

CODE SETTING TRENDS IN ELECTORAL MATTERS - CODE OF GOOD PRACTICE IN ELECTORAL MATTERS - VENICE 2002

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Abstract

The integrated and ongoing effort of the of the states in the European area to modernize and adapt their laws to the current needs and exigencies of the citizens is transposed, in terms of constitutional matters, in the actions of the European Commission for Democracy through Law, better known as the Venice Commission, as Venice is the place of the proceedings of this Council of Europe's advisory body on constitutional matters.

Keywords: *constitutional justice, universal suffrage, electoral fraud prevention, strict vote confidentiality.*

1. Foreword

The Venice Commission was established in May 1990 by 18 Council of Europe Member States. Currently, the Venice Commission has 60 member states: the 47 Council of Europe member states, plus 13 other countries (Algeria, Brazil, Chile, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA).

The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. These fundamental principles of the European constitutional heritage stand as the guidelines for the Commission works in three areas: democratic institutions and fundamental rights; constitutional justice and ordinary justice; elections, referendums and political parties.¹

2. Content

Ever since its establishment, the Commission's work has consisted of providing opinions on the draft electoral laws in various states, including Romania. This action has taken on a completely new dimension in 2002, following the setting up of the Council for Democratic Elections. Thus, the Venice Commission and the Council for Democratic Elections, in their efforts to ensure the stability of electoral legislations, have developed the principles

of the European electoral heritage by developing the Code of Good Practice in Electoral Matters.²

As the wording itself of the Guidelines³ and of the Explanatory Report to the Code of Good Practice in Electoral Matters⁴ clearly specifies, the five principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage. Furthermore, elections must be held at regular intervals.

Obviously, a main component in the attempt to ensure fairness of the elections is linked to the free nature of the suffrage and is set forth in paragraph 3.2 of the Guidelines on Elections related to the Code - Freedom of voters to express their wishes and actions to combat electoral fraud:

- i. voting procedures must be simple;
- ii. voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions:
 - iii. postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible;
 - iv. electronic voting should be used only if it is safe and reliable; in particular, voters should be able to obtain a confirmation of their votes and correct them, if necessary, respecting secret suffrage; the system must be transparent;
 - v. very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited;
 - vi. mobile ballot boxes should only be allowed under strict conditions, avoiding all risks of fraud;

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¹ http://www.venice.coe.int/WebForms/pages/?p=01_activities

² adopted by the European Commission for Democracy through Law at its 52nd Plenary Session (Venice 18-19 October 2002), adopted under CDL-AD(2002)23rev by the Parliamentary Assembly of the Council of Europe in its 2003 session – 1st part and by the Congress of Local and Regional Authorities in Europe in its Spring session 2003.

³ Adopted by the Venice Commission at its 51st Plenary Session (Venice, July 5-6 2002).

⁴ <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282002%29023rev-rom>

vii. at least two criteria should be used to assess the accuracy of the outcome of the ballot: the number of votes cast and the number of voting slips placed in the ballot box;

viii. voting slips must not be modified or marked in any way by polling station officials;

ix. unused voting slips must never leave the polling station;

x. polling stations must include representatives of a number of parties, and the presence of observers appointed by the candidates must be permitted during voting and counting;

xi. military personnel should vote at their place of residence whenever possible. Otherwise, it is advisable that they be registered to vote at the polling station nearest to their duty station;

xii. counting should preferably take place in polling stations;

xiii. counting must be transparent. Observers, candidates' representatives and the media must be allowed to be present. These persons must also have access to the records;

xiv. results must be transmitted to the higher level in an open manner;

xv. the state must punish any kind of electoral fraud.

Another aspect highlighted in the Explanatory Report of the Code of Good Practice in Electoral Matters is the equality of voting rights, which "requires each voter to be normally entitled to one vote and to one vote only. Multiple voting, which is still a common irregularity in the new democracies, is obviously prohibited – both if it means a voter votes more than once in the same place and if it enables a voter to vote simultaneously in several different places, such as his or her place of current residence and place of former residence."⁵

Stressing out the state's obligation to ensure the fairness of elections and to sanction any possible fraud in electoral matters, the Venice Commission argues that electors should be able to cast their votes for registered lists or candidates, which means that they must be supplied with ballot papers bearing their names and that they must be able to deposit the ballot papers in a ballot box at the premises that the state has to make available for electoral operations.

Furthermore, electors must be protected from threats and or constraints that are likely to prevent them from either casting their votes or from casting them as they wish, whether such threats come from the authorities or from individuals. The state is obliged to prevent and sanction such practices.

