

# Supervising electoral processes

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## I. The specificity of the electoral process

The electoral process shares a number of features in common with other processes carried out in the public sphere. Thus, in common with others, it consists of a series of sequenced acts aimed at delivering a particular outcome. However, despite being similar in this respect, it possesses important individual characteristics which differentiate it from others, for example administrative or judicial processes.

Most evident, first of all, is its complexity. This is a result of several factors and gives rise to a variety of issues. One such complexity is the large number of participants involved in the electoral process and the fact that they take part from different standpoints. Hence, they participate, for example, as voters, candidates or as members of the electoral administration, including those serving on the boards where the voting is verified. It is also a process of a unique nature due to both its territorial dimension (at times encompassing the entire country) and the extended period of time that it takes. This can be seen in the fact that the process runs from the moment the election day is officially announced, to the moment in which the votes are converted into official seats and those elected are given the corresponding credentials. Finally, it is a process comprised of acts of such a varied nature as the official proclamation of the commencement of the election, the speeches of the candidates and the vote counting process.

However, most importantly, the electoral process is defined by the end purpose it seeks to achieve, consisting, in essence, of ensuring a rotation in political power. The fact that elections form the basis of the entire democratic framework must also be emphasised. As a result of this factor, any defect in the manner in which elections are conducted potentially has more severe consequences than the effect a defect may have on other types of process. It could therefore be claimed that the flaws which exist in the electoral process, if not duly remedied, may go so far as to cast doubt upon the very foundations on which the system is built.

Due to such factors, almost all legal systems stress the need for election monitoring. This has increasingly been a cause for concern and the need for such monitoring has been seen when, following the implementation of universal suffrage, the electoral process has ceased to be in the hands of one social class which had been monopolising representation in parliament. The necessity for

electoral control actually increases in the periods of transition to democratic systems. This is viewed symbolically as a way of breaking with previous authoritarian structures and of guaranteeing that, in the new stage in question, the will expressed by the citizens at the polls will prevail. This was so in Europe following the Second World War and in Latin America following the establishment of new democratic regimes. This has also been, and continues to be, the case in the democracies of eastern European countries.

## **II. The various approaches to electoral control**

This concern for monitoring the electoral process is common to many legal systems, but different methods of electoral control are employed. In some countries, for example, in accordance with a liberal concept of the division of powers, the monitoring of the validity of the electoral outcome is divested in the parliamentary assemblies themselves. These assemblies then, at times, devolve this duty to bodies of a judicial nature, who may then issue legally binding decisions.

In other countries, monitoring approaches of a legal and external nature have been imposed. However, it is possible to find differing models even within this same category. This is evident, for example, in the different courts which have jurisdiction to rule on electoral law. Thus, in some cases, electoral monitoring comes under the courts' ordinary jurisdiction, whilst, in other cases, courts specialised in electoral matters have been created. It is also possible, in some systems, for the constitutional court to intervene, either exclusively or in the final instance after the ordinary appeal process has been exhausted.

It is obviously not possible, within the context of this paper, to analyse the individual aspects of each of these solutions in-depth. It may be pointed out, however, that the different approaches adopted are a result of the individual characteristics of each system. Such individual characteristics include factors such as whether there exists a binding written constitution, the types of guarantee established for respecting fundamental rights and the manner in which judicial power is organised.

The differences which exist between the monitoring bodies are, however, more far reaching. This can be seen in the types of act which are subject to control, given that, in some legal systems, this includes referendums as well as elections and the formulation of the people's legislative initiative. It must also be noted that those with a legal standing to bring an action against the electoral process or outcome also varies. It is possible, for example, in some systems for political parties to appeal against the electoral register, whilst in others this possibility is limited to voters, solely for the purpose of correcting those details which have a bearing on them personally. The outcomes of the control process also differ, ranging from votes being voided in part of or an entire territory, to the imposition of penalties on those committing infractions.

The differences highlighted are revealed by a fact far from anecdotal: the terms used in the various systems to refer to the same phenomena. Even among the countries where the same language is spoken, some major differences exist when determining matters such as the list of individuals who are entitled to vote, the bodies established for collecting votes and the ballot used for casting votes.

### III. The common principles of electoral law

It is necessary to bear these differences in mind, but it is also important to acknowledge the similarities which exist between the systems. Such similarities are not only a result of the fact that, in many cases, the different legal systems share common legal origins or that standardised solutions have arisen for resolving regularly occurring problems. They are the result of a need for each system to fit within a common framework, that is, the democratic constitutional state. This imposes a number of common requirements on the bodies responsible for electoral monitoring and serves to provide a link between each of the different models.

One such requirement is the principle that all public authorities are subject to the rule of law. In the case of electoral control, this idea requires that the bodies responsible for undertaking the monitoring task are not reduced to being mere referees in the electoral fight among those running for election. It also requires these institutions to be conferred with the necessary authority to ensure that there is no abuse of public power.

As a result of the demands imposed by the democratic constitutional state, the monitoring bodies are also entrusted with guarding the fundamental rights entailed in the electoral process. Hence, they ensure that the two faces of the right to political participation are adhered to. This is achieved by, firstly, guaranteeing the right to active and passive suffrage (first face of the right to political participation). Active suffrage requires that it may be exercised individually, equally, freely and secretly, whilst passive suffrage prevents illegitimate restrictions being imposed on candidates who meet the necessary legal requirements to stand for election.

Secondly, the electoral monitoring bodies control the freedom of expression and association (second face of the right to political participation). This is achieved by ensuring that those taking part in the election are able to freely issue their political manifestos and that the media is able to freely convey the different electoral messages to the voters.

Finally, these institutions guarantee equality among those running for election. This is secured by ensuring that those in public power are prevented from unlawfully using their authority in favour of their own candidacies and by making sure that the legal requirements regarding election funding are met.

The bodies responsible for controlling the fairness of the election process are, therefore, safeguarding the fundamental democratic principle by ensuring that its essential rule is abided by. This rule requires that the will of the majority prevails but that due respect is given to the rights of the minority. To this end, the monitoring bodies have a responsibility to ensure that the vote counting and official seat apportionment processes are carried out as set forth under the legal system.

#### IV. Some objectives

There are obviously many more common principles of electoral law which may be deduced from the democratic idea. A large number of these are contained in the Code of Good Practice on electoral law, adopted by the Venice Commission in 2002, which lists many of these principles in detail. This code includes, just to mention one example, the recommendation of endowing the electoral system with a certain degree of rigidity and stability. It also suggests that any change in legal regime which may have a bearing on the election process should not be enforced immediately. This suggestion is intended to ensure that any such changes do not impact on the possible re-election of the parliamentary majority which has passed them.

The Code of Good Practice considers these requirements and principles to be a common legacy, part of the European electoral heritage. In fact, they serve to build a common electoral law which, despite the differences mentioned above, is applicable in all countries which share a democratic nature.

This seminar is directly related to this aim of setting out a list of general rules and principles. Thus, we shall be forging ahead with building a law which is common to all by integrating new experiences and points of view. Those attending this seminar are not only expert researchers in electoral law, but many are also members of electoral control bodies and therefore may contribute positively by sharing the criteria they have employed when solving specific problems.

It must be acknowledged that this common electoral law cannot be composed of principles solely deductive in nature, in the manner of those constructed by the 19th-century German theory of the state. On the contrary, it must be built by inductions, based on decisions made by the electoral control bodies when they are confronted with specific conflicts. In this way, it should be possible to construct legal maxims or "topics" which can serve not only to bring the different legislations closer together, but which also provide guideline criteria for providing solutions to difficult cases.

One example of this is the role which must continue to be attributed to the old Roman aphorism by which *utile per inutile non vitiatur* when deciding upon the repercussions electoral defects may have on the process as a whole, or the weight placed on the principle *in favorem libertatis*, widespread in contemporary constitutional jurisprudence. Although both principles are solidly based on



legal doctrine and jurisprudence, it is necessary to continue reviewing how they relate to other electoral rules and principles with which they may enter into conflict.

In order to identify where the problems and the solutions lie, we have also decided to broaden the object of analysis and the scope of study. This has been achieved by, firstly, taking into account other electoral control related matters, such as the specialised monitoring of the electoral campaigns and the role played by supranational institutions for guaranteeing the quality of the electoral process. Secondly, we have acknowledged that many of the rules, principles and maxims of our “common electoral heritage” are the practice not only in Europe but also in the systems on the other side of the Atlantic, where jurisdictions specialised in electoral control have been created.

Thus, with the valuable collaboration of the Venice Commission, which is to be especially welcomed, the Centre for Political and Constitutional Studies aims to carry out one of the tasks assigned to us at our founding, that is, to serve as a link between Europe and the Americas.



# Electoral disputes – Procedural aspects

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Srdjan Darmanovic

Electoral disputes emerge where and when one or more electoral actors deny validation of the election process, or question election results or their consequences. These consequences can be distribution of the parliamentary seats, or a candidate's right to be elected as a member of parliament, for example. Electoral disputes take procedural form where and when authorised state bodies accept challenges to the electoral process and start making decisions about them.

State bodies authorised to decide on electoral disputes differ from country to country. There are, however, no main differences in the legislation of European countries when it comes to who has legal standing to appeal or complain in electoral matters. This right usually belongs to any voter or electoral contestant.<sup>1</sup> Subsequently, electoral commissions (central or at some lower level) have an important role in this process. They generally manage the first stage of the appeal process, but in some countries they may make the final decision in some elections, usually local ones. Predominant European practice is that final decision in electoral disputes most often lies with the courts – constitutional or supreme, depending on the judicial system of different countries. In some cases, other courts – administrative, district, municipal – can be authorised to decide, while there are also instances where the decision goes to parliament, or one of its chambers, as is the case in Denmark or Luxembourg.

Differences in procedure also depend on the level at which elections are conducted – local (elections for city councils and mayoral elections; elections for parliaments, governments or governors of federal units in federal states), or national (general elections for the parliament of the country, or the European Parliament or presidential elections if the head of state is elected by the popular vote) as well as on the nature of the electoral process – whether citizens elect organs of power (parliaments, heads of state) or they decide on some specific issue in a referendum.

In this short paper, we will highlight the basic ways in which institutions are authorised to decide on electoral disputes, in different types of election, using examples from many European countries. The majority of European countries can be divided into two basic groups, according to whether the courts or other

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1. Montenegrin election law, for example, provides that "any citizen, candidate or electoral contestant has the right to submit complaint to the electoral commission in charge if he or she finds his or her electoral rights are violated in the election process" (section 107, paragraph 1).

bodies are authorised to make a final decision in electoral disputes: a) countries where the same body decides on electoral disputes in all types of election; b) countries where different bodies are authorised to decide in two or all of the three levels, or types, of election. We will also take into account the many variations within this basic framework, as well as peculiarities in the decision-making procedure for electoral disputes. These usually start at a very local level – in polling stations and committees, subsequently in local electoral commissions, then central electoral commissions and ultimately in some of the court institutions.

In most European countries, the same judicial body decides on electoral disputes, regardless of the level at which elections are conducted or the purpose of the elections. It actually means that the same court is authorised to decide on electoral disputes, whether it is a local or national election or a referendum. The dominant decision-making approach is for electoral disputes to be taken out of the regular judiciary system and handed over to the constitutional courts, as is the case in Albania for instance (Article 131 of the Albanian Constitution), Austria (paragraph 67 of the Constitutional Court Act, 1953), Azerbaijan (sections 54 and 56 of the Law on Constitutional Court), Bulgaria (Article 66 of the Bulgarian Constitution), Croatia (section 125 of the Law on Constitutional Court; Law on the Election of the Representative Bodies of Local and Regional Self-Government Units), Cyprus (Articles 140 and 145 of the constitution), Georgia (sections 19 and 23 of the Organic Law on the Constitutional Court), Liechtenstein (Article 104 of the Constitution of Liechtenstein; section 1 of the Law on the Constitutional Court), Malta (Article 56 of Malta's Constitution; the General Election Act and the Local Councils Act), Montenegro (Article 149 of the Montenegrin Constitution; section 110 of the Law on the Elections of the Deputies and Local Representatives), Portugal (Article 223 of the Portuguese Constitution), Slovakia (Article 129 of the constitution). Decision making on electoral disputes at all levels is also in the hands of the constitutional judiciary in Germany but, due to the federal character of the German state, constitutional courts from different levels – provincial and federal – decide on these matters, each of them according to their own procedures (Article 41 of the constitution and section 13 of the Law on Constitutional Court).

In some European countries – including those that do not have separate court bodies for constitutional justice – decision making on electoral disputes comes under the regular judiciary process and usually comes to the supreme court of the country in question. This is the case in, for example, Estonia (paragraph 8 of the Referendum Act; paragraph 73 of the Parliament Election Act; paragraph 17 of the Local Government Council Election Act), “the former Yugoslav Republic of Macedonia” (section 60 of the Referendums Act), the Russian Federation (section 75 of Federal Law, No. 67) and the United Kingdom (Part III of the Representation of People Act, 1983 for Local and General Elections).

Finally, in some cases, for example in Finland, the administrative judiciary, that is the court that deals with procedural matters, decides on electoral disputes.

That means that Finland’s Supreme Administrative Court is authorised to make final decisions on this matter at all electoral levels (Local Government Act, 1995). In other countries, on the contrary, courts are not authorised to decide on electoral disputes at all. Instead, there are specific bodies whose role is to protect the regularity of the electoral process, as is the case in Sweden where the Election Review Board is the final decision-making body on irregularities connected with elections at all levels (section 16 of the Act of National Referenda). Similarly, in Belgium this role is played by the Conseil d’Etat (section 16, Law on State Council, 1973).

**Table No. 1 – The same institution decides on electoral disputes at all levels**

Country	Local elections	General/Presidential elections	Referendum
Albania	Constitutional Court	Constitutional Court	Constitutional Court
Azerbaijan	Constitutional Court	Constitutional Court	Constitutional Court
Belgium	Conseil d’Etat	Conseil d’Etat	not available
Bulgaria	Constitutional Court	Constitutional Court	Constitutional Court
Croatia	Constitutional Court	Constitutional Court	Constitutional Court
Cyprus	Supreme Constitutional Court	Supreme Constitutional Court	Supreme Constitutional Court
Estonia	Supreme Court	Supreme Court	Supreme Court
Finland	Supreme Administrative Court	Supreme Administrative Court	Supreme Administrative Court
Georgia	Constitutional Court	Constitutional Court	Constitutional Court
Germany	Constitutional Court of the <i>Land</i>	Constitutional Court	not available
Liechtenstein	Constitutional Court	Constitutional Court	Constitutional Court
Malta	Constitutional Court	Constitutional Court	Constitutional Court
Montenegro	Constitutional Court	Constitutional Court	Constitutional Court
Portugal	Constitutional Court	Constitutional Court	Constitutional Court
Russian Federation	Supreme Court	Supreme Court	Supreme Court
Slovakia	Constitutional Court	Constitutional Court	Constitutional Court
Sweden	Election Review Board	Election Review Board	Election Review Board
“The former Yugoslav Republic of Macedonia”	Supreme Court	Supreme Court	Supreme Court
United Kingdom	The Royal Court of Justice	The Royal Court of Justice	not available

However, many countries distinguish between local and national elections in the decision-making process for electoral disputes. Actually, they usually treat local electoral disputes as administrative ones and thus authorise some administrative bodies, or at least the administrative courts, to decide on them, while electoral disputes at national level are treated as matters to be ultimately decided by the constitutional or supreme courts.

Some countries are committed to the most common practice – constitutional courts decide on electoral disputes at a national level – but it is not considered necessary to use the same process to deal with local electoral disputes. In Armenia and Ukraine, for example, courts at lower levels – the Administrative Court in Armenia and the Courts of Appeals in Ukraine – decide on local electoral disputes, while in general elections or referendums this authority belongs to the Constitutional Court (Article 40.9, Electoral Code of the Republic of Armenia; sections 12.7 and 17.7 of the Law on the Central Election Commission and section 22 of the Law of Ukraine on Elections of Local Radas and of the Villages, Settlement, City Chairman). To some extent there is a similar situation in France, where the Conseil d'Etat decides on electoral disputes at a local level, while the Conseil constitutionnel – the institution that plays the role of the constitutional court in the French institutional system – decides on the same matter in national elections and referendums (Article LO180/Article L250 Electoral Code and Article 60 of the French Constitution). In Romania, Moldova and Slovenia decision making is divided in such a way that bodies conducting elections (such as municipal electoral commissions in Slovenia and central ones in Moldova and Romania) are authorised to decide on electoral disputes at the local level, while constitutional courts are once again the final authority on national elections and referendums (Articles 82 and 146 of the Romanian Constitution and section 33 of the Law on the Election of Local Public Administration Authorities; Article 72, 92, 137 Election Code of Moldova; section 99 of the Law on Local Elections of the Republic of Slovenia and section 69 of Law on the Constitutional Court).

In some other countries, the principle of divided decision making is introduced in a similar way, but within the framework of the regular judiciary system, as, for example, in Ireland and Poland. In these two countries, district courts – Irish circuit courts and Polish district courts (*Sad Okregowy*) decide on local electoral disputes and irregularities, while in the case of general elections and referendums this role is given to the Supreme Court (section 42 of the Referendum Act 1994 of the Republic of Ireland; sections 58 and 60 of the Polish Electoral law). A very similar situation can be found in Serbia, where decision making on electoral disputes is also in the hands of the regular judiciary. In fact, municipal courts decide on local electoral disputes (sections 46 and 50 of the Law on Local Elections), while the Supreme Court decides on disputes in general elections (Article 97, Law on the Elections of Representatives), but the Constitutional Court can have a role in this procedure too, because the Constitution of the Republic of

Serbia provides that the Constitutional Court “decides in those electoral disputes where other courts are not authorised to decide by law” (Article 167, Constitution of the Republic of Serbia).

We can find the principle of divided decision making on electoral disputes at a local and national level in both Lithuania and Luxembourg, but with a somewhat different underlying logic. In both cases the administrative court decides on local electoral disputes and referendums, while in general elections that role is given to the Constitutional Court in Lithuania (section 74.1 of the Law on Referendum and Section 80 of the Law on Elections to Municipal Councils) and to the lower chamber of the parliament – *Chambre des députés* in Luxembourg (section 278 of the Election Law and section 62 of the Law on Referendum). In Turkey, on the other hand, where it is a matter of decision making on electoral disputes, different bodies decide on elections and referendums and consequently the Supreme Election Council decides in the first two cases, while the Constitutional Court rules in the case of a referendum (Article 79 of the Constitution of the Republic of Turkey).

Finally, in some countries, different bodies, judicial or otherwise, decide in all three of the electoral situations mentioned, regardless of the election level (local, national) or the purpose of the election (electing power organs, referendums). In the Czech Republic, decision making is divided among organs for conducting elections: district electoral commission for local electoral disputes, regular judiciary (Supreme Court) for the general election disputes and constitutional judiciary (Constitutional Court) for the disputes on referendums (Law No. 152/1994, modified by Law No. 491/2001, concerning elections for municipal councils and section 89, Law No. 247 on Elections to the Parliament of the Czech Republic). Another example of this kind is Spain, where municipal courts decide on a local electoral level, *Audiencias Territoriales* in referendums, while the Constitutional Court decides at the level of general elections, such as elections for the Spanish Parliament or the European Parliament.

There are European countries we could not find relevant data for and therefore they have not been included in this short overview. There are also, obviously, many other procedural aspects relevant to the decision-making process on electoral disputes we have not considered here. Many of them are not only connected with the question of which institution is authorised to make a final decision, but also with other procedural issues. But, bearing in mind that many interesting issues are to be discussed in the conference, we offer this short comparative description on institutional differences as one thing to keep in mind during our discussion.

**Table No. 2 – Different institutions decide at two or all of three levels**

<b>Country</b>	<b>Local elections</b>	<b>General/Presidential elections</b>	<b>Referendum</b>
Armenia	Administrative Court	Constitutional Court	Constitutional Court
Czech Republic	District Electoral Commissions	Supreme Court	Constitutional Court
France	Conseil d'Etat	Conseil constitutionnel	Conseil constitutionnel
Ireland	Circuit Courts	Supreme Court	Supreme Court
Lithuania	Supreme Administrative Court	Constitutional Court	Supreme Administrative Court
Luxembourg	Administrative Court	Chambre des députés	Administrative Court
Moldova	Central Electoral Commission	Constitutional Court	Constitutional Court
Poland	District Courts	Supreme Court	Supreme Court
Romania	Central Election Bureau	Constitutional Court	Constitutional Court
Serbia	Municipal Courts	Supreme Court	Supreme Court
Slovenia	Municipal Electoral Commission	Constitutional Court	Constitutional Court
Spain	Supreme Tribunal of Justice of the Autonomous Communities	Constitutional Court	Audiencias Territoriales
Turkey	Supreme Election Council	Supreme Election Council	Constitutional Court
Ukraine	Courts of Appeals	Constitutional Court	Constitutional Court



## I. Introduction

As the ancient Romans remarked, laws without judicial sanctions represent declarations of intent rather than legal rules. There can thus be no disputing the importance of electoral disputes. In his report, Mr Darmanovic has described the various bodies responsible for such matters in Europe while other contributors have focused on what happens elsewhere, particularly in Latin America.

The types of electoral dispute heard by constitutional courts and their equivalents in Europe, not to mention those coming before the European Court of Human Rights, vary greatly. This report looks at the content of such disputes. It is based on judgments of European constitutional courts and equivalent bodies concerning elections recorded in the Venice Commission's CODICES database.<sup>2</sup>

We will briefly summarise the main electoral issues dealt with by the courts and then look in more detail at a number of major topics and judgments, with an emphasis on important areas of common interest.

### The main subjects of electoral disputes: summary

As will become quickly evident, electoral disputes are not confined to voting irregularities.

What is immediately striking is the number of cases concerning referendums. Yet, apart from Switzerland, where referendums are frequent, and to a lesser extent Italy, direct democracy plays a much more marginal role than representative democracy in Europe. At first sight, therefore, the frequency of such cases is rather surprising. The explanation may lie partly in the restrictions on the right of referendum, regarding both the substance<sup>3</sup> and the decisions that might be the subject of a referendum.<sup>4</sup>

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2. [www.codices.coe.int](http://www.codices.coe.int), which is also available on CD-ROM. The judgments are also published in the Venice Commission's *Constitutional Case-Law Bulletin*. They are cited here as in that publication.

3. Examples: HUN-1993-1-001 (judgment of 22 January 1993): parliament cannot be dissolved by popular referendum; UKR-2008-1-007 (judgment of 16 April 2008): the right of popular initiative applies to all areas other than ones excluded by the constitution from the scope of referendums.

4. Examples: HUN-1993-1-001 previously cited; ITA-2000-3-010 (judgment of 14 November 2000): referendums on the repeal of laws may not affect provisions of the constitution; SVK-1997-2-005 (judgment of 21 May 1997): the constitution may not be revised directly by referendum.

The remainder of this report looks at elections in the true sense. Such cases might be expected to be mainly concerned with electoral fraud and its consequences, but this is not the case. Although cases concerning the right to vote and eligibility to be elected appear slightly less frequently in national courts than in the European Court of Human Rights<sup>5</sup> they are still the most common, though rarely the most sensitive cases or the ones with the most serious consequences.

Refusal to grant the right to vote rarely leads to an election being annulled. There have to be extreme irregularities in electoral registers before this occurs, and the cases considered only throw up one such example.<sup>6</sup> Refusal to recognise eligibility to be elected is clearly more problematic, but it ought to be possible to settle such cases before the election.

In electoral matters, unlike in other areas, the cancellation of a mere decision (the validation of the election) may have more serious consequences than that of a law. Inviting the relevant authorities to revise the electoral system to provide more proportionality<sup>7</sup> or avoid so-called natural quorums or thresholds of 10% or more<sup>8</sup> is rather less extreme than overturning the election of a president or an entire parliament. Courts have shown a certain readiness to overturn elections in revolutionary situations but otherwise have been reluctant to do so. So a purely quantitative analysis of types of case does not necessarily reveal which are the most important ones.

The general rule is that an election will be declared invalid if an irregularity could have influenced the outcome.<sup>9</sup>

Based on the principles governing European elections as laid down in the Venice Commission's Code of Good Practice in Electoral Matters,<sup>10</sup> the Council of Europe reference document on the subject, the following types of judgment can be identified:

- Universal suffrage is undoubtedly the most frequent subject at issue, but infringements of this principle are generally limited in scope, involving the right to vote or eligibility of an individual or restricted group of individuals.
- The question of equal suffrage takes a variety of forms, ranging from dual voting for members of national minorities, which raises the problem of equal voting rights, to the allocation of seats between constituencies (equal

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5. See Mr Lopez Guerra's report.

6. ARM-2002-H-001 (judgment of 1 October 2002).

7. CZE-2001-1-001 (judgment of 14 January 2001).

8. SUI-2004-M-001 (judgment of 27 October 2004).

9. CDL-AD(2002)023rev (Code of Good Practice in Electoral Matters), II.3.3.d; see, for example, CZE-2006-3-013 (judgment of 12 December 2006); FRA-1959-S-001 (judgment of 5 January 1959).

For a more general discussion, see the proceedings of the UniDem seminar in Malta organised by the Venice Commission in November 2008, *The Cancellation of Election Results*, Science and Technique of Democracy No. 46, Strasbourg: Council of Europe Publishing, 2010.

10. CDL-AD(2002)023rev.

voting power), equal opportunities during election campaigns and gender equality.

- Issues relating to voters' freedom to vote or to express their wishes, and related problems of fraud, do not come up very often and those relating to voters' freedom to form their opinion occur even less frequently. But this is not surprising since until recently there has been much more emphasis on the lawful conduct of elections themselves than there was in the past. Moreover, voters' freedom to form an opinion is also dealt with from the standpoint of equal opportunities.

