

OBSERVATIONS BY THE GENERAL RAPPORTEURS

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The choice of an electoral system: some lessons from the Ukrainian experience

I am honoured to be speaking on behalf of Ukraine, which is hosting this Forum as one of the youngest states and democracies, but is one of the oldest nations in Europe.

It is important to point out that only the western part of Ukraine was involved in the first wave of European democratisation in the 19th century. In most of our country, the first more or less pluralistic elections, although not yet in fact democratic, took place in 1989, just 20 years ago. During its historically short period of independence, Ukraine has been endeavouring to strengthen its democracy, which might explain why we have experimented with four different electoral systems at the national level, with two other systems being tried out at the local and regional levels.

The electoral system is recognised as one of the central elements in democratic government. That is why the various political and social consequences of different electoral systems are widely studied and discussed.

The debate on electoral systems is as endless as the different possible electoral systems are innumerable. However, while there is no such thing as an ideal electoral system, we nonetheless have to consider, discuss and choose the optimum electoral system for a given country in a given situation. The choice of an electoral system often corresponds to specific political aims.

Are there any general limits on this choice? Could some electoral systems be inconsistent with the idea of democracy? Must an

electoral system devised by politicians be approved by the people, by civil society?

My answer to these questions is “yes”. Some requirements have to be considered as preconditions for targeted policy making which must be met if the electoral system in question is to be recognised as democratic and considered by the people as fair.

The first of these preconditions is that all electoral systems must conform to the fundamental principles and internationally recognised standards governing elections. Six of them are set out as underlying principles of Europe’s electoral heritage, in the Council of Europe’s major reference document, the Code of Good Practice in Electoral Matters, adopted by the Venice Commission in 2002. These principles are: universal, equal, free, secret and direct suffrage and also regular elections. The code stipulates that “within the respect of the above-mentioned principles, any electoral system may be chosen”. I would also add the legal requirement of the constitutionality of the electoral system, to be taken into account at the national (rather than the international) level; in particular, the system must respect the constitutional status of the elected body. This is important in devising electoral systems for elections at sub-national levels. Unfortunately, we ourselves made this mistake when selecting the system for elections of regional (*oblast*) and district (*rayon*) councils.

Six principles highlighted by the code are complemented in Ukrainian legislation by a number of further principles. The first is the well-known principle of fair elections. Proclaimed in a number of international legal instruments (beginning with the United Nations Universal Declaration of Human Rights), this requirement is of great importance to those nations which for decades lived under Stalin’s dictum: “It does not matter who votes; what matters is who counts the votes.” Thus the fight against forged voting results and other violations aimed at “correcting” the voters’ will is still the problem that requires the most urgent attention.

The fair election requirement is indirectly guaranteed in the Code of Good Practice in Electoral Matters, as procedural guarantees for the explicitly stipulated principles. These procedural guarantees, in particular, are as follows: firstly, an impartial body must be in charge of

applying electoral law. Secondly, both national and international observers should be given the broadest possible leeway for participating in the election observation exercise. Last, but not least, there must be an effective system of appeal. These would appear to be the main criteria for promoting fair elections. We, in Ukraine, also stress the criteria of personal and one-time voting.

We have generally managed to solve the problem of voting “for that particular person” (which is sometimes referred to as “family voting”), but consider that proxy voting is unacceptable. The fact that proxy voting is used in some European countries was apparently the only reason for excluding the criterion of personal voting from the principles of the European electoral heritage.

The principle of one-time voting requires that the voter can use his/her vote only once and only at one polling station during one set of elections. This is especially vital in the case of electoral systems in which voters have more than one vote (such as hybrid systems) or where two or more elections are being conducted simultaneously. This principle means that any attempt by a voter to vote in two or more polling stations is illegal and must be prevented or punished.

As a minimum, we adopt the principle of optional voting, which means that the voter’s participation in elections is considered merely as the right, not the obligation, to vote. It also means that the state is required to ensure that every voter can use his or her vote without discrimination, *inter alia*, on grounds of place of residence.

