



Strasbourg, 14 September 2007

**CDL-EL(2007)026\***

**Opinion 436 / 2007**

Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS  
ON THE ELECTORAL LEGISLATION  
OF THE UNITED KINGDOM**

by  
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*\*This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. The Monitoring Committee of the Parliamentary Assembly requested the Venice Commission by letter of 24 April 2007 to inform about three points related with the electoral law of the United Kingdom.

2. The present comments will limit to answer the third of these questions, namely: “(3) Is the fact that different requirements are used for one part of the country (Northern Ireland) with regard to voter registration and postal voting for the same elections, in line with Council of Europe standards?” It must be underlined that the reason of the inquiry is the different regulation and electoral requirements used in one part of the country compared to the requirements applied to the other parts of the country in **one same election procedure**.<sup>1</sup>

3. The following documents of the Council of Europe and the Venice Commission fixing standards in this matter apply to the case under study:

- *European Convention of Human Rights* and its Protocols
- *Code of Good Practice in Electoral Matters*, Doc. CDL-AD(2002)023 rev, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002)
- *Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe*, Doc. CDL-AD(2004)012, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004).

4. There are several statutes in the United Kingdom that regulate the electoral system, and that are relevant to analyse and conclude about the compliance or not of the rules regulating the voter registration and postal voting with the standards of the Council of Europe. The most important ones are:

- Representation of the People Act 1983
- Representation of the People Act 1985
- Representation of the People Act 2000
- Electoral Fraud (Northern Ireland) Act 2002
- Electoral Administration Act 2006
- Northern Ireland (Miscellaneous Provisions) Act 2006.

### **General Issues**

5. In general terms, it is perfectly possible and acceptable that a legal system has different norms that apply in different parts of its territory and that rule the same event. However, when the legislator chooses this option, it must respect the general principles of law: respect for fundamental rights, the rule of law, and the democratic principles. The principle of equality is particularly relevant in this case. The general principle of equality of all persons before the law is enforced through the corollary general prohibition of discrimination, as settled in Article 14 of the ECHR and in Protocol No 12 to the Convention. These principles taken together mean that the States cannot adopt discriminatory measures or differences between citizens, unless those measures are reasonable and tend to promote full and effective equality. In other words, the difference should be justified. Thus, if the legislation establishes different requirements for

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<sup>1</sup> The requirements of electoral law with respect to local government elections and to the elections to the Assemblies of Ireland, Scotland, and Wales differ. Thus, for example, there are some common rules applicable to England and Wales Ireland in ss. 35-40 of the Representation of the People Act 1983. Furthermore, some specific legislation has been enacted in Northern Ireland and in Scotland to regulate local government elections. Among the relevant legislation that rule local government elections in Northern Ireland, one can mention the Electoral Law Act (Northern Ireland) 1962; The Local Government Act (Northern Ireland) 1972; The Local Elections (Northern Ireland) Order 1985 - No. 454 with its amending orders; Political Parties, Elections and Referendums Act 2000; Electoral Fraud (Northern Ireland) Act 2002. Recently, the Parliament has approved special provisions regarding Absent Voting in Local Government Elections for Scotland, through The Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations 2007.

exercising an individual right, say the right to vote, the differences should be reasonably justified, or else, held as arbitrary and discriminatory.

6. The European Court of Human Rights has interpreted the principle of free elections of Article 3 of Protocol No 1 of the ECHR in relation to the principle of equality. According to the Court, the expression “under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” implies “the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election”.<sup>2</sup>

7. The ECHR has also clearly declared that the rights set out in Article 3 of Protocol No 1 are not absolute, but may be subject to limitations. Since Article 3 recognises them without setting them forth in express form, let alone defining them, there is room for “implied limitations”.<sup>3</sup>

8. Taken together the possibility of establishing limitations and/or conditions to the exercise of rights and the principle of equality, national legislation introducing limitations or creating different situations should satisfy the implicit criteria inspiring that principle: reasonableness, justifiability and non arbitrariness. On this line, the European Commission on Human Rights held that the application of a particular electoral system to a part of the country is not contrary to Article 3 if sustained by objective and reasonable justification and the means proposed are not disproportionate.<sup>4</sup>

9. Building on this case, the European Commission on Human Rights refined later the principles governing more precisely the scrutiny of the elements of an electoral system. Whilst states have a wide margin of appreciation on the introduction of conditions to voting rights, these conditions must satisfy the following criteria: they do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; they must pursue a legitimate aim and the means must be proportional.<sup>5</sup> Both cases referred (*Lindsay* and *Polacco and Garafolo*) are slightly different in their facts; the first refers to the use of single transferable vote for the EP elections in Northern Ireland, the later to the registration requirements for the regional elections in Trentino-Alto Adige. The principles, though, are general enough as to inspire the examination of other elements of an electoral system.

