



Strasbourg, 21 October 2010

CDL-AD(2010)037

Study no. 558/2009

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPORT
ON THE TIMELINE AND INVENTORY OF POLITICAL CRITERIA FOR
ASSESSING AN ELECTION

Adopted by the Council for Democratic Elections
at its 34th meeting
(Venice, 14 October 2010)
and by the Venice Commission
at its 84th Plenary Session
(Venice, 15-16 October 2010)

On the basis of comments by

Mr Andreas GROSS (Expert, Switzerland)

I. Introduction

1. At its 29th meeting (June 2009), the Council for Democratic Elections was informed about the preparation of a report on the evaluation of the election process.
2. A first draft was submitted to the Council at its 30th meeting (October 2009), and the members of the Council for Democratic Elections were invited to make their comments on it in written form. A number of comments were received, including from the OSCE/ODIHR. A new discussion on a revised version (CDL-EL(2010)021) was held by the Council for Democratic Elections at its 33rd meeting (June 2010), which led to the present version of the text.
3. This report was adopted by the Council for Democratic Elections at its 34th meeting (Venice, 14 October 2010) and by the Venice Commission at its 84th plenary session (Venice, 15-16 October 2010).

II. General remarks

4. European texts on standards for democratic elections are many. The documents concerned may be voluminous and very detailed.
5. For parliamentarians observing an election going through that wealth of expertise may not always be an option given the limited time a parliamentary election observation mission is in the field.
6. It is, thus, the purpose of this report to produce a concise political text, based on the existing standards, and put it at the disposal of parliamentary observers, so as to facilitate their task and help them focus on the most essential areas they should look at.
7. This text is, by no means, exhaustive, and does not aim at reviewing or building upon the relevant documents already in place.

III. European standard-setting documents and relevant publications

8. The existing European texts referring to the right to free elections are either general, or, for the main part, not legally binding. They are more a political or legal declaration than a precise body of legislation spelling out all the details of what a free democratic election is. While serving the specific purposes of the authors of those documents perfectly well, they are not particularly practical when it comes to such an applied art as election observation, which is not a precise science. On the other hand, election observation is a multidisciplinary area that draws upon methodology and tools of the political and legal sciences. The expanding legally binding case law of the European Court for Human Rights has recently been introducing new legal benchmarks in this field. However, this emerging body of case law, and the texts adopted by the Venice Commission, fall beyond the scope of this report. In addition, various recommendations and codes of good practices, elaborated by the Venice Commission, have established supplementary, as it were, preferred practices for democratic elections in support of the existing standards.
9. Indeed, with election observation emerging as an important area of activity of many international organisations and institutions, not least, due to the enlargement process with some of them, the need to come up with credible political criteria for assessing an election is increasingly becoming the order of the day.
10. The first Protocol (1952) to the European Convention on Human Rights in its Article 3 makes a albeit-direct fairly general reference to the right to free elections: 'the High Contracting

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'. This is the main basis on which the European Court of Human Rights has developed the aforementioned case law.

11. The Code of Good Practice in electoral matters (CDL-AD(2002)023rev) is the reference document of the Council of Europe in the electoral field. It enshrines European electoral norms and legacy. These norms are above all classical constitutional principles of electoral law: universal, equal, free, secret and direct suffrage as well as the periodical nature of elections. The Code, *inter-alia*, elaborates the prerequisites needed for such elections, such as respect for fundamental rights, stability of electoral legislation and procedural guarantees, such as organisation of elections by an impartial administration, the appeals system and an effective observation.

12. For its part, the election-related standard-setting document of the OSCE is the Document of the Copenhagen Meeting of the Conference on the Humanitarian Dimension of the CSCE (1990), generally known as the Copenhagen Document. It provides a more elaborate, but non-exhaustive, list of election related rights of individuals, and obligations of a State. Although it refers to the free and fair expression of the will of the people, the Document does not actually spell out specific criteria to assess how freely that will is expressed. Furthermore, the Document is politically, not legally binding, as it was not subject to a formal ratification procedure.

