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10 YEARS OF THE CODE OF GOOD PRACTICE IN ELECTORAL MATTERS

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1. Introduction

More than two decades after the fall of the communist regimes in central and eastern Europe (CEE), most countries in the region have held general elections in accordance with international democratic standards. However, as various observer reports indicate, in some CEE countries the elections cannot be called "free and fair", and in several others there have been serious shortcomings in the democratic quality of elections, although the principles of universal, equal, free, secret and direct suffrage are constitutionally enshrined in these countries.

It goes without saying that democracy, first of all, needs the commitment of the state authorities and other stakeholders, such as political parties and the media, to conduct free and fair elections. But electoral laws matter as well, because the regulations on electoral administration, campaigning, voting procedures, etc., may be a more or less favourable framework for implementing the constitutional principles of democratic suffrage. This is particularly true for CEE countries which, unlike Western democracies, have neither a long-standing tradition of rule of law nor an administrative history based on the bureaucratic principle of impartiality. Due to these contextual differences, electoral legislation from Western Europe could not serve as a blueprint for CEE countries. Instead, the electoral codes that were introduced in the region during the early 1990s have been constantly amended. Within this process, international organisations have played an important role. Many recommendations of the Council of Europe and the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR), based on regular electoral monitoring, were taken up by national authorities. Additionally, the Council of Europe made a great effort to standardise the notion of European electoral heritage in the "Code of good practice in electoral matters" (CDL-AD (2002) 23 rev; hereinafter referred to as "the Code"), which provides generally accepted guidelines for implementing the principles of democratic suffrage. As a consequence, electoral legislation in CEE countries has considerably improved since the 1990s. Nevertheless, various shortcomings in the democratic quality of elections remain. As highlighted by the "Report on electoral law and electoral administration in Europe" adopted in 2006 (CDL-AD (2006) 18, hereinafter referred to as "the

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2006 Report"), electoral practice in several CEE countries has been problematic, suggesting the need for further debate and potential amendments.

Following up from the 2006 Report, this paper tries to shed some light on recurrent problems of electoral legislation in CEE countries. For the sake of conciseness, it will focus on five issues that may be regarded as major challenges on the way to an electoral practice that meets international democratic standards. The next section will elaborate on these issues, illustrating the relevant problems with observations from recent elections in selected CEE countries. The third section concludes.

2. Recurrent challenges of electoral legislation in central and eastern Europe

The 2006 Report identifies 12 key areas in which there were significant problems with electoral matters in CEE countries from the 1990s to the early 2000s.[2] Building on this thorough and detailed stock-taking, the following considerations concentrate on five major areas of the electoral process that still pose critical challenges to the implementation of democratic suffrage in the region. These concern:

– the structures and procedures of the election administration;
– the right to vote and eligibility to be elected;
– the regulations of the election campaign;
– voting and vote counting;
– provisions for electoral appeal.

The ensuing paragraphs will highlight the overall challenges as well as specific issues that deserve particular attention in further debates on electoral reform.

2.1. Election administration: providing for impartiality and organisational effectiveness

To secure the democratic quality of general elections, a professionalised election administration is indispensable. It has to meet two essential requirements. First, it has to prevent any intervention in electoral management by the acting government or by other political players. Second, it should provide for a smooth electoral process that is strictly in line with international standards and thus cannot be credibly blamed for being unfree and/or unfair. Of course, there are many regulative details that need to be considered in establishing an impartial and effective election administration. Nevertheless, some key issues stand out. Following the relevant stipulations of the Code,[3] Electoral Commissions (ECs) should be set up as independent, permanent and multi-tiered bodies; EC members should be appointed by different institutions, not be recallable (except for

2. CDL-AD (2006) 18, sections II to XIII.
3. CDL-AD (2002) 23 rev, pp. 26-29.

clearly specified disciplinary reasons) and receive standardised training in election management; and EC procedures should be clear and efficient, allowing for inclusive discussions and effective decisions at the same time.

Although these norms have come to be enshrined in the electoral codes of CEE countries over the past decade, there are still specific shortcomings in some countries. A case in point is Belarus, where the president has predominant powers in appointing and dismissing the members of the central election commission. This has severely affected the independence and impartiality of the commission. The lower tiers of the election administration in Belarus have similar problems. The OSCE report on the 2010 presidential election notes that clear selection criteria for the members of territorial and precinct election commissions are lacking. As a consequence, the bulk of members for these commissions were nominated by pro-government organisations whereas the nominees of opposition groups were mostly rejected without proper justification.[4]

The provisions for selecting and replacing EC members also deserve scrutiny in other CEE countries. In Albania, for example, OSCE observers questioned "the unrestricted right of political parties to replace members of mid-level and lower-level election commissions at will and without any legal cause (Articles 32.2 and 39.2 of the Electoral Code)". This referred to the 2009 parliamentary elections, when political parties made excessive use of their right to replace commission members, which "significantly affected the independence, professionalism and efficiency of the election administration and had a negative impact on the integrity of the electoral process".[5]

Other recurrent problems in electoral administration concern organisational structures. In the 2012 parliamentary and presidential elections in Serbia, for instance, the ECs were generally observed to have fulfilled their duties "efficiently and within legal deadlines".[6] However, as a regional tier of election administration is still missing, the local ECs were hardly able to cope with the huge amount of work to be done. As there had been similar difficulties in previous elections, international observers renewed their recommendation to introduce an intermediate level of election administration.[7]

The last issue to be discussed here addresses a specific challenge: the organisation of voting from abroad. In many European states, this has been possible

4. OSCE/ODIHR (2011), *Republic of Belarus, presidential election, 19 December 2010, election observation mission final report,* Warsaw, 22 February 2011, pp. 8-9.
5. OSCE/ODIHR (2009), *Republic of Albania, parliamentary elections, 28 June 2009, election observation mission final report,* Warsaw, 14 September 2009, pp. 7-8.
6. OSCE/ODIHR/PACE/OSCE PA (2012), *International election observation: Republic of Serbia – parliamentary and early presidential elections, 6 May 2012. Statement of preliminary findings and conclusions*, Belgrade, 7 May 2012, p. 2; see also Council of Europe, Parliamentary Assembly (2012), *Observation of the parliamentary elections and the early presidential election in Serbia (6 May 2012)*, Doc. 12938, p. 5.
7. CDL-AD (2006) 18, p. 8.

only in the recent past.[8] This is particularly true for Moldova, where the 2010 parliamentary election was the first in which citizens were allowed to vote from abroad. However, there were serious political controversies because "the criteria for establishing polling stations abroad were not transparent and the distribution of polling stations abroad did not correspond to the distribution of citizens of voting age residing abroad".[9] Some stakeholders suspected the governing parties of manipulating the process in order to advantage their political strongholds abroad at the expense of those foreign countries in which the opposition's support was stronger. In this case, more precise guidelines for establishing polling stations abroad would definitely help to avoid allegations of election fraud in the future.

2.2. Right to vote and eligibility: securing non-discrimination

Universal suffrage – the right to vote (active electoral right) and to stand for election (passive electoral right or eligibility) – is a core element of modern democracy. It is of utmost importance that these fundamental rights are neither formally nor practically restricted without sufficient justification.[10]

The actual regulations on voting rights in CEE countries are generally in line with international standards. Problems that remain include franchise restrictions for particular groups, such as prisoners (e.g. in Armenia, Belarus and Bulgaria).[11] In some cases, passive electoral rights have also been unreasonably limited. For example, the electoral legislation in Armenia and Kazakhstan stipulates that candidates for parliament must have lived in the country for five and ten years respectively. Such lengthy residency requirements are inconsistent with good electoral practice.[12] Furthermore, at the 2010 general elections in Bosnia and Herzegovina citizens were barred from standing for the presidency on the basis of their ethnicity. This is a clear infringement of the European Convention on Human Rights.[13]

8. Nohlen D. and Grotz D. (2007), "The legal framework and an overview of electoral legislation", International IDEA, *Voting from abroad: the International IDEA Handbook,* International IDEA/IFE, Stockholm.
9. OSCE/ODIHR (2011), *Republic of Moldova, early parliamentary elections, 28 November 2010, election observation mission final report*, Warsaw, 26 January 2011, pp. 7-8; see also Council of Europe, Parliamentary Assembly (2011), *Observation of the early parliamentary elections in Moldova (28 November 2010)*, Doc. 12476, p. 5.
10. The Code specifies a number of conditions, such as age and nationality, which are not seen as unwarranted limitations of universal suffrage. See CDL-AD (2002) 23 rev, pp. 14-15.
11. OSCE/ODIHR/PACE/OSCE PA/European Parliament (2012), *International election observation: Republic of Armenia – parliamentary elections, 6 May 2012. Statement of preliminary findings and conclusions*, Yerevan, 7 May 2012, p. 3; OSCE/ODIHR, *supra* note 4, at 6; OSCE/ODIHR (2012), *Republic of Bulgaria, presidential and municipal elections 23 and 30 October 2011, election observation mission final report*, Warsaw, 5 January 2012, p. 6.
12. OSCE/ODIHR/PACE/OSCE PA/European Parliament, *supra* note 11, at 2; OSCE/ODIHR (2012), *Republic of Kazakhstan, early parliamentary elections, 15 January 2012, election observation mission final report*, Warsaw, 3 April 2012, p. 7.
13. OSCE/ODIHR (2010), *Bosnia and Herzegovina, general elections, 3 October 2010, election observation mission final report*, Warsaw, 17 December 2010, p. 5; Council of Europe, Parliamentary Assembly (2010), *Observation of the general elections in Bosnia and Herzegovina (3 October 2010)*, Doc. 12432.

Even more widespread are various practical problems that lead to *de facto* discrimination of (potential) voters and candidates. First of all, the implementation of universal suffrage presupposes complete voter registers and accurate procedures for voter registration. This issue is certainly "one of the most complex, controversial and often least successful parts of electoral administration in emerging and new democracies".[14] In this respect many CEE countries have made considerable progress in the last few years, especially by introducing unified and computerised voter registers. However, some shortcomings remain. For instance, international observers of the 2012 elections in Armenia reported that "the exchange of data among government institutions was insufficiently organised".[15] In other countries a sizeable number of voters remained unregistered prior to election day.[16] Such "last-minute enrolment" should be avoided since it opens the door for (allegations of) election fraud.[17] This concern is particularly relevant for out-of-country voting that can hardly be monitored by domestic observers. The 2010 election in Moldova, when nearly all voters abroad were "added to supplementary lists on election day",[18] was highly suggestive of manipulation by the acting government.

The registration of candidates is an equally important issue since overly restrictive candidacy requirements and/or their incorrect implementation may hinder citizens in making use of their passive electoral right. At some recent elections in CEE countries, international observers have received credible reports that candidates were directly intimidated or their supporters were put under pressure to withdraw their signatures from the relevant signature sheets.[19] Another problem in this context refers to cases in which candidates have been denied registration for dubious reasons. In Kazakhstan, for instance, several candidates for the 2012 parliamentary election were de-registered because of alleged discrepancies in their tax declarations. But these persons were neither notified by the state authorities about the alleged discrepancies, nor were they given the opportunity to appeal.[20] Similarly, in Azerbaijan, a number of citizens were deemed inadmissible to stand for the 2010 election because of "minor technical mistakes and without due consideration of the principle of proportionality of errors".[21]

14. CDL-AD (2006) 18, p. 14.
15. Council of Europe, Parliamentary Assembly (2012), *Observation of the parliamentary elections in Armenia (6 May 2012)*, Doc. 12937, p. 3; OSCE/ODIHR/PACE/OSCE PA/European Parliament, *supra* note 11, at 2.
16. See for instance, OSCE/ODIHR (2010), *Ukraine, presidential election, 7 January and 17 February 2010, election observation mission final report*, Warsaw, 28 April 2010, p. 2; OSCE/ODIHR (2011), *Azerbaijan, parliamentary elections, 7 November 2010, election observation mission final report*, Warsaw, 25 January 2011, p. 8.
17. CDL-AD (2006) 18, p. 16.
18. OSCE/ODIHR, *supra* note 9, at 7-8; Council of Europe, Parliamentary Assembly, *supra* note 9, at 5.
19. See for example OSCE/ODIHR, *Azerbaijan, supra* note 16, at 9-10.
20. OSCE/ODIHR, *supra* note 12, at 11-12; Council of Europe, Parliamentary Assembly (2012), *Observation of the early parliamentary elections in Kazakhstan (15 January 2012)*, Doc. 12884, pp. 3-4.
21. OSCE/ODIHR, *Azerbaijan, supra* note 16, at 9-10; Council of Europe, Parliamentary Assembly (2011), *Observation of the parliamentary elections in Azerbaijan (7 November 2010)*, Doc. 12475.

Although such practices cannot be completely eliminated by formal regulations, the relevant provisions should be scrutinised in order to clarify the relevant procedures, especially with regard to appeal proceedings (see also Section 2.5).

2.3. Election campaign: ensuring equal opportunities

In the run-up to democratic elections, all parties and candidates must be given equal opportunities to campaign.[22] State authorities should ensure level playing fields by (a) assuring freedom of movement, expression and association; (b) securing equal treatment of parties and candidates with regard to public facilities and resources; and (c) providing for equal media access and neutral media information. In this regard, the legal provisions in CEE countries have improved considerably in recent years. But, ensuring equal campaign conditions continues to be difficult in several countries.

Apart from the open intimidation of opposition candidates that is still observed in some cases,[23] there are also recurrent instances of public facilities and resources being (mis)used to support the campaigns of particular candidates or parties. A case in point is Belarus, where members of the government administration used to serve on the president's campaign team during working hours.[24] More widespread are infringements of the principle of campaign neutrality at regional or local level. In the 2012 Armenian elections, for example, "this included teachers being involved in campaign events during school hours … and the posting of campaign materials on schools and municipal buildings".[25]

A further challenge that applies to several countries is the impartial coverage of election contestants in the media. According to OSCE/ODIHR observation reports, in countries such as Georgia private TV channels are particularly biased against certain candidates or parties;[26] in others, like Ukraine and Russia, it is primarily the state-owned broadcasting stations that fail to provide neutral and balanced information on the candidates – a practice that openly contradicts the legal requirements in these countries.[27] Interestingly enough, despite such obvious shortcomings most recent observation reports do not make detailed recommendations for improving media regulations in the election codes. This might indicate that more balanced and neutral media reporting can hardly be achieved by legal amendments alone.

22. CDL-AD (2002) 23 rev, p. 7; CDL-AD (2006) 18, p. 20ff.
23. See for example OSCE/ODIHR (2008), Republic of Georgia, parliamentary elections, 21 May 2008, election observation mission final report, Warsaw, 9 September 2008, p. 12.
24. OSCE/ODIHR, *supra* note 4, at 10-11.
25. OSCE/ODIHR/PACE/OSCE PA/European Parliament, *supra* note 11, at 2; Council of Europe, Parliamentary Assembly, *supra* note 15, at 4.
26. OSCE/ODIHR, *supra* note 23, at 15.
27. OSCE/ODIHR, *Ukraine*, *supra* note 16, at 2; Council of Europe, Parliamentary Assembly (2012), *Observation of the presidential election in the Russian Federation (4 March 2012)*, Doc. 12903, p. 5.

2.4. Voting and counting: safeguarding procedural accuracy and transparency

Procedures on election day – voting and vote counting – have to be accurate and take place in a transparent manner. With regards to the polling procedure, simultaneous implementation of the principles of equal and secret suffrage cannot be taken for granted, especially in the context of emerging democracies. One crucial challenge has been to avoid "multiple voting", that is, the casting of ballots in more than one place by the same person. Electoral officers at polling stations must precisely identify each voter and attentively monitor the casting of ballots. At the same time, the voting act itself has to be secret, that is, "family voting and any other form of control by one voter over the vote of another must be prohibited" and "persons actually voting should not be published".[28]

According to these benchmarks, the polling practice in CEE countries seems to have improved considerably compared to the situation described in the 2006 Report.[29] In many recent elections, international observers assessed the overall voting process as "good". Only in a few cases, for instance Bosnia and Herzegovina, were breaches of the secrecy of the vote, family voting and proxy voting mentioned in election reports.[30] However, the overall practice of vote counting still reveals serious shortcomings. In a number of recent elections, various infringements were observed that affected the integrity of the election process. These include instances of ballot box stuffing, tampering with results, unperformed reconciliation procedures, and uncompleted or unpublished protocols of the election results.[31] Although the relevant legal provisions seem to be quite solid and precise in most countries, the practice of vote counting is still in need of improvement.