A first recommendation for preventing election fraud is that the voting procedure be kept simple.

Thus, starting from the idea that political forces involved in elections are represented equally in the central electoral commissions and, as such,

substantial fraud is difficult, the fairness of the ballot should be judged by two main criteria alone: "the number of electors who have cast votes compared with the number of ballot papers in the ballot box. The first measure can be determined by the number of signatures in the electoral register.

Human nature being what it is (and quite apart from any intention to defraud), it is difficult to achieve a total congruity between the two measures. Any further control such as numbering the stubs of the ballot papers or comparing the total number of ballot papers found in the ballot box plus those cancelled and unused with the number of ballot papers issued to the polling stations may give some indication, but one should be under no illusion that the results of these various measures will coincide perfectly.

The risk in multiplying the measures used is rather that the differences in the totals, and in the end the real irregularities, will not be taken seriously. It is better to have strict control over two measures than slack – and hence ineffective – control over a large number of variables.

Any unused ballot paper should remain at the polling station and should not be deposited or stored in different premises. As soon as the station opens, all the ballot papers awaiting use must be in full view on the table of the senior station official. No ballot papers should be stored in cupboards or in other places.

The signing and stamping of ballot papers should not take place at the point when the paper is presented to the voter, because the signatory or the person affixing the stamp might mark the paper so that the voter could be identified when it came to counting the votes, which would violate the secrecy of the ballot.

The voter should collect his or her ballot paper and no one else should touch it from that point on.

It is important that the polling station officials include multi-party representatives and that observes assigned by the candidates be present."⁶

The Commission also attaches considerable weight to the postal voting or proxy voting, which, however, is acceptable and encouraged only where the countries organizing the election procedure are capable to put in place measures designed to prevent electoral fraud. This voting method is rather used in western countries:

"It should be allowed only if the postal service is secure – in other words, safe from intentional interference – and reliable, in the sense that it functions properly. Proxy voting is permissible only if subject to very strict rules, again in order to prevent fraud; the number of proxies held by any one elector must be limited.

⁵ Point 11 of the Explanatory Report adopted by the Venice Commission at its 52nd Plenary Session (Venice 18-19 October 2002).

⁶ Points 32-36 of the Explanatory Report to the Code of Good Practice in Electoral Matters.

Neither of these practices should be widely encouraged, if problems with this postal service are added to the difficulties inherent in this kind of voting, including the heightened risk of “family voting”. Subject to certain precautions, however, postal voting can be used to enable hospital patients, persons in custody, persons with restricted mobility and electors resident abroad to vote, in so far as there is no risk of fraud or intimidation. This would dispense with the need for a mobile ballot box, which often causes problems and risks of fraud. Postal voting would take place under a special procedure a few days before the elections.”⁷

The beneficiaries of the Code of Good Practice are also informed that the use of mobile ballot boxes should be avoided as much as possible, where they involve a serious risk of fraud, in the absence of very strict rules such as the attendance of several members of the polling station election commission representing different political groupings.

The Commission’s recommendations do not lose sight of the military voting either, which, truth to say, does not benefit from an incriminatory protection under the Romanian criminal law, in the sense of an express provision requiring that a special supervisory commission be set up in order to prevent the risk of superior officers’ imposing or ordering certain political choices to be expressed during elections.

With respect to electronic voting, the Explanatory Report encourages the application of this voting method, especially when a number of elections are taking place at the same time, even though certain precautions are needed to minimize the risk of fraud, for example by enabling the voter to check his or her vote immediately after casting it. The recommendation in this case is to design the ballot papers in such a way as to avoid confusion and, if possible, to provide for a machine that could print votes onto ballot papers, with ballot papers to be placed in a sealed container where they cannot be viewed or accessed. Note is made that this voting method should necessarily ensure vote confidentiality, in addition to vote security and reliability.

Electronic voting methods are secure if the system are capable to prevent deliberate attack and if they can function on their own, irrespective of any shortcomings in the hardware or software employed. Furthermore, the voter must be able to obtain confirmation of his or her vote and, if necessary, correct it without violating in any way the secrecy of the ballot. Last but not least, the electronic voting system must be transparent, in the sense that it must be possible to check whether the system and the voting process are functioning properly.

In terms of vote counting, the Commission recommends that votes should be counted at the polling stations, to eliminate the need to transport the ballot boxes and accompanying documents, thus mitigating the risk of substitution of votes.

