



Strasbourg, 20 February 2007

Opinion No. 399 / 2006

Restricted
CDL-EL(2006)034rev
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON THE CONVENTION
ON THE STANDARDS OF DEMOCRATIC ELECTIONS,
ELECTORAL RIGHTS AND FREEDOMS IN THE MEMBER STATES
OF THE COMMONWEALTH OF INDEPENDENT STATES**

**on the basis of comments by
Mr Christoph GRABENWARTER (member, Austria)**

Introduction

1. *By letter dated 28 September 2006, the Secretary General of the Council of Europe asked for an opinion on the Venice Commission on the Convention on the standards of democratic elections, electoral rights and freedoms in the Commonwealth of Independent States.*
2. *The above-mentioned Convention was adopted on 7 October 2002 and was ratified up to now by Armenia, Kyrgyzstan, Moldova, Russia and Tajikistan.*
3. *The request by the Secretary General takes place in the framework of the discussion about the possibility to adopt a European convention in the electoral field as a Council of Europe convention. The issue whether the text submitted for opinion could inspire a European Convention will then have to be addressed.*
4. *The Venice Commission entrusted Mr Christoph Grabenwarter (member, Austria) to prepare the comments which are the basis for this opinion.*
5. *This opinion is based on a non official English translation of the Convention.*
6. *The present opinion was adopted by the Council for Democratic Elections at its ... meeting and by the Venice Commission at its ... session.*

Preliminary remarks

7. The Convention explicitly intends to “assure guarantees of public and international election observation in the States party to the Convention” and to “ensure the combination of generally accepted election standards of elections and national norms for election regulation, voting rights and freedoms of the person and citizen, and guarantees of their execution and protection” (Preamble).
8. According to the Preamble too, the Member States declare to implement the provisions of the Convention on the basis of the constitution and national legislation and adequate governmental policy, and intend to take into consideration national and historical traditions, which tends to seriously restrict the reach of the convention.
9. At first glance, when one looks at the proliferation of international documents and Conventions, one may even wonder how many Conventions of Rights Fundamental Rights may bear. In fact, in European countries, electoral rights and freedoms are almost always ruled by national Constitutions, and by most human rights Conventions and Declarations, since the 1789 *Déclaration des Droits de l’Homme et du Citoyen* (Articles 3 and 6: “The principle of any sovereignty lies primarily in the Nation”; and “The law is the expression of the general will. All citizens have the right to contribute personally or by their representatives to its formation”). Among these Conventions and Declarations, the following may be pointed out:
 - the 1948 United Nations Universal Declaration of Human Rights (Article 21: “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”);
 - the 1966 International Covenant on Civil and Political Rights (Article 25: “Every citizen shall have the right and the opportunity... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”);

- the ECHR and the already quoted Article 3 of Protocol No. 1 (The Parties undertake « to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature»); or
- the Code of good practice in electoral matters of the European Commission for Democracy through Law (CDL-AD(2002)023rev).

10. In Articles 13, 18 and 19, the Convention provides for a number of political rights in the context of elections. In this respect, a Council of Europe document should make reference at least once to the relevant Articles 10 and 11 of the ECHR and f Article 3 of Protocol No. 1. Such a reference would also ensure that restrictions on these rights are admissible within the limits of the “necessity” test made by the European Court of Human Rights. Although the Convention makes reference to international obligations, restrictions etc. in Articles 18, paragraph 2 and 20, paragraph 1, this is not enough to cover the whole election process and the corresponding electoral campaigns. The Convention also goes on to regulate in a detailed way the political process leading to elections. In this respect it should be kept in mind that the European Convention on Human Rights allows restrictions beyond those formulated in the Convention, such as restrictions on the political activity of civil servants, soldiers, policemen etc. in particular in post-communist times.

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

12. Nonetheless, it is possible to find differences of perspectives. In particular, the Convention states in its Preamble the wish of the States parties to this Convention to “promote the establishment and development of the representative rule, of democratic traditions for expression of the nation’s will in the course of elections, exercising another forms of sovereignty of the people based on rule of law, taking into consideration national and historic traditions.”

