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## **CONSTITUTIONAL COURTS' CASE LAW RELATED TO ELECTION DISPUTE RESOLUTION**

*Ladies and Gentlemen,*  
*Dear participants of the conference,*

### **Introduction**

As it was already mentioned at the conference, the Venice Commission formed the team of rapporteurs in view of preparing a **Comparative study on the issue of Election Dispute Resolution**. An overview of **practice** of the **constitutional courts** and other equivalent jurisdictional bodies is addressed in this Study.

It should be underlined that respective decisions (judgements, rulings) which were reviewed, were adopted by the constitutional courts and equivalent bodies over the course of quite a long period. Hence, it cannot be ruled out that during that time the relevant national legislative framework might change with regard to, *inter alia*, a scope of power of the constitutional courts, a procedure to challenge election' related violations and adjudication of electoral disputes, as well as applicable electoral system in the state concerned.

Also, it should be admitted that there is quite a limited volume of the decisions available at the CODICES database. Thus, none can claim that the overview is a comprehensive analysis, and some trends or structural problems were identified in a consistent manner.

However, in our opinion, such evolution of national legislation in particular countries should not diminish importance of exploring the available scope of relevant legal and factual findings established by the constitutional courts. It is worthwhile noting that the current Study pursues the goals of addressing the issues which constitute common interests for many states belonging to different legal systems. Thus, particular problems addressed by a constitutional court in one country may be of pertinent interest for some other states, provided that norms of the national legislation of the respective countries are similar, and factual circumstances arisen in different states are almost identical. At the same time, it must be emphasized that the respective legal reasonings of the constitutional courts, reviewed below, pertain to corresponding norms of national legislations which either were in legal force, or are still legally valid at the material time.

It is worth mentioning too, that a scope of authority of the constitutional courts is diverse in different states. In some systems the constitutional courts constitute a core (for example, in Austria) or integral element (for instance, in Armenia) of the system of bodies empowered to adjudicate the election' related disputes directly. In other systems the constitutional courts are authorized to interpret provisions of the national constitutions and verify whether norms of the national laws and under-law regulations comply with the constitutions (for example, in Ukraine during a period before a constitutional complaint system was introduced). Though in the later context decisions of the constitutional courts may be issued during and beyond the time limits of the electoral processes, such decisions may have a significant influence on progress of the national elections. Also, there are systems where the constitutional courts are empowered to examine constitutionality of the laws, as well as to resolve individual electoral disputes (for instance, in Croatia and Lithuania).

Taking into account the nuances mentioned above, an overview of practice of the constitutional courts and other equivalent jurisdictional bodies is systematized in two main sections, namely "Procedural Issues" and "Substantial Issues". Legal reasonings and factual findings within each of these main groups are sub-systematized based on criteria of concrete legal or factual elements.

Taking into consideration a very limited time for this presentation I would like to address the **most significate** aspects of the case law of the constitutional courts.

## **I. Procedural Issues**

Importance of establishing a clear and univocally understood legal mechanisms, including corresponding **procedural rules** pertaining to **challenging** electoral violations and **adjudication** of election related disputes was repeatedly underlined by the constitutional court of different states. Notably, the Constitutional Court of the Republic of **Armenia** held in the Decision dated April 16, 2003 (case # DCC-412), that neither the Electoral Code nor the Central Election Commission under-law regulations have established a precise order for examination of complaints filed with the election commissions.

That created a **risk of subjective interpretation** of legal norms or biased approach towards different persons. The Constitutional Court thus held that such an order shall be established both for the territorial election commissions and for the Central Election Commission. Hence, the following elements shall be specified by the laws, in particular: a **scope of persons authorized to file complaints**, an **order** and **timeframes** for **receipt of complaints** by a relevant election commission, and **registration** and **examination of complaints**.