Vote counting, too, should be conducted in a transparent manner. Another requirement, which, unfortunately, has not been transposed in the Romanian election law, is that voters registered in the polling station be authorized to attend the counting operation, along with the national and international observers whose presence on the premises must be allowed in all circumstances. One of the practical precautions recommended is that the record of proceedings should be written in ballpoint pen rather than in pencil, as text written in pencil can be erased.

Another recommendation is to avoid as much as possible treating too many ballot papers as invalid or spoiled and to make an attempt, in case of doubt, to ascertain the voter’s intention instead.

In terms of election security in relation to the polling premises, the Code of Good Practice pays particular attention to the polling stations, given that the quality of the voting and of the vote counting systems and the proper compliance with the electoral procedure depend on how polling stations are organized and operate. In this regard, the Code speaks of a series of technical irregularities noticed by international observers, such as “wrongly printed or stamped ballot boxes, overly complex ballot papers, unsealed ballot boxes, inadequate ballot papers or boxes, misuse of ballot boxes, insufficient means of identification of voters and absence of local observers. All these irregularities and shortcomings, in addition to political party electioneering inside the polling station and police harassment, can seriously vitiate the voting process, or indeed undermine its integrity and validity.”⁸

The Venice Commission also recommends that the principle of strict vote confidentiality be applied not only in vote casting, but also during the vote counting process, specifying further that noncompliance in this case must be punished by disqualification of any ballot paper whose secrecy is violated. In line with the secret suffrage principle, family voting (whereby one member of a family influences the vote cast by the other members) must be prohibited and the list of persons actually voting should not be published, given that this kind of conduct, too, may represent a choice made by the individual.

Another important issue tackled by the Venice Commission deals with regulating the funding of political parties, which, in the Commission’s view, should be transparent and operate at two levels: “The first concerns campaign funds, the details of which must be set out in a special set of carefully

⁷ Points 38-39 of the Explanatory Report to the Code of Good Practice in Electoral Matters.

⁸ Points 105-106 of the Explanatory Report to the Code of Good Practice in Electoral Matters.

maintained accounts. In the event of significant deviations from the norm or if the statutory expenditure ceilings are exceeded, the election must be annulled.

The second level involves monitoring the financial status of elected representatives before and after their term in office. A commission in charge of financial transparency takes formal note of the elected representatives' statements as to their finances. The latter are confidential, but records can, if necessary, be forwarded to the public prosecutor's office."⁹

In addition, the Commission recommends the member states to arrange that specific public bodies supervise the parties' accounts, especially where the funding of political parties is sourced from public funds.

Efforts made by the Venice Commission to consolidate and unify legislations in electoral matters, as transposed in the Code of Good Practice in Electoral Matters, were later followed by stronger trends towards strengthening democracy through electoral process surveys performed by experts in the field.

Thus, under CDL-AD(2010)043, the Council for Democratic Elections, at its 35th meeting (Venice, 16 December 2010), and the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010) adopted the Report on Figure Based Management of Possible Election Fraud¹⁰, whose role was to assess the possibility of detecting electoral frauds through statistical methods.

The experts in charge of carrying out the survey that has materialized into the said Report found that two of the most important obstacles in conducting elections that are fully compliant with the international standards of democracy are the lack of electoral experience and/or the ambiguities or omissions in written laws, both of which are inevitably leading to elections that are distorting the public will.

As such, in the opinion of the Venice Commission and of the Council for Democratic Elections, implementing a clear and unambiguous legal framework plays a special role in the conduct of genuine and honest elections.

The Venice Commission and the Council for Democratic Elections recognize, however, that "ambiguities in written law may be the result of lack of electoral experience or legal drafting skills, in particular during periods of political transition from authoritarian regime to democratic form of governance.

However, if advice to remove possible ambiguities in legal framework is systematically

ignored, questions may arise with regard to the nature of intentions to keep such ambiguities, as they are generally conducive for fraud.

If ambiguities remain in the legal framework, generally, the election administration would be expected to clarify them. As this may amount to determining the outcome of election, in particular if the clarifications are provided after the vote, such responsibility may test the limits of the authority of the election administration.

