



Office for Democratic Institutions and Human Rights

**OSCE/ODIHR COMMENTS ON THE DRAFT
CONVENTION ON STANDARDS OF ELECTIONS,
VOTING RIGHTS AND FREEDOMS
PROPOSED BY THE RF CEC**



Warsaw
19 October 2001

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This report provides a brief assessment of a draft Convention on Elections and Electoral Rights and Freedoms dated 31 July 2001. The text is proposed for adoption by the member States of the Council of Europe. It was drafted by a team of election specialists led by Prof. V. I. Lysenko of the Institute of State and Law, Russian Academy of Sciences, on behalf of the Central Electoral Commission of the Russian Federation. According to Prof. Lysenko's explanatory note, the aims of the Convention would be, *inter alia*, to bring together, in a binding international act, the accumulated experience of the Council of Europe in the legal regulation and the conduct of free and democratic elections. It would also concretise the electoral standards flowing from Article 3 of the First Protocol to the European Convention on Human Rights.¹

On 17 August 2001, Mr A. A. Veshnyakov, Chairman of the Central Electoral Commission of the Russian Federation, invited the opinion and proposals of the OSCE Office for Democratic Institutions and Human Rights on the draft Convention. The present comments are offered by way of a response to that invitation in the spirit of continuing co-operation between the CEC and OSCE/ODIHR.

I. OVERVIEW

1. In general terms the draft Convention appears to have achieved the objectives set out by its authors. It brings together a series of rules which, if observed, would make a very substantial contribution to the promotion of democratic elections. The text recognises and elaborates the core values of universal, equal and direct suffrage and secret and periodic voting free from undue influence. The rule of law and the need to provide effective protection of individual rights are themes which extend throughout the draft Convention.
2. In all material respects, this text complies with the core commitments on election standards set out in the Copenhagen Document.² In many important respects the Convention envisages safeguards which go substantially further than the Copenhagen Document.
3. In terms of its scope, the Convention does not seek to be comprehensive. However, all of the key subjects are covered. In certain areas there may be more detail than is

¹ "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."

² Final Document of the CSCE Conference on the Human Dimension, Copenhagen, 29 June 1990

appropriate, particularly given the broad range of election systems encompassed within the Council of Europe.

4. There are a number of relatively technical details in the text which may benefit from clarification or re-evaluation. These are addressed in Section IV below, which includes the suggestion that the present provisions on reservations under the Convention (Article 27) are too broad.

II. COMPLIANCE WITH THE COPENHAGEN STANDARDS

1. Both in content and language, the election commitments in the Copenhagen Document are reflected in the draft Convention. Every one of the key commitments set out in Paragraph 7 of the Copenhagen Document is expressed in the draft Convention.
2. Provision for free elections at reasonable intervals, as established by law (Paragraph 7.1 of the Copenhagen Document) is contained in Article 2 of the draft Convention.
3. Provision for elections for at least one chamber of the national legislature (Paragraph 7.2 of the Copenhagen Document) is contained in Article 10(2) of the draft Convention.
4. The commitment to universal and equal suffrage (Paragraph 7.3 of the Copenhagen Document) is contained in Articles 8 and 9 of the draft Convention.
5. Provisions on secret voting, honest counting and the official publication of results (Paragraph 7.4 of the Copenhagen Document) are contained in Articles 6(4)(d) and 11 of the draft Convention.
6. Provisions on respect of the right to seek office within political parties or individually (Paragraph 7.5 of the Copenhagen Document) is contained in Article 13(4) of the draft Convention. There is no express reference to the need to afford this right 'without discrimination' as stipulated in the Copenhagen Document, and it may be worth adding those words. But some reassurance on this point is provided in Article 6(1), which expresses a general commitment to ensure equal conditions for electoral participants.
 - i) Provisions on respect for the right to establish political parties with legal guarantees of equal treatment (Paragraph 7.6 of the Copenhagen Document) is contained in Articles 13(3), which recognises the right of citizens to organise political parties in accordance with the law. Again, the equal treatment provisions in Article 6 would evidently extend to this provision.
 - ii) Provisions to promote and protect free and fair election campaigning (Paragraph 7.7 of the Copenhagen Document) are contained in Articles 13, 17 and elsewhere in the draft Convention.
 - iii) Provisions on access to the media on a non-discriminatory basis (Paragraph 7.8 of the Copenhagen Document) are contained in Articles 6(4)(b), 13(6) and 17(3). The requirement for non-discriminatory access can be implied from the context of Article 6(4)(b) and from the use of the words 'just conditions for access' in