Other issues arise more sporadically, such as problems relating to secret voting or direct suffrage, or challenges to aspects of the electoral system, particularly quorum requirements, which may in any case be linked to the equality principle.

The courts have also been called on to consider what are referred to in Part II of the Code of Good Practice in Electoral Matters as the "conditions for implementing the principles" of the European electoral heritage, such as respect for fundamental rights, and restrictions on these rights, the organisation of elections by an impartial body, election observation and the financing of election campaigns.

In considering the main features of electoral disputes we will follow the order of the Code of Good Practice.

## **II. The principles of Europe's electoral heritage**

### **A. Universal suffrage**

Disputes about electoral registers are usually fairly minor and generally only concern a limited number of voters. As such they do not feature in the major annals of case law. The only exception is when there are massive irregularities, which in extreme cases may lead to elections being declared invalid.<sup>11</sup> The cases concerned vary widely, particularly as the state of electoral registers in many countries leaves much – sometimes very much – to be desired, yet with no resulting electoral sanctions.

Otherwise, the courts have sometimes removed certain obstacles to universal suffrage, but have also on occasions maintained them.

Examples of the former include the recognition of the right of refugees permanently resident in the country to vote in local elections<sup>12</sup> or the requirement that citizens resident in the country but out of it on election day, and vice versa, should be entitled to vote.<sup>13</sup> Courts have also overturned conditions of at least

11. As noted, only one such case emerged: ARM-2002-H-001 (judgment of 1 October 2002).

12. ARM-1999-3-003 (judgment of 16 December 1999).

13. HUN-2008-1-002 (judgment of 24 April 2008).

twelve months on the register in order to vote or stand for election<sup>14</sup> and at least one year's residence in the municipality for candidates for election as member of parliament or mayor.<sup>15</sup> The residence condition as such has been deemed to be unconstitutional, even for local elections.<sup>16</sup>

A number of grounds of ineligibility have been declared unconstitutional, which is consistent with the liberal approach recommended by international organisations, and in particular the Code of Good Practice in Electoral Matters. Examples include the ineligibility of members of the armed forces, uniformed police officers and authorised officers of the interior ministry and intelligence agency for the posts of municipal councillor and mayor.<sup>17</sup>

Other restrictions on the submission of candidatures have also been ruled inadmissible. For example, the Estonian Supreme Court has found that confining the right to submit lists at municipal elections to political parties, which must have at least 1 000 members, is unconstitutional since it makes it almost impossible to submit local lists. Allowing individual independent candidates to stand does not make the legislation constitutional.<sup>18</sup> In Russia, a provision in the electoral law stating that withdrawal from the list by a candidate holding one of the first three places in the electoral association's federal list will result in a refusal to register that list has been declared unconstitutional.<sup>19</sup> An alternative approach would have allowed all sorts of pressures to be exerted on candidates. The same reasoning underlay the decision to validate a ban on withdrawing candidatures.<sup>20</sup> However, a deposit of less than one month's salary has been found to be acceptable.<sup>21</sup>

A limited number of judgments have accepted restrictions on the right to vote. One of the most interesting cases concerns a judgment of the Constitutional Court of Bosnia and Herzegovina.<sup>22</sup> This clearly takes account of the country's post-conflict situation by preventing persons unlawfully occupying property belonging to someone else from voting in their place of residence. This restriction on the right to vote was only geographical and was simply intended to ensure that the beneficiaries of ethnic cleansing were unable to exercise their "democratic" powers at the expense of those whose property they had taken. Moreover, the provision only concerned persons who had been issued with an enforceable restitution order. Certain restrictions that have been found to be lawful are more open to discussion. Examples are the ineligibility of ministers of religion for municipal elections,<sup>23</sup> and restrictions on eligibility for the country's presidency

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14. POL-2006-1-005 (judgment of 20 February 2006).

15. SVK-1998-3-010 (judgment of 15 October 1998).

16. UKR-2003-3-017 (judgment of 23 October 2003).

17. MKD-1997-1-002 (judgment of 12 March 1997).

18. EST-2005-3-001 (judgment of 19 April 2005).

19. RUS-2000-1-006 (judgment of 25 April 2000).

20. MKD-1996-3-008 (judgment of 23 October 1996).

21. EST-2003-2-001 (judgment of 27 January 2003).

22. BIH-2004-1-002 (judgment of 30 January 2004).

23. GRE-1995-2-002 (judgment of 29 June 1995).

based on obligations to other states (in this case derived from an explicit constitutional provision)<sup>24</sup> or dual nationality.<sup>25</sup>

## B. Equal suffrage

### 1. Equal voting rights

The “one person – one vote” principle in the narrow sense is rarely at issue. The main subject that can arise is that of dual voting for members of national minorities. This has been found to be compatible with the Slovenian Constitution.<sup>26</sup>

### 2. Equal voting power

The almost universally acknowledged rule is that the first or single chamber must be elected on the basis of demographic principles.<sup>27</sup> Once this rule has been established, it needs to be applied in detail. Firstly, a basis must be determined for the allocation of seats, be this the number of inhabitants, citizens (including children), registered voters or votes cast. In Albania, it is the number of registered voters rather than votes cast,<sup>28</sup> in Romania, the number of inhabitants not voters.<sup>29</sup> Finally, there is a substantial body of case law on possible inequalities of representation. In France, for example, a minimum of two deputies (members of parliament) per *département* was found to be admissible in 1986, but the Constitutional Council modified its case law in 2009.<sup>30</sup> Similarly, in Belgium, the over-representation of Dutch speakers in the Brussels-Capital Region Parliament has been ruled to be compatible with the constitution.<sup>31</sup>

It then has to be determined whether the results have to be proportional, and if so to what extent. Equal suffrage does not, as such, imply an absolutely proportional system, with every vote having the same impact on the results. In other words, equality of results is not a requirement.<sup>32</sup> However, this changes when the constitution stipulates a proportional system. Disputes in such cases mainly concern electoral thresholds or quorums. In general, constitutional courts and equivalent bodies are reluctant to declare quorums unconstitutional.<sup>33</sup> Thresholds of 5% have been ruled lawful in the Czech Republic and Slovakia, as well

24. AZE-2003-2-004 (judgment of 1 August 2003).

25. LTU-1999-1-002 (judgment of 11 November 1998). See, however, the subsequent European Court of Human Rights judgment in *Tănase and Chirtoacă v. Moldova*, 18 November 2008, whereby such a restriction no longer appears to be acceptable.

26. SLO-1998-S-003 (judgment of 12 February 1998). On the subject of dual voting for members of national minorities see the Venice Commission report (CDL-AD(2008)013).

27. FRA-1986-S-002 (judgment of 1 July 1986).

28. ALB-2005-1-001 (judgment of 7 January 2005).

29. ROM-2008-1-001 (judgment of 12 March 2008).

30. FRA-1986-S-002; the change in the case law results from decision 2008-573 DC of 8 January 2009.

31. BEL-2003-1-003 (judgment of 25 March 2003).

32. SLO-2000-1-001 (judgment of 9 March 2000).

33. See Kieran Williams, *Judicial Review of Electoral Thresholds in Germany, Russia, and the Czech Republic*, *Election Law Journal*, Volume 4, Number 3, 2005, pp. 191-206, 191.

as higher figures for coalitions, with the figures rising to, respectively, 20% and 10%, depending on the number of parties concerned.<sup>34</sup> Interestingly, in the latter case, the persons bringing the case considered that a 10% threshold for coalitions of four or more parties discriminated in their favour rather than against them. A quorum of 6% has been found acceptable in Moldova.<sup>35</sup> However, the German Constitutional Court has ruled that a 5% quorum can only be justified by the impairment to the viability of the local representative bodies that can be reasonably anticipated.<sup>36</sup> A recent exception to judgments in support of quorums concerns the Swiss Canton of Aargau, but only for certain constituencies. The Federal Court has even suggested the abolition of natural quorums, that is, the restrictions on access to parliament in the case of small constituencies, when these quorums exceed 10%. It was ruling on the basis of a cantonal constitutional requirement for electoral districts to be amalgamated when this was necessary to avoid high quorums that were contrary to the rules of proportional representation.<sup>37</sup> Similarly, although the Czech Republic's Constitutional Court ruled the national 5% quorum admissible, it found that, combined with relatively small constituencies, the modified d'Hondt method, with an initial electoral divisor of 1.42 rather than 1, resulted in an excessive natural quorum of more than 14% on average, which was incompatible with the principle of proportional representation.<sup>38</sup>

### 3. Equality of opportunity

Equality of opportunity, particularly regarding access to the media, is often breached, while too often only lip service is paid to the neutrality of the media, as provided for in the Code of Good Practice in Electoral Matters<sup>39</sup> and in a specific Committee of Ministers recommendation.<sup>40</sup> Legislation designed to secure equal coverage is often understood to be confined to specially designed broadcasts. Unfortunately, the constitutional case law consulted does not seem to have done much to remedy the situation. For example, the Russian Constitutional Court has ruled that unless the courts have decided explicitly that the clear intention was to make propaganda, the actions of the media cannot be regarded as constituting propaganda or as a violation of a corresponding prohibition.<sup>41</sup> It is extremely difficult to establish that breaches are sufficiently serious to warrant the overturning of an election. Thus the Slovakian Constitutional Court has ruled that only serious and recurrent infringements of the law provide legal grounds for this sanction.<sup>42</sup> It is easier to establish a violation when the inequalities have a basis

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34. CZE-2001-1-001 (judgment of 14 January 2001); CZE-1997-1-002 (judgment of 2 April 1997);

SVK-2001-1-001 (judgment of 11 January 2001).

35. MDA-2000-3-008 (judgment of 10 October 2000).

36. GER-2008-1-003 (judgment of 13 February 2008).

37. SUI-2004-M-001 (judgment of 21 November 2003).

38. CZE-2001-1-001, cited above.

39. CDL-AD(2002)023rev, I.2.3.a.ii and I.3.1.a.i.

40. Recommendation No. R (99) 15 on media coverage of election campaigns.

41. RUS-2003-3-006 (judgment of 30 October 2003).

42. SVK-1994-3-006 (judgment of 2 November 1994).

in law, such as a ban on parties that are members of a coalition from exercising their right to media coverage separately.<sup>43</sup>

There is slightly more case law on other forms of abuse during election campaigns. One of the French Constitutional Council's first decisions was to set aside an election because of unlawful propaganda, particularly emanating from certain public bodies.<sup>44</sup> The Ukrainian Constitutional Court has criticised one of the most frequent abuses, sometimes known as "abuse of administrative resources". It stated that officials of executive bodies are prohibited from participating in electoral campaigns at any time, work or leisure.<sup>45</sup> Similarly, in France local government staff may not take part in election campaigns during working hours.<sup>46</sup>

The Russian Constitutional Court has concluded that the financing of election campaigns is also to some extent an aspect of the equal opportunities principle. It has found that the purpose of the ban on citizens' independently financing propaganda is to ensure the equality of candidates, as well as the transparency of election financing.<sup>47</sup> Without going into the detail of the debate, this approach appears to be completely at variance with that of the United States Supreme Court, which accepts a ceiling on private donations but considers them to be important for freedom of speech and association and prohibits ceilings on expenditure.<sup>48</sup> Purely state-funded campaigns might be the impartial ideal in an ideal world where there was complete separation of machinery of state and the governing authorities.

The thresholds for securing public funding are generally below those necessary to win seats. The Czech Constitutional Court has even stated that it must be significantly lower, and below 3%.<sup>49</sup>

#### 4. Equality and national minorities

There have been a number of court decisions on rules specially affecting national minorities. Infringements of the equality principle have been invoked by representatives of both minorities and majorities. In the former case, it is general rules that are not formally aimed at minorities that are perceived to be discriminatory. The question has been raised in the Italian Constitutional Court in connection with the minorities of Trentino-Alto Adige. It was thought that the situation at national and at regional levels differed. It refused to declare the national 4% quorum for

43. CRO-1999-3-021 (judgment of 17 December 1999).

44. FRA-1959-S-003 (judgment of 9 July 1959). See also FRA-1959-S-001 (judgment of 5 January 1959).

45. UKR-2005-1-003 (judgment of 24 March 2005).

46. FRA-2002-3-007 (judgment of 26 September 2002).

47. RUS-2006-2-003 (judgment of 16 June 2006).

48. See in particular *Buckley v. Valeo* of 30 January 1976, 96 *Supreme Court Report* 612 (1976).

49. CZE-2005-1-001 (judgment of 19 January 2005); CZE-2000-1-002 (judgment of 13 October 1999).

the proportional part of elections unconstitutional, even though it prevented a party representing the German-speaking minority from obtaining one of the seats allocated proportionally (though not one of the plurality system seats).<sup>50</sup> At provincial level, in the two provinces of Trento and Bolzano, the thresholds, which were set respectively, at 5% of the valid votes and at the “natural threshold”, were deemed to be incompatible with the regional statute, which established explicit safeguards for the Ladin community.<sup>51</sup> The question of dual voting for members of national minorities in Slovenia has already been considered.<sup>52</sup>

In Romania, on the other hand, rules to offer parliamentary representation to minorities who have not obtained seats under the normal allocation procedure have been declared constitutional,<sup>53</sup> though admittedly on the basis of a constitutional provision expressly concerned with minority representation.<sup>54</sup>

## 5. Equality and parity of the sexes

Whether or not there is an explicit constitutional provision usually determines the outcome of cases concerning gender parity or quotas. For example, such measures were declared unconstitutional in France,<sup>55</sup> until a constitutional amendment was passed to authorise them.<sup>56</sup> In Spain, however, the constitution<sup>57</sup> provides for material equality in a broad sense in several areas, including political participation. A legal requirement for candidate parity is therefore admissible. Finally, in Switzerland, after weighing up the interests, the Federal Court confirmed the decision that a cantonal referendum requiring absolutely and without further qualification that the ratio of women to men in the parliament, government and cantonal courts should be equivalent to the ratio in the population as a whole was void.<sup>58</sup>

## C. Free suffrage

### 1. Freedom of voters to form an opinion

As noted in the introduction, voters’ freedom to form their opinion has long been neglected. Such case law on this issue has generally overlapped with that on equal opportunities, which was considered earlier. It is still limited in scope when compared with the problems concerned. The Czech Supreme

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50. ITA-1993-1-002 (judgment of 16 January 1993). The court declared the application inadmissible in the absence of a constitutionally binding solution, in accordance with its established case law.

51. ITA-1998-3-009 (judgment of 21 October 1998).

52. Paragraph I.2.1.

53. ROM-2008-1-001 (judgment of 12 March 2008).

54. Article 4.2 of the constitution.

55. FRA-1999-1-001 (judgment of 14 January 1999); FRA-1982-S-004 (judgment of 18 November 1982).

56. Article 3.4.

57. Article 9.2.

58. SUI-1997-2-004 (judgment of 19 March 1997).



and Supreme Administrative Courts are an exception,<sup>59</sup> but the Constitutional Court did not back them up.

## 2. Freedom of voters to express their wishes, and combating electoral fraud

We have now reached the most bemusing or the dispiriting part of the report, namely, irregularities and even fraud in the very conduct of elections. In this respect, the human imagination knows no limits. A wide range of cases have come before the constitutional courts. For example, the Armenian Constitutional Court overturned a fairly close election following an accumulation of irregularities, none of which in itself was necessarily serious. An electoral commission had ordered more ballot papers than provided for in the electoral code, one person not authorised to form part of the electoral commission of a polling station had nevertheless done so, and the prosecution service had failed to cast light on two allegations of forged signatures by members of electoral commissions in two polling stations.<sup>60</sup> In another case where the election was overturned, ballot box stuffing seemed more than likely, given the presence of unsigned ballot papers, and the vote counting procedure had not been properly administered.<sup>61</sup> Other suspicious cases have included violations of the secret ballot, coupled with failure to check voters' identity, and significant, unexplained discrepancies between figures shown in the official record of results and in the counting sheets,<sup>62</sup> or, more whimsically, in one Mediterranean island, the disappearance in one polling station of the record and attendance lists and even, in another, the removal of a ballot box and its casting into the sea.<sup>63</sup> Irregularities in the collection of votes cast in the home by voters unable to travel to the polling station occurred when the chair of the electoral commission visited homes without another member of the commission and was himself a candidate.<sup>64</sup>

Another type of irregularity concerned the omission of the name of the candidate heading a list from the ballot paper,<sup>65</sup> but this was less serious than the omission of a complete list, as occurred in another case.

### D. Secret suffrage

Finally, the secret of the ballot box<sup>66</sup> may be the only issue at stake. The Austrian Constitutional Court has held that this is breached if ballot papers are sent to people's homes but are no longer available in polling booths.<sup>67</sup>

59. See Mr Podhrazky's report.

60. ARM-2003-2-003 (judgment of 1 July 2003).

61. ARM-2003-2-002 (judgment of 16 June 2003).

62. FRA-2002-2-004 (judgment of 24 April 2002).

63. FRA-1968-S-001 (judgment of 24 January 1968).

64. SVK-2004-1-002 (judgment of 19 February 2004).

65. CRO-1997-1-020 (judgment of 20 April 1997).

66. Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I.2.4.

67. AUT-2000-3-007 (judgment of 2 December 2000).

## E. Direct suffrage

The judgments considered have included ones concerning direct suffrage. The Constitutional Court of Bosnia and Herzegovina has confirmed that Article 3 of the Additional Protocol to the European Convention on Human Rights does not exclude the election of second chambers by indirect suffrage.<sup>68</sup> More originally, the Lithuanian Court has declared a ban on independent candidates unconstitutional, admittedly on the basis of freedom of association,<sup>69</sup> while the Slovenian Court has ruled that so-called closed lists are compatible with direct suffrage, except in the case of certain seats obtained from national lists because the relevant legislation did not provide for the mandatory publication of these lists.<sup>70</sup>

## III. Conditions for implementing the principles

Certain key conditions must be met to safeguard Europe's electoral heritage, including respect for fundamental rights and procedural safeguards, in particular the organisation of elections by an impartial body and an effective appeals system. Other requirements concern the stability of electoral law, the observation of elections and campaign financing, which has already been considered above.<sup>71</sup>

Appeals arrangements will not be considered here as they are the subject of the report on the procedural aspects of disputes. Fundamental rights in election periods should not differ fundamentally from those outside them, which is why the requirement for public meetings to be notified in advance also applies to election meetings.<sup>72</sup>

Regrettably, there have been a few cases concerning the organisation of elections by an impartial body.<sup>73</sup> One of the major problems in the organisation of elections is often the lack of independence of members of electoral commissions, who are generally answerable to the relevant authorities. In our research we have only identified one such case, where a member of an electoral commission was also a parliamentary candidate on a proportional list, which was unacceptable.<sup>74</sup> The question of objective impartiality may raise other issues, such as whether members of electoral commissions can be removed by the bodies that appointed them.<sup>75</sup> However, we consider it counter-productive to question the principle that such commissions should have partisan membership, since so-called non-partisan members are very often creatures of the governing authorities. There nevertheless remains the question of subjective impartiality.

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68. BIH-2005-1-001 (judgment of 28 January 2005).

69. LTU-2007-1-006 (judgment of 9 February 2007).

70. SLO-1996-1-002 (judgment of 25 January 1996).

71. CDL(2002)023 rev (Code of Good Practice in Electoral Matters), Part II.

72. MKD-2000-1-001 (judgment of 16 February 2000).

73. CDL-AD(2002)023rev, II.3.1.

74. ARM-2007-2-004.

75. See CDL-AD(2002)023rev, II.3.1.f.

Several constitutional courts have dealt with the observation of elections.<sup>76</sup> The Lithuanian Constitutional Court has stressed the importance of publicity and monitoring arrangements in democratic elections,<sup>77</sup> and the Slovakian Court has ruled that the right to information includes the right to be present when district electoral commissions are counting the votes at elections.<sup>78</sup> In Croatia, observers must have the same rights as representatives of political parties, which means that non-partisan observers must be granted access to relevant material.<sup>79</sup>

The courts have even considered the often forgotten issue of the stability of electoral law, since it is preferable not to be continually changing the rules of the game.<sup>80</sup> Thus, the Czech Constitutional Court has argued that electoral rules should not be subject to constant revision and, if possible, should be stabilised by means of a stricter adoption procedure.<sup>81</sup>

#### **IV. Conclusion**

The picture we have painted confirms – and this is almost a truism – that electoral disputes are determined on a case by case basis, even at the level of constitutional courts and equivalent bodies. However, in a more fundamental way the major principles are clearly applied, which is why we believe that structuring our presentation in this way is not simply one option but clearly the best one.

However, this presentation also highlights the limits of such an exercise. Since anything connected with elections is politically highly sensitive, cases leading to the setting aside of important elections are extremely rare. There are other sensitive issues which do not at first sight appear to be fundamental in determining whether or not an election is democratic, and which are only dealt with rarely and with great circumspection. These include voters' freedom to form their opinion, particularly with the assistance of the media, or the allocation of seats between constituencies. Future debates will show whether this statement remains true.

76. CDLAD(2002)023rev, II.3.3.

77. LTU-1996-3-013 (judgment of 23 November 1996).

78. SVK-1999-2-003 (judgment of 16 June 1999).

79. CRO-1997-1-007 (judgment of 27 March 1997).

80. CDLAD(2002)023rev, II.2; CDLAD(2005)043.

81. CZE-2005-2-009 (judgment of 22 June 2005).



# Party funding and campaign finance law in the United States

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Samuel Issacharoff

## I. Introduction

From the comparative perspective, the regulation of party funding in the United States has three features that, at least in combination, set it apart from the rest of the world. First, any governmental measures to control the expenditure of what is termed campaign finance in the United States is constrained by a constitutional regime that looks sceptically on any state activity that constrains political expression, even indirectly. The comparatively strong freedom of expression guaranteed in the First Amendment of the United States Constitution creates a rights overlay to the campaign finance field that severely limits any attempt to regulate or restrict campaign spending.

Second, elections in the United States are privately funded. The lack of any comprehensive public funding scheme is likely due in part to a historic reluctance on the part of the American public to finance political parties, something that operates even independently of the difficulty that regulators have found in trying to limit private expenditures against the constitutional guarantees in the First Amendment. The American Constitution shows its age in distinct ways. One is that, unlike more recent constitutions, the American version does not affirmatively provide a role for political parties. Indeed, the Framers of the American Constitution thought parties to be a form of what they termed “faction”, an organisation of sectional interests presumptively hostile to the public good.

Third, the United States has more elected state officials than probably any other nation on earth. The deep-seated populist commitment to accountability of multiple low-level public officials to the electorate translates into elections for positions that would be filled administratively in any other democracy. The litany is large, but among the more conspicuous are elections for state court judges and school boards. Since these candidates typically run in a single constituency, without the benefit of a proportionally selected slate, their ability to rise above the herd to get elected requires an ability to raise money independently to get elected.

These three features contribute to great pressure to raise money for contested elections and a tough legal environment in which to regulate the funding of politics and political expenditures. Congress and state legislatures have made several attempts to control the role of money in political campaigns, but have

consistently seen their legislative enactments hollowed out by a Supreme Court highly sceptical of any intrusion into the free expression of political ideas. This overview is meant to serve as an introduction to the development of campaign finance law in the United States. It begins with a description of the foundations of campaign finance regulation and then explores the subsequent treatment by the Supreme Court, concluding with the current state of the law.

## II. Foundations of campaign finance regulation: FECA and Buckley

The most significant contemporary attempt by congress to cabin the amount of money donated and spent in elections was the Federal Election Campaign Act (FECA).<sup>82</sup> As amended in 1974, FECA sought to restrict the amount of money in political campaigns by regulating both the demand side, through spending limits for candidates and groups, and the supply side, by limiting the amount that could be contributed to campaigns. The 1974 amendments imposed limitations on the amount that individuals, political parties and political action committees (PACs) could contribute to federal election campaigns. Ceilings were also placed on the amount that candidates could spend in federal elections, both from the candidate's personal funds and from campaign contributions. In addition, the 1974 amendments created the first system of public funding for presidential elections, establishing matching funds for primary candidates and full federal funding of the presidential election. FECA also introduced extensive reporting and disclosure requirements for federal election campaigns.

Oversight of the regulatory structure was given to the newly created Federal Election Commission (FEC). The FEC is composed of six politically appointed commissioners. No more than three commissioners are permitted to be from the same party, which in practice has meant that the FEC always has three Democrats and three Republicans. Due to a variety of intentional procedural and institutional constraints, the FEC has proven to be a largely ineffectual agency.<sup>83</sup>

Since the Supreme Court entered the political thicket, constitutional cases involving the law of politics have generally adopted the familiar cast of traditional constitutional rights doctrine. Campaign finance laws are predominately viewed through the constitutional lens of the First Amendment. A brief overview of First Amendment Law regarding freedom of speech and expression is warranted prior to diving into the specifics of how it has been applied to campaign finance. Government regulation of speech is generally divided into three categories, and the placement of such regulation determines the level of judicial scrutiny applied. Restrictions on the time, place and manner of speech receive the broadest

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82. 2 U.S.C. 441 ff.

83. In order to take any action, four of six commissioners must agree, which because of the evenly matched partisan makeup, rarely happens. Additionally, the FEC has little investigatory authority and is further limited by onerous procedural requirements. For a history of the creation of the FEC, see Brooks Jackson (1990) *Broken Promises: Why the Federal Election Commission Failed*, Priority PR Publications.

latitude from the courts. Because not everyone can speak at the same time or in the same place, the state is given discretion to require parade permits for large public gatherings and can limit the timing of such demonstrations in order to protect public safety or tranquillity.<sup>84</sup> These restrictions are upheld as long as they are not so onerous as to suppress speech, and they are applied consistently across all categories of speakers so as not to allow the state to curtail selectively the speech of dissidents. Courts generally invoke a form of “rational basis” review to time, place and manner regulation: “Content-neutral time, place, and manner restrictions are acceptable so long as they are designed to serve a *substantial governmental interest* and do not unreasonably limit alternative avenues of communication.”<sup>85</sup>

The second category of speech regulation is content regulation, which is subject to a far more searching variety of judicial review. When the state imposes limitations based on the content of the speech, First Amendment jurisprudence requires that the government show that the regulation is “narrowly tailored” to meet a “compelling state interest”. Because the standard of review is much more difficult for the government to satisfy in this case, a considerable amount rests on the determination of whether the speech regulation is content-neutral. This question remains controversial.