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

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

15. The consequence is what could be called a “structural/global approach”, more than an “individual” one. In other words, the Convention seems to point out how elections have to be held to be democratic (free elections, genuine elections, fair elections), more than the features of the democratic vote (free, universal, secret, direct suffrage), which seem to be more or less known. That is why the Convention primarily defines standards, rather than the rights of the

voters. These are, of course, also considered. But the Convention emphasises other aspects, such as real political pluralism, multi-party system and real and possibility of election based on the constitution and the laws, as previous requirements (Article 9.2); the right not to participate in elections (Article 8.2), or the definition of the rights of national and international observers (Articles 14 and 15).

16. In a way, it could be even said that this Convention responds to a previous heritage of non-democratic elections. The suffrage is well known, but the functioning of the whole system may not be democratic. The emphasis is not as much in the suffrage as in the elections as a whole. Of course, democratic elections require universal, free, secret, direct, equal votes. That is not enough. Without real pluralism, multi-partism, freedom not to participate, without observers the votes can be considered useless in democratic terms. Elections can be fraudulent.

17. The present opinion does not address the implementation of the Convention. It should however be reminded that the implementation of law is as important as its content, in particular for ensuring free and fair elections. Observations reports by the Parliamentary Assembly and other international organisations showed that a number of elections were not (fully) organised in conformity with international standards, including in countries which ratified the Convention.¹

General Remarks on the system of the Convention

18. The Convention consists of a preamble and 26 Articles. There are, however, no further divisions in the Convention's text (e.g. "parts", "sections" or "chapters"). The **inner structure** of the Convention is nowhere mentioned. One can discern three different parts. The first part (Articles 1 to 10) deals with the standards of democratic elections including election principles such as: periodic and mandatory, free, genuine, fair, open and transparent elections based on universal and equal suffrage, held by secret vote, assuring voters of their freedom to vote with effective judicial protection and monitoring by public and international bodies. Article 18, on measures not to be considered as discriminatory, may be included in this first part as relating to the principles of democratic elections.

19. A second part includes Articles 11 to 17. It defines the status of "election participants" and the technological infrastructure of the modern electoral process, ensuring equal legal possibilities for all election participants, including public monitoring of elections and stronger judicial guarantees. It lays down the basic rules of the status and powers of observers and candidates' agents, the procedure for filing complaints against violations of the electoral rights and freedoms of election participants with courts and other bodies, as well as general principles for the formation of a transparent funding mechanism for elections and the election campaigns of candidates and political parties.

20. A third part defines the obligations of the parties to the Convention and regulates the signing, ratification and entry into force of the Convention, as well as its implementation. It includes Articles 19 to 26.

21. The **systematic order** within the text of the Convention suffers certain inaccuracies. The following examples shall demonstrate this.

a. While Article 1 uses the term "principles of periodicity and an obligatory nature, fairness, authenticity and freedom of elections on the basis of universal, equal suffrage with a secret balloting, providing for freedom of expression of voters' will.", this order is not maintained

¹ For a summary of problems arising in practice, see CDL-AD(2006)018, [Report on Electoral Law and Electoral Administration in Europe - Synthesis study on recurrent challenges and problematic issues, adopted by the Council for Democratic Elections at its 17th meeting \(Venice, 8-9 June 2006\) and the Venice Commission at its 67th plenary session \(Venice, 9-10 June 2006\)](#)

in the further rules of the Convention, since the principle of “universal suffrage” is mentioned in the first place (Article 2), while free (Article 8), genuine (Article 9) and fair (Article 10) are mentioned in the end.

b. While the right to elect and to be elected is separately mentioned in Article 1, paragraph 2, it is at the same time considered as the first aspect of the universal suffrage in Article 2, paragraph 1.a. The separate mentioning of these rights in Article 1, paragraph 2 could have been left out and consequently considered as one of the main aspects of the universal suffrage such as provided later on in this paragraph. On the other hand, the principle of “direct suffrage” is only regulated in Article 4, but it is not enumerated in the introductory Article 1, although it is undoubtedly one of the generally accepted election principles; this would have justified its incorporation in Article 1 of the Convention.

c. Certain rules of the Convention contain at the same time material principles and procedural guarantees for these principles. There is no stringent system in the Convention.

22. Democratic elections can only be held if certain basic conditions of a democratic society based on the rule of law are met. The so-called “European electoral heritage” consists of the fundamental rule that the suffrage must be universal, equal, free, secret and direct. Furthermore, elections must be held periodically.