## **I.1. Right to Initiate the Proceeding**

**I.1.1.** The Constitutional Court of the Republic of **Croatia** inquired into the issue of a scope of persons entitled to initiate a proceeding on electoral dispute before a competent jurisdictional body. In particular, it is indicated in the Decision dated May 11, 2004 (the case # U-I-2495/2002), that the Court scrutinized the relevant provisions of the Act on the Election of the President of the Republic of Croatia in compliance with the norms of the Constitutional Act on the Constitutional Court of the state. The Court established that according to the Constitution, the Constitutional Court' Act is a regulation with the legal power of the Constitution, since it has been adopted and amended under the procedure for passing and amending the Constitution of the Republic of Croatia itself. By contrast, pursuant to the Constitution, the Act on the Election of the President is an organic law passed by a majority vote of all representatives, and therefore has legal power that is inferior to that of the Constitutional Court' Act. It is stipulated by the provision of the Constitution that the Act on the Election of the President has to be in accordance with the Constitution, and also with the relevant provisions of the Constitutional Court' Act, which has the power of the Constitution.

The Constitutional Court determined that norms of the **Act on the Election of the President** grant a **smaller circle of persons** with the right to lodge a complaint than those authorized by the relevant provision of the **Constitutional Court' Act**, which gives the right to lodge a complaint to a **larger circle of persons**. The Constitutional Court thus found that the principles of an objective legal order must be respected in the procedure for the protection of the electoral rights (electoral disputes), in particular the principles of integral proceedings and the legitimacy of the parties, because they are the foundations of general procedural law of the Republic of Croatia and the guarantees of legal certainty. Hence, the persons authorized to lodge a complaint with the competent electoral commission (as the first-instance body competent for resolving an electoral dispute) have to be the same as the persons authorized to file an appeal with the Constitutional Court (as the second-instance body competent for resolving electoral disputes), since they are integral legal proceedings and consequently the circle of entities authorized to apply for legal remedies in electoral disputes must be the same.

For the reasons stated above, the Constitutional Court struck down the relevant norm of the Act on the Election of the President, so that the provision now reads as follows: "An appeal against the Electoral Commission of the Republic of Croatia may be filed to the Constitutional Court of the Republic of Croatia by the applicant in the complaint".

## **I.2. Respondents and Subject Matter of Disputes**

There are some cases where the **legal status of a respondent** to the case and **the subject matter of a dispute** were scrutinized by the constitutional courts altogether.

**I.2.1.** The Constitutional Court of **Montenegro** delivered the Decision dated November 14, 2013 (the case # U-VI 9/13). In particular, the Court held that **protection of the right to vote** includes the **right to file objections or complaints** to the competent bodies and courts. The Constitutional Court insisted that **it applies to all stages of elections** including the issues pertaining to appointment of the bodies for administering election procedure, which are also entrusted with the appointment of nominees of submitters of electoral lists for the authorized representatives to the extended formation of the polling board.

Notably, the Law on the Election of Councilors and Members of Parliament prescribes, *inter alia*, a manner in which the right to vote is protected in relation to the procedure of electing councilors and members of the Parliament. In that sense, an **electoral dispute** refers to examination by competent bodies of **all violations** of the rules of electoral procedure **from the moment of calling for election to the moment of confirmation** of the seats won at elections.

Consequently, the Constitutional Court confirmed that **complaints might be filed** against a **wide scope of infringements** during the course of the electoral process.

**I.2.2.** The Constitutional Court of **Ukraine** examined the issue on whether the minutes of the territorial (constituency) election commissions on tabulation of voting results within a territorial electoral constituency, as well as the minutes on vote count compiled by the precinct election commissions may be challenged in a court. On October 19, 2009, the Court rendered the Decision in the case # 26-pII/2009, and held that according to the Constitution, the **court jurisdiction shall extend to all legal relations** arisen in the state, and thus, to the relations pertaining to **drawing up the respective electoral minutes** during the process of election of President.

Finally, the Constitutional Court repealed some legal norms that eliminated the right to challenge the minutes.

### **I.3. System of Bodies in Charge of Election Dispute Resolution**

In a number of cases the constitutional courts scrutinized the national legal framework governing **existing system of bodies authorized to examine electoral disputes**. Below there are some examples of the decisions where the constitutional courts either admitted their own competence to adjudicate particular cases or rejected applications based on legally envisaged availability of other avenues.

**I.3.1.** A number of issues related to the system of challenging electoral violations and examination of electoral disputes was addressed by the Constitutional Court of **Ukraine** in the Decision dated February 26, 1998 (case # 1-pII/98). The Constitutional Court repealed respective provisions of the Law on Parliamentary Election which contradicted the Constitution.

