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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON THE ELECTORAL LAW
OF THE UNITED KINGDOM**

on the basis of comments 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.*

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Introduction

1. The Chairman of the Committee for the honouring of the obligations and commitments of the member States of the Parliamentary Assembly of the Council of Europe, Mr Eduard Lintner, informed by letter dated Strasbourg, 24 April 2007 the President of the Venice Commission, European Commission for Democracy through Law, the late lamented Mr Antonio La Pergola that this Monitoring Committee of the Parliamentary Assembly, was currently investigating an application to initiate a monitoring procedure so as to investigate electoral fraud in the United Kingdom, and that two rapporteurs had carried out a fact-finding visit to the United Kingdom. The rapporteurs had proposed to ask the Venice Commission for an opinion. The Monitoring Committee had decided during its meeting of 18 April 2007 to put the following three questions to the Venice Commission:

(1) *Is the voters' registration system in the United Kingdom in line with Council of Europe standards, given in particular the household registration as opposed to individual registration and the relative lack of personal identifiers upon registration?*

(2) *Is the manner in which postal voting is implemented in line with Council of Europe standards, especially with regards to the security of the vote?*

(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?*

2. This opinion is based on:

- European Convention on Human Rights and its Protocols plus the Commission and ECHR cases.
- Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004) (CDL-AD(2004)012).
- Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report. Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002) (CDL-AD(2002)023rev).
- The electoral legislation of the United Kingdom (see the next paragraph).

3. 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

These pieces of legislation are partly reproduced in document CDL-EL(2007)024, which includes also the Absent voting (transitional provisions) (England and Wales) Regulations 2006.

4. The present Opinion was adopted by the Council for Democratic Elections at its ... meeting (Venice, ...) and the Venice Commission at its ... plenary session (Venice, ...).

1. Historical background

5. In the case of the United Kingdom, a foremost breeding ground of democratic institutions, one needs necessarily to adopt a historical approach, in order to understand fully the reasons behind the statutes governing elections, including those concerning the registration of voters. As in most fields of law, practice more than logic drove the development of the exercise of the franchise in the British Isles.

6. Early in the last millennium the Norman Kings started summoning Parliament, ostensibly to consult about dangers to the realm, in fact to urge for contributions, rather than to share in government. The Sheriff was asked to select two representatives of the counties and boroughs. The term used, in Latin, *elegi facias* was occasionally reverted back to the more coercive *venire facias*. Some electors would be recalcitrant at times, some electors might be too eager on other occasions. The elections were carried out during purposely called gatherings, derived from Germanic moots for the national *witangemot* of Anglo-Saxon times, with some cultural reference to the Roman *Comitiæ*. From 1265, two burgesses from each borough were summoned, alongside with two knights from each county. Boroughs were created by the Monarchy which recognised certain towns and gave them privileges and exemptions (hence franchise; *franchigie*).

7. The very first law of a constitutional nature still extant [The First Statute of Westminster, 1275, 3 Edw 1] provided for the freedom of elections, in Norman French, then still the official language: *Pur ceo q elections deivent estre fraunches, le Rey defent sour sa greve forfeiture q nul, haut home ne autre, par poer de armes ne par malice ne desturbe de fere fraûche election.* (Because the elections ought to be free, the King commands under pain of great forfeiture, that no man, high in position or other, by power of arms or by malice, should disturb the free holding of elections). More than a hundred and fifty years later, in 1430, an Act was passed (8 Henry VI Cap VII) which restricted voting rights to freeholders of property worth more than 40 shillings *per annum*. It was premised by an explanation that as the number of people at county elections had increased and people were taking part who were, in Norman French, of *null valu*, of no value, and there had occurred homicides, riots and other violent offences during the gathering, it was imperative to call only those, who, being landowners, had more to lose if they did not conduct themselves well. The legislators seem to have learnt that free elections had necessarily to be orderly and that access to the procedures had to be limited to such as could be relied upon to behave well. The legislators seem to have learnt that free elections had necessarily to be orderly and that access to the procedures had to be limited to such as could be relied upon to behave well.

