by the central executive body of a party" (72.5, so limiting any possibility of internal organization of functions within the party), and may be recalled by the same body (articles 72.5 and 11). Paragraphs 3 and 7 of this same article, for instance, almost reproduce literally the same long regulation of party applications to register representatives at different levels.

43. It may be underlined that article 73.1, that establishes that candidates have a right to "release from execution of their work or service", refers to the possibility of a candidate "who is President of Ukraine or a national deputy". It is evident that both positions cannot be equally treated: the President is the Head of State, and that institutional position should possibly be kept out of the political struggle about the legislative elections.

44. With respect to official observers, it has to be again highlighted the (bad) technique of continuous repetitions: instead of defining a set of common rights of all observers, and afterwards the specific rights of the different groups existing among them (from parties, from public organizations, from foreign states and international organizations), the law anew dedicates different articles to any of this categories, so including repeatedly the same provisions for all of them (see, e.g., articles 75.1 and 72.2; 75.7, 76.11 and 77.6; 75.9-11 and 76.14-16).

45. Once that has been said, some other points may arise: the questionable requirement of a two-years-old registration for public organizations to have the right to have official observers (76.1); the extremely detailed ruling of the procedure to nominate that observers (75.4 and, particularly, 76.2: requirements of qualified signatures, seals, notarized copies of the organization's statutes… aspects all of them which seem not to be adequate to be regulated through a law like this).

Voting procedure and establishment of results of the election (Section X, arts. 78-101)

46. General criticisms about excessively detailed regulation are also applicable here. It may suffice to say that article 78, regulating the "election ballot", contains 10 paragraphs. Article 79, on the "procedure of election ballots printing", 11 paragraphs. Article 80, on the "procedure of transferring election ballots to Election Commissions", 18 paragraphs (one of them, with seven sub-paragraphs). Article 88 ("Procedure of Ballot Boxes Opening and Ballot Tabulation"), 22 paragraphs, also with some sub-paragraphs). Article 89 ("Protocol of a Polling Station Commission on Voting Results at a Polling Station"), 10 paragraphs, one of them with 19 different points… In sum, again, too detailed regulations for any electoral law… especially if it is not the only electoral law in force in a country.

47. Consequently, some rules are perfectly arguable (the minimum space floor for any polling station: 50, 75 or 90 square meters for small, medium and large polling stations, respectively; article 81.3). Or the provision that "executive authorities and bodies of local self-government, their officials have to ensure public order, smooth work of public transportation, communication, *power supply, lightening and heating of premises* for voting on Election Day" (83.15). Or the (repeated) rule that excludes the use of pencils for filling out different documents (89.6 and 93.4).

48. Repetitions are also constant: see paragraphs four to eight in article 86; articles 89, 93, 94 and 96 (voting results at a polling station, in Territorial election districts, in election districts abroad and at national level). In particular, articles 96.11.4 and 97.1 require, once more, than the protocol on the results, and their publication, include data as "year of birth, profession, position (occupation), place of work", among others, whose place is not possibly that.

49. Article 98.1 establishes that the parties which have reached the minimum threshold of three per cent of the votes cast, and consequently take part at the distribution of seats, will also have right to the reimbursement of their expenses "in the amount equal to factual expenses but not more than one hundred thousand of minimal salaries". A wording with -quite curiously, given the antecedents- is almost identical to that of the article 79.1 of the 2004 Law. In any case, it should be noted that, according to this article 98, this reimbursement can take place almost one year after the date of elections. Effectively, "funds for reimbursement of expenses related to financing election campaign of parties… shall be stipulated in the Law On the State Budget of Ukraine for the *financial year following the year of election of national deputies*", and these "funds for reimbursement… shall be transferred to the account of the respective parties… *no later than on the thirtieth day from the day of enactment of" the mentioned Law.*[13] A delay that can also mean a financial problem… and which could be especially important in case of extraordinary, and unexpected, elections.