10. The legitimate aim pursued in both cases (*Lindsay*, and *Polacco and Garafolo*), generally stated was the protection of a minority. In both cases, the Commission argued that “*any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*”.

11. Hence, the legitimate aim pursued renders acceptable an element of differentiation which *prima facie* might be perceived as contrary to the equality principle. This aim must coherently be assessed in the context of the UK electoral legislation and the differences introduced.

12. The sovereign British Parliament can pass legislation on electoral matters that is one of the issues in which it has reserved powers to legislate. In other words, it is a political and legal decision of Westminster to enact laws that settle different requirements for voter registration and postal voting applicable to different parts of the territory. In the case under study, the different requirements for electors to register and to vote by post, and, by this way, the different

<sup>2</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, (Application No 9267/81), 2 March 1987, par. 54.

<sup>3</sup> ECHR Case *Py v. France*, Application no. 66289/01 Judgment 11 January 2005. This case follows the Case *Labita v. Italy* [GC] No 26772/95 § 201 ECHR 2000-IV.

<sup>4</sup> Decision of 8 March 1979, *Kennedy Lindsay and other v/ the United Kingdom*, Application No 8364/78.

<sup>5</sup> *Polacco and Garafolo v. Italy* Application no. 23450/94, 15 September 1997. See also Eur. Court HR *Gitonas and others v. Greece*, judgement 1 July 1997, Reports 1997-IV fasc. 42 and *Py v. France*...cit

requisites for the citizens to exercise the right to vote are based on a territorial criterion. Electors living in different places of the United Kingdom must observe different standards for voting in the same parliamentary election. In the case of Northern Ireland, the electoral system has been tailored to adapt to historical circumstances: political conflicts within Northern Ireland; social perception of electoral fraud as a significant problem inside this territory; distrust on the system of absent voting; and problems of persistent fraud and lack of transparency in past elections.

13. The reasons that justified the introduction of tighter controls and requisites to voter registration and absent voting - that, in short, consist of providing several personal identifiers both for individual registration or individual application to vote by post - were the perception of high levels of fraud, the inaccuracy of the registers and the insecurity of postal voting. The reasons motivated the enactment of the Electoral Fraud (Northern Ireland) Act 2002 and the ulterior norms (which are exposed more in detail below).

14. Fighting electoral fraud is no doubt, a legitimate aim that may warrant measures of differentiation within an electoral system. Measures adopted in fighting electoral fraud guarantee the equality among citizens (by removing non legitimated expressions of opinion) and improve in general the electoral process. In general terms, it may be concluded that the UK authorities pursue a legitimate aim when enacting these provisions. A different question, which will be discussed more precisely below, refers to the proportionality of the measure.

15. Moreover, the enactment of these measures complies an additional criterion regulating the principle of equality: non arbitrariness. This means that the logical connection between the legitimate aim pursued and the measures proposed can be imputed to a careful study of the facts and a perusal of the available means. In the case under review, the measures cannot be considered arbitrary at all, since they result out of a detailed process of fact finding and adjustment of legislation. Thus, the British government and Parliament have been concerned with the existence of electoral fraud in Northern Ireland in the last years. In 2001, the government made a review of the situation, and made some recommendations in order to improve the legislation and the measures to combat the fraud.<sup>6</sup> This sustained situation motivated the enactment of the Electoral Fraud (Northern Ireland) Act 2002. On the other hand, the Parliament has conducted a study and inquires over the same topic, results of which are compiled in two reports of Session 2004-2005.<sup>7</sup> Finally, the Electoral Commission has also followed the electoral reforms in Northern Ireland, and its effects and consequences, especially the voter registration decline, due both to people not responding to the canvass and people never being registered.<sup>8</sup> Within this framework, the Commission gave a commitment to monitor the impact of the Act on electoral registration and commissioned a series of registration updates focusing on various aspects of the registration process, the last of which is from 22 August 2007.<sup>9</sup>

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<sup>6</sup> Government's White Paper *Combating Electoral Fraud in Northern Ireland* (Cm. 5080), Presented to Parliament by the Secretary of State for Northern Ireland by Command of Her Majesty, March 2001 (online: <http://www.archive.official-documents.co.uk/document/cm50/5080/5080.htm>).