8. For a very long time, the right to vote was a matter for the convening officer [sheriff or mayor] to determine, was regulated locally and differed from county to county and from borough to borough. By the 19th century, the population changes brought about by the industrial revolution had created a situation in which a major conurbation might have no representation in Parliament, whilst towns which had declined in size to mere villages still retained their seat. Great Britain had been admired and set up as model for its separation of powers in the United States and in most of Europe, but was influenced on the other hand by the spirit of liberty and substantial justice coming from revolutionary France as well as from the United States. A political movement towards righting some wrongs and making the electoral process fairer increased its momentum and culminated, first, in 1829, with the Catholic Relief Act which opened to Catholics and Dissenters, and later to Jews, the right to vote and stand for election, and then with the **Reform Act of 1832**. In a more articulate measure which rendered the electoral process fairer and more representative, that Act abolished the units known as “rotten Boroughs”, controlled by the local aristocracy, and introduced electoral registers: 168 members were unseated, sixty boroughs disfranchised, eight more members allotted to London and

proportionately to the large towns in the North, such as Manchester, but the total number of members was reduced by more than sixty. The right to vote was extended, by legislation, to people who rented a household worth £10, **in fact the then middle class**, and the requirement of registration was introduced. This put the onus of proof of the entitlement to vote on the pretending registrant. As the numbers enfranchised increased considerably, it was more practicable to accept the applications at face value and subject false declarations to criminal sanctions. Rents and households were localising and registration was therefore anchored geographically. The act increased the number of entitled voters, by, between 50 to 80 percent, to 653,000 adult males. The administrative structures at that time could not be depended upon to assume the burden of taking the initiative of registration without prior application.¹

9. The Reform Bill of 1867 which was passed after considerable agitation, regulating the boundaries of the constituencies and the Courts to which recourse could be had when registration was contested. In the 1867 Reform Act, tenants (in addition to householders) in towns were given the right to vote, which in fact enfranchised most of the urban working class. In 1884 Gladstone managed to have the House of Commons, and with greater statecraft and compromise, the House of Lords, pass another Reform Act and a Redistribution Bill whereby all adult male householders and £10 lodgers, in the counties as well as the boroughs, had the same voting rights. In almost every case these adjustments to Electoral Law concerned England and Wales and separate Acts had to be passed for Scotland and Ireland. It was only in 1918 that the right of women (over 30) to vote and be elected was recognised and most of the property qualifications abolished. The age qualification was lowered for women to equal that of men at 21 in 1928.

10. The Representation of the People Act 1985 was aimed at enabling British Citizens resident outside the United Kingdom to qualify as "overseas electors" in the constituency for which they were last registered for a period of five years after they had left (this was subsequently changed to 20 years and is now 15 years). The Act allowed British Expatriate electors to register as overseas electors at British consular posts, starting in the summer of 1986. The Act also made British people abroad on holiday eligible to vote by postal ballot or by proxy, as well as those who were not reasonably expected to be able to be physically present at the polling station. Citizens of the Commonwealth as well as Citizens of the Republic of Ireland were given the right to register to vote at the place where they had taken up residence. The legal basis of these citizens' rights is the British Nationality Act 1981. Under the Representation of the People Act 2000, Commonwealth citizens requiring leave to enter the UK must have such leave before they qualify for inclusion on the Register. Citizens of other EU countries may vote in European Parliamentary and Local elections, according to the terms of accession.

11. The trend for the last two hundred years has been that of widening the franchise to include all those people who felt they had a stake in Great Britain, and were either residing there or kept from so doing temporarily for justifiable reasons, as in the case of members of the armed forces. British Crown servants and British Council employees could also apply to

¹ It is important to note that although the first census of the population of England and Wales was carried out in 1801 supposedly by a house-to-house enquiry, in reality, it was done by making use of the returns of baptisms and burials between 1700 and 1800, and marriages between 1754 and 1800, as supplied by the clergy. The details included the number of inhabited and uninhabited houses, the number of families occupying the former, the number of persons of each sex, and the numbers of people employed in agriculture, trade, manufacture or handicrafts. The enumerators in England and Wales were the overseers of the poor, local clergy or other substantial householders; in Scotland they were the schoolmasters. The local returns were statistical summaries only, made in a prescribed form and attested before the justices of the peace. The first abstracts and reports of the results of the census were compiled by John Rickman (1771-1840, clerk in the House of Commons). The machinery of the civil service had not as yet supplanted that of the Church and of voluntary service or of the school in Scotland. Napoleon never managed to invade Britain either by military might or by the culture of centralised administration. And the state structures in Britain arrived rather late.

be included on the Register of Electors. In a democracy the presumption should be in favour of participation in the vote, and the United Kingdom has a long and remarkable history of extensions of the right to vote. As it happens, paradoxically, the blanket exclusion of prisoners serving their term or remanded in custody, was later and rightly found excessive by the European Court of Human Rights, in *Hirst v United Kingdom* (6.10.05).

2. The voter registration system in the UK

12. 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.