The most recent trend in efforts to increase the transparency of voting and counting procedures in CEE countries is the employment of new technologies. The Russian Federation seems to be a front-runner in this respect:[32] at the 2012 presidential elections, web cameras were installed in each polling station in order to record the polling and counting procedures. Furthermore, many polling stations were equipped with ballot scanners and touch-screen voting machines to ensure the election's integrity. However, these innovative practices met with quite ambivalent reactions. While some OSCE interlocutors considered them a useful tool for increasing transparency, others doubted whether such new technologies could really capture serious violations of the election law that took place outside the purview of the cameras. Furthermore, the use of "surveillance" technologies

28. CDL-AD (2002) 23 rev, p. 9.
29. CDL-AD (2006) 18, pp. 28-33.
30. OSCE/ODIHR, *supra* note 13, at 3; Council of Europe, Parliamentary Assembly, *supra* note 13.
31. See for example OSCE/ODIHR, *supra* note 23, at 3; OSCE/ODIHR, *Azerbaijan*, *supra* note 16, at 3; OSCE/ODIHR, *supra* note 4, at 3.
32. OSCE/ODIHR (2012), *Russian Federation, presidential election, 4 March 2012, election observation mission final report*, Warsaw, 11 May 2012, pp. 7-9.

may potentially undermine the secrecy of the vote. As "any interested person could access the web cameras' live audiovisual feed on a special website",[33] one might question if this practice runs counter to the stipulation of the Code that "the list of persons actually voting should not be published".[34] In Western democracies, privacy has become a highly sensitive issue in the recent past. The further employment of new technologies at polling stations in CEE countries should thus be monitored attentively, since the growing effectiveness in making electoral procedures more transparent might at the same time prove a hindrance to secret suffrage.

2.5. Election appeal: accessibility and consequentiality of review procedures

Like any legal norm in a rule-of-law system, compliance with electoral legislation must be open to challenge before a body of appeal.[35] This applies to potential irregularities throughout the entire electoral process, that is, not only to the electoral outcome as such but also to all decisions taken before election day concerning the right to vote, electoral registers, candidacies, campaign rules, etc. There are different ways to organise procedures for resolving electoral disputes: appeals might be brought before either an electoral commission or a court, or the line of appeal can encompass both kinds of institutions. In emerging democracies particularly, appeal regulations are critical for the legitimacy of elections. To strengthen an election's integrity, it should meet two fundamental requirements. First, election appeals should be accessible to any stakeholder (voters, candidates and political parties). This implies, in particular, that the competences of appeal bodies should be precisely defined and the relevant procedures designed in a transparent and easily understandable fashion. Second, the judicial review has to be consequential, that is, appeal bodies should have the authority to annul the elections (whereby this annulment may not necessarily refer to the entire election outcome but to parts of it). While the claim of consequentiality might be taken for granted from a normative rule-of-law perspective, it has been of utmost importance for electoral practice in CEE countries. As the 2006 Report notes:

> There is still a "culture of impunity" for election-related offences. Of particular concern is the fact that election officials are seldom held legally or administratively accountable for electoral violations. … The relevant authorities' general failure to take measures against election violations undermined the credibility of, and public confidence in, elections of several countries.[36]

Although there have been some improvements in this respect in recent years, the overall picture emerging from observer reports of recent elections gives reason for serious concern. Some countries, such as Kazakhstan, still lack clear

33. Ibid., p. 7.
34. CDL-AD (2002) 23 rev, p. 9.
35. See CDL-AD (2002) 23 rev, pp. 29-31; CDL-AD (2006) 18, pp. 36-38.
36. CDL-AD (2006) 18, p. 38.

and comprehensive provisions for the resolution of electoral disputes.[37] In other countries, like Armenia, "the former Yugoslav Republic of Macedonia" and Ukraine, the procedures for electoral complaints and appeals could be simplified and/or clarified in various respects.[38] Even more widespread are instances where international observers noted serious shortcomings in the implementation of appeal procedures. Some citations of relevant reports might illustrate this finding: "The CEC [Central Electoral Commission]did not discuss the substance of complaints, disregarded the credibility of alleged irregularities and took a formalistic approach when dealing with many complaints" (Azerbaijan 2010);[39] "many decisions and judgments included flawed evaluation of the evidence and lacked sound and thorough factual-legal reasoning" (Georgia 2008);[40] "the process of resolving complaints filed on election day was characterised by an inconsistent application of the law and CEC regulations" (Russia 2012).[41]

In considering the fifth challenge to democratic suffrage in CEE countries, we cannot but refer to the relevant conclusion of the 2006 Report: "There is still a lot to do in order to improve election complaints and appeal procedures and to reverse the culture of impunity for election-related offences."[42]

3. Conclusions

This paper could not provide an exhaustive documentation of administrative and procedural shortcomings in elections in CEE countries. Rather, it has concentrated on recurrent challenges within five major areas of the electoral process that are crucial for the implementation of democratic suffrage. In comparison with the situation described in the 2006 Report, considerable improvements in electoral practice have been observed in nearly all the areas considered. The most critical challenge in this regard is the establishment of an accessible and effective system of election appeal across the region. Furthermore, there are various problems in individual countries concerning election administration, registration of voters and candidates, campaigning and/or voting and counting procedures. Given the difficult historical preconditions for democracy and the rule of law in CEE countries, such persistent irregularities in electoral practice do not come as a surprise, but they suggest a need for further debate and reform.

37. OSCE/ODIHR, *supra* note 12, at 17; Council of Europe, Parliamentary Assembly, *supra* note 20, at 4-5.
38. Council of Europe, Parliamentary Assembly, *supra* note 15, at 4; OSCE/ODIHR (2011), *The former Yugoslav Republic of Macedonia, early parliamentary elections, 5 June 2011, election observation mission final report*, Warsaw, 6 October 2011, p. 22; Council of Europe, Parliamentary Assembly (2011), *Observation of the early parliamentary elections in "the former Yugoslav Republic of Macedonia" (5 June 2011)*, Doc. 12643; OSCE/ODIHR, *supra* note 16, at 27.
39. OSCE/ODIHR, *Azerbaijan*, *supra* note 16, at 3; see also Council of Europe, Parliamentary Assembly, *supra* note 21.
40. OSCE/ODIHR, *supra* note 23, at 3.
41. OSCE/ODIHR, *supra* note 32, at 20-21; see also Council of Europe, Parliamentary Assembly, *supra* note 27.
42. CDL-AD (2006) 18, p. 38.

The various observation reports cited in this paper suggest that essential improvements of electoral processes require not only further time but also a more differentiated approach. Of course, some of the shortcomings discussed above may be remedied by legal amendments. Relevant examples include election appeal procedures and the regulations on voting from abroad. On the other hand, legal reforms are no panacea. As the 2006 Report indicates, several electoral laws in CEE countries are characterised by an abundant wealth of detail; this kind of over-regulation may have a negative effect on electoral transparency and effectiveness.[43] Thus, one should consider in each case whether "practical" measures – for example voter education or training programmes for administrative personnel – could provide more effective solutions than legal reform. Last but not least, some widespread irregularities – such as unfair campaigning and biased media reporting – are often not caused by insufficient regulation but rather by the unwillingness of key political players to secure a level playing field for all candidates. Such behaviour might only be changed in the long run by thorough monitoring of the election process and continuous debates with relevant stakeholders. In any case, observation missions based on international standards of good electoral practice will remain an important means to further improving electoral practice in CEE countries.

43. Ibid., p. 5.

2. Implementation of the Code of Good Practice in Electoral Matters – The experience of the Congress

Gudrun Mosler-Törnström[44]

Before addressing the concrete experience of the Congress of Local and Regional Authorities of the Council of Europe in implementing the "Code of good practice in electoral matters" ("the Code"), the present report will outline the activities of the Congress in the field of election observation: why and how does the Congress observe local and regional elections?

When, after the fall of the Berlin Wall, the Council of Europe began to observe elections as part of the accession process of new democracies, it was quite natural that the Congress – as the Council of Europe's main institution to safeguard local and regional democracy – was given the task of observing local and regional elections in wider Europe by the Committee of Ministers. The Congress aimed to supplement the Parliamentary Assembly's work in this field, which is focused on presidential and national parliamentary elections.

Since 1990, some 100 election observation missions have been organised by the Congress. Election observation has meanwhile become a political priority for our institution and Congress members have agreed on a policy for improving its quality and impact. Congress Resolution 306 (2010) lays down rules and strategies for election observation and includes the whole election process as well as the essential preconditions for genuinely democratic elections: the legal and political context, the election campaign, the role of the media and the post-electoral situation.

All Congress observers are elected local and regional politicians from the 47 Council of Europe member states. This means that the Congress's observation takes place in a peer review context. When the Congress is observing and assessing electoral processes in other countries, its members can revert to experiences in their home countries and base their recommendations also on their exchanges with other Congress members. It is important that election observation is not understood as a one-way street but as an exchange of views between local and regional politicians from 47 member countries and as a dialogue with the country in which the election observation takes place. The fact that the Congress observes elections only following an official invitation from the relevant

44. Member of the Congress of Local and Regional Authorities of the Council of Europe (Chamber of Regions); Vice-President of the State Parliament of Salzburg (Austria).

national authorities of Council of Europe member states gives weight to this interactivity. Each delegation comprises between 10 and 15 Congress members and its composition reflects a political and geographical balance and gender parity. Members of the European Union's Committee of the Regions usually form part of Congress election observation missions, which underlines the co-operative character of these missions. If the Congress is not the only international institution observing local and regional elections in a particular country, it may join an international elections observation mission. The Congress co-operates very closely with OSCE/ODIHR in this context.

To ensure appropriate follow-up to its recommendations and to achieve tangible results, the Congress has put in place a post-election assistance procedure that includes mandating its Monitoring Committee to supervise the implementation of specific measures as well as concrete programmes in the countries concerned. In the framework of its new action to support local and regional elected representatives and improve their leadership capacities, since the last local elections held in Albania on 8 May 2011, the Congress, together with a range of partners, has started a series of events to strengthen dialogue and the co-operative capacities of local elected representatives in the host country. This is a very concrete and positive example of how election observation can result in real action to improve the health of grassroots democracy.

As for many other international observers, the Code of Good Practice in Electoral Matters is the field guide for members of Congress delegations, a source of information, orientation and also inspiration.

Election observation – as a matter of concern for international organisations – has become widely accepted and plays an important role in providing assessments about the nature of electoral processes. They rely on the experience and specific skills of the observers, as well as their impartiality. Election observation has the potential to enhance the integrity of electoral processes, by deterring and exposing irregularities and fraud and by providing recommendations for improving processes.

The underlying concept of election observation is the international recognition of the right of citizens to vote and to be elected as a human right. Genuinely democratic elections cannot be achieved unless a wide range of other human rights and fundamental freedoms can be exercised without discrimination. They serve to resolve peacefully the competition for political power in a country. They are part of the process to establish democratic governance. Like other human rights and like democracy in general, they cannot be achieved without the protection of the rule of law.

As stressed in the Explanatory Report to the Code, there are five fundamental principles which together constitute the European electoral heritage: suffrage must be universal, equal, free, secret and direct. In addition, elections must be held periodically.

Let us have a closer look at the principle of universal suffrage and Congress experiences. Apart from the conditions mentioned by the Code for the right to vote or to be elected, such as nationality or specific residence requirements (by the way, after local elections in Moldova in June 2011, the Congress recommended the clarification by law of whether permanent or temporary residency should be the criterion entitling a voter to cast a ballot: the situation of internally displaced persons was scrutinised by the Congress delegation during local elections in May 2010), the Congress pays a lot of attention to electoral lists, notably during pre-election missions. The proper maintenance of electoral registers is vital in guaranteeing universal suffrage and local and regional authorities have an important role to play in this respect. The Venice Commission requires these lists to be kept permanently and regularly updated (at least once a year) and it is the municipal authorities that are in charge of this work. Inaccuracy of voters' lists is a persistent problem in many countries visited by the Congress. But it must be also said that authorities in the new democracies have made considerable efforts to improve the quality of electoral registers in their countries. Georgia and Moldova can be mentioned as positive examples in this respect, although in Moldova the introduction of a centralised electronic voter register – which was expected to further improve the process – was postponed until 2015.

A general matter of concern for the Congress in this context is the ongoing financial crisis and tight budgets at the national level, which also have a negative impact at local and regional level as resources cannot be transferred in a way that will enable territorial bodies to take full responsibility for the proper management of elections.

Let us continue with the principle of equal suffrage, which also encompasses the political system of a given country, the drawing of constituency boundaries and equal opportunities for candidates and parties. The last-mentioned – which implies state neutrality regarding the framework for electoral campaigning and media coverage – is a practical issue for the Congress's election observations. The basic idea is that the main political forces should be able to voice their opinions in the main organs of the country's media, that publicly owned media have – as noted above – a specific responsibility in this respect, and that all the political forces should be allowed to hold meetings. Let us recall, at this stage, some of the recommendations made by the Congress in recent years:

- first municipal elections of Yerevan (Armenia), May 2009: to improve media pluralism, notably concerning television;
- municipal elections in Azerbaijan, December 2009: to improve media pluralism, in particular concerning television and radio, and to create legal conditions in which independent journalists and free media can operate without intimidation or threats;
- local elections in Ukraine, October 2010: to ensure that journalistic freedoms and media pluralism are protected;

– local elections in Bulgaria, October 2011: to ensure a level playing field for all candidates by introducing legal provisions for the allocation of free airtime on public broadcasting channels for election candidates, and having in place a legal framework related to the media to guarantee editorial freedom and equitable coverage of the election campaign.

As far as the question of national minorities is concerned, prohibition of discrimination is key for election observation missions carried out by the Congress. This includes, in particular, the rights of national minorities to elect and be elected and to access information in their own languages. The latter is also closely connected with the notion of free suffrage and the obligation of the authorities to submit lawfully presented candidatures for citizens to vote on, to give the electorate access to lists and candidates standing for election, and to provide information in the languages of national minorities.

The Congress pays great attention to this condition: a recent example is the observation of local elections in Bulgaria in October 2011, where the Congress recommended providing persons belonging to minorities with election materials in their mother tongue, in order to enhance the understanding of electoral processes among all communities. Assessing the elections for the Bashkan (Governor) of the Autonomous Territorial Unit of Gagauzia, Republic of Moldova, in December 2010, the Congress noted with satisfaction that information posters for voters were available in all three official languages and regretted that – due to an information deficit – ballot papers were distributed mainly in Russian and given out in another language on request only.

The freedom of voters to cast their votes according to their wishes is also an issue followed very closely by the Congress. "Electors must be protected from threats or constraints liable to prevent them from casting their votes or from casting them as they wish", reads the Explanatory Report in the Venice Commission's Code. As is the case in vote buying, it is difficult for international observers to translate the rather abstract term of the "freedom of voters to express their wish" into concrete observations. Therefore, the Congress often encourages countries to take measures to increase public confidence in free and fair elections (in the Armenian report on elections held in May 2009, the Congress noted that there was a "general feeling of frustration and indifference vis-à-vis the election result which was considered as predetermined"; in the Bulgarian report on the elections of October 2011, the Congress described the phenomenon of controlled votes, the so-called corporate-pressure vote, and intimidation; according to a survey presented by Transparency International, 10% of respondents would vote for a particular candidate out of fear of losing their jobs).

Procedures that undermine the principle of free suffrage include "family voting" (which is also relevant for the principle of secret suffrage, which will be addressed a little later), the storage of ballot papers, and the signing and stamping of ballot papers. The recommendation by the Venice Commission that ballot

papers awaiting use must be in full view on the table of the senior station official often causes problems, simply due to undersized polling stations in many countries observed by the Congress. However, the proposition that voting procedures must be kept as simple as possible is advocated by the Congress without reservation. This subject will be elaborated on later.

In respect of mechanical and electronic voting methods, in particular e-voting, the Congress can revert to observations in Finland and Norway. The latter was carried out in September 2011 and resulted in a positive assessment by the Congress delegation, based on the transparent manner in which a pilot project on e-voting in 10 Norwegian municipalities was organised and due to measures taken to ensure the verifiability of the vote.

Counting of the votes is another very important issue for Congress observation missions and often results in concrete recommendations, for example in the report on municipal elections in Azerbaijan in December 2009 ("to introduce tools to strengthen transparency regarding voter participation and vote count and to revise the system to oversee the number of ballots cast") or the report on local elections in Bulgaria in October 2011 ("to reconsider or adjust the stamping procedure of the ballots foreseen by the Election Code, in order to ensure the principle of secrecy of the vote").

With regard to the Venice Commission's recommendation that votes be counted at the polling stations themselves, rather than in special centres, there might be exceptions to this general rule. In order to fight the severe problem of allegations of widespread vote buying, the Bulgarian authorities organised for the counting process of local elections held in October 2011 to be piloted in a regional counting centre.

In Albania in 2011, in the framework of the local elections, the Congress delegation observed the transfer of voting boxes from polling stations to ballot counting centres. This procedure was chosen to ensure the transparency of counting. The centres were equipped with cameras able to capture and broadcast images of the ballots to a large audience, both in the centres and via the Internet. This system imposed a very long time frame for analysing and counting the ballots. If in most regions of the country the counting proceeded slowly – but in a transparent manner – the system increased conflict in Tirana.

As mentioned in the Explanatory Report of the Venice Commission's Code, the transmission of the results from the precinct commissions to the electoral district to the regional authorities and eventually to the central election commission is a vital operation. It cannot be said that international observers are underestimating the importance of transferring the results in an orderly manner. In practical terms, however, it is not easy for observers to follow up on these operations.

In contrast, in respect of paper votes, the principle of secret suffrage is something relatively easily verified by international observers. As underlined by the Venice

Commission, the secrecy of the vote must apply to the entire procedure – and particularly the casting and counting of the vote. Family voting, mentioned earlier, infringes on the secrecy of the ballot because a given member of the family supervises the votes cast by other members. It is a common violation of the electoral law and a recurring issue during election observations of the Congress. Unfortunately, family voting is still prevalent, in particular in the rural areas of new European democracies, and this has to do with culture and the traditional roles of men, women and the family.

