

Disenfranchising voters and some ways to avoid it

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Democracy means simply the power of the people; thus a wide participation of citizens in the formation of government and political decision-making process is indispensable for democracy to be valuable.

The Council of Europe Forum «For the Future of Democracy» held a month ago in Kyiv was devoted to the problem of strengthening of the democracy in 21st century through improving electoral systems and electoral legislation in general. It was recognized that now the most important problems are how to turn the tendency of turnout decline, how to strengthen democratic practices to enhance inclusiveness of people and increase credibility to the institutions of representative democracy.

Elections are crucial to democracy. Democracy is inconceivable without elections held in accordance with certain principles that give them their democratic status. The principles of European electoral heritage are given in the Venice Commission's Code of Good Practice in Electoral Matters. The principle of universal suffrage is the most well-known and recognised. Nevertheless the aim to enhance participation forces us to look once more at this principle and the procedural guarantees of its implementation.

I'd like to stress that this is not a problem of voluntary illegal deprivation of the right to vote typical for non-democratic regimes as well as of participation in decorative voting without real choice so acquainted to the half of Europe since time of totalitarianism. The problem consists in disenfranchising (legal or de facto) of citizens of democratic state, depriving them of the possibility (or of incentive) to participate in democratic formation of government through real democratic elections.

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Before speaking on the problem of deprivation of the right to vote let's look who has that right.

In political science R. Dahl's inclusion criterion is well known: «Δεμος (which is the carrier of the power in the democracy) must include all adult members of the community excepting those who belongs to the community temporarily or are recognized as mentally incapable». In the legal terms it means that demos (electorate) includes all persons fulfilling three demands:

- they are citizens of the state;
- they are adults;
- they are not recognized as being incapable.

This is the set of persons who have the right to vote; further it could be spoken on restriction (or maybe, extension) of this category.

Depriving or restrictions of the right to vote may take place on different levels. I'd like to propose to distinguish four such levels.

The **first level** which could be called **constitutional** establishes the exact legal meaning of the Dahl's criterion. In fact it's the level of empowerment of the right to vote. It should be considered carefully whether this empowerment is too restrictive which in turn could deprive to vote some social groups of potential voters.

The **second (statutory) level** could set up any additional restrictions of the general category of voters. Here we can meet restrictions of the right to vote for persons who belong to some special groups engaged into some activity (e.g. military personnel), or are in some special conditions (e.g. are imprisoned), as well as temporary restrictions posed by the court as a punishment for some crimes in the form of prohibition of exercising public functions.

The **third (procedural) level** could produce difficulties in exercising legally available right to vote due to established procedures and mechanisms of its realization which for some reasons could be inaccessible for some voters or even some groups of voters. As it was stressed in 2006 Venice Commission Report on Electoral Law and Electoral Administration in Europe, "the electoral legislation may de facto disenfranchise a substantial part of the electorate

due to a lack of special voting provisions for voters who are hospitalised, homebound, imprisoned or temporarily away from their homes”.

The **fourth (social or political) level** is the level of abstention, i.e. non-participation in elections of those voters who has both the right to vote and procedural possibility to realize this right.

The first two are the levels of possible **legal deprivation** of the right to vote. The solution of this problem should be looked for in the international standards of electoral law and European electoral heritage established in the Council of Europe reference documents, especially Venice Commission, as well as in the case law of the European Court of Human Rights.

The third is just the level of de facto disenfranchising caused both with the legislative regulations (statutory establishing procedures and mechanisms of positive realization of the right to vote and of their protection) and with an implementation of legal rules (practices of implementation of statutory regulations).

At least, the fourth level is of social and political (or even in some sense psychological) nature. There could be some legal measures aimed to overcome voters' abstention but in general it should be studied mostly from the point of view of political science, sociology and so on.

Following aims of this Conference it is the third level which is the most interesting. Nevertheless I take the liberty to mention shortly some aspects of other three levels. Besides the basic international legal instruments I'll use mainly the experience of my country – Ukraine. It belongs to young, new democracies; thus some issues there are manifested in a legal sense more clear than in traditional western democracies where they are covered with a thick layer of unwritten democratic traditions and customs.