The final category, and the one engendering the most stringent review by courts, is viewpoint regulation. Viewpoint regulation not only looks to the content of the restricted speech, but also attempts to suppress a particular viewpoint on a specific issue.<sup>86</sup> The principle behind applying the strictest form of review to this type of state action is to prevent states from either promoting or suppressing one side of an issue or debate over another.<sup>87</sup> Unsurprisingly, opponents of campaign finance laws have argued that these restrictions are not content-neutral and thus deserve strict scrutiny by the courts.<sup>88</sup> Some have even argued that campaign finance regulations specifically favour certain elites and therefore are viewpoint regulation.<sup>89</sup> On the other side of the debate, scholars favouring campaign finance laws place them in the realm of content-neutral regulation of speech.<sup>90</sup>

The 1974 amendments to FECA were quickly truncated by the Supreme Court in its landmark decision in *Buckley v. Valeo*.<sup>91</sup> This lengthy and fractured decision

84. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (holding that content-neutral time, place, and manner restrictions need not be the least restrictive or least intrusive means of doing so).

85. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (emphasis added).

86. See, e.g., *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995).

87. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

88. See, e.g., Kathleen M. Sullivan (1997) “Political money and freedom of speech” *UC Davis Law Review*, 30 (3): 663-90, 681-82.

89. Bradley A. Smith (1996) “Faulty assumptions and undemocratic consequences of campaign finance reform”, *Yale Law Journal*, 105: 1049, 1080.

90. See, e.g., Cass R. Sunstein (1994) “Political equality and unintended consequences”, *Columbia Law Review*, 94(4): 1390-414, 1394.

91. *Buckley v. Valeo*, 424 U.S. 1 (1976).

navigated the First Amendment content-based regulation waters by distinguishing between two forms of campaign finance regulation: limits on contributions and limits on expenditures. Although the Buckley Court recognised that both “contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities”,<sup>92</sup> it reserved a higher level of constitutional protection for expenditures:

The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.<sup>93</sup>

Limiting the amount an individual or group can spend during a political campaign, the court reasoned, contracts the arena for discussion by restricting the number of viewpoints and audience reached. Thus, the court applied a strict form of judicial review to limits on spending by candidates, imbuing them with a presumption of unconstitutionality. In contrast, the court upheld the limits on contributions and the disclosure requirements, reasoning that contribution limits only marginally impact political communication:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.<sup>94</sup>

According to Buckley, while the expressive content of the contribution does not increase with its amount, the perception of corruption attaching to large campaign contributions does. The court found that the state had offered sufficient justification with the need to prevent quid pro quo corruption and the appearance of corruption.<sup>95</sup> The public funding provisions were also upheld because the court reasoned they tended to encourage rather than suppress public discussion.<sup>96</sup>

Unfortunately, the effect of striking down some portions of the act while upholding others was to essentially rewrite FECA. In particular, the starkly different treatment received by campaign contributions and expenditures has created a strange regulatory framework intended by no one. Many scholars have pointed to the perverse incentives this creates within the political system:

Buckley and its corresponding applications to state campaign regulations have produced a system in which candidates face an unlimited demand for campaign

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92. *Ibid.*, 14.

93. *Ibid.*, 57.

94. *Ibid.*, 21 (1976).

95. *Ibid.*, 29, 84 (1976).

96. *Ibid.*, 109.



funds (because expenditures generally cannot be capped) but a constricted supply (because there is often a ceiling on the amount each contributor can give). As in all markets in which demand runs high but supply is limited, the value of the good rises. In campaigns, the result is an unceasing preoccupation with fundraising. The effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat: chances are great that the constricted means to satisfy his appetite will create a singular obsession with consumption. If candidates are unable to rely on large contributions, the rather predictable outcome is that they will spend all their time having to chase smaller contributions to fill their giant-sized appetites.<sup>97</sup>

In addition to the perverse effects that Buckley had on candidate behaviour, it also created a system in which independent interest groups could spend essentially without limit, so long as they abided by the restrictions on direct contributions to parties and campaigns.<sup>98</sup> Thus, Buckley and subsequent cases created two domains of campaign finance, one that was regulated and one that was not. As congress, state legislatures and the courts exerted pressure against direct contributions to campaigns, the money that would ordinarily be given directly was instead diverted into unregulated independent expenditures. One of the more alarming consequences of the current system of campaign finance regulation is that it pushes spending away from the mediating influence of candidates and political parties and into the discretion of largely unaccountable individuals and groups seeking to influence the election.

In addition to individual and PAC contribution limits, Buckley left standing the provision in FECA that limits the amount that political parties can expend on congressional races. The difficulty with this provision is that it leaves the definition of expenditure somewhat ambiguous. Direct contributions from the party to the campaign clearly count toward the expenditure limit, but spending done seemingly independently, and unco-ordinated with, the campaign is less easily characterised. These issues were raised in a series of cases concerning the Colorado Republican Party and radio ads it bought attacking the presumptive Democratic candidate. Because these expenditures were made before a Republican candidate was even nominated, the Colorado Republican Party argued that they were independent expenditures and therefore did not fall under the FECA restrictions. A deeply fractured Supreme Court held that FECA should not apply to these types of party expenditure because "The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees."<sup>99</sup>

In addition to the contribution/expenditure divide, the other significant holding in Buckley is that corruption, or the appearance of corruption, is the only

97. Samuel Issacharoff and Pamela S. Karlan (1999) "The hydraulics of campaign finance reform", *Texas Law Review*, 77: 1705-38, 1710-11.

98. See, e.g., *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981).

99. *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 616 (1996).

significant governmental justification for infringing First Amendment rights with campaign finance regulation. In so holding, the court explicitly rejected the rationale that the government had an interest in equalising the political arena, so as to give all individuals and groups the ability to influence government and elections irrespective of wealth: “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>100</sup> The corruption rationale, like the expenditure/contribution distinction, soon ran into difficulties in the cases that followed.

The court has had to go to rather dramatic lengths to maintain the line that the interest in fighting corruption is the only permissible rationale for regulating campaign finance. In upholding a ban on using general corporate funds on independent expenditures in candidate elections, the court in *Austin v. Michigan Chamber of Commerce* identified:

a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.<sup>101</sup>

Once the corruption rationale is extended this far, it begins to look as if the court is slowly becoming more comfortable with the most commonly voiced alternative state interest – and the one rejected in *Buckley* – a concern over equality in the political system.<sup>102</sup> Still, this case remains an outlier in that it is the only time that a majority on the court has come close to acknowledging equality in the political arena as a potentially sufficient state interest in the infringement of constitutionally protected speech.

In some more recent campaign finance cases, certain plurality coalitions on the court have sought to expand the permissible state interests. Justice Breyer, in his opinion in *Randall v. Sorrell*,<sup>103</sup> confronted an interesting dilemma posed by a Vermont state law that was found to excessively limit contributions such as to underfund election challengers. The opinion focused not on the perception of corruption, but instead on the structural integrity of the political process. In worrying about the democratic accountability of elected officials to voters, the entrenchment of incumbents and the overall competitiveness of elections, this opinion might signal a shift in the outlook of the court.<sup>104</sup> It is worth noting

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100. *Buckley v. Valeo*, 424 U.S., 49.

101. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

102. Professor Julian Eule has made this exact point: “Once the definition of corruption is enlarged to encompass the corruption of the electoral process as well as the elected candidate, the distinction between the corruption rationale and the equalization one is obliterated.” Julian N. Eule (1990) “Promoting speaker diversity: *Austin* and *Metro Broadcasting*”, *The Supreme Court Review*, 1990: 105-32, 109-10.

103. *Randall v. Sorrell*, 548 U.S. 230 (2006).

104. See Pamela S. Karlan, “Dead ends and new beginnings in the law of democracy”, *Ohio State Law Journal*, 68: 743.

that the Supreme Court of Canada has had no such qualms with embracing the equality rationale to sustain restrictions on campaign spending. In two recent decisions, the Canadian Court identified the equal dissemination of various viewpoints as a core principle that justifies campaign finance regulation.<sup>105</sup>

### III. Post-Buckley regulatory problems and the congressional response: BCRA

In the post-Buckley regulatory framework, two predominant forms of campaign fundraising and spending developed, allowing political operatives to take advantage of the gaps in the surviving provisions of FECA: soft money and issue advocacy. Under FECA, "contributions" only includes donations of money or anything of value "for the purpose of influencing any election for Federal office".<sup>106</sup> Thus, any donations to state and local campaigns or political parties are exempt from the disclosure requirements and amount limitations of FECA. Political parties quickly discovered and learned to exploit this loophole by encouraging individuals and PACs that had already maxed out their contributions to federal elections to make large donations to the political parties for state and local elections. These donations were termed "soft money", as opposed to the "hard money" contributions which fell under FECA's definition of a contribution. Under the FEC's interpretation of the statute, parties could use soft money to finance election activity that included a mix of state and federal elections, including party building events and get-out-the-vote efforts. This understanding of FECA created a way in which the national political parties could raise almost unlimited funds that could be used for a wide range of electioneering activity at the federal level. By the late 1990s, soft money spending accounted for more than a third of total spending by the national parties.<sup>107</sup>

A key difficulty that campaign finance regulation has faced in the United States is where to draw the line between campaign-related spending and spending directed at more general public debate. First Amendment jurisprudence has long been sceptical of any perceived attempt by the government to influence the content of public discourse through regulation that might favour one side or the other. When an individual wishes to voice their opinion on any given issue, basic notions of liberty enshrined in the First Amendment protect their right to do so. This principle came squarely into campaign finance regulation in the 1990s with the rise of issue advocacy. Political entrepreneurs, stymied from contributing directly to candidates or parties by campaign finance regulation, began finding other outlets to express their political views. The distinguishing characteristic of issue advocacy is that it does not explicitly promote a specific

105. See *Libman v. Quebec (Attorney General)*, 3 S.C.R. 569 (1997); *Attorney General of Canada v. Harper*, 2004 SCC 33.

106. 2 U.S.C. 431(8)(A)(i).

107. *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 (2003).

candidate or party for election, but instead seeks to influence public opinion on a specific issue.

The 1974 FECA amendments cast a fairly wide net over spending, arguably catching up both issue and candidate advocacy. Any expenditures that were “in connection with” or “for the purpose of influencing” a federal election, or “relative to” a federal candidate, fell under the federal hard money limits. Buckley narrowed the domain of regulated spending considerably, requiring that the expenditures be directed toward the express advocacy of a candidate. In so ruling, the court introduced a non-exclusive list of example word phrases that might be used to promote a candidate, the so-called Buckley “magic words”. Although the court slightly expanded its formulation of candidate advocacy, it remained the case that a huge swath of ads, clearly directed toward influencing election outcomes, remained protected under First Amendment free speech principles because they carefully avoided adding “Vote for Smith” or similar formulations.

Although the court was generally reluctant to bring issue advocacy within the FECA statutory framework, campaign finance reformers within congress were much more eager to strengthen the various surviving provisions of FECA. After several years of struggling to gain sufficient congressional support through the late 1990s, congress finally passed the Bipartisan Campaign Reform Act of 2002 (BCRA), often referred to as McCain-Feingold after the bills two chief sponsors in the senate. The driving goal of BCRA was to fill the two loopholes in the existing regulatory framework: the largely unlimited use of soft money by the political parties and issue advocacy. Title I of BCRA severely restricted the ability of national parties to raise and use soft money by limiting the ability of political incumbents and other elites to raise money falling outside of the FECA limits. This provision also banned the national and state parties from bundling and using non-federal funds for advertising that was in any way related to federal elections, including issue advocacy. Title II of BCRA prohibited the use of corporate or union funds for issue advocacy, or “electioneering communication” as it was termed in the statute. To avoid the inevitable First Amendment challenge regarding the potential vagueness and over-breadth of a ban on certain funds going to electioneering communication, BCRA only applied to a defined electoral period and advertising that directly referred to a candidate for federal office. Unlike in parliamentary democracies in which the governing party has the power to strategically call an election, such as in England and Canada, the imposition of an electoral period is quite unnatural to the United States. Because the dates of all federal elections are prescribed, there is no obvious start of the campaign cycle. BCRA attempts to impose such a period, setting the date at 60 days prior to a general election and 30 days prior to a primary.<sup>108</sup> Additionally, in exchange for the restricting soft money and issue advocacy, BCRA raised the

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108. BCRA 201 (II)(aa)-(bb).

hard money contribution limits for individuals and PACs. Although this provision received less attention than the new restrictions, it may prove in time to be the most significant feature of BCRA.

The Supreme Court took up consideration of these provisions of BCRA shortly after passage in *McConnell v. Federal Election Commission*.<sup>109</sup> As has become customary in this field, the court was deeply divided in its ruling. The majority opinion found that the soft money limits of BCRA had only a “marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech”, as the primary effect was simply to “regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidate, and federal officeholders”.<sup>110</sup> Title I of BCRA did not simply limit the solicitation and acceptance of soft money donations, but also prohibited the expenditure of such funds. This runs directly against the contribution/expenditure divide that formed the primary analytical distinction in *Buckley v. Valeo*, and the opponents of BCRA argued that the court must apply the strictest form of judicial scrutiny to this provision. However, rather than upholding *Buckley*, this opinion severely muddled the waters of the contribution and expenditure division.

The court also reached the issue of whether the Title II restrictions on issue advocacy, or “electioneering communication”, violated First Amendment free speech protections. The majority rejected the strict divide between express advocacy of candidates and issue advocacy created by FECA and *Buckley*, and instead took a more functional approach. Rather than relying on “magic words” to indicate direct support or opposition to a candidate, the court found that it was reasonable and constitutionally permissible for congress to use a broader definition of “electioneering communication”.

The majority opinion in *McConnell* upholding virtually all of BCRA inspired a stinging dissent from Justice Scalia, in which he lambasted the court for allowing what he perceived to be serious impediments to the freedom of speech. In particular, he argued that a consequence of BCRA was to limit the level of criticism that could be directed at elected officials. Further, Scalia pointed out that the attempt to level the playing field by limiting the amount of money that corporations and unions could contribute and use for issue advocacy actually advantaged incumbents, who are already a known quantity to the electorate: “if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favoured.”<sup>111</sup> According to Scalia, regulation of the political arena that has the potential to advantage incumbents should receive the most searching review by the court.

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109. 540 U.S. 93 (2003).

110. *McConnell v. Federal Election Commission*, 540 U.S. 93, 138 (2003).

111. *Ibid.*, 249.

The Supreme Court's most recent review of the BCRA provisions casts serious doubt as to whether the old Buckley line will hold for much longer. In *FEC v. Wisconsin Right to Life (WRTL II)*,<sup>112</sup> Chief Justice Roberts, writing for a slim majority, held that an independent ad run during the BCRA election period must do more than simply intend to influence the election to come under the spending limits. In this case, a non-profit advocacy corporation purchased a television commercial in which a candidate running for office was named and his position on a specific issue was criticised. Under § 203 of BCRA, labour unions and incorporated entities are not permitted to pay for independent "electioneering communication" 30 days prior to a primary election for federal office. WRTL conceded that their ad violated BCRA, but challenged its applicability to their commercial under the constitution. Recognising that McConnell had stretched the definition of contributions to those expenditures that were the functional equivalent of direct donations to a candidate, Justice Roberts drew the line in this situation:

Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech.<sup>113</sup>

The scepticism concerning intrusions into protected speech displayed in this opinion may well signal a shift against the Buckley framework.

#### IV. Conclusion

Attempts to limit the role of money in US politics have thus far proven almost entirely unsuccessful. After more than three decades of campaign finance regulation, the consensus view is that more money than ever flows into the political arena. More so than in other areas of election law, the institution most responsible for the current state of campaign finance law is the Supreme Court, not Congress. Political action committees, 527 groups and issue advocacy are all the unintended creations of the Supreme Court decisions carving away at both FECA and BCRA. Unfortunately, the doctrine has not proved flexible enough to keep up with the advancements in election practices. In most situations, the problems encountered by rigid legal doctrines tend to be marginalised in the United States. For example, restrictions on minor party access to the election arena tend not to significantly affect outcomes because more constraining political institutions, such as first-past-the-post election districts, already largely preclude minor parties from gaining any serious direct representation. In campaign finance regulation, the courts may have caused real damage by creating perverse incentives for political actors to circumvent the regulatory framework by exploiting the gaps left when the court carves out pieces of the enacted legislation.

The future of campaign finance regulation is deeply unsettled. A growing dissatisfaction with campaign finance jurisprudence on the court has provided

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112. *Federal Election Commission v. Wisconsin Right to Life (WRTL II)*, 551 U.S. 449 (2007).

113. *Ibid.*

hints that the whole regulatory framework constructed around the holding in *Buckley* might soon fall. The court's most recent examinations of campaign finance regulation reveal deep schisms between the justices, with no majority supporting the *Buckley* line of imposing distinct levels of scrutiny for contributions and expenditures. One wing of the court, including Justices Scalia and Thomas, and probably Justice Alito and Chief Justice Roberts, would strike down most of the BCRA provisions, overturning *Buckley* in the process. Justice Kennedy, a perennial swing vote on the court, appears to be moving toward this group as well. The other wing, led by Justice Stevens and joined by Justices Ginsburg, Souter and increasingly Justice Breyer, would similarly reverse *Buckley*, but in favour of allowing more stringent regulations on campaign finance. So far, neither side has been able to garner a majority to strike down *Buckley*, even though as many as all nine justices think it bad constitutional law. While it remains unclear whether a majority coalition on the Supreme Court will be able to set *Buckley* aside, it is certain that the current state of party funding and campaign finance law in the United States remains in flux.





# Electoral disputes in practice – The Mexican experience

Salvador Olimpo Nava Gomar<sup>114</sup>

## I. Preliminary statements on the definition of conflict and electoral justice

The universe of social conflicts does not end in the spaces occupied by political and electoral disputes and the reality of many of the so-called failed states cruelly proves this.<sup>115</sup> The genre of conflict includes many types of dispute between two or more individuals or groups. Most of them don't fall into the jurisdiction of Electoral Law. However, timely prevention and effective problem-solving of electoral disputes contribute to the consolidation of institutional mechanisms of the constitutional state and the building of confidence within a democratic regime.

In this fashion, political consensus and electoral disputes are two faces of the same coin: the democratic process. The level of democratisation of a political regime sketches the lines in each face: the reach (legitimacy) and the magnitude (intensity) of the conflict. Democracy and, in particular, the institutional and normative design of the electoral system are legitimate means to build consensus and an institutional mechanism for dissention.

The intensity of conflicts within a democracy can be synthesised by a minimalist concept of democracy as understood by Karl Popper, as a way in which citizens can get rid of their governments without shedding blood.<sup>116</sup> Thus, democracy is the root of conflict but also the means of peaceful resolution. This is, or should be, the main goal of a democratic government.

Another necessary factor to prevent political conflicts is that public institutions and government officials earn the trust of citizens. The construction of a stable public sphere guarantees peace,<sup>117</sup> even if conflict and dissent are characteristics of an open, complex and plural society.<sup>118</sup> In fact, dissent is an expression of

114. Magistrado de la Sala Superior del Tribunal Electoral del Poder Judicial de la Federación, México.

115. See Robert Rotberg, Christopher Clapham and Jeffrey Herbst (2007) *Los Estados Fallidos o Fracados: un debate inconcluso y sospechoso*, Colombia: Siglo del Hombre Editores-Universidad de los Andes.

116. See Karl Popper, "Apuntes a la teoría de la democracia", *El País*, 8 September 1987. Available at [www.elpais.com](http://www.elpais.com) (accessed 31 March 2009).

117. See Luigi Ferrajoli (2004) *Razones jurídicas del pacifismo*, Madrid: Editorial Trotta.

118. See Remo Entelman (2002) *Teoría de los conflictos: Hacia un nuevo paradigma*, Barcelona: Gedisa. For a doctrinal revision of the contrast between consensus and dissent, from the perspective

freedom and a consequence of diversity and pluralism in a democratic society. Conflict is a manifestation of dissent and a recurrent manifestation following the results of an election.<sup>119</sup>

For a democratic regime to increase the level of trust in public institutions within the population, to a degree which permits an effective resolution of social conflicts, it is necessary, as Guillermo O'Donnell has said, to establish a system of vertical accountability which includes reasonably clean elections (competitive, free, equal, inclusive and decisive), the existence of an integral justice system and measures of horizontal accountability to control and reprimand the illegal acts of authorities.<sup>120</sup>

Electoral justice is a manner of control which consists of the creation of state agencies or specialised electoral bodies with administrative and/or judicial functions (courts, tribunals, electoral chambers, electoral institutes or councils) in charge of organising elections and resolving electoral disputes that may arise.<sup>121</sup>

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of Political Science, see Enrique Serrano Gómez (1998) *Consenso y conflicto: Schmitt, Arendt y la definición de lo político*, Mexico: Centro de Estudios de Política Comparada, A. C. For a critical analysis of "consensus" or "agreement" in the German federal system, see Thomas Darnstädt (2006) *Konsens ist Nonsense*, Munich: dtv Verlag, subsequently translated by Francisco Sosa Wagner (2006), *La trampa del consenso*, Madrid: Editorial Trotta; the translation includes an introduction called *Estudio introductorio: El Estado se desarma*.

119. The notion of conflict is complex and includes a series of omnipresent issues between human groups and within them. This article only includes one area of political conflict: "electoral conflicts". These are understood as political and juridical disputes which can be solved by a judge or an independent and impartial court as a last instance. For a broader study of the notion of conflict, see: Marc Howard Ross (1995) *La cultura del conflicto: Las diferencias interculturales en la práctica de la violencia*, Barcelona: Ediciones Paidós; and Remo Entelman (2002) *Teoría de los conflictos: Hacia un nuevo paradigma*, Barcelona: Editorial Gedisa. For a review of this issue from an electoral perspective, see Jesús Orozco Henríquez (2006) "Justicia electoral: prevención y resolución de conflictos" *Justicia electoral y garantismo jurídico*, Mexico, Porrúa, 1-32; Juan José Toharia (1998) "Selección de los conflictos en los sistemas democráticos," *Justicia Electoral. Revista del Tribunal Electoral del Poder Judicial de la Federación*, Mexico, No. 11, 29-37; and Alfonso Zárate Flores (2002) "Democracia y conflicto" Mexico: *Colección de cuadernos de divulgación sobre aspectos doctrinarios de la Justicia Electoral*, 2, TEPJF.

120. See Guillermo O'Donnell (2001) "Accountability horizontal: La institucionalización legal de la desconfianza política", *Isonomía*, 14, April, 7-31. Moreover, societal accountability is recognised as one that has a vertical character and is realised by citizens' associations or social movements which have an impact on the other forms of accountability (vertical, electoral and horizontal) as a citizen control of politicians and political parties. In a nutshell, it is possible to confirm that all types of accountability are important for the adequate performance of a democratic regime, (Ibid., 24).

121. Here I keep dealing with Jesús Orozco's notion of "electorally contentious" or "electoral justice" which refers to the totality of the technical-juridical forms of objection, refutation, or other resources such as judgments and reclamations, of the electoral acts and procedures (dealt with before an administrative, jurisdictional, or political body) to guarantee the regularity of elections adjusted to the rule of law. In addition, the term "electoral justice" alludes to the correction of possible mistakes or infractions to electoral norms and to the protection of the right to choose and be chosen to carry out a public duty, through a series of participants' rights in order to protect the collective will and to contribute to the legality, certitude, objectivity, impartiality, authenticity, transparency and justice of the electoral acts and procedures. See Jesús Orozco Henríquez (2007) "El contencioso electoral. La calificación electoral", in Dieter Nohlen, Daniel Zovatto, Jesús Orozco and José Thompson (eds) *Tratado de derecho electoral comparado de América Latina*, 2nd edn, Mexico, Fondo de Cultura Económica, pp. 1152-288.

These institutions are mostly found in Latin America and, according to Jesús Orozco Henríquez, are one of the region's most important contributions to political science and electoral law.<sup>122</sup>

The notion of electoral conflicts or disputes may vary according to the degree of democratic development of a particular state. They acquire their own connotation as the political sphere becomes judicialised. In this way, the contentious electoral system has different characteristics from a contentious political system which defined the way electoral results were presented in the past.

In the present day, contentious electoral systems define themselves by the extent of political and electoral rights that are given to citizens and the functions granted to the electoral authorities. Therefore, electoral disputes will take place in a parliamentary or a judicial playing field. In general, there is a tendency to judicialise electoral processes in Latin America.<sup>123</sup>

Electoral justice plays a fundamental role in the conformation of the constitutional and democratic state. Electoral justice: a) contributes to the prevention of conflicts, b) resolves electoral disputes through constitutional and legal controls, and c) guarantees and protects political and electoral rights of citizens.

The aim of this paper is to explain, in a general way, the dynamics of electoral conflicts in Mexico, through the judicial practice of the distinct means of dispute resolution.