Article 17(3). However, it may be worth adding an explicit reference to the need for access on equal and/or non-discriminatory conditions.

- iv) Provisions to ensure that elected candidates remain in office until their term of office expires or is terminated in accordance with law (Paragraph 7.9 of the Copenhagen Document) are contained in Article 1(4) of the draft Convention.
7. Recognition of the valuable role which international and domestic observers can play at national and lower levels (Paragraph 8 of the Copenhagen Document) is also expressed in the draft Convention (Articles 1(2), 15 and 20).

III. EXTENSION OF COPENHAGEN STANDARDS

1. In numerous respects, the Convention lays down standards which exceed those envisaged in the Copenhagen Document. For instance, on the key issue of openness and transparency in the organisation and conduct of elections, Article 15(4) of the draft recognises the importance of allowing candidates to nominate members with non-voting rights to electoral commissions. Article 6(e) underlines the crucially important point that election complaints must be considered promptly and effectively by courts and other authorised bodies. Throughout the text there are strong provisions on equal treatment for women (Article 12) and others who may face discrimination in the election process on grounds of race, colour, religion or other grounds. Article 16 contains strong provisions on controls over and the transparency of campaign finance. These are just a few examples; there are many more.
2. Article 14(3) contains a number of important provisions on the role of domestic observers and candidate proxies, including the very significant right to receive certified copies of election protocols. These provisions go well beyond those envisaged in the Copenhagen Document. Unfortunately the language used is rather cautious: the parties to the Convention are said to proceed on the basis that domestic observers and proxies 'may' be vested with such rights. It would be in keeping with the spirit and purpose of the Convention if the parties recognised that such rights 'should' be extended to domestic observers and proxies.

IV. OTHER OBSERVATIONS

1. Article 3(3) provides that decisions affecting electoral rights and freedoms may not be applied unless they have been officially published. A suggested clarification is that such decisions may not be applied *until* they have been officially published and should not have retroactive effect.
2. In Article 5(2) the words 'parties or coalitions' should probably be added to the end of the first sentence.
3. The purpose and meaning of Article 5(6) is not entirely clear. This provides that candidates and parties must recognise the results of democratic elections, but adds that they must have the opportunity to appeal the results. The term 'recognition' can mean various things and an unwillingness to recognise an election result can have various causes. A candidate or party may perhaps refuse to recognise a result because they

believe the election was called unlawfully, because there were procedural violations, because they were excluded – in their opinion improperly – from participating, or simply because they choose not to express recognition of the results. In some such cases where they feel there has been a serious defect in the elections, they may also feel that there is nothing to be gained from launching or continuing a formal appeal. The candidate or party may well feel in such circumstances that the elections were not democratic. They should not be prohibited from saying so or in some way be required to proclaim their recognition of the validity of the results. It is suggested that this provision is omitted from the text.