13. 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).

14. 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.²

15. A further related feature is the maintenance of the registers, particularly the rules referred to incorporation or elimination of electors’ entries. Based on the results of the annual canvass, the registration officers shall make the alterations in their registers 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.³

² 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. 69-70 below.

³ 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.

16. 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).

17. 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.

3. Is the voters' registration system in the United Kingdom in line with Council of Europe standards, given in particular the household registration as opposed to individual registration and the relative lack of personal identifiers upon registration?

3.1 Election Standards

3.1.1. United Nations Standards

18. The United Nations' Human Rights Committee, which has a supervisory role under the 1966 International Covenant on Civil and Political Rights, established during its 57th session in 1996, a list of international Standards of Elections. There it was said that any conditions which applied to the exercise of the rights protected by Article 25 of the Covenant (which recognises and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected, and the right to have access to public service), would have to be based on objective and reasonable criteria. The exercise of these rights by citizens was not to be suspended or excluded except on grounds which were established by law and which were objective and reasonable. No distinctions were to be permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The right to vote at elections and referenda had to be established by law and subjected only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It was unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. States had to take effective measures to ensure that all persons entitled to vote would be able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Voter education and registration campaigns are necessary to ensure the effective exercise of Article 25 rights by an informed community. It is therefore sound to say that registration (on the entitled voter's initiative) is assumed to be in the Covenant a proper way of ensuring access and participation. In the Lippiatt case (1996) the County Court Judge allowed the application to register of a "homeless" voter on the basis of a temporary (though of some duration) residence in a constituency, even though the applicant had no permanent home.

19. The Inter-Parliamentary Union during its 154th session, Paris, 26 March 1994 had adopted a Declaration on Free and Fair Elections urging governments and parliaments throughout the world to be guided by the principles and standards set out therein. In particular it specified that states should recognise and make provision for: The right of the individual to vote, on a non-discriminatory basis, and the right of the individual to access an effective, impartial and non-discriminatory procedure for the registration of voters.

3.1.2. Code of Good Practice in Electoral Matters

20. In the Commission's own Code of Good Practice in Electoral Matters certain criteria are adopted for Electoral registers (para. I.1.2) to be considered reliable:

- i. Electoral registers must be permanent;
- ii. There must be regular up-dates, at least once a year. Where voters are not registered automatically, registration must be possible over a relatively long period;
- iii. Electoral registers must be published;
- iv. There should be an administrative procedure---subject to judicial control---or a judicial procedure, allowing for the registration of a voter who was not registered; the registration should not take place at the polling station on election day;
- v. A similar procedure should allow voters to have incorrect inscriptions amended;
- vi. A supplementary register may be a means of giving the vote to persons who have moved or reached statutory voting age since final publication of the register.

3.2 **Compliance of UK system of electoral registration with electoral standards**

3.2.1. Voluntary vs. Automatic registration

21. The history explains why voluntary registration has come about as the standard way of establishing the citizen's right to vote in the United Kingdom. Mere historical explanation is, however, not justification. One has to see whether this system is

- (1) just or fair;
- (2) useful or necessary;
- (3) has better alternatives.

22. The implied reasoning behind the continuation of this system is that those who have a right to vote should be expected to take the initiative to have this right recognised by registration. One may argue that this could be unfair to those who do not know their rights. The usual reply is that though the actual casting of votes may be secret, the whole electoral ritual is so public and attracts so much attention that it is difficult to imagine one connected with the United Kingdom who could not be aware of it and not conscious of the possibility of participating in it. It can also be argued that the bare fact of asking to be registered is more of an exercise of democracy as assertion by the citizen, than the automatic grant by the State to a passive citizen. Moreover the procedures for registration are simple and straightforward and present no hurdle or difficulty.

23. The Code envisages that registration can either be automatic (presumably on attaining a certain age or on taking up residence) or initiated by the voter or on his/her behalf. This implies that though automatic voter registration might be the general rule in many countries, there is no infringement of standards when the alternative non-automatic registration system is allowed to continue to exist, co-exist or be maintained. One has to see however whether the six criteria of the Code are adhered to in the United Kingdom system.

i. Is the electoral register permanent?

24. Section 9 of the 1983 Act provided that the Registration Officers [appointed for every district and London Borough under Section 8] were to maintain (a) a register of parliamentary electors for each constituency or part of a constituency in the area for which they would be

responsible and (b) a register of local government areas or parts of local government areas for which they acted. The section further details what should be contained in the registers.⁴

25. Section 10 of that Act made these Registration Officers bound to conduct an annual "canvass" to ascertain the persons entitled to be or remain registered. This provision imposed on the state a duty to ensure full registration without discarding the original reliance on the voter's urge to register. There were established different conditions with respect to the Chief Electoral Officer for Northern Ireland's duties and timing of the canvass.

