# The cancellation of election results

**Science and technique of democracy, No. 46**


**Venice Commission**

Council of Europe Publishing

**For a full list of other titles in this collection, see the back of the book.**

*The opinions expressed in this work are the responsibility of the authors and do not necessarily reflect the official policy of the Council of Europe.*

All rights reserved. No part of this publication may be translated, reproduced or transmitted, in any form or by any means, electronic (CD-Rom, Internet, etc.) or mechanical, including photocopying, recording or any information storage or retrieval system, without prior permission in writing from the Public Information and Publications Division, Directorate of Communication (F-67075 Strasbourg Cedex or publishing@coe.int).

Cover design and layout: Document and Publications Production Department (SPDP), Council of Europe

Council of Europe Publishing
F-67075 Strasbourg Cedex
http://book.coe.int

ISBN 978-92-871-6651-7
© Council of Europe, January 2010
Printed at the Council of Europe

# Contents

**Introduction** ..... 7
Mr Pierre Garrone

**Electoral disputes** ..... 9
Mr Jean-Claude Colliard

**Cancellation of election results – Lessons learned from election observation** ..... 15
Mr André Kvakkestad

**Justice coming face to face with electoral norms** ..... 25
Mr Slobodan Milacic

**Electoral disputes and the ECHR: an overview** ..... 39
Mr Michael O'Boyle

**Electoral disputes: an issue which falls into the jurisdiction of the constitutional court?** ..... 57
Mr Ian Refalo

**Conclusions**
Mr Ugo Mifsud Bonnici ..... 69

This publication contains the reports presented at the UniDem seminar organised in Valletta on 14 and 15 November 2008 by the European Commission for Democracy through Law in co-operation with the Constitutional Court of Malta and the Maltese Ministry of Justice and Home Affairs.

The European Commission for Democracy through Law (Venice Commission) is an advisory body on constitutional law, set up within the Council of Europe. It is composed of independent experts from member states of the Council of Europe, as well as from non-member states. At present, more than 55 states participate in the work of the commission.

At its 81st Plenary Session (11-12 December 2009), the Venice Commission adopted a comparative report on the cancellation of election results, on the basis of contributions from 34 states (CDL-AD-(2009)054, http://venice.coe.int).

# Introduction

Mr Pierre Garrone
*Head of Division, Venice Commission*

Ladies and Gentlemen,

On behalf of the Venice Commission it is a great pleasure for me to welcome you to a new UniDem seminar for European constitutional court judges. For the first time, a seminar of this kind is to deal with electoral issues and with an aspect that is of great interest and, at the same time, of great concern for judges – cancellation of election results.

As you doubtless already know, the Venice Commission is the Council of Europe's body in charge of constitutional matters. These are construed broadly as encompassing both constitutional justice and electoral issues. Among the commission's achievements in these two areas mention can be made, firstly, as regards constitutional justice, of the CODICES database and the *Bulletin on Constitutional Case-Law*, as well as the World Conference on Constitutional Justice being held next January in Cape Town and, secondly, as regards electoral issues, of the Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev at www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp), the Council of Europe's reference document in this field, copies of which are available at this seminar, followed by the Code of Good Practice on Referendums (CDL-AD(2007)008rev at www.venice.coe.int/docs/2007/CDL-AD(2007)008-e.asp).



The seminars in the UniDem series (short for "Universities for Democracy") have been held virtually since the commission was set up and are aimed at determining common rules for the functioning of democratic states upholding human rights and the rule of law. For many years they have dealt with both constitutional justice and elections. As early as 1994, a seminar was held on the role of constitutional courts in consolidating the rule of law, followed two years later by constitutional courts and the protection of fundamental rights. Then there were a number of seminars intended specifically for constitutional courts or equivalent bodies on the themes of the principle of respect for human dignity, held in Montpellier in 1998; the right to a fair trial, held in Brno in 2000; and the resolution by constitutional courts of conflicts between central government and entities with legislative power, held in Rome in 2003. In parallel, there have been UniDem seminars concerned with new tendencies in electoral law in greater Europe, European standards of electoral law in contemporary constitutionalism, organisation of elections by an impartial body, and the preconditions for a dem-

ocratic election.[1] However, I wish to reiterate that this is the first time a seminar has been devoted jointly to constitutional justice and electoral matters. Furthermore, we are today resuming our interactive approach aimed at examining national solutions to given problems either in general, through discussion of responses to a questionnaire or, more specifically, through consideration of a case study.

Since ancient Rome, legal specialists have been well familiar with the concept that any law devoid of a judicial sanction is a *lex imperfecta*, a declaration of intent rather than a legal regulation. The judges present here today will, I am sure, concur with me on this. In electoral matters, as in other fields, people are tempted to commit fraud, to break the law. However, unlike in other spheres, breaches of electoral law can have considerable repercussions for society as a whole, since what is at issue is who will govern. It is therefore necessary that voters' rights should be safeguarded by a strong, impartial body; as stated in the Code of Good Practice in Electoral Matters,[2] this role should fall to a court, at least at last instance.

Over the next two days we shall be examining the judicial solutions to this issue, which is in essence of a highly political nature. After hearing the introductory reports, which will remind us of the issue's importance and of its different facets, we shall study the solutions adopted at national level on the basis of the replies to the Venice Commission's questionnaire. Some of the questions to be answered are: What is the legal basis for proceedings possibly leading to the cancellation of election results? Are the provisions concerned of a specific or a general nature? Can a cancellation be founded on general constitutional principles such as the right to free elections by secret ballot? In addition, although procedure is not an end in itself, it is here of vital importance. An example to be borne in mind is whether the rules allow the court dealing with the case to collect evidence of its own motion. Last but not least, an examination of the case law will enable us to determine the tangible implications of annulment proceedings.



Tomorrow will be devoted to a case study. Following the same approach as we adopted at the first UniDem seminar for constitutional court judges held in Montpellier in 1998, we consider it useful to illustrate the problem with a practical exercise. In the case study submitted to you some of the breaches are obvious, while others are more debatable with regard to national law; others concern general principles rather than specific standards. In addition, you will be asked to assess to what extent breaches of this kind should lead to cancellation of the election results, and in particular whether they influenced the election's outcome – must this question be addressed taking each breach individually or should all the breaches be considered together?

There is a lot to be said on these matters, and I am sure we will have some very interesting and fruitful discussions that will enable us to propose substantive enhancements of Europe's electoral heritage.

Lastly, I wish to thank the Constitutional Court and the Ministry of Justice and Home Affairs of Malta, without whom this seminar would not have been possible and who have organised it at short notice. We are honoured that the President of the Constitutional Court and the minister are here with us in person today.

1. See the list of publications in the series "Science and technique of democracy" at the end of this book.

2. Point II.3.3.a.

# Electoral disputes

Mr Jean-Claude Colliard (France)

*Professor at Paris I University*
*President of the Fondation Santé des Etudiants de France*
*Member of the Venice Commission*

We are, of course, delighted at the interest now being shown in elections – of which this seminar is one more example. For a very long time, elections tended to be considered of secondary importance, as an exercise involving political jiggery-pokery, in which any reputable lawyer ought to refuse, or at any rate be reluctant, to get involved, with the result that parliaments – in their capacity as representative of the sovereign – traditionally judged the validity of their members' office themselves.

Nowadays, fortunately, the view is taken that, since power is based on suffrage and parliamentary elections are very often also the occasion to elect the prime minister and government by universal suffrage, the authenticity of the election is of key importance to the democratic process and public trust in that process.



Accordingly, all the stages in the electoral process must be governed by law and hence overseen by the courts and, ultimately, observance of the law is guaranteed by the intervention of a court, which may have occasion to rectify the election results or declare them void. This applies in the case of basic principles, those that the Venice Commission has defined as constituting Europe's electoral heritage (universal, equal, free, secret, direct suffrage). What is trickier is to decide on the electoral system. A wide variety is acceptable from the broad categories of majority/plurality voting, proportional representation and mixed systems: ultimately, the sole requirement is what mathematicians call monotony, in other words the requirement that the party that obtains the largest number of votes be the one that gains the most seats (except in the event of an accident, and there have been occasional accidents). The voting system is often provided for in the constitution, but not always (see the case of France).

Although the principles have therefore been decided on and compliance with them is supervised, it is difficult to apply them. The exercise involves a large number of players, since the entire population of a country turns out on election day, everyone as a voter and a few people as officers in the numerous polling stations. The rule is often that there should be one polling station per thousand inhabitants, but the number increases where constituencies are divided into municipalities (in France, for instance, there are nearly 67 000 polling stations for a population of 63 million with 44 million voters). It is inevitable, given the vast number of polling stations, that there should be operational shortcomings, which may be deliberate, in which case it is a question of electoral fraud, or unintentional, resulting from a poor grasp of the legislation and situations concerned.

Here, too, an authority is needed to redress the situation, in other words a court, for it is generally a court that assesses such irregularities and any implications they may have for the outcome of the election, by carrying out what my colleagues specialised in the field of sociology would call "The electoral normality". This is what we are going to talk about here and, if you will forgive me, I shall do so by drawing mainly on the example of France – not that I consider the situation in France to be exemplary, but it is the one with which I am most familiar, having been involved in it, and, even though other approaches are of course possible, it illustrates the main issues. These seem to centre on the place of the courts and the conduct of the electoral process.

## I. The place of the courts

The first question that arises is of course which court is concerned, and the second is who has access to it, and who should have access to it if the objective of authenticity is to be attained.

### Which court?

As I said, it is traditional for parliaments to decide for themselves whether their members have been lawfully elected. This arrangement still applies to a large extent in a number of countries: the Benelux countries, Denmark, Italy and the United States. It is worth pointing out that, in the case of the European countries concerned, there is proportional voting, and irregularities concerning a few votes do not necessarily have much impact on the allocation of seats, and that in the United States many elections (90% in the case of the House of Representatives) are considered to be largely undisputed, in other words there are large differences in the number of votes obtained.



Yet this system inevitably means that the lawfulness of an election is judged by a political majority. This may lead to abuses, the most frequently cited example being the withdrawal of seats from numerous Poujadist (nowadays one would say populist) members of parliament by the French National Assembly, following the elections on 2 January 1956, as a result of which, in response to a general outcry, responsibility for judging elections was transferred to the Constitutional Council set up under the 1958 constitution.

The Constitutional Court is also responsible for hearing parliamentary election disputes in Austria, Greece, Germany, Portugal and Spain but, in the last three cases, it intervenes as an appeal court after the ordinary court, a solution which is reasonably satisfactory since it provides the safeguard of two tiers of jurisdiction.

In the United Kingdom an ordinary court is responsible, while in Finland it is an administrative court (this also applies to European and local elections in France).

All these arrangements are acceptable, and there is no reason to suppose that they raise problems where they apply. The choice obviously depends on local legal and court traditions, which differ – indeed, there is no reason why they should be the same.

Under other systems, particularly in the newly fledged democracies, the matter is initially settled by local, national or federal electoral commissions, with the possibility of appeal to the Supreme Court or the Constitutional Court. This does away with the potential objection that the commissions both organise and judge the elections (which is indeed the case, and it is a criticism that can be levelled at the French system, which involves the Constitutional Council, at least in the case of referenda and presidential elections).

### Who has access to the court?

Here countries are torn. There is a temptation to provide broad access to the court on the grounds that, as democracy involves everyone, oversight of the democratic process should be extended to all. There is a risk, however, of the court being snowed under with applications from habitual complainers. There are people who are fanatical about disputing elections, and the court is therefore liable to deal with complaints only superficially, or else take too long in the light of another requirement, which is that parliament should rapidly be formed with its definitive membership. A majority, particularly a narrow one, cannot spend a long time with the threat of being overturned looming over it.

The generally accepted arrangement is to restrict access to those who have an interest in instituting legal proceedings, in other words unsuccessful candidates, whose interest is obvious, and voters in the constituency concerned. This is reasonable in practical terms even if it is questionable from a theoretical viewpoint, since a member of parliament is often considered to represent the nation as a whole, whereas in fact he or she is elected in a particular constituency.



The question arises as to whether a political party should be considered, as such, to have an interest in instituting legal proceedings. Logically, the answer is "yes", since the strength of a party in parliament will depend on the number of members of parliament it has, but in practice it is often "no", so firmly entrenched is the illusion that standing for parliament is an individual act, with the party merely providing support.

On the other hand, intervention by a political party is more readily accepted prior to the ballot, in disputes concerning the run-up to the election. These may relate to the electoral legislation itself (particularly if it sets unduly high exclusion thresholds: the Strasbourg Court recently considered the issue in connection with the Turkish Electoral Act, which it ultimately upheld) or to the conditions under which the election campaign took place (allocation of speaking time on radio and television, pressure from the "powers that be", and so on).

Another issue is the form which the application takes: in some cases an application may be submitted freely within a certain time of the election (10 days in France), while in others it may be submitted only if a complaint was recorded on the protocol produced by the polling station concerned (this applies in France in the case of referenda). I think this is a minor technical issue, and that the sole concern should be whether there is an effective right of appeal, in other words whether the complaint or the protest recorded on the polling station protocol is actually referred to the court responsible for assessing its merits, so that court proceedings go ahead.

## II. The electoral trial

Electoral justice presupposes a state of tranquillity that is not always easy to come by, as decisions are handed down in the heat of the moment, immediately after an election campaign that has sometimes been vicious, and must comply with general principles, such as equality of arms, which is normally ensured by compliance with the principle that both parties must be represented at the hearing. It must not, however, be forgotten that the aim is not to punish any irregularity – if necessary the criminal court to which the matter is referred at the same time can do that – but to ensure that the person who occupies the seat is actually the person the voters wanted. The dispute is therefore a relative one.

### The requirement that both parties be represented at the hearing

We know that the European Court of Human Rights sets great store by this principle, even though it has remained very prudent where electoral disputes are concerned.

It is clear why this principle is important here. On one side there is a member of parliament whose election is contested but who has been declared elected by the immediate supervisory authorities, and on the other an unsuccessful candidate or discontented voter, who generally has good arguments but who cannot be taken at his or her word either.

This means that, whatever the type of court, there will necessarily be an investigation. The court will seek to assess the accuracy and importance of the complaints. I do not have sufficient comparative material here and will simply talk about the situation in France.



Proceedings before the Constitutional Council take place exclusively in writing. The council receives the application, ascertains its admissibility (compliance with the deadline, voter registered in the constituency, specific complaints, etc.) and forwards it to the elected member of parliament, who drafts a writ in reply (usually with the help of a lawyer), defending himself or herself against the complaints. This memorial is forwarded to the complainant, who may reply in turn (but without adding further complaints). The complainant's memorial is passed on to the defence counsel, and so on until there appears to be nothing more to add. At this point the investigation is normally over: it is very unusual for there to be an on-the-spot check (although this is possible in certain circumstances) or a hearing of the parties or their lawyers before a decision is considered. For a long time, the Constitutional Council systematically refused to proceed in this manner, and the proceedings took place solely in writing. Things changed in 2007-08, probably because it was afraid of failing to meet the requirements of the European Court of Human Rights, and several hearings were held on the occasion of the last parliamentary elections. I am not sure that this fundamentally changes the outcome of a dispute, but it is certainly more satisfactory in terms of the principle that justice must not only be done: it must be seen to be done.

Once the investigation is over, a deputy reporting judge, who is a member of the Conseil d'Etat (the supreme administrative court) or the Auditor General's Department, prepares the case and presents it to an investigation division (comprising

three of the Constitutional Council's nine members). The division prepares a draft decision, which is then put to the plenary council, which may agree to it, amend a particular point or, though this is unusual, take the opposite view. The decision is then communicated to the persons concerned and published. It is not possible to appeal against it (the few attempts to do so before the Strasbourg Court have been unsuccessful).

All this takes place within a relatively short space of time. The simplest applications take about six months (because it is necessary to wait around four months for the decisions of the board responsible for auditing the campaign accounts if there are financial complaints) and, even though it is not bound by a deadline, the Constitutional Council endeavours to have everything settled within a year of the election, which it succeeded in doing in 2002-03 and in 2007-08. The actual subject of the dispute makes this easier.

## A relative dispute

By this I mean that the electoral dispute is not an absolute dispute as is the case with, for instance, an administrative dispute, in which a substantial irregularity causes the act or decision in question to be set aside (though the court does have a degree of discretion).

In electoral disputes, what is important is whether the person who has been declared elected is actually the person who should have been elected, and the question is therefore whether or not the irregularities complained of might have altered the outcome of the election. This means that the margin by which the election was won (and this is particularly true in the case of majority voting) is a key factor. Let us suppose that 200 votes are contested in a constituency and the investigation shows that they are indeed disputable. If the election was won by 1000 votes, the reply will be that this is unfortunate (and the court will sometimes say so in order to condemn the misconduct), but that it does not call the outcome into question. If, on the other hand, the election was won by only 100 votes, the court will consider that there is cause for doubt and will declare the election void. It is worth noting that the Constitutional Council, although it has the power to do so, has never corrected the result of an election (in other words, declared the other candidate elected), whereas the Conseil d'Etat sometimes does so in the case of (minor) local elections.



This means that the court will first establish whether the complaints are accurate and assess the number of votes at issue. Sometimes this is easy: if there are 10 proxies that do not comply with the regulations, 20 ballot papers that were wrongly validated or declared spoilt and 15 cases in which the electoral roll was not signed, there are definite figures. But it can be more difficult: what is the impact of a leaflet handed out outside the permitted period, telephone calls from a mayor asking people to vote for a particular candidate, and so on? Here it is a question of precedent and experience, and there is inevitably a degree of subjectivity.

After establishing a figure, even an approximate one, for the number of votes that can be disputed, the court carries out a sort of hypothetical subtraction, fictitiously deducting these votes from the number obtained by the elected candidate. If the total is still higher than the number obtained by the other candidate, the election

is validated; if it is lower, it is declared void. This can be more elegantly summed up by the following inequations, where a and b are the number of votes obtained, respectively, by the person who has been elected and the challenger, and x is the number of votes that, on the face of it, do not comply with the regulations:

If a - x is greater than b → election validated

If a - x is less than b → election void

It will be readily acknowledged that it all depends on the way in which x is calculated, and that there can be a degree of subjectivity here. On the other hand, a rigorous approach, in which any irregularity led to the invalidation of the result, would be liable to cause the entire election to be declared void, for in any constituency, and indeed in any polling station, there are inevitably a few pardonable irregularities. And the prospect of the entire election being declared void is probably more alarming than the existence of a subjective element.

That said, it is quite acceptable that an election should be declared void regardless of the difference in the number of votes in the event of particularly serious fraud, such as ballot stuffing, falsification of the protocol of results and systematic violence. The court will then take the view that there is probably more than meets the eye (in other words, that the case file reveals only the tip of the iceberg) and that, regardless of the figures, there is a serious presumption that the entire election has been affected by irregularities.



