

Independence of Election Commissions: an Essential Feature of Democratic Elections

The doctrine of the Venice Commission

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1. Introduction

As the Council of Europe's expert body in constitutional matters, the Venice Commission does research to develop standards of Europe's constitutional heritage, strengthens the understanding of democratic institutions and assists individual countries in implementing them in their constitutions. Within this competence, electoral matters are of utmost importance: They are a cornerstone for the efficiency of a democratic system. Thus, since its creation in 1999, the Venice Commission has played a very active role in the development of European standards in electoral matters.

2. The “Code of Good Practice in Electoral Matters”

The most important reference text in this field is the “Code of Good Practice in Electoral Matters” from 2002 (CDL-AD [2002] 23). It comprises two parts: Part 1 are “Guidelines” with fundamental “Principles of Europe's electoral heritage”, and Part 2 is an “Explanatory Report” with 114 remarks that explain these principles and serve their implementation.

The comprehensive document deals with all sorts of questions relevant in the electoral field: the principles of universal, equal, free, secret and direct suffrage, the frequency of elections and their regulatory essentials. But it also establishes guarantees that can ensure that these principles are implemented in practice and – first and foremost – that no political influence can affect the result of elections. Thus, the Venice Commission's guidelines pay much attention on the procedural guarantees for elections.

3. Procedural safeguards

These procedural safeguards take into account various shortcomings that the Bureau of the Parliamentary Assembly of the Council of Europe had reported during its election observation missions (e.g. lack of transparency in the activity of the central election commission, variations in the interpretation of counting procedure, controversies in appointing members of the election bodies, the dominating position of the ruling party in the election administration).

That raised basic questions: How can politically motivated manipulations of the election procedure can be avoided? How can it be practically ensured that the ruling party does not put pressure on the election authorities to do what it wants?

One of the answers is that impartial entities have to be responsible for the election's organization. In the following 20 minutes I will give you an overview on the crucial points the Code of Good Practice in Electoral Matters specifies in this field.

4. The task of electoral bodies

The task of election entities is to take care that all the different steps of the election procedure are carried out transparently, professionally and impartially.

The most sensitive issue is the concept of "impartiality". It means freedom from directives by the Ministry of Interiors and other public authorities, but also independence from the political parties, particularly those that hold political power. Hereby, the Venice Commission distinguishes between states "where the administrative authorities have a longstanding tradition of independence" (that is to say with an established and professional civil service, that has been organizing elections in conformity with international standards for a long time) and states without such a tradition. In these countries impartial electoral commissions must be set up at all levels, from the national level to the regional and the local, polling station level.¹

¹ Guidelines II.3.1.b.

The Venice Commission calls on several essential elements of such bodies concerning 1. their composition, 2. their powers and 3. their mode of operation.

5. The composition of electoral bodies

The composition of election commissions plays a key role for their independence. Any central electoral commission – responsible for the important task of compiling and updating electoral lists – has to be “permanent in nature”.² This excludes a system of politically appointed “ad-hoc-commissions” for every new election, implies a certain stability of its officials and ensures reliability and correctness in the fulfillment of this function.

The members of this commission are exactly determined: They should include at least one member of the judiciary and representatives of parties already in parliament or having scored at least a given percentage of the vote.³ The member of the judiciary not only ensures independence but also professional competence in addressing legal issues, in particular legal disputes as they often arise in the course of elections. The presence of party representatives pursues the same objective. It seems to favor a political composition of the election commission, but this does not imply that it should be able to act partially. On the contrary: It emphasizes a political balance that can ensure a mutual control and helps to avoid irregularities. If party A wants to commit any irregularity, parties B, C and D will be interested in raising and preventing it. If no party at all is involved in the appointment of the commission’s members, the risk is that these members are simply appointed by the parliamentary majority and depend on it. Furthermore the guidelines provide that even the party representatives have to be “qualified in electoral matters”. They can be legal experts, political scientists, mathematicians or other people with experience in electoral issues.⁴ All this emphasizes again the competence and professionalism that should guide the commissions’ activities.

The guidelines furthermore provide that the central election commission may include one representative of the Ministry of the

² Guidelines II.3.1.c.

³ Guidelines II.3.1.d.

⁴ ER 83.

Interior. According to the explanatory report, this is only appropriate for practical reasons of cooperation between the central election commission and the Ministry of the Interior (e.g. transporting and storing ballot papers and other equipment). However, these reasons normally will not imply a full membership and thus an influence on the decision making of the election commission.

Finally the central election commission may also include representatives of national minorities. This will be desirable in territories where minorities are of political importance.

The election commissions on the sub-national levels are determined less strictly, but according to a similar system. They have to be impartial but a member of the judiciary is not essential. However political parties have to be “equally represented”. Equality may be construed strictly or on a proportional basis.⁵

A further important guarantee is the exclusion of every system with freedom to dismiss the members of election commissions “at will”.⁶ This is an essential element for the independence of all election commissions. According to the explanatory report “discretionary recall is unacceptable” because it can be used to put pressure on the commission’s members. Only recall for disciplinary reasons is permissible – provided that the grounds for this are clearly and restrictively specified in the law. Vague references to “acts discrediting the commission” for example are not sufficient.⁷

The requirement of professionalism is highlighted again in a provision of obligatory standard training for all members of electoral commissions.⁸ It is of particular importance for those members who are appointed by the political parties.