13. At the request of the OSCE participating States, the OSCE/ODIHR produced, in 1996, an Election observation handbook (the Bluebook) which is regularly updated. This is a very detailed and highly useful document, containing detailed assessment criteria. The Handbook was never formally debated or put to vote in the OSCE Permanent Council, allowing some critics of the book to degrade its status and refer to it as an internal working document of the ODIHR on whose text there is no formal agreement of the OSCE participating States. That said, the criteria in the Handbook are broadly regarded as a sound basis for assessing an election and are widely used by international observers, including those from PACE.

14. The Interparliamentary Union undertook to summarise the existing experience in election observation on a global scale, not least the criteria to assess an election. Later on, in cooperation with the United Nations, as well as a host of international think-tanks and NGOs, such as the Carter Center, the National Democratic Institute, IFES, to name but a few, a document, entitled Declaration of Principles for International Election Observers and Code of Conduct for International Observers was produced and endorsed, on 27 October 2005, by 21 international governmental and non-governmental organisations, institutions and agencies engaged in election observation. PACE Bureau endorsed that document at its meeting of 7 October 2005, as well as the Council for Democratic Elections at its 14th meeting (20 October 2005) and the Venice Commission at its 64th Plenary Session (21-22 October 2005). The latter document, it should be noted, focuses primarily on responsibilities and proper functioning of election observation missions, rather than on electoral standards.

15. It is not the purpose of this report to revisit the existing criteria or to reinvent the wheel, but rather to establish an assessment timeline and to come up with a broad political definition of what a democratic, free and fair election is. Political criteria to assess an election should be based on the underlying principles of a democratic election.

IV. Elections as a process

16. An election is not a one-off exercise. It is a continuous process involving several stages, all of which need to be analysed in order to assess an election. That includes, *inter-alia*, the choice of the electoral system, political party legislation, campaign and party funding, etc.

17. Long before the election day, the process starts with the elaboration of electoral legislation. The quality of that legislation is a major, although not the unique criterion to assess an election.

18. In a democratic society, elections belong to the people. They are organised to ascertain and honour the people's will as to who should occupy elected office. Principles for democratic elections are traced to the precept that citizens have the right to take part in government and in the conduct of public affairs. On a global scale, this precept is enshrined in Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant of Civil and Political Rights. Sound electoral legislation is a *conditio sine qua non* for putting that precept into practice.

19. While electoral legislation is not something cast in stone, it should not be subject to constant change. Having the rules of the game change immediately before or during the game is not conducive to a democratic election. The Code of Good Practice in electoral matters (CDL-AD(2002)023rev), item II.2.B states that 'the fundamental elements of electoral law...should not be open to amendment less than one year ahead of an election, or should be written in a constitution or at a level higher than ordinary law.' In an Interpretative Declaration on the Stability of the electoral law (CDL-AD(2005)043), this provision is further clarified 'In general, any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election.' In certain circumstances, exceptions to the one year rule could be accepted, namely where there is a need to rectify, through legislation, unforeseen problems or to provide redress to violations of internationally recognised rights where they had been built into the electoral law.

20. Thus, for the purposes of this report, the timeline for assessing an election starts one year ahead of the vote.

21. The second stage starts with the date when an election is called. That date, in normal circumstances involving regular elections, should be reasonably distant from the voting day to allow all political stakeholders to prepare for an electoral contest.

22. The third stage starts with the opening of the electoral campaign.

23. The fourth stage is the voting day proper, and the vote counting.

24. The next stage is the declaration of results of an election, followed by a complaints period stage.

25. The proposed assessment timeline, while not exhaustive, is designed to put into a clear perspective the application of the very detailed and elaborate election assessment criteria contained in the OSCE/ODIHR Election observation handbook.