## **II. Types of electoral disputes: a Mexican perspective**

### **A. General aspects**

In Mexico, since the constitutional reform of 1996 and subsequent reforms in 2007-08, an integral system of electoral justice has been created and consolidated. Formed by: a) the Supreme Court in overseeing the constitutional control over electoral laws; b) the Federal Electoral Court formed of a High Chamber and five Regional Chambers, in charge of the concrete constitutional control of electoral laws, lawful control of acts and decisions of the administrative electoral authorities and political parties, c) 32 Local Electoral Courts, in charge of

122. *Ibid.*

123. Considering the legislations of 20 countries in the American Continent, 17 of them have bodies which are autonomous from state powers with the capability of solving the controversies derived from the preparation and results of elections (Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay, and Venezuela). Only in Canada, where the organisation of elections is attributed to an autonomous body, is electoral justice taken care of by ordinary courts of the judicial power. In two countries the organisation of elections is the competence of the executive power, but overseen by an autonomous body: in Argentina this same body solves the conflicts of electoral matters and in the United States these issues are taken care of by justice courts. Eight countries have administrative electoral bodies in addition to another jurisdictional body (Argentina, Brazil, Colombia, Chile, Ecuador, Mexico, Peru, and Venezuela). Twelve countries count with a jurisdictional body whose competence is the solution of electoral conflicts (Bolivia, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay and Uruguay).

supervising local elections, d) administrative controls by the federal and local administrative electoral authorities, and d) internal mechanisms within political parties designed to guarantee the right to participate in the electoral process of party members.

The system strives to protect fundamental rights and democratic principles through judicial procedures in independent and impartial courts, respecting due process and applying the constitution as well as international treaties like the Inter-American Convention on Human Rights and the International Covenant on Civil and Political Rights. Furthermore, the system operates on definitive principle, not only in the different stages of the electoral process, but also of the disputed acts, so that we guarantee certainty within the electoral process as well as the autonomy of the electoral authorities from political parties.<sup>124</sup> The integral system consists of the existence of a series of procedures intended to guarantee the political rights and fundamental principles of a democratic state. It begins with the protection of the rights of militants, continues with the protection of political rights of citizens before administrative electoral authorities, and culminates with the possibility of citizens defending themselves against gross human rights violations.<sup>125</sup>

## B. Electoral disputes since 1996

With the 1996 constitutional reform that incorporated the Electoral Court to the Judicial Power as a specialised tribunal, which gave the court powers of constitutional oversight and the task of judging presidential elections, electoral disputes have become highly judicialised in Mexico. The 2007-08 reform gave the court even more power to oversee pre-campaign issues, order recounts, void elections and verify the constitutionality of electoral laws.<sup>126</sup>

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124. In this respect, the following constitutional articles are relevant: 41; 99; 105, fraction II; and 116, fraction IV of the Political Constitution of Mexico. Certain theses of the High Chamber of the Federal Electoral Court are also relevant: "Juicio para la protección de los derechos político-electorales del ciudadano: Procede contra actos definitivos e irreparables de los partidos políticos" (Thesis S3elj 03/2003); "Medios de defensa internos de los partidos políticos: Se deben agotar para cumplir el principio de definitividad" (Thesis S3elj 04/2003); "Medio de impugnación intrapartidario: Debe agotarse antes de acudir a la instancia jurisdiccional, aun cuando el plazo para su resolución no esté previsto en la reglamentación del partido político" (Thesis S3elj 05/2005); "Partidos políticos nacionales: Se rigen preponderantemente por la constitución y leyes federales" (Thesis S3EL 032/2001);

125. A good example is the "Castañeda Case", taken before the Inter-American Court of Human Rights. See Inter-American Court of Human Rights, *Caso Castañeda Gutman Vs. México. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentence of 6 August 2008. Serie C, No. 184.

126. In general, see Ricardo Becerra, Pedro Salazar, and José Woldenberg (2005) *La mecánica del cambio político en México: Elecciones, partidos y reformas*, 3rd edn, Mexico: Cal y Arena. For a more thorough analysis of recent reform see Lorenzo Córdova and Pedro Salazar (2008) *Estudios sobre la reforma electoral 2007: Hacia un nuevo modelo*, Mexico: TEPJF. For a study of the electoral reform of 1996 see Ricardo Becerra, Pedro Salazar and José Woldenberg (1997) *La reforma electoral de 1996: Una descripción general*, Mexico: Fondo de Cultura Económica. For a revision of the evolution of electoral justice in Mexico see, among others, José Fernando Ojeste Martínez Porcayo (2003) "Evolución de la justicia electoral en México", in idem, *Evolución de la justicia electoral en México, en Alemania y en España*, Mexico: Cuaderno 2, TEPJF, pp. 13-42; José Woldenberg (2003)

There is a wide variety of disputes that can present themselves during a specific electoral process.<sup>127</sup> The series of electoral reforms mentioned above has increased the number of electoral cases that are presented. In addition, more electoral activities are regulated, more rights are protected and obligations demanded. This should derive in more confidence among the citizens and electoral actors that the electoral process is legally protected in all its stages.

In Mexico there are six types of resource for judicial dispute settlement in electoral matters.<sup>128</sup> Apart from the administrative resource of Revision which is presented in the Federal Electoral Institute (IFE), there is an appeal procedure that can be brought to the Electoral Court for cases involving an administrative decision that sanctions a political party.

In addition, when electoral results of federal processes are challenged there is a Suit of Non-Conformity that can be presented in the Regional and High Chambers of the Electoral Court. If presented in the Regional Chambers, the reconsideration process may be presented before the High Chamber as the last resort.

Finally, two more means of constitutional control may be presented. The first one, the trial for the protection of political and electoral rights of citizens which overseas violations to the main political rights (to vote, stand for election, association and political affiliation) as well as rights directly related to the former, freedom of speech, religion, right to information, petition and so on. And the last, constitutional revision, that grants the Electoral Court the power to oversee judgments and decisions that stem from state courts.

The jurisdiction of the Electoral Court is defined by subject matter. The High Chamber settles disputes stemming from the presidential election, deputies and senators by the principle of proportional representation, governors and the mayor of Mexico City, and disputes within national political parties.

The following table shows how the case load has increased since 1996.

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*“Orígenes, función y perspectivas del Tribunal Electoral del Poder Judicial de la Federación”, in idem., Testimonios sobre el desempeño del Tribunal Electoral del Poder Judicial de la Federación y su contribución al desarrollo político democrático de México, Mexico: TEPJF, pp. 345-67; Tribunal Electoral del Poder Judicial de la Federación (2002) Evolución histórica de las instituciones de la Justicia Electoral en México, Mexico: TEPJF.*

127. In this section I will mention the term “electoral conflict” or “electoral dispute” considering a restricted perspective, in which the conflict involves a juridical controversy presented before an electoral dispute settlement body or before competent internal bodies of political parties with the aim of guaranteeing a right or verifying the fulfilment of some legal or partisan obligation.

128. The means of objection or refutation in electoral matters are the following: the resource of revision (competence of the federal electoral administrative authority), the suit of non-conformity, the reconsideration process, the appeal procedure, the trial for the protection of political and electoral rights of citizens, and the resource of constitutional revision. The last five are the competence of the Federal Electoral Court of Mexico. Other means for the settlement of disputes are included in the constitution, the Organic Law of the Federal Judicial Power, and in the General Law of the System of Objection Means in Electoral Matters. In addition, there is a judgment to settle the working conflicts of the civil servants of the Federal Electoral Institute (IFE) of Mexico.

### High Chamber cases from 1 November 1996 to 4 November 2006<sup>129</sup>

MEANS	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	TOTAL
RRV	-	-	-	-	13	-	-	-	-	-	-	13
RAP	2	34	24	30	56	66	48	123	82	74	88	627
JIN	-	-	-	-	2	-	-	-	-	-	376	378
REC	-	73	-	-	44	-	-	63	3	-	52	235
JDC	2	64	68	80	251	130	1 187	634	992	921	1 739	6 068
JRC	6	214	266	288	538	435	256	565	529	290	472	3 859
JLI	-	59	50	55	29	29	21	27	33	31	27	361
AES	1	2	10	15	21	38	17	36	28	25	57	250
CLT	-	-	-	-	-	-	-	-	6	7	5	18
CDC	-	-	-	1	1	-	-	1	1	1	-	5
ELI	4	6	-	-	-	-	-	-	-	-	-	10
TOTAL	15	452	418	469	955	698	1 529	1 449	1 674	1 349	2 816	11 824

### High Chamber cases from 5 November 2006 to 31 March 2009

MEANS	2006	2007	2008	2009	TOTAL
RRV			6	1	7
RAP	7	92	269	62	430
JIN	1				1
REC			5	3	8
JDC	44	2 531	2 990	416	5 981
JRC	67	646	188	13	914
JLI	3	100	52	3	158
AES	9	3			12
CLT		2	1	2	5
CDC		1	1	1	3
RVT		4	9		13
AG		35	58	13	106
OP			26	8	34
SFA			7	7	14
TOTAL	131	3 414	3 612	529	7 686

129. Information provided by the Directorate of Statistical Analysis and Case Law of the Co-ordination of Case Law and Judicial Statistics of the Federal Electoral Court of Mexico.

<b>Acronym</b>	<b>English translation</b>	<b>Spanish</b>
RRV	Revision appeal	Recurso de Revisión
RAP	Appeal	Recurso de Apelación
JIN	Proceedings of non-conformity of electoral results	Juicio de Inconformidad
REC	Appeal for reconsideration	Recurso de Reconsideración
JDC	Proceedings for the protection of political and electoral rights of citizens	Juicio para la Protección de los Derechos Político-Electorales del Ciudadano
JRC	Constitutional review in electoral matters	Juicio de Revisión Constitucional Electoral
JLI	Proceedings relating to labour disputes of employees of the Federal Electoral Institute	Juicio para Dirimir los Conflictos o Diferencias Laborales de los Servidores del Instituto Federal Electoral
AES	Special issue	Asunto Especial
CLT	Proceedings relating to labour disputes between the Electoral Tribunal of the Judiciary and its employees	Juicio para Dirimir Conflictos o Diferencias Laborales Entre el Tribunal Electoral del Poder Judicial de la Federación y sus Servidores
CDC	Contradiction of opinion (in lower electoral courts)	Contradicción de Tesis
RVT	Revision appeal in the field of transparency and access to information	Recurso de Revisión en Materia de Transparencia y Acceso a la Información
AG	General issue	Asunto General
OP	High Chamber opinion on matters of unconstitutionality	Opinión de Sala Superior en Trámites de Acciones de Inconstitucionalidad
SFA	Request for transfer of a case	Solicitud de Facultad de Atracción
ASA	Appeal against an administrative sanction	Apelación por Imposición de Sanción Administrativa
ELI	Special labour proceedings (no longer in practice)	Procedimiento Especial Laboral
QRA	Complaint for administrative responsibilities of civil servants of the Electoral Court of the Judiciary of the Federation	Quejas por Responsabilidades Administrativas de los Servidores Públicos del Tribunal Electoral del Poder Judicial de la Federación

### **C. Types of electoral disputes**

To illustrate the types of different disputes that are presented at the Electoral Court I will give a few examples. I will classify the examples by electoral process stage, actors involved in the controversy and root cause of the dispute.

From the perspective of the stage within an electoral process, we must first begin by separating the activities performed before the formal process begins and

those that take place during the preparation of the electoral process; those that take place during election day and those that happen afterwards. Some strange disputes can even take place after the date the elected officials are programmed to be sworn in.

When classifying by the actors involved in a dispute we can identify: political parties, electoral authorities, political groups, state and federal legislatures, companies, candidates and private citizens.

Another way to classify electoral disputes is by the root cause of the conflict. For example, in some controversies the request is to nullify a concrete act because it is considered illegal. Others may want a legal norm to be invalidated because it contradicts the constitution or an international treaty. Many cases have to do with the extent or reach of a fundamental political right, and finally sometimes there is no real conflict but a definition or interpretation is needed of a certain legal precept.

#### **D. Electoral conflicts before, during and after election day**

To better illustrate the distinct conflicts that may be presented in the aforementioned stages the following thematic separation has been elaborated.

##### **1. Electoral disputes that can present themselves at any stage before, during or after the electoral process**

- Control of political propaganda.
- Constitutional review of general electoral laws.
- Legal review of electoral regulation passed by administrative authorities.
- Appointment of official radio and TV time to political parties.
- Political party funding disputes.
- Supervision of annual funding reports by political parties.

##### **2. Conflicts that may be presented before the electoral process**

- Electoral ID card disputes.
- Political party registration process.
- Campaigning before the legal period begins.
- Problems with electoral redistricting.
- Designation and integration of electoral authorities, administrative and jurisdictional.

##### **3. Conflicts during the electoral process**

a. During the preparation period:

- party coalition problems;



- propaganda control;
- pre-campaign spending;
- candidate choosing, primaries;
- registering of candidates;
- voter lists and registry disputes;
- administrative fines or sanctions;
- electoral authorities' campaigns.

b. On election day:

- voter registration cards;
- electoral observers' clearance issues;
- voting from abroad issues;
- polling stations issues;
- preliminary results problems;
- campaigning during election day.

c. During the results stage and judging of the election:

- district or state results tallying (mathematical errors or specific causes for cancelling votes);
- election annulment. Eligibility causes, serious violations to democratic principles or a high percentage of polling stations were not installed;
- disputes over the assignment of seats by the principle of proportional representation.

#### **4. Conflicts after the electoral process has concluded**

- Impossibility of carrying out the duties of the elected office.
- Disputes over access to ballots.
- Supervision of party spending during the campaign.

Other types of dispute have to do with conflicts within political parties that did not find an intraparty solution and differ from the aforementioned disputes.

Intraparty disputes:

- Challenging of party statutes.
- Designation of party officials.
- Affiliation or denial of party membership status.
- Disciplinary measures taken by the party against party members.

## E. The judicial perspective: relevant cases in Mexican electoral law

The following section will describe some of the most relevant cases that illustrate electoral conflicts in Mexico. Some of the cases reflect what can be called an expansive view of political rights through normative interpretation.<sup>130</sup>

### a. Rejection of political party registration

Democratic regimes must allow the arrival of new political actors to contend elections. These actors must agree to respect predefined rules. Two new political associations requested registration as political parties for the present electoral process. Both requests were rejected by the administrative electoral authority and the decision was confirmed by the Electoral Court. The first political association was denied registration because it did not comply with the principle of internal democratic practices in the election of party officials. The second was denied because it failed to respect the constitutional norm that prohibits labour unions from forming political parties.

In the first case (SUP-JDC-517/2008),<sup>131</sup> the High Chamber considered that one of the party statutes which allowed indefinite re-election of party officials was contrary to democratic principles.

In the second group of cases (SUP-JDC-2665/2008 and SUP-JDC-2670/2008),<sup>132</sup> the High Chamber determined that the fact that labour union members ran the political associations, and that resources from the labour union were utilised for the creation of the political association, constituted a violation of Article 41 of the Mexican Constitution.

### b. Conflicts over electoral redistricting

Territorial division is key for a sound electoral system and proper representation in the legislative branch. The High Chamber has said that redistricting must be disputed before the electoral process begins because it results in several measures that have to be taken by the administrative electoral authorities once it begins.<sup>133</sup> Also the redistricting process must be done with as much census information as possible to make sure that the population will be duly represented in the state and local legislatures.<sup>134</sup> It must also be taken into

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130. An example of this perspective is the case law (jurisprudence) S3ELJ 29/2002: Derechos fundamentales de carácter político-electoral. Su interpretación y correlativa aplicación no debe ser restrictiva.

131. Sentence of 20 August 2008.

132. Sentence of 1 October 2008.

133. Relevant thesis XXXVIII/2007: "Redistribución: Los acuerdos y resoluciones adoptados por el consejo general del instituto electoral durante las fases del proceso correspondiente, adquieren definitividad si no se impugnan oportunamente" (Legislation of the state of Quintana Roo) derived from the judgment SUP-JRC-234/2007, available on [www.trife.org.mx](http://www.trife.org.mx).

134. Relevant thesis II/2007: "Redistribución: Para llevarla a cabo se pueden utilizar instrumentos adicionales al censo general de población" (Legislation of the state of Aguascalientes), derived from the judgment SUP-JRC-480/2006.

account that redistricting affects not only the electoral map but also voter lists and ultimately the result of a legislative election.<sup>135</sup>

### **c. Appointment of electoral authorities**

As a federated state, in Mexico each federal entity has the right to pass their own electoral laws as long as they do not contravene the constitution. Each state also has a local administrative and judicial electoral authority.

The 2007-08 constitutional reform implied that each state had to pass legislation to adapt the local laws to the federal norm. In some of these cases the state reforms included a legal precept by which electoral officials in office were removed or the process for their renewal was modified.

This was the case in Mexico City and the law was challenged by some political parties. The High Chamber decided that the new laws could not affect the interests of the electoral officials already in office, and had to be applied henceforth.<sup>136</sup>

### **d. Disputes over party statutes**

One mechanism that ensures democratic participation, especially in party systems, has to do with the intervention by judicial review of party statutes. Two examples are cases SUP-JDC-1728/2006 and SUP-JDC-512/2008, in which the High Chamber declared the first paragraph of Article 94 of the Partido Acción Nacional's (PAN) statutes unconstitutional. The article stated that the national committee of the party could appoint local delegations at their own discretion. In the second case a statutory norm of the Partido Revolucionario Institucional (PRI) gave party members only 24 hours to dispute results in internal elections. This was considered too short a deadline by the court.<sup>137</sup>

### **e. Disenfranchisement**

A very interesting change in our jurisprudence has to do with disenfranchisement. Traditionally people charged and convicted of a crime are disenfranchised in Mexico. However, the High Chamber has said that only criminals who are imprisoned should be deprived of their political rights. When prisoners are granted parole, their political rights should be restituted because they had been disenfranchised as a result of being deprived of their freedom. Once their freedom is given back there is no excuse for keeping them disenfranchised.<sup>138</sup>

135. Thesis S3EL 025/2000: Redistribución: Los trabajos de. deben resolverse entre dos procesos electorales ordinarios", derived from the judgment SUP-JRC-12/2000.

136. SUP-JRC-105/2008 and SUP-JRC-107/2008. Sentence approved in public session (11 June 2008).

137. From the first case derived thesis IV/2007: "Facultad discrecional establecida en el artículo 94, primer párrafo, de los estatutos del partido acción nacional: Es inconstitucional al contravenir los principios de legalidad y certeza". Related to these subjects see case law (jurisprudence) S3ELJ 03/2005: "Estatutos de los partidos políticos: Elementos mínimos para considerarlos democráticos".

138. Thesis XXX/2007: "Suspensión de derechos político-electorales: Concluye cuando se sustituye la pena privativa de libertad que la produjo" (Legislation of the State of Mexico and others). Also

## f. Registration of candidates

Candidacies are often contested by the opposition and many of the disputes deal with candidates being eligible to stand for office. An interesting case posed the following question: can a person be eligible for office if he has not yet concluded the term he was elected for in a previous elected position? In other words, can a person run for governor if he has not concluded his period as mayor? The restriction may sound strange but it is part of a democratic conflict. If the person was elected for a three-year term what right has he to resign from that office to seek a higher position? Does he not owe the electorate the full three years? Also, what right is there to prohibit a person from seeking public office on the grounds that he is already an elected official? The High Chamber considered that the correct principle to follow was the second; the person should be able to run for office.<sup>139</sup>

## g. Electoral propaganda

Campaign propaganda is always a problem that has many faces. From the contents of the propaganda and freedom of speech issues to party spending, the 2007-08 reform sought to regulate these issues. Negative campaigns were a huge topic in 2006 and, although the High Court has said that during an electoral competition freedom of speech should be guaranteed, this freedom is not absolute, and a balance between freedom of speech and third-party rights to honour and reputation must not be affected.<sup>140</sup>

## h. Transparency in political parties

Another central theme of the 2007-08 reform was the inclusion of certain duties for political parties pertaining to transparency. Political parties must provide the Federal Electoral Institute a list of party member names and state of residence. In case number SUP-RAP-137/2008,<sup>141</sup> the High Court determined that this information does not infringe the party members' right to privacy, because the list does not include personal information protected by laws. Also political affiliation information is not protected by law because the individual has the choice to identify himself with party colours.

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see jurisprudence 1/2007: "Incorporación del ciudadano al padrón electoral y a la lista nominal de electores cuando es rehabilitado en sus derechos político-electorales", derived from the resolution of criterion contradictions between the regional Chambers of the third and fourth circumscriptions.

139. Thesis XLI/2007: "Derecho a ser votado: No debe vulnerarse por ocupar un cargo de elección popular" (Legislation of the state of Baja California).

140. See jurisprudence theses 11/2008 and 14/2007, respectively called: "Libertad de expresión e información: Su maximización en el contexto del debate político and honra y reputación. Su tutela durante el desarrollo de una contienda electoral se justifica por tratarse de derechos fundamentales que se reconocen en el ejercicio de la libertad de expresión ». Also see Thesis XXIII/2008: "Propaganda política y electoral: No debe contener expresiones que induzcan a la violencia" (Legislation of the state of Tamaulipas and others).

141. Sentence of 18 September 2008.

### **i. Institutional conflicts: official radio and TV airtime**

The Federal Electoral Institute (IFE) has the power to assign official radio and TV airtime to political parties and local and federal electoral authorities. The IFE denied the local Yucatan Electoral Court airtime arguing that there was no electoral process in that entity; the decision was appealed and the High Chamber ordered the IFE to grant the airtime to promote the institution.<sup>142</sup>

### **j. The duty to collaborate with electoral authorities and journalists' rights to reserve information**

In cases where a journalist has proof of wrongdoing by a political party within an electoral process, and has publicly denounced this fact, the journalist has the duty to collaborate with the IFE by giving testimony or providing proof of the allegations. However, the right of the journalist to protect his or her sources is also guaranteed, and the duty to collaborate is only enforced if the administrative authority has no other means of obtaining the required elements of proof. SUP-RAP-141/2008.<sup>143</sup>

### **k. Voiding elections**

Without a doubt, the main electoral disputes have to do with the results of an election. Judging the legality of an election is the principal duty of any electoral court. Here are a few examples:

In municipal elections in Yurécuaro and Acapulco the High Chamber interpreted the 2007-08 reform which states that an election can only be declared void by causes clearly stated in the law<sup>144</sup> as those causes of nullification contemplated in secondary norms as well as the respect of constitutional principles. These principles are not just general guidelines but true rules on how an electoral process should be carried out.

In the Yurécuaro case the court considered that the constitutional principle that divides church and state had been violated. Religious symbols were utilised during the campaign and could have been a determining factor in the election. Equity and freedom to vote were compromised as well as the religious neutrality of the state.

### **l. Impossibility of taking office**

The High Chamber has had several cases dealing with the impossibility of taking office. In these cases the political rights are expanded to guarantee that an

142. Thesis XL/2008: "Legitimación en el recurso de apelación: La tienen las autoridades electorales, tanto jurisdiccionales como administrativas, para impugnar actos relativos a la asignación de tiempo en radio y televisión, para fines institucionales", derived from the resource SUP-RAP-209/2008.

143. Sentence of 10 September 2008.

144. SUP-JRC-604/2007 and SUP-JRC-165/2008 (sentences of 23 December 2007 and 26 December 2008); Article 99, fraction II, second paragraph, of the Political Constitution of Mexico.

individual may not only stand for office but, if elected, he or she is also permitted to perform the duties he or she was elected to carry out.<sup>145</sup> In case SUP-JDC-466/2008<sup>146</sup> an elected official left his office and the mayor was required to swear in his substitute, also elected by popular vote. The mayor did not comply with his duty until he was ordered to do so by the court.<sup>147</sup>

**m. Access to electoral ballots after the election (SUP-JDC-10/2007 and SUP-JDC-88/2007)**

One of the most controversial cases has to do with a petition that was made to the IFE. A few citizens, mainly journalists, requested access to the ballots after the electoral process had concluded, but before the ballots were destroyed. The IFE denied them access and, alleging a violation to access to public information, the citizens appealed the decision. The court also said that denying access to the ballots did not infringe the right to information as the information contained in the ballots had been counted by citizens and the results had been made available to everyone.<sup>148</sup> The case is now pending in the Inter-American Commission of Human Rights.

**III. Final considerations: towards an integral understanding of electoral disputes.**

Law exists as a result of conflict within a society.<sup>149</sup> The views expressed and cited examples in this paper allow us to understand the complexity of electoral conflicts in modern day democracies.

In the constitutional state, political and electoral conflicts are an expression of pluralism and diversity of interests in a democratic society. Democracy does not pursue the abolition of conflict and discrepancy, but merely designs institutional and peaceful means of opposition. Electoral justice is one of these means; its

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145. Thesis XVII/2008: "Sustitución por renuncia de un representante popular electo: Procede el juicio para la protección de los derechos político-electorales del ciudadano", derived from the judgment SUP-JDC-79/2008. The High Chamber adopted this criterion and departed from thesis S3EL 026/2004: "Juicio para la protección de los derechos político-electorales del ciudadano: La permanencia o reincorporación en los cargos de elección popular está excluida de su tutela".

146. Sentence of 23 July 2008.

147. Also see Thesis XXVI/2008: "Convenios: Los realizados en contravención a derechos fundamentales, así como a los procedimientos y reglas previstas para la integración e instalación de los ayuntamientos, deben declararse nulos", where it is said that the electoral norms and the general principle that determines that the will of individuals cannot overwhelm the observance of law, nor alter or modify it, lead to the conclusion that the agreements celebrated between any of the subjects that intervene in the electoral process still sanctioned by the respective authorities, who by any means disclaim the fundamental citizen rights or the procedures for the integration and installation of a municipal or city Council, should be declared void.

148. Related to this issue, see Theses V/2007 and VI/2007: "Boletas electorales: En cuanto a su regulación no existe antinomia entre la ley de transparencia y el código electoral federal and derecho a la información. No está sujeto a la calidad o actividad profesional del solicitante".

149. Manuel Atienza (2000) *Tres Lecciones de Teoría del Derecho*, Spain: Editorial Club Universitario, p. 30.

task is not only to prevent and resolve electoral disputes, but also to protect fundamental rights and basic principles of a democratic state.

