



Strasbourg, 7 March 2006

Study no. 329 / 2004

Restricted
CDL-EL(2006)016
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT REPORT ON

**THE PARTICIPATION OF POLITICAL PARTIES
IN ELECTIONS**

on the basis of comments by

**Mr Ángel SANCHEZ-NAVARRO
(Substitute member, Spain)**

Mr Hans-Heinrich VOGEL (Member, Sweden)

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 11th 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 Messrs Á. Sanchez-Navarro (Substitute member, Spain) and H.-H. Vogel (Substitute member, Sweden) as rapporteurs on this subject.*

4. *The following report is based on comments provided by Messrs A. Sanchez-Navarro and H.-H. Vogel, as well as on some remarks provided by the members of the Council for Democratic Elections. This report was adopted at the... meeting of the Council for Democratic Elections and ...Plenary session of the Venice Commission (Venice, ... March 2006).*

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

5. 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'.

6. 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. Regardless of this diversity, two main approaches to the existence of the political parties can be mentioned. The first one defines a political party as a free association of individuals, with minimal state regulation, oversight, financial support etc (UK experience) or it may be that of a specific association with precise duties, responsibilities and prerogatives (German model). Parties in Europe have evolved from one or other concept and are on a converging path, but cultural differences are still significant. Hence, in many countries, any

state regulation is still seen as interference, whilst in others there is less hesitation about political engineering through party law, registration procedures etc.

7. 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.

8. 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.

9. 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.

10. Another important aspect of political parties’ participation in elections is that of the influence exercised by the electoral system itself on party internal structure. For example, a candidate-based first past the post electoral systems hardly requires any party involvement in other issues than candidate’s political backing and contribution to the campaign financing. On the contrary, in proportional systems with closed party lists a party has very important prerogatives in defining, among other issues, the place of each given candidate in the list.

A) Questions raised during the pre-electoral period

11. The *Code of Good Practice in Electoral Matters*¹ 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”. However –and indeed- this right may be subject to certain conditions, usually concerning age and nationality.²

12. 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

¹ CDL-AD (2002)023rev, I, 1.a.

² See also CDL-AD(2005)012 Report on the abolition of restrictions on the right to vote in general elections endorsed by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004).

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

13. 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

14. 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),³ 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.

15. 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”⁴. 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...⁵ However, some pre-conditions for registration of political parties existing in several Council of Europe Member States requiring a certain territorial

³ *Replies to the Questionnaire on the Establishment, Organisation and Activities of Political Parties* (CDL-DEM(2003)002rev, 1.5)

⁴ *Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues* (CDL-AD(2004) 007).

⁵ 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).

representation and a minimal number of members for their registration could be problematic in the light of the principle of free association in political parties.

16. 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”,⁶ 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

17. 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 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.⁷

18. 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.⁸

c) Parties and election management bodies

19. 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

⁶ *Guidelines... on Legislation on Political Parties: Some Specific Issues* (CDL-AD(2004)007).

⁷ *Cf. Replies to the Questionnaire on the Establishment, Organisation and Activities of Political Parties* (CDL-DEM(2003)002rev, 3.5).

⁸ *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).

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”).

20. 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 practical option.⁹ 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 some of the main ones may be enough) have a role in their nomination process.

21. However, the electoral management bodies should be composed in a way to ensure the trust of all forces taking part in elections and individual voters in their impartiality and professionalism.

d) Rights and obligations of parties observers

22. 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.

⁹ Very recently, for instance, the Venice Commission and OSCE/ODIHR 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”.

23. 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 including the equality principle and the use of public (State) resources

24. The Venice Commission has already established guidelines on the financing of electoral campaign expenses, which differs from regular financing.¹⁰ 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.

25. 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 does not mean that all parties are entitled to public resources regardless of their real strength in a given society. For example, the Code of good practice in electoral matters provides that:

“Depending on the subject matter, equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections [...]”¹¹

26. 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?

27. In a different sphere, it is clear that 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

¹⁰ *Guidelines and Report on the Financing of Political Parties* (CDL-INF(2001)8).

¹¹ *Code of good practice in electoral matters*(CDL-AD (2002) 23 rev), I.2.3.b.

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?

28. The Venice Commission's Guidelines and Report on the Financing of Political Parties (CDL-INF(2001)8) distinguish between regular financing and financing of electoral campaigns. But the practical usefulness of the distinction is limited when political parties receive (public) funds permanently and regularly for both their current operations and their participation in elections. If that is the case, it is underlined in the report, "*confining funding to the full or partial coverage of campaign expenses ... merely aims to avoid emptying the parties' coffers every time an election takes place and to permit the trouble-free functioning of the democratic process through the holding of regular, free elections.*" It is also pointed out in the report, that most of the major European democracies have opted for this approach. The situation is similar when political parties acquire (private) donations.