<sup>7</sup> House of Commons, Northern Ireland Affairs Committee, *Electoral Registration in Northern Ireland*, First Report of Session 2004-05, and Second Special Report of Session 2004-05. Both can be consulted online: <http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmniaf/cmniaf.htm>. See also the recent report of about electoral registration of the House of Commons, *Speakers Committee - Second Report 2007*. Session 2006-2007, online: <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmspeak/997/99702.htm>

<sup>8</sup> A further concern, linked with the drop on the electors admitted to vote in Northern Ireland, is the duty of the electors to produce a specified form of photographic identification at polling stations before being issued with a ballot paper.

<sup>9</sup> Research from the Electoral Commission examining key aspects of the electoral registration system in Northern Ireland, online: <http://www.electoralcommission.org.uk/templates/search/document.cfm/20223>. The Reports were committed to PricewaterhouseCoopers, and can all be find online, in the website mention in n.14 supra.

16. Therefore, the existence of differences in the regulation of registration and postal voting in Northern Ireland are reasonably justified by the particular historical and socio-political circumstances of Northern Ireland. Thus, different regulations *per se* do not violate the standards of the Council of Europe. A different question to be scrutinised is whether the specific requirements do not contravene the principle of proportionality.

### **Specific Issues**

17. The different requirements in the UK electoral legislation for Northern Ireland concern both voter registration and postal voting. Firstly, the system of both registration and postal voting applicable to the parliamentary elections in the United Kingdom will be described in order to see clearly the differences. Then, the particularities of the regulations applicable to Northern Ireland will be exposed.

18. The aim of this scrutiny is twofold: firstly, it aims at contrasting these provisions with the standards of the Council of Europe. It may happen that, even if they prescribe more exigent requisites, they adjust better to the general directives in order to prevent fraud, ensure secret voting, and maintaining accurate and complete electoral registers for the electors to exercise their right to vote. The characteristics of the electoral registers and the minimum requirements for postal voting, as established by the Code on Good Practice of Electoral Matters, will be taken into account in the analysis of this perspective below. Secondly, it will be pondered whether the requirements are proportionate.

### **Voter Registration**

19. The general requirements for voter registration according to the electoral law of the United Kingdom are settled in the Representation of the People Act of 1983, as amended, particularly in sections 8-13D.

20. The Electoral Registration Officers in England, Scotland and Wales have the duty to prepare, maintain and publish a register each year. For exercising their right to vote, the individuals must be on the electoral register. The registration system is based on an annual registration form that the householder must complete on behalf of all the eligible individuals residing in each property, and then return to the registration office before 15 October each year. The Representation of the People Act 2000 introduces a mechanism of voluntary "rolling" (continuous) registration, by which individuals can modify their details and personal information contained in the register outside the period of annual canvass, and can also notify its eligibility to register. The main problem of the current householder system is that the electors are registered by address without any personal identifier (such as date of birth, signature or national security number).

21. Every registration office shall maintain two types of registers, a register of parliamentary electors and a register of local government electors, each of which shall contain the name of the person, its address and its electoral number. Concerning the maintenance of the registers, section 10 establishes the duty (subjected to the prescribed exceptions) of each registration office to conduct annual canvass in the area under their jurisdiction "for ascertaining the persons who are for the time being entitled to be, or to remain, registered in his registers". In the case of Northern Ireland, as will be seen below, the form and timing of the canvass are subjected to precise rules.<sup>10</sup>

22. A further related feature is the maintenance of the registers, particularly the rules referred to incorporation or elimination of elector's entries. Based on the results of the annual canvass,

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<sup>10</sup> The canvass shall be conducted with the form prescribed for those purposes, requiring the information of section 10 (4A), and in the timing specified in section 10ZA. See para. 26-27 below.

the registration officers shall make the alterations in their registers as fall to be made in accordance with section 10A. This section regulates several circumstances such as entitlement to be registered and to be treated as being registered; entitlement to remain registered; and termination of the entitlement to remain registered. If as the result of a canvass a form completed in respect of an address "specifies any person as a person who is entitled to be registered in a register" and the person has not for the time being been registered in respect of that address, "he shall be treated as having made, on the 15th October in the year in question, an application for registration in the register in respect at that address". The person already entered in a register in respect of any address is entitled to remain registered, unless it is determined that the elector was not resident at that address as legally required, or the form was not returned in respect of that address, or for any other reason the information received is insufficient to establish whether the elector was resident at that address. In any of these cases, the registration office determines that the elector has ceased to be resident at that address or has failed to satisfy the conditions for registration, and it shall remove the person's entry from the register.<sup>11</sup>

23. The published version of a register that results from the annual canvass can be altered if the registration officer, on the basis of an application for registration made by a person in accordance with the prescribed requirements, determines that the person is entitled to be so registered (Section 13A of the Representation of the People Act 1983).