6. The mode of operation

As the composition of the electoral commission is of big importance for its independence, this applies equally to its decision making procedure. In close connection with the composition issue the guidelines consider it “desirable” that electoral commissions take decisions by a

⁵ Guidelines II.3.1.e.

⁶ Guidelines II.3.1.f.

⁷ ER, 77.

⁸ Guidelines II.3.1.g.

qualified (2/3) majority.⁹ This encourages debate between the majority and at least one minority party and strengthens the control function the party representatives exert vis-à-vis each other. Consequently reaching decisions by consensus is even “preferable”.¹⁰ It makes it difficult to exert political pressure on the election procedure.

An interesting issue is the openness of the commissions’ meetings for the public. It is not mentioned by the guidelines, but the explanatory report states that the meetings of the central electoral commission should be open to everyone, including the media. This emphasizes the importance of transparency for the decision making procedure.

An essential feature of an independent election commission is a sufficient support for its administrative demands and needs. This includes to have available appropriate staff with specialized skills, able to organize elections in practice. It may be responsible for preparing and distributing the electoral registers, ballot papers, ballot boxes, official stamps and other required material, as well as determining the arrangements for storage, distribution and security.

7. The powers of electoral bodies

The powers of the electoral commissions are not strictly determined in the guidelines. However, as they should remove every irregularity and even serious suspicion of irregularity of elections, they have of course to administrate every level and every step of the election procedure. It begins in the pre-election period and ends with the announcement of results.

Furthermore, election commissions can be installed as bodies of appeal when election results are challenged. This is appropriate because of their specialized competence and experience in electoral matters. Their competence could be the annulment of elections, if irregularities may have influenced the outcome, the distribution of seats. However in such a case there should be a further right to appeal to an appeal court or – at last instance – to the Supreme Court.

⁹ Guidelines II.3.1.h.

¹⁰ ER 80.

To summarize, the Venice Commission do not provide a perfect model for an election commission. But it refers some essential elements, a minimum standard, that these commissions have to meet to avoid political pressure, conflict and the suspicion of irregularities.

8. Some practical examples

To complete my overview let me quote two practical examples from the past years. Because of numerous controversies and irregularities in the elections of some countries, the Venice Commission, together with the ODIHR was asked to reflect its guidelines in specific opinions. They concerned Albania and Georgia.

In the case of Albania several shortcomings of the Electoral Code 2003 raised serious concern.¹¹ Of major concern were provisions regulating the composition of election commissions. The central election commission was composed of seven members. Two of them had to be appointed by the assembly, two of them by the President of the Republic, three by the High Council of Justice. However, the Electoral Code gave full control of the nominating procedures to the two major political parties of either political spectrum, with the result that they achieved an extremely dominant role in the election administration. As the voting required a qualified majority of 5 members, each of the parties was enabled to block the decision making at every level. It is not surprising that some of the members behaved in response to political pressure rather than in their required role of impartial election administrators. Similar provisions applied to all election commissions, so that in effect the Electoral code failed to diminish the highly politicized environment at every level of the election administration. The example shows the importance of political pluralism and political balance in the election commissions. But in order to ensure independence of the election administration the Venice Commission and ODIHR also advised for specific and detailed rules on the functioning of the central election commission, including the publicity of its meetings and the possibility for interested persons to take part. In two further opinions 2007 and 2009,

¹¹ CDL-AD(2004)017.

they added a recommendation for proper training of commission members and for limiting powers to remove members at will.¹²

Another example concerned Georgia, whose electoral legislation was evaluated by Venice Commission and ODIHR in 2004,¹³ 2006¹⁴ and 2009.¹⁵ In this year, the electoral code had reintroduced political representation in the election bodies. The system provided a central election commission with 13 members. The Chairperson and 5 members were elected by the Parliament upon nomination of the President of Georgia (selected under competition procedure), while seven members were appointed by political parties in proportion to their representation in Parliament. As the President and the parliamentary majority represented the same political interests, the ruling party had the dominant role in selecting 7 out of 13 members, with the potential to hamper the independence of election administration. In the view of the Venice Commission, this was not appropriate to depoliticize the appointment of the elections commission's members. It shows that every election legislation has to take into account the de facto distribution of political power.

9. Conclusion

In all these opinions the Venice Commission underlined that there is no “formal” or “technical” solution for the composition of election commissions that could be a remedy for political pressure or lack of respect for election laws on behalf of electoral stakeholders. But there are some provisions in an Electoral Code that even encourage a politicized and completely inefficient election administration. On the contrary, there are structures and processes that help to ensure independence of election administration. Summarized, these are political balance, proper training, the impossibility to recall members of election commissions at will as well as the transparency of their decision-making and special majorities.

Furthermore, these examples show the importance of well regulated and well administrated elections for the efficient function of democracy. Thus, independence of election commissions is no minor issue but a cornerstone of and political peace and stability.

¹² CDL-AD(2007)035 and CDL-AD(2009)005.

¹³ CDL-AD(2004)005.

¹⁴ CDL-AD(2007)037.

¹⁵ CDL-AD(2009)001.