26. Furthermore under Part 2 of the Electoral Administration Act of 2006, the legislator has imparted [through the direction of the Secretary of State] to the Electoral Registration Officers (EROs) a new more proactive direction in seeking to take steps to register eligible electors, and so ensure registers are as complete and accurate as possible.

ii. Are there provisions for regular up-dates, at least once a year? Where voters are not voted automatically, registration must be possible over a relatively long period.

27. Section 13 of the 1983 Act obliged each registration officer to publish *each year* a revised version of his registers. The annual canvass would undoubtedly turn up the need for changes [the deceased to be erased, those sentenced to prison or remitted to mental hospitals, those who come of age, new entitled residents, those who have definitively left their residence]. Section 13B of the 1983 Act (alteration of registers: pending elections) amended by Section 11 of the 2006 Act, can not be seen as too restrictive in any sense. That is, whilst an election has to be held on the basis of the last published register, an alteration comes into effect as soon as possible.

28. The Electoral Administration Act of 2006 in its Part I provides for co-ordinated on-line record of Electors. In the words of the General Note appended to the Act, *"the CORE scheme is an arrangement whereby record of information currently held only by several locally based electoral registration officers can be consolidated at one central point"*. This for the United Kingdom was an unprecedented attempt at unifying the various area registers into one centralised information pool. A CORE scheme furnishes no doubt a formidable weapon for updating the registers. It is to be used for electoral purposes, and additionally for the jury service.

iii. Electoral registers must be published.

29. Section 13 of the 1983 Act bound each registration officer to publish each year a revised version of his registers. Schedule 1 of the Representation of the People Act 2000 elaborated further that following the conclusion of the canvass conducted by a registration officer for any year the officer had to publish a revised version of both (the "full" and the "edited") of his registers

(a) by 1st December in that year; or

(b) by such later date as regulations may prescribe. The revised versions of the registers were to incorporate (a) all the alterations which are required to be made in them as mentioned in section 10(6) above; and (b) any alterations which are required to be made by virtue of section 13A(3) below. The registration officer could, in addition, if he thought fit, publish a revised version of either of his registers at any time between (a)

⁴ Electoral registers were traditionally made for particular constituencies and divided into polling districts. The 1918 Representation of the People Act stipulated registration of voters by streets and house number. Before that, voters' lists were alphabetical and contained in addition to the voter's residential address, information concerning his qualification to vote, including the relevant property. Finally after 1945 only the voters' names and addresses were shown on the registers.

the time when the register was last published in accordance with subsection (1) above, and (b) the time when it is due to be next so published;

and a registration officer proposing to publish a revised version of a register in accordance with this subsection must publish notice of his intention to do so by such time and in such manner as may be prescribed.

- iv. *There should be an administrative procedure - subject to judicial control - or a judicial procedure, allowing for the registration of a voter who was not registered; the registration should not take place at the polling station on election day.*
- v. *A similar procedure should allow voters to have incorrect inscriptions amended.*
- vi. *A supplementary register may be a means of giving the vote to persons who have moved or reached statutory voting age since final publication of the register.*

30. Conformity to para. iv to vi will be jointly treated. Section 8 of the 1983 Act provides that for the registration of electors there should be electoral registration officers. These officers according to Section 10A had to “determine” (in the sense of deciding upon) all applications for registration. Regulations made under the powers conferred by Section 53 of that Act provides for an appeal to the Courts:

Rule 2

(1) Where notice of appeal from a decision of a registration officer is given pursuant to regulations made under section 53 of the said Act of 1983, the registration officer shall, within 7 days after receipt of the notice by him, forward the notice by post to the court in which the appeal is required to be brought, together with the statement mentioned in those regulations;

(2) The appeal shall be brought in the court for the district in which the qualifying premises are situated. In this paragraph ‘qualifying premises’ means the premises in respect of which –

- (a) the person whose right to be registered in the register of electors is in question on the appeal is entered on the electors’ list or is registered or claims to be entitled to be registered; or*
- (b) the person whose right to vote by proxy or by post is in question on the appeal is or will be registered in the register of electors; or*
- (c) the elector whose proxy’s right to vote by post is in question on the appeal is or will be registered in the register of electors, as the case may be.*

(3) The respondents to the appeal shall be the registration officer and the party (if any) in whose favour the decision of the registration officer was given.