It also should be stressed that these issues are very sensitive to the type of elections (national, supranational or regional/local). I'll confine myself only with the problems of national elections – parliamentary or presidential (where president is elected by direct suffrage).

Among the above mentioned demands of the **first level** it is worthy to mention the criterion of citizenship.

It seems to be obvious that the right to vote belongs to all citizens of the state conforming demands of lawful age and capability. But there arise questions about (i) foreigners (citizens of other states, citizens of EU, persons without citizenship) and (ii) persons with double (or multiple) citizenship.

A few states do not worry with empowering citizens of some specific other states to vote (like Great Britain). The early (of the beginning of 1990-ies) Ukrainian electoral legislation foresaw the right to vote for citizens of other republics of the former Soviet Union. But this should be considered as exclusion (for national level election). Establishing and defense of the national sovereignty of such European post-colonial states like Ukraine makes it necessary to treat very jealously the non-participation of foreigners in election process in any active role, to say nothing of voting.

Almost the same could be said about persons with a multiple citizenship. The European Convention on citizenship enables them with the same rights as usual citizens (without special mentioning of electoral rights). Nevertheless in the case when national legislation of some state (contrary to its neighbours) does not tolerate double citizenship the participation of such persons in national elections may cause both legal and political problems. In any case it would seem unnatural for persons with a double citizenship to participate elections in both countries on terms of equality. To my mind, this problem needs more detailed discussion

On the **second level** the problem of voting those who are imprisoned is to be mentioned.

The Code of Good Practice in Electoral Matters prescribes that the deprivation of the right to vote in this case must be based on a criminal conviction for a serious offence. The problem was discussed in the 2005 Venice Commission Report on the Abolition of Restrictions on the Right to Vote in General Elections on the base of the case law of the European Court of Human Rights.

We in Ukraine don't use the deprivation of imprisoned at all; this is due to 1998 case law of Constitutional Court which judged it would be unconstitutional. Nevertheless sometimes we feel the necessity to introduce such a deprivation as a kind of sanction in the case of electoral offences because both a money penalty and an imprisonment are not considered (for different reasons) as an appropriate punishment.

From the point of view of legal regulation it is the **third level** which particularly deserves consideration. The situation in this case could be described as follows: some person has the right to vote and wishes to realise his/her right but cannot do it. What could be the reason for that?

The first reason: a voter is not included into voters' rolls at any poll station.

The second: a voter cannot vote on the poll station where he/she is included into voters' roll because of improper organisation of voting procedure.

The third: a voter cannot get to his/her poll station due to his/her disability (illness) or his/her ability to move is limited for other reasons.

The forth: a voter cannot get to the poll station where he/she is included into voters' roll because he/she is far away of the proper poll station.

The latter could be divided in some additional cases:

- there exists some poll station a voter can get to;
- there exists no poll station a voter can get to (for example, on the territory of foreign state).

Speaking more formally we deal with three legal problems. The first is the problem of voters' register and of compiling voters' rolls for poll stations according to the register. The second is the problem of proper regulation and proper organisation of voting process (the size of poll station, suitable voting time, sufficient number of members of poll station commission etc.). The third could be denoted as absentee voting. All these problems have both regulatory and practical components.

To look for solutions to these problems it's useful to keep in mind some underlying principles of election law.

First of all I'll stress that we speak of the **right** to vote. It means that voter's participation in elections is considered just as the right, not as the obligation. In turn, combined with the principle of universal suffrage it means that it is the state which is obliged to ensure possibilities to every voter to use his/her vote without any discrimination, among others on reasons of place of residence or stay.

Next we have to adopt the demand of one-fold voting. It means that a voter can use his/her vote during the same elections only once and only in one poll station. This principle means that any attempt of any voter to try to vote on two or more poll stations is illegal and must be prevented (or punished).