23. In the Convention, democratic elections are considered as “one of the highest direct expressions of the people’s power and will” (Article 1, paragraph 1). Common European “election standards” in the sense of the Convention (Article 1, paragraph 2) includes:

- the right to elect and to be elected,
- periodic and mandatory, fair, genuine and free elections,
- based on universal, equal suffrage and held by secret ballot which ensure free expression of the will of voters,
- judicial and other protection of the electoral rights and freedoms of a human being and citizen,
- the effective public control over and international observation of elections,
- guarantees for realization of electoral rights and freedoms of participants in the electoral process.

24. The enumeration of election standards in Article 1 of the Convention has certainly an introductory and programmatic character, while the single election standards are defined and explained in the following articles of the Convention. However, there is no clear structure in that respect. The principle of free elections (Article 1, paragraph 2) is established by following Articles: Free elections: Article 8. Periodic and mandatory elections: Article 6. Fair elections: Article 10; Genuine elections: Article 9; Open and transparent elections: Article 7. Election principles of universal and equal suffrage are defined in Articles 2 and 3. The conditions of secret voting are defined in Article 5. Direct suffrage is not included in Article 1, paragraph 2, though it is mentioned in Article 4 of the Convention. In addition to these election principles, Article 9, paragraph 4 refers to the official language of elections (see also Article 17).

25. These comments will follow the structure described above (paragraphs 18 to 20), pointing out different aspects of the Convention.

First Part: Standards of democratic elections, voting principles (Articles 1 to 10, 18)

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

27. Article 1 defines these principles. According to Article 1, paragraph 2 the principles include the following: **Democratic elections must be periodic and mandatory, fair, genuine, free,**

secret, based on universal and equal suffrage, open, and public. Different features which, as has been said, refer to the whole election, and not only to each one of the votes.

28. Article 1 includes two principles that call for a comment. Article 1, paragraph 5 stipulates that elected persons shall “assume office ... thereby admitting their responsibility to voters” and shall “remain in office until the period of their powers expires or these powers are terminated otherwise.” This statement seems rather general and at least partly political.

29. Article 1, paragraph 7 raises the following problem: according to the Convention foreign nationals, stateless persons, foreign legal entities and “international public movements” shall not be allowed to participate in any activity “conducive or obstructive to the preparation and conduct of election.” This wording must be understood as a general prohibition of participation of foreigners in electoral campaigns. This conflicts not only with the constitutional law of some member states of the Council of Europe but also with the law of the European Union (EU). If a Convention were drafted at European level, it should take this issue into consideration. It is true that states parties to the European Convention of Human Rights (ECHR) are allowed to restrict the rights of foreigners in the context of political activities (Article 16 ECHR). However, there is no obligation under the Convention. On the contrary, under certain circumstances states parties to the Convention, which are also members of the EU at the same time, must not take advantage of this permission. First, it is generally suggested that this article does not apply to EU foreigners in an EU member state. This has been confirmed by the European Court of Human Rights in the case of a person who stood for election for the European Parliament (case of Piermont/France, judgment of 27.4.1995; Series A314). For elections on the level of local communities this problem is even more evident. As there is a right for EU foreigners to stand for elections on local community level such a prohibition would prevent those people from using a right provided in community law and to be confirmed by the draft Constitution of the European Union. Finally a number of European states give the right to vote to certain groups of foreigners even at the national level.

30. In addition, the strict ban on donations from foreign sources (Article 12.3) seems too strict having regard to the variety of systems in Europe. At least, it should apply only when there is an explicit prohibition in the national legislation and should be “necessary in a democratic society” in the meaning of Article 11, paragraph 2 of the European Convention on Human Rights. The stricter rules of European Union law are reserved.²

31. The principle of **universal suffrage** in the sense of Article 2 refers to the active and passive electoral rights, in other words to the right to vote (the “right to elect”) and the right to stand for election (the “right to be elected”, paragraph 1.a).

32. Article 2, paragraph 1.b includes a prohibition of discriminatory restrictions, paragraph 1.c deals with the right to vote of citizens residing abroad, paragraph 1.d is a provision dealing with the voter lists.

33. According to Article 2, paragraph 1.a each citizen who has attained the age established by the Constitution has the right to elect and be elected. The Convention does not give a precise minimum age for the right to vote.