(4) On the hearing of the appeal (a) the statement forwarded to the court by the registration officer and any document containing information furnished to the court by the registration officer pursuant to the regulations mentioned in paragraph (1) shall be admissible as evidence of the facts stated therein; and (b) the judge shall have power to draw all inferences of fact which might have been drawn by the registration officer and to give any decision and make any order which ought to have been given or made by the registration officer.

(5) A respondent to an appeal other than the registration officer shall not be liable for or entitled to costs, unless he appears before the court in support of the decision of the registration officer.

Rule 3 concerns what are called “selected appeals” whereby should two or more appeals depend on the determination of a particular point of law, the judge may direct that one appeal shall be heard in the first instance as a test case, so as to avoid repetition.

C. Sections 13A and 13B which deal with the alteration of registers, in very minute detail, obviate against any precipitous and unsafe alteration on the polling date or in the immediately preceding five or six days, at the same time providing for the possible registration and then exercise of the voting right until the very last opportune moment.

3.2.2. Household registration system and lack of personal identifiers upon registration

31. There is not doubt that in Great Britain it is "*a person (who) is entitled to be registered in the register of Parliamentary electors*" (Section 4(1) of the 1983 Act).

32. Section 4 of the 1983 Act provides that a person is entitled to be registered in the register of parliamentary electors for any constituency or part of it if on the relevant date he or she is

- (a) resident in that constituency or part of it;
- (b) is not subject to a 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. The Second Subsection stipulated an extra requirement for Northern Ireland, that of having resided in Northern Ireland during the whole of the period of three months ending on the relevant date. It is to be noted that residence is the first stated requirement, whilst the second is the negative requirement of not being legally incapable, whilst political qualification (by citizenship) takes the third place followed by age. The fundamental premiss is that one votes where he resides: representation in parliament is local. Whilst the franchise is open to Commonwealth citizens (with further qualifications) and citizens of Ireland, it would not be wise to relinquish the strict bind of residence in a constituency. In the case of Northern Ireland, the special prerequisite of a full three months residence prior to the relevant date, was considered necessary in view of the tense internal political situation there and the temptation of swelling some areas with appropriate voters to assure results in marginal districts. In local elections and European Parliament elections, EU citizens are entitled to be registered as voters if they qualify as residents.

33. Despite what is referred above, the way of registering is not the same as the entitlement to be registered. The latter is a personal right fully guaranteed, whilst the system or procedure followed may raise difficulties.

34. In the UK, the registration follows a householder model: *the major way of registering continues to be through the annual canvass forms that the registration officer sends to each address, and in which the householder provides the information about the persons that live in that address who are entitled to vote* (Representation of the People Act 1983, as amended by the Representation of the People Act 2000 and by the Electoral Administration Act 2006, Sections 9: Registers of electors; 9A: Registration officers: duty to take necessary steps; 10: Maintenance of registers: [duty to conduct canvass]; 10A: Maintenance of the registers: registration of electors; 13: Publication of registers, 13A: Alteration of registers). One single person signs each canvass form. This means that only one person is responsible for the accuracy of the information of all the voters in a household.⁵

35. The UK registration system does not seem to require any personal identifiers to register. The traditional British respect for privacy makes the requirement of personal identifiers problematic. Whilst the Government has enacted legislation on an Identity Card in 2006, this does not imply automatically that it can be used for electoral purposes. Another example of the traditional British mistrust of public use of private information is Section 9 of the Representation of the People Act of 2000 which provides for drawing up of two electoral registers, one ("the full register") complying with the provisions of the act, and another ("the edited register") omitting

⁵ See Securing the vote May 2005 page 26.

the names and addresses of registered voters who have requested that these details be not published.

36. The system relies on individuals own honesty. There is a normal general assumption that people declare the truth, which is followed by the wise provision of sanctions against those who do not. The Representation of the People Act of 1983 in Section 13D makes it an offence for a person to provide any false information to the registration officer for any purpose connected with the registration of electors. Even a false signature [not the usual signature or one written by another person] constitutes false information. The punishment is commensurate: six months' imprisonment or fine not exceeding the fifth level on the standard scale.