Notably, the Court held that the Constitution guarantees that **everyone shall enjoy the right to challenge decisions, actions and inactions** of the bodies of the state power and local self-governance in the courts. Hence, citizens of Ukraine shall enjoy the right to challenge decisions, actions and inactions of the Central, constituency and precinct electoral commissions, as well as members of these electoral management bodies in the courts directly. In particular, the Constitutional Court insisted that decisions of the district electoral commission on annulment of election in a majoritarian constituency or declaring a winner of election as an elected member of the Parliament, may be challenged in the courts.

In such a way, the Constitutional Court of Ukraine established that the **courts of general jurisdiction** constitute a **part of the system of bodies** empowered to **adjudicate the electoral disputes**.

**I.3.2.** The Constitutional Court of **Montenegro** determined that the State Election Commission is vested with competence to examine complaints pertaining to acts of the election management bodies of lower level. In particular, the Constitutional Court mentioned in the Decision dated November 14, 2013 (the case # U-VI 9/13), that the State Election Commission rejected a complaint against a resolution of a municipal election commission on the basis that the concrete case concerned not violation of the electoral right, but appointment of authorized representatives of a political party to a polling board, which does not fall within the remit of the Commission. The State Election Commission was thus of the opinion that it lacks jurisdiction to adjudicate such a complaint.

The Constitutional Court of Montenegro held that those persons, submitting the electoral lists, are eligible to nominate their authorized representatives to the extended formation of the polling board, are entitled to appoint their authorized representative each, and are to notify a municipal election commission of such nominations. The Constitutional Court established that, in compliance with the Law on the Election of Councilors and Members of Parliament, submitters of election lists are entitled to file a complaint to the competent body, namely, the State Election Commission, if they are of the opinion, that an act or decision of a municipal election commission violated their right to nominate a representative to the extended formation of an electoral board in the election process.

Accordingly, the Constitutional Court held that the State Election Commission had failed to vindicate the complainant's right in the procedure for establishing the list of nominees to be appointed representatives to the extended polling board, while rejecting the complaint as inadmissible, due to its lack of jurisdiction. The Constitutional Court of Montenegro determined that the State Election Commission is granted with relevant authority, and this Commission thus shall act as a body responsible to examine the election related disputes. The Constitutional Court therefore established that the contested decision of the State Election Commission was legally unfounded and the complaint legally founded.

Hence, finally the Constitutional Court held that the State Election Commission **must therefore examine** the **applicant's complaint** within the time prescribed by the law.

**I.3.3.** The Constitutional Court of **South Africa** interpreted the provisions of the Constitution and the laws in such a manner that the Court **admitted its own competence** to examine some cases. In particular, it is acknowledged by the Constitutional Court in the Judgement dated February 24, 2006 (the case # CCT 10/06), that there is no provision in the Municipal Electoral Act which renders the norm of the Electoral Act applicable to disputes arising from municipal elections. Accordingly, on a proper interpretation of the Municipal Electoral Act, read with the Electoral Act, the corresponding norm of the Electoral Act is not applicable to disputes arising from municipal elections.

The Constitutional Court nevertheless underlined, that there is also no express provision in the Municipal Electoral Act stating that the decision of the Electoral Court is final. In these circumstances, it cannot be said that the corresponding norm of the Electoral Act applies to disputes arising from municipal elections and accordingly cannot on any terms be held to oust the jurisdiction of the Constitutional Court to entertain an appeal. **Legislation should not be presumed to have intended to oust the Court's jurisdiction when it does not expressly state as such.**

The Constitutional Court also noted that “the closer the appeals are to the election, the greater the risk of disruption to the elections. It is clear that elections should not unnecessarily be disrupted. On the other hand, political rights are central to a democratic society and their protection is an important constitutional purpose”. These two interests may at times point in opposite directions. For example, an appeal may raise the question of an applicant's political rights but entertaining the appeal and granting the relief may result in the disruption of the election in a manner quite disproportionate to the right claimed by the applicant. The timing of the application for leave to appeal will be of great importance. In this case, the elections are imminent and disruption to them is a risk. However, the political rights at issue involve a large number of voters in one of the major metropolitan areas and are therefore substantial. Hence, the Constitutional Court held it was necessary to examine the merit of the appeal.