34. In the context of universal suffrage Article 18, and in particular its paragraph 1.b has to be mentioned, which allows States to deprive those kept in detention under a court sentence of the right to vote and to be elected. In this general way, this rule is contrary to Article 3 of

² See the Opinion on the prohibition of financial contributions to political parties from foreign sources adopted by the Venice Commission at its 66th Plenary Session (March 2006), CDL-AD(2006)014.

Protocole No. 1 to the ECHR in its interpretation given by the European Court of Human Rights in its *Hirst* case.³

35. The principle of **equal suffrage** is dealt with in Article 3 of the Convention. The observance of this principle comprises a variety of aspects. It means that each voter has one vote or the same number of votes as other voters and his vote has the equivalent weight to that of other voters (“equality in voting rights”; Article 3, paragraph 1.a). According to the Convention, electoral districts should be formed on an equal basis, so that voting results should reflect the will of the voters most accurately and fully. Deviations from the average representation quota may be allowed e.g. for areas of compact settlement of national minorities and ethnic groups (“equality in voting power”; Article 3, paragraph 1.b).

36. Article 3, paragraph 2 provides for access to polling stations, paragraph 3 establishes other possibilities of voting, such as early voting, outside the polling station or “by means of other voting procedures ensuring maximum convenience for voters”.

37. In this context it has to be mentioned that, if the present (detailed) structure of the Convention is maintained, problems with regard to **remote voting** should be addressed more precisely. Convenience for voters must not be the only criterion for alternative means of voting. This is even more important as there are a number of initiatives on national level in a number of states as well as on international level, in particular within the framework of the Council of Europe. Reference is made to [Recommendation Rec\(2004\)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting](#). In particular, provisions providing for security, reliability and transparency of such voting methods should be introduced. This also applies to other forms of remote voting such as the traditional form of postal voting and proxy voting. These questions could also be dealt with in a more precise manner in the provision on secret voting (Article 5).

38. The principle of **direct suffrage** is prominently dealt with in Article 4, although direct suffrage is not enumerated explicitly in Article 1, paragraph 2 of the Convention. According to this provision, direct suffrage should be applied to at least one of the chambers of the national parliament. However it does not contain any provision for regional or local assemblies (see European Charter of Local self-government, ETS No. 122). The direct election of the national legislative assembly (and regional or local representative bodies) is one of the principal aspects of the European constitutional and democratic heritage. If in a bicameral system, the other chamber is not elected by direct elections, this does not contradict the provisions of the Convention (Article 4, paragraph 3).

39. Observance of the principle of **secret voting** means exclusion of any control whatsoever over the expression of the will of voters, assurance of equal conditions for making a free choice (Article 5, paragraph 1). The voters’ right of secret voting is one aspect of voter freedom and shall not be restricted in any way and by anything (Article 5, paragraph 2).

40. The Convention does not mention the respect for fundamental rights, in particular freedom of expression and of the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes, including the creation of political parties, as preconditions for democratic elections.⁴

41. In accordance with Article 3 of the Additional Protocol to the European Human Rights Convention and Article 25.b of the International Covenant on Civil and Political Rights, Article 6, paragraph 1 of the Convention provides for **periodic elections** held at reasonable intervals. The Convention does not provide for a maximum period of powers. Elections shall be held so

³ *Hirst v. United Kingdom (2)*, Application No. 74025/01, Judgment of 6 October 2005.

⁴ See Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II.2.a.

that the basis for the elective bodies be always “formed by the free will of the people”. One can have reasonable doubts whether this pathetic formula gives a practical guideline.

42. The Convention foresees the possibility of restrictions on electoral rights and freedoms, including election postponement, in extreme situations such as state of emergency or martial law (Article 6, paragraph 5).

43. The content of the principle of “**open and transparent elections**” (Article 7) is also quite traditional: “Elections shall be prepared and conducted openly and publicly” (Article 7, paragraph 1). This refers to all decisions related with the electoral process, including legal acts (which “shall not be applicable unless they have been officially published”, Article 7, paragraph 3). Observance of the principle of open and public elections must “ensure creation of legal conditions for public and international monitoring of elections” (Article 7, paragraph 5).

