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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

by

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I. Introduction

1. The current opinion follows previous work by the Venice Commission on the reform of the electoral laws of Ukraine. The current opinion is based on:

- The constitution of Ukraine, adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996, CDL (2003) 86;
- The Law of Ukraine on Making Amendments to the Law of Ukraine on Election of National Deputies of Ukraine, adopted by the Verkhovna Rada on 7 July, 2005, unofficial translation by the Indiana University Parliamentary Development Project for Ukraine;
- Opinion on the draft Law on Election of People's Deputies of Ukraine (draft introduced by people's deputies M. Rudkowsky and V. Melnychuk), adopted by the Venice Commission at its 57th Plenary Session, 12-13 December 2003, CDL-AD(2004)001;
- Opinion on the draft Law on Election of People's Deputies of Ukraine (draft introduced by people's deputies S. Havrish, Y. Ioffe and H. Dashutin), adopted by the Venice Commission at its 57th Plenary Session, 12-13 December 2003, CDL-AD(2004)002.

2. The Ukrainian parliament adopted the Law on Election of People's Deputies of Ukraine on 25 March 2004, replacing the law that was in effect since 2001. Among the most significant changes was the introduction of pure proportional system of elections, replacing the previous mixed system where half of the MPs were elected from majoritarian constituencies. The law was to take effect on October 1, 2005. However, on 7 July 2005, the parliament adopted a new law on the election of national deputies (technically, the new law only made amendments to the law adopted in 2004). This law, except a few provisions, will enter into force on 1 October 2005. The current comments concentrate on the most recently adopted law.

3. The Law provides 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 (Final provision No. 2). It is understood that last-minute sudden changes to the laws are to be avoided. The comments can, however, be used in the future reforms of the parliamentary election law, also taking into account the experience of the implementation of the law during the 2006 elections. It needs to be stressed that the fair and unbiased implementation of the law is the most crucial stage of ensuring the democratic nature of elections.

4. The 2005 law is much more detailed than any previous law on the parliamentary elections in Ukraine. Many questions are regulated in a very detailed way. This has already induced comments that the law is not as clear as it could be, due to length and complex nature of the provisions. It is recognized that some issues necessarily have to be regulated in great detail, in order to avoid abuse of the election process. On the other hand, there have to be real consequences for violation of those detailed (procedural) rules. Thus, the efficient implementation should remain a priority, as the detailed nature of the procedural rules does not provide sufficient guarantees in itself.

II. Comments on the law

5. Electoral system. According to the new law, the 2006 parliamentary elections will be held under a proportional electoral system. There is one national district, and the voters have the right to vote for a party, not for an individual candidate (a closed list system). The Ukrainian law (article 96, paragraphs 6-9) uses the largest remainder method with a Hare quota (i.e. the Hamilton method). The electoral threshold amounts to 3%.

The Venice Commission has previously commented on the arguments for and against adopting such an electoral system in a country the size of Ukraine. It should be stressed that the system does not run counter to the European standards of democratic elections. It is up to the Ukrainian authorities to assess the implementation and consequences of the new electoral system, and draw appropriate conclusions therefore.

6. Right to stand for election. The law (Article 9) provides that only a citizen who has resided in Ukraine for the last five years may be elected to the parliament. Our previous comments have criticized this provision, as this is an unusually restrictive provision. Due to the fact that the restriction is enshrined in the constitution (art. 76a), it may be difficult to change the situation.

The law retains the provision that only parties who have been registered 365 days prior to the voting day may nominate candidates (Article 10). The previous opinions of the Venice Commission have indicated that this limitation seems unnecessary. The nomination of candidates actually starts 119 days before the election day. It should be up to the voters to decide whether a new party is to be taken seriously, and whether their candidates should be accepted.

7. Formation of election commissions. The law provides for detailed rules regulating the formation of election commissions. The rules for forming the CEC is contained in another law and cannot be considered here. The formation of the District Election Commissions and Polling Station Commissions is largely based on partisan nominations. The management positions cannot be held by a single party (bloc) representative. During the implementation of those rules, attention should be paid to ensuring the professional qualifications of the election commission members.

It is unclear whether the new provision in article 34(1) is changing the nature of the CEC work. This rule provides that the representatives of parties on the CEC have a “recommendation vote.” The previous code did not have this restriction. The rule may exist in the current law on the CEC. This lack of clarity demonstrates that it should be considered whether various laws on elections should be compiled into a single act.