37. On the other hand one must presume that any registration officer who is asked to "determine" upon an application to register will have means of identification on the local level, even if the Statute does not specify how this should be done. One has to note Section 24(3)(3) of the 2000 Act which provides for the issue of regulations granting the registering officer these special powers:

"(3) Provisions authorising a registration officer, where—

(a) he has so required any person registered in one of his registers to give him information, or to make any declaration, for the purpose of enabling him to determine whether the person is entitled to be so registered, and

*(b) the person has not within the prescribed period complied with that requirement in a manner which the officer considers satisfactory (or at all),
to remove the person's name from the register.*

38. Since 2001, there is a possibility of rolling registration during the year on individual basis and also the possibility for individuals to amend their details as they appear in the register.

4. Is the manner in which postal voting is implemented in line with Council of Europe standards, especially with regards to the security of the vote?

39. The special arrangement for voting by post was historically the result of the large number of servicemen still abroad after the November armistice of the 1914-18 war, so as to enable them to vote in the December 1918 General Election (see the Representation of the People Act of 1918). People with physical disabilities or justified absence were gradually allowed to use these arrangements until 2000. In implementation of a recommendation by a Home Office Working Party which had been given the mandate of making suggestions as to the way to increase trust in the democratic process and participation in elections, both national and local, Section 10 of the Representation of the People Act 2000, gave the Secretary of State discretion, after consulting the Electoral Commission, to approve schemes (pilot schemes) in particular local government elections, for the use of postal votes.

40. Postal voting in the case of the British Armies still abroad in 1918 was a success because it was orderly and disciplined. Its use for persons by physical or other disabilities, which was later extended to people serving abroad or momentarily absent, presented no great danger, because the numbers involved were small. When it was opened as a general option, in a number of experimental [trial] local elections, the whole gamut of problems, inherent in postal voting, came to the fore. Some people were still reticent, some had realised its potential for manipulation.

41. 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.⁶ The House of Commons has produced, too,

⁶ 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

some standard notes on postal voting.⁷ 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.

42. This report will focus only in postal voting as one form of absent or remote voting, 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).⁸ Two aspects are important here: the application for postal voting and the returning of the postal ballot.

43. 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 2000,⁹ 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, para. 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, para. 5(1)).

44. 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 voters' list. He/she can verify the signature and date of birth against his/her records.

45. 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.¹⁰

46. 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

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>.

⁷ 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>.

⁸ An all-postal election is one where all eligible electors are sent their ballot paper by post and may vote 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>.

⁹ The text in force of this Schedule was amended by Section 14 of the Electoral Administration Act 2006.

¹⁰ *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), Paragraphs 23-24, and 47.

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.

47. A report of the Electoral Commission of 2003 made the following recommendations:

A. To promote wider participation: replace the declaration of identity with a simpler, more effective alternative; allow registered postal voters to apply for a replacement ballot paper at any point up to 5 pm on polling day; and revise the annual registration form to include postal and proxy arrangements for overseas voters;

B. To increase public confidence in the secrecy of the vote: more rigorous checks for fraud after elections: introduce a new offence of intending fraudulently to apply for a postal or proxy vote; and giving police the power of arrest for suspected personation at any location, not just polling stations.

48. Following upon the Decision by Richard Mawrey Q.C. which found massive electoral fraud through the misuse of the postal vote in Birmingham (Aston and Bordesley) in the local elections of 2004 there was a general reappraisal of the system. It was intended to “save” postal voting, and incidentally not bar the way for progress in the introduction of E-voting; but also to further tighten the measures which render manipulation of the system by political agents less easy. The anti-fraud measures in Part 3 of the Electoral Administration Act of 2006 run in this direction. Section 14 of that Act requires the signature of the person asking for a postal ballot together with his/her date of birth, though care was taken to provide for persons who would be unable, because of disabilities, to furnish a signature, whilst Section 15 contemplates the offence of furnishing false information. Section 39 aims at obviating against *undue influence* whilst Section 40 provides for a number of delinquencies in respect of postal voting. The fact remains however that in opting for postal voting one is abandoning the “absolute” guarantee of freedom of individual choice that can be assured by a proper polling booth. During voting at home or at the work place the presence of family members and friends or even others cannot be excluded and it is difficult to define or rule out “undue” influence.

49. Section 62 A of the 2006 Act attempts to close some of the doors and windows through which fraud and manipulation can enter into the process: Its title is Offences relating to applications for postal and proxy votes

“(1) A person commits an offence if he—

(a) engages in an act specified in subsection (2) at a parliamentary or local government election, and

(b) intends, by doing so, to deprive another of an opportunity to vote or to make for himself or another a gain of a vote to which he or the other is not otherwise entitled or a gain of money or property.