#### **I.4. Time Limits for Filing Complaint/Lawsuit**

**I.4.1.** A procedural aspect of the time limits to challenge electoral violations in courts was scrutinized by the Constitutional Court of **Ukraine**. In particular, it is stated in the Decision dated July 03, 2003 (case # 13-пп/2003), that the Law on Parliamentary Election envisages the time limits for filing complaints that pursue the aims to ensure enjoyment of the electoral rights of citizens, election of a legitimate composition of the Parliament, and opportunity for the Parliament to commence its activity within the time limits anticipated by the Constitution. Hence, in the opinion of the Constitutional

Court, **short terms** for **filing electoral complaints** correspond to **specifics** of the **electoral process**. At the same time, enforcement of these short time limits **shall not restrict** the **rights** and **freedoms** of the voters, political parties, and candidates.

The Constitutional Court noted that according to norms of the Law on Parliamentary Election, the complaints on violations committed by the precinct election commissions during the course of a vote count and tabulation of results of voting at a precinct, and by the constituency election commissions during the course of a tabulation of electoral results within a constituency, may be filed in the court or the superior election commission within 2 and 5 days, accordingly, beginning with the day of election, but not with a day, when an alleged violation was committed. At the same time, the Court held that **in practice it deprived** a number of the election contestants **from the right to file a complaint** in cases, when the alleged violations were committed by the election commissions after an expiry of relevant time limits.

The Constitutional Court thus found the relevant provisions of the Law on Parliamentary Election as unconstitutional, and repealed them.

### **I.5. Legal Status and Scope of Competence of Bodies Authorized to Adjudicate Electoral Disputes**

Quite a broad range of issues pertaining to **legal status** and **scope of competence** of courts, election management bodies, and other authorities in charge of election dispute resolution was addressed in respective decisions of the constitutional courts.

**I.5.1.** The Constitutional Court of **South Africa** examined the issue of a scope of competence of the Electoral Court while adjudicating the case # CCT 64/15. In particular, the Constitutional Court indicated in the Judgement dated November 30, 2015, that “the jurisdiction to review any decision of the Electoral Commission relating to an electoral matter affords the Electoral Court a power of judicial oversight over the activities of the Commission”. The Electoral Court is authorised to examine any decision by the Electoral Commission and substitute it with its own, and “the range of electoral matters may be great”. The Constitutional Court held that “certainly all the issues arising in the present case relate to electoral matters. They concern who may vote and whether all those who voted were entitled to do so. They also concern the ability of candidates to ascertain who their electorate is and to canvass for support. These matters are fundamental to the electoral process and the conduct of free and fair elections”.

The Constitutional Court further observed that “in addition to this broad power of review, the Electoral Court may hear an appeal against any decision of the Electoral Commission insofar as that decision involves a question of law or is provided for in any law”. Hence, “all electoral disputes, apart from infractions of the Electoral Code, will necessarily have arisen because in the exercise of its powers the Electoral Commission has made a decision concerning an electoral matter. Until that has

occurred one way or the other the dispute will not have crystallised sufficiently for it to be pursued before the Electoral Court”.

## **I.6. Procedure of Examination of Electoral Disputes. Legal Remedies**

**I.6.1.** The Constitutional Court of the Republic of **Lithuania** looked into the issue of **legal remedy** while adjudicating the case # 13/93. In the Ruling dated June 30, 1994, the Court indicated that at the material time when the Seimas adopted the disputed resolution, the Constitutional Court did not yet commence its function. Therefore, the legal mechanism of investigation and settling the disputes pertaining to the violations of Laws on Elections could not be applied. Thus, the mechanism of the judicial control was employed, stipulated by the Law on Election to the Seimas which was in effect at that time, namely an opportunity to file the complaints considering the declaration of the elections invalid with the Supreme Court of the Republic of Lithuania.