V. Principles of a democratic election

26. A democratic election is a free and fair election, one which is inclusive and based on universal and equal suffrage.

27. For an election to be democratic, other internationally recognised human rights must also be exercised in the electoral context, without discrimination and restrictions, including:

- The right to equality and non-discrimination;
- The right to associate into political organisations, such as political parties, candidate support organisations or groups favouring or opposing referenda propositions;

- The right to assemble peacefully for meetings, rallies and to otherwise demonstrate support for electoral competitors in locations easily accessible to the general public;
- The right to move freely, *inter-alia*, to build electoral support;
- The right to be free of the threat of violence or other forms of coercion, while making political choices or exercising political expression;
- The right to hold political opinions without interference;
- The right to freedom of political expression, including the freedom to seek, receive and impart information and ideas in order to develop informed choices required for the free expression of the will of the electors;
- The right to equitable access to public media in the electoral context;
- The right to an effective remedy for the violation of protected rights.

28. Generally, a free election is an election, where candidates can compete without any obstacles erected by the authorities, where the electorate has genuine substantive options and a free access to information concerning those options. It is not the multiplicity of candidates, but the diversity of programmes that differ on substance that matters. After all, an election is all about political platforms, not only competing personalities, whose different programme positions are not known, not understood or not openly discussed.

29. In this connection, the media has an important role to play in assisting the electorate to make an informed and genuine choice. Thus, public media behaviour in an electoral campaign is an important assessment criterion.

30. A democratic election must not only be a free election, it must also be a fair election.

31. If an election is free, but the playing ground is not level for all the players, if there is state interference resulting in inequality of chances for the runners in the electoral race, an election cannot be fair and therefore genuinely democratic.

32. A fair election is the one where the quality of the electoral process meets the spirit and the letter of established standards.

33. A democratic election is a transparent election. It is not possible to know whether the right to be elected and the right to vote are being ensured by governments unless electoral processes are transparent.

34. The transparency principle is based on internationally recognised human rights and fundamental freedoms.

35. The basis for transparency is the freedom to seek, receive and impart information, which is integral to freedom of expression.

36. The right to information is central to whether electors and electoral contestants are able to vote and to be elected. A democratic process presupposes that information concerning electoral contestants, information concerning the exercise of electoral rights and information about electoral processes, is freely available to the citizens. It is the responsibility of the State to provide voter education.

37. State practice almost universally demonstrates acceptance that electoral contestants have a right to be present in polling stations on voting day to witness and verify the integrity of voting, counting and tabulation procedures.

38. State practice also demonstrates growing acceptance of the right of citizens to participate in public affairs and to seek and receive information about the election process through the activities of domestic non-partisan observers, as well as international observers.

39. Democratic elections require accountability.

40. While, *per se*, elections create an accountability mechanism, there must also be accountability within the election process. The accountability principle helps to achieve electoral inclusiveness required by the rights to universal and equal suffrage for prospective voters and electoral contestants.

41. The accountability principle is linked to the transparency principle, which is needed to understand how officials are conducting public affairs and thereby hold themselves answerable for their actions or lack thereof.

42. Accountability in electoral process is multifaceted and includes, *inter alia*, the need to provide effective remedies for violations of election-related rights; the need to create administrative accountability for those organising elections and those conducting governmental activities related to the election; and the need to bring to account those who conduct criminal acts that affect election-related rights.

43. A democratic election is one the electorate has confidence in.

44. Public confidence, like universal and equal suffrage, relates to electors and those seeking an election alike. Should those who seek to occupy public office lose confidence in elections as the best means to attain their goal, they could turn to non-democratic ways of gaining power.

45. The principles of inclusiveness, transparency and accountability come together as the basis for public confidence in elections.

VI. Conclusions

46. Elections are more than technical matters. Electoral processes are part of a compact between citizens and the government that represents them. Elections are indicative of how a government treats and respects citizens through a wide range of institutions and processes.

47. In its turn, the quality of an election is derived from the quality of the process and generally reflects the level of democracy in a society.

48. An election is best judged politically on how fully the principles for a democratic election are observed and implemented in a State.

49. A State's openness to an international scrutiny of an electoral process bodes well for the prospects of a further fine-tuning of its democracy.

50. By contrast, a State's unwillingness to invite international election observers is a criterion in itself and should give rise to serious concerns and be followed up by international institutions, even though there is no legal obligation of a State to invite international observers.

51. Finally, an election marred by mass scale gross systemic violations puts into question the legitimacy of thus elected Office, being aware that legitimacy is the most precious product of really free and fair elections.