As to the role of constitutional judges, their task is not simply to resolve a concrete dispute, but to do it through the power of the law.<sup>150</sup> Furthermore, the mission of Constitutional Court is to find truth and justice or at least contribute to the process of finding it.<sup>151</sup>

The magnitude and intensity of electoral conflict stem from different roots: public confidence in the legal system, credible authorities and responsible behaviour by political actors. Electoral processes are not only susceptible to legal and institutional frameworks but to a complex reality that includes economic interests, organised crime and political negotiations. Because of this, now more than ever, we need strong electoral bodies that guarantee legality and certainty in electoral processes.

The Electoral Court has always tried to protect the political rights of the Mexican citizens. A solid commitment to international standards and openness to international organisations characterises the way the court works. Recent reforms in Mexico are a direct result of a sincere dialogue between the judicial and legislative branches, and have given the court new tools to safeguard our democracy. Only time will tell if its judgments and decisions have limited or contributed to our young democracy.

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150. Gustavo Zagrebelsky (2004) "Juicio a quo y promoción del proceso constitucional", in idem, *¿Derecho procesal constitucional?: y otros ensayos de justicia constitucional*, Mexico: Fundap, p. 22.

151. Related to these issues see Robert Alexy and Eugenio Bulygin (2001) *La pretensión de corrección del derecho: La polémica sobre la relación entre derecho y moral*, Colombia: Universidad Externado de Colombia; Peter Häberle (2006) *Verdad y Estado constitucional*, Mexico: UNAM-IJ; Ulfried Neumann (2006) *La pretensión de verdad en el derecho*, Colombia: Universidad Externado de Colombia; Michele Taruffo (1996) "La justicia civil: ¿opción residual o alternativa posible?", in Perfecto Andrés Ibáñez (ed.), *Corrupción y Estado de derecho: El papel de la jurisdicción*, Madrid: Editorial Trotta, pp. 135-50; Rodolfo Vigo (ed.) (2008) *La injusticia extrema no es derecho: De Radbruch a Alexy*, Mexico: Fontamara; and Gustavo Zagrebelsky and Carlo María Martini (2006) *La exigencia de justicia*, Trad. Miguel Carbonell, Madrid: Mínima Trotta.





# Comparative analysis of the bodies in charge of electoral supervision, especially judicial ones – The situation in Greece

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Vassilis Androulakis

Before the 1911 constitution, responsibility for scrutinising the lawfulness of electoral operations in Greece lay entirely with parliament. As was to be expected, parliament monitored the elections on the basis of political and not legal criteria. On occasion, parliamentary majorities ratified the unlawful election of their own members and invalidated the election of opposition members of parliament, even though they had been lawfully elected. For these reasons, since 1911 the country's constitutions have assigned responsibility for reviewing the validity of elections to a judicial body, while parliament is still responsible for monitoring disqualifications and cases where people are not entitled to stand for office.

Article 58 of the constitution currently in force, which dates from 1975 (revised in 1986, 2001 and 2008), assigns responsibility for monitoring parliamentary elections entirely to a court, known as the Special Supreme Court and provided for in Article 100 of the constitution. It should be specified that disputes concerning elections in the municipalities and prefectures (*nomoi*) may be the subject of administrative law action and come under the jurisdiction of the higher administrative courts, subject to appeal on points of law to the Supreme Administrative Court. Supervision of the election of the President of the Republic is the responsibility of parliament, which elects the president, and not of a judicial body.

Before looking at the role of the court in judging elections (II.), it is worth outlining the way in which it is organised generally (I.).

## I. General description of the Special Supreme Court

1. The court is a type of court new to Greek law, set up under the 1975 constitution. It is a court with special jurisdiction that differs from the existing types of jurisdiction (administrative jurisdiction and ordinary jurisdiction).

2. The court's jurisdiction is provided for in Article 100 of the constitution and covers: a) disputes concerning parliamentary and European elections (the latter are not mentioned in the constitution: jurisdiction was assigned to the court under Law No. 1180/1981),<sup>152</sup> and the validity and returns of referenda; b) judgment in cases involving disqualification from or forfeiture of office of a

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152. The court held that this act was not contrary to the constitution, although the latter listed its areas of jurisdiction exhaustively (judgment 10/1982).

member of parliament; c) settlement of disputes concerning jurisdiction; d) settlement of controversies on whether the content of a statute enacted by parliament is contrary to the constitution, or on the interpretation of provisions of such a statute when conflicting judgments have been pronounced by the Supreme Administrative Court, the Supreme Civil and Criminal Court or the Court of Auditors and, lastly, e) settlement of controversies related to the designation of rules of international law as generally acknowledged.

The organisation and working arrangements of the court are governed by Law No. 345/1976 and the rules of court. With regard to matters not settled by the above-mentioned act, the latter refers to the Code of Civil Procedure.

3. In accordance with Article 100 of the constitution and Law No. 345/1976, the Special Supreme Court is composed of three *ex officio* members, namely the three presidents of the supreme courts (Supreme Administrative Court, Supreme Civil and Criminal Court and Court of Auditors) and eight members with a two-year term of office, namely four members of the Supreme Administrative Court and four members of the Supreme Civil and Criminal Court, all chosen by lot every two years, in December, before a plenary public sitting of the Supreme Administrative Court. In addition to these 11 members of the judiciary, there are two university law professors (also chosen by lot) in cases where the court is ruling on a dispute concerning jurisdiction, or an objection to a law on grounds of unconstitutionality. The Special Supreme Court is presided over either by the President of the Supreme Administrative Court or by the President of the Supreme Civil and Criminal Court, depending on which of them has seniority in the office of president.<sup>153</sup> Law No. 345/1976 also provides for auxiliary staff composed of members of the legal service and lecturers in law from the Law Faculty of the University of Athens. The members of the court carry out their main occupations in parallel.

The fact that the composition of the court is not stable, along with its vast range of responsibilities, has prompted some legal writers to argue that, at the very least, the way in which the composition of the court is determined should be reviewed.

The duties of Secretary General of the Special Supreme Court are performed by the Secretary of the Supreme Court whose president presides over the court.

4. When cases are referred to the court, its president sets the date of the hearing and appoints a rapporteur from among its members. The rapporteur, with the help of one of the legal service members or professors who are members of the court, makes arrangements to obtain any evidence needed to hear the case and drafts a report which is lodged with the court registry five days before the hearing and may be examined by the parties. The court, of its own motion, considers the admissibility of the application and the merits of the submissions, but confines itself to examining the grounds pleaded by the applicants (judgment 16/2008).

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<sup>153</sup>. The court is currently presided over by the President of the Supreme Administrative Court.

5. The court does not hand down a very large number of judgments: to take recent years as an example, it delivered eight judgments in 2002 and 51 in 2000. As is to be expected, most of the cases concern elections. Apart from those concerning elections, the court's judgments are published in the Official Gazette.

## II. The court as an electoral court

Some preliminary remarks:

I shall refer not only to the court's jurisdiction to review the electoral process in the strict sense of the term, but also to its jurisdiction to rule on disqualifications from office concerning parliamentarians that emerge after the elections have taken place. It should be pointed out that the court does not have any case law concerning referenda for the simple reason that none has been announced to date. Moreover, there is no point in making a distinction between national elections and European elections because the principles applied are largely the same.

I shall consider, in this connection, firstly the conditions of the admissibility of applications (A), then the rules governing the court in the performance of its duties (B) and, lastly, the consequences of its judgments (C).

### A. Admissibility of applications

1. Firstly, it should be observed that cases may not under any circumstances be referred to the court *ex officio*: a case must be brought by an applicant. The following have the right to take a case to the court, and hence to challenge the election of a member of parliament:

- a. any voter on the electoral roll of a constituency, for the purpose of challenging the validity of the election results in that constituency. The applicant must prove that he or she is on the electoral roll (judgment 26/2004);
- b. any candidate standing for parliament in a constituency who has not been elected. The applicant (voter or substitute member of parliament) may neither call for the annulment of the elections as a whole (judgment 30/2004), nor contest the election of a member of parliament in another constituency, unless he or she can argue that a violation of electoral law in another constituency affected the results in his or her own constituency (judgments 8/2008, 12/2005, 26, 30/2004).

The court has held, on the basis of a strict interpretation of the law and the constitution, that an application from a political party or legal entity is inadmissible (judgments 26, 30/2004). It merely acknowledged that political parties could intervene in the proceedings.

2. Electoral operations are complex operations, the main stages of which are as follows:

a. Dissolution of parliament and announcement of elections (by decree). The court is not competent to set aside the decree dissolving parliament, and therefore rejects any application containing such a request as inadmissible. It may nevertheless, in connection with a specific case, consider whether the decree complies technically with the law; obviously the grounds for dissolving parliament may not be reviewed (judgments 9/2008, 30/2004, 47/2000). Nor does the court have jurisdiction to set aside the decree allocating seats to members of parliament, but it may examine its lawfulness in connection with a specific application challenging the election of a member of parliament, in which case its review covers all the aspects of the lawfulness of the decree.

b. Submission of candidacies and announcement of the names of the candidates. The latter operation is entrusted to the Regional Court located in the capital of the constituency. On the occasion of the 2007 elections, the problem arose of the scope of the review carried out by the courts in this connection, in other words whether they had jurisdiction to consider, at that stage of the election proceedings, whether a particular candidate was entitled to stand for election or whether they must confine themselves to formal scrutiny of candidacies. Some legal writers considered that only the Special Supreme Court had jurisdiction to carry out such a review. This was not the view taken by the Supreme Civil and Criminal Court, which refused to ratify one candidacy on the grounds that the candidate held a post that disqualified her from standing for election, even though she had resigned beforehand.

c. The actual ballot and the validation of the results by the Regional Court. The 15-day deadline for appealing runs from the date on which the validation decision is published. An application may not be submitted to the court before the elections take place and the results have been announced. An appeal against forthcoming elections is inadmissible (judgment 9/2007), as is an appeal registered before the official announcement of the results (judgments 22/1985, 5/2005 concerning the European elections) or an appeal registered after the expiry of the deadline.

There is no deadline for appeals to have a member of parliament removed from office on the grounds that he or she is disqualified from office (judgments 1/2007, 5/2006).

As for the registration of voters on the electoral roll, which is an administrative decision (and therefore subject to appeal to the Administrative Court), the court reviews the lawfulness of registration in connection with specific cases (judgment 16/2005).

3. Applications must be submitted in writing and contain the surname, first name and status of the applicant and the (elected) persons against whom they are addressed, and set out the facts and the grounds for annulment. They must also indicate the constituency concerned by the prospective annulment of the election. They do not have a suspensive effect. Once an application has been submitted to the court, the hearing takes place before the court even if the applicant withdraws the appeal (judgment 7/2005, which held that the fact that it

was impossible for the applicant to withdraw the appeal was not contrary to Article 20 of the constitution, which guarantees the right to legal protection from a court). A friendly settlement is not possible. Lastly, the court holds that there is no need to rule on cases that are pending if the parliamentary session ends before the hearing (31/1997).

## **B. The rules governing the court in the performance of its duties**

### **1. Review of compliance with the constitutional principles governing elections**

a. Article 51 of the constitution provides that elections shall take place by direct universal suffrage and secret ballot, and that parliamentary elections shall be held simultaneously throughout the country. The court reviews compliance with these principles by considering whether legislation governing elections is in keeping with the constitution. It should be noted that Greece has a system of widespread review of the constitutionality of the law, in that every court has the duty to review the constitutionality of the law applicable.<sup>154</sup> It can therefore happen that the court reviews the electoral laws it has occasion to apply in the light of constitutional principles.

b. In its judgment 34/1985 the court had occasion to review the law in the light of the constitutional principle of direct suffrage. The case concerned the abolition, by the law existing at the time, of the system whereby a voter could choose which of the candidates on the list submitted by a party he or she wanted to see elected. This system was replaced by a fixed-party-list ballot. The court held that the law was not contrary to the above-mentioned principle (or indeed to any other constitutional principle) because, even in this circumstance, the will of another party (an electoral college) did not intervene between the expression of the will of the voter and the election. Suffrage therefore continued to be direct.<sup>155</sup>

According to the court's case law, parliament is free to choose the electoral system it wishes, provided it complies with constitutional principles. The court held that the constitution provided for equal suffrage, which meant that a voter could not vote in more than one constituency and that each vote had the same value, in that it must have the same influence on the election results of a constituency. It considered that the electoral law provision whereby no member of parliament could be elected if his or her party had not obtained at least 3% of the total number of votes cast in the country was constitutional. According to the court, this was an objective, impersonal percentage that made it more likely that stable, viable governments would be formed (judgments 26/2001, 74/1997). On the same grounds, the court considered that the provision whereby seats not filled after the

<sup>154</sup>. Under Article 93, paragraph 3, of the constitution, "The courts shall be bound not to apply a statute whose content is contrary to the constitution."

<sup>155</sup>. In the meantime, the law that gave rise to this judgment has been repealed. Under the legislation in force, fixed-party-list ballots apply where parliamentary elections take place less than 18 months after the previous elections.

initial allocation were assigned to the party that obtained the largest number of votes was constitutional (judgment 47/1978).

In a recent judgment (judgment 4/2008), the court had the opportunity to assess the constitutionality of a statutory provision whereby former prime ministers standing for election were considered to have obtained all the votes cast for their party in the constituency in which they were standing without the need for voters to express a preference for them. According to the court, this provision did not violate any constitutional principle, in particular the principle of equality of candidates, which required that the law treat candidates in the same way, without discrimination, for in the current system the prime minister played a preponderant and dominant role, as was borne out by a series of constitutional provisions. The challenged provision merely acknowledged that role, admittedly introducing an exception to the equality rule (in the case of other candidates, voters had to express a choice in their favour for them to be elected), but it was constitutionally tolerable because it was based on objective criteria related to the political life of the country.

While in most cases the court recognises the constitutionality of electoral provisions, thereby acknowledging that parliament has a wide measure of discretion when legislating on the subject, there are two cases in which it did not hesitate to reject its choices.

Blank ballot papers raise tricky constitutional issues. Electoral law provides that the electoral quotient is calculated on the basis of valid ballot papers, with no account being taken of spoilt and blank ballot papers. In its judgment 12/2005, the court, in a reversal of precedent, held that the provision in question was contrary to the principles of the sovereignty of the people and the equality of votes and hence at variance with the constitution and inapplicable. Blank ballot papers should therefore be taken into account in calculating the electoral quotient and allocating seats. The court, in accordance with its case law, was therefore to reallocate the seats in the main constituency of Central Macedonia. This judgment, which was moreover taken by a narrow majority of six votes to five, was severely criticised. Parliament, for its part, did not, in the Electoral Act that followed, amend the provision in question concerning blank ballot papers (Law No. 3434/2006 and Decree No. 96/2007 codifying the electoral legislation). Given that parliament has retained the provision, it will be interesting to see whether in future, in the context of "dialogue" between parliament and the court and on the occasion of a forthcoming election, the court will stand by its new case law.

In another judgment (judgment 36/1990), the court held that the Electoral Act in force at the time infringed the principle of equality and Article 52 of the constitution, which reads: "The free and unfalsified expression of the popular will, as an expression of popular sovereignty, shall be guaranteed by all State officers ...". More specifically, under the electoral system in question, constituencies in which only one member of parliament could be elected were dealt with differently from the others: once it had been established who had been elected, the votes cast in

that constituency in favour of the candidate who had not obtained a majority no longer counted when votes were added up to obtain the total number of votes that the party to which that candidate belonged was deemed to have obtained at national level (this figure is designed to serve as a basis for determining the number of seats to be allocated during the second round of apportionment and allocation of seats). By contrast, unused votes in favour of candidates from the same party in constituencies where several members of parliament were elected were added up. The court ordered a new census, in keeping with constitutional principles, to establish the total number of voters at national level that was to serve as a basis for recalculating the allocation of seats.

## 2. Review of violations of electoral law

The court ensures that the provisions of the Electoral Act and any other rules concerning the election have been complied with. Any application alleging failure to comply with the provisions in question may be submitted to the court.

Here are a few examples. The court frequently has occasion to rule on the validity of ballot papers. It considers as invalid those ballot papers that bear distinctive marks that could violate the secrecy of the ballot (which is a constitutional principle) by making it possible directly or indirectly to identify the voter. The court seeks to ascertain whether the mark was made intentionally for the purpose of revealing the voter's identity. Any mark made by chance, because of the voter's advanced age, haste, state of emotion or otherwise does not cause the ballot paper to be invalidated (judgments 9/2005, 25/1999). In case of doubt, the court considers the ballot paper to be valid (judgment 12/2005).

The court has held that failure by the presiding officer of the polling station to initial ballot papers taken out of the ballot box, serious shortcomings in the drafting of election reports, a lack of election material in a polling station making it impossible for a number of voters to express their preference for a candidate or party and the use of non-regulation ballot papers constitute infringements of the electoral rules. With regard more specifically to failure to initial the ballot papers, this may invalidate the ballot papers only if their validity is contested (judgments 12/2005, 26/2001).

In a recent judgment, the court had to interpret a provision of the Electoral Act whereby it is forbidden to engage in election campaigning or issue election messages on the eve or day of the election. The court held that the messages prohibited are those issued publicly to a broad public and an indeterminate number of people. Text messages sent by mobile phone are therefore not prohibited messages: they are private messages addressed to a finite, albeit possibly large, number of people and therefore constitute a means of personalised communication (judgment 23/2008).

The court has ruled that illicit promises and gifts to voters at election time constitute violations of the law and may lead to the election being declared invalid in a particular constituency (judgments 25/2001, 2/2000, 26/1994). It has

also held that exit polls are not, in principle, illegal. According to the case law, reference to exit polls on certain television channels before the end of the ballot, although reprehensible and subject to criminal and administrative penalties, cannot influence the expression of the will of the voters sufficiently to warrant annulment of the elections (judgment 66/199).

According to the constitution (Article 29, paragraph 2) and Law No. 3023/2002, a member of parliament who exceeds the authorised expenditure ceiling during the election campaign may be removed from office by decision of the court.

### **3. Review of situations where people are not entitled to stand for election or are disqualified from office**

Articles 56<sup>156</sup> and 57<sup>157</sup> of the constitution, which are fairly detailed, set out the situations in which parliamentary candidates are not entitled to stand for election and members of parliament are disqualified from office.

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156. "1. Salaried civil functionaries and servants, other employees of the public sector, persons serving in the armed forces and the security corps, employees of local government agencies or of other legal entities of public law, elected single-member organs of local government agencies, governors, deputy governors or chairmen of the boards of directors or managing or executive directors of legal entities of public law or of state legal entities of private law or of public enterprises or of enterprises whose management the state appoints directly or indirectly by administrative act or as shareholder, or of local government enterprises, may neither stand for election nor be elected to parliament if they have not resigned prior to their nomination. Such resignations shall be valid upon written submission thereof only. Military officers who have resigned may under no circumstances return to active service. Senior elected single-person organs of local government agencies of the second degree may not stand for election nor be elected to parliament during the tenure for which they have been elected, even if they resign. 2. Professors of institutions of university level are exempt from the restrictions of the preceding paragraph. The exercise of the duties of professor shall be suspended for the duration of the parliamentary term and the manner of replacement of professors elected to parliament shall be specified by law. 3. The following persons may not stand for election nor be elected to parliament in the electoral district where they served or in any electoral district to which their local authority was extending during the last eighteen months of the four-year parliamentary term: a) Governors, deputy governors, chairmen of the boards of directors, managing and executive directors of legal entities of public law, with the exception of associations, of state legal entities of private law and of public enterprises or of enterprises whose management the state appoints directly or indirectly by administrative act or as shareholder. b) Members of independent authorities which are established and operate pursuant to article 101A, as well as of the authorities designated by law as independent or regulatory. c) Senior and top-ranking officers of the armed forces and the security corps. d) Salaried employees of the public sector, of local government agencies or of enterprises thereof, as well as of the legal entities and enterprises under case (a) who were holding a position of head of unit at the level of department or another corresponding position, as specifically provided by law. Employees mentioned in the preceding section and having wider local authority are subject to the restrictions of this paragraph concerning electoral districts other than those of their seat, only in case they were holding a position of head of unit at the level of general directorate or other corresponding position, as specifically provided by law. e) Secretaries general or special of ministries or of autonomous secretariats general or regional administrations and all persons that the law puts in the same category as these. Persons nominated as state deputies shall not be subject to the restrictions of this paragraph. 4. Civil servants and the military in general, having undertaken the obligation by law to remain in service for a certain period of time, may not stand for election nor be elected to parliament during the period of such obligation."

157. "1. The duties of member of parliament shall be incompatible with the duties or the capacity of owner or partner or shareholder or governor or administrator or member of the board of directors or general manager or of their deputies, of an enterprise that: a) Undertakes public works or studies or supplies or the provision of services to the public sector or concludes with the public sector similar



### a. Prohibition from standing for election

It is generally accepted that provision should be made for situations where people are not entitled to stand for election, in order to prevent the election of persons who may influence the electorate by virtue of the posts they occupied before standing for election. This rule, which limits the freedom of citizens to stand for election and be elected, is designed to enhance the neutrality and impartiality of persons in public office. It is not appropriate here to go into the details of situations where people are not entitled to stand for election or make constitutional distinctions (absolute and relative prohibition).

As we have seen, entitlement to stand for election may also be reviewed at the stage when candidacies are announced. It is worth pointing out that, according to a long line of court decisions, given that cases where people are not entitled to stand for election are exceptions that undermine electoral freedom, the relevant constitutional provisions must be strictly interpreted (judgments 20/2008, 12/2004, 7/2002, 51, 18/2000). Accordingly, recent case law (that dating from after the 2001 revision, which largely reformed Article 56) has specified, pursuant to Article 56, that the following are entitled to stand for election: a) a deputy prefect who was not elected to the post but appointed by order of the prefect (who was elected to that post) and who is consequently not an elected official (judgment 5/2008); b) the deputy chair of the board of a public law legal entity, who may not be considered as chair simply because he stands in for the chair when the latter is absent or otherwise engaged (judgment 7/2008);

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contracts of a development or investment nature. b) Enjoys special privileges. c) Owns or manages a radio or television station or publishes a newspaper of country-wide circulation in Greece. d) Exercises through concession public service or public utility enterprise. e) Rents for commercial purposes real estate owned by the state. For the purposes of applying this paragraph, local government agencies, other legal entities of public law, state legal entities of private law, public enterprises, enterprises of local government agencies and other enterprises whose management the state appoints directly or indirectly by administrative act or as shareholder, are put in the same category as the public sector. Shareholders of an enterprise falling within the restrictions of this paragraph are all persons possessing a percentage of more than one percent of the share capital. *The duties of member of parliament are also incompatible with the exercise of any profession. Activities compatible with parliamentary office, as well as matters relating to insurance and pension issues and to the manner in which members of parliament return to their profession after loss of the capacity of member of parliament, shall be specified by law. Under no circumstances may the activities of the previous section include the capacity of employee or legal or other advisor of enterprises under cases (a) to (d) of this paragraph.* Violation of the provisions of the present paragraph shall result in forfeiture from parliamentary office and shall render the related acts null and void, as specified by law. 2. Members of parliament falling within the provisions of the first section of the preceding paragraph must, within eight days of the day on which their election becomes final, state their choice between their parliamentary office and the above stated duties or capacities. Failing to make the said statement within the set limit, they shall forfeit their parliamentary office *ipso jure*. 3. Members of parliament who accept any of the capacities or duties mentioned in this or in the preceding article and designated as impediments for parliamentary candidature or as incompatible with parliamentary office, shall forfeit that office *ipso jure*. 4. The manner of continuation or transfer or dissolution of contracts mentioned in paragraph 1 and undertaken by a member of parliament or by an enterprise to which he participated before his election, or undertaken in a capacity incompatible with his office, shall be specified by law." The sentence in italics was deleted when the constitution was revised in 2008 and replaced by the following provision: "Professional activities other than those mentioned in the preceding paragraphs which members of parliament are prohibited from carrying out may be specified in a special law."

c) civil servants and public law legal entities bound by a private law contract, since they do not come under the scope of Article 56, paragraph 1, of the constitution, which refers to “civil functionaries” (judgment 13/2004); d) the chair of the board of a private law municipal undertaking, who is not covered by Article 56, paragraph 3.a (judgment 10/2004) and e) an official of the European Communities, who does not, *ipso facto*, have national civil servant status (judgment 20/2008). Furthermore, the court held that the public limited companies Greek Electricity and Hellenic Radio and Television were public enterprises within the meaning of Article 56, with all the consequences that this status entailed for their directors (judgments 91/1997, 21/2000), and that a dentist employed by Social Security under a private law contract fell into the category of “other employees” of the public sector and “employees” of other legal entities of public law and was therefore not entitled to stand for election if the conditions laid down in Article 56, paragraph 1, were not fulfilled (that is if the dentist did not resign before his candidacy was announced; judgment 26/2008).

*b. Disqualification from office (incompatibilities)*

People may be disqualified from office because they are engaged in occupations or activities that are not compatible with parliamentary office. Disqualification is designed to guarantee the independence of parliamentarians, the impartial performance of their duties and the transparency of politics. Disqualification is an issue that emerges only after the election, and the elected candidate must choose within the constitutional time limit between parliamentary office and his or her occupation. Cases in which persons are disqualified from office are exhaustively listed in the constitution (judgment 2/1992) and, as in cases where persons are not entitled to stand for election, the relevant constitutional provision must be strictly interpreted (judgments 7/2002, 22/2001).