This situation is similar to that occurring in a particular type of dispute that is, I believe, more or less confined to France: in addition to disputes concerning authenticity, there are disputes over election funding. If a candidate has broken campaign funding rules (has exceeded the expenditure ceiling or accepted prohibited donations or assistance from a public figure), the candidate will be declared ineligible and, if he or she has been elected, will lose his or her seat, and the election will be declared void. This applies even if the rule has been broken in a relatively minor way. Indeed, we are wondering whether the legislation in question, which was no doubt necessary initially to ensure that the funding rules were taken seriously, has not become too strict, and the Speaker of the National Assembly has set up a working group which is now considering the matter.

That is how electoral justice operates: there is a court, an effective right of appeal, respect for the principle that both parties must be represented and a cautious attitude on the part of the courts, which will in turn be judged by public opinion if their decisions appear palpably wrong. I must say that I believe that the decisions of electoral courts are rarely contested in established democracies, except possibly by the person adversely affected by the decision, if he or she is intent on saving face in order to make a comeback at the next election.

# Cancellation of election results – Lessons learned from election observation

Mr André Kvakkestad (Norway)
*Lawyer, former member of the Parliamentary Assembly of the Council of Europe*

## What is election observation?

The fundamental reason to conduct an election observation mission is to obtain an informed view regarding the electoral process and its credibility.

Election observation is often regarded as people running around in polling stations on the day of election, asking questions and noting down the answers. This is the most visible part of election observation, but it is far from all the work necessary to have a qualified opinion regarding an election.

One must bear in mind that an election is much more than what happens on election day. The process usually starts with the announcement that an election is going to be held on a certain date. Candidates then register, election campaigns are prepared and carried out, and voter lists are drawn up. On election day the electoral process is officially opened, voting takes place, the electoral process is closed and ballots are counted. Following this local results are incorporated into regional and national tables. This is usually done as soon as possible, but it may take some time before the final results are released.



Parallel to the formal electoral procedure, civil society is active through the media and other means of information and influence.

All the above form the basis for the functioning of elections as a part of governing through democratic processes.

Election observers require information regarding the overall functioning of the electoral process and to what extent voters can make an informed and free decision; they must therefore take into account much more than events on election day.

This is only possible with qualified persons present to follow the situation from the calling of the election until the final result is released. This might include the observation of complaints procedures and the solving of electoral disputes some time after the end of the election.

An observation mission should include observation throughout this entire period. Focus should be placed on the situation in terms of formalities and the implementation of election regulations, and the situation in general such as where the election is being held and gives it credibility.

The opinions of those involved in the electoral process are of great importance. This includes both complaints and explanations. This information can be both informative and deceiving. Nevertheless, it sometimes takes a long time to gather, check and systematise all such information.

It is therefore apparent that an organised staff must be present for some time before and after election day. Additional resources are also required on election day to observe polling stations.

Co-operation between some international organisations is very welcome. This makes it easier to take full advantage of the resources and personnel available for the observation mission. In addition, such organisations often find it useful to draft joint statements and reports when addressing the conduct of elections. However, each organisation must be able to maintain its independence and credibility.

## Election observation as a standard?

Election observation alone does not make an election valid or invalid. An election is regarded as valid unless there is any major reason to declare it otherwise.

Many of the older democracies have conducted elections for decades without them being observed. This has not affected their validity.

The need to observe elections should help countries on the way to a functioning democracy. Election observation must be regarded as a temporary measure and not a long-term need. The norm should be that election observation stops when it is no longer needed.



The need for election observation is usually based on the wish to help a country on its way from a non-functioning democracy to a well-functioning democracy. To do this, a country usually needs to conduct some elections in order to develop some kind of experience and traditions on how to best prepare and conduct elections.

Election observation may also be necessary in order to look into practices and irregularities that might arise. Controversy and mistrust from the electorate or candidates that would like to take part in the electoral process fall into the same category.

There are many different reasons why election observation may be welcomed by all participants, all the more so as it can also make the election result more credible.

At this seminar we shall look into the situations in which elections are cancelled and how election observations might be important in such a situation.

## European standards on electoral matters

Which standards and regulations apply to an election?

The rules and regulations of a country provide the legal framework for the conduct of elections. Each country has the right to decide on how an election is to be carried out. The member states of the Council of Europe are obliged, upon joining the Organisation, to conduct elections in line with European standards. This standard is contained in the European Convention on Human Rights, which is implemented by the European Court of Human Rights in Strasbourg.

Those European standards which are not found in the Convention can be found in the Code of Good Practice in Electoral Matters drafted by the Venice Commission. A state following the recommendations included in the code of good practice would be acting in conformity with European standards on electoral matters. It is worth mentioning that the European Court of Human Rights takes the code of good practice into consideration when rendering judgments. Although the code of good practice is not binding, it can be regarded as a solid basis for conducting elections.

This means that a state should have a valid reason for not following the code of good practice in this specific situation.

If the Venice Commission's recommendations are not followed, resulting in the filing of a case based on a possible violation of the European Convention on Human Rights following the election, states need to have a good reason for not having done so.

## Where to focus when observing an election?

Election observation reports provide information on the whole process from beginning to end. Problems which begin early in the electoral process become more difficult to deal with as the election approaches. If problems are identified early on as a result of a long-term observation process, critical points during the electoral process can be dealt with more efficiently.

In order to have a solid and conclusive report on the election and the result it is necessary to understand and identify where problems are most likely to occur. Since those carrying out an observation do not have enough resources to observe everything at all times, attention should be drawn to those topics which are considered to be the most important during that specific election. This ought to be done on the basis of information, experience and local knowledge, but may amount to an educated guess.



Observations should not be carried out to prove that a country or a regime is not as democratic as it should be. Although this might prove to be the case, it should not be the reason for the observation. Nevertheless, each electoral situation needs to be considered in a critical manner. A healthy reservation towards participants in the election should not be regarded as a prejudgement or as being biased. Nor should there be mistrust of anyone focusing on observing specific topics or parts in an electoral process.

## Election observation as part of a cancellation process

An election has never been cancelled solely on the basis of statements from an observer to an election. Observers do not have the right to announce or to decide whether the election is valid or not.

Cancellation of the election can only be made through the competent national authorities responsible for handling complaints or responsible for the final decision on the validity of the election.

To challenge the result of an election, it is obviously necessary to provide evidence, for instance proof of tampering. It is not enough to be convinced of something, proof is needed.

These findings during election observation might be useful when endeavouring to prove that something untoward has occurred.

Situations that might have an impact on the election result often occur in more than one place during the electoral process. The electoral process should be seen as a whole in order to recognise situations and trends which may have an impact on the result in general.

In order to obtain the most accurate information, it is important that the observers draft reports in a precise manner. This can include the taking of notes and pictures. In order to build a case to cancel an election result back-up statements are needed. Witnesses are of course useful but it is rare that international observers stay behind to provide testimonies. In this case it is important to obtain substantial reports from the international observers which can be used as documentation to show what they observed, notably the fact that neither European standards, and in some cases not even the national laws, have been met.

This report on the election might be used to show that violations or mishaps that by themselves are not of a great importance may as whole have an impact on the final result of the election. By obtaining an overview it is possible to see how things have developed from the start of the election campaign up to election day and the result itself.



It is of course easier to find reasons to cancel an election if one or two clear and serious violations occur on election day, rather than having to add together a number of minor mistakes which have occurred throughout the country. Should it be necessary to include problems that occurred during the electoral campaign to explain non-compliance with the country's obligations to hold free and democratic elections, the case becomes more difficult.

It is easier to prove intention should violations occur throughout the electoral process. Then it is important to discover who is responsible and who may have benefited from these violations. It might be useful to consider the possibility that more than one person may be involved in these violations. In order for reports to be considered credible in a dispute on election results, they have to be objective and include details of the violations and the details of those involved. The argument that the violations from one side can offset the violations of the other side is not acceptable.

If results and protocols have been tampered with on the way from the polling station to the central election committee then this should be taken into consideration when deciding whether a result is valid or not.

## What makes a country cancel an election result?

The decision to cancel an election result rests with the country itself.

International organisations may make statements or impose bilateral sanctions such as reducing diplomatic relations. For members of the Council of Europe, the

European Court of Human Rights can determine whether there have been violations with regard to the obligations of the country involved, but cannot by any means change the result or annul it.

This means that the question of changing or cancelling the result of an election has to be dealt with by the democratic institutions within the country concerned.

For a case to totally or partially cancel the outcome of an election, proof of one or more violations linked to the election and the outcome has to be provided. The closer the link to the electoral process the easier it is to make it a relevant argument.

The violation not only needs to be relevant, but it also has an impact on the result. If a candidate officially obtained 65% of the votes, but after findings it was revealed that he only obtained 59%, it is relevant but does not have an impact on whether the candidate was in fact elected. In this case it would not be necessary to cancel the result. This even if the deciding body finds the lower number to be correct.

On the other hand, it is important to have an overview of the whole situation. Although one violation by itself may not have an impact on the result, several violations would. Then one can include faults in the counting and in the tables. To this can be added other issues such as problems with the list of voters, etc., but this is usually a bit more difficult to prove.

## When can an election result be cancelled and by whom?



Before the election results are official the institutions of a country can carry out a critical revision and decide to cancel the results. The main objective is for an election to be carried out without violation, and to ensure that standards are applied if violations have been made. Nevertheless, a complaint or at least a statement in the media can be useful.

In Norway there was a partial cancellation of the parliamentary election in 1981. This was owing to the fact that the number of ballots counted did not correspond to the number of voters who were noted on the list as having voted. This was reported by the officials themselves. The margin between the candidates was so small that this could have had an impact on the result. In this case it was concluded that new elections needed to be conducted in the two districts concerned. The result was that in one of the districts the first elected labour candidate lost the seat to a conservative candidate.

In the local elections in Norway in 2007 there was a question of whether a supporter of a labour candidate had bribed voters to vote for this candidate. There was evidence that people had received bribes. It was concluded on this occasion that a violation had occurred, however, the margin between the candidates was so great that it could not have had an impact on the result of the election or those elected. Therefore all parties agreed that there was no real reason to carry out a new election.

## Examples

### Georgia, 2003 – Parliamentary elections

This was the election that ended with the "Rose Revolution".

#### The pre-election period

The build up to election day often provides an indication of what to expect on election day.

Some weeks before the election day, I had the privilege to participate in a pre-election mission that included meetings with several representatives from the government, opposition, media and the Constitutional Court.

One of the interesting topics was the questions on the independence of the courts in Georgia at that time. President Shevardnadze had publicly stated that the Constitutional Court should have consultations with the authorities before making a ruling. This was of importance if the judges serving in the court were to expect to get their salaries paid by the government. The Chair of the Constitutional Court replied that the Constitutional Court was an independent body and was going to execute their work and obligations accordingly.

There were also reports on violence that took part during the electoral campaign. This was criticised and condemned by all the parties involved, however, they did not give the impression that they were trying to prevent more violence from taking place. Each party was blaming the other for the violence. Nevertheless, this became a problem when the public needed to be given an informed choice between the different political parties through an effective and competitive campaign.



There was also doubt whether Georgia was able to establish a realistic list of persons entitled to cast their vote in the election. This proved to be a serious reason for concern at a later date.

And finally a better standard of transportation and establishing the results of the vote was desirable. This was followed up by the Chair of the Central Election Commission. In my opinion, this was one of the reasons why it later become possible to see that numbers did not add up from the one level to the other.

#### Election day

*Voter lists*

There was total chaos regarding the voter lists. There were up to three different lists that could be taken into consideration in the polling stations. These three lists were: (1) the Central Election Commission list; (2) the list made for the previous election by the respective district election commission; and (3) a list presented by the opposition. To be able to vote the voter had to be on at least one of these lists. But they did not have the same interpretation in all polling stations, some only used the first list number, others used the first and second lists, and finally there were polling stations that accepted all three lists.

*Numbers did not add up*

Turnout was reported to be way out of proportion. In some areas it was officially reported to be as much as 95%, but in those districts where observers were present, they reported that the turnout was approximately 40%. It seemed that the difference tended to be in support of the governing party by nearly 100%.

Protocols changed numbers in turnout and in favour of the presidential party at all stages from precinct election committees via district election committees up to the Central Election Committee.

*Cancelling of the result – Weeks later*

The court sent cases back to district committees due to the fact that things did not add up. But they did not cancel anything until the president had publicly stated that he had resigned from his post.

When Shevardnadze had declared that he had stepped down, the President of the Constitutional Court informed the Speaker of Parliament that should the court receive a formal complaint regarding the conduct of the election, the result of the election would have to be annulled. This is what happened.

The election result was then declared invalid and new elections had to be held for both the parliament and presidency.

It is important to remember that in Georgia at that time there were strong and well-organised opposition parties which held great influence by occupying important posts in parliament including the Speaker of Parliament. They also had experience from previously being in government. The opposition also had control of certain media in the same way as the government did at the time. This made it a more balanced battle than is often the case in newer democracies.



### Ukraine, 2004 – Presidential election

This was the election that ended with the "Orange Revolution".

The Supreme Court did not change the result but called for a new election.

There are some significant similarities with the situation in Georgia. In Ukraine there were also people with great experience, as they had previously been in the government. The opposition also controlled different kinds of media at all levels. This made a balance and provided the possibility to promote their views not only in the campaign but also when they contested the numbers that were likely to become the official result of the election.

## Short of European standards but not cancelled

### Kazakhstan, 2004 (not a member of the Council of Europe, but a Venice Commission observer state)

The main problem was that there was both electronic and paper voting. There was no way of checking whether a voter trying to vote electronically had already done so on paper or vice versa. This made it possible for voters to vote twice. The expla-

nation given as to why this was not checked was that Kazakhs do not do things like that.

It was also noted that the officially reported electoral turnout was announced before the results could have come in. There were also discrepancies between signatures on voter lists and ballots. This was explained by the electronic voting system.

(As observers we also received a phone call from the prosecutor's office after the polling stations had closed. They asked about the registration of our visas and stated that there may be problems if this had not been carried out in a proper manner.)

There was no national pressure to cancel the election. The result of the election stood regardless of international criticism.

**Moldova, 2005**

The election procedure carried out on election day was, by and large, in accordance with European standards taking into account that there were some problems regarding the election relating to the situation in Transnistria.

The main problem regarding the electoral process was the campaign itself, or more specifically the lack of a campaign. It did not enable voters to make an informed choice when voting. A compatible election campaign is important not only for information about party politics, but also to ask difficult questions and to test the different parties' credibility.



All parties involved have a responsibility to conduct their election campaign. There were some slight difficulties regarding the question of hanging up posters, but this was sorted out before the election took place. There were no real obstacles to any party or candidate campaigning, so no particular blame could be attributed.

The lack of a real election campaign is not by itself a strong enough reason to cancel an election. Other problems were not significant enough to make a case for a cancellation of any sort. This was not done by any participant either.

**Azerbaijan, 2005 – Presidential elections**

The conduct of the election did not comply with European standards or the obligations undertaken by Azerbaijan.

The different electoral bodies and the Constitutional Court did nothing to challenge the official result even with strong international reports.

National pressure was not strong enough to cancel the election.

**Russian Federation, 2003**

In Russia, observation is a challenge due to the size of the country. This is because a tremendous number of people are needed in order to observe in a proper manner.

On election day, voting, counting and the establishment of tables appeared to be carried out in a proper manner. I suppose that minor mishaps have to occur from time to time in such a large operation. This is not the same as saying that there is some kind of major violation or fraud.

The main concern in the elections recently has been that the electoral campaign was carried out in a climate where the media and the resources were very one-sided. This can result in overwhelming the voters. Voters are especially vulnerable if there is no visible opposition. On the whole, the result might be a kind of unreasonable pressure for the voter to vote in a special manner.

The report from observing organisations was critical but did not contest the result as such or state that it could be invalid.

**Some developing countries that are not members of the Council of Europe**

Countries that conduct elections are not necessarily democratic. At the same time, well-conducted and credible observations and reports exist which state the opposite. In this context, the question of whether to cancel or not depends totally on the strength of the opposition and may even lead to violence.

Nevertheless, it is important to try to observe what is going on during this kind of electoral play. It is only by carrying out observations that a certain understanding of the functioning of the different parts of the country and its regime can be obtained.

## The possibility of cancelling an election result

Election results will stand even if violations of electoral proceedings' standards and even violations of electoral laws and regulations are observed, unless there is some kind of internal pressure in the country to enable the rule of law to function properly.

For elections to form a part of what governs a country, remedies cannot only be provided within the electoral system, but need to be developed as part of the rule of law of a country. Elections are part of the governing system and cannot stand alone without the other fundamental institutions in order for a modern state to function correctly.



It is of great importance to have a free and critical press and a functioning legal system with an independent judiciary. If the control mechanism functions in general, then the means to control and act in a proper manner in the face of controversies relating to electoral matters will also function efficiently.

Election results are made more credible when the public is well informed and interested due to easy access to information on electoral proceedings. The main objective is to enable countries to conduct elections with great credibility without the need for international observers. In order to reach this goal, the public must have confidence in the procedure and be able to follow the figures and see how they logically add up.

## How to make the election observation credible?

It is important to bear in mind that organisations that participate in election observation may do so for their own reasons. I am not going to comment on any of the statements made by different organisations; however, in my opinion, some organisations have more stability and experience than others. When the Council of Europe carries out election observations they are often in co-operation with organisations which in general have the same aims and commitments regarding elections.

Of course, election observation and the ensuing statements are taken more seriously by countries when carried out together with organisations that have credibility in the matter. It is often better than having separate and possibly conflicting statements.

When organisations with some influence observe and comment on the same kind of problems and violations they speak together with one voice and thereby make it easier to draw attention to problems during the conduct of the election procedure.

When the information has been given, it is of great importance that national participants and media bring the findings to the competent bodies which handle disputes and decisions regarding the election result.

# Justice coming face to face with electoral norms

Mr Slobodan Milacic (France)
*Professor Emeritus at Montesquieu University – Bordeaux IV*
*Centre d'Etudes et de Recherches sur les Balkans*

## Process precedes rights

Allow me to begin by explaining my choice of "viewpoint" for this paper.

The idea is to situate electoral norms among the other constituent norms of a law-governed state and the justice system in relation to the other branches of government in a democratic state, that is to say, a political state, since, by definition, the pluralist democracy which we claim to be is either political or is not.

Such an approach, which ranges from the general to the particular,[3] seeks to understand the issues in themselves, but also in the context in which they arise. It provides insights into electoral disputes through the general "laws" that govern our system; the system and "the spirit of the law", namely systemic laws. The system, however, is complex and ambivalent, for it incorporates both the legal and the political – the democratic law-governed state and the democratic-political state. As in the case of constitutional proceedings involving political elections, where formal legal rules concerning the run-up to and the conduct of elections and the publication of the results must be considered in conjunction with the substance, not to say the political nature, of the complaint and where there is bound, at some point, to be a degree of interaction between the two. Thus, what is essentially a legal – or even jurisdictional – authority can, on occasion and to some extent, involve or "encroach" on matters political, in the same way as political authorities interpret legal rules, if only by applying them. Historically speaking, our system of constitutional democracy has developed in a largely empirical manner, shifting to accommodate the pragmatic necessities that arise, often in contradiction of notions of legal or political "purity". This relative flexibility has been one of the factors in the enduring nature of democracy, and in its "moderation" (Montesquieu), largely synonymous with rationality, which has itself now come to be associated with what is reasonable or indeed realistic.