4. Similarly, the prohibition on calling for an election boycott may need to be reconsidered. Article 4(3) expressly recognises that participation in an election is voluntary. Non-participation is therefore a citizen's right. There are obvious difficulties in prohibiting anything which encourages citizens to exercise one of their legally protected rights. Such activities clearly do not fall into the same category as the other activities mentioned in Article 7(6), such as falsifying the result. Accordingly this particular provision may also benefit from reconsideration.
5. On a point of terminology, Article 6(3) refers to '*social associations* [presently translated as 'public formations'] and other subjects of law'. This term is very familiar in post-Soviet legal terminology but less so elsewhere: it might sensibly and simply be omitted.
6. Article 8 deals with universal suffrage. It is suggested that this should include the grounds on which active and passive voting rights may be denied. Minors and those who suffer from mental incapacity should clearly be denied both active and passive voting rights. It is desirable that the Convention recognises the active voting rights of persons who are detained on suspicion of a criminal offence but have not been convicted.
7. One of the necessary implications of equal suffrage is that each voter's voice should carry approximately equal weight. On that premise the language of Article 9(1)(b) is perhaps insufficiently direct. The draft provides that having approximately equal representation of voters 'may be one of the criteria' for forming election constituencies. It is suggested that this is necessarily the principal and most fundamental criterion for defining constituency boundaries, recognising always (as the Convention already does) that in certain circumstances allowances have to be made for geographical peculiarities.
8. Article 9(3) envisages various forms of alternative voting which may help to secure the right to vote to all voters (early voting, mobile and other special voting procedures). Some specific provision on safeguards is made elsewhere in the Convention. For instance, Article 14(3)(c) stipulates that domestic observers and proxies may be permitted to attend voting outside the polling station. However, it may be worth emphasising in that paragraph that election law must establish clearly defined safeguards for all forms of alternative voting to ensure adequate procedural transparency, protection of confidentiality and the security of the ballot. A specific provision might be included in Article 11, that measures to protect the secrecy of the vote must be adopted in relation to all forms of alternative voting.
9. Article 10(1) raises the perennially problematic issue of voting against candidates. There are two almost invariable objections to negative voting. The first is that it is much

easier to spoil a ballot paper if the voter has to make numerous markings rather than one. The second is an issue of confidentiality. If there is ever a single candidate on a ballot paper it is usually obvious how a voter has voted: if they are voting for the candidate, they will either take the ballot paper straight to the ballot box or walk in and out of the voting booth without doing anything. In either case anyone watching will know who the voter has voted for. It would be going too far to suggest that negative voting is undemocratic, but if possible this is an aspect of the election process which should be discouraged. It may be possible to incorporate some form of discouragement within the general provisions of the Convention. More specifically, Article 11, which deals specifically with secrecy of the ballot, should include a provision that negative voting is not appropriate in any election in which there may be only one candidate, list of candidates or party on a ballot paper.

10. As noted above, Article 10(2) provides that at least one chamber in the national legislature must be directly elected in contested elections. Article 10(3) provides that if the members of another, second, chamber in the national legislature are not directly elected, such a rule shall not be regarded as violating the Convention. Yet that would surely depend on how the other chamber is in fact formed and what powers it enjoys. Like the Copenhagen Document, the Convention as presently drafted stipulates that the right to rule must be based on the will of the people as expressed in genuine and periodic elections.³ But if the second chamber was created by undemocratic means and/or enjoyed equal or greater powers than the directly elected chamber, that would be inconsistent with the Convention. It would undermine the expressed purpose of the Convention and contradict the axiomatic premise that the will of the people is the basis for government power. Accordingly it is suggested that this paragraph is reconsidered or removed.
11. Article 14(3)(g) provides that both proxies and observers may be given the right to appeal the decisions of election agencies to a court. It is suggested that this is not an appropriate role for observers, whether domestic or international. The observers' impartiality is one of their most important qualities. That impartiality, whether real or perceived, may well be compromised if observers launch legal or other official complaints. It is always open to a voter, candidate or political party affected by a particular decision to instigate their own complaint, possibly drawing on evidence provided by election observers.
12. Under Article 16(1) the financing of measures connected with elections is effected at the expense of the national budget. For the sake of clarity, it may be worth referring here to measures connected with the organisation and conduct of elections. This would make clear the distinction between that aspect of elections and campaign finance.
13. Article 16 contains some ambitious rules on campaign finance. Whilst these are generally laudable, this is one area where a significant number of reservations may be anticipated from signatory states.
14. The meaning and scope of Article 16(3) is not entirely clear.