44. The principle of “**free suffrage**” dealt with in Article 8 of the Convention under the head of “Free Elections” is based on two different aspects: firstly, free formation of the elector’s opinion and secondly, free expression of this opinion including the freedom of voting procedure and accurate assessment of the result.

45. Article 8 of the Convention refers to “free elections” in the sense that the holding of free elections should in any case be based on the supremacy of the constitution which is the basis for the legal and other guarantees of strict observance of the principle of free elections in the course of the entire electoral process (cf. Article 9, paragraph 2). In addition, it defines the principle of free elections by the ability of citizens and other participants in the electoral process, to choose, without any influence, coercion or threat or any other unlawful inducement, whether to participate or not to participate in elections in the forms allowed by law and by lawful methods, without fear of any punishment or mistreatment regardless of voting returns and election results (Article 8, paragraph 1). Participation of a citizen in elections should be free and voluntary (Article 8, paragraph 2).

46. The determination of a freely expressed will of voters and its implementation shall be ensured separately by the observance of the principle of “genuine elections” established by Article 9 of the Convention, although the principle of genuine elections can generally be considered as an integral part of the principle of free suffrage in the mentioned meaning.

47. The Convention does not refer explicitly to the freedom of voters to form an opinion. Even if some implicit references to this principle may be found (see e.g. Article 13, paragraph 5 relating to access to media), the text of the Convention focuses much more on free expression of the voter’s opinion than on its free formation, whereas it is now admitted that what happens on Election Day is just part of a process whose previous stages are also of great importance for ensuring free suffrage.⁵

48. Neither does the Convention refer to the issue of free media. It must however be reminded once again that respect of freedom of expression and of the press is an essential prerequisite of democratic elections.⁶

49. According to Article 8, paragraph 2, “no one shall compel ...” a citizen to vote for or against any definite candidate. With regard to the fact that the Convention is an international treaty, it would be more in conformity with general practice that it does not impose direct prohibitions on individual persons. The same is true for Article 8, paragraph 3.

⁵ Cf. Code of Good Practice in Electoral Matters, I.3.1.

⁶ Code of Good Practice in Electoral Matters, II.1.a.; Copenhagen document, points 7.7 and 7.8.

50. In a number of European countries, the legislature may impose a duty to participate in elections. This is not explicitly accepted in the Convention. It may be advisable to include such a provision in the text of the Convention.

51. Article 9 refers to “**genuine elections**” which is a basic principle, perhaps even the most basic principle. As already mentioned before (see for example paragraph 45), the rules and measures provided in paragraphs 2 to 6 of Article 9 could, however, be regarded as being contained in the principles of free and equal suffrage, so the separate mentioning of an additional principle of “genuine elections” is not necessary. The meaning of “genuine” in this context is not clear, especially in relation to the principle of “free elections”.

52. When we talk about democratic elections, we mean “genuine elections”, and this idea implies “the determination of a freely expressed will of voters and its direct implementation”, defining “a *real* and *law-based* possibility to elect candidates”, in a framework of “*real* political pluralism, ideological diversity, and a multi-party system”, through parties “whose lawful activity is under the legal protection of the state”. That “real” possibility also requires that voters have “free access to information”, and that candidates have free access to the “mass information and telecommunications media” (Article 9, paragraph 3). This guarantee includes the right to appeal possible violations of the election laws (Article 9, paragraph 7). However, the obligation for candidates and parties “to accept the voting returns and results of democratic elections”, included in the same provision, could be abused by power when interpreted in its favour.

53. The principle of “**fair elections**” (Article 10) shall ensure equal legal conditions to all election participants. “Fair elections” should guarantee (Article 10, paragraph 2):

- a) universal and equal suffrage (Articles 2 and 3),
- b) equal possibilities for participation in an election campaign (e.g. Article 13),
- c) fair and open funding of elections, election campaigns of candidates, political parties (coalitions) (Article 12),
- d) honest voting and vote counting, full and swift communication of the results of voting with an official publication of all results,
- e) organisation of the electoral process by impartial election bodies (Article 11), working openly and publicly and under effective public and international observation (Articles 15 and 16),
- f) prompt and effective adjudication of complaints about violations of electoral rights and freedoms (Article 16).