It is interesting to mention a very recent observation made by the members of the Congress delegation who observed local elections in May 2012 in Serbia. In this case, the equipment of polling stations remained a matter of concern from the perspective of the Congress (this was also the case in 2008). Simple cardboard separations at tables instead of proper polling booths compromised the secrecy of the vote in most of the polling stations visited by the Congress. Even if this situation seemed to be acceptable for the voters in Serbia, it was not acceptable for the observers. This also raises the question of whether polling booths, as part of the standard equipment of polling stations, should be added – under the item of "operating polling stations" – to the set of practical proposals for democratic elections.

From the perspective of local and regional democracy, most evidently, the principle of direct suffrage is something close to the heart of the Congress. According to the Venice Commission, direct election to one of the chambers of the national parliament by the people is one aspect of Europe's shared constitutional heritage. The Explanatory Report of the Code states also that local self-government – as a vital component of democracy – cannot be conceived of without local elected bodies. In this spirit, the Congress has been promoting the idea of directly electing mayors, notably of capital cities or big cities, and not just members of municipal councils. It must be said that, for the time being, there is no broad consensus among Congress members about the advantages or disadvantages of the direct election of mayors by the people. In May 2012, when the Congress observed local elections in Serbia, it learned that legislation had been changed and indirect mayoral elections had been reintroduced for these elections. According to the Serbian authorities, this measure was taken due to an often strong polarisation between the mayor and the rest of the municipal council as a result of partisan positions.

Let us conclude this contribution with some conditions pivotal to implementing the five principles of genuinely democratic elections described above: stability of law, procedural safeguards, an appeal system, organisation of polling stations and funding of parties.

On the stability of electoral law, the Congress report on local elections held in Ukraine in October 2010 should be quoted. The principal matter of concern during this observation visit was a new election law adopted by the authorities

– contrary to the recommendation of the Venice Commission not to change legislation in the last year before elections – only a few weeks prior to election day. As a consequence, there were severe shortcomings during the preparatory phase of these elections, in particular with regard to the registration of candidates and the composition of electoral commissions. In addition to our recommendation to submit any future electoral legislation – the authorities were discussing a unified electoral code – to the Venice Commission for opinion, prior to adoption by parliament, the Congress asked for more balanced political representation in electoral commissions at all levels; for the admission of independent candidates to local elections, in particular, as mayoral candidates; and for tighter control of the ballot design and the printing process. Due to the rushed time frame in which these local elections took place, the Congress noted that electoral commissions were unbalanced in terms of political representation, and training for their members was insufficient.

As stressed by the Venice Commission, the composition of central electoral commissions and all other lower-level commissions should be based on maximum impartiality and competence. However, over the years, experience has shown that there are persisting problems regarding the impartiality and independence of the bodies responsible for organising elections. Therefore, the Venice Commission has decided to continue work in this respect and prepare a new report that will be presented in the framework of this conference.

In this regard, the Congress report on local elections in Albania pointed to the fact that "the Electoral Code left too large a scope for decisions to be taken by the parties by a simple majority" and stated that "one option, for the future concerning the electoral exercise, could be the gradual establishment of independence for the members of all electoral commissions." Lastly, it raised issues regarding the training of members of the voting centre commissions.

In addition to politically well-balanced and skilled election commissions at all levels, election observation forms part of the procedural safeguards for democratic elections. The experiences of Congress observers with regard to the role of domestic observers are rather ambiguous. Both in the reports concerning Armenia (May 2009) and Azerbaijan (December 2009), the Congress recommended that these countries "clearly define the role of domestic observers by introducing measures to strictly specify those persons who are allowed to be present during voting and counting procedures." More concretely, the report on Azerbaijan states:

> Members of the Congress delegation noticed that local observers who pretended to belong to so-called "opposition parties" systematically were not even aware of the number of candidates of their own faction on the list. In fact, with the exception of the sporadic presence of NGOs or representatives of Embassies there was no observation system in place which could be qualified as ''independent".

Let us add some details on the importance of an effective system of appeal. The Venice Commission requires that election results, the right to vote and to

be elected, access to the media, party funding and other issues be subject to a challenge before an appeal body – an ordinary court, special court, the constitutional court or an electoral commission. It recommends also that appeal proceedings be as brief as possible and specifies a time limit of three to five days, both for lodging appeals and deciding on them. Let us quote, in this respect, a few Congress recommendations highlighting the importance of the appeal system for the electoral process in:

– local elections in Bulgaria (October 2011): "the Congress invites the Bulgarian authorities … to amend the provisions concerning complaints and appeals procedures in a way that a final appeal to a court should be possible … there should be an effective judicial procedure in place for the challenging of election results, in line with good electoral practice; the same applies to the time limits for lodging and deciding appeals";
– local elections in Ukraine (October 2010): "the Congress invites the Ukrainian authorities to take all necessary steps … [to ensure] that the electoral complaint and appeal system be brought into compliance with the recognised European standards";
– municipal elections in Georgia (May 2010): "the Congress invites the Georgian authorities … to amend legal and procedural shortcomings in the complaints and appeals process (in particular, to be more specific about deadlines and procedures and to avoid inadequate response to complaints)".

The mode of organising and operating polling stations – which has an effect on the quality of the voting and counting procedure – is a very practical aspect of polling and relatively easily verified by election observers. Poorly equipped or too small polling stations, polling stations that are – in most cases – not easy to access for persons with disabilities and elderly people, overly complex ballot papers, the absence of domestic observers (or the presence of questionable partisan observers) are shortcomings frequently noted by Congress delegations. In addition, there is the issue of political party electioneering inside (and in the vicinity of) polling stations – such as the above-mentioned phenomenon of "controlled votes" or corporate-pressure votes, which has to do with the election climate in a given country.

The funding of political parties and electoral campaigns is also an important factor in the regularity of electoral processes and is a recurring issue during election observation missions organised by the Congress. The required transparency of funds – which according to the Venice Commission should be set out in a special set of carefully maintained accounts – is certainly one of the weak points of electoral processes both in new as well as traditional democracies. For example, in Austria, changes in legislation on the financing of political parties have been launched only recently, after severe criticism of the Austrian system by the Council of Europe's Group of States against Corruption, GRECO. The Venice Commission even speaks of a second level of transparency, that is, monitoring the

financial status of elected representatives before and after their term in office. It is difficult to say if in any of the countries observed such a system has already been proven to be effective. Certainly of great importance is the proposition by the Venice Commission that public funding of parties has to come under the principle of equality of opportunity.

The experience of the Congress in implementing these safeguards has shown that there is a lot of room for improvement in respect of funding. Practically all Congress reports mention the need to introduce measures for increased transparency in respect of party and campaign financing and the need to introduce mechanisms allowing for effective oversight and enforcement of legal provisions.

With regard to future developments, the Congress is looking forward to receiving the comparative study prepared by the Venice Commission on the use and misuse of administrative resources during election campaigns, all the more because this is a recurring issue during our observation missions. There is also a study under way on "eligibility criteria for local and regional elections", which the Venice Commission will carry out at the request of the Congress. Lastly, it would be interesting to mention a few topics that – from the specific perspective of the observation of local and regional elections – should or could be addressed in the future. Among these issues are the direct or indirect election of mayors; ways to stimulate citizen participation in elections and the involvement of young voters by introducing electronic tools for voting; the training of commission members and observers; and the issue of the capacities of local and regional authorities to organise elections in times of economic crisis.

3. Organisation of elections by an impartial body

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1. Introduction

An election administration is responsible for the conduct of elections in line with domestic legislation, which should be consistent with international standards for democratic elections. The management of democratic elections requires that the election administration bodies perform their duties in a professional and impartial manner, independent of any political interests,[45] and subject to judicial control. The election administration bodies should also uphold the civil and political rights of all voters including women, minorities and youth.

Professionalism implies the transparency, accountability and efficiency of performance of the election administration. These are key factors in ensuring public confidence[46] in the process, including in its outcome. These factors are critical as the election administration makes and implements important decisions that may have an impact on the overall conduct, and even on the outcome, of the elections. Transparent and accountable performance lends integrity to the election process, credibility to election administration bodies and builds public confidence and legitimacy towards the election.

The election administration and all other state authorities – the central and local self-government executive, and the judiciary – must act at all times in a politically impartial manner. Impartiality implies that the law should be placed above the objectives of any political interest, ensuring equal treatment for all electoral contestants in a pluralistic environment underscored by the rule of law.

2. International standards

International standards for democratic elections regulating the election administration are scarce and mostly found in so-called "soft" international law.

45. A political interest is a notion that could be broader than a political party – it could be a group of parties not necessarily in coalition or even a group of individuals controlling some levers of power.
46. See Annex 1, "OSCE/ODIHR explanatory note on possible additional commitments for democratic elections, 11 October 2005", in OSCE/ODIHR (2006), *Common responsibility: commitments and implementation*, Warsaw, 10 November 2006, www.osce.org/mc/22912, accessed 6 November 2012.

Paragraph 20 of General Comment 25 to Article 25 of the United Nations' International Covenant on Civil and Political Rights (ICCPR)[47] states that:

> An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant.

However, General Comment 25 does not elaborate further on the term "independent".[48] In particular, it is unclear what dependencies should be avoided – on other public institutions, political interests, etc. As it is generally assumed that elections are funded by the public budget, "absolute" independence appears unlikely. A predictable and legally determined budgetary allocation for election administration can, however, foster independent action, even if it cannot guarantee it.

One could encounter interpretations according to which "independent" means that the election administrators should not be members or be affiliated in any way with any political party or interest. Such an opinion is not supported below for the following reasons. First, it is believed that the mere fact of affiliation with a political interest is not sufficient to assume that the respective individual is ready to act in a politically biased and unprofessional manner. Second, there have been a number of occasions when election administrators who have declared that they are not affiliated with any political interest have been observed to perform their duties in a politically biased manner, favouring most often the incumbents.

The second part of Paragraph 20 of General Comment 25 uses the qualification "impartially", which implies that the performance of the election administration has to be politically impartial.

This qualification plays a key role in the language used by the Venice Commission's "Code of good practice in electoral matters" ("the Code"),[49] which states that "an impartial body must be in charge of applying electoral law."[50]

Here, the emphasis seems to be placed on the performance of the election administration, rather than on formalistic criteria such as membership of a political party – something not always easy to verify. This emphasis on professionalism of performance is key to an appropriate understanding of how to ensure the

47. The United Nations' International Covenant on Civil and Political Rights, www2.ohchr.org/english/law/ccpr.htm. General Comment 25 is available at www.unhchr.ch/tbs/doc.nsf/. Accessed 6 November 2012.
48. The author is aware of the impressive work of International IDEA on election management bodies and their classification, available at http://aceproject.org/ace-en/topics/em/em10 (accessed 6 November 2012) and based on the qualifications "independent" v. "governmental". As the adjective "independent" carries the risk of being misconstrued in this context, this classification was not used below.
49. See the Guidelines in CDL-AD (2002) 23 rev "Conditions for implementing these principles", Section II, "Procedural guarantees", Section II.3, and "Organisation of elections by an impartial body", Section II.3.1.
50. Ibid., Section II.3.1.a.

adequate functioning of the election administration. It should not matter whether an election administrator has his or her personal political preferences, which is a basic right. What really matters is whether the election administrators – individually and as a body – apply the law in a professional manner ensuring equal treatment of electoral contestants.

3. Key principles of performance

3.1. Transparency

The transparency of the process is fundamental to democratic elections. It is the people's right to know that an electoral process honestly respects their will, and transparency is the means whereby this right is fully assured. Transparency applies to all elements of the electoral process.

Transparency means that nothing related to the election process can be qualified as "confidential" or "secret". The election administration should ensure that all election related information is made public in a timely manner and is accessible to the broadest possible audience. Such information includes all acts of the election administration bodies throughout the process, and timely and accurate[51] announcement of preliminary and final results.

Finally, transparency could require states to ensure that the law provides a simple and clearly defined process, including public hearings, for considering and resolving electoral complaints and appeals in a fully transparent and effective manner, within reasonable time limits established by law.

3.2. Accountability

Accountability constitutes a fundamental principle of democratic governance. This is particularly relevant in the administration of the electoral process, where it serves as a counterweight to the potential advantages of incumbency.

Accountability means that all state bodies, including the election administration, the police, prosecutors and the judiciary, are accountable for their actions and inactions that affect the achievement of democratic elections. In addition, state resources must not be used for the electoral advantage of any political contestant or, alternatively, must be utilised in an equitable manner by all contestants.

Finally, legislation must be clear as to what conduct constitutes a violation of electoral rights and provide for sanctions. Possible election offenders must be held legally accountable for the violation in a timely manner as a culture of impunity will undermine confidence in the electoral process. Sanctions must be

51. When a preliminary result is announced, there should be a clear message that the figures released may change after results of additional polling stations are aggregated into these figures; if preliminary results from a given area are announced, this should be clearly stated as the influence of parties may depend on particular geographic areas.

imposed according to the law and be proportional to the offence committed. A political party cannot be held collectively responsible for the violations of individual members.

3.3. Professionalism, impartiality and public confidence

Election administrators must demonstrate respect for the rule of law by strictly adhering to legislation, and applying it impartially, consistently and objectively. Where there might be a need to clarify details of the legal provisions, decisions on the approval or rejection of a draft act of the election administration must be guided only by the law and the principles mentioned above.

Election administrators must operate independently in the sense that their decisions must not be influenced by the executive authorities or political parties. The impartiality of the election administration is demonstrated by a commitment to the public interest, rather than narrow political party interests. It is important for the election administration not only to function impartially, but also to be perceived to be doing so.

Elections are administered by single individuals in some states and by collective bodies in others. While in both cases personal integrity matters, when the election administration bodies are constituted of a group of individuals, these individuals must operate in a collegial manner. Collegiality implies the need to respect each other's opinions and base decisions on the law alone.

The law should provide clear provisions on how the election administration conducts business. It should define what acts are issued by the election administration, what the decision-making mechanism to issue such acts is, and how these acts may be contested by those participating in the election.

The decision-making mechanism should be designed with a view to satisfying two competing priorities – inclusiveness and efficiency – to achieve an optimal compromise. Inclusiveness would dictate that an act of the election administration be approved by a qualified majority of members of the election administration body.[52] Efficiency implies that acts should be approved by a "minimal" majority. In political environments where there might be a deficit in public confidence, inclusiveness should take precedence.[53] The Code advises[54] that it is desirable that election commissions[55] take decisions by "qualified majority or consensus".

52. For example, two thirds of the members present, if those present constitute more than half of all members.
53. A possible compromise between these priorities might be developed by selecting key acts of the election administration, e.g. registration of contestants, approval of results. These should be approved by a qualified majority, while the other acts may be approved by simple majority.
54. Section II.3.1.h., Guidelines to CDL-AD (2002) 23 rev.
55. See "Models for election administration bodies", Section 6.2 of this chapter.

Implementation of the law by the election administration should be based on comprehensive and standard training;[56] inclusiveness in registration of candidates and voters; focused and timely voter and civic education; coherence and integrity of the voting procedures and counting of the votes, and their tabulation through appropriate measures preventing possible unlawful and fraudulent activities; and timely and accurate announcement of the preliminary partial and final results.

Public confidence is one of the fundamental requirements of a democratic society. There are many factors that can influence public confidence in elections. These factors encompass all aspects of the election process. However, the political will of both institutions and political parties alike is the ultimate factor contributing to public confidence in the electoral process. Where there is a deficit of political will to respect fundamental civil and political rights and to conduct a genuinely competitive election, this deficit cannot be compensated for by changing the composition of the election administration bodies, the election system or other aspects of the election process.

A consistent point reflected in numerous OSCE/ODIHR election observation reports is the important role that election administration bodies have in building public confidence. Elections should be administered by persons who represent various interests and segments of society, are capable of acting in a professional and impartial manner and are knowledgeable (or willing and able to acquire the necessary knowledge) in election administration.[57]

4. Legislative considerations

4.1. General principles

Two approaches in drafting election legislation seem to have emerged. In some states, long-standing traditions of conducting genuine elections have led to detailed legislation seeking to address all eventualities in the law, sub-legal acts or case law. In others, there is a tendency to adopt legislation that leaves some of the details to be tackled by the election administration.

However, there are a number of principles that should be reflected in election legislation in order to ensure an appropriate legal framework for the transparent and efficient administration of an election. These principles include the following:

– election legislation should be stated in objective language and its interpretation should not be a matter of subjective opinion;
– election legislation should be enacted sufficiently in advance of elections to provide contenders and voters with adequate time to become informed of the rules of the election processes, and should be published and readily

56. Section II.3.1.g., Guidelines to CDL-AD (2002) 23 rev.
57. OSCE/ODIHR, *supra* note 46.

available to the public. The Code recommends that "the fundamental elements of the electoral law … should not be open to amendments less than one year before an election";[58]

- the legal framework should establish election administration bodies in an unambiguous manner with regard to their composition, nomination and appointment, term of office, decision-making mechanism and competences;
- the provisions regulating the administration of different elections should be in harmony.[59] The law should include explicitly all electoral deadlines;
- relationships between state and local authorities, and between the election administration bodies and other governmental bodies, should be clearly defined to prevent conflicting or overlapping powers during the conduct of an election;
- important issues such as registration of candidates, campaign and election day procedures including counting of the votes, tabulation and announcement of results, and procedures for complaints and appeals should be clearly regulated by law.