50. To finish with this Section, another curious rule may be mentioned: article 101.3 foresees a kind of "pre-recall", given that "the party… that nominated candidates for national deputies for its party list… may pass a decision on eliminating a candidate… not elected from its party list at any time after the Election Day", but always "before this person is registered as a national deputy of Ukraine" in case of replacement of another candidate of the same party list

[13] Article 98, paragraphs 7 and 8 (emphasis has been added), following the system already set up by the 2004 Law (art. 79). It should be remembered that regular elections have to take place "on the last Sunday of March of the last year of authority of the *Verkhovna Rada*" (art. 16.1).

elected on Election Day but who loses his/her seat for any reason (pre-term termination of mandate, 101.1). In sum, parties cannot recall their elected deputies; but they can recall their proposed candidates before becoming deputies (be it *before* the elections, art. 64.1.2; be it *after* the elections, 101.3).

Extraordinary elections (Section XI, art. 102)

51. As we have already pointed out, this only article serves to rule the whole election process in case elections are convoked "by the President of Ukraine on the basis and under the procedure established by the Constitution" (art. 15.3). Such elections "shall take place on the last Sunday of the 60-day period after publication" of the Presidential Decree, defining a shorter election process of about 55-60 days (art. 16.3 and .4).

52. In that circumstances, "the election districts and polling stations situated abroad established for the previous parliamentary elections shall be used" (102.1); and the "lists of voters at regular polling stations shall be compiled and produced pursuant to the procedure established" by the Law "On the State Register of Voters of Ukraine" (102.8). For the rest, District Election Commissions shall be established no later than fifty days before the Election Day; regular and special polling stations shall be created no later than 19 days before the Election Day, and Polling Stations Commissions no later than 12 days before the same date.

53. Therefore, before unexpected elections, the Law contains an alternative model capable of managing the most difficult stages of the election process more skilfully than the regular one. Something that should be taken into account if, in the future, Ukrainian legislature should decide to reform their election procedure.

System of appeal of decisions (Section XII, arts. 103-117)

54. The Law includes (since the 2004 reform) a specific section on this matter (which was lacking in the 2001 Law, as the Venice Commission opinion stated). Once that has been said, it is also certain that practically all the points and shortcomings underlined there have not substantially varied. In particular, the Law keeps the double, alternative possibility of appealing to an electoral commission or to a court, at the discretion of the plaintiff (art. 105.2), and it foresees appeals against private persons or legal entities (art. 104.3).

55. Apart from that, and as in the rest of the Law, rules are too detailed and, in the same extent, too close to particular cases, instead of including general principles. In this particular respect, it implies, for example, that article 103 includes a list of concrete possible plaintiffs, instead of invoking the existence of a violated right, or of a legitimate interest as a ground for appealing. On other respects, article 109 regulates "proofs", establishing rules which are very likely to be proper of general procedural laws (e.g.: the list of proofs in paragraph 1 includes "written documents and materials", "written explanations of the subjects", "material evidences", or "expert conclusions"; and paragraph 3 says that "in the event that" subjects of the process "fail to provide evidence to prove the circumstances that they quote, the election commission shall adopt a decision based on available evidence"). Art. 110 states that "decision[s]… must be legal and justified" (¿?), and includes some too long, too detailed and too repetitive lists of contents of the decisions (paragraphs 2, 3 and 4).

Storage of election documentation and final provisions (Sections XIII, art. 118; and XIV)

56. The last "ordinary" section of the Law rules the storage of, and the access to, election documentation and other material values, especially in the National Archive Fund and local archive institutions. It is, evidently, a new issue whose inclusion in this legal text seems out of place.

57. With respect to the final provisions, the second one foresees that "amendments and additions to this Law may be made no later than 240 days before the day of election of national deputies of Ukraine in 2006. A rule absolutely respectful of the criterion of stability of electoral laws defended by the Venice Commission,[14] but which may be too rigid, and in practice may cause problems if used with partisan aims.

58. Finally, it may be remarked that this Law declares "null and void" the previous 2004 Law. Nevertheless, in practice it has replaced the 2001 text, given that the Law enacted in 2004 was to enter in force on 1 October 2005, and it has therefore been reformed before that date, which is maintained by this text.

[14] *Code of Good Practice…* Explanatory report, points 63 and ff.