8. Status of election commissions. According to article 25, the district election commission is a legal entity, whereas a polling station commission is not. The precise meaning of this distinction is unclear. In the civil law sense, the election commissions should usually not be legal persons (i.e. they usually don’t own property, and enter into contracts in the name of the state). In administrative law, the election commissions are subject to legal rights and duties. For example, polling station commission may be a party to a court proceeding, when its decision has been challenged. In fact, the law defines it as a subject of the election process (article 12). Also, it is unclear what is meant by saying that “the CEC shall not be legal inheritor of district election commission” (art. 25 (3)). If those provisions are necessary due to the peculiarities of the Ukrainian legal system, they should nevertheless be retained.

9. Number of voters per polling station. The number of voters per one polling station has been set to 20-2500. The Venice Commission has recommended to keep the number of voters per one station low. In one opinion, it was recommended that no more than 2000 voters per station, and even this number may be too high. Compared to the previous 3000 voters per station, improvement has taken place. It is recommended that the authorities assess the smoothness of voting and tabulation procedures in bigger polling stations, in order to determine whether an optimal number has been reached.

10. Electoral districts. According to Article 18 (2), there are 225 territorial election districts. The choice of this number does not seem to be based on the administrative build-up of the Ukrainian territory, but rather on the previous electoral system (225 candidates were elected from a single-member district). As single-member districts are abolished, the number of size of the "election districts" does not play an important role any more. Instead, the districts are just a tool for electoral administration. Therefore, the number 225 could be reconsidered, especially if it would be possible to distribute electoral management duties logically based on administrative units of the country.

11. Voter registration. According to article 39, voter registers are compiled before each election by the workings groups of voter registration established in various local and regional units (the law is unclear which working groups actually have to be established – village, settlement, city, city district, rayon and district are mentioned in various provisions). Address information for voters is taken from the general address register. This register was authorized in 2004 by the law "On Freedom of Movement and Free Choice of residence in Ukraine". However, the law does not envisage the creation of a national voter register, and the problems regarding the inaccuracies in voters registers are likely to continue. The voter registration procedures should be thoroughly revised.

The law is very complex regarding the process of creating the voters register. No single institution seems to have central responsibility over the creation of voter register. The responsibility is further eroded by the creation of temporary working groups (instead of vesting the responsibility in the executive bodies themselves). Various authorities, including the Ministry of Interior who possesses the official registration information, have to send the official registration information to the rayon and city working groups (art 39 (12)). The role of the election commissions is not clear in this process.

12. Campaign financing. The campaign financing provisions have been revised, although the essential elements of the regulation remains the same. The campaign costs may be financed through a party's election fund, and costs up to 100,000 times the minimum salary will be compensated through the State Budget for parties who have received at least 3% of the votes. The election fund is created by party "own funds" and contribution of individuals (Art 53(1)).

Some issues remain unclear. First, it is unclear to what extent, if at all, may an independent organization or individual spend in the electoral process. Article 48(3) prohibits to fund "election events or materials" through any other sources than State Budget or party election fund, "irrespective of availability of agreements with parties." Article 66(5) provides that it is prohibited to use funds from other sources for campaigning, "including agitation on voters' initiative." This seems to prohibit any third-party spending on the election and campaigning for candidates or issues whatsoever. Such a prohibition would be a very serious interference with the freedom of speech.

Apparently only individuals may contribute to the party election fund. However, it is not clear what the party "own funds" consist of. The law on political parties does not prohibit donations to the parties by commercial enterprises. It is unclear whether parties are prohibited from accepting donations from commercial enterprises and then transferring those funds to the election fund as their "own funds."

There seems to be no campaign spending limit for the parties. Thus, even though the contributions by individuals to the election fund are limited, if party gathers enough funds, it may outspend other parties considerably. The absence of spending limits is not uncommon and pose no problems for the democratic nature of the election process as such.

The law tries to regulate what "campaigning" is, thus providing a way to separate parties' everyday activities from campaign activities (art 66). Still, a provision helping to distinguish campaigning from everyday party activities is missing.

13. Equality in mass media. The law has detailed provisions against favouring of a particular candidate by mass media. Candidates are to be given equal airtime in public broadcasting, and news reporting has to be balanced (articles 68-70). Regarding those provisions, the implementation of the law seems to raise more questions than the provisions of the law themselves. It remains to be seen whether the news organizations will actually follow the spirit of the law, and whether election administration officials are willing to enforce the legal provisions.