That is why we felt it was best to take a theorising approach, seeking to situate disputes relating to political elections (parliamentary, presidential and referenda, in France) in and through state systems of law and politics, in all their breadth and



3. And what scholars refer to as "hypothetico-deductive" methods.

complexity, in the hope of gaining a more thorough understanding of their "meaning and scope".[4]

Practitioners of the law and those who deal with disputes in particular will hardly need reminding that the two types of approaches, or even cultures, involved here, although very different, are, at bottom, mutually complementary. Theoreticians systematically look to what is happening "on the ground" to provide them with fresh ideas while practitioners must refer to conceptual categories to guide them in their pragmatic and casuistic approach.

These preliminary remarks having been made, we will look firstly at the system of the democratic law-governed state, and the special place occupied there by legal norms and the courts, alongside the ballot box and majorities as a sort of "electoral sanction" if not an arbiter of political power. We will then endeavour to sketch out this oversight, up to and including the annulment of political elections by France's Constitutional Council, since that is the central theme of this seminar.

## I. Justice and norms in a democratic law-governed state or the interrelationship between the legal and the political

"Constitutional democracy"[5] was the fashionable term in the 1970s, shortly before the "reinvention" of the "democratic law-governed state". The latter developed with neo-liberalism, but fairly soon the adjective "democratic" was dropped, leaving the law-governed state alone to serve as the principal frame of reference for our system of government, or rather our system of political governance. The truncation occurred both at a superficial and at a deeper level; it was both semantic and substantive, where political matters are concerned.[6] It has its roots not simply in the pressure for catchy, simplified language in today's fast-moving world but also in the fact that political democracy, again essentially state-based, is having trouble finding its niche, eclipsed as it is by the rule of law. Since then, the word "democratic" has come to be used in legal texts and scholarly writings more as an adjunct to the notion of a law-governed state than as an integral part of it, or else as merely one of several components. National, EU[7] and international positive law make trade-



4. Theory is not like life, capable of being observed directly; nor is it the sum of the cases observed in a particular field over a particular period. Rather, it is the interpretation of observed phenomena, which calls for an extrapolative approach: selecting, filtering and subjecting to analysis in order to single out only that which is most typical, illuminating or comprehensive.
Theory, then, is first and foremost about providing an overview or, in today's vernacular, a global perspective. "There is no theory other than that of the general," as the ancients put it, for the whole helps us to better understand the parts, and vice versa.
It operates through ideas, that is to say, abstractions or concepts: definitions that have been codified to a greater or lesser degree by the discipline in question.
Elevation to the rank of theory is thus accomplished through the linkage of interdependent, major concepts, within a whole which, although complex, is coherent as an issue, which then becomes the new, rather more modest, name for theory, whose genius lies more in the questions it poses than in the answers it offers.

5. The term coined by the American constitutionalist Carl Friedrich.

6. There is as much difference between "government" (in the Anglo-Saxon sense of "system" of government) and "management" (as in the management of public and even private policy).

7. Such as that on the European constitution, for example.

offs between the concepts involved, through juxtaposition or enumeration,[8] while legal theorists have difficulty combining them into a whole. To our knowledge, of the major international instruments produced in recent years, only the Council of Europe's rank democracy first in the Organisation's trio of core, founding values: democracy, rule of law and human rights.

On closer inspection, however, namely from a more theoretical standpoint, these three cornerstones of legal instruments concerned to properly reflect the interplay of cultures can be seen to boil down to a conceptual dichotomy between the law-governed state and a state based on political democracy, providing, as it were, a pleasing symmetry and complementarity between the two paradigms on which our system rests.

The "rule of law" is a vastly important and long-standing principle of English law but, more specifically, the theory of the law-governed state originated in Germany (*Rechtsstaat)* and was developed in continental Europe. It implies as a basis the rule of law not only in terms of formal references but also, and above all, in terms of the liberal substance of the law, with the primary focus on human rights. The rule of law, furthermore, applies to all of the law that concerns us here, including constitutional, institutional and political law. Today, the notion of the law-governed state is becoming "decoupled" from that of the rule of law through a rigorous view of the hierarchy of norms and, above all, through the requirement for judicial review of the constitutionality of laws, with a distinct European preference for the Kelsenian model (a special constitutional court) over the American model (where the ordinary courts also rule on constitutionality).



In the end, this last example brings us back to the major conceptual dichotomy of political democracy versus law-governed state.

It is no accident, therefore, that, throughout history, our system of government has needed two frames of reference to define itself: first the liberal, constitutional and ultimately pluralist democracy and, second, the law-governed state, coupled with political democracy, itself essentially state-based,[9] since the 1970s-80s and the rebirth of postmodern liberalism.

These twin foundations, both liberal and democratic, which give our system its complexity and also its distinctive and profound genius, are evident to a greater or lesser extent, throughout its organisational structure, where they occur in varying proportions. We will come across them again in the context of electoral disputes, where they are more closely interwoven than elsewhere.

Today, the liberal law-governed state and the democratic political state go hand in hand, but it was not always thus. The relationship between the two paradigms is an asymmetrical one: a law-governed state, even a liberal one, can exist without democracy and indeed predates it. Some representative "governments" in the form

8. Through enumeration or juxtaposition of the key references, rather than through an integrated vision of democracy and the law-governed state.

9. Rather than international or local, two levels to which the term "democratic" or even "political" should never be applied lightly.

of monarchies have been very liberal with "civil liberties" in particular individual ones. A pluralist democracy, on the other hand, is conceivable only within the framework of a law-governed state.

A brief – and diagonal – journey back in time[10] will help us to understand the distinction, at least for the purposes of analysis, between what we will call legal liberalism and political democratism.

### A. The history of the twin juridico-political concept: liberal democracy

While modernity began with the Age of Enlightenment, in France the main turning point was the French Revolution of 1789 and the rise of liberalism,[11] which in turn paved the way for the gradual growth of democracy, throughout the 19th century.

Liberalism establishes freedom as a core principle, both as a founding myth and as an ultimate end to be achieved. Ever since, the intention has been that it should be exercised in a competing manner, that is "freely", under the supervision of the courts, as the ultimate guarantors of freedoms and property rights in particular. Freedoms were thus "bestowed" from "above" on individuals by way of "civil liberties" and on towns and citizens via charters.

In these circumstances, the law was the principal logistical force behind liberalism, just as politics would later be for democracy.

Based on promises and revolutionary events, with egalitarianism as a "founding principle", universal suffrage as a means of securing political legitimacy and the ballot as a sort of electoral sanction or arbiter, political democracy came, as it were, to serve as a backup, if not a bulwark, for legal liberalism, thanks to the synergy and also the constantly negotiated trade-offs between the two "sub-systems".



As a result, our system has become more complex. Freedom and equality, norms and elections, the courts and majorities have thus found themselves operating in complementary or even synergistic ways. And in some cases, too, competing or even conflicting with one another.[12] Both as means of conferring legitimacy and, conversely, as a type of sanction. This is not the first time here that contradictions have been noted between the rule of law and democracy.

### B. Legal rules and political elections as sources of legitimacy

In the two centuries that followed 1789, there were three main periods when the two paradigms of our system were somewhat out of balance.

Early liberalism was built on constitutional or other norms, organising civil liberties and the competition they engendered. Such voting as existed under the

10. With the focus on the French experience, although, in this area, the other European democracies followed the same basic route.

11. The democratic parameters of the discourse on the power of the people and the participation of the working classes in the key events, including the storming of the Bastille.

12. Like the founding principles which are said to form the core of the common heritage of values and yet which are often a source of conflict between the Left (too much freedom is detrimental to equality) and the Right (too much equality is detrimental to freedom, as equality is apt to lead to egalitarianism).

representative system of government was confined to the nation's "élites" who were both "electors" and themselves eligible for election. In disputes, norms were safeguarded by the courts and the political branch of government by extrapolation from the idea of "peer justice", with the political authority being transformed, for the purposes of the case, into a judicial one. It was a way for the judicial sphere to win ground from the political branch in the days before its historic rise.

With the advent of universal suffrage and the parliamentary Third Republic, in 1875-77, legal liberalism gave way to democratic politics, to summarise rather crudely.

Priority was often given to ballots rather than to norms, which were seen as being the product of, and at the mercy of, the former; this was equally true of statutory or even constitutional norms and even more so of jurisprudence, as a source of law. The principle of legality was, of course, widely proclaimed and endorsed, but not the review of constitutionality. Certainly the "legal state" possessed elements of the "rule of law" but parliament and the political class did not come under the jurisdiction of the courts.

The pendulum this time had swung in favour of political democracy.

It was inconceivable back then that the courts (ordinary or special, the constitutional court did not yet exist) might penalise the political class for electoral infringements.

Throughout the near 100-year history (Third and Fourth Republics) of political democracy, electoral disputes were a matter for political, that is, parliamentary bodies and procedures. It is what eventually came to be known as the "verification of mandates procedure", which could be applied either systematically or sporadically. The political parties were then both judge and jury, with the inevitable result that the process became politicised, eventually dying out with the Fifth Republic. Initially de Gaullian, with the decline of parliamentary authority in general, this later evolved into a Gaullist republic with the triumphant return of liberalism, or "neo-liberalism", and a new emphasis on legal rules rather than the ballot and on the constitutional court rather than statutory and electoral norms.



Nowadays, it is the Constitutional Council, the "French-style" constitutional court, which deals with disputes involving the election of deputies, senators, the president of the republic and referenda. And in keeping with this process of constitutionalisation, electoral law and electoral disputes, hitherto regarded as something of a backwater, are once again coming to the fore.

The disputes that concern us here now need to be seen in the wider context of a system where "liberal" often takes precedence over "democratic". Constitutional norms are frequently accepted in legal and even political practice as the supreme source of legitimacy, without looking beyond those norms, to the elections that produced them, for example. Alternatively, attention is directed to the universal values provided by natural law, as an expression of the rationality that transcends politics.

It is imperative, however, that this dual structure of our system should not be viewed in dogmatic, still less black and white terms. Freedom and equality as founding principles, legal rules and political ballots, the courts (with the rights of the defence)

and the majority (with the rights of the opposition) operate in synergy and complementarity and sometimes, too, in tension and conflict, the peaceful outcome of which, through political negotiation or legal reform, is always possible and indeed foreseen.

Freedom and equality (among other things, of course), rules and elections, courts and majorities are part of the consensual legacy of values and methods of governance. They are, at any rate, common frames of reference. The two main political currents of liberal democracy,[13] however, do not give precisely the same substantive meaning to the principles invoked[14] (freedom and equality) and – in particular – do not rank them in the same way as, for example, in the case of legal and political methods (disputes and elections).

The general theory of the democratic law-governed state having thus been, for the most part, expounded, our next task is to situate the constitutional court in relation to electoral disputes, as it appears in France.

## II. Justice and electoral disputes or the justice system as guarantor of freedom and democracy

With the advent of the Fifth Republic, the task of judging elections, that is, "national" or state elections, passed chiefly to the Constitutional Council. Some authors (notably Dominique Rousseau) have lamented the fact that the council does not have ordinary jurisdiction to rule on elections, a sign, albeit indirect, of the high regard in which the institution is now held, after a slow, gradual process of evolution both as a constitutional court in general, and as a court dealing with elections in particular.



Despite the progress made in this respect, some constitutionalists are disappointed that the Constitutional Council has not gone further in reviewing compliance with the rules of the democratic process, in particular those relating to equality in terms of initial conditions and/or opportunities. Others feel it makes too much of these as it is and accuse it of behaving like a "political court", without being too specific, however, about whether it is the council's make-up that is the problem (political appointments) or its decisions (described as "partisan").

We therefore propose to examine the principle of judicial review of elections on which the French model is based, before turning our attention to the few advances made by the Constitutional Council's case law with regard to the implications for freedom (to vote and to stand for election) and equality (in terms of the conditions enjoyed by voters and candidates).

Depending on the different state systems, the interplay between the legal and the political is generally organised in two ways:[15]

13. In everyday terms, "the – classic – liberal right" and "the – modern – democratic left" as they were known not so long ago, before neo-liberalism.

14. The same applies to dignity, solidarity, etc.

15. Not forgetting the system of electoral commissions, which are often "backed up" by the court as an appeals body.

- the political body (parliament) reserves this competence for itself as a "sovereign power" or recourse is had to the fiction of the transmutation of political authority into judicial competence, which would then act in that capacity;
- alternatively, electoral disputes are dealt with by the courts (ordinary or specialised, constitutional courts).

For a long time, it was traditional in France for courts to be kept out of the political arena, which had sole power to review political elections. With the advent of representative government, and later parliamentary democracy, the system of "verification of mandates" (whether systematic or sporadic) took hold. The "representatives of the nation" were thus both "judge and jury" up to and including the Fourth Republic. This was the period in history when the dominant paradigm was political democracy, with all its inherent imbalances and in particular the tendency to substitute "parliamentary sovereignty" for "popular sovereignty". Various consequent frustrations undermined support for this system of dealing with electoral disputes, however. The withdrawal of seats from 25 of the 53 Poujadist deputies elected in 1956 effectively sounded its death knell, a fact that was acknowledged by the Fifth Republic in 1958 when most of the powers of review which concern us here were transferred to the constitutional judge.

### A. Judicial review of political elections

There is no question that reviewing political elections is a "patently judicial" function. The Constitutional Council is the "electoral court" and as such has "full jurisdiction", that is it can examine any question and exception raised in the application.



Substantively speaking, however, this is an eminently political matter. Political democracies are first and foremost electoral in nature. Granted, we are no longer in the inter-war period and nowadays the notion of a pluralist democracy is about more than simply elections or even voting in general. Political elections, however, remain central to the democratic system.

The court in these circumstances is expected to provide external or formal legal oversight of procedural acts and decisions, whether they relate to the run-up to elections, the actual ballot itself or publication of the results.

This contentious jurisdiction in electoral matters is exercised by the Constitutional Council in a cautious and highly inflected manner.

Where an application is manifestly inadmissible, the council will dismiss it without giving judgment.[16] It does not wish to be inundated with groundless, frivolous or perverse complaints nor does it want to see elections needlessly tainted by the doubts that can occur when there is a large number of challenges, even unfounded ones.

16. It dismisses without any preliminary inquiry complaints that have been filed too early or too late, complaints the purpose of which is unconnected with the proceedings and, generally speaking, any complaints where it is clear that the alleged infringements could have had no bearing on the outcome of the ballot: closure of a polling station a few minutes before the allotted time, candidate subjected to insults by voters, lengthy wait in order to vote, etc.

At the other extreme, it draws the line at judging the sincerity of candidates' commitment to the ideas they profess or interfering in parties' internal affairs by checking to ensure that party appointments have been made in the proper manner[17] or examining matters relating to parties' internal operation.[18]

Operating between these two poles, the Constitutional Council generally exercises its supervision with a fair degree of caution. It is, as you might say, "prudent" in its juris-"prudence".

Initially more modest or less "interventionist", its primary concern was to preserve voters' freedom of choice, while at the same time striving for "effectiveness". It thus has no hesitation in dismissing "lesser" complaints: minor overspends on elections; limited-scale distribution of leaflets to which the person in question has had time to respond, or as a reciprocal measure; unlawful or unwarranted pressure that cannot reasonably be said to have reached a dangerous level, actually interfering with freedom of choice.

In all these cases and more, the court will refrain from declaring an election void.

Some legal theorists have criticised the Constitutional Council for being too timid in this respect. Such self-restraint, however, dates from a time when the council was still building its legitimacy, on rather fragile constitutional foundations, and was anxious not to encroach too much on the other branches of government which had to "suffer" the gradual widening of its scope and the increasing intensity of its activity.[19] In these circumstances, it was particularly afraid of being seen as a "political court" vis-à-vis the other two political authorities, with whom it had no wish to enter into open rivalry.



As the system of the Fifth Republic has developed, however, the Constitutional Council has come to assume a greater role, as will become apparent in the context of electoral disputes.

### B. Towards the court as guarantor of freedoms and democratic rules, up to and including cancellation

With the rise of "neo-constitutionalism" as an expression of "neo-liberalism" under France's Fifth Republic, legal norms have acquired greater prominence and hence, too, legitimacy, eclipsing political ballots. The new imbalance between the two founding paradigms, which has already been highlighted, seems also to have manifested itself in the sphere of electoral disputes, enabling the constitutional court to venture rather more boldly into the territory of substantive rather than merely formal review of electoral irregularities. In so doing, it may have been encouraged (although not enough, according to some writers) by the fact that its legitimacy is no longer grounded solely in its more or less direct link with universal suffrage. To a large extent, then, the French constitutional court appears to have secured the

17. 25-XI-2004, S., Yonne.

18. 28-VI-2007, A. N., Bas Rhin, 3e.

19. Particularly in the electoral field where it has "unlimited jurisdiction", whereas its jurisdiction in ordinary matters is preventive in nature.

legitimacy which it was initially said to lack, so much so, indeed, that some writers consider it to be a "representative of the people" in a constitutional and judicial capacity. It makes its rulings, if you recall, "in the name of the French people" but, most importantly, its ground-breaking case law has introduced French law to new values and ideas, which are then taken up by the legislator.

For example, compliance with rules and procedures as such has become a more powerful factor for legitimacy than in the past.[20] There have been cases of governments (Lionel Jospin's for example) scurrying to the council in advance for confirmation that their bills are constitutionally sound, so that they can turn round later and claim to be "good constitutionalists". Similar attitudes and behaviour have been observed in electoral matters. All this has helped nudge the court towards the realm of substantive and hence political – liberal and democratic – law where it has come into contact with the basic principles and thinking which inform that law; liberally or democratically inspired rules and the spirit behind them. As an electoral court with "unlimited jurisdiction", the Constitutional Council can rectify material errors, correct the tally of votes,[21] amend the list of elected candidates or quite simply declare an election void. Such annulments are always effected on an individual basis, even when there are as many as 10 candidates involved, as happened in the case of a proportional representation list.[22]

Although annulments remain rare,[23] they reflect a growing recognition of the basic conditions required for "freedom of voters to form an opinion": voters must have a "genuine choice" and candidates equal opportunities. The council now makes the link between the freedom of voters to form an opinion and the democratic exercise of that freedom: the existence of a genuine choice, and of credible competition.



Generally speaking, the Constitutional Council considers that a substantive irregularity undermines the integrity of electoral operations and, hence, democracy itself. It is all a question of the level of severity.

Elections have accordingly been annulled in the following instances: irregularly constituted polling station;[24] irregularities in the counting of votes;[25] substitute not

20. In the United States, the home of "constitutional patriotism", playing by the rules has always been of paramount importance. There have been several cases in history, including recent history, where the candidate elected president by the presidential "grand electors" did not win the majority of the popular vote, or even where the elected candidate had fewer popular votes than his defeated rival. In Europe such a situation would be barely conceivable. The United States, however, has come to accept this paradox for, however tough the final outcome might be, the rules are the rules. Such procedural "hitches" are regarded as an unavoidable hazard of the electoral process. At the end of the day, as in certain sports such as tennis, the player who wins the most sets wins the match, even if he or she lost the majority of the games. The rules are sacrosanct.