(2) These are the acts—

(a) applying for a postal or proxy vote as some other person (whether that other person is living or dead or is a fictitious person);

(b) otherwise making a false statement in, or in connection with, an application for a postal or proxy vote;

(c) inducing the registration officer or returning officer to send a postal ballot paper or any communication relating to a postal or proxy vote to an address which has not been agreed to by the person entitled to the vote;

(d) causing a communication relating to a postal or proxy vote or containing a postal ballot paper not to be delivered to the intended recipient.

(3) In subsection (1)(b), property includes any description of property.

(4) In subsection (2) a reference to a postal vote or a postal ballot paper includes a reference to a proxy postal vote or a proxy postal ballot paper (as the case may be).

(5) A person who commits an offence under subsection (1) or who aids, abets, counsels or procures the commission of such an offence is guilty of a corrupt practice.

(6) This section does not apply to anything done at a local government election in Scotland."

50. After the reports on various pilot schemes were published, the Electoral Commission, on the 2nd August 2007 called for an end to trials of telephone and internet voting until the government had set out a strategy for modernising the electoral system and made it more secure.

51. Certain inherent difficulties in postal, proxy or e-voting can never be completely overcome. One may in balancing the advantages and convenience to the electors, and therefore incidentally their contribution to the overall aim of greater voter participation, with the inevitable dangers, consider that the risks to be taken, given the numbers or the rate of prevalence, are not such as to give rise to fear that the final result may be substantially effected. One may doubt whether *de minimis* should be applied in electoral matters *a priori*. That is a political decision to be taken by each individual country. One realises however that if voting takes place in an unsupervised context, it is virtually impossible to guarantee that it will be carried out in secret, and that lack of secrecy constitutes a serious violation of the principles of freedom and fairness that govern elections in democratic states. This applies to proxy, postal or e-voting, that is to all variations of absent voting. It seems that in Great Britain, after the Howarth Report (Published 1999), the advantages of absent voting were seen as outweighing the problems, but it was decided to test the ground experimentally in pilot projects. The Acts of 2000 and 2006 sought to circumscribe the threats of electoral fraud of some consistency by imposing criminal sanctions on some of the more evident cases of organised manipulation or abuse. The stray individual act of undue influence or corrupt practice remains very difficult to trace and punish, but would not, ultimately, given the overall numbers, be determining on the election result.

52. The specific issue of the rules applying to postal voting in Northern Ireland will be developed under point 5 below.

5. 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?

5.1. General issues

53. In Great Britain the traditional divisions of the different constituent nations (Wales, Scotland, Ireland, England) have held fast not only in Sport, but also very decidedly in legal institutions. The Electoral Laws, time and again, refer to this distinction and different Acts regulated parts of the Electoral Law in this country. In the case of Northern Ireland the different dispositions were not merely the result of deference to historical traditions, but also a reaction to a political situation far more charged and fraught with dangers as well as temptations. Gerrymandering was not invented in Northern Ireland but political chicanery and pettifogging in the drawing up of electoral boundaries was surely not unknown. In a notorious case, during

local elections, the decidedly Irish nationalist area of Derry produced a Unionist majority through the shamefaced gerrymandering of the electoral ward.

54. It must be underlined that the reason of the Parliamentary Assembly's 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**.¹¹

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

56. 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".¹²

57. 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".¹³

58. 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, in a case concerning Northern Ireland, 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.¹⁴ More precisely, when elections for the European Parliament were introduced, the Single Transferable Vote system of Proportional Representation was adopted for Northern Ireland so as to ensure that the minority would not be totally deprived of representation. When this differentiation from the rest of the United Kingdom was contested, the application to the European Court of Human Rights was dismissed as inadmissible.

¹¹ 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 as well as Northern 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.

¹² *Mathieu-Mohin and Clerfayt v. Belgium*, (Application No 9267/81), 2 March 1987, para. 54.

¹³ 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.

¹⁴ Decision of 8 March 1979, *Kennedy Lindsay and other v/ the United Kingdom*, Application No 8364/78.

59. 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.¹⁵ 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.

60. 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*”.

61. 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.

62. 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 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.

63. 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).

64. 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.

65. 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

¹⁵ *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

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.¹⁶ 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 2004-2005.¹⁷ 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.¹⁸ 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 2007.¹⁹

66. 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.

5.2. Specific Issues

67. The different requirements in the UK electoral legislation for Northern Ireland concern both voter registration and postal voting. Firstly, the particularities of both registration and postal voting applicable to Northern Ireland will be exposed.

68. 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 maintain 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.

5.2.1. Voter Registration

¹⁶ 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>).