24. The Electoral Administration Act 2006 incorporates an additional mechanism for registration purposes (that, nonetheless, does not substitute the registers maintained by each registration office): the Co-ordinated on-line Record of Electors (the CORE scheme). The CORE is a new tool for consolidating at one central point the electoral registration information that the several locally based electoral registration officers currently held.

25. In spite of the general rules where applicable, Northern Ireland has special rules for registration of voters that regulate:

- A system of individual registration, providing the personal data required
- The duty of the Chief Officer to conduct a canvass according to the timing settled by the Act
- The additional information that the voter must provide in order to be included in the register
- The relevant registration objectives
- The alteration of registers pending elections
- The electoral identity card.<sup>12</sup>

26. The special rules are a result of the amendments introduced by both the Electoral Fraud (Northern Ireland) 2002 and the Northern Ireland (Miscellaneous Provisions) Act 2006, acts that sought to reduce the electoral fraud, make the system more transparent<sup>13</sup>, and improve the mechanism of registration of electors.

27. The Electoral Fraud (Northern Ireland) Act 2002 substituted the system of household registration in force until that moment<sup>14</sup> with an individual registration system, whereby eligible electors have to complete an individual registration form on an annual basis. There was not,

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<sup>11</sup> Other rules of general applicability concerning registration are contained in Sections 13, 13A and 13B, that regulate, respectively, the publication of registers, the alteration of registers, and the alteration of registers pending elections.

<sup>12</sup> One of the photographic identifications accepted at the polling stations is the electoral identity card for Northern Ireland electors, regulated by section 13C of the Representation of the People Act 1983.

<sup>13</sup> See also the Explanatory notes to this Act, online: <http://www.opsi.gov.uk/ACTS/en2002/2002en13.htm>.

<sup>14</sup> Formerly, one member of a household could register all eligible persons living there. More information can be consulted on the webpage of the Electoral Commission, online: <http://www.electoralcommission.org.uk/your-area/registrationresearch.cfm>.

then, an automatic system for first registration nor for re-registering each year on the basis of the register of the previous year, but it was necessary both for people never being registered and for people already registered to complete annually a registration form and present it to the electoral office.

28. The problems generated by the Electoral Fraud (Northern Ireland) Act 2002 pushed the government to enact the Electoral Registration (Northern Ireland) Act 2005, which ordered the reinsertion into the electoral register of names previously removed. Thus, this Act reinstated electors onto the register who had been previously registered, but chose not to re-register. The later Act set up temporary amendments in subsection 7 of section 10A for achieving this task.<sup>15</sup>

29. Further amendments concerning registration were introduced by the Northern Ireland (Miscellaneous Provisions) Act 2006. This Act removed the requirement for an annual canvass and fixed dates for the preparation of the register by the electoral officer. Instead of the system of annual canvass, the Act implements a system of continuous registration based on individual registration, in which the electors will register once and will need to re-register only if their details change. Every 10 years, or as deemed necessary, the Chief Electoral Officer will undertake a canvass.

30. A Chief Electoral Officer who works in co-ordination with the Electoral Office for Northern Ireland (EONI)<sup>16</sup> administers the electoral system in Northern Ireland. The Chief Electoral Officer is both the registration officer and the returning officer for each constituency (Section 8(4) and 26(1) of the Representation of the People Act 1983).

31. The application form for the registration of an address in Northern Ireland includes the signature of the person, the date of birth of each such person, his national insurance number or the statement that he does not have one, a statement of whether or not he has been resident in Northern Ireland for the whole of the three-month period ending on the date of the application, and any other address in the United Kingdom in respect of which he is or has applied to be registered (Section 10A (1A) of the Representation of the People Act 1983).

32. The relevant registration objectives of the Northern Ireland system of registrations are to secure, so far as reasonably practicable, "(a) that every person who is entitled to be registered in a register is registered in it, (b) that no person who is not entitled to be registered in a register is registered in it, and (c) that none of the required information relating to any person registered in a register is false".<sup>17</sup>

33. For achieving the relevant registration objectives, the Chief Electoral Officer can collect personal information through the canvass, such as: (a) the person's name; (b) the person's qualifying address; (c) the person's date of birth; (d) subject to some exceptions, the person's signature; (e) the person's national insurance number or a statement that he does not have one (Section 10ZB (4) Representation of the People Act 1983). The additional personal data gathered in the registration process does not appear on the published register of electors. However, it will be used to check the identity of the voters when they apply to absent voting (by post or proxy), or in the polling station, before receiving the ballot (asking for the date of birth).