³ Paragraph 2 of the Preamble

15. Article 16(4) envisages a complete bar to anonymous campaign donations. A less strict formulation may be appropriate, whereby anonymous donations up to a maximum amount specified by law would be permitted.
16. Article 17(2) provides: ‘Any intentional discrediting in the state-owned mass media of individual parties (coalitions) and candidates participating in elections should not be allowed’. It is certainly undesirable that the media, particularly the state-owned media, should launch attacks on candidates or parties. The difficulty lies in finding a properly enforceable legal formula for dissuading such activities. For instance, a news report on state television showing a candidate engaged in discreditable activities, or identifying weaknesses or contradictions in a particular party platform, may well be perceived to be discrediting that candidate or party. But the media, including the state-owned media, must be permitted a broad interpretation of what is of legitimate public interest. The formulation as it presently stands may give rise to breaches of Article 10 (freedom of expression) of the European Convention on Human Rights. It is suggested that on this point it would be more appropriate to express an aspiration rather than a firmly expressed rule, perhaps: ‘The parties proceed on the basis that the state-owned mass media shall seek to provide balanced coverage of the election campaign and refrain from partisan reporting’.
17. Article 17(7) is problematic. This provides that the media in one signatory state should not be used for campaigning in another. Again, issues of definition arise here. What one observer sees as fair reporting of a particular party’s misfortunes may be perceived elsewhere as campaigning on behalf of that party’s opponents. A more practical issue is that the mass media is ever more international in nature. Many media organisations operate in different countries and are owned by people or organisations based in different countries. It may accordingly be very difficult to identify what is or is not the mass media ‘of one signatory state’. This issue may be one which is not capable of regulation within a Convention of this kind.
18. It is suggested that Article 18(5) is omitted. Citizens only have the right to appeal to international judicial organs if that right is established in some other international legal act. Obviously, if this draft is adopted as a Council of Europe convention, those whose rights have been violated under the European Convention of Human Rights may be entitled to apply for a remedy to the Strasbourg Court. The present Convention would undoubtedly be regarded as an authoritative guide to the interpretation of Article 3 of the First Protocol to the ECHR. But this provision in Article 18(5) of the present Convention makes no difference to that position.
19. Article 19 makes some fairly specific rules on the rights of foreign citizens to participate in elections. There is perhaps insufficient commonality in this area as between Council of Europe states to warrant such detailed rules. Moreover, there are certainly valid arguments to insist that voting rights should be restricted to those persons who have obtained citizenship.
20. It is suggested that the reference to inviting international observers from ‘any other states’ should be to ‘any other states within the Council of Europe’.
21. It is suggested that the rights and obligations of international observers enumerated in Article 20 of the draft Convention should include the obligation not

- to inquire of a voter how s/he has voted or intends to vote;
 - to touch or handle any voting materials or participate in voting or counting procedures.
22. Article 22(2)(b) provides that legal normative rules governing the conduct of elections should not be adopted through normative acts emanating from the executive branch of power. This formulation possibly goes too far. It is certainly desirable, as this Article envisages, that all the key principles and rules on organising and carrying out elections are laid out in the Constitution and national legislation. But in some jurisdictions the functions of a central electoral commission are exercised by a body which operates partly or wholly from within the executive branch. Those functions need to include the power to make binding rules on the details of conducting a particular election. Similarly, local executive authorities may need to adopt binding normative acts to deal with practical matters in the conduct of the election.
23. Given the substantial overlap of membership between the Council of Europe and the OSCE, it is obviously desirable that the proposed European Election Bureau should not substantially reproduce the functions of the OSCE/ODIHR.
24. Article 27(1) allows signatory states to enter a reservation that their laws do not conform with any provision of the Convention. This is perhaps an unfortunately broad formulation. There are some provisions of this Convention which are so fundamentally important that reservations should not be contemplated. For instance, a potential signatory state in which the law prohibits women from voting should not accede to the Convention until that law has been reversed. Nor should reservations be contemplated which contradict existing international commitments, including those under the Copenhagen Document. This provision may therefore warrant reconsideration.