4.2. Appointment and removal from office

The members of a given election administration body should be appointed formally by a single authority ensuring equality of status, although they could be nominated by different institutions, political parties or even groups of individuals.

The method of selecting or appointing election administrators should be transparent, publicly known and based on professional qualifications and standing in society. It should protect the fundamental civil and political rights of the individuals chosen including their freedom of conscience. Equally, the law should oblige the appointed individuals to act only in the interest of the law.

Beyond resignation and death, early removal of election administrators from their office should be possible only on an exceptional basis and be decided by a court of law. The Code explicitly provides that the appointing authorities should not be free to dismiss election administrators at will.[60] Members of election administration bodies should be protected against arbitrary or politically motivated removals.

The law should specify the rights of members of election administration bodies, including the right to receive timely and adequate notice of meetings, the right to participate in all meetings, and full and immediate access to all election documents and relevant information upon request.

58. Section II.2.a., Guidelines to CDL-AD (2002) 23 rev; exceptions may be possible only where there is a broad political agreement to address an outstanding issue or unexpected development.
59. It might be useful to consider the adoption of an election code to regulate, through a single piece of legislation, all types of elections by popular vote that a state conducts.
60. Section II.3.1.f., Guidelines to CDL-AD (2002) 23 rev.

4.3. Qualifications of members

Where possible, persons familiar with the electoral framework should be appointed to administer elections. Common sense suggests that the majority of the members of the central election administration body should have a background or training in law. Such a requirement may be somewhat restrictive for lower level election management bodies, in particular at the polling station level.

Depending on the concrete responsibilities of the election administration body, it would be useful to include in its membership, notably at the central level, experts in other relevant fields such as administration, mathematics or information technology, and sociology or political science.

The personal integrity of members of the election administration and their willingness and ability to participate in professional discussions without antagonising their colleagues is also critically important for the professional performance of the election administration. In their official capacity, the appointed persons must act only in the interest of the law. They should not forget that actions in their personal capacity are likely to be interpreted by the media as if they were conducted in an official capacity.

4.4. Legislative provisions v. acts of the election administration

Certain principles should be respected when authority is given to the central election administration body to issue acts that could clarify legal provisions if and where necessary for the effective management of the election process. Such principles respect the right of the legislator to adopt election legislation, while also recognising the need to provide the possibility for the central election administration to issue supplementary acts. However, it must be remembered that an election administration is an administrative, rather than a legislative body.

These principles declare that:

- substantive fundamental rights, such as the secrecy of the vote, may not be abrogated or diminished by any act of the election administration;
- acts of the election administration may not be inconsistent with the law;
- election legislation should clearly state the hierarchy of legal norms governing the elections, including that the constitutional and legislative provisions take precedence over any acts of the election administration;
- the authority of the central election administration body should be clearly defined in the law, which should unambiguously state the scope and extent of the central election authority to clarify the law, including in emergency situations and on election day;
- election legislation should indicate the key acts that the central election administration body should issue in order to provide those details that are not included in the law. Ideally, such acts should be issued as soon as possible after the approval of the law;

– election legislation should provide a process for candidates and voters to file complaints and appeals arising from the adoption and implementation of acts of the election administration, including from alleged violations of the law by the central election administration.

5. Structure and status

5.1. Structure

Usually, the election administration comprises one central election administration body and a high number of polling station bodies. Between the centre and the polling stations, there may be intermediate level election administration bodies. On the other hand, a decentralised (federal) state may have no central election administration.

The central election administration has overall responsibility for administering the election, while the polling station bodies are responsible for the conduct of the election day process, including voting and counting of the votes, and reporting results to the institution(s) superior to them.

The number of levels of election administration bodies usually depends on country specifics, the election system for a given election and the structure of local (self-)government. Usually, there are one or two levels between the central election administration body and the polling stations. Lower level election administration bodies generally replicate the principle of establishment of the central one.

If election results are announced at a local level such as a municipality or electoral district, then at that level there should be an intermediate election administration body. Examples include municipal elections and national elections where representation is based on several electoral districts, such as majoritarian systems or regional proportional systems.

However, in the context of concrete elections, one must be wary, on the one hand, of creating an excess of election administration bodies and, on the other, of having an insufficient number of levels in the election administration.

5.2. Permanent or campaign central body?

The central election administration body can work on a permanent or on a campaign (temporary) basis. The Code recommends that this body be "permanent in nature",[61] with a view to enhancing continuity and institutional consolidation. However, if the executive branch of power is tasked by law to provide strong administrative support to the electoral process under the guidance of the central election administration body, the latter could still function appropriately on

61. Ibid., Section II.3.1.c.

a periodic "campaign" basis. Continuity of membership in a credible election administration body is always a benefit to the electoral process.

The state should provide adequate public budget funding for the ongoing operations of the central election administration and its subordinate bodies. However, it is normal for lower level election administration bodies, in particular at the polling station level, to be temporary, established in a timely manner before election day.

5.3. Self-sustainable or supported by a secretariat?

A central election administration body can be self-sustainable and fully "hands-on" in the election process. This means that members can be organised into "working groups" that draft acts on specific topics and submit these draft acts to the body's plenary for discussion, possible corrections, approval and publication. Such a collegial mode of operation would require a higher number of members of the central administration body to handle the volume of work. In this case the central election administration body should be legally authorised to supervise the election related activities of specific departments of the executive branch responsible for electoral logistics.

Alternatively, a central election administration body with fewer members would have to rely on civil servants who would be responsible for the preparatory work for each act of the body and for election logistics. Such an arrangement is considered by some states to be more "independent", although in practice the central election administration may be held hostage to hidden political agendas.

The aforementioned civil servants are usually organised in a secretariat. Such an arrangement requires a clear and legally defined division of responsibilities between the election administration body and its secretariat, as well as the executive branch. Otherwise, duplication of activities may occur. In addition, the tasks of the secretariat in between elections remain unclear. The establishment of a secretariat inevitably results in an increase of bureaucracy and related expenditure, and it may be difficult to motivate such an institution between elections.

6. Central election administration body

6.1. Political context

A broad political agreement on the type and composition of the central election administration body has the potential to enhance trust in the administration of elections, and boost public confidence in the entire process.

As the central election administration body has the overall responsibility for the conduct of an election, it is often perceived as a political rather than an administrative body. This perception is fundamentally wrong as the election administration has the simple task of implementing the law. However, the performance of

the central election administration can have an impact on the political outcome of the election through the manner in which it administers the entire process.

If the law is in line with international standards, the process is administered transparently and in accordance with the law, and political contestants are given equal treatment, then the outcome is likely to reflect the contents of the ballot box and thus the prevailing popular attitudes. If there is political will to administer an election in a professional and impartial manner, even if the law has some "technical" lacunae, it is still possible to conduct a good election. However, if the process is administered in a non-professional, non-transparent, inconsistent and politically biased manner, even with good laws in place the outcome may fail to reflect popular attitudes. Hence the importance of the composition of the election administration, from the centre to the level of the polling stations.

6.2. Models for election administration bodies

A wide range of models for the formation of election administration bodies has emerged over centuries of electoral practice. In the absence of specific international standards related to their type and composition, each country has found (or should find) the most appropriate model that reflects local tradition and good international practice based on the key principles mentioned in Section 3 of this chapter.

Countries with an established tradition of conducting elections in line with international standards have election administration bodies that are generally composed of civil servants, at central level – often from the ministry of the interior – or are represented by officials elected by popular vote, even on party tickets. Such arrangements have emerged in communities where confidence was generally deeply rooted and served as the cornerstone for such models of election administration.

More recently, in countries that have struggled through decades of interruption in democratic traditions, an alternative form of election administration has emerged – the election commission. Such a model is clearly recognised by the Code,[62] whereby a Central Election Commission (CEC) serves as the central election administration body. This model addressed the overall reluctance to task a ministry of the interior with administering elections after a period of non-democratic governance and eroded confidence.

Election commissions have been or are being gradually established even in countries with established traditions of conducting democratic elections. This is an acknowledgement of the added value of a professional and impartial institution as a repository of national electoral experience, as well as their utility as a focal point of engagement with international counterparts for the exchange of election management experience and best practice.

62. Ibid., Section II.3.1.b.

Often, the establishment of a CEC is an attempt to address a political issue related to the transition to a democratic system of governance. The success of such an attempt can be augmented if it enjoys broad agreement on applicable rules among election stakeholders, and it is a way to boost public confidence in the electoral process. In accordance with the Code,[63] the inclusion of women and representatives of minority communities in the central election administration body further enhances trust.

The Code affords a considerable measure of discretion to states with regard to the composition of election commissions.[64] This diversity underscores the importance of the principles[65] already outlined. Existing modalities for the composition of a CEC are outlined below.

6.2.1. Nominees of political parties (multiparty representation)

The key assumption is that major political interests contesting the election are able and willing to identify professional and publicly respected individuals who, regardless of their political affiliations, will be able to implement the legal framework in a professional and collegial manner, in accordance with the law.[66] The main value of setting up a CEC based on multiparty representation is to provide key electoral contestants with close access to the process with a view to strengthening public confidence and transparency.[67] This is achieved by allowing key political interests[68] to take part in the administration of the election through their trusted representatives, who may or may not be members of a specific political party and may or may not be civil servants. No political interest should dominate the CEC. Such a model vests the responsibility for demonstrating the necessary political will in these political interests. On occasion, a CEC established in line with this model is perceived as not being "independent".

6.2.2. Institutional quotas with or without staggered terms

A CEC established on the basis of institutional quotas includes representatives from major state institutions, such as the legislature, the executive and the judiciary. In a pluralistic political environment, political interests are generally represented through the nominees from the legislature. This model is easily

63. Ibid., Sections I.2.4 and I.2.5.
64. Ibid., Section II.3.1.d.
65. See Section 3 of this chapter, "Key principles of performance".
66. Observers have reported, at times, that this model has been abused by granting decision-making powers to a single political interest.
67. Sections II.3.1.d.ii and II.3.1.e., Guidelines to CDL-AD (2002) 23 rev.
68. There is always a risk of controversy with regard to naming the major political interests in a given country at a given time. This is one of the sensitive points in establishing broad agreement. However, controversy may be minimised if the election is conducted in an atmosphere of overall confidence in the process.

implemented to introduce staggered terms for CEC members in order to ensure continuity.[69]

6.2.3. Permanent quota from the judiciary and a temporary quota from the political parties

A CEC can be composed of two components – permanent and temporary. The permanent component is formed of representatives of the judiciary[70] who take leave from their permanent offices to join the CEC for a few months and administer the process including the registration of candidates. After the completion of registration, a few weeks before election day, the CEC is expanded with the temporary component. The latter comprises nominees of those parties and coalitions that have been registered to participate in the election and who enjoy full voting rights and decision-making authority during the remaining phases of the election process.

6.3. Activities

During the election period the central election administration body has to accomplish different tasks depending on the country context, including its traditions, legislation and administrative arrangements.

Typically, the activities of the central election administration body include the registration of parties and candidates to contest a concrete election, the appointment of election administration bodies below the central one, the approval of polling station areas proposed by the relevant authorities and oversight of the election day process.

Depending on the electoral system in place,[71] the central election administration body may adjudicate on complaints and appeals against lower level bodies (preferably not as a last instance in the adjudication process), tabulate election results, allocate seats to election contestants and announce preliminary and final results.

On occasion, in the absence of relevant independent institutions,[72] the central election administration body may also be tasked to regulate election coverage by the media, oversee campaign funding, draft the boundaries of electoral districts and determine the number of elected officials returned by these districts, and register political parties and/or eligible voters.

69. In dynamic political environments, influential political interests not represented in parliament may be excluded.
70. One could argue that the inclusion of judges in a central election administration body will have an impact on the independence of the judiciary. If judges are included in the election administration, all measures have to be taken to avoid a situation whereby a judge, after returning to his or her permanent job, hears election-related cases.
71. The formula to transform votes cast for party lists and/or candidates into seats in the body elected.
72. Such institutions may be "independent" agencies for the media or for the audit of political parties, population registers, constituency boundary commissions, etc.

7. Conclusions

The professional and impartial performance of the election administration, a key element of the Code, represents a performance-oriented approach towards the regulation of election administration. It implies the transparent performance of an accountable body of appropriately trained individuals who cannot be removed from office at will on the basis of political considerations. The ability and willingness of such individuals to recognise that they are not politicians is key to their professional and impartial performance.

In an electoral environment where the political will to administer elections in a professional and impartial manner prevails, the Code provides for adequate procedural guarantees that the legal framework and its implementation will, overall, respect international standards for democratic elections and good electoral practice upholding public confidence. Where such political will is lacking, procedural guarantees and a legal framework generally in line with international standards may be abused and their advantages may only be manifest to a limited extent.

Numerous models for determining the formation, composition and key responsibilities of central administration bodies have evolved on the basis of the concept of professional and impartial performance clearly underscored by the Code.

One of these models, the multiparty CEC, has gained a measure of popularity because it contributes to overall transparency in societies undergoing political transition. On a number of occasions, this model has been abused to provide a single political interest with the entire decision-making authority, which has not always been used first and foremost to uphold the public interest. Multiparty election commissions are successful in delivering democratic elections in line with international standards and good electoral practice only if they respect the aforementioned principles throughout the process.

4. Electoral law and representation of minorities

Professor Jan Velaers[73]

1. Introduction

The protection of minorities has become one of the major preoccupations of European public law. The involvement of members of minorities in various aspects of life in mainstream society, and more specifically their political participation, serve two goals.[74] In the first place it is a tool to advance a stable democratic system. The exclusion of minorities from political participation can indeed pose a real risk to the stability of the system. The OSCE's High Commissioner on National Minorities, Knut Vollebaek, has rightly pointed out:

> If minorities do not feel that their voices are being heard through the democratic process, they will be more likely to resort to less acceptable means for promoting their interests. Nothing is more dangerous in the long term than a cohesive group of disgruntled citizens who sees no point in showing loyalty to a state because it feels "foreign" to them. If however, they feel that they "belong", that the state is also "theirs" then civic identity is more likely to transcend that of ethnicity, linguistics or religion.[75]

The effective participation of minorities in public life is thus an important factor in preventing conflicts and the alienation of minorities, establishing a peaceful society and advancing real democratic governance.[76]

In addition to the argument for democratic stability, the effective political participation of minorities can also be looked at from a minority rights perspective.[77] The involvement of minorities in political decision making – especially when it affects them directly – can be an important tool to guarantee minority rights. A report from Human Rights Watch, contrasting municipalities in Croatia where Serb parties participate in local government with those municipalities where they are excluded despite constituting a significant share of the population, clearly suggests that the political inclusion of the Serb minority significantly advances

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73. Professor, University of Antwerp.
74. Bieber F. (2008), "Introduction: minority participation and political parties", in *Political parties and minority participation*, Friedrich Ebert Stiftung – Office Macedonia, Skopje.
75. Vollebaek K. (2009), "Statement to the 2nd session of the UN Forum on Minority Issues: effective political participation of minorities", http://www.osce.org/hcnm/40305, accessed 6 November 2012.
76. Lijphart A. (1999), *Patterns of democracy: government forms and performance in thirty-six countries*, Yale University Press, New Haven.
77. Bieber, *supra* note 74, at 6.

minority rights.[78] In order to ensure that the specific concerns of minorities are taken into account, it is essential that they have the possibility of participating in the political decision-making process in matters that directly affect them.

Full and effective participation in various aspects of life in mainstream society, and more specifically in political life, is rightly considered to be a "third generation minority right".[79] This right has its roots in international human rights law. Article 25 of the ICCPR states:

> Every citizen shall have the right and the opportunity …
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

The key provision for the subject in the European Convention on Human Rights is Article 3 of its first protocol, which provides for free elections "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." In more recent documents that date from the 1990s, a specific emphasis is laid on the right of political participation of minorities. Let me just refer to paragraph 35 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 1990,[80] to Article 2, paragraphs 2 and 3, of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992,[81] and last but not least to Article 15 of the Council of Europe Framework Convention for the Protection of National Minorities of 1995.[82] The rather general standards developed in these documents have been further elaborated by international organisations active in this field, such as the OSCE High Commissioner on National Minorities (HCNM), the Office for Democratic Institutions and Human Rights (ODIHR) and also the Venice Commission. The recommendations they produced in so-called "soft law" documents, such as the "The Lund Recommendations on the effective participation of national minorities in public life"[83]

78. Human Rights Watch (2006), *Croatia: a decade of disappointment. Continuing obstacles to the reintegration of Serb returnees*, Vol. 18, No. 7(D), HRW, New York, p. 19.
79. Sinania G. (2008), "Minorities in Albania and their participation in public life", in *Political parties and minority participation*, Friedrich Ebert Stiftung – Office Macedonia, Skopje, p. 201.
80. Paragraph 35: "The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities."
81. Article 2.2: "Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life." Article 2.3: "Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation."
82. Article 15: "The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."
83. OSCE/HCNM (1999), "The Lund Recommendations on the effective participation of national minorities in public life & explanatory note", OSCE/HCNM, The Hague.