We in Ukraine realise the importance of the fundamental principles of elections. Precisely these principles underpinned the well-known decision of the Supreme Court of Ukraine during the last presidential election in December 2004. The court stressed that formal voting and formal counting of votes could not be considered as sufficient guarantees of genuine elections if the main principles of elections were widely violated.

Nevertheless, there can be different interpretations of the contents and modes of application of these fundamental principles (or at least some of them) in different Council of Europe member states. What is needed now, in our view, is to:

1. define the content of the fundamental principles in general but unambiguous terms;
2. establish possible procedures and mechanisms for the positive implementation of these principles;
3. lay down possible procedures and mechanisms for defending them (preventive mechanisms) and dealing with the consequences of any violations (effective appeal procedures).

These three items comprise many special issues affecting the choice of an electoral system.

Even universal suffrage raises problems (for minorities, aliens, detained persons, military personnel, etc.). Apart from these special groups, whose voting rights are discussed at the legal level (with different member states opting for different solutions), there are further problems vis-à-vis the procedural guarantees on the positive implementation of the legally guaranteed right to vote. Clearly, there is no problem for most voters who turn out to vote at the polling stations. However, some voters cannot, for a variety of reasons, travel to the polling station where they are registered. The view that it is for the state to create the conditions for every voter to cast his or her vote means that the state must (legally) provide for additional voting mechanisms. We share the doubts on postal voting expressed in the Venice Commission's code; respect the principle of personal voting, which excludes proxy voting, and consider early voting as an unsafe procedure. This leaves us with problems in terms of voting procedures for at least three groups of voters, namely those who cannot come to the polling station due to illness or disability; those who are absent or far from home and those who are actually abroad on polling day.

I would like to dwell a little on the latter case. States that respect the principle of personal voting must open polling stations outside their sovereign territory. In Council of Europe member states, however, there is no standard approach to opening polling stations in other states. Practices vary widely. Given that there are approximately one million Ukrainian citizens spread across Europe (virtually all of them voters), and realising all the problems that this involves, our country is interested in securing joint recommendations on standardising practice, or at least achieving some basic joint positions on this

problem. The concern about foreigners' voting rights in elections in their countries of residence is very much connected to the issue of their rights concerning elections in their countries of origin and citizenship.

The practical implementation of the principle of universal suffrage necessitates national registration of voters (in Ukraine we can assert that our state voters' register is now operational as an electronic information and telecommunication system). The fundamental principles in this context require every voter to be included in the register once only. This constitutes a large-scale problem for Ukraine, which has more than 30 million voters. We hope that the practical work on the register will solve this problem within the next year or two.

Different interpretations of specific principles affect the mechanisms and procedures for their practical implementation. For instance, the Code of Good Practice in Electoral Matters considers that the equality principle concerns equal suffrage and equal opportunities (for candidates and parties).

Again, equal suffrage can be seen as meaning equal numbers of votes for each voter (the so-called formal aspect) or else equal voting power (the so-called material aspect). Both aspects may influence the choice of electoral system.

In fact, if one wants to use the plurality vote in multi-seat constituencies, the formal aspect requires the use of constituencies of equal size (that is with the same number of seats per constituency). Even uninominal constituencies raise the well-known problem of constituency boundaries, from the angle of the material aspect of equality.

These problems are much easier to solve in systems of proportional representation based on lists of candidates. Using list systems, however, makes it much more difficult to resolve problems of representing different kinds of minority (or under-represented) groups. Quota systems, which are geared to guaranteeing the representation of women, national minorities, etc., must comprise special mechanisms to avoid violating the equal opportunities principle (so-called positive discrimination towards a specific group, which usually means negative discrimination towards another group). Moreover, the criteria for applying positive discrimination to some population groups (other

than women) are unclear. In any case, the open list system (like any other which allows voting for individual candidates) makes any quota system ineffective.