Under Article 57, paragraph 1, as it stood before the 2008 revision, the court annulled the election of a member of parliament who was a practising barrister, on the grounds that he had not chosen between parliamentary office and his profession. The problem was that this provision was the result of the 2001 revision and had a retrospective effect, in that it concerned members of parliament elected in the elections that took place in 2000. The member of parliament against whom the appeal was directed argued that the retrospective effect violated the principle of legitimate expectations, which was a constitutional principle. The court rejected the argument on the grounds that constitutional provisions all had the same value and that the provision preventing certain persons from standing for election was applicable as a special law (judgment 11/2003). The member of parliament then took his case to the European Court of Human Rights, which, in the case of *Lykourazos v. Greece* (15 June 2006), sentenced Greece under Article 3 of the Protocol No. 1 to the Convention (Right to free elections). According to the Strasbourg Court, the court had

to satisfy itself that the conditions imposed in the right to vote and to stand for election [did] not curtail the rights in question to such an extent as to impair their very essence

and deprive them of their effectiveness; that they [were] imposed in pursuit of a legitimate aim; and that the means employed [were] 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 people through universal suffrage ... Equally, once the wishes of the people [had] been freely and democratically expressed, no subsequent amendment to the organisation of the electoral system [could] call that choice into question, except in the presence of compelling grounds for the democratic order.

The European Court of Human Rights went on to observe that

the applicant [had been] elected in conditions which were not open to criticism, namely in accordance with the electoral system and Constitution as in force at the material time. Neither the applicant, as candidate, nor his electors could imagine that the former's election could be called into question and held to be flawed while his term of office was still in progress on account of a disqualification arising from the parallel exercise of a professional activity.

In the circumstances, the court concluded that the Special Supreme Court had caused the applicant to forfeit his seat and had deprived his constituents of the candidate whom they had chosen, in breach of the principle of legitimate expectation, and that this situation was in breach of the very substance of the rights guaranteed by Article 3 of Protocol No. 1. The court therefore found that there had been a violation of this provision.

This judgment is important, particularly because it raises the question of the relationship between the constitution and the European Convention on Human Rights and seems to accept that the latter takes precedence.

### *c. The consequences of the court's judgments*

It should first be observed that judgments of the court annulling the election of a member of parliament are valid *erga omnes* (judgment 8/2000). Such judgments are final and not subject to appeal: any appeal would therefore be inadmissible (48/1982).

If the court finds that a member of parliament was not entitled to stand for election or is disqualified from office, it merely declares the member's election invalid or rules that the member must be removed from office. It is not competent to declare another candidate elected (judgment 48/2000).

Since the 2001 revision of the constitution, removal of a member of parliament from office on grounds of disqualification has no retrospective effect and applies only as from publication of the court's judgment (judgment 11/2003).

If the court finds an error in the counting of the votes obtained by a candidate, it recounts them itself, in which case it may declare another candidate elected (judgment 36/1990). In that case, the candidate declared elected by the court is considered to have been elected from the start of his or her term of office.

A judgment acknowledging that a member of parliament was not entitled to stand for election has a retrospective effect. Decisions by the chamber to which the member of parliament who has been removed from office belonged are considered valid even after his or her removal from office.

Lastly, if the court finds a serious irregularity in the election procedure, it may annul the election in question, in which case a new ballot is held. The court has, however, made use of this power only once since 1975.

# A comparative analysis of the bodies in charge of electoral supervision, especially judicial ones – The Czech case

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Milan Podhrazky

To define the judicial control of elections in the Czech Republic, it is necessary to begin by mentioning several general points relating to the Czech constitutional system and the position of the courts within this system. In my opinion, the Czech experience in the field of election control could represent a suitable model of a country where electoral cases are primarily tried by the administrative courts, in spite of the existence of the Constitutional Court. As a representative of the Supreme Administrative Court of the Czech Republic, I will, of course, deliver my report specifically from this court's point of view, although the Constitutional Court and the regional administrative courts will also, to some extent, be within the scope of this report.

As the legal regulation of election control in the Czech legal system is not very detailed, the role of the Supreme Administrative Court and the regional administrative courts in this context is really indispensable. I will therefore divide my report into two separate parts. In the first part, I will present you with some general information about election control in the Czech Republic and especially about the role of the Constitutional Court and the Supreme Administrative Court within this system of control. The second part will give concrete examples of judicial decisions in the field of election control (leading cases).

## **I. Judicial control of elections in the Czech Republic: preliminary notes**

The judicial power in the Czech Republic is exercised by the ordinary ("general") courts on the one hand and the Constitutional Court on the other. It is necessary to point out that the Constitutional Court in the Czech Republic is a specialised judicial body responsible for the protection of constitutionality. In contrast to the situation during the Czechoslovak period prior to the Second World War (Law No. 125/1920 Coll.), no specialised electoral courts in the Czech Republic exist at present.

Before January 2003, justice in electoral matters was significantly fragmented. There were no specific and detailed regulated judicial proceedings in the field of electoral matters and also the general regulation in several electoral acts was incomplete. The highest court in electoral matters was the Supreme Court of the Czech Republic. Since 1 January 2003 (the date the new Code of Administrative

Justice – Law No. 150/2002 Coll. – came into force), administrative courts have been competent to hear all disputes relating to elections. Although electoral disputes are not strictly speaking administrative law issues per se (they do not involve judicial review of public administration), electoral matters are issues of so-called public law, so competence in this area has been conferred upon the administrative courts. Consequently, justice in electoral matters as well as justice in matters concerning political parties became a part (a very specific part) of newly conceived administrative justice in the Czech Republic.

It was the Constitutional Court which, in its decisions from the 1990s, repeatedly pointed out the deficiency of administrative justice in the Czech legal order and eventually – through its decision of 27 June 2001 (published as Law No. 279/2001 Coll.) – annulled in its entirety Part Five of the Civil Procedure Code, which had been the legal basis of administrative justice in Czech law. However, the Constitutional Court deferred the effect of its ruling until 1 January 2003, thus providing the legislature with sufficient time to pass the necessary legislation. The court's ruling became the necessary impetus for the new framework of administrative justice to be adopted by both chambers of the parliament. The Supreme Administrative Court was re-established on 1 January 2003, nearly 50 years after its dissolution.

Today, the Supreme Court is the highest judicial body in the Czech Constitution for matters that fall within the jurisdiction of courts, with the exception of matters that come under the jurisdiction of the Constitutional Court or the Supreme Administrative Court. This means that the highest judicial body on electoral matters within the justice system today is the Supreme Administrative Court.

## **II. The Supreme Administrative Court, the Constitutional Court and justice in electoral matters**

Under Czech law, the authority competent to certify the electoral results is the State Electoral Commission. This means that responsibility for election control lies primarily with this authority. This commission issues a certificate of election during the elections for both chambers of the parliament (the Assembly of Deputies and the Senate). In municipal and regional elections, the municipal office and the regional authority issue the certificate of elections. Bodies competent to decide on complaints against the certification of election results are the regional administrative courts (in municipal and regional elections) and the Supreme Administrative Court (in parliamentary elections and elections to the European Parliament).

The Constitutional Court is a competent body in electoral matters, firstly, as it makes decisions about complaints against the certification of election results as a court of second instance in parliamentary elections and, secondly, because it operates as a court for extraordinary relief in other matters. A remedial action against a decision concerning the certification of the election of a deputy or a

senator may be brought by a deputy, a senator, or the electoral party for which the deputy or senator stood as a candidate, against a decision claiming he or she was not elected. A remedial action may also be brought by a person against a decision of the appropriate chamber of the parliament, or a body thereof, concerning the certification of the validity of a deputy's or senator's election. If the court grants the remedial action, it shall declare in its judgment that the deputy or senator was validly elected. Upon the announcement of such judgment of the Constitutional Court granting the action, the decisions of other authorities, which are in conflict with the judgment, shall lose force and effect.<sup>158</sup> As a court of extraordinary relief, the Constitutional Court then decides about the constitutional complaints. A constitutional complaint (which, under certain circumstances, could also relate to election control) may be submitted by a natural or legal person, if he or she alleges that his or her fundamental rights and basic freedoms guaranteed by the constitutional order have been infringed as a result of the final decision in a proceeding to which he or she was a party, or through a measure, or some other encroachment by a public authority.<sup>159</sup>

Furthermore, it is necessary to mention that, under Czech law, no specific constitutional provisions stipulating the judicial control of elections exist. Article 20 of the Czech Constitution lays down solely that other conditions of exercising the right to vote, the organisation of elections and the scope of judicial review shall be set by law. The only constitutional provision related to judicial control of elections regulates the above-mentioned jurisdiction of the Constitutional Court over remedial actions concerning the certification of elections of a deputy or a senator (Article 87).

The Czech electoral courts are not involved in certifying electoral results. Consequently, the electoral court trying a case (with the exception of the Constitutional Court dealing with the review of a certificate of election of a member of parliament) makes a decision only in response to an election complaint and then its decision cancels only the challenge decision. From the point of view of proceedings in electoral matters, it is also important to mention that the electoral courts can collect evidence which they judge to be necessary in order to make a decision. The parties can present evidence as well, but the courts are not bound by the scope of the evidence presented by the parties. Administrative courts in election cases decide in principle on an *ex tunc* and not on an *ex nunc* basis; therefore, if they cancel the election results, the apparently elected candidate is apprehended as though he or she had never been elected, even if he or she were already installed or taking part in any activities of the body to which he or she had apparently been elected.

As will be stated in more detail below, under the Code of Administrative Justice, administrative courts are competent to hear disputes relating to the keeping

158. Act on the Constitutional Court (Law No. 182/1993 Coll.) paragraphs 85 ff.

159. *Ibid.*, paragraphs 72 ff.

of the electoral register, the registration of a candidate list for the election, the removal of a candidate from the candidate list, or challenges to the registration of a candidate list. Administrative courts may furthermore hear actions concerning the validity of elections, the validity of individual ballots and, finally, protection in matters relating to the duration of the mandate of a member of a municipal council. In electoral matters, administrative courts are required to decide within strict time limits. Four statutes regulate various types of elections in the Czech Republic and other conditions relevant to the judicial control of elections. More precisely, Law No. 491/2001 Coll. applies to elections to municipal representative bodies (councils); Law No. 130/2000 Coll. applies to regional representative bodies (councils); Law No. 247/1995 Coll. applies to parliament (the Chamber of Deputies and the Senate); Law No. 62/2003 Coll. applies to the European Parliament. Each statute also stipulates its own terms for dealing with electoral control.

In the Czech Republic, courts in electoral matters not only assess the activities of individual candidates or political parties, but also take into account the activities of others.

### **III. Types of judicial control of elections**

Under the Code of Administrative Justice, it is possible to distinguish several types of proceeding focused on the judicial control of elections. These differ with respect to the subject competent to submit a complaint, or with regard to the various time points of the election process and so on.

As mentioned above, electoral disputes are not strictly speaking administrative law issues *per se*. Consequently, there are several specific provisions dealing with the judicial control of elections that are common to all types of that control,<sup>160</sup> but that differ from the traditional type of protection granted by administrative courts (action against a decision of an administrative authority), for example:

- the petition whereby the proceedings in electoral matters are initiated (or acts by which the proceedings or their subject matter are dealt with) can be made only in writing or orally by transcription at a court competent locally and according to subject matter (in my opinion this rule is in fundamental discrepancy to modern trends relating to e-Justice);
- no party is entitled to reimbursement of costs of proceedings in electoral matters;
- the courts post their resolutions in electoral matters upon the official notice board of each court. Such resolutions come into force upon the day of posting.

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<sup>160</sup> Code of Administrative Justice, paragraph 93.



### A. Protection in the matter of the register of electors

The first type of judicial control of elections, relating to the opening part of the election process (pre-election stage) deals with the registers of electors.<sup>161</sup> It applies when an administrative authority which keeps a regular electoral register under a special law fails to correct errors and shortcomings in the regular electoral register and its addendum. In that case, an affected person may address the court competent, according to the seat of the administrative authority, with a petition for the correcting or the supplementing of the register or its addendum. In such cases, the court shall make its decision without a hearing within three days of the petition being submitted.

### B. Protection in the matters of registration

While the protection mentioned in the previous section (III. 1) concentrates on the electors, this type of judicial control of elections favours the candidates. Under Czech law it is also possible to seek judicial protection in a case where the administrative authority under the special laws (that is, the election laws mentioned above) has rejected a list of candidates or an application for registration, deleted a candidate from the list of candidates, registered the list of candidates or the application for registration. The court shall decide in such cases within 15 days from the date the petition was submitted. It is possible to distinguish the following sub-types of this protection:<sup>162</sup>

1. The administrative authority has rejected a list of candidates or rejected an application for registration. Under these circumstances a political party, political movement or their coalition, independent candidate or association of independent candidates could seek a decision for registration by the administrative authority.
2. The administrative authority has deleted a candidate from the list of candidates. In such cases, the subjects mentioned above may seek a decision on keeping the candidate on the list.
3. The administrative authority has registered the list of candidates or application for registration. In such cases, the subjects mentioned above may seek a decision on cancellation of registration of other candidates.

### C. Invalidity of elections and voting

Under conditions provided by special laws (that is, the election laws mentioned in section II) a competent person may file a petition for the invalidity of elections or invalidity of voting or the invalidity of a vote for a candidate.<sup>163</sup> This type of election control is related to the election act itself (casting a ballot). Following a

<sup>161</sup> Ibid., paragraph 88.

<sup>162</sup> Ibid., paragraph 89.

<sup>163</sup> Ibid., paragraph 90.

judicial decision could, under certain circumstances, result in the cancellation of election results. This type of election control could therefore be considered the most important.

The Supreme Administrative Court pointed out that election results may be cancelled only if three cumulative conditions of election review are fulfilled. The first condition is a violation of law and the second condition is a causal nexus between the violation of law and the election results. The last and most important condition for cancelling the election results is the fundamental intensity of the violation of law which could have influenced the election results. The Czech legal system does not distinguish between the compulsory and the facultative cancellation of the election results. The cancellation of election results is not the only possible consequence of a violation of law. In its review of the election results, the court proceeds with regard to the individual circumstances of each case. The invalidity of the elections, or of voting for a candidate may only be declared if the violation of law influences the election results.

The Supreme Administrative Court also noted, in one of its significant judgments on electoral matters, that a court makes a decision in electoral matters not only on the basis of a violation of the electoral laws, but also taking into account the violation of other laws related to the elections. The Supreme Administrative Court named this theory "relevant unlawfulness".<sup>164</sup> The cases which resulted in the cancellation of electoral results were generally based on two separate cancellation reasons: errors in the voting procedures (for example, incorrect calculation of election results, or fundamental errors in the organisation of elections);<sup>165</sup> breach of the pre-election campaign rules (for example, a dishonest and unfair campaign or abusing the state-owned media, or by the self-governing units in campaign).

#### **D. Protection in matters concerning the termination of a mandate**

This specific type of protection in electoral matters is relevant only to elections for local or regional representatives.<sup>166</sup> Under conditions provided by special laws (covering municipal and regional council elections) a councillor (or political party or association of independent candidates) whose mandate has been terminated may seek a cancellation of a council's or administrative authority's decision on the termination of the mandate of the councillor. The court shall decide in such cases within 20 days from the petition's submission.

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164. See judgment of the Supreme Administrative Court of 4 July 2006, case No. Vol 36/2006, [www.nssoud.cz](http://www.nssoud.cz) (Collection of the Decisions of the Supreme Administrative Court No. 960/2006).

165. See judgment of the regional court in Hradec Králové on 20 November 2006, case No. 52 Ca 71/2006 (Collection of the Decisions of the Supreme Administrative Court No. 1055/2007), judgment of the regional court in Brno on 14 November 2006, case No. 30 Ca 206/2006, or judgment of the regional court in Brno on 10 November 2006, case No. 30 Ca 203/2006 (this judgment was finally revoked by the Constitutional Court).

166. See paragraph 91 of the Code of Administrative Justice.

## IV. Election control in the courts in practice

The system of the judicial control of elections in the Czech Republic, as described above, led in several cases to some discrepancies in the adjudication of the election courts in recent years. Such discrepancies mostly lie in different approaches to the legal interpretation of particular issues of election law. It is necessary to comment that such discrepancies are not very common; however, to achieve understanding of the entire concept of the election control under Czech law, it is useful to mention at least two cases that are of cardinal importance (leading cases).

Those cases could also cast light on the specific situation in the Czech Republic in the field of judicial control of elections where, under certain circumstances, both the Supreme Administrative Court (previously the Supreme Court) and the Constitutional Court deal with election matters. I would like to point out cases that were decided by the Supreme Administrative Court (the Supreme Court) but where these decisions were ultimately – for various reasons – revoked by the Constitutional Court. It is also not coincidental that the cases described in the following sections of this report deal with issues relating to the pre-election campaign. These issues are without doubt in the scope of election control amongst the most frequent and most important ones.

### A. Judgment of the Constitutional Court – Lastovecka case (Case No. I. ÚS 526/98)<sup>167</sup>

In this case, the Constitutional Court decided in the matter of the petitioner, the Civic Democratic Party (*Občanská demokratická strana*), on the appeal against the decision of the Senate of the Parliament of the Czech Republic and the Mandate and Immunity Committee of the Senate of the Parliament of the Czech Republic in the matter of verification of the election of the senator and against the decision of the Supreme Court of 3 December 1998 (case No. 11 Zp 54/98). The Constitutional Court decided that D. Lastovecka was a validly elected senator (so the Constitutional Court concluded that the appeal was justified).

The petitioner appealed against the decision of the Supreme Court. In the appeal he defined the points which the Supreme Court decided incorrectly: that the election of the above-mentioned senator in parliament elections was invalid and the petitioner could not be given a certificate of election as senator. The petitioner in the proceedings before the Supreme Court (the Czech Social Democratic Party, *Česká strana sociálně demokratická*, in the adjudicated matter identified five events as evidence of violation of the Election Act (Law No. 247/1995 Coll.): on the first day of the second round of elections a daily newspaper published an article on the front page with the headline “Brno mayor Lastovecka has a chance to become chairman of the Senate”. On the same day, the above-mentioned newspaper published

<sup>167</sup> Judgment of the Constitutional Court of 18 February 1999, case No. I. ÚS 526/98, <http://www.usoud.cz>.

a pre-election poll, in which it designated D. Lastovecka as the clear favourite. One day later, the same newspaper published an article dedicated to the electoral campaign and included a section with the sub-heading "ČSSD candidate Božek acted immorally". In the first round of the senate elections, D. Lastovecka allegedly had access to the district election commission, before the protocol on the termination of its work was signed. During the first day of the elections, D. Lastovecka appeared in a television news programme, where she allegedly spoke about and evaluated her election campaign. Her election materials were allegedly distributed on the second day of the elections. In this context, the Supreme Court pointed to section 16, paragraph 2, of the Election Act, under which an election campaign must take place honourably and honestly. In particular, untrue information may not be published about candidates and political parties, or coalitions on whose candidate lists they stand. Paragraph 5 of this provision specifically forbade election campaigning for political parties, coalitions and candidates in the period of 48 hours prior to elections and on election days (this provision was changed later). It also banned the publication of the results of pre-election public opinion polls, "provided that they may be published no later than the seventh day before election day".

In my opinion, it is useful to remember that in this case, in the opinion of the Supreme Court, the Election Act was violated, specifically section 16 concerning regulation of an election campaign. The violation was said to have occurred for the following reasons: (1) On the first day of the second round of elections (20 November 1998) the daily newspaper *Lidové noviny* published an article on the front page with the headline "Brno mayor Lastovecka has a chance to become chairman of the Senate". On that same day, the same daily paper published a pre-election poll, in which it identified D. Lastovecka as the clear favourite. (2) On 21 November 1998, the same daily paper published, in the article "Commissions discussed campaign" a section with the sub-heading "ČSSD candidate Božek acted immorally". (3) On 20 November 1998, that is, on the first day of the elections, D. Lastovecka was able to appear on the television news programme *Jihomoravský večerník*, where she allegedly spoke about and evaluated her election campaign.

Concerning the objection about the alleged interference of D. Lastovecka with the work of the district election commission, the Supreme Court stated that this fact had not been proved in any way. With regard to the complaint about the distribution of election materials from D. Lastovecka on the second day of the elections, the Supreme Court stated that, if this did actually occur, it could have been a violation of the Election Act, nonetheless,

in view of the conclusions cited above and the shortness of the time available to the Supreme Court for decision making, it no longer considered it useful to deal with this question.

The Supreme Court stated that, in terms of the degree and seriousness of the violation of the Election Act, it is of course important whether the violation occurred

through the actions of the candidate or her party, or through another entity without her knowledge. In the case of isolated less significant interference of third parties with the election, there would clearly not be such violation of the law leading to the invalidity of the elections. Nonetheless, if such interference is committed by the mass media (a national daily considered “trustworthy” and state-wide public television) “the question of some sort of fault or participation by the candidate in such election campaigning in these cases is irrelevant”. At the same time, the obligation to refrain from election campaigning in the statutorily defined period cannot allegedly be considered to be interference with freedom of speech and the right to information, as it is in the interest of the free decision making of voters just before elections and during elections to have an opportunity to consider their decision in peace. Likewise, the absolute ban on publishing results of pre-election public opinion polls during the specified period cannot be circumvented in the way that *Lidové noviny* did, as this would cast doubt on its very purpose. Thus, although in the opinion of the Supreme Court “there is no discussion” about the fact that D. Lastavecka did not subjectively cause violation of the rules of elections – with the exception of the television appearance – (and there is no evidence that she instigated the articles or the television programme), the Election Act is based on the fact that it is to be objectively observed, and, if it is not observed, it can have only one consequence – invalidity of the elections. The media are also required to observe the law and, if they violate it, they should bear the liability, including criminal liability.

The Constitutional Court’s described decision primarily expressed that in these proceedings this court decided on an appeal against a decision in the matter of verifying the election of a deputy or senator, and because it acted as a – *sui generis* – appeal level, it had to evaluate the particular case not only in terms of protection of constitutionally guaranteed rights or freedoms, but primarily in terms of the trustworthiness of the democratic election process. The argument concerning objective or subjective violation of the Election Act is considerably misleading. Generally, it should not be exclusively under the jurisdiction of the Constitutional Court whether the Election Act was violated objectively or subjectively, but it is necessary to take into account the circumstances of the specific case and the degree and manner in which the Election Act was violated. Thus, it cannot be generally stated that each violation of the Election Act results in the invalidity of the election, or that the penalty of invalidity of the election cannot be applied to the violation of the Election Act at all.

In my opinion, it is also useful to point out that, under this ruling of the Constitutional Court, it is clear from the nature of the matter that in the “moratorium period” of 48 hours before elections begin and during the election itself, it is not possible to completely ban any election campaigning whatsoever. Therefore, section 16, paragraph 5 of the Election Act must be interpreted rather restrictively, in the sense that the legislature intended to ban active election campaigns, that is, intentional and purposeful campaigning, specifically targeted at political

parties, coalitions and candidates. In this ruling, the Constitutional Court also added that, although proceedings on an appeal in the matter of verifying the election of a deputy or senator are specific proceedings – whose primary task is to protect the function of elections in a democratic society, in terms of the “objective” constitutional law, it is necessary for them to reflect the protection of fundamental rights and freedoms of natural persons and legal entities. Although the Election Act bans active election campaigning in the statutorily defined period, the intended aim of this restriction may not violate other fundamental rights and freedoms, in particular freedom of expression and the right to information. Thus, even in the statutorily protected period, the media have the right to provide information, and may present their own opinions; they are only forbidden to campaign actively for any particular candidate. Freedom of expression and the right to information are among the main pillars of a democratic society, which the media, in particular, naturally use in their work. This fundamental right and its exercise are necessarily a prerequisite for their free existence. The right to freedom of expression and the right to information are cornerstones of a democratic state, as only free information and its exchange and free discussion make a person a citizen of a democratic country. It is the press, radio and television, which spread and provide the information; in this context, freedom of information has extraordinary importance. Thus, the principle of honourable and honest election campaigns and the ban on campaigning in the period of 48 hours before elections and during them cannot be interpreted so widely that the act would create a social vacuum making the existence of freedom of expression and the right to information (in connection with elections) impossible.

In the case described here, the Constitutional Court concluded that consideration of the predictability of the law (its consequences) cannot be restricted only to its grammatical text. It is a judicial body which – although it does not have a classical precedential nature – interprets the law, or completes it, as the case may be, and its relative constancy guarantees legal certainty and also insures general confidence in the law. This applies particularly to the Supreme Court, which is the supreme judicial body in the field of the general judiciary. This, of course, does not contradict the fact that judicial case law can develop and change with regard to a number of aspects, in particular with regard to changes in social conditions. According to this decision, the purpose of section 16, paragraphs 2 and 5, of Law No. 247/1995 Coll. was undoubtedly the protection of honourable and honest elections. It can be agreed that – institutionally speaking – it would generally not be appropriate to concentrate exclusively on the question of whether it was only a candidate (political party) who violated the cited provision. On the other hand, however, it is difficult to accept a strictly objective criterion comprehensively and to ignore the fact that the candidate did not subjectively cause the violation of the election rules. The opposite interpretation would necessarily lead, under this decision of the Constitutional Court, to a situation in which any subject could achieve the invalidity of the election of any candidate completely without fault, which could significantly interfere with elections.

## B. Judgment of the Constitutional Court – Nadvornik case (Case No. Pl. ÚS 73/04)<sup>168</sup>

In this case, the Constitutional Court decided on an appeal filed by the Civic Democratic Party. The Constitutional Court eventually decided that J. Nadvornik was a validly elected senator in Senate elections.

According to the resolution of 3 December 2004,<sup>169</sup> the Supreme Administrative Court decided on a petition from A. Zapotocky that the senate elections held in election district Prague 11 were invalid. In proceedings before the Supreme Administrative Court the petitioner claimed that the election campaign in that election district was not conducted honourably and honestly, because untrue information was repeatedly published about him in the local press.