54. Most of these points are classical. There are also some original aspects, whose meaning should be possibly better understood in the global perspective already pointed out. For instance, Article 10, paragraph 2.d includes within the guarantee of fair elections the “*honest* voting and vote counting”, and the “full and swift communication of the results of voting with an official publication of all results”.

55. The significance of this Article 10 may also be qualified as programmatic, as it gives an overall view of certain aspects of fair elections referring to provisions contained in other articles of the Convention.

Second part: Voting procedure *lato sensu* (Articles 11 to 17)

56. The first article dealing with the voting procedure is Article 11 according to which preparation and conduct of elections, assurance and protection of electoral rights and freedoms of citizens and control over their observance shall be entrusted to **election bodies** with their status, competence and powers being established by the constitution and other legislative acts (Article 11, paragraph 1). The central electoral body or commission should have a permanent

status and a special composition, facilitating maximum impartiality.⁷ Article 11 does not, however, refer to this particular aspect.

57. The procedure for the formation of election bodies, their powers, organisation of their activity as well as the procedure, grounds and time for dissolution of an election body or premature termination of the powers of their members should be **established by law** (Article 11, paragraph 3). Further guarantees of independence are included. Decisions shall be binding on all authorities, political parties and organisations (paragraph 6).

58. Article 12 provides rules for **funding of elections and election campaigns**. It requires, of course (although this rule may be absent in most of traditional electoral laws) that the public activities connected with elections shall be funded from the budget (paragraph 1).

59. According to paragraph 2 the state shall, on a fair basis, allocate budget funds to candidates and political parties. Private funding is possible as well. This “dual” system is quite common in most political systems in the Council of Europe member states. The rules include the possibility of limiting the size of the election fund, and the openness and transparency of private donations and expenses (Article 11, paragraphs 2 and 4), which allows an effective control by the competent bodies. The Convention does not provide for criteria according to which public funding is distributed to candidates and/or political parties after the elections. It would be suitable to add such criteria including the principle of equality. The allocation of public funds must follow objective criteria, such as number of votes received in previous elections, the number of registered candidates, the status of parliamentary party, etc.⁸

60. The provision generally forbidding foreign donation (Article 12, paragraph 4) seems excessive, bearing *inter alia* in mind that to some extent there is or may be right to vote for foreigners or nationals living abroad. Moreover this rule will be difficult to control (see above paragraphs 29 and 30).

61. Article 13 deals with **information support of election campaigning**. The States must ensure basic freedoms (of the search for, collection and dissemination of information). The Convention provides for a number of guarantees of neutrality of the mass media. Candidates and political parties shall have an equal opportunity of access to the mass media (paragraph 5). This is a fundamental pillar of modern elections. With regard to the “equal” access (“on an equitable basis”) to mass media required according to Article 13, paragraph 5 of the Convention reference is made to national practice according to which the size of a party may influence the extent of access to the mass media.

62. The provision of Article 13, paragraph 6, according to which “no abuse of the freedom of speech and freedom of mass media shall be allowed, including calls for a violent seizure of power, a violent change of the state system, violent change of the constitutional system and violation of the territorial integrity of a state, warmongering, calls for terrorist or other violent acts, incitement to social, racial, national, ethnic, religious hatred and enmity”, seems more problematic. The problem will naturally be the effective control and implementation of such rules. It should be made clear that they have to be applied in conformity with the principle of proportionality.

63. Articles 14 and 15 deal with national and international observers. Article 14 rules the **“status and powers of national observers”**. The different provisions reflect international standards of control by representatives of the political parties or candidates.

⁷ Code of Good Practice in Electoral Matters, II.3.

⁸ Cf. Code of Good Practice in Electoral Matters, I.2.3.

64. Article 15 on international observers considers an aspect which is quite common in “new democracies”, that is the participation in the electoral process of international observers, experts usually appointed by international organisations to guarantee the respect of all rights and freedoms constitutionally, legally or conventionally established. Article 15, paragraph 8 establishes a quite comprehensive list of powers. This obviously highlights the limits the prohibition to “engage in any activity unrelated to monitoring of the election campaign” (Article 15, paragraph 7) and to “interfere in the electoral process”, as well as of the obligation to abide by such principles as political neutrality, impartiality, non-expression of any preferences or opinions with regard to elections bodies, bodies of state power and other bodies, officials, participants in the electoral process (Article 15, paragraph 9). In other words, the latest provisions should not be abused in order to prevent observers from doing their work, in particular in saying whether elections bodies, bodies of state power etc. acted or not in conformity with the law and international standards.