(HCNM), the "Guidelines to assist national minority participation in the electoral process" (ODIHR),[84] and the "Code of good practice in electoral matters"[85] ("the Code") or the study "Electoral law and national minorities" of the Venice Commission,[86] all aim to provide guidance on guaranteeing the right of minorities to effective participation in public life and are based on experience and examples of good practice.

All these documents show that there is a wide spectrum of mechanisms or models to create the conditions for the participation of minorities. Three types of processes can be distinguished: the consultation of minorities by means of appropriate procedures, the participation of minorities in the decision-making process both at national and local levels, when necessary by means of a specific electoral design, and finally decentralisation and minority self-government. As the HCNM rightly pointed out, the "suitability of a certain mechanism or model will depend on the historic, geographic, political and economic circumstances of each individual case."[87] States enjoy a large margin of appreciation in adopting the appropriate measures. Although parliamentary representation is surely not the only and perhaps even not the most effective form of minority inclusion, it is surely symbolically the most important. Minorities represented at a national, regional or local level feel that they have a stake in society and that their voices can be heard. For this reason the Parliamentary Assembly of the Council of Europe, back in 2003, recommended that states "pay particular attention … to ensure parliamentary representation of minorities".[88]

In my report I will focus on electoral law and the possibilities it gives to members of national minorities of participating in elected bodies. The Venice Commission has a double approach. In many opinions it has taken the following stance:

> the long-term interests of minorities and of societies as a whole are in principle, better served by representation under the "ordinary electoral system", which guarantees equal rights to citizens, irrespective of the group to which they are initially affiliated. However, this does not exclude specific measures of a transitional nature when needed in order to ensure proper representation of minorities.[89]

I believe this double approach to be very sound. The ultimate aim of minority protection is the full integration of minorities in society. Ideally, in a well-integrated

84. OSCE/ODIHR (2001), "Guidelines to assist national minority participation in the electoral process", OSCE/ODIHR, Warsaw.
85. Section 2.4.b., Guidelines to CDL-AD (2002) 23 rev: "Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage."
86. CDL-Inf (2000) 004.
87. Vollebaek, *supra* note 75.
88. Recommendation 1623 (2003) on the rights of national minorities, adopted by the Parliamentary Assembly on 29 September 2003.
89. "Report on dual voting for persons belonging to national minorities", adopted by the Council for Democratic Elections at its 25th meeting (Venice, 12 June 2008) and the Venice Commission at its 75th plenary session (Venice, 13 and 14 June 2008), CDL-AD (2008) 13, paragraph 65.

society, the ordinary rules of electoral law, which treat all people in the same way, should in principle create the conditions for persons belonging to minorities to participate in the electoral process and to have access to the electoral assemblies. These persons have the right to vote and to stand for office. They also have the right to establish their own political parties, organised on ethnic lines. In many countries such parties have been created. They have been "at the forefront of representing minority interests" and have been influential. Only in a few countries – Albania, Bulgaria and in the past also Bosnia and Herzegovina – have mono-ethnic parties been prohibited. Such bans constitute a restriction upon the freedom of association, which – according to the Venice Commission – can hardly be consistent with European constitutional heritage.[90] Moreover, these bans have to a large extent been ineffective. In Albania, Unity for Human Rights is the successor to the Greek minority party Omonoia and in Bulgaria, the Movement for Rights and Freedoms is, *de facto,* the Turkish minority party. Both are tolerated under seemingly non-ethnic labels.[91] The assessment endorsed by the Venice Commission that bans on ethnic parties are unusual, ineffective and incompatible with human rights standards[92] does not mean that such parties are indispensable. On the contrary, in a well-integrated society, persons belonging to minorities should be encouraged to be members of, or to vote for parties that are not organised on ethnic, linguistic or religious lines, but are sensitive to the concerns of minorities.[93]

However, we do not live in an ideal world. In some societies the process of integration is ongoing. When in such societies a certain minority is structurally not represented or under-represented, it might be necessary to establish mechanisms to facilitate or guarantee the election of minority representatives. Affirmative action can then be justified. Affirmative action aims at the establishment of *de facto,* not just *de jure,* equality. In connection with national minorities it can be defined as a set of "policies and practices which favour ethnic, linguistic or religious groups who have historically experienced disadvantages" in effectively participating in public life.[94] Affirmative action is very often subject to criticism. Measures to favour minorities are often assessed as leading to the discrimination of the majority. The European Court of Human Rights has taken a nuanced stance on the issue. The Court is on the one hand very strict in reviewing compliance with the principle of equality, but on the other hand it allows the states a great margin of appreciation in their choice of voting system and more specifically in balancing "the requirement of the protection of minorities with the

90. "Report on electoral rules and affirmative action for national minorities' participation in decision-making process in European countries", adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and the Venice Commission at its 62nd Plenary Session (Venice, 11 and 12 March 2005), CDL-AD (2005) 9.
91. Bochsler D. (2010), "Electoral rules and the representation of ethnic minorities in post-communist democracies", *European Yearbook of Minority Issues,* Vol. 7, p. 16.
92. CDL-Inf (2000) 004, p. 14.
93. CDL-AD (2008) 13.
94. CDL-AD (2005) 9.

national, traditional constitutional and electoral arrangements."[95] The Court accepts that all votes must not necessarily have equal weight as regards the outcome of the election. If a legitimate aim is pursued – providing means for the effective participation of minorities – and if the action taken is proportional to this aim and to the real needs of the minority group in question, then the affirmative action can be justified.[96]

States have a large margin of appreciation in this matter. Many different solutions are possible. International practice does not oblige states to adopt any specific solution when ensuring the representation of minorities in public decision-making processes.[97] In its "Report on dual voting for persons belonging to national minorities", the Venice Commission stated:

> representation of minorities in elected bodies may be ensured either by the application of the general rules of electoral law or by specific rules. The situation depends on a number of variables, such as the nature of the electoral rules (e.g. proportional v. plurality/majority system), the repartition of the minorities (in particular, whether they are in a majority in any part of the territory) and the degree of integration, in practice, of minorities in the political system.[98]

The Venice Commission also declared "there is no absolute rule in this field".[99] What can be an appropriate solution to promote representation of minorities in one country may hinder this representation in another. It is a matter of the states' discretion as to whether preferential treatment is legitimate and what measures are to be taken. Affirmative action electoral rules can be formulated for the various dimensions of the electoral system and the electoral law. In this report I will examine specific electoral rules related to:

- electoral systems (proportional or mixed system);
- electoral districts (their size, form and magnitude);
- numerical thresholds;
- reserved seats;
- dual voting rights.

2. Electoral systems

Generally speaking, the choice of the electoral system – proportional representation, majoritarian rule or a mixed system[100] – has justifications beyond that of minority inclusion or exclusion,[101] but it is obvious that it is not irrelevant to the

95. CDL-AD (2008) 13.
96. CDL-AD (2008) 13; CDL-AD (2005) 9.
97. CDL-AD (2008) 13, paragraph 5.
98. CDL-AD (2008) 13, paragraph 65.
99. CDL-AD (2005) 9.
100. In some countries (Albania, Hungary, Lithuania, and earlier in Bulgaria, Croatia, "the former Yugoslav Republic of Macedonia", Russia and Ukraine), a mixed electoral system is applied: a certain number of parliamentary seats is allocated through single-seat districts, with the rest allocated through proportional representation.
101. Bieber, *supra* note 74, at 17.

participation of members of minorities. It is conventional wisdom that the more an electoral system is proportional, the greater the chances minorities have of being represented in elected bodies. Majoritarian systems are often seen as not appropriate in this respect.[102]

This is, however, a relative rather than absolute truth. The proportionality of the outcome may indeed be influenced by other factors. The presence of an electoral threshold, the size of the constituencies, and the number of seats per constituency are decisive factors. Bieber rightly notes that:

> PR [proportional representation] in combination with relatively high thresholds might actually be a greater disadvantage to minorities than majoritarian systems when these minorities are geographically concentrated. In Albania for example, the Greek minority party has been able to enter the Parliament only due to the mixed electoral system.[103]

In its report on "Electoral law and national minorities" the Venice Commission recalled that "a proportional system … does not in itself guarantee that the composition of the elected body is a true reflection of that of the electorate. The proportionality of the outcome may be limited by several factors".[104] Let us focus on some of these factors.

3. Electoral districts

Above all, the size of the constituencies and the number of seats they contain play an essential part in the proportionality of the result: the fewer seats there are in a constituency, the higher the electoral quotient is and the harder it is for a party to obtain a seat.[105] Therefore the delimitation of the constituencies can be used as a tool to advantage or to disadvantage minorities. The phenomenon of ethnic gerrymandering is well known. Constituencies can be drawn to prevent state majorities from becoming regional minorities, and to reduce the chances of minorities gaining seats.[106] But the delimitation of constituencies in such a way as to prevent the dispersal of the votes of the members of a minority can also be a tool to ensure minority representation.[107] When the minority is territorially concentrated, the recognition of this territory as a constituency helps the minority to be represented in elected bodies, especially if a majority system is applied.[108] Single-member electoral constituencies, in areas where minorities

102. CDL-AD (2008) 13; Bochsler, *supra* note 91, at 5.
103. Bieber, *supra* note 74, at 17.
104. CDL-Inf (2000) 004. p. 5.
105. CDL-Inf (2000) 004.
106. Bieber, *supra* note 74, at 21; see Bochsler, *supra* note 91, at 9: "Countries in which (some) minorities are de facto excluded from their own representation because the districts are too small for (some) non-concentrated minority groups: Croatia, Macedonia, Slovenia. Only for single-seat district mandates: Hungary, Lithuania, Russia (1993-2003), Ukraine (1994-2002), Macedonia (only in 1998)".
107. Recommendation 43 (1998) on territorial autonomy and national minorities, adopted by the Congress of Local and Regional Authorities of the Council of Europe on 27 May 1998.
108. CDL-AD (2005) 9.

are concentrated, enhance minority chances of being represented, especially when a parliamentary seat is allocated to the constituency, even if the number of voters does not comply with the criteria provided for by the general rules of electoral law.[109] Another possibility is to establish – as has been done in Croatia – a country-wide electoral district, allowing minorities to choose whether to vote for a minority candidate or for a candidate in the constituency of their residence.[110] Once again, it is not possible to provide for a "best practice" in this field, as much depends on the local context. In general, it can only be said that the delimitation of electoral constituencies should facilitate equitable representation of the whole population and that it can be a tool to favour the representation of national minorities by preventing the dispersal of their votes.

4. Numerical thresholds

In many proportional representation systems, an electoral threshold has been introduced, reserving seats for parties that obtain a minimum percentage of the votes.[111] The threshold generally varies between 2.5% (Albania) and 5%, but sometimes it runs up to 7% (Russia) or even 10% (Turkey). The main reason to introduce a threshold is to prevent the further fragmentation of the political spectrum. The effect is that small parties have difficulties in obtaining seats. The electoral threshold is also a significant obstacle for minority parties.[112] To lower the threshold[113] or even abolish it for minority parties is a very effective affirmative action to enhance minority representation. In Serbia, minority parties failed to cross the 5% threshold in the 2003 parliamentary elections. After the abolition of the threshold in 2004, five minority parties representing Hungarians, Bosniaks, Albanians and Roma returned to parliament in the 2007 elections. In

109. CDL-AD (2008) 13.
110. Bieber, *supra* note 74.
111. Analysis of the electoral thresholds adopted in the member states that have proportional representation shows that only four states have opted for high thresholds: Turkey has the highest, at 10%; Liechtenstein has an 8% threshold; the Russian Federation and Georgia have 7% thresholds. A third of the states impose a 5% threshold and 13 have chosen a lower figure. The other member states (seven) do not use thresholds. Moreover, in several systems the thresholds are applied only to a restricted number of seats (in Norway and Iceland, for example). Thresholds for parties and thresholds for coalitions may be set at different levels. In the Czech Republic, for example, the threshold for a single party is 5%, whereas in the case of a coalition it is raised by 5% for each of the constituent parties. In Poland, the threshold for coalitions is 8% whatever the number of constituent parties. There are similar variations among the thresholds for independent candidates: in Moldova, for example, the relevant threshold is 3%.
112. Bochsler, *supra* note 91, at 14-15: "There are plenty more countries that use PR electoral systems with high legal thresholds that prevent their ethnic minorities from accessing national parliament with their own parties: the Czech Republic (5% threshold), Russia (7%), and until 2003 Serbia (5%). In Estonia (5%), Latvia (5%), Moldova (6%), and Ukraine (3%), only the Russian minorities (in Moldova along with ethnic Ukrainians) could numerically surpass the thresholds … In Slovakia, only the Party of the Hungarian Coalition can pass the 5% threshold, whereas other minority groups fall below the threshold. In Montenegro, parties underlie a 3% threshold. This hurts all minorities apart from the large Serbian community (32% of the population), which in the 2006 elections was for a first time represented through the Serbian List. For the Albanian minority, a special rule applies."
113. Since 1992 Lithuania has applied a lower threshold for its minorities.

Poland and Germany the threshold of 5% does not apply to minority lists.[114] The European Court of Human Rights stated in the case *Yumak and Sadak v. Turkey* that it would be desirable for the 10% threshold applied to Turkish elections to be lowered and/or for corrective counterbalances to be introduced to ensure optimal representation of the various political tendencies.[115] The position of the Venice Commission is that electoral thresholds should not affect the chances of national minorities being represented.

5. Reserved seats[116]

Reserved seats are of course the most obvious way of favouring minority representation. In many countries a certain number of seats are set aside on the basis of ethnic affiliation. The mechanisms for distributing such seats vary greatly.[117] In Slovenia, one seat in the National Assembly is reserved for the Italian minority and one seat for the Hungarian minority.[118] In Montenegro, a system of reserved seats for the Albanian minority has existed since 1998, based on a special constituency with five reserved seats for the Albanian community. In Kosovo,[119] 20 seats in the 120-member Parliament have been set aside for minorities. Irrespective of the participation of minorities and the additional seats minorities might gain through proportional representation, 10 seats are reserved for Serbs and 10 for all other minorities.[120] In Romania, the organisations of citizens belonging to a national minority that does not win parliamentary representation in either chamber are entitled to one seat each in the Chamber of Deputies on the condition that the organisation obtains at least 10% of the average number of valid votes normally necessary for electing a member of Parliament. There is no upper limit on the number of seats reserved for a minority. As a result, after the 2008 elections, 18 seats were distributed among ethnic minority parties. In Croatia, the law specifies that out of 140 seats, eight seats are guaranteed in advance for national minority members.[121] The most recent Hungarian

114. CDL-Inf (2000) 004.
115. *Yumak and Sadak v. Turkey*, No. 10226/03, 8 July 2008, paragraph 147: "the Court considers that in general a 10% electoral threshold appears excessive."
116. Reynolds, A (2011), "Reserved seats in national legislatures: a research note", *Legislative Studies Quarterly*, Vol. 30, Issue 2.
117. Bieber, *supra* note 74, at 24.
118. CDL-Inf (2000) 004.
119. All reference to Kosovo, whether to the territory, institutions or population shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.
120. Ten seats for the representatives of the Serbs; four seats for the representatives of the Roma, Ashkali and Egyptians; three seats for the Bosniaks, Montenegrins, Croats, Hungarians and Toskan; two seats for the Turks; one seat for the Gorans.
121. See CDL-AD (2005) 9: The Serb national minority elect three representatives; the Hungarian national minority elect one representative; the Italian national minority elect one representative; the Czech and Slovak national minorities elect one representative together; the Austrian, Bulgarian, German, Polish, Roma, Romanian, Ruthenian, Russian, Turkish, Ukrainian, Vlach and Jewish national minorities elect one representative together; the Albanian, Bosniac, Montenegrin, Macedonian and Slovenian national minorities elect one representative together.

Act on the Elections of Members of Parliament, which was adopted in December 2011, also contains specific provisions aimed at favouring the participation of national minorities in parliament. Nationality lists may be drawn up by the 13 recognised nationality self-governments, supported by at least 1% of the voters registered with a maximum of 1 500 signatures from the nationality. The 5% threshold is waived for such nationality lists and a certain number of mandates will be reserved for minorities, the so-called preferential mandates. They will be allocated to the nationality lists that obtain at least one quarter of the number of votes needed for an ordinary mandate.[122] Moreover any nationality that draws up a nationality list but fails to win a mandate will still be entitled to a non-voting parliamentary spokesperson, who is the unsuccessful candidate ranked first on the nationality list. This new system will be applied for the first time at the 2014 general parliamentary elections.