21. Again out of concern to be effective, the council may validate certain ballot papers which the electoral commission has deemed void if to do so would enable the political movement in question to secure 5% of the vote and obtain a refund of their campaign expenditure. This case law stems from a concern to ensure a wide range of political ideas in the interest of freedom of expression and choice.

22. In Haute Garonne, in 1986.

23. For further details, see below.

24. 19-II-1963, A. N., Réunion, 2e.

25. 12-II-1963, A. N., Gard, 2e.

eligible to stand for election;[26] failure to update the electoral register;[27] irregular registration;[28] spending on elections beyond the maximum limit;[29] lack of financial transparency;[30] undue propaganda to which the rival candidate has no opportunity to respond;[31] mass distribution of leaflets;[32] allegations of a particularly virulent and misleading character;[33] large number of irregularly constituted proxies;[34] temporary disappearance of a list of signatures in an election that was won by a single vote;[35] pressure on voters;[36] voters prevented from moving freely around the counting tables in an unlawfully constituted polling station.[37]

In presidential elections and referenda, there have been no annulments but there have been a number of cases where supervision has "encroached" on substantive law. France's Constitutional Council has no jurisdiction to rule on acts passed by referendum which are "the direct expression of national sovereignty" (1962) and while, generally speaking, it cannot prevent a referendum that is actually a plebiscite in disguise, it considers itself competent to rule on the constitutionality of the referendum operation and requires that the question put to the electorate be "clear and fair", failing which it could condemn the question as "equivocal". The council could also bring a measure of influence to bear by refraining from giving the government its opinion, a move which would certainly cast doubt on the referendum. Last but not least, it can make comments and suggestions about the list of bodies entitled to use official means of propaganda (any opinions given in this connection must be given confidentially, however).



This tribunary or pedagogical advisory function is even more wide-ranging in parliamentary elections where it extends to the use of opinion polls, financial transparency and transparency in the lists of "sponsors".

Despite the few inroads made into substantive law, the council has set itself boundaries, of both a quantitative and qualitative nature. It requires that any irregularity attain a certain level of severity and has ordered few annulments overall.

Since the beginning of the Fifth Republic, it has annulled the election of 57 deputies and nine senators, which makes 66 cancellations in all, there having been no annulments in presidential elections or referenda.

26. 5-VII-1973, A. N., Lourdes, 1ère.
27. 23-XI, 1988, A. N., Wallis et Futuna.
28. 12-VII-1978, A. N., Paris, 16e.
29. 24-XI-1993, A. N., Paris, 19e.
30. 16-XI-1993, A. N., Loir et Cher, 1ère.
31. 7-VI-1978, A. N., Seine Saint-Denis, 9e.
32. 3-XII-1981, K. N., Paris, 2e.
33. 7-VII-1993, A. N., Loire Atlantique, 8e.
34. 25-XI-1988, A. N., Bouches du Rhône, 6e.
35. 3-V-1996, S., Vaucluse.
36. 23-X-1997, A. N., Haut-Rhin, 6e.
37. 21-X-1988, A. N., Meurthe et Moselle, 19e.

If we consider that up until 2002, there had been 12 general elections in 500 constituencies, on average, that is a relatively small number. Especially given the very pronounced tendency of voters to re-elect the person whose mandate was declared invalid.

Also worth noting is the fact that, out of concern for effectiveness, the council will refrain from annulling an election that was irregular if correcting the difference in the number of votes will not change the final result. Some writers have expressed indignation that quantity should be the determining factor in the decision whether or not to cancel, even going so far as to describe the practice as "amoral" and conducive to a "culture of impunity".

When the council conducts reviews and imposes penalties that might seem overly selective, however, it is merely acting in keeping with the spirit of the system which marries a concern for "representativeness" through genuine freedom[38] of will and choice with a concern for "good governance", and the proper functioning of democracy,[39] through its insistence on political competition.

For a long time, electoral disputes were kept in the shade, regarded as being of lesser importance and as such a matter for the ordinary courts or special electoral commissions. With the advent of neo-constitutionalism and its emphasis on the rule of law and legal norms, however, things have begun to change. Compliance with legal rules is becoming an increasingly effective test of legitimacy. The more so since with the general trend towards the blurring of distinctions between political philosophies, we are gradually moving towards a system of government or governance based on consensus. As a result, the focus of legitimacy has shifted to election processes and procedures as safeguards for the free formation of political opinion and equality of opportunity, or "proper competition" between candidates.



France's constitutional court could afford to address certain political, namely democratic aspects of elections, rather more boldly and with greater transparency. In 1791, Mirabeau, addressing the National Assembly, said that electoral disputes were one of the most important political issues with which we had ever had to contend. And the experience of Germany's Constitutional Court shows that numerous political issues can be translated into constitutional terms in order to find a solution to them, or at least a legal formulation. Electoral democracy could benefit even more from the logistics of the rule of law.

France's Constitutional Council has sometimes been criticised for being a "political court", specifically in the context of electoral disputes. Such charges, however, are too ambiguous to be convincing, if all they rely on is slogan or cliché, without any further critical analysis to support them.

The fact is that the political sphere, as a subject, constitutes the principal part of constitutional law. More specifically, democracy as a legal "regime" and political "system" is set within the framework of the rule of law. It could even be argued, from the point of view that concerns us here, that democracy exists and is realised

38. On the part of voters, in particular, as regards the freedom to form and express opinions.

39. Equal opportunities, namely competition between candidates.

only through the collective uses made of the rights and freedoms affirmed and guaranteed by a liberal, law-governed state *stricto sensu*. By intervening more boldly in electoral disputes, the court does not necessarily become "political". It does not presume to give opinions on political discourse (of candidates or parties) or public policy (by examining the balance between ends and means or promises and results) but merely verifies that the rules of politics, in the sense of majority or opposition "party politics", are observed in a fair and transparent manner. One does not become a "political judge" by being a judge of politics, and of the system through its rules, which are necessarily a reflection of its ideas and core values, or, as Montesquieu would say, its "spirit".

## To sum up the French experience

To sum up and comment on the basis of France's experience of judicial review of political elections, let us look again at the oft-repeated claim that the Constitutional Council monitors little and badly. To a large extent, the two criticisms overlap, since the implication is that to monitor "little" is in and of itself a bad thing.

Depending on whom you read, the council cancels "little", "very little" or even "too little", doubtless for fear of being seen as a "political court", which is one of the charges frequently levelled at it. We have already tried to rebut this argument with our suggestion that being a judge of political matters is not the same as being a "political judge", either statutorily, in law and in fact, or functionally, through "tendentious", "partial", "politicised" or "partisan" decisions. By the same token, when a court rules on legislative matters, that does not make it a legislator.



This criticism that the Constitutional Council cancels "too little" proceeds from a concern for democracy and democratic ethics in particular. Some critics have described as "amoral" the general tendency to adopt a strictly mathematical approach when deciding whether to punish certain irregularities. In cases involving electoral fraud, the council will not act if the number of votes liable to be annulled is too small to affect the end result. Yet surely, goes the argument, this creates a sort of incentive to commit fraud, since a candidate will in that case have every reason to commit fraud extensively in order to widen the gap with his rival. And by extension, where serious irregularities are committed by both candidates, the council will be apt to conclude that since the breaches are of equal "weight" in terms of their severity, they cancel each other out.[40] It could even be said that the Constitutional Council, unintentionally of course, pushes candidates into a sort of "tacit agreement to defraud" or, for that matter, to "out-fraud" each other because, ultimately, if the winner has significantly more votes than his rival, his election will not be annulled and neither will the other candidate's (also voidable).

The reasons for this reluctance to annul can be traced back to the judicial institution itself. From the general spirit of the council's case law in electoral disputes, it will

40. Constitutional Council decision of 11 May 1989, where Mr Tapie exceeded the maximum permitted expenditure, as did his rival, Mr Teissier, whose expenditure was of "a similar type and volume". In the circumstances, it was held that "their mutual disregard for the law did not have the effect of undermining voters' freedom of choice or the integrity of the ballot".

be observed that the court's stance has always been one of self-restraint when presented face to face with the sovereign electorate,[41] with whom, as has already been pointed out, it is disinclined to meddle.

It strikes us, however, that in principle, there is no reason for the council to be more restrained, timid even, when dealing with the body of voters in electoral disputes than when dealing with the "body" of constitutional law, which is, even more so than ordinary law, the direct expression of the constitution-making sovereign.

Particularly as unlike referenda, where the sovereign votes in a blanket fashion, parliamentary elections are annulled in an individual (based on the candidate concerned) and partial manner (based on the constituency). It is not as though every – fraudulently – elected candidate across the country is going to have his or her mandate declared invalid, thereby producing a new, overall winner. And yet, legally speaking, that is the only circumstance in which the sovereign could properly be said to be directly involved.



41. Of particular note was the 1962 Constitutional Council decision in which it refused to review legislation passed by referendum, deeming it to be a "direct expression" of the sovereign.

# Electoral disputes and the ECHR: an overview

Mr Michael O'Boyle[42]
*Deputy Registrar, European Court of Human Rights*

In the first draft of the European Convention on Human Rights (ECHR) that was sent to the Committee of Ministers in 1949 there was no mention of the right to free elections or the right to vote. It was argued by those experts who had excluded it that the ECHR was designed to protect individual rights and not to define the political structures which should be set up within the states parties. This caused a strong reaction by the UK and French experts and a draft of such "political" rights was promptly drawn up. However, pending agreement on how individual rights and "political" rights of this sort could be reconciled with each other, the right to free elections was not contained in the finalised text of the Convention and had to wait for the adoption of the First Protocol to the Convention in 1954.[42]

The case law of the Court on Article 3 of Protocol No. 1[43] still echoes this fundamental disagreement as to what exactly should be the role of the Convention in this area. The jurisprudence is, for the most part, relatively recent. The Court gave its first judgment in *Mathieu-Mohin and Clerfayt v. Belgium*[44] in 1987 although it was preceded by some pathfinding admissibility decisions of the former Commission which are followed by the Court to this day.[45] This provision is seen by the Court as enshrining a "characteristic principle of democracy" and has a strong link with Article 10 which affords strong protection to freedom of political debate. Together they are considered to constitute the bedrock of any democratic system.[46] Article 3 is primarily concerned with the state's positive duty to hold democratic elections at reasonable intervals and although unlike other Convention rights it is not framed as conferring a "right" as such, the Court has read into this provision both the right to vote and the right to stand for elections but accepts that both rights may be subject



42. For an analysis of the *travaux préparatoires* of Article 3 of Protocol No. 1, see Sergey Golubok, "Right to free elections: emerging guarantees or two layers of protection?" (2008) – paper available in the Human Rights Library, Strasbourg.

43. Article 3 of Protocol No. 1 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". See generally, Chapter 20, Harris D. et al., *The law of the European Convention on Human Rights,* second edition, Oxford University Press, April 2009.

44. 2 March 1987, Series A No. 113.

45. *Ždanoka v. Latvia* [GC], No. 58278/00, paragraphs 109-111, ECHR 2006-IV, for examples of some of these cases.

46. *Bowman v. the United Kingdom*, *Reports* 1998-I, paragraph 42.

to restrictions provided that such restrictions are not arbitrary and do not undermine the free expression of the opinion of the people.

Since the Court's leading judgment in *Mathieu-Mohin* there have been a large number of cases, many of them concerning the electoral systems of central and eastern European countries. However, there are five leading judgments which establish the Court's general approach to the interpretation of Article 3 concerning both active and passive electoral rights – *Matthews v. the United Kingdom*, *Hirst (No. 2) v. the United Kingdom*, *Ždanoka v. Latvia*, *Podkolzina v. Latvia* and *Yumak and Sadak v. Turkey*.[47] The interpretation of Article 3 as developed in these judgments is governed by five main considerations.

First, that the right to vote and to stand for election, together with freedom of expression and especially freedom of political debate, form the foundation of any democracy.[48] However, for the Court "expression of the opinion of the people is inconceivable without the assistance of a plurality of political parties, representing the currents of opinion flowing through a country's population. By reflecting those currents, not only within political institutions but also, thanks to the media, at all levels of life in society, they make an irreplaceable contribution to the political debate which is at the very core of the concept of a democratic society".[49]

Second, that the state enjoys a wide margin of appreciation when assessing restrictions of these rights although the Court has indicated that it will subject restrictions on the right to vote to greater scrutiny than to restrictions on the right to stand for election which fall to be assessed against the background of the particular political traditions and customs in the country concerned.



Third, the Court has also found that Article 3 permits inherent restrictions of these rights with reference to a wider variety of legitimate state aims than is the case with the rights set out in Articles 8-11 where the aims are carefully delineated. In consequence, the Court does not apply the traditional tests of "necessity" or "pressing social need" which are used in the context of Articles 8-11.

Fourth and more importantly, the Court's examination will focus on whether there has been arbitrariness or a lack of proportionality and whether the restriction has interfered with the free expression of the opinion of the people. Thus it will not accept restrictions that are arbitrary or are based on political discrimination and thus destroy the very essence of the right concerned.[50]

47. *Matthews v. the United Kingdom* [GC], No. 24833/94, ECHR 1999-I; *Hirst v. the United Kingdom (No. 2)* [GC], No. 74025/01, ECHR 2005-IX; *Ždanoka v. Latvia* [GC], No. 58278/00, ECHR 2006; *Podkolzina v. Latvia*, No. 46726/99, ECHR 2002-II; *Yumak and Sadak v. Turkey* [GC], No. 10226/03, 8 July 2008.

48. See generally in this context – the remarks of the President of the Court, Jean-Paul Costa, in "The links between democracy and human rights under the case-law of the European Court of Human Rights", Helsinki (5 June 2008) (available at www.echr.coe.int).

49. *Yumak and Sadak v. Turkey*, paragraph 107.

50. See, in this connection, *Paschalidis, Koutmeridis and Zaharakis v. Greece*, judgment of 10 April 2008. One issue on which the Venice Commission has already expressed an opinion concerns restrictions on electoral rights based on multiple citizenship. In its view – based on its own Code of Good Practice in Electoral Matters – such restrictions could amount to violations of both Article 3 of Protocol No. 1 and

Fifth, the case law – especially the Court's leading judgments – well reflects the reluctance by the Court to meddle in the political or constitutional arrangements of the state, particularly as regards rules concerning parliamentary representation. The Court's approach reveals a certain caution or prudence in imposing a Strasbourg view of how the national constitutional order should function in place of that chosen by the "people" through national institutions. Such prudence, as earlier indicated, aptly mirrors the early debates in the *travaux préparatoires* on the appropriateness of including such "political" rights among the individual rights set out in the ECHR. As one dissenting judge has put it, the Court faces a dilemma when examining cases under Article 3 of Protocol No.1: "on the one had, it is the Court's task to protect the electoral rights of individuals; but, on the other hand, it should not overstep the limits of its explicit and implicit legitimacy and try to rule instead of the people on the constitutional order which this people creates for itself".[51]

This omnipresent tension concerning the proper role of the Strasbourg Court between the need to protect individual rights on the one hand and the concern to do so in a manner which does not overly impinge on the constitutional order has permeated the case law from the very beginning and is graphically illustrated in the contrast between the vote-reaffirming approach of the Court in *Hirst (No. 2)* and the more cautious recent judgment in *Yumak and Sadak*. Notwithstanding the enduring difficulties of drawing the appropriate line in such cases, the Court's case law has gradually moved the cursor of protection from a baseline of minimum protection to a higher threshold of what European democracies should protect in their laws, especially in the area of the right to vote. In doing so, as will be seen below, the Court has upheld the four pillars of the European electoral heritage: universality, equality, freedom and the secret ballot. This is perhaps a slow start in a process which will prudently but surely continue to develop in an upwards direction.



## The meaning of the term "legislature" in Article 3 of Protocol No. 1

The right to vote is limited to guaranteeing "the free expression of the opinion of the people in the choice of the legislature". Accordingly, it does not extend to the full range of elections that take place in modern democracies. However, the Court has stressed that the word "legislature" in this provision does not necessarily mean the national parliament. Thus in *Mathieu-Mohin and Clerfayt v. Belgium*[52] the Court accepted that the Flemish council constituted part of the Belgian legislature by virtue of the range of its competence and powers. Also in *Santoro v. Italy*, the Court accepted that regional councils were part of the legislature because they were "competent to enact within the territory of the region to which they belong, laws in a number of pivotal areas in a democratic society, such as administrative planning, local policy, public healthcare, education, town planning and agriculture".[53]

---

Article 14 – see report of 30 October 2008 on Moldova's 2008 amendments to the Electoral Code. This question has now been examined by the Court in the case of *Tănase and Chirtoacă v. Moldova* (judgment of 18 November 2008). The applicants were not allowed to stand for election on account of their dual Romanian and Moldovan nationality. The case is considered below.

51. See Judge Levits's remarks in the *Ždanoka* chamber judgment (17 June 2004), paragraph 17.

52. *Supra* note 44.

53. ECHR 2004-VI, paragraphs 51-53.

In *Matthews v. the United Kingdom*, the applicant complained about the exclusion of Gibraltar from voting in the European parliamentary elections. The Court, rejecting the government's position that, as a supranational body the European Parliament fell outside the ambit of Article 3, found that it was to be considered a "legislature" within the meaning of this provision.[54] For the Grand Chamber of the Court, Article 3 of Protocol No. 1 could be applicable to the European Parliament even though it was an international organ and that, in practice, it had the characteristics of a "legislature" for the people of Gibraltar. The Court in this landmark decision acknowledged the significance of the evolution of the powers of the European Parliament and its increased role in law-making, notably since the Maastricht Treaty. Its role in this respect was no longer merely "advisory and supervisory" but had moved toward being a body with a decisive role to play in the legislative process of the European Community and, in practice, there were significant areas where community activity had a direct impact on Gibraltar. The Court also attached weight to the fact that the European Parliament "derived democratic legitimation from the direct elections by universal suffrage".[55] Since the applicant had been completely denied the opportunity to express her opinion in choosing members of the European Parliament, Article 3 was violated.

On the other hand, not every election to an institution which is considered important for effective political democracy is covered by this provision. The Court has held, for example, that Article 3 does not apply to elections to bodies which are not involved in legislative activities as such. Thus presidential elections, elections to local authorities or local governments which lack sufficient legislative authority in terms of the scope or strength of their powers and referenda on important matters are not considered to amount to elections to the "legislature" for purposes of this provision, notwithstanding the importance of such electoral exercises in a democracy.[56]



## The right to vote

Although Article 3 of Protocol No. 1 is expressed in general terms as a right to hold free elections, the Court has read into this provision the right to vote. Underscoring the importance of the right to vote in a democracy it has emphasised that the right to vote is not a privilege and that universal suffrage has become the basic principle in a democratic society.[57] According to the Court, "the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, frame the right to vote in terms of the possibility to cast a vote in universal, equal, free, secret and direct elections held at regular intervals".[58] The Court has also stressed that the right to vote is not absolute and that there is room for implied

54. *Supra* note 47.