34. The entitlement of the electors of Northern Ireland to remain in the register terminates if: a) in the annual canvass their form does not contain the additional information of Section 10

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<sup>15</sup> The Electoral Registration (Northern Ireland) Act 2005 temporary substitutes subsection (7) for a period of 12 months beginning on the day on which it was passed, that is, from 24.02.2005 to 24.02.2006, and introduces, with the same temporal limits, subsections (7A) and (7B).

<sup>16</sup> Information of EONI is available online: <http://www.eoni.org.uk/>.

<sup>17</sup> Section 10ZB, Representation of the People Act 1983, inserted by the Northern Ireland (Miscellaneous Provisions) Act 2006.

(4A) (signature; date of birth; national insurance number or makes a statement that he does not have one; a statement that he has been resident in Northern Ireland for the requisite three-month period before 15 October in the year in question; and to state any other address in the UK in respect); or b) if the registration officer “determines that the elector was not entitled to be registered in respect of that address or that he has ceased to be resident at that address or has otherwise ceased to satisfy the conditions for registration set out in section 4 above”.<sup>18</sup>

35. The alteration of the registers pending elections follows different rules in the case of parliamentary elections in Northern Ireland (Section 13BA). One important difference with respect to the general rules of Section 13B is the time-limit to alter the registers pending elections, since the general rule is that the changes will have effect if they are made before the fifth day before the date of the poll, whereas related to Northern Ireland they will have effect if they are made before the final nomination date.

36. The Chief Electoral Officer must publish each year a revised version of his registers, incorporating the alterations made in them. If there is canvass that year, the register shall be published “during the period starting with the end of the canvass in that year and ending with 1st December in that year or such later date as may be prescribed”. If there is no canvass, “on 1st December in that year or by such later date as may be prescribed”. In addition, the registration officer can publish at any time in between a revised version of the register (Section 13, Representation of the People Act 1983).

37. Relating to electoral registers, guideline I.1.2. of the Code of Good Practices in Electoral Matters recommends that they should be permanent, regularly up-dated and published. Additionally, there should be an administrative or judicial procedure allowing for the registration of a voter who was not registered or to amend incorrect inscriptions. If the eligible electors need to register to vote, then the procedure of registration, the maintenance of the registers, the amendment of them, and more broadly, their completeness and accuracy are key ingredients in guaranteeing universal suffrage and in carrying on democratic elections. The explanatory report, in its paragraph 7, adds some few directives to the general framework.

38. Comparing the registration system of Northern Ireland with these standards, we can conclude that the former is in accordance with the latter. There is a permanent register of parliamentary electors kept by the Chief Electoral Officer. This register is regularly up-dated, since amendments and new electors can be incorporated in the register when requested through the year, and thus, allowing registration for a long time period (with the restrictions in case of amendments pending elections). The electoral law also prescribes that a revised version of the register must be published once a year. There is as well a simple administrative procedure before the Chief Electoral Officer for correcting the inaccuracies of the registers, for removing unjustified entries, and for incorporating electors entitled to register. Besides, sections 56 and 58 of the Representation of the People Act 1983 establish a procedure of registration appeals before the respective county court. Finally, the closing of the register pending elections in the case of Northern Ireland is in accordance with the standards as amendments are accepted until the final nomination day, which is a reasonable period.

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<sup>18</sup> Section 10A (5A) of the Representation of the People Act 1983. For the general rules, see paragraph 13 above. According to Section 4, in the case of Northern Ireland, a person is entitled to be registered in the register of parliamentary electors for any constituency if, on the relevant date (normally, the date of the application) he (a) is resident in the constituency or that part of it; (b) is not subject to any legal incapacity to vote (age apart); (c) is either a qualifying Commonwealth citizen or a citizen of the Republic of Ireland; (d) is of voting age; (e) he has been resident in Northern Ireland during the whole of the period of three months ending on the relevant date.



39. On the other hand, the continuous registration system based on individual registration - implemented through the different amendments in the last five years - meets also the standards of the Council of Europe. It enables the electors to register personally through a registration application form, for which they need to provide the personal information requested. Some of this information will be used at the polling station for checking the identity of the elector. It also permits to delete errors and to introduce changes, e.g. change of address, when needed.

40. To summarise, the rules that regulate the electoral registers and registration procedure in Northern Ireland are in line with the Council of Europe standards.

41. The right to vote of citizens of Northern Ireland is not affected by this different registration system, because the more exigent requirements are not an obstacle for the elector to exercise his or her right; they consist merely in giving some extra personal data at the very moment when they apply to register. The fact that these data are used for identifying the elector in the polling station or in the postal voting system reduces the possibility of impersonation and double registration. On the other hand, the problems of inaccuracies of the registers derived from the householder registration system are reduced by this individual registration system. Finally, the equality between citizens residing in Northern Ireland and the rest of the territory of the United Kingdom is not undermined, because the differentiation is not arbitrary but supported by a notorious and persistent electoral fraud practice in that part of the territory in the past.