The Venice Commission has a nuanced opinion on the system of reserved seats. In the first place it has underlined that in general, those electoral rules that favour affirmative action have limited range. The beneficiaries of these reserved seats have of course been the smaller minorities. The number of beneficiaries in a given country is however clearly and sharply determined either by the constitution or the law or by other accompanying legislative acts.[123] And as the number of reserved seats is generally small, and almost always lower than the number of minorities present in the country, they have not been a major distortion of proportionality and equal representation.[124] In assessing the system the Venice Commission has stated that:

> if a state is a newly established democracy after many years of totalitarian regime and of repression of its minorities, it could be advisable, as a transitional measure, to provide for reserved seats for the minorities in the elective assemblies. But this solution does not favour the integration of the minorities in the general societies, especially not if the members of a minority are not allowed to make a choice between different political parties because the seat or the seats are reserved only to a political party which pretends to be the exclusive representative of the minority.[125]

Finally, the Venice Commission has emphasised that:

> all the solutions providing for reserved seats for persons belonging to national minorities imply the disadvantage that the persons concerned are obliged to declare their ethnic or linguistic identity. The danger cannot be avoided. Therefore it is necessary that the human rights and fundamental freedoms at large are guaranteed by the national legal system to all those who declare themselves to belong to a national minority.[126]

122. Section 16 d): "The total number of national list votes shall be divided by ninety-three, and the result shall be divided by four, the preferential quota shall be the integer of the resulting quotient."
123. CDL-AD (2005) 9.
124. Bieber, *supra* note 74.
125. CDL-AD (2008) 13, paragraph 52.
126. CDL-AD (2008) 13, paragraph 54.

6. Dual voting rights

The last affirmative action electoral rule I would like to draw your attention to is the so-called "dual voting" system. In some countries persons belonging to national minorities are entitled to cast two votes: they may vote for a general list but may also vote for specific minority lists. Slovenia is currently the only country that grants dual voting rights to members of national minorities: members of the Hungarian and Italian minorities have the right to elect on a special list a representative of the minority, but at the same time they also have the right to vote for ordinary candidates. Unlike other citizens who cast only one vote, persons belonging to minorities have the right to "dual voting". In 1998, the Slovenian constitutional court found that this arrangement was compatible with the principle of equality because it was enshrined in bilateral treaties with Italy and Hungary. In Cyprus, further to their general right to vote as members of the Greek community, the members of the Maronite, Armenian and Latin religious minorities elect a deputy to the House of Representatives. But this representative has only a consultative status. The Croatian Constitution stipulates that the law might give members of all national minorities, besides the general voting right, the right to elect their minority representatives to the Croatian Sabor (parliament), but such a dual voting system has not been introduced yet.[127]

According to the HCNM, "States enjoy less flexibility in altering the 'one person, one vote' principle, than in designing the methods that translate votes into seats of parliament".[128] "Departure from the principle 'one person, one vote' may only be exceptional: exceptions should be justified only by the impossibility of reaching the expected result through implementation of the numerous special mechanisms available, including positive discrimination in conversion of votes into seats."[129] In the same sense the Venice Commission, in its report on dual voting, stated that although an exception to the principle "one person, one vote" might at first sight seem to be inadmissible, in certain specific circumstances it might be the only system to ensure on the one hand that the minority is represented and on the other "that the persons belonging to minorities are allowed on an equal basis, to take part in the national political debate". The Venice Commission suggests that states coming from a totalitarian experience need to favour the integration of minorities in national political life. The dual voting system should be a real exception to the fundamental principle of "one person, one vote", and therefore very well justified. The Venice Commission concludes that dual voting may be admitted if:

> it respects the principle of proportionality under its various aspects. This implies that it can only be justified if:
>
> – it is impossible to reach the aim pursued through other less restrictive measures which do not infringe upon equal voting rights;
>
> – it has a transitional character;
>
> – it concerns only a small minority.[130]

127. CDL-AD (2008) 13, paragraphs 10 to 12.
128. HCNM, Equal voting rights; equal numerical values of votes, paragraph 16.
129. CDL-AD (2008) 13, paragraph 56.

7. Conclusions

I come to my conclusions. We have examined specific electoral rules aimed at guaranteeing minority representation in elected bodies. It may be useful to recall the words of the Venice Commission:

> the electoral system is but one of the factors conditioning the presence of members of minorities in an elected body. Other elements also have a bearing, such as the choice of candidates by the political parties and, obviously, voters' choices, which are only partly dependent on the electoral system. The concentrated or dispersed nature of the minority may also have a part to play, as may the extent to which it is integrated into society, and, above all, its numerical size.[131]

That being said, it is a challenge to democratic societies to allow minorities to participate in political decision making, as this is still the best way to preserve inter-ethnic peace and stability. Although affirmative action will always be controversial, its rationale is strong. In its 2005 "Report on electoral rules and affirmative action for national minorities' participation in decision-making process in European countries", the Venice Commission emphasised five important principles. I think it is worthwhile to mention them as a conclusion:

a. Parties representing national minorities must be permitted. Yet the participation of national minorities in political parties is not and shall not be restricted to the so-called ethnic based parties.
b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.
c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.
d. Electoral thresholds should not affect the chances of national minorities to be represented.
e. Electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes.[132]

130. CDL-AD (2008) 13, paragraph 71.
131. CDL-AD (2005) 9.
132. CDL-AD (2005) 9, paragraph 68.c.

5. The Code of Good Practice in Electoral Matters in the case law of the European Court of Human Rights

Vincent Berger,[133] assisted by Stéphanie Bouchié de Belle[134]

1. Introduction

1.1. European electoral litigation

European electoral litigation is not the most abundant, and in fact electoral cases only began to emerge fairly recently. In connection with the "right to free elections" as secured under Article 3 of Protocol No. 1 of the European Convention on Human Rights ("the Convention"), the European Commission of Human Rights ("the Commission") systematically declared such cases inadmissible until 1975. There was very little movement until the eastward enlargement of the Council of Europe, after which litigation on political rights increased considerably.

The European Court of Human Rights ("the Court") attaches great importance to such litigation. It considers it a "characteristic principle" of "an effective political democracy",[135] or a fundamental right that is "crucial to … democracy governed by the rule of law".[136] It is no wonder, therefore, that this type of litigation, which is particularly sensitive – in that it affects political rights – has produced a proportionally large number of Grand Chamber judgments.

What we might refer to as "European electoral case law" mainly concerns Article 3 of Protocol No. 1, sometimes in conjunction with Article 13 of the Convention (right to an effective remedy) or Article 14 (prohibition of discrimination), and occasionally also with Article 11 (freedom of assembly and association) or Article 10 (freedom of expression).

Article 3 of Protocol No. 1 of the Convention reads as follows: "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". While this rule appears only to be targeted at states, the Commission[137] inferred "subjective rights of participation" from it, as confirmed by the Court in the seminal judgment *Mathieu-Mohin and*

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135. *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, No. 9267/81.
136. *Hirst v. The United Kingdom (No. 2)*, No. 74025/01, 6 October 2005, paragraph 58.
137. Commission (decision), *W., X., Y. and Z. v. Belgium*, Nos. 6745/74 and 6746/74, 30 May 1975.

Clerfayt v. Belgium of 1987. In this way, European case law derives from the obligation to organise free elections the right to vote and the right to stand for election,[138] which implies the right to exercise one's mandate.[139]

1.2. A common vision of European electoral heritage

In accordance with the "Code of good practice in electoral matters" ("the Code"), in the framework of European electoral heritage, suffrage is governed by five principles: it must be universal, equal, free, secret and direct. The Court's case law shares this vision and highlights the same general principles, although their content can vary considerably. For instance, in its Grand Chamber judgment *Yumak and Sadak v. Turkey* of 2008,[140] it quotes the Code, which "forcefully recalls that the 'five principles of the European electoral heritage are universal, equal, free, secret and direct suffrage'".

Article 3 of Protocol No. 1 of the Convention refers to the principle of free and secret suffrage. The need for secret polling was affirmed by the Commission in 1976,[141] because secrecy helps shield voters from pressure to vote for a specific party or candidate. Broadly speaking, this safeguard does not raise any particular difficulties. It is, nevertheless, one possible reason for Switzerland's failure to ratify the protocol (some cantons still practise public voting by a show of hands). The issue of voting by automatic or electronic means or by correspondence can also lead to problems of confidentiality.

The principle of universal suffrage was discarded during the drafting of Article 3 (under pressure from the United Kingdom representative), but this omission has subsequently been compensated for by European case law. Article 3 is considered to imply universal suffrage, the only type of suffrage that is deemed genuinely democratic. This principle was recognised by the Commission in 1967[142] and has been confirmed on many occasions by both the Commission[143] and the Court, starting with the *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 1987 (paragraph 51). Other landmark judgments have also reaffirmed it more recently, and the Court has ruled that any derogation from the principle constitutes "a risk of undermining the democratic validity of the legislature as so elected and the laws which it promulgates".[144]

138. Ibid.
139. Commission (decision), *M. v. the United Kingdom,* No. 10316/83, 7 March 1984; *Sadak and Others v. Turkey,* No. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002, paragraph 33.
140. *Yumak and Sadak v. Turkey*, No.10226/03, 8 July 2008, paragraph 54.
141. Commission (decision), *X. v. the United Kingdom*, No. 7140/75, 6 October 1976.
142. Commission (decision), *X. v. the Federal Republic of Germany*, No. 2728/66, 6 October 1967.
143. Commission (decision), *W., X., Y. and Z. v. Belgium*, Nos. 6745/74 and 6746/74, 30 May 1975; Commission (decision), *X. v. the United Kingdom*, No. 7566/76, 11 December 1976.
144. *Hirst v. The United Kingdom (No. 2)*, No. 74025/01, 6 October 2005, paragraph 62; *Melnytchenko v. Ukraine*, No. 17707/02, 19 October 2004, paragraph 56; *Yumak and Sadak v. Turkey*, No. 10226/03, 30 January 2007, paragraph 65.

European case law infers equality before electoral law from the right to free elections. According to the Commission, "the only condition laid down [by Article 3] is that elections must guarantee equality of treatment for the citizens", that is, as the Court points out, "equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election".[145] Electoral law must not be applied in a discriminatory manner, and the Court frequently combines the violation of Article 3 of Protocol No. 1 with violation of Article 14 of the Convention, as in the case of *Aziz v. Cyprus,* in which it condemns the differential treatment between the two communities on the island.[146]

On the other hand, the Court does not allow for "equal opportunities", as one heading in the Code declares. The Court specifies that "it does not follow … that all ballots must have equal weighting in terms of the result, or that all candidates have equal chances of winning".[147] It thus accepts a number of electoral techniques. Geographical distortions caused by constituency boundaries are therefore possible. The case of *Bompard v. France*[148] is a clear illustration of this.

Where voting systems are concerned, the equality principle does not imply any "obligation to introduce a specific system … such as proportional representation or majority voting with one or two ballots".[149] This is because "the choice of electoral system … is a matter in which the State enjoys a wide margin of appreciation".[150]

Furthermore, the Commission[151] and later the Court[152] have accepted the possibility of making reimbursement of a deposit conditional upon obtaining a minimum number of votes.

The Code addresses many points that have not as yet been dealt with in Strasbourg. This applies to election periodicity and voting procedures, such as voting by correspondence, election result transfer, election observation or the organisation of polling stations. This is probably due to a lack of applications concerning these issues, which is in turn caused by ignorance or discouragement on the part of possible complainants. It is also possible that applications have been declared inadmissible by committees or, since 1 June 2010, by single judges, whose decisions are not published.

In the Court's case law, the Code is quoted in some 20 cases (since the *Hirst v. The United Kingdom (No. 2)* judgment of 2005), which mainly concern alleged infringements of Article 3 of Protocol No. 1 and a wide variety of

145. *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, No. 9267/81, paragraph 54.
146. *Aziz v. Cyprus*, No. 69949/01, 22 June 2004, paragraph 38.
147. *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, No. 9267/81, paragraph 54.
148. *Bompard v. France*, No. 44081/02, 4 April 2006.
149. *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, No. 9267/81, paragraph 54.
150. *Matthews v. the United Kingdom*, No. 24833/94, 18 February 1999, paragraph 64.
151. Commission (decision), *Desmeules v. France*, No. 12897/07, 3 December 1990.
152. *Cheminade v. France (dec.)*, No. 31599/96, 26 January 1999.

electoral law issues. They can be split into three groups: the right to vote, the right to stand for election and the right of appeal.

2. Right to vote

The Court has adjudicated on cases of exclusion of the right to vote resulting either from a prohibition to vote or from non-registration on the electoral roll.

2.1. Prohibition to vote

Three very different categories of persons have complained to the Strasbourg Court of being deprived of the right to vote: convicts, persons placed under guardianship and expatriates.

2.1.1. Convicts

The judgment *Hirst v. The United Kingdom (No. 2)*[153] was the first to address the issue of the disenfranchisement of convicted prisoners.

In this judgment, the Grand Chamber quotes, among the relevant international documents, the section of the Code on deprivation of the right to vote and to be elected (I.1.1.d.):

i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:
ii. it must be provided for by law;
iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;
iv. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;
v. furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

The Grand Chamber's reasoning comprises similar stages to those of the Code, considering the proportionality and gravity of the measure and the safeguards provided by a court of law, and ends with a finding of violation of the right to free elections.

The Grand Chamber did, however, qualify its position in the judgment *Scoppola v. Italy (No. 3)*.[154] It begins by confirming the *Hirst (No. 2)* judgment, stating that general prohibitions of the right to vote that automatically affect an undifferentiated group of persons based solely on their prisoner status and irrespective of the length of sentence, the nature or gravity of the offence committed and their personal situation, are incompatible with Article 3 of Protocol No.1 of the Convention.

153. *Hirst v. The United Kingdom (No. 2)*, No. 74025/01, 6 October 2005.
154. *Scoppola v. Italy (No. 3)*, No. 126/05, 22 May 2012.

The Court once again quotes the Code (paragraph 44), but nevertheless decides not to apply the last condition, which it imposes vis-à-vis the passing of a sentence by a court in a specific decision. It thus varies from *Frodl v. Austria*,[155] considering that the aim of minimum individualisation of the sentence can be sufficiently achieved in the absence of a judicial decision. While the intervention of a judge can guarantee the proportionality of the restrictions placed on prisoners' rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in law, making its application conditional on such factors as the nature or the gravity of the offence committed. The Court also notes the lack of a consensus on the need for a judgment under comparative law (paragraph 99).

2.1.2. Persons placed under guardianship

The judgment *Alajos Kiss v. Hungary*[156] follows directly from *Hirst (No. 2)*, although it targets a very different group.

The Court mentions (paragraph 16) the Code in connection with exclusion of the right to vote, and declares that it "cannot accept … that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation" (paragraph 42). It "further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification" (paragraph 44). The Code is once again highlighted by the Court, as is the United Nations Convention on the Rights of Persons with Disabilities, to the extent that these instruments of international law require strict scrutiny of any curtailment of their rights (paragraph 44). In the light of these considerations, the Court concludes that Article 3 of Protocol No. 1 has been violated. This requirement of individualised judicial assessment is similar to that laid down in the Code.

2.1.3. Expatriates

In the case of *Sitaropoulos and Others v. Greece*,[157] concerning the fact that expatriates cannot vote in their state of residence in parliamentary elections held in their country of origin, the Court first of all decided that there had been a violation of Article 3 of Protocol No. 1. It considered that the failure to enact legislation on voting rights for expatriates as laid down in the Greek Constitution constituted "unfair treatment of Greek citizens living abroad … in comparison with those living in Greece, despite the fact that the Council of Europe had urged member States to enable their citizens living abroad to participate to the fullest extent possible in the electoral process". Under the section on international law (paragraph 18), the Court considered the relevant texts adopted by

155. *Frodl v. Austria*, No. 20201/04, 8 April 2010.
156. *Alajos Kiss v. Hungary*, No. 38832/06, 20 May 2010.
157. *Sitaropoulos and Others v. Greece*, No. 42202/07, 8 July 2010.

the competent bodies of the Council of Europe, including the Code, on voting by correspondence and electronic voting.

The Grand Chamber has nevertheless reviewed this position.[158] Like the Venice Commission, it now advocates facilitating the exercise of expatriates' voting rights, although this is not compulsory, but rather a possible option for each individual country. It also notes that in comparative law, some Council of Europe states do not provide for voting by expatriates and that in states which so provide, although they are the majority, the conditions for exercising this right vary considerably and involve wide discretionary powers for states. Moreover, the Greek Constitution provides for a possibility for voting by expatriates rather than making it mandatory, and the authorities have on many occasions endeavoured – in vain – to legislate on this issue. This new position seems to constitute a more accurate reading of the Code, because the latter only mentions voting by correspondence and e-voting in terms of laying down strict criteria regulating their use, in view of the inherent risks of fraud.

2.2. Drawing up electoral registers

In the case of the *Georgian Labour Party v. Georgia*,[159] the applicant party complained – among other things – about the rules on the drafting of electoral registers.

Among the relevant international documents, the Court extensively cites (paragraph 47) the Code, particularly in connection with regulatory levels and the stability of electoral law (II.2.b.):

> The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law.

However, the Court (paragraph 89) considers that:

> in the present case, the electoral authorities had the challenge of remedying manifest shortcomings in the electoral rolls within very tight deadlines, in a "post-revolutionary" political situation … Consequently, the Court concludes that the unexpected change in the rules on voter registration one month before the … parliamentary election … was, in the very specific circumstances of the situation, a solution devoid of criticism under Article 3 of Protocol No. 1.

Consequently, the Court is in fact moderating the requirements laid down in the Code following a concrete analysis of the situation, by refraining from adopting the standards set out in the Code.