55. *Supra* note 47, paragraphs 45-54.

56. See *Matthews*, paragraph 40; *The Georgian Labour Party v. Georgia*, No. 9103/04; *Booth-Clibborn v. the United Kingdom*, 43 DR 236; *Cherepkov v. Russia*, No. 51501/99.

57. "In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power", *Hirst (No. 2*), paragraph 59.

58. See *Russian Conservative Party of Entrepreneurs v. Russia,* judgment of 11 January 2007.

limitations. It has also reaffirmed that the margin of appreciation in this area is a wide one taking into consideration the numerous ways of organising and running electoral systems and the wealth of difference, *inter alia*, in historical development, cultural diversity, and political thought within Europe, "which it is for each Contracting State to mould into their own democratic vision".[59]

It is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with. In so doing, it will consider whether the restrictive conditions do not curtail the right in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, any conditions imposed must not "thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage".[60] Accordingly, conditions concerning the imposition of a minimum voting age with a view to ensuring the maturity of those participating in the electoral process or criteria such as a residence requirement or having continuous and close links to, or a stake in, the country are relevant factors.[61] In assessing the acceptability of the length of the residence requirement the Court will have close regard to the particular context under scrutiny.[62] Conditions concerning the exercise of the right to vote such as registration within a particular time limit would be likely to be considered to serve a legitimate aim, namely to ensure the proper conduct of elections and to avoid electoral fraud. Significantly, the Court has emphasised that any departure



59. *Hirst (No. 2),* paragraph 61, *supra* note 47.

60. Ibid., paragraph 62.

61. Ibid., citing *Hilbe v. Liechtenstein*, decision of inadmissibility, ECHR 1999-VI: "In the present case the Court considers that the residence requirement which prompted the application is justified on account of the following factors: firstly, the assumption that a non-resident citizen is less directly or less continually concerned with his country's day-to-day problems and has less knowledge of them; secondly, the fact that it is impracticable for the parliamentary candidates to present the different electoral issues to citizens abroad and that non-resident citizens have no influence on the selection of candidates or on the formulation of their electoral programmes; thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country."

62. In the *Polacco and Garofalo v. Italy* case (Commission decision of 15 September 1997, DR 90-A), only those who had been living continuously in the Trentino-Alto Adige Region for at least four years could be registered to vote in elections for the Regional Council, which were held every five years. The former Commission took the view that that requirement was not disproportionate to the aim pursued, given the region's particular social, political and economic situation. In the case of *PY v. France* (judgment of 11 January 2005), the Court upheld a 10-year residence requirement to vote in elections in New Caledonia. Even the Court conceded that such a period appeared disproportionate but argued that the situation was exceptional and was bound up with the negotiations to the Nouméa Accord which brought to an end a turbulent period of political and institutional history. The representatives of the local population had insisted during the negotiations that the results of elections should not be affected by the mass of recent arrivals who did not have strong ties to the area. The Court reasoned that such factors were to be taken into account as part of the "local requirements" rule under Article 56 of the Convention (see paragraphs 59-65). The ruling may thus be seen as exceptional and limited to a colonial setting. Significantly, both of these decisions pre-date the *Hirst* judgment and it may be questioned whether, in the light of this judgment and the presumption it attaches to the right to vote, the Court today would have reached the same conclusion or exhibit such deference to local particularities.

from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates.[63] Exclusions of any groups or categories of the general population must accordingly be reconcilable with the underlying purpose of Article 3 of Protocol No. 1.[64]

The judgment in *Aziz v. Cyprus* well illustrates the latter point. In this case, the Court considered that the denial of voting rights to a Turkish-Cypriot resident in non-occupied territory of Cyprus violated Article 3 because it amounted to completely excluding such persons from the democratic process. It was not acceptable that the applicant, living in a government controlled part of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives of the country of which he was a national and where he had always lived. Such a situation had continued for a period of 30 years. The Court accordingly concluded that the very essence of the applicant's right to vote had been impaired.[65]

A similar exclusion from the right to vote occurred in the case of *Matthews v. the United Kingdom*, mentioned above, which concerned the denial of voting rights in European Parliament elections to residents of Gibraltar.[66] She had been completely denied her right to choose a member of the European Parliament and her position was thus considered different to those of persons who are denied the vote because they live outside the jurisdiction "as such individuals have weakened the link between themselves and the jurisdiction".[67] In *Labita v. Italy*, the Court considered that temporarily suspending the voting rights of persons against whom there is evidence of mafia membership pursues a legitimate aim. However, once a suspect was acquitted it was not justified to continue to deny the person his right to vote since the basis of the original suspicion had been found to lack a concrete basis.[68] Disenfranchisements of persons who have been declared bankrupt have also been declared to be in breach of this provision. The Court noted in the case of *Vicenzo Taiani v. Italy* that the law served no purpose other than to belittle the applicant or to indicate moral condemnation on account of having become insolvent.[69] It thus was not considered to pursue a legitimate aim.



In the leading case of *Hirst v. the United Kingdom (No. 2)*, the Court considered the systematic disenfranchisement of convicted prisoners in the United Kingdom without any distinction being drawn between different categories of prisoners. Could such a blanket restriction on the rights of convicted prisoners to vote be justified?[70]

63. Ibid.

64. See *Georgian Labour Party v Georgia*, judgment of 8 July 2008, where the Second Section of the Court found a violation of the party's right to stand for election arising out of the disenfranchisement of some 60 000 Ajarian voters by a decision taken by an electoral commission to cancel the result of the election in two districts for electoral irregularities and not to proceed to new elections in these areas.

65. ECHR 2004-V, paragraphs 26-30. The Court also found a violation of Article 14, paragraphs 36-38.

66. *Supra* note 47.

67. At paragraph 64.

68. ECHR 2000-IV (GC), paragraphs 198-204.

69. 13 July 2006 (Hudoc).

70. The disenfranchisement was not completely universal though most convicted prisoners were affected

In the Court's view it could not. Its judgment was influenced by the fact that there had been no substantive debate by members of the UK legislature on the continued justification in the light of modern day penal policy and of current human rights standards for maintaining such a general restriction.[71] While accepting a wide margin of appreciation, the Court did not consider it acceptable to strip a significant category of persons of their right to vote and to do so in a manner which was indiscriminate, applying automatically to prisoners, irrespective of the length of their sentence or of the nature or gravity of their offence and their individual circumstances. For the Court, "Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1."[72] In keeping with the general policy of the Court, it did not attempt to legislate on the state's behalf by indicating how the law should be amended. The matter of which categories of prisoners could be legitimately deprived of the vote fell to the UK legislature to decide. The Court's sole concern was that all convicted prisoners should not be treated on the same exclusionary footing.

The minority in *Hirst (No. 2)* cautioned the Court against crossing the line between adjudication and assuming legislative functions.[73] Their disagreement went directly to the issue of the deference that an international court owes to the decisions taken by a democratically elected parliament concerning the very system from which it derives its legitimacy. In their view, the majority had trespassed on the legislative function in an area where there was little consensus amongst Council of Europe states that prisoners should enjoy the vote. They also took issue with the remarks that there had not been any substantive debate in the legislature on the grounds that it "was not for the Court to prescribe the way in which national legislatures carry out their legislative functions".



## The right to stand for election

Article 3 of Protocol No. 3 also guarantees the individual's right to stand for election and, once elected, to sit as a member of parliament. In *Castells v. Spain*, the Court noted that while freedom of expression is important for everybody "it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests."[74] Accordingly, interferences with the freedom of expression of an opposition member of parliament call for the closest scrutiny on the part of the Court.

---

by it. It did not apply to those imprisoned for contempt of court or to those imprisoned for default, for example, in paying a fine (see paragraph 23).

71. *Supra* note 47; see paragraphs 22 and 79. Section 3 of the Representation of the People Act 1983 re-enacted without debate Section 4 of the 1969 act of the same name, the substance of which dated back to the Forfeiture Act 1870 which in turn reflected earlier rules of law concerning the forfeiture of certain rights by a convicted felon – the so-called "civic death" of the times of Edward III.

72. At paragraph 82.

73. The dissenters were Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens.

74. A236, judgment of 23 April 1992, paragraph 42.

The Court has had fewer occasions to deal with an alleged violation of the individual's right to stand as a candidate for election (the so-called passive aspect of the rights under Article 3). Its approach in examining such cases under this aspect has been rather cautious and not as strict as in the area of voting rights[75] but nevertheless it has been willing to curb overtly anti-democratic practices.

In the leading case of *Ždanoka v. Latvia*, it emphasised the importance of the historical and political context when examining restrictions: "the Contracting States enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, these criteria vary in accordance with historical and political factors specific to each state. The multiplicity of situations provided for in the constitutions and the electoral legislation of numerous member states of the Council of Europe shows the diversity of possible approaches in this area. Therefore, for the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned."[76]

In making its assessment, the Court will also have regard to the close connection between democracy and the Convention. Democracy is seen as the fundamental feature of European public order and it has frequently stated that the realisation of human rights is best ensured by an effective political democracy. This connection is illustrated by the following cases where the Court has found violations of the right to stand.[77]



In *Sadak and Others v. Turkey (No. 2)*, the Constitutional Court had dissolved the Democratic Party (DEP) on the basis of speeches that had been made by senior officials of the party abroad. However, under Turkish law, it was an automatic consequence of the party's dissolution that all of the applicants were forced to vacate their parliamentary seats. The Court considered that this was harsh and disproportionate since a forfeiture of their seats was not the consequence of their personal political activities. It thus found that the measure was incompatible with the very substance of the applicant's right to be elected and sit in parliament but that it also infringed the sovereign power of the electorate who elected them as members of parliament.[78] Similarly, in *Lykourezos v. Greece* the applicant – a practising lawyer – was required to forfeit his parliamentary seat on the ground that carrying on a professional activity disqualified him from holding such office. He had been elected in April 2000 and it was only in 2001 that a revision of the constitution made all professional activity incompatible with the duties of a member of parliament. In finding that there had been a violation of Article 3 in this case, the Court considered that at the time of the election it could not have been imagined that an election would be called into question on the ground that the applicant was at the same practising

75. The Court recognises this in *Yumak and Sadak v. Turkey*, *supra* note 47, paragraph 109 (v).

76. *Supra* note 47, paragraph 106.

77. See, for example, *Yumak and Sadak*, *supra* note 47, paragraph 107.

78. ECHR 2002-IV, paragraph 40.

a profession. His disqualification thus came as a surprise both to him and his constituents, both of whom had acted in the legitimate belief that he would represent them for a full parliamentary term. The decision of the special Supreme Court that he forfeit his seat had deprived his constituents of the candidate they had chosen freely and democratically to represent them in parliament in breach of the principle of legitimate expectation.[79]

In *Melnychenko v. Ukraine*, legislation in Ukraine established a minimum residence requirement of five years as a condition on the right to stand. The applicant had maintained a residence within Ukraine during a five-year period but had been absent due to fear of prosecution which had resulted in him being granted political asylum in the United States. He had worked in the office of the President of Ukraine and was alleged to have tape recordings of conversations between the president and others concerning the disappearance of a political journalist whose decapitated body was found just before the applicant fled Ukraine. The Court found that the applicant was in an impossible dilemma. If he had stayed in Ukraine his personal safety or physical integrity may have been seriously endangered, whereas in leaving the country he was also being prevented from exercising his political rights. Since it was not part of Ukrainian law that the applicant be continuously or habitually resident in Ukraine, the Court considered that the refusal of the electoral commission to allow him to stand was in breach of Article 3 of Protocol No. 1.[80]

In the recent judgment of *Tănase and Chirtoacă v. Moldova*, the Court examined the compatibility of a Moldovan law that did not permit holders of both Romanian and Moldovan nationality to stand in elections. The Court was prepared to accept the government's submission that the rule pursued the aim of ensuring the loyalty of MPs to the state. However, it found the restriction disproportionate, observing that Moldova was the only country which, while allowing multiple nationalities, prohibited them from standing. In fact when Moldova adopted legislation in 2002-03 permitting Moldovans to hold double nationality there was no indication that the political rights of those who availed of the new option would be curtailed. It also noted that there were other means of securing loyalty to the state such as requiring MPs to take an oath of loyalty and that Moldova is a party to the European Convention on Nationality which guarantees to all persons holding multiple nationality equal treatment with other Moldovans. The Court emphasised that a "sizeable proportion of the population has not only found itself banned from actively participating in senior positions in the administration of the State, failing renunciation of an acquired additional nationality, but will also face limitation on its choice of representatives in the supreme forum of the country".[81] Finally, it stated that it could not overlook the inconsistency of such practice with the recommendations of the Council of Europe in the field of elections and that the promoters of the law had rejected outright the proposal from the opposition to submit the draft for examination by Council of Europe experts in accordance with Moldova's membership commitments.[82]



79. ECHR 2006-VIII.

80. ECHR 2004-X, paragraphs 53-67.

81. Judgment of 18 November 2008, paragraph 112.

82. The Venice Commission had issued a clear opinion that restriction of citizens' rights should not be

Under what circumstances is it legitimate under the Convention to impose a bar on a candidate from standing for election? This issue was addressed by the Court in the important case of *Ždanoka v. Latvia*.[83] The applicant had been a member of the Communist Party of Latvia (the CPL) which had taken part in two attempted *coup d'états* following the declaration of Latvia's independence in 1990. When she attempted to stand as a candidate in the 1998 parliamentary elections her candidacy was refused on the grounds that she had actively participated in the CPL's activities and on that basis was considered ineligible under the relevant rules. In 2002, her name was subsequently removed from the list of candidates for national parliamentary elections on the same basis. The prohibition had been considered and upheld by the Constitutional Court on 30 August 2000. In 2004 she was subsequently elected to the European Parliament.

The Court considered that while such a measure could scarcely be considered acceptable in the context of a political system which had an established framework of democratic institutions going back many decades or centuries, it could nonetheless be considered acceptable in Latvia in view of the historical-political context and given the threat to the new democratic order posed by "the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime".[84] The Latvian legislative and judicial authorities were considered better placed to assess the difficulties in establishing and safeguarding the democratic order. The purpose of the measure was not to punish but rather to "protect the integrity of the democratic process by excluding from participation in the work of a democratic legislature those individuals who had taken an active and leading role in a party which was directly linked to the attempted violent overthrow of the newly-established democratic regime".[85] The Court also attached weight to the fact that the Latvian Parliament had periodically reviewed the relevant legislation and that the Constitutional Court in a decision in 2000 had examined the historical and political circumstances underlying the legislation and found that the restriction was neither arbitrary nor disproportionate. The Court emphasised that Article 3 did not require "supervision by the domestic judicial authorities or the proportionality of the impugned statutory restriction in view of the specific features of each and every case". It was sufficient that the domestic courts merely established whether a particular individual belongs to the impugned category or group. Nevertheless, there needed to be safeguards in the judicial process and the Court required that "the



based on multiple citizenship and that the Code of Good Practice in Electoral Matters issued by the Venice Commission specifically quoted Article 17 (1) of the European Convention on Nationality concerning the equality of rights of persons possessing double nationality with those of other nationals of the state – see paragraph 110 and paragraphs 108-115 generally. See also note 50 above.

83. See *Gitonas v. Greece*, *Reports* 1997-IV, where the rule preventing holders of public office from standing as candidates was seen as serving the legitimate aim of preventing undue influence on the electorate or having unfair advantage over other candidates; also *Ahmed v. the United Kingdom*, *Reports* 1998-VI, where the Court did not consider it disproportionate that local authority officers were required to resign if standing in an election. The rule was considered to pursue the legitimate aim of maintaining the political impartiality of local government officers.

84. Ibid., paragraph 133.

85. Ibid., paragraph 122.

statutory distinction itself [was] proportionate and not discriminatory as regards the whole category or group specified in the legislation".[86]

The Grand Chamber therefore accepted that the restrictions imposed were acceptable under Article 3 and that they warranted the applicant's disqualification from standing even in 2006 (date of the Court's judgment), 15 years on from the events of 1991. However, in an unusual caveat the Court effectively summoned Latvia to amend its law. It expressed the view that even if Latvia could not currently be considered to have overstepped its margin of appreciation under Article 3, the Latvian Parliament had a duty to keep the statutory restriction under constant review with a view to bringing it to an early end. Such a conclusion was all the more justified in view of the greater stability which Latvia now enjoyed by reason of its full European integration. A failure by the Latvian legislature to take active steps in this connection, the Court warned, could result in a different finding.[87]

For the four dissenting judges, it was considered that the prohibition had gone on too long: the point had come to condemn the restrictions imposed on Ždanoka as Latvia had now emerged far beyond the difficult times associated with the early 1990s.[88] It may have been justified during the first years of the new regime and for the sake of democratic consolidation. However, 15 years after the attempted *coup*, five years from the Constitutional Court's decision and two years from the date of the applicant's election to the European Parliament it had lost its potency. In their view, the measure had become an almost permanent one and, as such, was disproportionate as it had not been established that the restriction was necessary based on the facts of the applicant's case.



In the course of its *Ždanoka* judgment, the Court referred to several cases where the Commission had rejected applications as inadmissible from two persons who had been convicted, following the Second World War, of collaboration with the enemy and on that account were permanently deprived of the right to vote. The Commission considered that the purpose of legislation depriving persons convicted of treason of certain political rights was to ensure that such persons were prevented in future from abusing their political rights in a manner prejudicial to the security of the state or the foundations of a democratic society.[89] In the case of *Van Wambeke v. Belgium*, decided in 1991, the Commission declared inadmissible, on the same basis, an application from the former member of the Waffen-SS convicted of treason

86. *Supra* note 47, paragraph 114. "There was no obligation… for the Latvian Parliament to delegate more extensive jurisdiction to the Latvian courts to 'fully individualise' the applicant's situation so as to enable them to establish as a fact whether or not she had done anything which would justify holding her personally responsible for the CPL's activities at the material time in 1991, or to re-assess the actual danger to the democratic process which might have arisen by allowing her to run for election in view of her past or present conduct" (paragraph 128). But see *Ādamsons v. Latvia*, judgment of 24 June 2008, where the Court found a violation in respect of the exclusion of a former member of the KGB from standing for election on the grounds that it had not been shown that his behaviour warranted it.

87. Ibid., paragraph 135: "*the Latvian Parliament must keep the statutory restriction under constant review,* with a view to bringing it to an early end" (emphasis added).

88. Judges Rozakis, Zupančič, Mijovic and Gyulumyan. See also the partly dissenting opinions of Judges Wildhaber, Spielmann and Jaeger.

89. *X v. the Netherlands*, decision of 19 December 1974, 1 DR 88, and *X v. Belgium*, decision of 3 December 1979, 18 DR 250.

in 1945 who complained that he had been unable to take part in the elections to the European Parliament in 1989.[90] Although the Court made no reference to the "permanent" nature of these restrictions, it may be questioned whether they would stand up to scrutiny today in the light of the stricter approach evident in the *Hirst (No. 2)* judgment.