The Supreme Administrative Court granted the petition to annul the elections. It relied on its case law, which, in order to grant a petition in election matters (see also Chapter III.3 of this report), requires, firstly, unlawfulness, secondly, a relationship between this unlawfulness and the election of the candidate whose election is contested by the election complaint and, thirdly, a fundamental intensity of that unlawfulness, the consequences of which must, at least, cast considerable doubt on the election of the candidate in question. It concluded that section 16 of the Election Act (Law No. 247/1995 Coll.) does not exhaustively regulate election campaigns, but applies only to their final or “hot” phase. An election campaign is one of the ways of exercising fundamental rights, including primarily freedom of speech, the right to information, freedom of association, freedom of assembly and so on. The provision of section 16 of the Election Act makes these fundamental rights and constitutional principles concrete – above all, the principle of free competition of political forces in a democratic society and the principle of equal entitlement to the right to vote. Although section 16 paragraph 1 of the Election Act mentions only the use of surfaces for posting election posters, in the Supreme Administrative Court’s opinion it is clear, without any substantial doubts and in view of the cited constitutional principles, that this is only one example of a generally valid approach to the means of communication which a municipality has at its disposal. It follows that the principle of equality of candidates must be observed in the use of all means of communication owned by the municipality. In this particular case, however, the Supreme Administrative Court believes that this principle was not observed. It was violated by the publication in the *Uhříněves Reporter* No. 10/2004 and the special issue of the *Petrovice Reporter* directly before the first round of the senate elections. In the Supreme Administrative Court’s opinion, the nature of the information published in these publications was such that it was capable of significantly harming the petitioner, A. Zapotocky, in the eyes of potential voters. The particular circumstances of the case, the publication of these periodicals just before the

<sup>168</sup> Judgment of the Constitutional Court of 26 January 2005, case No. Pl. ÚS 73/04, [www.usoud.cz](http://www.usoud.cz).

<sup>169</sup> Resolution of the Supreme Administrative Court, case No. Vol 10/2004, [www.nssoud.cz](http://www.nssoud.cz).

elections, the clear one-sidedness of the opinions presented, the manner of distribution and the significantly higher print run of the special issue of the *Petrovice Reporter*, persuasively show that this was the intention of the publisher of these periodicals.

The Supreme Administrative Court also concluded that the nature of the information published in these periodicals does not meet the requirements for fairness in an election campaign formulated in section 16, paragraph 2, of the Election Act, whereby it has in mind specifically the printing of the anonymous letter from 2001, especially as it was presented without any commentary whatsoever, as a letter from members of the representative body of *Prague-Petrovice*, although the authorship of these members was not verified. The Supreme Administrative Court also concluded that there was a relationship between the violation of the Election Act and the election of J. Nadvornik. What is also important here is that, in the case in question, the petitioner ended in third place in the senate elections, by a margin of 325 votes behind the candidate who was in second place. In the Supreme Administrative Court's opinion, the narrow margin of votes, which meant that the petitioner did not advance to the second round, could in fact have been caused by circumstances which the Supreme Administrative Court sees as violating the Election Act. If this unlawfulness had not occurred, the petitioner could realistically have advanced to the second round of elections, in which the possibility that he might have been elected could not be ruled out; therefore, a "certain relationship" exists between the violation of the Election Act and the election of the candidate. Finally, the Supreme Administrative Court considered the issue of evaluating the intensity of the unlawfulness. It said that in a situation where the petitioner did not advance to the second round of senate elections because of a relatively narrow margin of votes, the degree of unlawfulness necessary for declaring the elections invalid is naturally lower than in a case with a large margin of votes.

As mentioned above, the Constitutional Court in this case did not share the opinion of the Supreme Administrative Court dealing with the issue of the pre-election campaign. The Constitutional Court pointed out that, with regard to the content of an election campaign, arguments are often presented to voters in a very emotional and heightened form, and are intended to influence their electoral behaviour and their decision on whom to vote for. However, the purpose of an election campaign in a pluralistic democracy is undoubtedly also to evaluate the most controversial issues in the manifestos of political parties and candidates generally, as well as their personal qualities and capability to hold elected public office. Only then will voters be able to make informed decisions, and only thus can the fundamental constitutional principle that the people are the source of all state power be fulfilled. Insofar as the Election Act under this ruling speaks of the requirement for honourable and honest conduct of an election campaign, it is pointing to what was previously called the cleanness of elections. However, these concepts cannot be interpreted in terms of private law and general



morality, because they are being applied in the context of an election campaign, which is nothing more than a fight for voters' votes. Its negative effects can be regulated, but cannot be ruled out by law. The lack of effective protection in the Election Act for the conduct of elections will always lead to an effort to resolve such disputes through election complaints. The Constitutional Court concluded in this chapter, however, that the protection of individual rights in these proceedings can only play a supporting role in terms of guaranteeing and observing the rules for the proper conduct of an election campaign.

The essence of proceedings before the Constitutional Court in this case lies in guaranteeing protection for the fundamental provisions of the constitutional order, which give rise to the principle that the people are the source of all state power, and in this role, among other things, they share the aim of establishing the state through free and democratic elections. The statutory framework for the election judiciary disputes and verification of elections corresponds to this. In terms of the procedural regulation of the election judiciary disputes and the conduct of such proceedings, this gives rise to the presumption that election results correspond to the wishes of the voters. Presenting evidence to rebut this presumption is the obligation of the person who claims that there was an error in elections. According to the Constitutional Court, our election judiciary does not recognise absolute defects in election proceedings (so-called "absolute confusion of election proceedings"), that is, such violation of a constitutional election regulation which would result in the automatic annulment of elections, the election of a candidate or voting. In this sense, all possible defects and doubts must be considered relative, and their significance must be measured by their effect on the results of elections to a representative body, as such, or on the result of the election of a particular candidate, or on the result of voting, according to the proportionality principle. Proceedings are thus based on the constitutional principle of protection of a decision which resulted from the wishes of the majority, manifested in free voting and taking into consideration the rights of the minority, as the Constitutional Court has already pointed out in another context. The framework for verifying elections is based on the prerequisite of an objective causal connection between an election defect and the composition of a representative body, or at least a possible causal connection (the principle of potential causality in the election judiciary disputes). However, this possible cause, as established in section 87 of the Election Act, must not be interpreted as a mere abstract possibility.

The Constitutional Court derived from the Charter of Fundamental Rights and Basic Freedoms the right of an elected candidate to uninterrupted exercise of his office during the specified period, which emphasised the right of candidates, if elected, to exercise these offices without obstacles. The judicial branch can change the decision of the voters, as sovereign, only in exceptional cases, where defects in the election process resulted in or could demonstrably result in voters having made a different decision and a different candidate having been

elected. However, the essential thing is that the annulment of elections cannot be seen as a punishment for violating election regulations, but as a means to ensure the legitimacy of an elected body. It is the probability of influence of an election defect or an election offence on the election result in particular elections, with particular voters, that is decisive. A mere abstract possible causal connection is not sufficient. In such a case, the threat of annulling the result of elections as the only possible consequence is inconsistent with the constitutional principle of proportionality of interference by public authorities. This certainly does not rule out disqualifying a candidate who committed a serious election offence. In this regard, the Constitutional Court is obliged to say that, compared with other countries, the legal regulation of defects in the election process, election offences and the rules for conducting an election campaign in general, are, for one thing, very fragmentary, and for another, basically rooted in conditions which correspond to "elections" during the previous regime. Therefore the legislature will have to weigh up whether the election culture of voters, candidates and public officials is on such a level that regulation of these issues is unnecessary, or whether it will guide electoral behaviour through pre-set rules that will create a situation of legal certainty for the subjects of the election process and which will be at least a prerequisite for electoral economy.

The Constitutional Court concluded that neither an objective nor potential causal connection was proved between the content of the cited publications and their distribution among voters and the election of J. Nadvornik. Under this ruling, the Supreme Administrative Court only considered the question of whether A. Zapotocky could advance to the second round of senate elections. However, in terms of the aforementioned presumption that election results are valid, it was not proved that the elements of the fundamental substantive law of our election judiciary were present, that is, whether under section 87, paragraph 4, of the Election Act the provisions of the act were violated in a manner which could influence election results. Therefore, the data provided does not lead to any logically or statistically documentable conclusion that, applying the principle of an absolute majority, there was a high degree of probability that anything would have changed in the election results of the second round and that J. Nadvornik would not have been elected senator. Therefore, the presumption that the voters' decision in an election is valid was not cast in doubt. There is no dispute that the printed materials published as municipalities' newspapers because they are in the hands of the public authorities must remain correct and neutral. Elections can be annulled only as a consequence of fundamental and substantial violation of state neutrality in the course of elections.

# A comparative analysis of the bodies in charge of electoral supervision, especially judicial ones – The case of France

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André Roux

France's 1958 Constitution gave the newly established Constitutional Council responsibility for scrutiny of the three main political voting exercises that take place at national level – the election of members of parliament, the election of the President of the Republic, and referendums. Litigation arising out of local elections is a matter for the administrative judge (administrative courts, with appeal to the Conseil d'Etat in the case of municipal and cantonal elections, whilst the Conseil d'Etat is the body of first and last resort for regional elections, as well as for elections to the European Parliament).

The powers of the Constitutional Council vary depending on the type of vote involved. In the case of elections to the two houses of parliament, its role is solely to adjudicate on disputes. For the other two kinds of vote it has a broader role which includes overseeing the proper conduct of voting operations and announcing the results. We shall thus look in turn at the powers and role of the Constitutional Council with respect to these three types of voting exercise.

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## I. The Constitutional Council and elections to parliament

Prior to 1958, the only people who judged whether or not parliamentary assemblies were properly constituted and operated in the correct manner were the members of those assemblies. This internal scrutiny was replaced by a system of external scrutiny. Since the start of the Fifth Republic, the Constitutional Council has been responsible for ensuring that members of the National Assembly and Senate are properly elected and it has ruled on matters of ineligibility and incompatibility.

### A. Litigation arising out of parliamentary elections<sup>170</sup>

Under the old system of verification of credentials, each chamber of parliament, immediately following an election, verified the situation of each of its members and, if necessary, disqualified any member found to have been improperly elected. This scrutiny was often more political than legal, and under the Fourth Republic it gave rise to serious abuses. To quote just one example: in the 1956

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170. See L. Philip (1991) "Le Conseil constitutionnel, juge électoral", *Pouvoirs*, No. 13, new edn.

legislative elections 11 *Poujadist* members of the National Assembly, in a totally arbitrary decision, were replaced by candidates of the governing majority who had come second in the vote. So, when judicial review of these matters by the Constitutional Council was introduced, this met with broad approval.

From this point on, scrutiny was very different from that previously exercised by the two chambers. Firstly, the Constitutional Council initially interpreted the scope of its powers very strictly; in contrast to the earlier parliamentary practice, it did not consider itself to have sovereign powers of judgment in these matters. Secondly, in building its body of electoral case law it took an extremely prudent position, basing itself not on what had formerly been done in parliament but on the principles established by the administrative courts in litigation over local elections.

### 1. Scope of its powers

To begin with, the council put a restrictive interpretation on Article 59 of the constitution. This requires it to rule, in the event of a dispute, on whether or not a member of the National Assembly or Senate was properly elected.

Its powers are limited in two respects:

a. Firstly, the council can only investigate the proper conduct of an election if an objection, made in due and proper form, has been referred to it.

The right of referral is quite broad here: it may be exercised by any candidate and by any constituency voter. However, objections to the council may not be made by political parties or groupings, even if the person acting for them was on the electoral lists or a candidate in the constituency where the election was held (cf. Decision 88-1040/1054 of 13 July 1988), by associations (decision of 23 March 1973) or even by the representative of the state in the *département* (Decision 88-1043 of 21 June 1988).

In the absence of any written and signed objection, lodged (directly with the council, or the prefect, who must pass it on) within 10 days of the election results being announced, the election is deemed to have been properly conducted. This 10-day period also applies to the content of objections: thereafter the objector cannot submit any pleadings different from those contained in his initial challenge (Decision 88-1040/1054 of 13 July 1988). The objector may only add to or further explain the initial complaint (Decision 88-1093 of 25 November 1988).

In no event may the Constitutional Council give a ruling on its own initiative.

This is certainly consistent with the terms of Article 59 of the constitution. But the council's application of this principle has sometimes been questionable. In 1959 it was required to rule on an objection to the election of a senator for the Dordogne. This *département* had two Senate seats to fill. Both of the successful candidates had benefited from improper electioneering publicity which had rendered the result invalid. But the council had received an objection to only one of

the senators, and so it disqualified him without looking at the case of the other, who was not challenged (Decision of 9 July 1959).

Once an objection has been lodged, the process of review is referred by the President of the Constitutional Council to one of three sections, each comprising three members drawn separately and by lot from among the members appointed by the President of the Republic, those appointed by the Speaker of the National Assembly and those appointed by the Speaker of the Senate. The president then appoints a rapporteur who may be one of the existing deputy rapporteurs. Every year the Constitutional Council draws up a list of 10 deputy rapporteurs chosen from the *maîtres des requêtes* (legal advisers) of the Conseil d'Etat and the *conseillers référendaires* (auditors) of the Court of Audit. The review section has very broad powers. It may consult all appropriate documents and may hear witnesses. The parties submit their written observations in an exchange of pleadings. The review process allows all parties a hearing and access to all the relevant procedural documents. When the case is ready for judgment, the section hears the rapporteur, who sets out the facts and legal implications and puts forward the draft of a decision; if he or she thinks that an inquiry or other investigative measures would be helpful, he or she explains why. The section considers the rapporteur's proposals and lays the matter before the council for a judgment on the merits. But, if it sees fit, the section may order the inquiry or other investigative measure itself or it may lay the matter before the council to that end, whereupon the council will decide whether that measure is appropriate and, where appropriate, rule on the merits straight away. It should be noted that the council may, without hearing the parties beforehand, take a reasoned decision to dismiss objections that are inadmissible or related to complaints which manifestly cannot affect the election outcome. The decision is then communicated to the chamber concerned.

In a decision of 8 November 1988, the council firmly restated the rule that hearings should not be held in public, saying that this was not contrary to Article 6.1 of the European Convention on Human Rights. On 28 June 1995, however, it amended its rules on electoral disputes, allowing that "the parties may ask to be heard".

b. Secondly, the council does not rule on the overall conduct of an election, but only that part of it which relates to the declaration of a successful candidate.

Thus the council does not consider objections to elections as a whole, to all the successful candidates from a party, or to elections in a specific municipality (decision of 24 May 1963). The challenge must be to the election of a specific individual, and the complainant must clearly name the candidate whose election is challenged or the constituency concerned (decision of 17 May 1978).

It is also worth mentioning that the council initially saw fit to apply a very narrow interpretation to the concept of "elections", but a slightly wider interpretation of its powers.

The word "election" can have two meanings. Strictly speaking, an election means choosing elected representatives. In that case the word describes simply the process which culminates in the declaration of the candidate who has received the greatest number of votes, and anything that is not directly connected with that declaration, anything that does not result in a challenge to it, is not the concern of the election judge. In a broader sense, the word "election" means the whole of the electoral process and the expression "proper conduct of the election" necessarily encompasses a whole range of acts and operations in addition to the actual vote itself. Specifically, proper conduct of an election supposes that the acts which precede it (calling the election, organising the poll) are lawfully performed. If we adopt the wider meaning it follows that the Constitutional Council has real "blanket powers" covering all aspects of the electoral process. But the council applies the narrow definition: it rules only on whether an elected member of parliament has been properly elected. Faced with an objection which does not challenge this, it declares itself incompetent. Thus, for example, it will not consider the case of a candidate who disputes the number of votes he has received, when just one vote more would get him to the threshold of 5% above which he can claim reimbursement of his campaign expenses (decision of 12 December 1958 in the Rebeuf case).

Since 1981, however (decision in the Delmas case), the council has interpreted its powers less restrictively, amending Article 1 of its rules of procedure accordingly in 1986.

When required to rule on a dispute over whether a member of parliament was properly elected, it is competent to examine all questions and all objections raised at the time of the challenge. Thus, when an objection is raised to the conduct of an election, it can rule on whether the electoral lists were properly drawn up or the declarations of candidacies properly made. It also decides whether the successful candidate and his or her substitute have been properly elected. It sees Article 59 of the constitution as giving it a duty of scrutiny, authorising it to assess whether the administrative acts entailed in organising and holding elections were properly performed, where such acts may prejudice the legitimacy of the subsequent elections as a whole (decisions of 17 December 1993 in the Mayet case and of 20 March 1997 in the Richard case). In a decision of 22 May 2002 (Hauchemaille case) it confirmed that it is competent in exceptional cases to rule on "objections to acts affecting the legitimacy of the forthcoming vote, where a finding of inadmissibility might seriously compromise the efficacy of its scrutiny of the electoral process, invalidate the overall conduct of the vote or disrupt the routine functioning of the apparatus of government". This case law was further extended to the Senate elections (20 September 2001, Marini and Hauchemaille cases), election of the president (14 March 2000, Hauchemaille case) and a referendum (25 July 2000, Hauchemaille case).

And, whilst no legal text specifically provides for this, the Constitutional Council feels free to comment on the conduct of parliamentary elections (observations of 15 May 2003, for example).

c. Lastly, the Constitutional Council does not punish all irregularities committed during an election campaign. The council does not, in fact, pass judgment on whether the election was properly conducted, but merely on whether the election result is fair. That means it only punishes an irregularity by nullifying the election result if that irregularity is likely to have led to an incorrect result. To assess exactly what influence the irregularities committed have had, the council reviews a number of factors: the seriousness and scale of the irregularity, how the various candidates behaved, how much chance they had to refute last minute personal slurs or untrue allegations and, above all, how many votes separated the successful candidate from the runner-up. The smaller the gap, the more likely it is that the alleged irregularities (assuming they are proven, of course) may be thought to have possibly distorted the result (see the decision of 5 January 1959, *Deval v. Durand*). Decisions are often difficult here since the number of irregularities committed in the course of an election campaign is often large, and it is not always easy to know exactly how much effect they have had.

## 2. Principles of electoral case law

The Constitutional Council may have based its rulings largely on the case law of the administrative courts, but it does not hesitate on occasion to take a different line. It did so notably on the matter of postal voting (decision of 14 February 1974). Its own case law thus has a number of specific features: it seeks to ensure that elections are morally fair; it comes down relatively hard on voting irregularities; it is extremely prudent when it comes to nullifying elections.

### a. "Moral" elections

The guardian of the constitution endeavours primarily to condemn any unfair practices employed by candidates during an election campaign. To that extent, the council's case law sounds a somewhat moralising note. This is clearly apparent if we look at the many nullifying decisions which are quite outspoken in their moral condemnation of the behaviour of certain elected representatives. The council unhesitatingly points to the "serious", "regrettable" or "particularly regrettable" nature of some procedures, or deplores certain actions as "particularly reprehensible".

It seems that the supreme authority wants to encourage candidates to remain within the limits of electioneering polemics and that, whilst it cannot enforce strict adherence to the electoral code, it seeks at least to encourage candidates to abide by the rules of political ethics for the duration of the election period. It especially castigates personal slurs against opponents, manoeuvres designed to deceive the voter, insisting in particular that candidates retract or abstain from making untrue allegations. And, when only a small number of votes separates the two main candidates, it does not hesitate to nullify the election result and punish behaviour of that kind.

*b. Punishment of voting irregularities*

The Council has sought here to counter fraud, especially in connection with postal or proxy voting. Likewise, it punishes very serious electoral irregularities such as a missing election record (protocol) or missing poll lists, opening of the ballot box during voting. Many elections have been nullified for reasons like these. Its very strict attitude towards irregularities in postal voting prompted parliament to abolish that method in 1975 in favour of broader opportunities for proxy voting.

*c. Scrutiny of the funding of election campaigns*

The laws of 11 March 1988 and 15 January 1990 on the funding of political activities gave the Council the power to punish candidates who fail to comply with the new statutory requirements (keeping proper accounts, not exceeding a prescribed ceiling for expenses, filing accounts, etc.) by declaring them ineligible and by removing from office elected persons who exceed the ceiling. Depending on the case, it may or must declare ineligible a candidate who fails to respect the rules on the funding of election campaigns, even if the candidate himself or herself is not directly at fault. The council may be called upon to rule on a candidate's campaign accounts in one of three ways: by the National Committee for Campaign Accounts and Political Funding if the account has been refused, by an objection challenging the accounts of an elected representative, or by a ruling on its own initiative if the elected representative has failed to file the required statement of assets or campaign accounts. In the latter two cases the council automatically declares the individual concerned ineligible for one year. It may also declare him or her ineligible, again for one year, if the ceiling for electioneering expenses has been exceeded. Since 1985, the date on which an elected representative becomes ineligible is the date on which the judge's ruling of ineligibility becomes final, which means that the individual concerned cannot then stand in the by-election following the nullification.

*d. The Constitutional Council's relative prudence in nullifying elections*

From the list of nullifying decisions we can see that these are relatively rare. Since 1958 the Council has delivered over 2000 decisions, but only five elections of senators have been declared invalid and just over 50 elections of members of the National Assembly. The Council appears to be more conservative in this regard than the administrative courts are on local election matters.

Its prudence is further evident in the fact that it has never yet inverted a result, as the administrative courts sometimes do, although it too has the power to do this.

This case law of the Constitutional Council, fairly prudent overall, has its drawbacks: firstly, the fact that irregularities in the conduct of election campaigns are rarely punished by nullification hardly encourages candidates to abide by the electoral rules; secondly, many cases still do not come under its jurisdiction. Moreover, members of parliament whose election is declared invalid are often



re-elected. Following the elections of June 2002, the council nullified the election of five members of the National Assembly and the five individuals concerned were then re-elected. But decisions punishing infringements of the rules on campaign funding are more efficacious because the offender is rendered ineligible (two members of the National Assembly were dismissed and declared ineligible in 2002, and three in 2008 following the 2007 elections).

## **B. Scrutiny of ineligibility for election and incompatibility**

The constitution does not expressly give the Constitutional Council competence in this area. But it is generally held that scrutiny of the proper conduct of an election necessarily includes checks both on eligibility and on incompatibility. The organic ordinance (*ordonnance organique*) on the conditions of eligibility and incompatibility of members of parliament upholds this tradition by making provision for the council to act. Here, however, in contrast to its scrutiny of the proper conduct of elections, it does not have sole competence. It performs this scrutiny jointly with other bodies.

### **1. Scrutiny of eligibility to be elected**

a. The Council may be called upon to rule at different stages and in different ways:

- When a nomination is filed, it is the prefect who must check whether the would-be candidate is eligible. If the prefect has any doubts, registration must be suspended and the matter referred within 24 hours to the administrative court, which has sole competence to rule on eligibility and, if appropriate, to bar the candidate from standing for election. However, the administrative court's decision, which must be given within three days, may be challenged before the Constitutional Council if an objection is lodged asking for the election to be nullified. Thus the Constitutional Council may have to overturn the judgment of an administrative court, something that is normally a matter for the administrative appeal courts (8 July 1986, AN, Houteer, Haute-Garonne).
- If a person who is ineligible is declared elected, his or her election may be challenged before the Constitutional Council within 10 days. And the council may declare his or her election invalid if it decides that the member of parliament was indeed ineligible. His or her election may also be declared invalid if it was the member's alternate who was ineligible (decision of 5 July 1973).
- As we have already seen, the council declares ineligible for one year from the date of their election any candidates who fail to comply with the new rules on the scrutiny of campaign accounts and political funding.
- If the elected candidate is found to have been ineligible for election after 10 days have elapsed since the election, or during his or her term of office,

the procedure is different again. In this case the Constitutional Council simply records the elected member's removal from office at the request of the bureau of the house of parliament concerned, the justice minister or the public prosecutor. The scope for the council to act is thus far more limited here. If the matter is not referred to the council the member, despite being ineligible, will retain his or her office. On the face of it that seems rather shocking, especially if it works to the benefit of a member of parliament representing the majority. But it is not an issue in cases where judgment against a member is confirmed, because to date the public prosecutor has always, virtually automatically, referred such cases to the Constitutional Council.

b. The Council's case law on ineligibility is dominated by the principle of restrictive interpretation.

The principle, in electoral matters, is freedom. Consequently, a citizen may never be declared ineligible for election in the absence of a legal text, and that text has to be interpreted rigorously when it comes to the exercise of a civic right.

The Constitutional Council has had occasion to apply this principle many times. Thus, someone currently doing military service is not ineligible to stand for election as president – though he or she cannot stand for election to parliament – because the legal texts on the election of the president make no express provision for this possibility (Decision of 17 May 1969). Similarly, since the functions of the director of a *département CIO* (*centre d'information et d'orientation* – careers guidance centre) do not feature on the restrictive list given in the electoral code, they do not bar such a director from standing for election even though they are similar to other functions which do.

The council has also deemed the following to be eligible to be elected: a deputy director of veterinary services of a *département* (though directors of agricultural services are ineligible), and a forestry engineer ("*Itéf*" – *ingénieur des travaux des eaux et forêts*) is eligible but his or her superior ("*Igref*" – *ingénieur du génie rural des eaux et forêts*), is not. Under the organic law a member of the National Assembly or Senate or an alternate may not be an alternate for a candidate standing for election to parliament. But the Council decided that this prohibition did not apply to members (or alternates) standing for re-election.

## 2. Scrutiny of incompatibility

The issue of incompatibility can only arise post-election and indeed only after the period of time allowed for the member of parliament to resign from functions incompatible with his or her office has elapsed. Consequently objectors cannot refer this issue to the council as part of a challenge to the election result. As with ineligibility which becomes apparent when a person has already taken office, the Constitutional Council's powers to act here are limited. The matter may only be referred to it by the justice minister or the bureau of the parliament concerned. As

of 1961, however, review by the council may also be sought by any member of parliament who is doubtful about his or her situation.

a. When the council has a case referred to it by the justice minister or the bureau of the assembly, it removes from office the member who is exercising an incompatible function, either immediately in some cases or after 15 days have elapsed (if the member of parliament has not acted to rectify the situation).