¹⁷ 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 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>

¹⁸ 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.

¹⁹ 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.

69. Despite the system described above (see paragraphs 12-17) 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.²⁰

70. 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,²¹ and improve the mechanism of registration of electors.

71. The Electoral Fraud (Northern Ireland) Act 2002 substituted the system of household registration in force until that moment²² with an individual registration system, whereby eligible electors have to complete an individual registration form on an annual basis. There was not, 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.

72. 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.²³

73. 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.

74. A Chief Electoral Officer who works in co-ordination with the Electoral Office for Northern Ireland (EONI)²⁴ administers the electoral system in Northern Ireland. The Chief Electoral Officer is both the registration officer and the returning officer for each constituency (Sections 8(4) and 26(1) of the Representation of the People Act 1983).

75. 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

²⁰ 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.

²¹ See also the Explanatory notes to this Act, online: <http://www.opsi.gov.uk/ACTS/en2002/2002en13.htm>.

²² 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>.

²³ The Electoral Registration (Northern Ireland) Act 2005 temporarily 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).

²⁴ Information of EONI is available online: <http://www.eoni.org.uk/>.

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).

76. 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”.²⁵

77. 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).

78. 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 (4A) (signature; date of birth; national insurance number or the voter 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”.²⁶

79. 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.

80. 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).

²⁵ Section 10ZB, Representation of the People Act 1983, inserted by the Northern Ireland (Miscellaneous Provisions) Act 2006.

²⁶ Section 10A (5A) of the Representation of the People Act 1983. For the general rules, see paragraph 63 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.

81. 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.

82. 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 of 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.

83. 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.

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

85. 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.

86. 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 right 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 above (para. 13 ff).

87. The overall context of Northern Ireland has also to be taken into account. When, after the Good Friday Accords considerable efforts were being expended to reinforce trust one could understand and justify the extra requirement of extent in time periods prior to an election for registration in a particular district or for the request of postal voting documents. The threat of the offsetting of lean majorities by rushes of last minute registrations is present and it is legitimate to take extra precautions. The longer time period required does not run counter to any principle. Stability of the registers in the immediate run up to an election (say three months) does not in any way infringe the democratic principle of free and fair elections. It could safely be adopted more universally without upsetting the system itself. Though no doubt it is a *desideratum* that all obstacles to registration should be removed and registration liberally allowed until the very last day preceding the poll, yet the principle of ascertain ability when the general situation is that of a dearth of trust, should prevail in the circumstances.

5.2.2. Absent voting

88. 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.²⁷ 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 types of requirements: that the elector is or will be registered as service voter or 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.).

89. 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 ff) 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.

90. The rules for returning the postal ballot in Northern Ireland are similar to the ones mentioned in para. 83. 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 officer (in this case, the same Chief Electoral Officer) 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..."²⁸ 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.

²⁷ 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.

²⁸ Schedule 1, rule 24, Representation of the People Act 1983, as amended by the Electoral Administration Act 2006.

91. 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 on the register (Rule 45, Schedule 1, Representation of the People Act 1983).

92. After the postal ballot is taken to be duly returned, the returning officer shall mix 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).

93. 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.

94. 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 ECHR²⁹ 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.

95. 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.

96. 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.

²⁹ 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.

97. 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.

Conclusion

98. In answer to the first query (relating to the voters' registration system), United Kingdom Legislation on the Electoral process looks by and large as is conformity with the European standards. However, the registration system does not rely on personal identifiers but on a general belief on the bona fide of citizens. This may eventually be a source of inaccuracies from which other vices may eventually flow.

99. In response to the second query (relating to postal voting), the United Kingdom legislation goes a long way to try to defend the systems of absent voting, including postal voting, from fraud and manipulation. One has to realize however that even though this limits the damage wrought by fraud and manipulation, one still cannot exclude to possibility of undue influence or improper use. This is not solely a United Kingdom problem.

100. In answer to the third question (relating to the differences in legislation between Great Britain and Northern Ireland): the special requirements for Northern Ireland are justified and fair, given the special circumstances. 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 (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. The arguments exposed 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. 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 matters 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.

101. As a general comment one should say that the Constitutional History of the United Kingdom is illustrative of the urge to achieve greater fairness, participation and freedom, encountering an ingrained instinct for stability and conservation of traditions. As a long standing democracy the United Kingdom system has grown within it, its own instruments of self-correction, which operate against the backdrop of an ingrained generalised feeling for fairness. In this instance these instruments have been activated and are in a position to proceed with the ongoing process of refinement of the electoral structures.