In a similar vein, the Commission had declared inadmissible the application by *Glimmerveen and Hagenbeek v. the Netherlands*, which concerned the refusal to allow the applicants, who were leaders of a proscribed organisation with racist and xenophobic tendencies, to stand for election. The admissibility decision referred to Article 17 of the Convention, noting that the applicants "intended to participate in these elections and to avail themselves of the right – for a purpose which the Commission had found to be unacceptable under Article 17".[91]

While the Court has accepted the legitimacy of various conditions or requirements for candidates standing for election, it has been careful to ensure that compliance with these requirements is carefully and fairly assessed. This procedural dimension imports a requirement of due process in the assessment of compliance with electoral law and is in keeping with the Court's insistence on national due process when there is an interference with a Convention right.[92] In *Podkolzina v. Latvia*, the law required prospective parliamentary candidates from Latvia's Russian-speaking minority to demonstrate proficiency in Latvian. The Court had no difficulty in accepting that such a requirement pursued the legitimate aim of ensuring the proper functioning of the Latvian legislature. It added that it was not for the Court to determine the choice of a working language of a national parliament as that choice was dictated by historical and political considerations and was a matter exclusively for the state concerned to determine. However, the Court found that in this case the measure removing the applicant's name from the list of candidates had been disproportionate. The applicant had held a valid language certificate which had been issued by a committee following an examination. However, she was nevertheless required for spurious reasons to sit a further language examination and to have her language proficiency assessed by a single examiner instead of a board of experts and the examiner was not required to observe the procedural safeguards and assessment criteria laid down in the regulations. The Court expressed surprise that during the interview she was questioned about the reasons for her political orientation, a matter that had nothing to do with her knowledge of the Latvian language. Thus, the full responsibility for assessing the applicant's linguistic knowledge was left to a single civil servant who had exorbitant power in the matter. In finding a breach of Article 3 in this case the Court stressed, for the first time in this context, the importance of safeguards against arbitrariness: "the finding must be reached by a body which can provide a minimum of guarantees of its impartiality. Similarly the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure for



90. No. 16692/90, decision of 12 April 1991. See *Ždanoka*, paragraphs 109-110.

91. Decision of 11 October 1979, 18 DR 187.

92. Articles 2 and 3 are classic examples but see also Article 5 (as regards disappearances, *Kurt v. Turkey*, *Reports* 1998-III) and Article 1 of Protocol No. 1 (*Jokela v. Finland*, judgment of 21 May 2002).

ruling a candidate ineligible must be such as to guarantee a fair and objective decision and prevent any abuse of power on behalf of the relevant authority".[93]

## Electoral systems

As indicated above, the Court affords states a wide latitude to design their own electoral systems to suit their own circumstances, taking into consideration their particular history and traditions. In *The Liberal Party, Mrs R and Mr P* case, the former Commission considered that the United Kingdom electoral system based on the principle of "first past the post" (simple majority system) was overall an acceptable system for elections to the legislature and did not become unfair by reason of the small number of seats won by the Liberal Party in the election despite winning a high percentage of the national vote. Article 3 did not require that states implement a system of election based on proportional representation. The Commission was influenced by the fact that the simple majority system was one of two basic electoral systems which was used in many democratic countries even if it has an adverse effect on smaller parties. It noted that even in countries where there was a constitutional guarantee of equality of voting, supreme courts had upheld the system as being compatible with the principle of equality. It went on to hold that proportional representation was not itself incompatible with Article 3.[94] Significantly, the Commission left open the question whether an issue could arise under this provision and/or Article 14 where the effect of the voting system was that religious or ethnic groups would not be represented.

The Court has pointed out in *Yumak and Sadak v. Turkey* that electoral systems often seek to fulfil objectives which are sometimes scarcely compatible with each other: on the one hand, to reflect faithfully the opinions of the people and, on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. It has also stressed that Article 3 does not imply that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. No electoral system can eliminate wasted votes altogether.[95]



*Yumak and Sadak v. Turkey* concerned the question of electoral thresholds. Under Turkish law a political party was required to secure 10% of the vote nationally in order to win seats in the National Assembly. The applicants stood as candidates in parliamentary elections for the Democratic Peoples Party and obtained 45.95% of the vote in their province but did not secure 10% of the vote nationally. Accordingly, they won no seats in the assembly.

The Court observed that the national 10% threshold was the highest of all the thresholds applied in the member states of the Council of Europe. Only three other member states had opted for high thresholds (7% or 8%). It also attached importance

93. *Supra* note 47, paragraphs 36-38.

94. No. 8765/79, 21 DR 211, at 225; both Germany and the United States were cited. Their Constitutional Court and Supreme Court respectively had upheld simple majority systems notwithstanding the fundamental right of equality of voting, at 225; see also *Mathieu-Mohin v. Belgium*, *supra* note 44, at paragraph 54.

95. *Supra* note 47, paragraph 112.

to the views of Council of Europe bodies to the effect that the level of the Turkish national threshold was exceptionally high and had called for it to be lowered.

Nevertheless, the Court considered that electoral thresholds were acceptable in principle as they served a legitimate aim: they were "intended to promote the emergence of sufficiently representative currents of thought within the country and of avoiding excessive and debilitating parliamentary fragmentation and thus of strengthening governmental stability". As regards the proportionality of the law, the Court observed that it could not assess a particular threshold without taking into account the electoral system of which it formed a part, although it could accept that a threshold of about 5% corresponded more closely to the member states' common practice. Crucially, it considered that it should have regard to the "correctives" and other safeguards in place in the Turkish system in order to assess the real effect of the threshold requirement. For the Court, an election system that was otherwise dubious under Article 3 was redeemed since the political parties that were hampered by the threshold had managed in practice to develop strategies to attenuate some of its effects. There existed "correctives" and "other safeguards" associated with the electoral system that rendered the high threshold compatible with Article 3. In particular, the applicants could have stood as independent candidates forming a political group once elected, as had happened to the successor of their political party in the 2007 election. Likewise, small parties had the possibility of forming electoral coalitions with other political groups. While the law prevented parties from presenting joint lists, political parties have developed an electoral strategy to circumvent this prohibition. This produced tangible results particularly in the 1991 and 2007 elections. In reaching its decision, the Court had also been influenced by decisions of the Turkish Constitutional Court which had emphasised that the legislature could not adopt "measures tending to restrict the full expression of the opinion of the people, or subject political life to the hegemony of a political party, or destroy the multi-party system".[96]



In conclusion, the Court considered that while a 10% electoral threshold appeared excessive, it was not persuaded that when assessed in the light of the specific political context of the elections in question, and given the existence of "correctives" and other guarantees which had limited the effect of the threshold in practice, the threshold has not had the effect of impairing the right secured to the applicants by Article 3.

The dissenting judges, on the other hand, considered that the very essence of Article 3 was impaired in that the 10% threshold deprived a large proportion of the population of the possibility of being represented in parliament and that it had a profoundly negative effect on the fortunes of political parties with a regional focus, something that was hard to reconcile with the need for pluralism in a democratic society. They also questioned how an improperly functioning system could be saved by what was in effect "stratagems" used by smaller parties, especially as this was dependent on the vagaries of politics, had no guaranteed place in the system and relied on the candidates to circumvent the existing electoral rules. They had difficulty

96. Ibid., paragraphs 133-138.

accepting that smaller parties would have to find political allies or disappear in order to achieve parliamentary representation. In their view, all the above considerations went against the grain of Article 11 case law and the importance of political pluralism and the role of parties in a democracy.[97]

## Conclusion

The minimum standards established by the Court in the area of electoral rights contrast with the much higher protection afforded in the case law to freedom of political expression, freedom of association and freedom of assembly. This is certainly due to the weak formulation of Article 3 but also to the general reluctance of the Court to meddle in the electoral affairs of the state. However, there are signs of Article 3 coming of age as the Court is asked to grapple with electoral disputes arising from the new democracies and a braver approach has been taken in many cases. The influence of leading decisions of certain national courts emphasising the importance of the right to vote have played a certain role in this.[98] This is perhaps based on a realisation that while western states by virtue of their well-established democratic systems give rise to relatively few problems there is a need for such states to set the example for other less well-entrenched democracies and for the Court to insist on the application of such standards in more perilous or fragile settings. It is true that in the past it could not be maintained that Article 3 imposed a burdensome set of obligations on the state. However, the Convention community of states has changed dramatically and it can be argued that in this fundamentally altered situation where new problems arise, for example, in the area of lustration laws, Article 3 is asserting itself as the central democratic right from which all else flows. In an important sense the protection of human rights generally is dependent on free and fair elections since it is the government so constituted that will have the responsibility for respecting national and international obligations in the field. As constitutional courts throughout the world have long realised, the right to vote is a fundamental political right because it is "preservative of all rights".[99]



Curiously, the new Court has not yet been asked to examine what is meant by the obligation to hold elections at "reasonable intervals".[100] Nor has it been called on to declare an election void because of a violation of Article 3 although it is certainly in the realm of possibilities that an attempt will be made to use the Court's interim measures provision (Rule 39) to request that an electoral result be suspended

97. Ibid., paragraph 147.

98. See, for example, the references to the judgments of the Canadian Supreme Court and the South African Constitutional Court in the *Hirst (No. 2)* judgment, paragraphs 35-39.

99. See, in this regard, *Yick Wo v. Hopkins*, 118 US 356, p. 370 (1886). In the words of Mr Justice Matthews: "The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."

100. The issue was examined by the Commission in the case of *Timke v. Germany,* decision of 11 September 1995, 82-A DR 158. For the Commission, rejecting the complaint, the purpose of elections is to ensure that fundamental changes in prevailing opinion are reflected in the legislature. Too short an interval may impede political planning – too long an interval can lead to the petrification of political groupings in parliament which may no longer bear any resemblance to the prevailing will of the electorate. A five-year interval was considered acceptable from this point of view.

pending judicial examination. On the present state of the case law, such a request would be most unlikely to succeed and in any event the case law reveals a general reluctance by the Court to interfere, even by way of its ordinary jurisdiction, with the day-to-day workings of the state in this highly sensitive area. Nor has the Court yet carried out an examination on the merits of a complaint concerning the drawing of electoral boundaries (as opposed to the choice of electoral systems) where the principle of equality of voting is placed before it.[101] The Court has yet to pronounce itself on "gerrymandering" and it is submitted that none of the preceding cases prejudice a possible future determination once an electoral system has been chosen – be it the simple majority or proportional representation system – that the authorities must organise their systems in such a way that one person's vote has generally the same value as that of another person or that constituencies must be drawn up in a manner which respects the principle of equality – due regard being had to relevant political, historical and geographical features and the need to make provision for the representation of recognised minority groups. It is only a matter of time before such an issue is brought to the Court for decision and there is every reason to believe that the fundamental difference of approach that has marked the above cases will reassert itself once more.[102]

The cases discussed above have become a civilised battleground between competing judicial philosophies: the one concerned to develop democratic standards in this area and strengthen the status of the right to vote and the right to stand for election in the light of modern day electoral standards, the other to tread carefully when it comes to the design of the states' democratic system and to be wary of second-guessing the national choices made by a freely elected legislature.[103] The latter approach is reminiscent of the policy factors underpinning the margin of appreciation doctrine generally but made more pungent in the area of electoral rights and the former presupposes the existence of a bundle of superior electoral rights waiting to be tapped into. Both approaches have their limitations – presupposing the existence of a freely elected legislature surely begs the question when restrictions on electoral rights are under scrutiny and to which political system would one look in order to determine best practice in the field of electoral rights? Which state's custom



101. It rejected a complaint concerning the failure of the French authorities to review electoral boundaries as manifestly ill-founded, *inter alia*, on the grounds that no demographic discrepancy had been shown to exist in the applicant's constituency – *Bompard v. France*, decision of 4 April 2006. See also *Georgian Labour Party v. Georgia*, *supra* note 64, paragraphs 82-93, concerning the importance of the proper management of electoral rolls as a precondition for a free and fair ballot.

102. The matter has been extensively litigated in the United States. Consider the stirring words of Chief Justice Warren in *Reynolds v. Sims*: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavoured areas had not been effectively diluted", 377 US 533 (1964).

103. See *Ādamsons v. Latvia*, judgment of 24 June 2008, for the most recent example of different approaches to interpretation within the Court in this area with a concurring opinion by three judges and one dissenting opinion.

and tradition should the Court choose to select as "best practice" in the field? However, the tension between these positions is not necessarily an unhealthy or unproductive one and occasionally gives rise to the type of creative solutions found, for example, in the *Podkolzina v. Latvia* judgment,[104] as well as an instructive dialogue between the judges as to how the Court should exercise its functions in respect of European countries that have faced the challenges of establishing democracy anew following the break-up of the Soviet empire. Its resolution can doubtless be assisted by taking into account the views of bodies such as the Venice Commission when it gives opinions on electoral matters since it is this commission which must surely be regarded in the Council of Europe system as the equivalent, *mutatis mutandis*, of the CPT in the area of electoral disputes.[105]



104. See also the reliance on procedural safeguards in *Georgian Labour Party v. Georgia*, judgment of 8 July 2008, paragraph 141.

105. As was in fact the case in the Court's *Tănase and Chirtoacă* judgment, *supra* note 81. The Venice Commission's Code of Good Practice in Electoral Matters has also been cited in numerous cases: *Hirst v. the United Kingdom (No. 2)* (Fourth Section's judgment), and *Yumak and Sadak v. Turkey – supra* note 47. Also *Georgian Labour Party v. Georgia (II)*, decision of 22 May 2007; *Petkov v. Bulgaria*, decision of 4 December 2007; and *Sukhovetskyy v. Ukraine*, judgment of 28 March 2006.

# Electoral disputes: an issue which falls into the jurisdiction of the constitutional court?

Mr Ian Refalo (Malta)
*Dean of the Faculty of Laws, University of Malta*

The issue of constitutional jurisdiction in the electoral process ties in with the evolving concepts in the ambit of the modern democratic state of the functions of the courts both in relation to the constitutional life and processes of the state, and in relation to the possibility of review being exercised with respect to government and administrative matters. It ties in, in particular, with the concept of an ensemble of fundamental rights pertaining to the individual which the state underwrites and guarantees, and it connects directly with the supervisory roles the courts come to exercise in relation to securing these rights to every single individual. It is in the light of these principles that the judicial process relative to elections must be viewed. For it is this principle which to my mind justifies and underpins the whole exercise of jurisdiction in these matters. And I here refer purposely to the judicial process since, depending upon the structure of the courts of a particular state, it may not necessarily be the constitutional court in exercise of a constitutional jurisdiction which will intervene but any ordinary court competent to take cognisance of the matter. For the purpose of justifying the intervention, it is not so essential to make a distinction between the ordinary jurisdiction and the constitutional jurisdiction since, to my mind, the democratic imperative underpins the jurisdiction of all courts involved in the electoral process.



What do I understand by the democratic imperative? The state does not function consequent to an authority which it receives from above; rather, it functions on the basis of an authority it receives from below, from the people that compose it. This is the essence of the exercise of sovereignty in the democratic state. The sovereignty of the state is a result of the will of the people that compose it, and it functions in virtue of that will, in representation and in the interest of that people, and in full respect of the dignity of the individuals that compose it. The democratic imperative therefore implies two things – firstly, representative government, and, secondly, government in accordance with the law and in full respect of the fundamental rights of all individuals. That this democratic imperative seems to be accepted by all modern democratic states needs no elaboration: it is of the very essence of the concept of democratic government. What perhaps may be clarified is the role of the courts in connection with such matters. Independently of the existence or otherwise of a written constitution, but perhaps more so where a written constitution exists, the courts have come to be the guardians to a large extent of the democratic imperative, entrusted with the task of verifying that the fundamental human rights of the individual are not in any manner violated or abridged.

In states with a written constitution, the courts – and the constitutional court in particular – have developed a supervisory role not only in connection with the enforcement of fundamental human rights and with the possible breaches of the same by the executive, but also a supervisory role, which is sometimes exercised with greater (justifiable) hesitation in connection with the legislative. It is in this perspective that the concept of judicial review in relation to the electoral process has to be considered. It is not the place, here, to go into a history of developing constitutional jurisdictions. Suffice it to say that the concept was really born in a system which had indeed a constitution but no constitutional court. I am here referring to the Constitution of the United States, where the old case of *Marbury v. Madison* ushered in the concept of the supremacy of a constitution and the ability of the courts to review the acts of the other organs of government for constitutionality. Indeed it has always been my idea that the concept of limited government, limited by the boundaries laid down for it by its constitution, was in a manner a reflection of the concepts of judicial review developed in common law jurisdictions. Even though in the United Kingdom, where the concept of judicial review had indeed developed, this concept of judicial review was a necessarily limited notion, limited by the idea of the sovereignty of parliament which animates the United Kingdom Constitution. In the British colonies, the position was different as there, there was no sovereign parliament, but necessarily subordinate bodies which allowed the concept of judicial review to extend even to constitutional matters.

To come back, however, to my main subject, after this digression, the democratic process, coupled with the human rights imperative, necessitates that the popular will be freely and fully expressed. In situations of necessarily representative and not direct democracy this can only be done through electoral processes and systems, and it therefore becomes more than ever necessary to safeguard this process in order to ensure that the will of the people is freely and adequately represented through the election of their members of parliament, members of local councils, and the election of other authorities. This is therefore clearly the legal justification for the exercise of a judicial power in connection with the electoral process.



Bede Harris in *A new constitution for Australia* comments on Section 354 of the Commonwealth Electoral Act, which confers jurisdiction on the High Court of Australia in relation to the validity of elections or returns. The High Court may also exercise jurisdiction on disputes relating to the qualification of members of either house of parliament or vacancies in either house. He comments that: "In doing so Parliament waives its privilege in respect of such matters. There is much to be said for the crucial matter of the validity of elections, and of the eligibility of members of Parliament to sit in either House, to be de-politicised by having them fall within the jurisdiction of the courts as a matter of law, rather than it being left to Parliament whether the courts will hear such matters." He argues that jurisdiction in relation to electoral matters should be in the constitution as part of the High Court's original jurisdiction.

In this perspective the constitutional jurisdiction forces the dispute in relation to elections to be discussed on purely legal terms and therefore removes it from the arena of partisan politics and puts it squarely in the perspective of the protection of people's rights as a matter of law. This is what to my mind underlies the exercise of a jurisdiction in relation to electoral processes. It is ultimately the task of the courts,

and in that respect principally the constitutional court, to see that the electoral process takes place in accordance with the law and this in order to ensure the full and free exercise of the right to vote by the people.