42. Regarding this point it is important to recall the guidelines and explanatory report settled by the Code of Good Practice on Electoral Matters about the sense of the right to free elections: it includes the freedom of voters to express their wishes and combating electoral fraud. If it is considered that the aim of the voter registration system is to remove the existing electoral fraud and to prevent it in future elections, then it can be concluded that the means used to achieve this legitimate aim, i.e. the settlement of an individual registration system, which requires personal data, and the incorporation of the possibility of continuous registration and amendments of the registers, are proportional. This proportionality derives from the fact that the measure is suitable, necessary, tends to the protection of the rights to vote, and it does not affect the principle of equality, since the difference of requirements is reasonably justified by the particular circumstances of Northern Ireland. Additionally, electors have measures of redress following the procedures described in paragraph n (see above par. 20 ff. above).

### **Absent voting**

43. As well as in the case of electoral registration, the issue of absent voting has been a matter of concern during the recent years. The Electoral Commission began the review of the law and practice of absent voting in Great Britain in November 2001, in order to identify its problems of fraud, secrecy, and administration, among others<sup>19</sup>. The House of Commons has produced, too, some standard notes on postal voting<sup>20</sup>. The amendments of the absent voting rules should try, mainly, to balance the tension between, on the one hand, promoting electoral participation, and on the other, protecting the democratic process and individual votes, by introducing security measures and building public confidence.

44. Absent voting in United Kingdom exists since the Representation of the People Act of 1918. In what follows, we will focus only in postal voting as one form of absent or remote voting,

<sup>19</sup> Electoral Commission, *Absent Voting in Great Britain: report and recommendations*, 25 March 2003, online: <http://www.electoralcommission.org.uk/templates/search/document.cfm/7240>. See also the document of the Electoral Commission *Delivering democracy? The future of postal voting*, last update 5 April 2005, online: <http://www.electoralcommission.org.uk/templates/search/document.cfm/10935>.

<sup>20</sup> See the following standard note from the House of Commons Library: *Postal Voting and Electoral Fraud*, SN/PC/3667, last updated 16 May 2007, online: <http://www.parliament.uk/commons/lib/research/notes/snpc-03667.pdf>; *Postal Voting: New Regulations requiring the provision of Personal Identifiers*, SN/PC/4325, last updated 25 April 2007, online: <http://www.parliament.uk/commons/lib/research/notes/snpc-04325.pdf>.

and in postal voting on demand, that is, the one requested by the elector when, in the circumstances established by the law, he or she cannot attend the polling station (all-postal voting will not be discussed).<sup>21</sup> Two aspects are important here: the application for postal voting and the returning of the postal ballot.

45. The manner of applying for postal voting in parliamentary elections in the United Kingdom is ruled under Section 12 and in Schedule 4 of the Representation of the People Act 2000,<sup>22</sup> as amended in 2006. The main change in the postal voting system was the collection of personal identifiers (signature and date of birth) for the application of postal voting. Generally speaking, even when there are some differences between them, both in the cases of absent vote at elections for definite or indefinite period and absent voting for a particular election, the registration officer shall grant the application to vote by post if (a) he is satisfied that the applicant is or will be registered in the register of parliamentary electors, local government electors or both (as the case may be), and (b) the application contains the applicant's signature and date of birth and meets the prescribed requirements (Sch. 4, par. 3(1), 4(1)). The registration officer shall keep a postal voters' list of those whose application to vote by post at the election has been granted, together with the addresses provided by them in their applications as the addresses to which their ballot papers are to be sent (Sch. 4, par. 5(1)).

46. The rules for the returning of the ballot are in Schedule 1 of the Representation of the People Act 1983, particularly under rules 24, 31A and 45. For the postal ballot to be valid, it has to be returned with a postal voting statement that contains the signature of the elector and its date of birth. If the postal ballot is duly returned together with the postal voting statement, the registration officer shall mark the name of the person in the postal voter's list. He/she can verify the signature and date of birth against his/her records.

47. The Electoral Fraud (Northern Ireland) Act 2002 introduced modifications in the Representation of the People Act 1985 (Sections 5-11 and Schedule 2), that have effects in the case of absent voting (by post or by proxy) only in parliamentary elections in Northern Ireland.<sup>23</sup> An elector is entitled to vote by post if he/she shows in the absent voters list for the election. In this situation, he/she is eligible for an absent vote for an indefinite period or for a particular election. The eligibility depends on two type of requirements: that the elector is or will be registered as service voter, and that he cannot be reasonably expected to go to the polling station for one of the circumstances contemplated by the law (blindness or physical incapacity, nature of his occupation, and sea or air travellers, etc.).