It should be stressed that different principles can be in competition in this field. The prime example is the clash between the equality principle (in the sense of equal opportunities) and free elections (in the sense of the free formation of voters' opinions). In fact, it is no easy matter to harmonise the requirement of equal access by candidates and parties to the media with editorial freedom, which is usually considered as a manifestation of the freedom of expression. Not only advertising, but also so-called editorial comments and political analyses in the media, especially the broadcasting media, have to be regulated so that they do not become an instrument of unfair manipulation of public opinion. Such misuse of the media during campaigns, which is often encouraged by media owners, depending on their political interests, is liable to endanger not only the equal treatment of candidates standing for election and the parties nominating them (the equality principle), but also the genuinely free formation of the voters' will, which is an important aspect of the principle of free elections.

The European Court of Human Rights (the Court) has addressed this problem on a number of occasions. The well-known case of *Bowman v. the United Kingdom* provides a very important position on this issue. While acknowledging that freedom of expression is one of the preconditions for free elections, the Court nonetheless stressed that in some cases two principles (the right to free elections and freedom of expression) may conflict, in which case it might be deemed necessary to place restrictions on the freedom of expression during elections. The aim of such limitations is to guarantee the free formation and expression of the people's will during the elections. The Court left a wide margin of discretion for member states to strike a balance between these two principles. From my perspective, it is time we tried to identify a common approach to this issue that is capable of pinpointing permissible restrictions and also taking account of a variety of circumstances (both domestic and geopolitical), especially in the young democracies. The French experience of state and public control of the media during elections is particularly interesting here.

Some of the mechanisms and procedures for implementing the fundamental principles governing elections are of special interest. They are designed to defend these principles and, more broadly, the integrity of the electoral process. I would like to examine just one of them – election observation, especially by international observers. We in Ukraine have the relevant legal regulations in this field, but feel that it is unfortunate that the legislation and practice of some of the older democratic states lack similar regulations. Of course, supervision of the election process in these countries is probably superfluous, but observing genuinely democratic election processes might constitute an effective school of genuine democracy, an experience of great value to young and emerging democracies.

Any discussion of electoral systems must also embrace their influence on party systems. The traditional doctrine here is expressed by the famous Duverger rule. However, it is interesting that some new democracies show the opposite trend. In Ukraine, for instance, it is the proportional representation system which is consolidating the party spectrum and ensuring the emergence of a number of large, more or less stable parties.

Nevertheless, Ukrainian practice shows one negative phenomenon in the development of our party system – the “leaderist” character of the main parties which, as was mentioned at the Forum, is a problem which does not only affect our country. In our case we consider that it stemmed from the so-called “party imperative mandate” which was introduced despite fierce criticism from the Council of Europe’s institutions. This step was geared to enforcing the “party discipline” of members of parliament, but has been quite rightly deemed incompatible with European constitutional traditions. Reinforced by its combination with a closed party-list electoral system, it makes a charismatic party leader a central, inerrant figure of the party and of its parliamentary faction.

This phenomenon highlights the extremely important role of intra-party democracy. It should be recognised that any party, even one with a highly democratic programme, which lacks real intra-party democracy is insincere, because its activity does not teach party members about democratic behaviour and democratic decision making and does not reproduce democracy at the wider political level. In this

connection, it is important to stress the significance of the Code of Good Practice in the Field of Political Parties, which was adopted by the Venice Commission in 2008, six years after the adoption of the Code of Good Practice in Electoral Matters. It is recognised as a reference document of the Council of Europe and has become the basis for the common formulation and common understanding of the European electoral heritage.

The Forum shows that it is time we analysed our experience with promoting and implementing the Code of Good Practice in the Field of Political Parties, clarified the content of some of the concepts and clauses, and established a number of minimum standards as vital requirements for compliance with the main principles as well as their possible expansion under different electoral systems and other specific circumstances in different countries. It might be useful to highlight examples of current practices which are incompatible with the European electoral heritage.

I might venture to say that such an activity would be especially useful and instructive for new democracies. On the other hand, I am sure that the practice of the newly democratic countries provides many new pointers for analysis and general implementation, thus enriching the common experience. This might help ensure that the diversity of European nations promotes our common future development.