I'd also like to mention the demand of personal voting which means that a voter has to fill his/her ballot paper and to put it to a ballot box personally. This principle is not recognized in a number of traditional democracies due to mechanism of proxy voting (and partly post voting) which violates that demand. It seems that proxy voting is the only reason for which the demand of personal voting is not included to the principles of European electoral heritage. Nevertheless for new democracies this principle is very important being an instrument against the so called "family voting" (see, e.g., 2006 Venice Commission's Declaration on Women's Participation in Elections where the principle of personal voting is stressed).

These principles may compete when we try to solve above mentioned problems.

Let's consider in short the problem of voters' register. The essential demands to such a register are listed in the Code of Good Practice in Electoral Matters. Nevertheless the crucial requirement is: every voter should be included to the register, but only once. As it was shown this is the responsibility of the state (i.e., the government) to create and to maintain such a register corresponding to citizens' right to vote. But it seems unreal to keep the register database in everyday actual state without the active position of a voter whose personal data could be changed.

As in many post-communist countries there was a tradition in Ukraine to form voters' rolls ad hoc, for every election. Now we can claim that our ambitious

project to create the State voters' register as an electronic information and telecommunication system is realised now.

The IT form of the register permits to satisfy two demands: locality in relations with voters (which is necessary to include all voters) and nationwide character of its maintaining (which enables to control the one-fold including of every voter). The register combines a system which contains an element of active participation of the voters in initiating their registration (every person may apply for registration or for checking personal data to the register maintaining body) with regular updating (four times per year) of database made on documental base (without addressing to voters) and general correction (once a year) when the every voter is addressed to check his/her personal data in the register database.

Now we have finished the first general correction of the register database. In particular, as a result of this procedure some hundred thousand records of "twin" voters (about 1% of the total number of voters) were excluded. At the current presidential election the register passes its first practical test.

The voters' register helps essentially to solve the problem of precision and completeness of voters' rolls. Nevertheless there still exist some questions which are to be answered independently. The main question is: could voters' rolls formed according to the register data be changed after their formation? Usually (but not everywhere) the answer is "yes". Different procedures could exist (and they really exist in some countries) – an administrative procedure subject to judicial control, or a judicial procedure, allowing to do some changes in rolls, in particular to include the voter who had to be but was not registered. But a wish to help a voter to realize his/her right to vote including him/her to a roll on the election day cannot be accepted. The Explanatory Report to the Code of Good Practice in Electoral Matters says gently that "it is thus ill-suited to the organisational needs on which democracies are based". We can say more clear that such an approach means a threat of abuses and thus obviously violates the principle of fair election. Unfortunately today in Ukraine we meet an attempt to repeat this approach well known at the 2004 Presidential elections.

In practice procedural (or de facto) disenfranchising could happen due to some organizational complications in the procedure of voting (the second, third and fourth reasons mentioned above).

Usually there is no problem for large group of voters who could come and vote in premises of poll stations where they are included to voters' roll. The proper measures ensuring it include the appointment of the election day on a day of rest with a suitable voting time and especially the size of poll stations. We in Ukraine have an upper limit of a number of voters per poll station established by law up to 2,500 (for parliamentary elections) and even up to 3,000 (for presidential elections), and these limits are not rigid. It's really difficult to organize properly voting process; and sometimes there arise long lines of voters waiting for possibility to come to premises of the poll station. It is not strange that some of them don't want to wait and decide not to vote.

Much more complicated is the problem of those voters who, for different reasons, cannot come to poll station where he/she is included into voters' roll. I'd like to remind that it is the state which is in charge for creating conditions to every voter enabling him/her to cast the vote. It means that the state must foresee (both on the legal and organizational level) some additional mechanism of voting.

There exist three possible solutions for all cases of voter who cannot get to his\her poll station on Election Day. They are:

- early voting in poll station (i.e. voting before the election day);
- post voting (which really is also early voting);
- proxy voting.

The last way (proxy voting) could be the best if it would not violate the principles of personal and one-fold voting (and in some sense of secret suffrage). For that reason some countries cannot adopt it.