The Supreme Court established the infringements of the Law on Elections to the Seimas, committed by the Central Electoral Committee in three electoral districts, and nullified unlawful and groundless resolutions of the Central Electoral Committee. In the statement of reasons, the Supreme Court’ specified the Court does not obligate the Central Electoral Committee to confirm other election results, because the Law on Election to the Seimas imposes the duty of the Committee to confirm correct election results. However, the Central Electoral Committee adopted the resolution which stated therein that, regardless of the decisions of the Supreme Court the Committee “does not find any legal basis for changing” its resolution previously nullified by the Supreme Court which confirmed the final results of elections to the Seimas electoral districts.

The Constitutional Court underlined that “in legal power a court decision equals to the law, therefore, no one may refuse to abide by court decision”. Thus, the Constitutional Court concluded that the disputed decision of the Seimas was adopted under the circumstances when the Supreme Court’ decisions were ignored by the Central Electoral Committee, and legal remedies for bringing an act of the later in conformity with these decisions were not available. Hence, the decision of the Seimas should be regarded as “the **inevitable measure**, as it **overcame the disregard of powers of judicial authority**”.

**I.6.2.** One of the most important factors pertaining to examination of electoral disputes is a **manner of interpretation** of the **substantial legislation** by the jurisdictional authorities. Specifically, this aspect is of high significance when the issue of restriction of certain rights is at stake.

On May 17, 2005, the Constitutional Council of France rendered the Decision on the appeal relating to eligibility to stand as a candidate in the Presidential election. The Constitutional Council indicated that with regard to the Presidential election, it exercises



powers which are both advisory and judicial, and it also adjudicates immediately on certain claims concerning acts preliminary to the election.

The Constitutional Council held that **any restriction on the exercise of a civic right must be interpreted restrictively**. In particular, the Council offered a **liberal interpretation** to the relevant provisions of the Electoral Code envisaging that “no one shall be elected unless he shows that he has satisfied his obligations under the law on recruitment to the army”. Finally, the Council established that a person concerned, who was **doing his military service**, should be regarded as **having satisfied the obligations of the law**.

## **I.7. Challenging the Results of Election**

There were a number of cases examined by the constitutional courts where the final results of election constituted a subject matter of the disputes. An overview of these decisions demonstrates to some extent **various approaches** of the constitutional courts of the **distinct countries** in this particular matter.

**I.7.1.** For instance, the Constitutional Court of **Austria** was requested to review the second round of the Presidential election. In particular, the appellant claimed, that the election results had been affected by widespread irregularities. As it is indicated in the Decision of the Court dated July 01, 2016 (the case # WI 6/2016), the legal provisions on elections aiming at preventing abuse or manipulation must be applied strictly in accordance with their wording. The Court determined, that an option of postal voting is not unconstitutional as such, and can therefore remain in effect. However, the Court established that “infringements of the law occurred in numerous districts in the implementation of the system of postal voting”.

Amongst other considerations, the Constitutional Court insisted that activities directly relating to the counting of votes, must be performed by the electoral authority as a collegiate body (i.e. by the chief electoral officer and the assistant electoral officer together). This is required in order to ensure transparency in the establishment of the electoral result. The Court established, that in a number of the electoral districts the rules governing the implementation of the postal voting system were not complied with. The infringements concern a total of 77,926 postal votes. At the same time, the difference in the numbers of votes cast for each of two candidates amounts to 30,863 votes. As the number of votes concerned by the infringements by far exceeds 50% of that difference (15,432 votes), the infringements may have had an influence on the election result.

The Constitutional Court mentioned that when the **infringements of the law are of an extent** that they “**may have had an influence on the election result, it is of no relevance if manipulations have actually occurred or not**”. Consequently, the Court concluded that the **runoff election of the Federal President must be repeated in its entirety** in all of Austria.

**I.7.2.** The Constitutional Court of **Slovakia** addressed the issue of annulment of election in the case # PL. ÚS 19/94 as well. In particular, in the Decision rendered on November 02, 1994, the Constitutional Court indicated that the petition filed by the political party was targeted at an allegedly unjust course of events in the conduct of the election. It was based on the alleged inequality of opportunity for public discussions offered by the Slovak Television to «big» and «small» political parties, thereby infringing the Electoral Law.