48. Applications to vote by post must be signed and state an applicant's date of birth and national insurance number (or state that he does not have one). The signature, date of birth and national insurance number on the application must correspond with the information provided to the Chief Electoral Officer on registration. If the Chief Electoral Officer is not satisfied with this correspondence, he may refuse to grant an absent vote application. The difference between this application to vote by post and the one described above (para.39) for the rest of the United Kingdom is only that in this case a further information is requested (the national insurance number or the statement that he does not have one), and the fact that the electoral officer strictly controls that the information corresponds with that one that appears on the register.

<sup>21</sup> An all-postal election is one where all eligible electors are sent their ballot paper by post. This modality of voting has been implemented in pilot regions in the United Kingdom for local government elections and for the European Parliamentary elections. See the Standard Note *All -postal voting*, SN/PC/2882, last updated 30 March 2004, online: <http://www.parliament.uk/commons/lib/research/notes/snpc-02882.pdf>.

<sup>22</sup> The text in force of this Schedule was amended by Section 14 of the Electoral Administration Act 2006.

<sup>23</sup> Provision for absent voting at local government elections are contained in Part I of Schedule 2 to the Local Elections (Northern Ireland) Order 1985 (S.I. 1985/454), as substituted by Schedule 2 to the Local Elections (Northern Ireland) (Amendment) Order 1987 (S.I. 1987/168) and other amendments.

49. The rules for returning the postal ballot in Northern Ireland are similar to the ones mentioned in par. 46. In this case, those entitled to vote by post must return the ballot paper and the declaration of identity in the prescribed form, together with the two envelopes issued by the returning office (in this case, the same Chief Electoral Office) The prescribed form shall include, as in the case of postal voting for an election held in England and Wales or Scotland, "provision for the form to be signed and for stating the date of birth of the elector..."<sup>24</sup> The elector must put the completed ballot inside the ballot paper envelope and seal it, and put the completed declaration of identity and the sealed ballot paper envelope inside the return envelope.

50. In Northern Ireland, the postal ballot shall be taken to be duly returned when a) it is returned in the proper envelope and in the proper time-limit, and is accompanied by the declaration of identity duly signed, and (b) that declaration of identity states the date of birth of the elector and the returning officer is satisfied that the date stated corresponds with the date supplied as the date of the elector's birth in the register. The declaration of identity referred shall be taken not to be duly signed unless the returning officer is satisfied that the signature on the declaration corresponds with the signature supplied as the elector's signature register (Rule 45, Schedule 1, Representation of the People Act 1983).

51. After the postal ballot is taken to be duly returned, the returning officer shall mixed the postal ballot papers with the ballot papers from at least one ballot box before counting them (Rule 45 (1A) (a), Schedule 1, Representation of the People Act 1983).

52. According to the report of the Venice Commission on remote and electronic voting, remote voting, defined as "voting outside the premises where voting takes place in general", is in principle permitted. Moreover, it is a common electoral procedure in a great number of the member states of the Council of Europe, even if there is a considerable diversity between these systems and it is difficult to identify shared or common standards. Remote voting can take place in a controlled or supervised environment, or in an uncontrolled or non-supervised environment<sup>25</sup>.

53. To see the compatibility of a certain system of remote or absent voting with the standards of the Council of Europe, we need to see in detail if the legislation guarantees measures to avoid fraud or intimidation and prevents family voting, if the conditions of the national postal service are safe and reliable (or put different, if it is protected from deliberate manipulation and it operates correctly), and if the secrecy of the vote is secured. These conclusions can be reached by analysing the guideline I.3.2. of the Code of Good Practice in Electoral Matters, and the corresponding paragraph 38 of its explanatory report. Besides the need of an appropriate legislation, the compatibility will depend on the implementation of postal voting and the particular technical and social conditions of the country or area where it applies.

54. Postal voting in Northern Ireland is of a non-supervised type. The amendments to this system introduced in 2002 and 2006 aimed at eliminating fraud, since the elector eligible to vote by post must fulfil an application form with personal information, which will be checked with the one available on the registers. The claims about fraud in this kind of remote voting do not seem to have been directed, on the other hand, towards the security or reliability of the postal service. Thus, the postal voting system seems to fit with the provisions of the Council of Europe in order to avoid fraud both at the level of applications and voters' lists, and at the level of postal service.

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<sup>24</sup> Schedule 1, rule 24, Representation of the People Act 1983, as amended by the Electoral Administration Act 2006.