65. The possibility to withdraw international observers’ accreditation (Article 15, paragraph 7) could in particular lead to abuses. It should be interpreted in conformity with the principle of proportionality. The same is true for the restrictions on their rights based on national security (Article 15, paragraph 8.a) and for restrictions on the access of national observers to “documents indicated in election laws” (Article 14, paragraph 3.a. It is actually doubtful that any document related to elections might affect national security.

66. Article 16 includes a more programmatic provision on **complaints about and responsibility for violation of electoral rights and freedoms of citizens**. In the event of violation of the standards of democratic elections, electoral rights and freedom of citizens according to this Convention the injured person(s) shall have the right and possibility to complain about the violation and have the violated rights restored by courts and election bodies (paragraph 1). Persons guilty of unlawful actions (omissions) shall bear responsibility in accordance with law (paragraph 2). Electoral Documentation - as a precondition for effective control of the electoral process - is provided for in Article 17. These provisions stand in a clear contrast to the detailed previous 15 articles of the Convention. However, without proper rules on complaints and appeals, electoral law is just *lex imperfecta*; the importance of the issue must therefore be underlined.⁹

Third part: Signature, ratification, entry into force and implementation (Articles 19 to 26)

67. The third part of the Convention sets up some general rules. Article 19 summarises the “obligations” undertaken by the Parties to the Convention. Most of those obligations have already been pointed out, be it because of their general character (“to guarantee protection of the democratic principles and standards of the voting right within the framework of generally accepted principles of international law, the democratic nature of elections...; reasonable requirements to declaring elections to have taken place and be valid and legitimate”: paragraph 2.a; “to adopt national programs of civic education”: paragraph 2.i; and others); be it because Article 19 repeats obligations previously defined (e.g. “to carry out registration of voters on the basis of a legislatively established non-discriminatory and effective procedure”: paragraph 2.e; “to ensure creation of independent impartial election bodies”, paragraph 2.j). Some other obligations go beyond the guarantees already mentioned, as is the case of Article 19 paragraph 2.m (“to facilitate ... the creation of a unified data bank”), or Article 19 paragraph 2.n (“to promote cooperation between the election bodies of the states party to the Convention”).

68. The last seven articles deal with the Convention itself. Article 20 specifies that nothing in it prevents the States Parties from the fulfilment of their international obligations. Article 21 provides for an “Inter-State Electoral Council” on the basis of the election bodies of the member

⁹ Cf. Code of Good Practice in Electoral Matters, II.3.3, as a detailed provision.

states. Article 22 includes the rule for its entry into force. Articles 23 and 24 refer to the possibility of accession and withdrawal. Articles 25 provide for the possibility of modifications and amendments of the Convention. In Article 26 we find a general dispute settlement clause.

69. It has to be underlined however that no international implementation mechanism is set up.

Conclusion

70. The Convention is a contribution to the definition and implementation of the international standards of electoral law. It includes some elements which reproduce other international – or, more specifically, European – international documents; some others which might pose a few difficulties. They will not be repeated here in detail, but some may be reminded, such as the restrictions to the rights of observers, the prohibition of any involvement of foreigners in the electoral process, or the obligation to accept the results of elections. The Convention offers an interesting regulation of the different aspects of the electoral process, including not only rights and freedoms of the different agents involved, but also the description of the context and the circumstances, which may influence, and give sense, to the whole process.

71. Irrespective of the particular questions addressed in this opinion, the general shape of the Convention raises a number of questions. It is not short, on the contrary. It provides many details, which are sometimes very important, which is quite surprising considering they are not usually found in such an international document. A number of guarantees can be found twice or even more often in the Convention, and not always in the same form. This may give rise to misunderstandings.

72. Concerning the substance, the essential features of the European electoral heritage have been introduced into the text, although a certain number of points, which will not be enumerated again here, could be reviewed. It should be underlined, in a general way, that all restrictions to the rights enshrined in the Convention should be clearly submitted to the principle of proportionality.¹⁰

¹⁰ Cf., for example, Code of Good Practice in Electoral Matters, I.1.1.d and II.1.b.