29. Therefore, if and when the distinction is to be used anyhow in regulations for different provisions concerning, on the one hand, electoral campaigns and, on the other, pre- and post-electoral periods, a number of clarifications is desirable. Such clarifications should be considered in order to avoid some of the problems which have been discussed on various occasions in Europe during the last few years and especially during the deliberations which preceded the adoption of the European Union Regulation (EC) No 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding.¹²

30. If public funds are allocated *with general regard* to an electoral campaign it should be clarified that the funds can be used by the political party for any legitimate party purpose; specific conditions for the use of appropriations should be expressly indicated. If funds are appropriated *strictly for campaign purposes* and for such purposes only, guidance should be provided how to handle expenditure which cannot be classified as exclusively campaign related – as for example expenditure for (rent of) party premises, which are used both for current party business and for campaign activities, or for party employees who are employed by the party for both current and campaign activities. If applicable, guidance should also be provided as to both the span of time before and after an election during which the use of appropriations is legally acceptable and the time at which expenditure is considered to have occurred.

31. If private donations are acquired for campaign purposes by either the party or the candidate guidance should be provided how to handle any conditions or wishes for the use of a donation, which may have been expressed by the donor, how to handle expenditure which cannot be classified as exclusively campaign related and for which time before and after an election the use of campaign donations is acceptable. Further, problems may be caused, if the candidate him-

¹² Regulation (EC) No 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, Official Journal of the European Union (OJ) 2003 L 297/1, *together with* the Decision of the Bureau of the European Parliament of 29 March 2004 laying down the procedures for implementing Regulation (EC) No 2004/2003, OJ 2004 C 155/1, *and* Court of Auditors, Special Report No 13/2000 on the expenditure of the European Parliament's political groups, together with the European Parliament's replies, OJ 2000 C 181/1, *as well as* the travaux préparatoires to Regulation No 2004/2003.

or herself provides own resources. In such cases guidance may be necessary, for example, to which extent the candidate may use own resources or resources of his family, how resources, which are provided in kind, have to be valued and who has to do the valuation.

32. If political parties are or can be liable to income tax it should be clarified to which extent appropriations, donations, membership fees etc. are or can be regarded as taxable income, which expenditure is deductible from taxable income and which information has to be provided by the political party to establish deductibility. Similar clarifications should be considered concerning value added tax and other taxes which may apply to political parties.

33. It should also be clarified according to which set of regulations the party has to keep its books – for example according to provisions for private associations or companies or any other private individuals or according to provisions for public authorities or other public entities (or maybe even both).

b) Access to (public and private) media

34. From a different point of view, contemporary societies are mainly “information” societies: elections are fought in a very particular 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. The Code of good practice in electoral matters provides that:

“Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by the state authorities, in particular with regard to: the election campaign and the coverage by the media, in particular by the publicly owned media [...]”¹³

35. 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.¹⁴ 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.

¹³ Code of good practice in electoral matters(CDL-AD (2002) 23 rev), I.2.3.a.

¹⁴ See also the Code of good practice in electoral matters(CDL-AD (2002) 23 rev), I.2.3.c..

36. Another complex issue concerning the coverage of electoral campaign is the responsibility of different mass media for the quality of information they provide on different political forces. The freedom of press is a corner stone of modern democracies, however there should be a mechanism providing an effective remedy against misuse or abusive use of information during the pre-electoral period.

C) Questions raised the day of election

a) Role of parties observers

37. 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.

38. 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

39. 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. In the context of elections, an effective system of appeal would mean that any decision by any state authority can be challenged and that a decision by a competent body is taken immediately. Any delay in complaints and appeals procedures can seriously compromise the credibility of an election.

D) Questions raised at the post-election period.

a) Contesting electoral results: timeframe.

40. The “deadlines for taking decisions on complaints and appeals”, including of course the decision of contesting electoral results, have to be “realistic”.¹⁵ 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

¹⁵ *Joint Recommendations on... Albania* (CDL-AD(2004)017), already quoted, para. 103.

41. 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.

III. Conclusion

42. The Council of Europe Member States have different approaches to the regulation of political parties' activities and their participation in political life, notably in elections. However, there are some common trends and concerns as to the equality of different forces seeking political representation, financing of parties and issues related to the internal operation of parties.

43. A set a common standards is not only possible but also quite appropriate in a number of fields, which are:

- a. procedures for the nomination of candidates for different elections;
- b. equal treatment of different parties and individual candidates competing in elections;
- c. possibility to have observers during the elections;
- d. transparency in campaign financing and accountability of parties for the different resources used;
- e. equal access to mass media;
- f. effective complaints and appeals system, which provides for a speedy procedure for the settlement of different disputes during the whole electoral process;
- g. respect of the principle of proportionality in case of sanctions.

44. The Venice Commission hopes that further co-operation between the Council of Europe Member States in these areas could contribute to the establishment of common standards in addressing the issue of political parties' activities and to the improvement of electoral practice in Europe.