The Constitutional Court ruled that its power to declare elections void does not extend to all infringements of the Electoral Law. **If every infringement of the Law could result in the nullity of the election, the election could easily be indefinitely postponed and parliamentary democracy could be shaken or even destroyed.** That is why **negligible infringements** of the Electoral Law **are not a ground for declaring the election void.** Solely gross, consequential or recurrent infringements of the law constitute a legal ground for exercising the power to declare an election void.

Upon examination of the arguments advanced by the petitioner, the Constitutional Court ruled that the infringement of the Electoral Law invoked by the petitioner had **none** of the **qualities** of the above-mentioned criteria. The petition was dismissed accordingly.

**I.7.3.** On January 26, 2005, the Constitutional Court of the **Czech Republic** rendered the Decision in the case # Pl. US 73/04 pertaining to the issue of annulment of the election of Senator in one of the electoral districts. Amongst other things the Court noted that a basic function of the Constitutional Court, in remedial actions based on decisions concerning the certification of the election of Deputy or Senator, is to ensure that elections are properly conducted. The decision of the voters, which constitutes sovereign authority, can be modified by the judiciary authority only in exceptional cases where defects in the electoral process caused, or could demonstrably have caused, the voters to decide differently, as a result of which another candidate would have been elected. Therefore, the issue before the Constitutional Court was the validity of the election of the petitioner's candidate, and not the non-election of candidate who filed a complaint, itself.

The Court held that the **rules concerning verification of elections** are based upon the **presupposition** of an **objective connection**, or **at least a possible causal connection**, between a **defect** in an electoral procedure and the **composition** of the **representative body**. However, such a possible causal connection **must be interpreted** in the light of **certain facts**, **rather** than it **simply being** an **abstract possibility**. The **annulment** of the election **must not be seen** as a **sanction** for the **violation** of **electoral enactments** but rather as a **means** of **ensuring** the **legitimacy** of the **elected body**. What is **decisive** is the **probability** of the **impact** of the electoral defect on the **actual results** of election.

The Constitutional Court ruled that it was not proven that the provisions of the Act on Elections were violated **in such a manner** as to **influence** the **outcome** of the election because the material elements defined in the basic substantive provisions of the electoral proceedings had been met.

**I.7.4.** In the Decision dated October 21, 1993 (the case ## 2 BvC 7/91, 2 BvC 8/91, 2 BvC 9/91, 2 BvC 10/91, 2 BvC 11/91, 2 BvC 12/91) the Federal Constitutional Court of the **Federal Republic of Germany** enunciated fundamental criteria for examination of the results of election. Notably, the Constitutional Court held that review of the validity of elections is **only admissible** if a **violation** of a provision concerning the elections **has an impact** on the **distribution** of the **seats** in the Parliament.

## **II. Substantial Issues**

It was remarkably noted by the Constitutional Court of South Africa in the Judgement rendered on November 30, 2015 (the case # CCT 64/15), that “**there is no internationally accepted definition** of the term “**free and fair elections**”. The Court insisted that whether any election can be so characterised **must always** be **assessed in context**. “Ultimately it involves a value judgement. The following elements can be distilled as being of fundamental importance to the conduct of free and fair elections. First, every person who is entitled to vote should, if possible, be registered to do so. Second, no one who is not entitled to vote should be permitted to do so. Third, insofar as elections have a territorial component, as is the case with municipal elections where candidates are in the first instance elected to represent particular wards, the registration of voters must be undertaken in such a way as to ensure that only voters in that particular area (ward) are registered and permitted to vote. Fourth, the Constitution protects not only the act of voting and the outcome of elections, but also the right to participate in elections as a candidate and to seek public office”.

These and other issues constitute a range of **substantial components** of the relevant election’ related disputes. In this section of the Study, the legal views of the constitutional courts pertaining to a range of **substantial components** are summarised.

### **II.1. Rights to Vote and Stand for Elections**

The fundamental political rights to vote and to stand for election (or, to be elected) constituted a subject matter of a number of cases examined by the constitutional courts and other equivalent jurisdictional bodies in some states.

**II.1.2.** As a result of adjudication of the case # CCN 9/99 the Constitutional Court of South Africa rendered the Judgement on April 13, 1999. Among other aspects the Court addressed the issue of effectiveness of the electoral rights, and role of the legislator to guarantee such effectiveness. In particular, the Constitutional Court held

that “the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless”.