158. *Sitaropoulos and Giakoumopoulos v. Greece*, No. 42202/07, 15 March 2012.
159. *Georgian Labour Party v. Georgia*, No. 9103/04, 8 July 2008.

3. Right to stand for election

The right to stand for election is central to many "electoral" cases submitted to the Court. Most of the obstacles or hindrances arise prior to the elections, but they also sometimes follow them.

3.1. Pre-electoral measures

3.1.1. Refusal to register candidatures

In the case of *Sukhovetskyy v. Ukraine*[160] concerning the deposit required to stand for election, the applicant had contended before Ukraine's Supreme Court, in vain, that his annual income was insufficient for him to pay this sum.

Among the relevant international documents, the Court cites (paragraph 38) the Code in connection with "submission of candidatures" (I.1.3.vi.):

> If a deposit is required, it must be refundable should the candidate or party exceed a certain score; the sum and the score requested should not be excessive.

In considering the legitimate aim of this infringement of the right to free elections, the Court (paragraph 61) refers to this paragraph and a joint report by the Venice Commission and the OSCE, which regards the aim of discouraging frivolous candidatures as a legitimate one, provided that serious candidatures are not discouraged. It then notes that the amount of the deposit required under Ukrainian law is one of the lowest in Europe (paragraph 70). This meets one of the requirements vis-à-vis deposits set out in the Code. Again, "in view of the relatively low amount of the sum involved, the electoral campaign services provided by the State (see paragraphs 15-17 above), and the other burdensome costs of organising elections which such deposits may help to allay, the Court does not find the measure arbitrary or falling outside the State's wide margin of appreciation" (paragraph 72). The Court thus focuses on only one of the criteria set out in the Code, and does not expand on the fact that the deposits were only returned to candidates and parties that obtained at least 4% of the national vote (paragraph 14). It therefore does not pronounce on the question of whether this 4% figure is excessive. It is also true, however, that the applicant's main contention was that the deposit required exceeded his annual income, with no mention of the 4% threshold.

3.1.2. Failure to reinstate candidatures

The case of *Petkov and others v. Bulgaria*[161] concerned the failure to reinstate candidates on the electoral lists (the applicants had been struck off – "deregistered" – following allegations of collaboration with the communist-era secret and security services), despite the annulment of the deregistration decision (four days after the elections in the case of one, and two days before in the case of the others).

160. *Sukhovetskyy v. Ukraine*, No. 13716/02, 28 March 2006.
161. *Petkov and Others v. Bulgaria*, Nos. 77568/01, 178/02 and 505/02, 11 June 2009.

Under "relevant international documents" the Court quotes the Code at length, particularly the provisions on the stability of electoral law (Guideline ii.2.b.).

The Court observes in this connection that the difficulties encountered by the electoral authorities vis-à-vis the delays in issuing administrative decisions were attributable to the public authorities because the electoral law "was enacted less than two and half months before the elections … at odds with the recommendations of the Council of Europe on the stability of electoral law" and because "the practical arrangements for the application of this rule (on the deregistration of candidatures) were clarified by the Central Electoral Commission just twelve days before the elections". The Court therefore concludes that Article 3 of Protocol No. 1 was violated.

3.1.3. Dissolution of political parties

In the case of *Republican Party of Russia v. Russia*,[162] the applicant party complained of its dissolution as decided by the Minister of Justice of the Russian Federation on the grounds that it had a membership of under 50 000 and fewer than 45 regional federations with over 500 members each, contrary to the law on political parties. It relied in particular on Article 11 of the Convention.

Among the relevant international instruments, the Court quotes the Code (paragraph 61), especially the provisions on the stability of electoral legislation (paragraphs 63 to 65).

It notes that "the minimum membership requirement is not unknown among the member States of the Council of Europe", but that "the required minimum membership applied in Russia is quite the highest in Europe" and that "domestic legislation on these requirements has changed frequently over the last few years". It is not convinced by the respondent state's justifications of this legislation, namely that it was aimed at avoiding public expenditure and excessive fragmentation of parliament, as these aims were achieved by other measures that were already in place. The Court then recalls that "frequent changes to electoral legislation will be perceived, rightly or wrongly, as an attempt to manipulate electoral laws to the advantage of the party in power", an assertion that is very similar to that used in the explanatory report of the Code. The Court concludes as follows:

> the applicant's dissolution for failure to comply with the requirements of minimum membership and regional representation was disproportionate to the legitimate aims cited by the Government. There has accordingly been a violation of Article 11 of the Convention

It should be noted that the Code provides that "democratic elections are not possible without respect for human rights, in particular freedom of expression … freedom of assembly and freedom of association for political purposes, including the creation of political parties", and that "restrictions of these freedoms must

162. *Republican Party of Russia v. Russia*, No. 12976/07, 12 April 2011.

have a basis in law, be in the public interest and comply with the principle of proportionality". These arguments are similar to those used by the Court.

3.1.4. Television coverage of election campaigns

This issue emerged for the first time in the case of *Communist Party of Russia and Others v. Russia*.[163] The applicants were two political parties that had stood for the 2003 parliamentary elections and six individuals who had voted for these parties. The elections had been covered by the main national broadcasting corporations, three of which were directly controlled by the state and two indirectly attached to the state. The applicants contended that the television coverage had been generally hostile to the opposition parties and candidates and that the United Russia Party, which represented the pro-government forces, had exerted influence on the television companies to secure favourable reporting, with the result that the elections had not been free.

The Court draws on several international documents and, obviously, refers to the explanatory report of the Code, which stresses equal opportunities and in particular the neutrality requirement for the public media (paragraph 2.3).

In its (non-final) judgment, the Court basically seconds the findings of the Supreme Court of the Russian Federation, which had examined an application to cancel the election results. The applicants produced no direct evidence that the Government of the Russian Federation had abused its dominant position in the television companies. The TV journalists themselves did not complain of any undue pressure from the government or their superiors during the election campaign. Drawing on the opinion of the OSCE, the Court agrees that the media coverage was not favourable to the opposition, but it considers that it is very difficult, indeed impossible, to draw a causal link between "excessive" political publicity and the number of votes obtained by a party or candidate. It concludes that Article 3 of Protocol No. 1 was not violated.

3.2. Post-electoral measures

3.2.1. Cancellation of elections

The problem of the cancellation of an election – an extremely serious measure – arose for the first time in the case of *Georgian Labour Party v. Georgia*.[164] The applicant party complained of the cancellation of elections in two constituencies, depriving 60 000 voters of their right to vote and preventing said party from achieving the 7% threshold required for a seat in parliament.

Among the relevant international documents, the Court refers (paragraph 47) extensively to the Code, particularly in connection with "the organisation of elections by an impartial body" (Guideline II.32.1.).

163. *Communist Party of Russia and Others v. Russia*, No. 29400/05, 19 June 2012.
164. *Georgian Labour Party v. Georgia*, No. 9103/04, 8 July 2008.

It considers that the authorities did not validly justify their decision or surround it with guaranties capable of preventing abuse of power. Noting that the central electoral commission, instead of organising fresh elections in the two districts in question, hastily decided to close the national election without any valid justification, the Court holds that the applicant party's right to stand in an election was flouted in breach of Article 3 of Protocol No. 1.

3.2.2. Inability to exercise an elective mandate

Can someone have the right to stand for election and be elected, and then be required immediately to renounce his mandate? This seems difficult to imagine, but *Tanase v. Moldova*[165] dealt with just such a case. It concerned a legal prohibition on Moldovan nationals holding a second nationality from sitting in parliament after having been elected, subject to undergoing a procedure to renounce the second nationality.

In its judgment, the Grand Chamber stresses the fact that the international reports, especially those of the Venice Commission, have voiced unanimous concerns and criticisms vis-à-vis the discriminatory effect of the Moldovan law.

Moreover, among the "relevant instruments adopted in the context of the Council of Europe", the Court mentions (paragraph 86) the Code, and more specifically two passages from its explanatory report, on equal rights for dual nationality holders and the stability of the electoral law (paragraphs 6.b. and 63-65).

In an attempt to ascertain whether the measure concerned really had the legitimate aim of guaranteeing loyalty to the state (paragraph 168), the Court notes that the overall electoral reforms have had a disproportionately negative effect on the opposition, that some dual nationality holders are not affected by the law, and that the amendments were adopted less than one year before the parliamentary elections:

> the Court refers to the Venice Commission Code of Practice, which warns of the risk that frequent changes to electoral legislation or changes introduced just before elections will be perceived, rightly or wrongly, as an attempt to manipulate electoral laws to the advantage of the party in power.

The Court is clearly using the Code here, especially since the terms used are very similar to those of the explanatory report (paragraph 63: "voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful"). Furthermore, the reference to "one year before the elections" may be seen as a further reference to the Code (Guideline II.2.b.: "The fundamental elements of electoral law … should not be open to amendment less than one year before an election").

165. *Tanase v. Moldova*, No. 7/08, 27 April 2010.

4. Right of appeal

In a number of States Parties to the Convention, electoral litigation commonly comes under the jurisdiction of electoral commissions and then the ordinary courts.

4.1. Electoral commissions

In the judgment *Georgian Labour Party v. Georgia*,[166] the applicant party complained about the composition of the electoral commissions. For instance, most members of the central electoral commission were representatives of the political forces in power. Furthermore, this commission had reached its decisions on a majority basis, which enabled it to ignore the applicant party's many complaints about the irregularities that it had noted.

Among the relevant international legal texts, the Court refers (paragraph 47) extensively to the Code, particularly in connection with "the organisation of elections by an impartial body" (Guideline II.3.1.). It also quotes its explanatory report: "In states where the administrative authorities have a long-standing tradition of independence from the political authorities … [it is] acceptable for elections to be organised by administrative authorities, and supervised by the Ministry of the Interior" (paragraph 69). On the other hand, in countries with little experience of organising pluralist elections, independent, impartial electoral commissions are needed to ensure that elections are properly conducted (explanatory report, paragraphs 70-71).

In this case, however, the Court does not go into all the criteria laid down in the Code on the composition of these commissions. Given the applicant party's criticism of the lack of independence vis-à-vis the political authorities, it concentrates on this criterion. While an OSCE report regretted the lack of political balance in the electoral commissions and noted a few cases of dysfunction in these bodies, the Court notes that there is no evidence that the rights and interests of the applicant party were directly restricted by the action or inaction of the electoral commissions. Moreover, it states in paragraph 109:

> the Court cannot find a violation of Article 3 of Protocol No. 1 solely on the basis of the allegation, no matter how plausible it is, that the system created possibilities for electoral fraud; instead, the applicant party should have submitted evidence of specific incidents of alleged violations.

Here again the Court avoids abstract considerations, rejecting the allegation of partiality on the basis of appearances.

166. *Georgian Labour Party v. Georgia*, No. 9103/04, 8 July 2008.

4.2. Ordinary courts

The ineligibility of individuals based on their activities within political parties that have been declared illegal and dissolved was central to the cases of *Etxeberria and others v. Spain* and *Herritarren Zerrenda v. Spain*.[167]

Among the relevant instances of international law and practice, the Court (paragraph 37) refers to the Code in respect of an "effective system of appeal" (Guideline II.3.3.).

It notes that the time allowed to the groupings in question to submit their appeals, namely two days, was short, and then recalls that the standards established by the Venice Commission in the Code recommend a time limit of three to five days at first instance. It therefore seems to be taking the recommendations of the Code seriously. However, after its analysis *in concreto*, it decided to qualify these abstract principles, to the effect that it had not been demonstrated that a period of two days was too short to allow the applicants to appeal and appropriately defend their interests. The Court therefore concluded that Article 13 had not been violated.

The judgment *Grosaru v. Romania*[168] is particularly interesting as regards the parliamentary representation of national minorities. It concerns a refusal by the central electoral office in Romania to grant a parliamentary mandate to a representative of the Italian minority, even though the latter had received the largest number of votes at the national level in the parliamentary elections, and the fact that this mandate was granted instead to a different representative of this minority who had obtained the largest number of votes in only one constituency.

Among the relevant instances of international law and practice, the Court makes extensive reference (paragraph 22) to the Code in connection with an "effective system of appeal" (Guideline II.3.3.).

It goes on to note (paragraph 55) that:

> no national court ruled on the interpretation of the legal provision at issue. Thus, the Supreme Court of Justice rejected the applicant's challenge as being inadmissible, considering that the decisions of the central office were final. Subsequently, the Constitutional Court informed the applicant that it had no jurisdiction in electoral matters.

The Court recalls that it is important for such allegations to be examined "in the context of judicial proceedings". A further reference (paragraph 56) is made to the Code:

> That approach has, moreover, been confirmed by the Venice Commission in its Code of Good Practice in Electoral Matters, which recommends judicial review of the application of electoral rules, possibly in addition to appeals to the electoral commissions or before parliament.

Considering "the lack of clarity of the electoral law as regards national minorities and the lack of sufficient guarantees as to the impartiality of the bodies responsible for examining the applicant's challenges", the Court concludes that Article 3 of Protocol No. 1 was violated, as was Article 13 of the Convention in conjunction with Article 3 of Protocol No. 1.

The Code would seem to have been particularly influential here because the judgment constitutes a reversal of precedent. It was the Court's first ruling that Article 13 had been violated in conjunction with Article 3 of Protocol No. 1, which combination it had previously avoided.[169]

In the case of *Namat Aliyev v. Azerbaijan*,[170] a candidate for the parliamentary elections complained of irregularities and violations of the electoral law and of the fact that the elections had not been effectively examined by the authorities, primarily the electoral commissions, but also, subsequently, by the appellate court and the Supreme Court of the Azerbaijan Republic. The latter had set out extremely formal grounds in order to avoid examining the substance of the applicant's complaints.

Having extensively cited the Code (Guidelines II.3.1., "The organisation of elections by an impartial body", and II.3.3., "An effective system of appeal"), which cautions against "excessive formalism in examination of election-related appeals", the Court criticises the courts in question. It states that "such a rigid and overly formalistic approach was not justified under the Convention". Since the point at issue was compliance by the state with its obligation to organise free and impartial elections, the domestic courts should have reacted by taking reasonable measures to investigate the alleged irregularities, without imposing excessively strict and unreasonable procedural obstacles on the applicant. The latter relied not on Article 13 but on Article 6, which is not applicable to electoral matters. However, the Court confirmed its wish to sanction the lack of an effective appeal in electoral matters for the first time by imposing on states a procedural obligation based on Article 3 of Protocol No. 1, finding a violation of this provision.

Lastly, in its judgment *Communist Party of Russia and Others v. Russia*,[171] the Court accepted that although the appeal facilities made available during the election campaign to lodge complaints about the partiality of television companies might have been insufficient, the applicants had nonetheless been able to request the cancellation of the results by the Supreme Court of the Russian

167. *Etxeberria and Others v. Spain*, Nos. 35579/03, 35613/03, 35626/03 and 35634/03; *Herritarren Zerrenda v. Spain*, No. 43518/04, 30 June 2009.
168. *Grosaru v. Romania*, No. 78039/01, 2 March 2010.
169. Commission (decision), *Estrosi v. France*, No. 24359/94, 30 June 1995; *Pierre-Bloch v. France*, No. 24194/94, 21 October 1997, paragraph 64; *Bompard v. France*, No. 44081/02, 4 April 2006.
170. *Namat Aliyev v. Azerbaijan*, No. 18705/06, 8 April 2010.
171. *Communist Party of Russia and Others v. Russia*, No. 29400/05, 19 June 2012.

Federation. The latter had examined the applicants' requests and issued a reasoned judgment, and its independence had at no stage been challenged. The fact that the Supreme Court had only studied some of the recordings of the TV broadcasts produced by the applicants ("sampling method") did not render this appeal ineffective. Furthermore, the Court did not note any procedural defect in the proceedings before the Supreme Court. In short, there was no violation of Article 13.

5. Conclusions

5.1. Partial consideration of the Code

As the Grand Chamber stressed in its judgment *Tanase v. Moldova*,[172] the Court is careful to consider the relevant international instruments and reports, in particular those issued by other Council of Europe bodies, in interpreting the guaranties provided under the Convention and determining whether there is any European common standard in the relevant field. The Code figures large among these international instruments, and when it is taken into account it has a varying degree of influence over case law.

The Court has apparently interpreted the Convention "in the light" of the Code in a number of cases concerning the lack of an effective remedy in electoral matters, and also the issue of ineligibility (for instance, non-reinstatement of candidates on the electoral list despite the cancellation of a decision on deregistration or dual nationality holders being barred from exercising their mandates).

In other cases, the influence of the Code seems weaker, merely reinforcing the Court's arguments. This applies to several cases concerning breaches of the right to stand for election (the dissolution of a party, or a deposit requirement), or limitations on voting rights (vis-à-vis convicted prisoners and persons under guardianship).

Nevertheless, the Court has clearly distanced itself from the recommendations of the Code on several occasions. Each time, the Court seems to consider it with interest but ultimately decides to discard it, considering that the case under consideration and a concrete appraisal of the situation call for some qualification. For instance, the "post-revolutionary" situation in Ukraine was regarded as requiring flexibility in analysing the stability of the electoral law. The Grand Chamber has also held that under certain circumstances a law could adequately fulfil the requirements of individualising sentences imposed on prisoners, in connection with deprivation of their voting rights. Moreover, the Court is sometimes rather fastidious about evidence, requiring the applicant to specify the extent to which a given appeal time limit was too short or to report on incidents showing that the action or inaction of electoral commissions infringed his right of appeal.