Generally, international (including European) standards for democratic elections do not provide for specific antifraud measures. Rather, standards emphasize on respect for fundamental civil and political rights and provide general guidance for establishment of sanctions for possible fraudulent activities as well as legal remedies for complainants against alleged fraud."¹¹

To identify possible fraud, the experts consider it necessary to analyze the vulnerable stages in an electoral process. Chronologically speaking, the first stage in the electoral process that is most prone to the risk of election tampering is the registration of persons entitled to vote. At voter registration stage, the following potential election fraud hazards have been identified by the authors of the Report:

"(a) To many voters entries in the polling station voter lists due to inclusion of non-existing voters, deceased voters, voters residing abroad and/or voters included in the lists more than once (multiple entries);

(b) Too few voters included in the voter lists, resulting in disenfranchisement of eligible voters through omissions from the voter lists;

(c) To many voters added to the voter lists on election day, especially if on unclear grounds; and

(d) Manipulation of electoral constituency borders to favor the incumbents on the basis of incorrect numbers of population and/or registered voters."¹²

To assess allegations of voter registration fraud and prevent fraud linked to eligible voter registration it is recommendable to update the Voter Register by comparing it with the population census figures. In the case of voters residing abroad, the Commission gives examples of practices applied by some countries, whereby, in the absence of international standards, such voters are required to register themselves with the diplomatic representation offices in advance.

The alternative of allowing registration of voters on the election day, which is practiced in some states, may create conditions for electoral frauds. In some states, legislation requires that the voter

⁹ Point 109 of the Explanatory Report to the Code of Good Practice in Electoral Matters.

¹⁰ The Report was based on the comments made by 2 experts – Nikolai Vulchanov (Bulgaria) and Anders Eriksson (Sweden).

¹¹ Points 17-19 of the Report on Figure Based Management of Possible Electoral Fraud.

¹² Point 45 of the Report on Figure Based Management of Possible Electoral Fraud.

registration be completed some period of time before election day, after which the voter register is closed and updates of records are not permitted any more, such alternative being seemingly preferable for transparency considerations.

In any case, in the opinion of the Venice Commission, the following three aspects of an election process are crucial for preventing possible electoral fraud: transparency of the process, accountability of all state officials involved in the conduct of election and public confidence in the process. The transparent and professional performance of the Election Administration, the public scrutiny of voter lists, use of appropriate results forms, timely and comprehensive reporting of results, the presence of election observers and the parallel vote tabulation/counting are the key conditions for any election process to be conducted in full compliance with the principles of democracy.

The conclusions of the Report drafted by the experts on identification of possible electoral frauds are as follows:

“* Detection and prevention of possible figure based fraud requires detailed analysis of the legal provisions that have an impact on the election results and outcome, in particular when voters’ choices result in narrow margins;

* Voter registration fraud requires significant resources; therefore issues related to potentially incorrect voter registration figures are more likely to arise from insufficient understanding of the system for voter registration and sloppy performance of the responsible authorities rather than due to international fraud;

* The most efficient methods to combat figure based election fraud stem from transparency of the electoral process; and

* Distinction should always be made between possible fraud and insufficient election administration experience; reasonable allegations for committed fraud should only be made after in-depth analysis of the relevant circumstances.”¹³

4. Conclusions

In line with the considerations above, the constant recommendations made by international and European bodies (European Commission for Democracy through Law - Venice Commission) are in the direction of creating a flexible, integrated, consistent and transparent legal framework, that is free of ambiguities; in other words, an electoral legislation that, on the one hand, is easy to understand by individuals, while, on the other hand, prevents possible electoral fraud.

In conclusion we propose the transposition and incorporation of the recommendations above under the umbrella of an Election Code, leaving aside election crimes, an issue to which lawmakers have devoted a special title in the Revised Romanian Criminal Code, which would nevertheless become fully effective, if the entire regulatory framework in election matters were consistent and uniform, eliminating any blurring or irregularities in the application of incriminating legal texts, so that the election process may become the true expression of the free will of the people.

References:

- Recommendation REC (2003) 4 adopted by the Committee of Ministers on 8 April 2003 at the a 835th meeting of the Ministers’ Deputies;
- Code of Good Practice in Electoral Matters – Venice 2002, adopted by the European Commission for Democracy through Law in its 52nd Plenary Session (Venice 18-19 October 2002), approved under CDL-AD(2002)23rev by the Parliamentary Assembly of the Council of Europe at its 2003 meeting – 1st part and by the Congress of Local and Regional Authorities of Europe at its Spring session 2003;
- Dosanto C. C., Simmons N. L. – Federal Prosecution on Election Offenses – Ed. a 7-a, Practicing Law Institute, 2007;
- Electoral Justice: e International IDEA Handbook, 2010;
- Election Crimes: An Initial review and Recommendations for Future Study – U.S. Election Assistance Commission, December 2006;
- www.venice.coe.int/WebForms/pages/?p=01_activities;
- www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282002%29023rev-rom.

¹³ Point 143 of the Report on Figure Based Management of Possible Electoral Fraud.