The law does not provide for creation of an independent media monitoring body, as recommended in the previous opinions. Such a body would be a further safeguard in ensuring equal media coverage of campaign activities.

14. Abuse of administrative resources. The law expressly prohibits the use of public resources by candidates for campaigning (except money from the State Budget that is distributed on equal basis to the candidates), and prohibits the campaigning by public officials in their official capacity. Again, the implementation of those rules will be of crucial importance.

15. Nomination of candidates. The law regulates the internal process of parties for nomination of candidates and submitting lists for election (Art. 57). It is mandated that a party shall nominate candidates at its congress (for a bloc – inter-party congress). It is unclear whether those provisions allow for holding intra-party elections for the list places or other instruments of internal democracy. It is to be kept in mind that a congress may not have many possibilities for influencing the final order of the candidate list.

16. Official observers from public organizations. Article 76 regulates the rights of observers from "public organizations." Only those organizations may have observers whose "statutory activities … extend over the election process and observation thereof and registered under the established procedure at least two years before the election day." This provision gives some organizations the right to observe elections, but limits the number of such organizations considerably. The purpose of such restrictions is not clear.

17. Voting against all. The law retains the option for the voters to vote against all candidates (Art 78(4)). This provision is unusual among established democracies. They may provide voters an illusion that they have meaningfully voted whereas their vote really does not make a difference. Those votes may only raise the effective electoral threshold of 3% because "all votes cast" will be taken into account (Art 98(1) – it is assumed that the "vote against all" is actually a "vote cast").

18. Order in polling stations. The law does not expressly prohibit law enforcement officers to be present at the election unless for cause. It does list persons who have the right to free access to premises of voting in special polling stations (art 81(5)); there is no similar provision for ordinary polling stations. The only restriction comes from article 83(2), according to which the chair or deputy chair of a polling station commission has the right to invite an officer of interior bodies into a premise for voting in case of gross violations of voting procedures, disorderly conduct or other infringements. An express provision prohibiting their presence in other circumstances would be recommended.

19. Invalidation of voting. The law provides that the polling station election commission may declare the voting results in the polling station invalid if there are violations of election law that make it impossible to truthfully determine the will of the voters (Art 90). However, there is a restriction in the law allowing for the invalidation if more than 10% of the votes were illegal in one way or another (see Art 90(1), subparagraphs 1-3). The usefulness of such a threshold is doubtful. The law should give a general guideline when election results may be declared invalid. It should be noted that a 9% discrepancy in various polling stations may well influence the national election results. Also, in some instances it is very difficult to determine whether the 10% error rate has been reached or not.

More importantly, it is not completely clear what will happen if election results from a single polling station will be declared invalid. If those results will just be omitted from determining the final national election results, the national result may not reflect the true will of the voters. Also, the right to vote for the voters in this particular district would be effectively invalidated. The law does not envisage the organization of a re-voting in certain polling stations.

20. Complaints procedure. The law regulates the complaints procedure in articles 103-117. The procedure has been kept relatively simple. Three issues warrant closer examination.

Firstly, the law provides a list of persons or bodies who have the right to file a complaint. Such an approach is not optimal in some situations. Many countries give the right to appeal decisions of election commissions to any person whose rights have been violated. Under the current text, it is not certain whether the rights of the person or body who files the complaint have to be violated at all (except when the complaint has been filed by a voter). At the same time, some potential persons whose rights may have been violated may not be able to file a complaint, or their rights are at least unclear under the current law (e.g. a potential candidate, or a media organization).

Secondly, the law maintains the system where a complaint may be filed in either a court or a higher election commission. This may create the problem that same issues are being decided by different election appeals bodies at the same time. The election commission may suspend proceedings only if the "same complaint" has been filed in a court (art. 105(4)). If different plaintiffs protest against similar violations, the complaints can hardly be considered the "same". The appeals process should promote a more uniform process of deciding on election complaints.

Thirdly, the instances where election results may be declared invalid, when a recount may be ordered, and what happens if parts of the elections are declared invalid during the appeals process, could be regulated more clearly.

21.Comprehensive electoral code. The Ukrainian legislature should in the future assess whether the combination of various electoral rules into a single electoral code would be feasible. Many provisions of different codes are repetitive. At the same time, discrepancies in procedures may occur due to the complex and extensive nature of those rules. Such inconsistencies should be avoided if at all possible.