<sup>25</sup> *Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe*, Doc. CDL-AD(2004)012, adopted by the Venice Commission at its 58<sup>th</sup> Plenary Session (Venice, 12-13 March 2004), Paragraphs 23-24, and 47.

55. The purpose of the declaration of identity that the elector must return together with the postal ballot to the electoral office aims also at preventing electoral abuses, as the electoral officer has to check that the elector shows in the postal voting list and that his identity and personal data correspond with the information held in the registers. On the other hand, the principles of secrecy of vote and freedom of expression of Article 3 of Protocol 1 to the European Convention on Human Rights and Article 10 of the ECHR<sup>26</sup> are not undermined, given that the ballot paper is inside a separate sealed envelope, and then placed in the return envelope together with the declaration of identity. The latter is checked with the information available in the registers and the postal voting list; then, the postal ballots are mixed with the ballots of at least one ballot box in the polling station, and afterwards opened and counted.

56. Connecting these previous ideas, we can say that some important measures have been introduced in the application for the postal voting system in Northern Ireland, particularly to eliminate and avoid fraudulent voting. The returning system seems also to prevent abuses and to be in line with the principle of secret suffrage.

57. The mechanism of postal voting in Northern Ireland protects the secrecy and effective exercise of the right to vote when the elector is not expected to go to the polling station and for that reason applies to vote by post. The legitimate aim pursued by the specific requirements concerning postal voting is to avoid the abuses that this mechanism of voting produced in the past, and to make sure that the person who applies for the postal ballot and returns it is really the registered elector. For reaching this aim, the Northern Ireland legislation requires the elector to use an application form provided by the electoral officer that asks for personal data, and to return the postal ballot with a declaration of identity to be checked with the information available at the electoral officer's. This additional personal data required is a proportionate mean for preventing electoral fraud, and does not obstruct the exercise of the right to vote by post.

58. On the other hand, the system of postal voting in force in the rest of the United Kingdom is very similar to the one of Northern Ireland since the amendments introduced in 2006. The main difference is that the individual application in Northern Ireland requires also the national insurance number or the statement that the elector does not have one, and the fact that for Northern Ireland, for the postal ballot to be valid the registration officer must, and not just can, check the data and the signature against the information available in the electoral office. Therefore, these minor differences in the rules of postal voting in Northern Ireland can not be considered to affect the equal treatment of their citizens with respect to the rest of the citizens of the United Kingdom; on the contrary, these rules of postal voting guarantee in a better way the principle of free elections, and allow the citizens exercising their right to vote by post in a more secure and confident way.

## **Conclusions**

59. The differences between the electoral legislation applicable to Northern Ireland and the rest of the United Kingdom referred to registration of voters and postal voting are the result of a number of amendments introduced by Parliament in order to tackle with problems of inaccuracies of the registers and electoral fraud. These abuses, which were linked with particular social and political circumstances of Northern Ireland, were of deep concern within the government, the parliament itself, and other British public authorities (e.g. the Electoral Commission). The aim of the Electoral Fraud (Northern Ireland) Act 2002, the Northern Ireland

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<sup>26</sup> Article 3 of Protocol 1 states: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". This article, together with the one that establishes freedom of expression, guarantee to citizens the exercise of their right to vote in secret and expressing freely their political opinion. These are core principles in order to carry out fully democratic elections.

(Miscellaneous Provisions) Act 2006, and the Electoral Administration Act 2006 was precisely to include anti-fraud measures to prevent electoral abuses that could be generated through registration or postal voting.

60. The arguments expose above support the opinion that *the difference in the electoral system* is not, *per se*, against the standards of democratic elections and human rights that bind the member states of the Council of Europe. In this particular case, moreover, the different requirements are reasonably justified by the special historical circumstances of Northern Ireland and by the urgency both of preventing fraud and improving the social perception of elections as the cornerstone mechanisms for the good functioning of democracy.

61. Concerning *the specific requirements* for Northern Ireland implemented by the electoral law, it can be affirmed that they are also in accordance with the standards of the Council of Europe. Even more, we could say that they adjust better to them than the ones that operate in the rest of the United Kingdom concerning parliamentary elections, especially in relation with registration. Thus, the continuous individual registration system complies better with the principles of good practice in electoral matter and with the European electoral heritage that underlies them. The postal voting system, on the other hand, establishes a procedure of application, returning and checking of identity and personal data by the electoral officer that tend to make this electoral mechanism more secure and transparent. In other words, the legislation in force in Northern Ireland establishes tighter controls for securing the right to secret and free vote that cannot be considered as an obstacle for the exercise of this right, but as measures that intend at reducing fraud and abuses, and at guaranteeing democratic elections.