It is also pertinent to point out that the electoral process does not involve the operation of one single fundamental right but an ensemble of fundamental rights which together reflect themselves in the electoral process. There is, of course obviously, the right of each individual to participate in the electoral process. This right is enshrined in Article 3 of the First Protocol to the European Convention. Though this right is today taken for granted it is good not to forget that this has not always been so, and that this is a right which has been won in the course of history. Universal suffrage is today a guaranteed right, and moreover it is normally stipulated that this right is to be exercised by secret and free ballot. Article 3 of the First Protocol to the Convention provides that "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." But in the electoral process other rights may come to the fore or enter into play and these may have to be considered by a court exercising jurisdiction over electoral matters. Not least among these rights are freedom of speech, freedom of opinion, and the right to associate freely. These rights are evidently important in the context of free elections and democracy, and safeguarding these rights becomes a key element in ensuring a free and balanced election which truly expresses the people's will. Besides, in the course of legal contestation and other proceedings, further rights may enter the picture and would have to be taken into account by the adjudicating tribunal, for instance the right to a fair hearing. The electoral process therefore clearly impinges on a number of associated fundamental rights without which the exercise of the right to vote would be inadequate. It is therefore good to keep in mind, when looking at the constitutional jurisdiction and the electoral process, that the reference to the court, or the issue in front of the court, may well arise not only directly as a matter of the right to vote, but in areas such as the above which either impact on the right to vote or condition the electoral process. As these are rights enshrined in the European Convention on Human Rights, the matter may also become an issue before the European Court in Strasbourg, and must therefore also be looked at from the point of view of the local judicial authorities enforcing the Convention obligations within their territories.



At the opposite end of the right to universal suffrage one ought also to consider the right to contest elections. As the Strasbourg Court stated in the case of *Podkolzina v. Latvia*, "the right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1 and is inherent in the concept of a truly democratic regime, would only be illusory if one could be arbitrarily deprived of it at any moment". The Court conceded that states do have a wide margin of appreciation when establishing eligibility conditions in the abstract, but it also drew attention to the principle that rights must be effective and it went on to state that this principle requires the finding. In particular, the Court added that the finding that a particular candidate has failed to satisfy eligibility conditions must be reached by a body which can provide a minimum of guarantees of its impartiality, whose discretion is not to be exorbitantly wide but, rather, one that is circumscribed, with sufficient precision, by the

provisions of domestic law. Lastly, the Court opined that the procedure for declaring a candidate ineligible must be such as to ensure a fair and objective decision and prevent any abuse of power on the part of the relevant authority.[106]

Another case which is relevant in the context of the right to contest elections is *Sukhovetskyy v. Ukraine*.[107] In this case, the applicant complained under Article 3 of Protocol No. 1 and Article 14 of the Convention that it was impossible for him to stand for parliamentary election on account of his inability to raise the money to pay the election deposit. The Ukrainian Law on Parliamentary Elections of 18 October 2001 required all candidates for parliamentary elections to pay an electoral deposit of 60 times the gross monthly income. The Constitutional Court of the Ukraine declared the deposit to be in conformity with the Ukrainian Constitution, and this in order to encourage a responsible attitude on the part of potential candidates as well as to prevent an abuse of electoral rights. The Strasbourg Court also declared that the requirement to pay an electoral deposit did not constitute a violation of Article 3 of Protocol No. 1 of the Convention and it opined that the said fee could not be considered "excessive or such as to constitute an impenetrable administrative or financial barrier for a determined candidate wishing to enter the electoral race, and even less so an obstacle to the emergence of sufficiently representative political currents or an interference with the principle of pluralism". This line of Strasbourg jurisprudence therefore indicates that the right to contest elections may not be an unlimited one, although those limits cannot be exempt from the power of review.



It is therefore necessary to analyse the different ways the electoral process may become the subject matter of a constitutional or judicial dispute. I say a constitutional or judicial dispute because it is quite clear that, depending on the nature of the contestation as well on the particular provisions of the local or constitutional law, the matter may fall either within the jurisdiction of the ordinary courts or of a constitutional court; this will not only depend on the nature of the dispute at hand but also on the specific provisions of the particular constitution within the framework of which the dispute arises.

In order to attempt an analysis of the different ways in which a dispute relative to the electoral process may become the subject matter of constitutional litigation, it is natural to follow the whole *iter* of the electoral process. The electoral process and the manner of participation in that process is not normally regulated in great detail by the constitution itself, and while constitutions lay down the general guidelines the detailed framework of the system is usually left to be provided for by ordinary legislation. Legislation may also usually provide for a balanced access to the media and for a plurality of other matters pertinent to the running of elections. Disputes may arise as to whether the system is sufficiently representative or fairly reflects the constitutional guidelines laid down and such matters may be pertinent to constitutional review by a court enabled to review legislation.

106. *Podkolzina v. Latvia*, No. 46726/99, paragraph 35, ECHR 2002-II.

107. Application No. 13716/02, decided on 28 March 2006.

An electoral process also necessitates a number of administrative decisions connected with the logistics of holding a general election. In order to exemplify such matters, these would be issues relative to the registration of voters, issues relative to the distribution of constituencies, and issues relative to the whole manner in which the voting is to take place. Although most of these matters may be dealt with administratively, they would normally be regulated by legislation providing the parameters within which the administrative decisions are taken. These matters do not necessarily or always raise constitutional issues. The law may reserve the review of such decisions either to administrative or ordinary courts, and it may not be necessary to resort to a constitutional jurisdiction on such matters. However, whether such matters will raise a constitutional issue or not would also depend on the particular provisions of the local law and the local constitution. Moreover, the issue may also present a question touching upon the fundamental human rights of an individual and in that event the constitutional jurisdiction may well be, in a number of cases, called into play.

There is then also the consideration of the validity of the election itself, and in particular the validity of the election of any single member or official, as well as issues touching upon the qualification of an elected member to a particular office, or the incurring of disqualifications by an elected member or official. This is often a matter to be referred to a constitutional court in its constitutional jurisdiction, though of course there may be systems, where either all matters are referred to the ordinary courts as there would be no constitutional court provided for, or where the particular matter, despite the existence of a constitutional court, would still be reserved to an ordinary court or some other body.



Lastly, there is the duty to see that an election is fair and allows for the proper expression of the popular will. That is, an election is be free from illegal or corrupt practices. The court may have a constitutional jurisdiction to enquire whether the election is thus free from corrupt practices and to take the necessary remedial action if it finds that corrupt practices have so extensively occurred as to substantially affect the electoral result.

The above is not intended to attempt an exhaustive list of the manner in which the electoral process may come to the attention of the ordinary tribunals or of a constitutional court. It is only an attempt to cursorily list the different ways in which the problem may present itself, as this would usually have an effect on whether the constitutional jurisdiction is going to be called into play or otherwise. Whether such jurisdiction is called into play or not will ultimately depend also on the particular provisions of the constitution and laws under which the problem arises as this will have a determining role on the issue of whether the matter is to be decided as a constitutional issue or as a matter of ordinary law.

Besides, as we are seeing, disputes concerning the electoral process often develop into claims that the fundamental human rights of the individuals are in some manner being violated or breached. This may in turn ultimately call into play a further jurisdiction under the Convention for the Protection of Human Rights and Fundamental Freedoms, that is the Strasbourg jurisdiction where local remedies have been exhausted without success. Indeed the European Convention itself, especially where

the Convention has been incorporated into local law, may open another avenue for the review of the electoral process either in front of an ordinary court or in front of a constitutional court; only after the local courts have pronounced themselves on the matter would the dispute spill over to Strasbourg. There is thus a further element to take into account in considering the exercise of the constitutional jurisdiction in relation to the electoral process.

In situations where there is no constitutional court, such as in the United Kingdom, the incorporation of the Convention into United Kingdom legislation by the Human Rights Act of 1998 has introduced a further element of judicial review on the basis of the Convention. Under British Law, the Election Court (a Divisional Court of the Queen's Bench Division) has the power, in respect of the electoral process, to order a re-count, declare corrupt or illegal practices, disqualify a candidate from membership of the House of Commons and declare the runner-up duly elected, or to order a fresh election.[108] It is interesting in this context to refer to the case *The Liberal Party, Mrs R and Mr P v. the United Kingdom* decided by the European Commission in Strasbourg in 1980; it was claimed that the British electoral system engendered a situation which violated both Article 3 of the First Protocol and Article 14 of the Convention as the electoral system produced a situation where the Liberal Party was under-represented in parliament when one took into account the number of votes obtained by the party. The Commission found that neither article was breached as there was no obligation under Article 3 to bind the states as to the electoral system they should use, and that Article 3 does not add any requirement of "equality" to the "secret ballot". But evidently in the United Kingdom the Convention rights may be used as a basis for bringing ordinary litigation under review in the British courts in relation to the electoral process.



In systems operating a constitutional court, a number of issues may be reserved for the constitutional court to decide. The French Constitutional Council "shall monitor the validity of the election of the President of the Republic".[109] It also "investigates complaints and declares the result of the ballot". In cases of dispute the Constitutional Council rules on the validity of the election of deputies and senators.[110] It also monitors the validity of referenda and declares results.[111] It is clear therefore that the council exercises a constitutional jurisdiction with reference to disputed elections. In *Pierre-Bloch v. France* the exercise of this constitutional jurisdiction by the council led to the unsuccessful attempt by Pierre-Bloch to have the exercise of such jurisdiction declared to be in violation of his fundamental rights as protected by the European Convention.[112] Mr Pierre-Bloch failed as the Court held that the rights in question did not qualify as civil rights for the purposes of Article 6 of the Convention. But of course there have been a number of applications to Strasbourg from several jurisdictions following the exercise of constitutional review in connection with disputed elections.

108. Hilaire Barnett, *Constitutional & administrative law*, 4th edition, p. 440.

109. Article 58 of the French Constitution.

110. Article 59 of the French Constitution.

111. Article 60 of the French Constitution.

112. Judgement of the Strasbourg Court of 21 October 1997.

Another case where a country which has a constitution was sued before the Strasbourg Court relates to the Ukraine. In *Kovach v. Ukraine*,[113] the applicant claimed that while he had received more votes than his rival candidate, he had been denied a seat in parliament owing to the unfair counting procedure and the unfettered discretion of the constituency electoral commission. The European Court of Human Rights found that there had been a violation of Article 3 of Protocol No. 1 in that the local authority's decision to annul the vote in four electoral divisions was arbitrary and not proportionate to any legitimate aim on the government's part. In particular, the Court noted that the irregularities in the process had not been so extensive as to make it impossible to ascertain the wishes of the voters without annulling the entire vote. As we will see later on, a similar approach is to be observed in English case law regarding the challenging of election results where the courts are reluctant to upset these results if the breach complained of is not such as to affect the final outcome of the result itself. The case of *Kovack v. Ukraine* is also interesting insofar as the Strasbourg Court scrutinised the review of the outcome of the electoral process made by the Ukrainian authorities, including the Supreme Court. In this respect, it reflects the rather wide powers of review which the international Court has the power of exercising over the pronouncements of the domestic courts.

In reality, in democratic systems, elections seem a fertile ground for the calling into play of a constitutional jurisdiction. This stems from the need that there must necessarily be an overseeing of electoral processes to ensure that the will of the people is freely and honestly reflected in the vote. As was stated by the European Court in *United Communist Party of Turkey v. Turkey*, where the Turkish Constitutional Court had made an order dissolving the Turkish Communist Party on the ground that its programme contained statements to undermine the integrity of the state and the unity of the nation. Democracy is without doubt a fundamental freedom of the European public order. That is apparent from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured, on the one hand, by an effective political democracy and, on the other, by a common understanding and observance of human rights. This emphasises the prime importance of Article 3 of Protocol No. 1 which enshrines an effective principle of an effective political democracy.[114]



It is this principle of the need to safeguard and guard a functioning democracy that underlies the basis for the exercise of a constitutional jurisdiction in electoral matters and that would presumably guide the Court in the exercise of such a jurisdiction. It is the belief that such matters are better discussed and solved as legal issues distanced from the heat and passions generated by partisan politics.

It is also to be pointed out that not all systems will entrust such matters to a constitutional review. In various systems, a number of issues would fall within the parameters of judicial review and be left for decision by the ordinary courts while other issues will be reserved for a constitutional jurisdiction. This much depends on the

113. Application No. 39424/02.

114. Cited in David Hoffman and John Rowe, *Human rights in the UK*, at p. 311.

particular system operating within a particular constitution. In situations where there is no constitutional court, it would be natural for such issues as are thrown up by the electoral process to be decided by the judicial organ in its ordinary jurisdiction. A case in point would be the United Kingdom situation where no constitutional court exists. In a number of situations, the constitutional review may not be largely different from that exercised by the ordinary courts of the state. A case in point would be that of Malta, where the composition of the Constitutional Court is largely identical to that of the Court of Appeal, and there is little to distinguish the exercise of constitutional review from judicial review except in the name of the court, and except of course that the court in such cases would be exercising a constitutional jurisdiction which would not normally or otherwise be exercised by the Court of Appeal. To refer to the Maltese situation, the constitution specifically refers a number of electoral disputes to the jurisdiction of the Constitutional Court. It also reserves to the Constitutional Court appeals touching matters involving the breach of human rights as protected either under the constitution itself or under the Convention for the Protection of Human Rights and Fundamental Freedoms. In electoral matters the jurisdiction specifically reserved to the Constitutional Court comprises:

> Any question whether:
>
> (*a*) any person has been validly elected as a member of the House of Representatives;
>
> (*b*) any member of the House has vacated his seat therein or is required, under the provisions of sub-Article (2) of Article 55 of this Constitution, to cease to perform his functions as a member; or



> (*c*) any person has been validly elected as Speaker from among persons who are not members of the House or, having been so elected, has vacated the office of Speaker,
>
> [which] shall be referred to and determined by the Constitutional Court in accordance with the provisions of any law for the time being in force in Malta.[115]

as well as:

> any reference made to it in accordance with Article 56 of this Constitution and any matter referred to it in accordance with any law relating to the election of members of the House of Representatives.[116]

Under the Maltese system, the conduct and overseeing of elections are entrusted to an Electoral Commission constituted under the constitution. Among its powers the commission has the power to suspend an election if it feels that corrupt or illegal practices have so prevailed as to substantially affect the electoral result. Should the commission decide to so suspend an election, then it is under a duty under the constitution to refer the matter to the Constitutional Court for a final decision on the matter. If, on the other hand, corrupt and illegal practices occur and the commission does nothing about them, it is open to any voter to bring an application before the Constitutional Court not later than three days from the publication of the electoral result alleging that corrupt and illegal practices have so prevailed as to substantially affect the electoral result. In such circumstances the Constitutional Court has a very

115. Section 63 of the Constitution of Malta.

116. Section 95(2)(b) of the Constitution of Malta.

wide remit and jurisdiction and may make any such orders or give any such directions as it may consider appropriate or desirable to ensure that an election is free from corrupt and illegal practices, including among such orders the annulling of an election and an order that a further election be held.

Before turning to an examination of Maltese case law regarding the jurisdiction of the Constitutional Court over electoral matters, I would like to take a glance at UK jurisprudence as even though no constitutional jurisdiction is here called into play, the decisions are still instructive. In the UK, the position established by the case of *Morgan and Others v. Simpson* is that for an election not to be free and fair "the objection must be something substantial. Something calculated really to affect the result of the election".[117] In that judgment, Lord Denning had stated the law succinctly in three propositions:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the *Hackney* case, 2 O'M. & H. 77, where two out of 19 polling stations were closed all day and 5 000 voters were unable to vote.

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. That is shown by the *Islington* case, 17 T.L.R. 210, where 14 ballot papers were issued after 8 p.m.

3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated. That is shown by *Gunn v. Sharpe* [1974] Q.B. 808, where the mistake in not stamping 102 ballot papers did affect the result.



It is interesting to note that where English courts have maintained that as much as possible they will not disturb an election, and this even where official duties and election rules may have been breached, provided that such breaches will not have affected the result of the election itself, the English courts have always done so with a view to preserving as much as possible the will of the voters. This position is harvested from a perusal of such cases as *Woodward v. Sarsons*,[118] *Islington*,[119] *Marshall v. Gibson*[120] and *Harris v. Gilmour*.[121] A recent English case in this line of decisions is that of *John Fitch v. Tom Stephenson, Harshad Dahyabhai Bhavsar, Annette Dawn Byrne and Colin Stuart Marriott*, decided by the Queen's Bench Division on 1 April of this year. Mr Fitch, the petitioner in this case, had been defeated in the May 2007 local government elections for the 22 wards of Leicester City Council and brought an action under Section 127 of the Representation of the

117. *Morgan and Others v. Simpson*, [1974] 3 A11E.R.722.

118. (1875) LR 10 CP 733.

119. 5 O'M & H 120.

120. Divisional Court, judgment of 14 December 1995.

121. Divisional Court, judgment of 11 December 2000.

People Act 1983, alleging that the fact that a proportion of the votes cast were not counted constituted an irregularity in the conduct of the election such that it could not be said that the election had been conducted substantially in accordance with the law as to elections and contrary to Section 48(1) of the Representation of the People Act. Mr Fitch submitted that an election should be declared invalid if it appears that it was not so conducted as to be substantially in accordance with the law as to elections, irrespective of whether any failure affected the result. In their turn, the respondents claimed that the breaches complained of were not sufficient to invalidate the election process since the same candidates would have been elected even had all the votes been counted. The court found that Mr Fitch had not shown that the election in question had not been "so conducted as to be substantially in accordance with the law as to elections" and it therefore rejected his petition and declared the election confirmed. In particular, the court reiterated that the courts should "give effect to the will of the electorate and to preserve the election". What is also interesting from a constitutional law point of view is the remark which the court made when it substantiated its reasons for the rejection of the petition. The court remarked, "In the present case we do not consider that the informed member of the public would regard what happened as a travesty." This indicates that the court also has in mind the confidence of the electorate as a benchmark for assessing whether or not to upset the electoral process.

English pronouncements regarding the courts' reluctance to disturb the result of an election may be compared with Maltese Constitutional Court pronouncements to the effect that the procedure for contesting the electoral process is one of public order which must be strictly observed. In 1998 two cases arose before the Maltese Constitutional Court following the general elections held that same year. The first of these, *Nazzareno sive Reno Calleja v. Electoral Commission*, decided on 20 October 1998, was a case opened by a candidate who during the counting of the votes had requested the Electoral Commission to order a recount of the penultimate count, where he had been outvoted. The Electoral Commission had declined this request and the candidate filed his application before the Constitutional Court. The Constitutional Court, however, refused his application owing to the fact that the plaintiff had not requested the recount in the period of time established by law. The Constitutional Court reasoned that the procedure for impugning the electoral process was one of public order which therefore had to be followed, and it also highlighted that it was important that the time limit for challenging the process was there in order to ensure the legal certainty of the entire process. A similar situation cropped up in *Ansell Farrugia Migneco v. Electoral Commission*,[122] where the plaintiff submitted that the Electoral Commission had given a wrong interpretation of the electoral rules. Whilst rebutting the merits, the defendant also submitted that the First Hall of the Civil Court (in its constitutional jurisdiction) lacked jurisdiction since the plaintiff had not observed the established procedure. Whilst this procedural plea was rejected by the first court, which then found for the defendant regarding the merits, the plea as to lack of jurisdiction was accepted upon an appeal to the Constitutional Court. The Constitutional Court reiterated that the procedure for attacking electoral



122. Decided on 22 September 1998.

processes was one of public order and was necessary to ensure legal certainty; since the plaintiff had not scrupulously followed the established procedure, the Constitutional Court could not entertain his claim.