Other two are doubtful being unprotected of abuses. For example, it could demand to make ballot papers accessible long before the election day; it would be necessary to maintain ballot boxes during all these days in a safe way. In post-totalitarian societies where the level of mistrust is rather high it cannot be accepted taking into consideration the principle of fair elections.

There exist some other mechanisms which give the possibility to vote for some of above mentioned special categories of voters.

First of all, if we allow imprisoned to vote we need to establish poll stations in places where they are kept. In Ukrainian legislation such a poll station are called “special” due to the special regime of corresponding institution. We also establish special poll stations in hospitals and some other institutions (even in polar scientific station in Antarctica) to give the possibility to vote for those voters who stay there. Despite of special regime of such institutions special poll stations are open for observation.

For voters who will be away from their home area (and thus from poll station where he/she is included in voters’ roll) the use of so called “absentee voting certificates” is foreseen by parliamentary election law. But previous (2004) presidential elections were characterized with the abuse of the absentee voting certificate system; that is why for this year elections this mechanism is excluded (this step was supported in the Common Opinion of Venice Commission and OSCE/ODIHR). Nevertheless I’d like to stress that now it will be problematic (if not impossible) for this category of voters to realize their right to vote. Thus this step could be an example of de facto disenfranchising of some group of voters in a legal way.

I’d like to pay some attention to the case of voters who reside or stay on the Election Day abroad. States keeping the principle of personal voting face necessity to open their poll stations out of their sovereign territory. But there exists no uniform approach to opening poll stations of other state in Europe. Practice is extremely various. It’s clear that the solution of this problem is not simple. Nevertheless for Ukraine having more than one million our citizens in Europe (practically everybody is a voter) it’s urgent. Impossibility to open sufficient number of poll stations abroad also means real disenfranchising of large group of voters.

Somebody considers the e-voting (via Internet) as a mechanism which could help to solve problems of voting of all special categories of voter mentioned above. To my mind it cannot be considered as panacea. Remote e-voting is very doubtful from the point of view of keeping the principles of secret suffrage, personal and one-fold voting. In societies where these principles are vital for democracy remote e-voting seems to be far from usefulness.

It should be stressed that there exist no perfect procedures of voting of special categories of voters; anyone of them threatens some fundamental principles of democratic elections. Thus every society has to select some of them according to their reliability and to the choice of principles which could be deviate or to weaken. In any case corresponding safeguards must be implemented to ensure the integrity of the vote cast in a specific way.

As it was mentioned the **fourth level** of our main problem (i.e. the problem of turnout) has rather political nature then legal one. Nevertheless there exist some attempts to solve this problem with legal instruments.

One attempt consists in establishing some threshold of turnout for recognizing elections to be valid. We in Ukraine have very unfortunate experience of using this measure. In 1994 parliamentary elections the two-round majority system was used combined with the demand of 50% turnout in every round. As a result some constituencies had never elected a member of parliament up to the next elections in 1998. Thus this way seems not to solve the problem of low turnout.

Another way is imposing a voter the obligation to vote. I'll not comment this way but has to say that it changes the philosophy of relations between voters and the state; at least it weakens the state obligation to ensure possibilities to vote for every voter. Another aspect of this problem was mentioned in 2008 Venice Commission Comparative Report on Thresholds and Other Features of Electoral Systems Which Bar Parties from Access to Parliament. It has been suggested that under a compulsory voting regime voters who are otherwise not inclined to vote might, out of their dissatisfaction with the major parties, "cast a protest vote" which often goes to a radical (usually a minor) party. As D.Nohlen reports, "radical right did fare slightly better in the eight nations which use compulsory voting" and "this evidence is suggestive".

Speaking politically, non-participation of voters in elections means that they have no incentive to vote because they don't believe it would change their life. It could be caused by two opposite reasons. On the one hand, people could be quite satisfied with the living conditions and feel no danger to them irrespectively of election results. On the other hand, people could be quite disappointed and not believing that something could change after elections.

It's clear that these two situations are met in different countries. Nevertheless the recipes are not of legal nature.

In this presentation I tried to gather and to systematize possible criteria for disenfranchising which without any doubts are well known. I hope it could be a base for fruitful discussion.