The Rives-Henry case of 1971 raised the question of whether the authorities empowered to refer cases to the Constitutional Council had an obligation to exercise that prerogative where incompatibility was doubtful or contested, or whether, on the contrary, they were free not to do so if they deemed such action inopportune. It would seem difficult to accept that referral is obligatory when this is not expressly provided for in a legal text. Consequently, a member of parliament may hold a function incompatible with his office and happily carry on doing so, if the bureau of the assembly and the justice minister decline to refer his or her case to the council.

b. There have been several instances of a member of parliament asking the council for a judgment, and the council has established the following points:

- It applies the same principle as in matters of ineligibility; namely the legal texts defining incompatibility must be strictly interpreted.
- It also seeks to establish whether, in fact, the exercise of a given function is likely to be subject to a statutory prohibition or to compromise the independence of the person elected, although appraisal of such matters is sometimes delicate (case of Marcel Dassault in 1977, for example).
- Incompatibility does not (usually) mean ineligibility. Consequently, whilst members of parliament cannot serve more than one constituency at once, a serving member is free to stand for election during his or her mandate in a different constituency. Similarly, whilst membership of the government is incompatible with exercise of the office of a member of parliament, there is nothing to stop a minister from standing in a parliamentary election.
- Lastly, the council has been prompted to clarify that a member of parliament may only ask it to rule on an issue of incompatibility if the matter is in doubt or contested. Specifically, he may not refer it to the council unless his position has first been considered by the bureau of the assembly. If the assembly does not recognise the problem, or declines to give an opinion on it, the council cannot give a ruling on incompatibility.

## II. The Constitutional Council and the election of the president

The Constitutional Council has a wider role in presidential elections because it has both judicial and advisory powers, playing a part before, during and after the vote. It has also got into the habit of publishing its “observations”

on the election process, enabling it to suggest improvements to the way in which the process is conducted.

## A. Scrutiny of the proper conduct of the election

The role of the Constitutional Council here is wider than in elections to parliament; it is involved in preparing the election, the conduct of voting operations and declaration of the results.

### 1. Preparing the election

The Constitutional Council is actively involved in the measures which precede the election. Not only is it consulted by the government on the organisation of voting operations, it also draws up the list of candidates and adjudicates disputes.

a. It is consulted during drafting of the texts concerning the election's organisation. In the past the government seems to have paid little heed to the council's comments on these. Thus, in announcing the 1974 results, it saw fit to publish its observations on omissions and imperfections in the legal texts governing presidential elections. It called on the government to make changes to the rules governing the nomination of candidates and to cater for the eventuality of a candidate dying. Its recommendations led to amendment of the organic law on the election of the President of the Republic and to revision, in 1976, of Article 7 of the constitution. After each presidential election it formulates its observations and offers a number of recommendations (see its observations of 7 November 2002 on the election of 21 April and 5 May 2002, which suggested that the official list of candidates should be drawn up earlier, or that the full list of candidate sponsors (*parrains*) should be published; see also its observations of 31 May and 7 June 2007, which suggested a standardised closing time for all polling stations in metropolitan France and an express ban, throughout the national territory and until the last polling station has closed, on the release of any partial result or exit poll figures, or an increase from 500 to 1 000 in the number of proposers in order to avoid multiple candidacies).

b. The Constitutional Council is directly involved in the election process. It receives the candidacies, checking their number and that they are validly presented. A candidate must be nominated by at least 500 elected representatives – members of parliament, regional or general councillors, Paris councillors, mayors, etc. Signatories must include elected representatives from at least 30 *départements* or overseas territories, and not more than one tenth of them may hold elected office in any one *département* or overseas territory.

The Constitutional Council, after running the above checks and making sure that the person nominated does indeed wish to stand, is eligible to be elected and has paid the deposit, publishes the official list of candidates. Whilst its decisions are not appealable under the constitution, the council has been prepared to consider challenges to those of its own decisions which finalised the list of

candidates or attributed distinctive identifiers to certain candidates. Thus, in 1969 it looked at an objection by one candidate to the inclusion on the official list of another candidate who was currently doing his military service and whom he considered to be ineligible. This kind of appeal, however, is open only to nominated candidates (decision of 7 April 2002, Hauchemaille case).

All these checks must be carried out very quickly, since nominations have to reach the council no later than 19 days before the first round of voting, and the council must draw up the list of candidates ready for publication in the *Journal officiel* not later than 16 days prior to the vote.

Following an order of 27 December 1987 by the President of the Constitutional Council, candidacies have been processed electronically, which makes these operations much easier.

The constitutional revision of 18 June 1976, amending Article 7, also envisaged a role for the council in one theoretical circumstance, which has never yet arisen, that a candidate dies or becomes incapable of standing for election. If one or other circumstance should arise within the seven days prior to the closing date for receipt of candidacies, the council “may decide to postpone the election”. If it arises before the first round of voting and when the list has already been published in the *Journal officiel*, the council must postpone the election. If one of the two remaining candidates remaining after the first round of voting dies or becomes incapable, the council will declare that the whole election must be rerun, including the first round of voting. It is up to the council to assess the acts or circumstances which indicate “incapacity”, a concept which has not yet been defined.

## 2. Monitoring the conduct of the election

The Constitutional Council plays no part in the election campaign, which is overseen by a National Supervisory Committee (the CNCCEP) especially appointed for the purpose. This committee is tasked with ensuring compliance with the principle that “all candidates shall be given the same campaign facilities by the state with a view to election of the president”. This solution, which creates some conflicts of competence with the council, is not logical. It would have been preferable to entrust this task to the council, which has responsibility for ensuring that the election is properly conducted, even if the council had to ask the committee for help in performing it.

The Constitutional Council does, however, oversee the conduct of voting operations. To that end it usually delegates officials (usually law officers) to monitor operations on the spot. These have not always been well received by the polling station presiding officers, and this prompted the council, in 1974, to declare invalid the voting operations in some polling stations to which its officials had not been allowed access. In its observations on the presidential election of 2002, the council suggested that parliament “introduce the offence of obstructing the

work of the council's officials, given that they are sometimes impeded in the performance of their duties". This was acted on in the organic law of 5 April 2006.

### **3. Declaration of the results**

The general count of the votes takes place under the council's direct supervision. The council verifies the number of votes obtained by the candidates, announces the result of the first round of voting and then the second round, and subsequently declares that the candidate who obtains the greatest number of votes has been elected as President of the Republic. Before making that declaration it considers all complaints forwarded to it within 48 hours of the polls closing, either directly by the representative of the state or by a candidate, or complaints mentioned in the election records of polling stations or returning offices. But it cannot receive complaints directly from voters, as is the case in parliamentary elections.

In the election of the president, any complaints expressed may not challenge the actual election result. They must be made whilst voting is ongoing, that is to say, before the results are announced. The Constitutional Council exercises its scrutiny here a priori, even before the results are declared. Once they have been declared, the proper conduct of the election can no longer be challenged and no further complaints are permitted.

In the event of irregularities, the council is empowered, before the results are declared, to declare either certain operations or the entire election invalid. It has already had occasion to nullify some parts of the election process, for example because voters' identity had not been properly checked despite repeated warnings by the council's official, because the poll list was missing, because there were major discrepancies between the number of persons voting and those on the poll list, because certain polling stations did not open due to serious disruptive events, etc.

If it seemed likely that nullification would change the outcome, the council would probably decide to declare the entire election invalid and would not use its rectifying power. Within two months of the election, each candidate in the first round of voting must submit the accounts for his or her election campaign to the National Committee for Campaign Accounts (prior to the organic law of 5 April 2006 these accounts went directly to the Constitutional Council). This enables checks to be done that the accounts are fair and honest and that the authorised ceiling on expenses has not been exceeded (ceiling set in 2007 at €15 481 000 for the first round and €20 679 000 for the second round). If the checks are satisfactory, the state reimburses the expenditure incurred by the candidate, at a flat rate.

The National Committee for Campaign Accounts may approve the accounts, amend them or reject them after hearing the parties. Candidates challenging a committee decision may appeal against it to the Constitutional Council within one month of being notified of the decision.

In 2002 Bruno Mégret had his campaign accounts rejected and was thus not entitled to reimbursement of his election expenses (decision of 26 September 2002).

### III. The Constitutional Council and referendums

Article 60 of the constitution says that “The Constitutional Council shall ensure the proper conduct of referendum proceedings ... and shall proclaim the results of the referendum”. The term referendum means not only the legislative referendum referred to in Article 11 of the constitution, but also the referendum in Article 89 on amendments to the constitution and, following the constitutional revision of 3 March 2005, the referendum referred to in Article 88-5 on ratification of a treaty pertaining to the accession of a new member state to the European Union.

The council has interpreted the terms of Article 60 in a fairly restrictive way. Consequently, with regard to referendums, it exercises powers that are both limited and very different, depending on whether it is organising the vote and scrutinising the election campaign, or overseeing the conduct of the vote and declaring the results. In the former case its powers are purely advisory, whilst in the latter case they are judicial.

#### A. Advisory powers

Some of these are not set out in the constitution itself, but in an organic law or even in simple decrees.

##### 1. Regarding the holding of a referendum

The ordinance of 7 November 1958 enacting an organic law on the Constitutional Council provides that the council shall be consulted by the government and informed of all measures taken on this subject. This implies that it is free to give its opinion on all texts concerning the holding of the referendum, for example the decree deciding to put a bill to a referendum (with the bill appended), plus the decrees on organisation of the election campaign. The order also stipulates that the council may submit observations on the list of organisations authorised to use official media in their electioneering. This is an essential question. But the position is very different from that we have described with regard to presidential elections. Here the Constitutional Council has no direct responsibility. It is not the council that draws up the list of organisations allowed to use official media in their electioneering and it declines, moreover, to consider objections to the content of the list (decision of 23 December 1960).

It is unfortunate that its role is so closely constrained here. Ideally it should be the council that draws up the list of organisations allowed access to official media for their electioneering.

The council's opinions are purely advisory, and whilst it may be that the prestige of the council definitely lends them authority, it is hard to measure their precise impact, given that they are confidential.

Ideally, too, it should be consulted by the President of the Republic on the wording of the referendum question put to voters and should deliver a published opinion on this question, which is often of capital importance.

In a decision of 2 June 1987, concerning a referendum on self-determination held in a French territorial community, the council took the view that the situation required total clarity and should satisfy the twofold requirements of a fair and unequivocal vote (see decision of 4 May 2000, Referendum on Mayotte).

If the council was able to give its opinion on the presentation and wording of the referendum question, it could check that the requirements of the constitution had been complied with.

In 1993, the Vedel Commission had very pertinently suggested that all bills requiring approval by referendum should be checked for their constitutionality. During the debate of 23 July 2003 on revision of the constitution, the Senate and the National Assembly were both unwilling to go as far as to introduce that kind of check on bills requiring a referendum. The – questionable – reason given was that one should not raise the eventuality of the President of the Republic invoking Article 11 in order to revise the constitution.

It should be pointed out, though, that the constitutional revision of 23 July 2008 gave new powers to the Constitutional Council, under the new procedure for a parliamentary and popular referendum which may be initiated at the request of one fifth of members of parliament and one tenth of voters on the electoral rolls.

The original intention was simply that the Constitutional Council should scrutinise the "proper conduct of the initiative". An amendment by the Senate significantly broadened this scrutiny to the extent that an organic law must now set out the conditions in which the Constitutional Council monitors compliance with the requirements of the new system as a whole; this means, implicitly but clearly, that it must check the substantive constitutionality of any bill that is to be put to a referendum. Thus it will be able to check that the bill does indeed concern one of the matters named in Article 11, paragraph 1 (organisation of the public authorities, reforms relating to the economic, social or environmental policy of the nation and to the public services contributing thereto, ratification of a treaty which, although not contrary to the constitution, would affect the functioning of the institutions) and that it contains no provisions inconsistent with the rules and principles of the constitution, notably those relating to fundamental rights.

Even if confined to private members' bills submitted to referendums, scrutiny of constitutionality prior to the approval of any referendum initiative is of real value because it will prevent a situation in which a text that is unconstitutional or inconsistent with international law gets put to a popular vote and may subsequently



be referred for a ruling on its unconstitutionality. This latter remains, a priori, a possibility in the case of referendum-approved laws that originate in government bills, and this is not without its problems.

In any event, it would seem desirable to have scrutiny exercised once the bill receives the support of one fifth of members of parliament and before it receives the support of one tenth of the electorate. Voters would have difficulty understanding an interruption of the procedure on grounds of unconstitutionality if signatures had already been collected.

## 2. Conduct of the referendum campaign

In contrast to the procedure for a presidential election, it is the Constitutional Council and not the National Supervisory Committee which oversees the conduct of the campaign here. Its monitoring of equal radio and television airtime for the different political groupings is specifically regulated in a decree. It is a rare instance of a specific power being conferred on the Constitutional Council by simple decree.

### B. Judicial powers

Under Section 50 of the organic law on the Constitutional Council, the Council is competent to rule on “irregularities in the conduct of voting operations”. It has interpreted this provision very restrictively. It takes the view that this legal text is concerned only with challenges which may be made to voting operations after the vote. This means that objections, whether made by the representative of the state in the *département* within 48 hours of the polls closing or by voters (objections which must be included in the election record and not sent to the council direct) can only be made in respect of the conduct of the vote. Consequently, no appeal is possible against the organisation of the referendum and conduct of the campaign, even though these are the most important things. The Constitutional Council’s action is thus confined to the conduct of the vote: it monitors voting through the officials representing it on the spot; it oversees the general count; it considers objections and it declares the results. As in presidential elections, it may decide, in the event of serious irregularities, either to nullify part of the results (for example because the polling station was closed too soon, or because voters did not have the use of a polling booth as the constitutional principle of the secret ballot demands), or to declare the entire referendum invalid, something that has never happened yet.

It should be remembered that the council declines to scrutinise the constitutionality of texts approved in a referendum (decision of 8 November 1962), arguing that the constitution concerned itself only with laws passed by parliament and not those approved in a referendum which are the direct expression of national sovereignty.

Existing legislation on the Constitutional Council's powers in electoral matters, whether parliamentary or presidential elections or referendums, is not very satisfactory, on the one hand, because its competence is still too limited and, on the other, because it varies too much depending on the nature of the vote concerned. Ideally, the Constitutional Council should become the ordinary-law judge in political elections. Ideally, too, the rules governing referrals to the council and the scope of its powers here should be standardised. The council itself seems to favour such a development because it indicated its wish, when declaring the result of the 1974 presidential election and during the 1981 parliamentary elections, to be the true judge and sole guarantor of the proper conduct of elections. It would make sense for it to play the same role in referendums.

It was naturally with great pleasure that I agreed to present the conclusions of the discussions we have been holding since yesterday morning on the theme of supervising electoral processes. In addition to thanking the organisers, the Venice Commission and the Centre for Political and Constitutional Studies, I wish to convey my sincere thanks to all those who have contributed to the success of this seminar.

It has indeed been a real success. This raises a first question: what has made the last day and a half so enriching and stimulating? It is clear to see that we participants would like to be able to continue our discussions, here or elsewhere.

The first reason for this success is the chosen subject matter. As all the speakers pointed out, democracy requires free and open elections be held on a regular basis. Supervising the electoral process, from the announcement of the elections to the examination of complaints, necessitates legal controls and a political consensus, neither of which are easy to develop. This was and is a fascinating subject. In my capacity as President of the International Association of Constitutional Law, I might venture to say that it always will be.

The second reason lies in the quality of the speakers. Whether members of bodies responsible for organising and supervising elections, judges of national or international courts or academics, they all exposed their views, proposals and criticisms with great competence, genuine sincerity and a willingness for dialogue. Everyone could tell that this was a subject close to their hearts, and they knew how to communicate their enthusiasm to the participants.

The third reason follows from the first two. Throughout this seminar comparisons have been drawn. The speakers described the situations in some 10 countries of Europe (the Czech Republic, France, Georgia, Greece, Montenegro and Spain), Latin America (Colombia, Costa Rica, Mexico and Uruguay) and North America (the United States). The presentation of three regional jurisdictions, those of the European Court of Human Rights, the Inter-American Court of Human Rights and the Venice Commission, made it possible to broaden the debate beyond the national framework and – perhaps a novelty for some participants – to gauge the influence of international organisations and courts on developments in legal control of elections.

With regard to the observations made in the introductory report by Ms Biglino Campos, the highly active Director of the Centre for Political and Constitutional Studies, two conclusions can clearly be drawn: the first is a confirmation, that this is indeed a complex field; and the second a refutation that, contrary to expectations, comparison is possible.

## **I. Confirmation of the subject's complexity**

All those taking the floor, and indeed all those familiar with this field, are aware that elections are particularly complex operations. The comments made throughout the conference confirm this. This complexity is due both to the development of legal controls and the diversity of the arrangements adopted.

### **A. Development of legal control of elections**

Whatever the country concerned, the speakers highlighted the three factors which are, to differing degrees, essential to guarantee that the electoral process is democratic and, if possible, consistent with the Code of Good Practice in Electoral Matters adopted in 2002 by the Venice Commission.<sup>171</sup>

#### **1. Organisation**

Organising elections involves a series of operations which, from drawing up the roll of voters to registering candidatures, followed by running the campaign and, lastly, the voting arrangements themselves, require not only particularly precise legal rules but also the mobilisation of administrative and human resources, without which the casting and subsequent counting of votes would not be feasible.

Depending on the country concerned, this is the responsibility of central government, local authorities or independent bodies. All the speakers mentioned the numerous difficulties encountered, for example, merely as regards the links between civil registration and the compilation of the electoral roll or the measures to be taken to ensure that there are sufficient polling stations and that they function in a satisfactory way.

#### **2. Funding**

Compared with 30 years ago, it is striking how strong financial control of elections has become. Depending on the country concerned and the electoral techniques adopted, the regulations concern limitation of campaign expenses per candidate or per list, fundraising methods, coverage of expenses by public budgets, whether to a significant or a minimal extent, and of course the penalties for non-compliance with the financial rules, which have been considerably extended.

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171. Venice Commission, "Code of good practice in electoral matters", document CDL-AD(2002)023rev, [www.venice.coe.int](http://www.venice.coe.int)

It can be seen from the presentations that none of the situations is perfect and that coping with the realities of electoral funding, and possibly even the impact of corruption, remains a real issue.

### **3. Oversight**

Under some legal systems the concept of oversight is confined to post-election proceedings when certain candidates, whether or not elected, seek to challenge the results in the courts.

In other cases, and this is the most widely accepted interpretation, oversight consists in ensuring from the beginning to the end of the electoral process that the rules of equality, neutrality and impartiality are respected by both public bodies and the candidates themselves. It can immediately be noted that the control procedures must be organised with the greatest possible care and, above all, allow rapid action before the election has taken place.

## **B. The diversity of arrangements**

No one would have assumed there was only one way of organising elections, and the conference confirmed this.

### **1. Specific bodies**

In a number of countries, for entirely explicable historical or political reasons, the whole electoral process, from organisation of polling to dispute resolution, is entrusted to specific bodies, known as electoral commissions or electoral tribunals. This is notably the case where central or local government bodies are regarded as either ineffective or too exposed to partisan pressures to run the elections in a way acceptable to all concerned. The advantage of this system lies in the possibility of involving all political movements in the organisation of the elections and hence preventing, as far as possible, the risk of bias.

With regard to the bodies exercising prior or subsequent oversight, an argument often advanced is that elections are a specialist matter and judges need to have acquired real experience in this field, not just to be practised in ordinary court proceedings.

The discussions showed that this is an issue which commands little unanimity and that, whether a country is a longstanding democracy or has a less well-established democratic tradition, the arrangements adopted vary considerably, reflecting the underlying national situation.

### **2. Non-specialist bodies**

Conversely, in other countries organisation of elections is the responsibility of the ordinary administrative authorities, whether central or local. Judicial oversight is then exercised by the ordinary courts, the administrative courts or the

constitutional court. Here too, the situation varies considerably from one country to another. Unlike in the situation described above, organising and controlling the electoral process are perceived as routine activities from the standpoint of both the administrative authorities and the courts, and it is not felt necessary to remove them from this traditional setting.

### **3. International courts**

It was striking to see the extent to which the European Court of Human Rights and the Inter-American Court of Human Rights are now part and parcel of the electoral landscape. It is true that their actions and decisions are limited in many ways, notably by reason of the fact that, since the electoral process is very closely linked to sovereignty, each country is keen to retain a strong hold over the rules applied and their control. However, at the same time, there can be no gainsaying the influence exerted by these two courts. It is on the basis of Article 3 of Protocol No. 1 to the European Convention on Human Rights that the European Court of Human Rights sets limits beyond which it considers that the principle of free, democratic elections is violated.

The speakers also clearly showed how the Inter-American Court of Human Rights has influenced reform of the electoral system in certain countries of Latin America.

It might be inferred from the various complexities described above that drawing comparisons between electoral processes is impossible. On the contrary, identifying cross-cutting themes can be seen to be perfectly feasible.

## **II. A refutation: comparison is possible**

Contrary to a rudimentary idea, the diversity of situations immediately calls for comparisons to be drawn. To be persuaded of the relevance of this approach one need but analyse the individual stages from the standpoint of substantive law or consider the role of the courts.

### **A. Comparison of substantive law**

#### **1. Drawing up the electoral roll**

All of the speakers, or at least those who talked about the material organisation of elections, emphasised a key requirement for a good electoral process, which is the existence of a comprehensive and accurate electoral roll. Whether or not its preparation is linked to civil registration, there was general agreement as to the need for a single, accurate voter register. Care must be taken, firstly, to avoid failure to register certain persons who are entitled to vote, that is to say, those who have the right of active suffrage, and, secondly, to ensure that people are registered only once, so as to prevent multiple voting by the same individuals, which would falsify the results.

All of the examples cited focused on the material difficulties of drawing up the roll and the need to have both the necessary time and particularly sophisticated arrangements in place. Once voters' identities have been established, a computerised system facilitates matters.

## **2. Regulating the campaign**

A number of speakers stressed the fact that, to guarantee a fair, open election campaign, a number of conditions must be laid down, including both the beginning and end dates, which raises the eternal question of campaigning by many candidates before the official opening date.

The issue of propaganda means or techniques was frequently mentioned. A new dimension has been added to this debate with the question of reliance on traditional resources, such as documents and meetings, versus use of new technologies, whether television broadcasts or websites, and it can be seen that the concerns are the same from one country to another, even though in positive law various shades of difference may exist.

Intensive use of propaganda by certain candidates in a manner detrimental to the others naturally detracts from, and can even seriously breach, the principle of equality.

## **3. Campaign funding**

Regardless of the rules that may govern various aspects of a campaign, the same questions arise whatever the country or the type of election concerned. Is it necessary and possible to limit campaign expenses for both local and national elections? Is it possible to prohibit certain, national or foreign, sources of funds or to restrict their amount? To what extent is it legitimate that a greater or lesser share of expenses should be borne by society, that is to say, the taxpayer, in the form of direct support or tax exemptions? Is it possible to have two systems, one based on strictly regulated public funding and the other entirely unregulated with candidates making no use of public funds?

These are sensitive questions, the answers to which vary from one country to another, but there is nonetheless one feature in common, the belief that failure to guarantee a minimum of equity with regard to funding debases the entire electoral process, in particular where there are real risks of corruption.

## **4. Guaranteeing lawfulness**

There is a genuine consensus that elections must be lawful not only in form but also in substance, and must above all be perceived as such by the candidates, political movements and public opinion, and possibly in some cases by foreign observers.

This raises many questions concerning the very organisation of the elections and, first and foremost, the role to be played by the courts in supervising the entire electoral process.

## **B. The role of the courts and the judicial function**

Where a political operation is governed by law, it necessarily entails a role for the courts.

### **1. The need for a system of appeal**

It is clear to see that there is a consensus regarding the absolute necessity for candidates, political movements and even voters to have effective means of appeal concerning the outcome of an election. This does not consist of permitting anyone to appeal against anything, but, at the same time, the possibility of bringing the matter before a national, and where applicable international, court for those who consider that an election was unfair, or that the results were tampered with, constitutes an essential aspect of the fairness of the elections. Although no one disagrees that candidates must have the ability to appeal, there is some controversy about voters' entitlement to do so.

### **2. Choice of forum**

The discussions showed that, between the proponents of special electoral courts and those who consider that the ordinary courts are the best judge, the debate is far from closed.

The existence of a special Electoral Court at first instance, or even for the entire hierarchy of proceedings, lays emphasis on the sensitive nature of elections and also their political implications. Conversely, countries which rely on one or more ordinary courts, and even more so those which have a Supreme Court with sole jurisdiction in electoral matters, emphasise the need to respect the separation of powers and point out that electoral law is part and parcel of a broader legal system and its specificity must not be exaggerated.

### **3. Powers of the courts**

Whatever its status, the court dealing with electoral matters must have extensive powers. There is a real consensus on this point. This means that the court must have powers of investigation and that it must not be possible to impede its investigations. Attention has been drawn to the court's ability to cancel, and even modify, the election results. The question of case law concerning the "deciding impact of irregularities" should be discussed in greater detail.

In electoral matters, a court with limited powers is not democratic.



#### 4. The system of penalties

There was general agreement that the system of penalties is of key importance. What should be done when a court finds that a ballot, whether local or national, failed to comply with the rules laid down or with constitutional democratic principles?

In the case of a local election it is fairly easy to cancel and repeat the ballot. For a national election the question remains open to a large extent, but it is worth pursuing the comparison of possible solutions. A key issue is the exclusion of candidates found guilty of serious fraud from subsequent elections, whether they were elected or not.

In the end, the seminar raised two fundamental questions which should be the subject of further discussion.

The first concerns effectiveness: how can the satisfactory organisation of elections from A to Z really be guaranteed? Are there performance indicators relating to the holding of democratic elections?

And the second: in some cases reference is made to an electoral power that allegedly exists alongside the three traditional branches of power – the executive, the legislature and the judiciary. This viewpoint, which some people challenge, should be examined in greater depth, particularly from the standpoint of the rule of law.



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