The point of interest when the aforementioned British judgments are compared with the Maltese judgments relates to the reasons which motivate the decisions in both cases. Whereas UK courts are reluctant to upset the electoral result even if the applicant adduces proof of breaches of the established electoral process, provided the breach in question does not affect the outcome of the result, and this in deference to the will of the electorate, the Maltese Constitutional Court has, on both occasions when the electoral process was challenged, refused to entertain the application and this on grounds of public order and legal certainty. The implied common ground between the Maltese and the UK position seems to be that the court gives prevalence to the electorate's interests in exercising its jurisdiction as a reviewing court. In the United Kingdom the interests of the electorate to have their choice respected are regarded as a cardinal principle and elections are therefore not to be invalidated so long as it can be ascertained that that choice remains legitimate, even in the presence of a certain amount of tampering. In Malta the interests of the electorate are interpreted as an interest for certain (that is, definite) knowledge, in the sense that the result of an election cannot be held suspended for too long a time, as otherwise the confidence of the people in their own vote will be undermined. This prompts the Maltese Constitutional Court to place the emphasis on the procedural aspect. Thus, while the Maltese approach may be criticised for refusing to scrutinise potential fundamental human rights and constitutional law breaches merely on procedural grounds, albeit legally established ones, the court's approach is to interpret the procedure itself as safeguarding the collective interests of the electorate. In a way, therefore, in their constitutional jurisdiction to review the electoral process, what the UK courts achieve substantively in terms of protection of the interests of the electorate, the Maltese courts achieve procedurally.



An interesting issue arose in front of the United States courts in the presidential elections of 2000 in connection with the counting of votes. Unfortunately in the process of the election of a United States President it may well happen that the person who obtains fewer votes gets elected. When the decision of the result becomes dependent on judicial decisions, situations may easily arise which will cause confusion or undermine the confidence of the public in the electoral process.

The importance, in a democracy, of a transparent and fair electoral process for both individual and collective rights to be respected immediately takes on real shape if one but thinks of electoral crises. The guiding principle in the exercise of a constitutional jurisdiction is that the function of the court is ultimately to ensure the prevalence of the will of the electorate. If this were not so, public confidence in the election process would be heavily compromised. It is important that the public perception remains throughout that it is the decision of the electorate that has prevailed.

# Conclusions

Mr Ugo Mifsud Bonnici (Malta)
*President Emeritus, Vice-President of the Council for Democratic Elections*
*Member of the Venice Commission*

1. The participants in the UniDem Seminar on the Cancellation of Election Results, held in Malta on 14 and 15 November 2008, examined one of the essential conjunctions of democracy and the rule of law. The exercise of popular sovereignty through the vote, in elections or referendums, is considered a fundamental feature of democracy (in the welcoming speech by the Minister of Justice of Malta, "the cornerstone of democracy"); but even this primary expression of the people's will is subject to law (in the Maltese Chief Justice's welcoming address it is seen as an elementary condition for civilised communities), and derives therefore its "legitimacy", in both of its senses, from conformity to law. Mr Pierre Garrone, opening the proceedings on behalf of the Venice Commission, reminded the participants that all laws needed to be fortified by sanction, for without it, a law could be a *lex imperfecta*. Cancellation of election results was the ultimate sanction.



2. The paradigm words "liberty" and "equality" were used by Professor Slobodan Milacic, of the Montesquieu University of Bordeaux, to get to the roots of the justification of this conjunction. Law is the guarantor of liberty, the equal franchise is the classical exercise of equality. Law safeguards rights, politics provide the mechanics for legislation and implementation. Moderation of the whole political process can only be made properly through law and its operation. Though courts may be reticent in entering this field, and the Conseil d'Etat, in France, too timid, their role is by no means irrelevant or dispensable. Jean-Claude Colliard, President of the Fondation Santé des Etudiants de France and member of the Venice Commission, made the point that even the validity of the election which produced the legislative organ has to be decided upon by the courts, if contested. Earlier some legislatures contended that they could not only confirm the credentials of individual members but also "auto-legitimise" themselves. The best way is for independent electoral commissions to conduct elections and referenda, and let disputes that might arise be adjudicated upon by the courts.

3. Professor Ian Refalo of the University of Malta argued the case for certain electoral disputes to be referred to the special competence of constitutional courts where these exist, whilst leaving the ordinary courts with the primary general jurisdiction. He compared the position in the case law of the United Kingdom and that of Malta, observing the reluctance to interfere with the result, in both countries. Furthermore, he looked at the new overall role of the European Court

of Human Rights. Mr Michael O'Boyle, Deputy Registrar of that Court, reviewed the principal cases decided by that Court and the general trends in its case law. He remarked that whilst the Court had gone a long way to extend the interpretation of Article 3 of Protocol No. 1 to the European Convention on Human Rights, to include within the meaning of "legislature" all bodies with a rule-making competence, it would be impossible to see the protection covering also the right to vote for presidential elections or in a referendum. He also expressed the opinion that present thinking in the Court did not show that it would be willing, given the text of the Convention and its protocols, to go deeper into the question of the breach of equality in the weighting of the votes through distortions in the electoral systems legislated by the states, though blatant gerrymandering would not be countenanced and would be sanctioned as fraudulent. He also referred to the way that the opinions given by the Venice Commission concerning electoral matters have helped the Court to assess what is the best and standard practice in this field. Mr André Kvakkestad, from Norway and former member of the Parliamentary Assembly of the Council of Europe, spoke on the great service rendered by election observation missions to keep in check abuses and breaches of good practice in the conduct of elections. Cases[123] were quoted which highlighted the difference that organised opposition in a given country can make in the gathering of evidence of these abuses, and in the way that these can be used in internal and international fora. Mr Kvakkestad stated that observation missions, though, of course, obliged to exercise discretion in disclosing sources of information, are not bound by confidentiality with regard to what their members have observed directly. Mr Oliver Kask, Judge of the Court of Appeal of Estonia and member of the Venice Commission, pinpointed some distinctions to be made: regulation by a country's constitution *vice* regulation by electoral laws; compulsory sanction of cancellation as against discretionary power of cancellation; the ascertainment of the violation and its impact on the result; the acts directly traceable to a candidate and those committed without his or her knowledge or connivance; and violations in one particular constituency and those more widely spread.



4. Participants were asked to react to the presentations by making comments and referring to occasions, in their own countries, when some matter concerning elections was brought before the courts.

   Bulgaria, Bosnia and Herzegovina, Croatia, the Czech Republic, France, Germany, Greece, Latvia, Malta, Poland, Serbia, Sweden, "the former Yugoslav Republic of Macedonia" and the United Kingdom all produced examples of electoral disputes, together with different solutions. Arguments were made with regard to the difficulties attached to the various electoral systems employed. It was noted that whilst simple majority systems can produce unfair results, they were accepted because this was known and taken into account beforehand. On the other hand, even the most proportional of systems, such as that of Germany, could produce difficulties in the formation of stable governments.

123. Georgia, Ukraine, Kazakhstan, Azerbaijan, Moldova, and the question of the barren wastes of northern Norway and their disproportionate, but in some way justified, electoral representation.

5. In summing up, I have reviewed what has been said by the participants in their interventions.

**In conclusion**

a. It seemed that all our countries could make efforts to further fine-tune their electoral systems. It was evident that when the constitution provided for certain clear indications concerning the running of elections and referenda, and when the electoral laws were specific and precise in the requirements and obligations, less contestations would arise after the result. More legal guidelines or criteria should be specified as to when a violation could be of such import as to be considered determining the result, and when criminal acts or "corrupt practices" are found to be so widespread as to invalidate the result of a whole countrywide election. The matter of possible alternative sanctions should also be provided for in the legislation. It was also pointed out that in matters of eligibility for voting or standing for elections, stricter rulers as to when and with what knowledge and evidence it could be raised should be specified in electoral laws. Questions such as who has the right to contest the validity of an election and within which time limits should be further examined and defined. The more provident the laws with regard to the ambit of discretion given to the electoral commissions and to the courts, the easier it would be for these bodies to moderate impartially.

b. It seemed that some further objective and scientific research into the workings of electoral systems is now warranted. It was surely not merely a matter of the mathematics involved – though, no doubt, numbers are of the essence of democracy and equal weighting of the vote of every single citizen is expected by people in all European countries. Perhaps better methods could be devised to ensure that "free and fair elections" be held in such a way that equality is attained, without jeopardising the possibility of the formation of proper governing majorities. It was emphasised that the European Convention, together with its protocols, does not adequately cover the right to vote in presidential elections and referenda, and that should there exist a strong political will, some further amendment to strengthen the requirement of substantial equality in the weighting of votes could also be agreed to among the member states of the Council of Europe. It would seem that a consensus could be arrived at, after a fuller and more detailed examination of the possible electoral systems, about the best ways of achieving this *desideratum*.

c. The European Convention on Human Rights, which authorises the European Court of Human Rights to interfere, should be revisited. It was emphasised that Article 3 of the protocol of 1952 does not adequately cover the right to vote in referenda, and elections to bodies or public offices which cannot be said to legislate, and does not fully safeguard the supreme value of the substantial equality of voting rights and weighting of votes. Given a strong political will, it should not be impossible to have the member states agree on an amendment to cover both deficiencies.

## Venice Commission's Science and technique of democracy Collection[1]

No. 1 Meeting with the presidents of constitutional courts and other equivalent bodies (1993) [Or]

No. 2 Models of constitutional jurisdiction (1993) [E-F-R]
by Helmut Steinberger

No. 3 Constitution making as an instrument of democratic transition (1993) [E-F]

No. 4 Transition to a new model of economy and its constitutional reflections (1993) [E-F]

No. 5 The relationship between international and domestic law (1993) [E-F]

No. 6 The relationship between international and domestic law (1993) [E-F-R]
by Constantin Economides

No. 7 Rule of law and transition to a market economy (1994) [E-F]

No. 8 Constitutional aspects of the transition to a market economy (1994) [E-F]

No. 9 The protection of minorities (1994) [Or]

No. 10 The role of the constitutional court in the consolidation of the rule of law (1994) [E-F]

No. 11 The modern concept of confederation (1995) [E-F]

No. 12 Emergency powers (1995) [E-F-R]
by Ergun Özbudun and Mehmet Turhan

No. 13 Implementation of constitutional provisions regarding mass media in a pluralist democracy (1995) [E-F]

No. 14 Constitutional justice and democracy by referendum (1996) [E-F]

No. 15 The protection of fundamental rights by the constitutional court (1996) [E-F-R]

No. 16 Local self-government, territorial integrity and protection of minorities (1997) [E-F]

No. 17 Human rights and the functioning of the democratic institutions in emergency situations (1997) [E-F]

No. 18 The constitutional heritage of Europe (1997) [E-F]

No. 19 Federal and regional states (1997) [E-F]

No. 20 The composition of constitutional courts (1997) [E-F]

No. 21 Nationality and state succession (1998) [E-F]

No. 22 The transformation of the nation-state in Europe at the dawn of the twenty-first century (1998) [E-F]



1. Letters in square brackets indicate that the publication is available in the following language(s): E = English; F = French; R = Russian; Or = contains speeches in their original language (English or French).

No. 23 Consequences of state succession for nationality (1998) [E-F]

No. 24 Law and foreign policy (1998) [E-F]

No. 25 New trends in electoral law in a pan-European context (1999) [E-F]

No. 26 The principle of respect for human dignity (1999) [E-F]

No. 27 Federal and regional states in the perspective of European integration (1999) [E-F]

No. 28 The right to a fair trial (2000) [E-F]

No. 29 Societies in conflict: the contribution of law and democracy to conflict resolution (2000) [Or]

No. 30 European integration and constitutional law (2001) [E-F]

No. 31 Constitutional implications of accession to the European Union (2002) [Or]

No. 32 The protection of national minorities by their kin-state (2002) [Or]

No. 33 Democracy, rule of law and foreign policy (2003) [Or]

No. 34 Code of Good Practice in Electoral Matters (2003) [E-F-R]

No. 35 The resolution of conflicts between the central state and entities with legislative power by the constitutional court (2003) [Or]



No. 36 Constitutional courts and European integration (2004) [E]

No. 37 European and US constitutionalism (2005) [E]

No. 38 State consolidation and national identity (2005) [E]

No. 39 European standards of electoral law in contemporary constitutionalism (2005) [E-F]

No. 40 Evaluation of fifteen years of constitutional practice in central and eastern Europe (2005) [E]

No. 41 Organisation of elections by an impartial body (2006) [E]

No. 42 The status of international treaties on human rights (2006) [E]

No. 43 The preconditions for a democratic election (2006) [E]

No. 44 Can excessive length of proceedings be remedied? (2007) [E]

No. 45 The participation of minorities in public life (2008) [E]

No. 46 The cancellation of election results (2010) [E]

No. 47 Blasphemy, insult and hatred (2010) [E]

No. 48 Supervising electoral processes (2010) [E]

No. 49 Definition and development of human rights and popular (forthcoming) [E]

# Sales agents for publications of the Council of Europe
# Agents de vente des publications du Conseil de l'Europe

**ELGIQUE**
uropéenne -
n Bookshop
ne, 1
UXELLES
2 231 04 35
2 735 08 60
@libeurop.be
libeurop.be

noy/DL Services
Koi 202 Koningslaan
UXELLES
2 538 43 08
2 538 08 41
de.lannoy@dl-servi.com
jean-de-lannoy.be

**O HERZEGOVINA/**
**RZÉGOVINE**
s d.o.o.
liça 2/V
ARAJEVO
3 640 818
3 640 818
tsplus@bih.net.ba

shing Co. Ltd.
otek Road
A, Ontario K1J 9J3
745 2665
745 7660
: (866) 767-6766
.dept@renoufbooks.com
renoufbooks.com

**ROATIE**
s d.o.o.
a 67
PLIT
1 315 800, 801, 802, 803
1 315 804
tsplus@robertsplus.hr

**UBLIC/**
**E TCHÈQUE**
s.r.o.
47
RAHA 9
424 59 204
848 21 646
rt@suweco.cz
suweco.cz

**DANEMARK**

et 32
OBENHAVN K
66 60 00
66 60 01
@gad.dk
gad.dk

**NLANDE**
a Kirjakauppa

LSINKI
)9 121 4430
)9 121 4242
aus@akateeminen.com
akateeminen.com

**FRANCE**
La Documentation française
(diffusion/distribution France entière)
124, rue Henri Barbusse
FR-93308 AUBERVILLIERS CEDEX
Tél.: +33 (0)1 40 15 70 00
Fax: +33 (0)1 40 15 68 00
E-mail: commande@ladocumentationfrancaise.fr
http://www.ladocumentationfrancaise.fr

Librairie Kléber
1 rue des Francs Bourgeois
FR-67000 STRASBOURG
Tel.: +33 (0)3 88 15 78 88
Fax: +33 (0)3 88 15 78 80
E-mail: librairie-kleber@coe.int
http://www.librairie-kleber.com

**GERMANY/ALLEMAGNE**
**AUSTRIA/AUTRICHE**
UNO Verlag GmbH
August-Bebel-Allee 6
DE-53175 BONN
Tel.: +49 (0)228 94 90 20
Fax: +49 (0)228 94 90 222
E-mail: bestellung@uno-verlag.de
http://www.uno-verlag.de

**GREECE/GRÈCE**
Librairie Kauffmann s.a.
Stadiou 28
GR-105 64 ATHINAI
Tel.: +30 210 32 55 321
Fax.: +30 210 32 30 320
E-mail: ord@otenet.gr
http://www.kauffmann.gr

**HUNGARY/HONGRIE**
Euro Info Service
Pannónia u. 58.
PF. 1039
HU-1136 BUDAPEST
Tel.: +36 1 329 2170
Fax: +36 1 349 2053
E-mail: euroinfo@euroinfo.hu
http://www.euroinfo.hu

**ITALY/ITALIE**
Licosa SpA
Via Duca di Calabria, 1/1
IT-50125 FIRENZE
Tel.: +39 0556 483215
Fax: +39 0556 41257
E-mail: licosa@licosa.com
http://www.licosa.com

**MEXICO/MEXIQUE**
Mundi-Prensa México, S.A. De C.V.
Río Pánuco, 141 Delegacíon Cuauhtémoc
MX-06500 MÉXICO, D.F.
Tel.: +52 (01)55 55 33 56 58
Fax: +52 (01)55 55 14 67 99
E-mail: mundiprensa@mundiprensa.com.mx
http://www.mundiprensa.com.mx

**NETHERLANDS/PAYS-BAS**
Roodveldt Import BV
Nieuwe Hemweg 50
NE-1013 CX AMSTERDAM
Tel.: + 31 20 622 8035
Fax.: + 31 20 625 5493
Website: www.publidis.org
Email: orders@publidis.org

**NORWAY/NORVÈGE**
Akademika
Postboks 84 Blindern
NO-0314 OSLO
Tel.: +47 2 218 8100
Fax: +47 2 218 8103
E-mail: support@akademika.no
http://www.akademika.no

**POLAND/POLOGNE**
Ars Polona JSC
25 Obroncow Street
PL-03-933 WARSZAWA
Tel.: +48 (0)22 509 86 00
Fax: +48 (0)22 509 86 10
E-mail: arspolona@arspolona.com.pl
http://www.arspolona.com.pl

**PORTUGAL**
Livraria Portugal
(Dias & Andrade, Lda.)
Rua do Carmo, 70
PT-1200-094 LISBOA
Tel.: +351 21 347 42 82 / 85
Fax: +351 21 347 02 64
E-mail: info@livrariaportugal.pt
http://www.livrariaportugal.pt

**RUSSIAN FEDERATION/**
**FÉDÉRATION DE RUSSIE**
Ves Mir
17b, Butlerova ul.
RU-101000 MOSCOW
Tel.: +7 495 739 0971
Fax: +7 495 739 0971
E-mail: orders@vesmirbooks.ru
http://www.vesmirbooks.ru

**SPAIN/ESPAGNE**
Mundi-Prensa Libros, s.a.
Castelló, 37
ES-28001 MADRID
Tel.: +34 914 36 37 00
Fax: +34 915 75 39 98
E-mail: libreria@mundiprensa.es
http://www.mundiprensa.com

**SWITZERLAND/SUISSE**
Planetis Sàrl
16 chemin des Pins
CH-1273 ARZIER
Tel.: +41 22 366 51 77
Fax: +41 22 366 51 78
E-mail: info@planetis.ch

**UNITED KINGDOM/ROYAUME-UNI**
The Stationery Office Ltd
PO Box 29
GB-NORWICH NR3 1GN
Tel.: +44 (0)870 600 5522
Fax: +44 (0)870 600 5533
E-mail: book.enquiries@tso.co.uk
http://www.tsoshop.co.uk

**UNITED STATES and CANADA/**
**ÉTATS-UNIS et CANADA**
Manhattan Publishing Co
2036 Albany Post Road
USA-10520 CROTON ON HUDSON, NY
Tel.: +1 914 271 5194
Fax: +1 914 271 5886
E-mail: coe@manhattanpublishing.coe
http://www.manhattanpublishing.com

**Council of Europe Publishing/Editions du Conseil de l'Europe**
FR-67075 STRASBOURG Cedex
el.: +33 (0)3 88 41 25 81 – Fax: +33 (0)3 88 41 39 10 – E-mail: publishing@coe.int – Website: http://book.coe.int