The Constitutional Court emphasized that **“the right to vote is of course indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former.** The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised. Two of these implications are material for this case: each citizen entitled to do so must not vote more than once in any election; any person not entitled to vote must not be permitted to do so. The extent to which these deviations occur will have an impact on the fairness of the election. This means that the regulation of the exercise of the right to vote is necessary so that these deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote”.

Also, the Court noted that “the requirement that only those persons whose names appear on the national voters’ roll may vote, renders the requirement that South African citizens must register before they can exercise their vote, a constitutional imperative. It is a constitutional requirement of the right to vote, and not a limitation of the right”. The Constitutional Court thus held that “it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a court. But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional”. Hence, in the Court’ opinion, “Parliament must ensure that people who would otherwise be eligible to vote are able to do so if they want to vote and if they take reasonable steps in pursuit of the right to vote”.

The Constitutional Court further insisted that “Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so”. The Court concluded, therefore, “that the Act would infringe the right to vote if it is shown that, as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right. Any scheme which is not sufficiently flexible to be reasonably capable of achieving the goal of ensuring that people who want to vote will be able to do so if they act reasonably in pursuit of the right, has the potential of infringing the right”.

The Court arrived at a view that “the responsibility of ensuring that people know of the requirements for voting is not only that of the government. Indispensable to any democratic process is that political parties will ensure that their potential supporters are aware of the prerequisites of voting and comply with them”.

**II.1.3.** The Constitutional Court of the **Former Yugoslav Republic of Macedonia** scrutinized the issue of whether the limitation of the electoral rights envisaged by the National Constitution might be extended by the electoral laws. Notably, the Constitutional Court in the Decision dated March 12, 1997 (the case # U.2/97), insisted that under the Constitution, any citizen on reaching 18 years of age acquires the electoral rights. This right is enjoyed equally, universally and directly and it is exercised at free elections by secret ballot. Only persons deprived of civil capacity are excluded from the right to vote and to be elected.

The Constitution does not distinguish between the “active” and the “passive” electoral rights, which means that once the determined conditions are fulfilled the citizen acquires the right to vote and the right to be elected. No special conditions for the acquisition of the right to be elected are envisaged except for the election of the President of the Republic. In view of the fact that the **Constitution has established fundamental electoral principles** allowing the electoral regime and procedure to be determined by the law, the **legal presumption** is that the **electoral laws should be consistent** with the **Constitution**, i.e. **they cannot contain restrictions on the electoral rights which extend beyond the limits of the constitutional frame**, in particular, **limitation on the right to be elected for a certain category of citizens**.

For these reasons, the Constitutional Court repealed the challenged provision of the Law on Local Elections, under which the members of the armed forces, uniformed police officers and authorized officers of the Ministry of Internal Affairs and Intelligence Agency, may not be nominated or elected as members of Local Council or as a mayor.

### **II.3. Campaigning**

**II.3.3.** The Constitutional Council of **France** rendered the Decision in the case # 59-213 on July 09, 1959. Among other issues the Council concluded that the **means employed for the purposes of election propaganda must not amount to pressure or manoeuvres** capable of **adversely affecting the freedom** or the **sincerity** of the vote.

**II.3.4.** The Constitutional Court of **Ukraine** scrutinized the respective provisions of the Law on Presidential Election that prohibited certain category of individuals to participate in the electoral campaigning. On March 24, 2005 (the case # 3-пп/2005), the Court held that the main aim of the electoral campaign is to externalize the voters’ will to vote for the one of the other candidates. The Constitutional Court noted that the Law envisages a **range of limitations to participate in campaigning**. In particular,

the bodies of the executive power and local self-governance, their officials and officers, as well as the election commissioners are **prohibited to campaign**.

The Constitutional Court insisted that **such a ban is aimed**, first of all, to **prevent the use of public sources in favor of the one or the other candidates**. Second, the said ban is **aimed to eliminate a pressure on voters**. In the Court view, the legislative prohibition to participate in the electoral campaigning is stipulated by the need to create conditions for free expression of voters' will during the course of the election. Hence, the Constitutional Court determined the **legitimate purposes** of imposing the limitations of the right to participate in electoral campaigning for **certain category** of persons.