172. *Tanase v. Moldova*, No. 7/08, 27 April 2010, paragraph 176.

In short, the Court uses the Code as a valuable source of inspiration, but does not consider itself bound by its requirements.

Beyond any comparisons between the conclusions of the Court and the recommendations of the Code, which in fact reveal more complementarity than divergence, the Code has the advantage of shedding fresh light on cases, assisting in the elucidation of European standards. This is especially interesting given that increasing numbers of cases concerning electoral rights are being submitted to the Court. The past five years have seen many allegations of violations of the right to free elections in central and eastern Europe (e.g. Azerbaijan, Bosnia and Herzegovina, Bulgaria, Georgia, Latvia, Moldova, Romania, Russia and Turkey). Two of these countries – Turkey and Azerbaijan – account for the largest number of cases involving Article 3 of Protocol No. 1.

5.2. Random compensation for violations

Despite the fair number of findings of violation of the provisions of the Convention and Protocol No. 1, the Court has never invited a state to organise fresh elections, whether in a single constituency or, *a fortiori*, nationwide. And yet it is clear that in many fields it no longer seems to hesitate in applying Article 46 of the Convention, particularly with regard to judgment enforcement. There are several possible explanations, apart from the politically sensitive nature of the issue. Applicants do not usually demand fresh elections, knowing how difficult the procedure would be, especially as they have since spent some time exhausting domestic remedies and carrying out proceedings with the Strasbourg Court. Furthermore, fresh elections, which may be less open to criticism, have in most cases been held in the meantime. In short, *restitutio in integrum* here seems if not impossible then at least extremely difficult. The Court's cautious approach is also adopted by the Committee of Ministers of the Council of Europe.

This leaves the possibility of the Court granting the victim of the violation "just satisfaction" under the terms of Article 41 of the Convention. Such compensation does not concern material damage, because the Court refuses to conjecture about a candidate's chances of being elected or the latter's failure to receive the remuneration or allowances payable, for instance, if he or she had been elected to parliament. On the other hand, the Court may award a sum of money for the non-material damage caused by the violation. It also sometimes confines itself to declaring that the finding of violation is sufficient.

Beyond individual compensation, the question of enforcing the Court's judgments is fairly serious since many of the "electoral" cases submitted to the Court point to underlying structural problems. In this connection, the United Kingdom's persistent refusal to grant voting rights to convicted prisoners is a major cause for concern, especially as, if we set aside such geopolitical problems as Cyprus and Transnistria, it is the first ever case of deliberate non-enforcement of a judgment, issued, moreover, by the Grand Chamber.

At all events, democracy is and will remain the only political model envisaged by and compatible with the Convention. And of course genuine democracy is impossible without genuinely free elections.

6. Representation of women in elected bodies

Lydie Err[173]

Parity democracy, political parties and electoral systems

Democracy, or in other words the sovereignty of the people, implies the separation of powers, the rule of law and human rights. The term "parity" comes from the Latin "paritas"; in Latin, "par" means "equal" or "similar". The aim of parity is the fair representation of the electorate, which as we know is made up of men and women, whose sexual difference is essential for the survival of the human race.

The difference between the sexes, which nobody disputes, is used as the pretext for an allocation of human activities that was understandable when these activities were limited to hunting and gathering but has long been totally unwarranted. Yet men and women continue to be assigned specific activities.

Activities that attract little or no pay such as domestic and voluntary work are still reserved for women, whereas the more rewarding and better-paid activities are mostly still carried out by men. Politics forms part of the latter category of activities in which women are still largely in the minority. This is an indisputable fact and it is important to look into the reasons for it.

The first is undoubtedly the unpaid work carried out for the most part by women in the family. Families are not just consumption units but also labour production units. Yet this labour, which cannot be separated from the organisation of labour as a whole, is not considered an economic activity. As a result, it is not taken into account when calculating the wealth of nations as reflected in Gross Domestic Product (GDP).

This overlooked share of human labour is considerable, however. Switzerland has assessed the value of domestic work in commercial terms, and in 1998 it was estimated at CHF 215 billion or over half of its GDP (CHF 172 billion for house work + CHF 43 billion for the care of dependants), while the time devoted to it (7.25 billion hours in 2000) was calculated to be greater than that spent on paid work (6.7 billion hours).

The whole of society benefits from the domestic work performed by women because it represents major savings for the state in the health and education

173. Mediator of the Grand Duchy of Luxembourg.

fields, whether they do it themselves or employ other women for the purpose. This work is not taken into account if it is carried out in a private capacity in the family, but is if it is done by other women whose identical activities are paid for (albeit poorly) and hence considered to form part of a country's economic activities. Where is the consistent economic thinking in all of this?

The reader may be wondering why I am digressing into the world of work when the subject here is politics. The purpose is to show that access to politics is more difficult for women than for men because they do much of the unpaid work in the home which, although crucial for families and society and requiring just as broad a variety of technical, ethical and organisational skills as any other work, is not valued by the community. The scale of values attributed to different types of work is disadvantageous to women.

Although, on the whole, occupations are now mixed, they are still segregated in the sense that some, particularly those that are the most called on and valued by society and the economy, are still very difficult for women to gain access to. Among these is politics, which will tend to remain the exclusive domain of men unless the political will to change these regrettable and unfair circumstances results in more equality in the distribution of tasks, particularly political tasks. The number of women in politics is increasing but the "natural" rate of progress is too slow for them to be able to influence matters.

By way of explanation of the unsatisfactory state of parity democracy, I would like to make the following points:

– Women do about three quarters of the world's work, including practically all of the essential but unpaid work, which is not included in GDP figures;

– Women who have a job earn 20% less than male colleagues with equal skills in the same job or in work of the same value;

– Payment systems for unskilled work are far less advantageous when the work is performed by women than they are for male staff.

The result is that while men are no more active than women, they are richer. Women possess only 1% of the world's wealth and this is linked to some extent to civil inheritance laws. Women also find it more difficult to attend the training needed for access to the labour market outside the household and are often confined to their homes from a very early age. They are subject to structural forms of discrimination such as domestic violence, which is one of the world's most widespread evils.

Women have also been excluded for too long from active and passive electoral rights, but the fact remains that they have the right to be involved, and states have a duty to involve them, in public and private decision-making processes. As long as women are not involved in decision making, democracy will be incomplete.

To remedy this situation, which is unacceptable in any self-respecting democracy that also respects its citizens, the representation of women must be increased to such an extent that they can have a real influence on legislative processes. In politics and in business, quotas are an effective means of increasing the presence of women. A significant presence of women in politics is particularly necessary because the lack of balanced representation threatens democratic legitimacy and constitutes a violation of the fundamental right to equality. It goes without saying that the activities of political leaders reflect the priorities of elected representatives, which are influenced by their different experiences of life, which will vary depending on which gender they belong to. Since humankind is divided into two component parts, it is essential that both of these parts take part in decision making on public affairs (*res publica*), as the public interest is a matter for the whole of society, made up of both men and women.

According to statistics from the Inter-Parliamentary Union (IPU), the percentage of women elected in the 35 years since the First World Conference on Women in 1975 has increased by 7%, in other words, 1% every five years. If this progression were linear, which it is not because there have been drops and sharp rises in representation rates, we would have to wait another 160 years to reach perfect parity. In 2010, the percentage of elected women was 19% and in 2012 it can be estimated to be about 20%. The IPU therefore concluded that quotas would be the ideal way to increase the number of women in decision-making bodies.

In the legal system, quotas are a logical consequence of the fact that humankind is divided into two genders and of the principle of equality, which is generally included in constitutions. In this connection, it is worth referring to the Venice Commission's "Code of good practice in electoral matters" adopted in 2002 ("the Code"): "Legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis".

To achieve an acceptable minimum proportion for the gender currently underrepresented within a reasonable time frame and then, in the future, a critical mass for both sexes, we need to set quotas that initially address the first problem and then, in the longer term, the second.

It follows that the quotas to be introduced must relate to both women and men so that a critical mass can be reached. This was set at between 30% to 35% by the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) in 1997 and at 40% by the European Parliament in 2001. Like the European Parliament, the Committee of Ministers of the Council of Europe, in recommendations issued in 2003 and 2004, recommended that parity should be understood to require the presence of at least 40% of each sex in elected bodies. It should still be emphasised that this proper proportion of men and

women is not an end in itself but a means of changing politics so that its decisions take account of the two halves of humankind as a whole.

While it is true that the primary goal of electoral legislation is not gender equality but the proper representation of the population and the parties in contention, it is still essential that both men and women, who are different but equal, be equally represented in the country's institutions. Bearing in mind that both halves of humankind contain all the categories in society, we should remember the indisputable truth that women, who actually form the majority of the world population, are not a category but an essential component of humankind.

For this reason, introducing quotas for the sexes does not necessarily mean that they should subsequently be introduced for young people, immigrants or, in short, any persons belonging to a specific category in society, when it goes without saying that all these categories are constituted of both women and men.

It should be pointed out straightaway that while education for all but especially for women is one of the keys to progress along the road to parity democracy, as is the historical, cultural and religious context of the country concerned, the most important factor of all is the strength and the convictions of political parties, as they are the main players in elections.

The importance of all these factors is broadly acknowledged, as is that of the electoral system in the strictest sense, that is to say the means by which voters express their political preferences and how votes are translated into political mandates or seats. These systems are generally divided into three types: the majority system, the proportional representation system and the mixed system.

For a more detailed analysis, I would refer you to the report I presented to the Parliamentary Assembly of the Council of Europe in January 2010 entitled "Increasing women's representation in politics through the electoral system", and the report adopted by the Venice Commission in 2009, entitled "The impact of electoral systems on women's representation in politics" (CDL-AD(2009)29), itself based on a report by Michael Krennerich.

Some aspects of electoral systems have a decisive effect on the proper representation of both sexes because the effectiveness of quotas differs not just on account of their nature and their means of application but also on account of the particular electoral system adopted. The Venice Commission's study relates solely to electoral systems used to elect single or lower house legislatures, as was, moreover, the case with the IPU survey mentioned above and a 2008 study commissioned by the European Parliament on "Electoral gender quota systems and their implementation in Europe". This means that this report only covers electoral legislation relating to national elections.

According to the Venice Commission's report, one of the most obvious conclusions is that countries applying proportional representation systems have a higher proportion of women in their parliaments than those with majority

systems. Mixed electoral systems (such as mixed member proportional systems) appear to be more conducive to women's parliamentary representation than majority systems but less so than traditional proportional representation systems.

It should also be noted that proportional voting systems are actually more favourable to all "atypical" candidates, in other words, all those other than middle-aged or older men. Choosing an electoral system that is more conducive to the representation of women should therefore also automatically facilitate the candidatures of young and elderly people and immigrants and other less mainstream categories.

The size of multi-member constituencies also seems to play a role. Some believe that the larger they are, the more chance women have of being nominated and elected because of the higher number of candidatures.

What is true is that the size of a party – in other words, the number of seats it wins or expects to win in a given constituency – sometimes plays an even greater role. It would seem that only those parties that can predict that they will win several seats in a constituency truly try to balance male and female candidatures, thus assisting women candidates.

Legal thresholds, which set the minimum percentage of the vote that a party must receive to be assigned seats, would not usually be conducive to the representation of women because they often prevent small parties that may represent women's interests from being represented in parliament. However, in practice, as a result of legal thresholds, only relatively large parties get into parliament – they even profit from the exclusion of small parties. Since they have more room on their lists, it is easier for them to nominate women and help them to win seats. Nonetheless, the Parliamentary Assembly criticises legal thresholds of more than 3% for other reasons linked to fairer and more democratic representation.

In majority systems in single-member districts, only individual candidatures are possible. In proportional representation systems, voters are presented with different types of lists: closed, open or free. High thresholds effectively exclude new political parties, which are the least representative of the population, and consolidate the larger parties, providing them with greater stability and making it easier for elected politicians to retain their seats.

With closed lists, the political parties determine the order in which candidates will be allocated any seats won and the voters endorse the entire list and are unable to change the order.

With open lists, on the other hand, voters may express preferences for particular candidates, changing the order in which they are ranked on the list. With free lists, voters may even choose between candidates from different lists – a process known as panachage or cross-voting.

The type of list that is most conducive to the representation of women depends on whether gender quotas are applied when deciding on the order on the list and whether they are actually implemented – in which case closed lists seem the most conducive, but also on the extent to which women organise themselves and actively campaign for women candidates – in which case open lists do not necessarily run counter to women's interests.

The impact of gender quotas differs according to the different electoral systems. The aim of gender quotas is not just to improve the representation of women but also to strike a balance between the representatives of both sexes in politics by establishing a minimum and maximum percentage of representatives of each sex on electoral lists and, in the best-case scenario, in the executive bodies of political parties and the bodies responsible for putting forward candidates for election.

It should be said that quotas are widely applied to ensure the representation of a region (official quotas), while those intended to secure the representation of certain socio-professional categories or other groups (linguistic, ethnic or religious) are often applied informally.

Both official and unofficial quotas are used to ensure proper geographical and socio-professional representation while leaving the voter with a free choice and offering a range of possible candidates whose breadth depends on electoral laws. They do not ensure the election of representatives chosen on the basis of informal quotas but do ensure the election of a given number of candidates on the basis of geographical quotas, which is in fact the number of elected representatives per constituency. It is reasonable to infer from this that quotas do not in any way restrict voter choice; instead, they make for more diversity in the choice of candidates.

It should be noted that there are different types of quotas, namely results-oriented quotas and means-oriented quotas.

In results-oriented quota systems whole lists or a fixed number of seats are reserved for women. In addition to Afghanistan, this system is applied in several African countries – Burundi, Rwanda, Uganda, Tanzania, and to a lesser extent, Sudan and Kenya. This type of quota, which was also applied in the former communist countries of central Europe, is currently less popular despite its obvious effectiveness because it is considered to restrict voter choice. If we accept this reasoning, it should also be applied to closed list systems, as here parties decide on the order in which their candidates will be elected. It is worth pointing out that it is in such list systems that quotas can be most effective provided that the competing political parties are able to agree on the principle of closed lists and an appropriate penalty if the rule is broken. Maximum effectiveness can be achieved if non-compliant lists are simply declared inadmissible rather than providing for a system of fines.

Means-oriented quotas may be legally imposed or optional. Legal quotas are compulsory for all electoral lists, whereas optional ones are applied only by parties that wish to adopt them.

It should be said that the effectiveness of the two types of quotas depends on the electoral system to which they are applied, in other words, whether quotas are means-oriented or results-oriented, whether they are clear about the order in which women candidates will be placed on lists and, assuming that the head of the list has a special part to play, whether it is possible, or whether there is some political desire, for it to have two heads and to consist of a man and a woman.

Quotas are all the more effective if proper penalties are applied when they are not complied with, such as declaring a list inadmissible or leaving a place not taken by a member of the under-represented sex vacant. There are also systems in which fines are imposed on parties that present a lower number of women than the baseline quota and financial rewards are granted to those that present a higher number. So far, such financial measures have failed to prove their worth, meaning that declaring lists inadmissible and leaving places vacant are the most effective penalties.

In order to advance the cause of equal choice in electoral systems, selecting the right quota type and method is a crucial factor but not enough in itself. It is essential and a matter of priority, as the Venice Commission recommends, to add a provision to constitutions on the principle of gender equality (in and before the law but also in practice) and on non-discrimination and to combine it with the possibility of an exemption to allow affirmative action. While in principle affirmative action is intended only to be temporary, this is not the case for gender quotas that work for both sexes. (In Norway, for example, quotas currently work in favour of men.)

In the Venice Commission's report, it was found that in theory the parliamentary representation of women was particularly fostered by an electoral system that combined a vote on a proportional list in a large constituency and/or a constituency covering the entire national territory with a legal threshold, closed lists and a mandatory quota that provided not only for a high portion of female candidates but also for strict rank-order rules, such as a zipper system, and effective sanctions for non-compliance.

I cannot conclude without saying that in order to achieve parity, it is essential to prevent or discourage the holding of multiple offices. This also has the advantage of bringing new people into politics, which is beneficial both for parties and for voters. There is also good reason to think that restrictions on multiple-office holding may check the current decline in voter turnout, the scale of which is threatening the democratic functioning of our institutions.

Transparent, adequate and fair funding for all candidates, political parties and election campaigns is a means of ensuring that the public will accept political funding arrangements.

Education on equality for children and adults, particularly political professionals, journalists, the judiciary and teachers, will also help to promote equality in both the public and the private spheres.

In conclusion, it should be pointed out that the driving force behind all change is political will.

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The Code of Good Practice in Electoral Matters, which was adopted by the Venice Commission in 2002, is the reference document of the Council of Europe in the electoral field. It defines in detail the standards of European electoral heritage: universal, equal, free, secret and direct suffrage, as well as the frequency of elections, including the framework conditions that are necessary for the organisation of proper elections, such as respect for human rights, particularly in the political field, the organisation of elections by an impartial body and an effective appeals system.

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