COMMENTS

ON THE DRAFT LAW ON THE STATE REGISTER OF VOTERS OF UKRAINE, submitted by people's Deputies of Ukraine, Mr O. Zadorozhny and Mr Yu. Klyuchkovsky

I. General remarks

1. It is difficult to ascertain the exact position of this text within the Ukrainian electoral legislation. According to its own presentation, "this Law defines the legal and organizational principles of establishing and maintenance of the uniform State Register of Voters". But other Laws, such as the Law on Election of People's Deputies of Ukraine (adopted on July, 7, 2005; and in force since October, 1, 2005) foresee a particular "procedure for Compiling General Voter Registers", apparently *ex novo*: it includes that "general voter registers in the format approved by the Central Election Commission shall be compiled by October 1 of the year preceding the year of regular election of national deputies", and the creation of "working groups of voters registration" (art. 39).

2. At the same time, this "*Draft* Law on the State Register of Voters" affirms that it "*shall* enter into force on 1 January 2005". If it is so, in the terms that have been submitted to this opinion (which would then deal not with a Draft Law, but with a Law of Ukraine), it coexists with the previously mentioned Law on Election of People's Deputies. A Law that, certainly, presumes (as an alternative system, only applicable to the particular case of extraordinary elections) the existence of a Law of Ukraine "On the State Register of Voters of Ukraine" (article 102.8).

3. All that said, this Law sets up a model of State Register of Voters which seems technically correct, and of course much better than the complex system fixed by the Law on Election of Deputies. It foresees a permanent State Register, with a system for periodical updating of personal data; an structure with different levels (local, regional and Central Registers of Voters), which may act in a coordinate way. And defines the authorities in charge of the system; the rights, duties and responsibility of all subjects affected, and a system of dispute settlement and of appeals to defend legitimate rights and interests at stake.

4. In any case, it should be considered the convenience of enacting an Ukrainian global electoral law, which would make it easier for citizens to understand, for political actors to handle, and for electoral commissions and courts to deal with electoral processes. In that sense, this particular law seems a good starting point to solve one of the main problems of any electoral systems, which is the relative to the formation of the Register of Voters, essential to practically define the constitutional concept of "people", as subject of sovereignty.

5. Nevertheless, the Law presents some of the problems which may be found in other Ukrainian texts on the same issues and, in particular, the tendency to a too detailed regulation, which explains a quite long (21 articles plus three short final provisions) and sometimes reiterative and confusing Law for ruling this particular issue.

II. Particular considerations

6. The "definition of terms" of the first article should possibly be better throughout the text. For instance, the definition of "State Register of Voters" could initiate the present article 2 ("main objectives of the State Register"), which defines its objectives. Therefore, that article would have two paragraphs: one, defining the Register; the second, its objectives. In fact, that happens when article 1 says that the term "administrator of the State Register shall mean the Central Election Commission", but an almost identical definition is repeated in 10.2 ("The Central Election Commission shall be the authority of maintenance of the Central Register of Voters and the main administrator thereof) and in 13.2 ("The Central Election Commission shall be the *Main* Administrator of the State Register", which exists with *other* administrators -regional, local: art. 13.1-, so modifying the definition in article 1). And, after this little mess, in some occasions the Law still refers to the "Central Election Commission", instead of using the alternative definition (see article 14.2).

7. The principles of maintenance of the Register (art. 3), and the list of the data that have to be registered (art. 4) do not pose problems. With respect to the rights and duties listed in article 5, it may be difficult to put into practice the right to "disprove false information regarding… *other voters*" because, by definition, treatment of personal data must not be easily open to third persons.

8. As it has been already pointed out, the Register seems to have a reasonable structure, with a national (Central or State), and some regional and local registers (art. 8). It may be remarked that the translation uses both terms (State: art. 9.1 and 9.2; or Central: 9.3) with reference to the same national Register. Their general design and system of relations among them seems quite adequate, as the procedure of submission of data (art. 15).

9. Other parts of the Law, as the rules about the updating and correction of data of the Register of Voters may be too detailed, but in general seem to be reasonable. Only the provision of regular checks using information owned by other public organs (Ministries of Internal Affairs and Justice, State Tax Administration and the State Department for Execution of Services, art. 17.2) may pose some difficulties, if it is not handled within the legal framework to the respect of personal data. And, as it may be also pointed out with reference to the Law on Election of Deputies, it is also arguable if regular checks should be fixed at certain moments referred to the future elections ("from September 1 to November 1 of the year preceding the year of regular elections of… deputies and from February 1 to April 1 of the year preceding the year of regular elections of the President", art. 17.3), instead of regularly (every year or every two years, for instance), or at a given moment after last elections (for instance, two/three years).